CBA: Title IX and Student Sexual Assault Litigation

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Title IX Claims and Representing the Accused

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Introduction

Male students disciplined by universities after being falsely accused of sexual misconduct often file lawsuits.[1] Judges oftentimes rule at least partially in favor of these male plaintiffs.[2] The Title IX claims in these lawsuits are often based on: (a) erroneous outcomes, (b) selective enforcement/hostile environments, (c) deliberate indifference, and/or (d) retaliation. These lawsuits can trigger hostile reactions which *Brown Univ.* discussed by noting:

> " . . . . the Court is an independent body . . . [that] cannot be swayed by emotion or public opinion. After issuing the preliminary injunction this Court was deluged with emails resulting from an organized campaign to influence the outcome. These tactics, while perhaps appropriate and effective in influencing legislators or officials in the executive branch, have no place in the judicial process. This is basic civics, and one would think students and others affiliated with a prestigious Ivy League institution would know this. Moreover, having read a few of the emails, it is abundantly clear that the writers, while passionate, were woefully ignorant about the issues before the Court. Hopefully, they will read this decision and be educated."[3]

Attorneys who regularly represent the falsely accused would likely agree individuals with political agendas are attempting to shape the legal landscape facing male Title IX plaintiffs. This is partly because universities face tremendous internal and external pressure to discipline male students

[1] *See generally, Stop Abusive and Violent Environments' Oct. 2016 Special Report: Victim-Centered Investigations: New Liability Risk for Colleges and Universities* (detailing how thirty lawsuits filed by plaintiffs accused of sexual misconduct resulted in judicial decisions which at least partially favored the plaintiffs in claims against their universities). Available at http://www.saveservices.org/wp-content/uploads/Victim-Centered-Investigations-and-Liability-Risk.pdf.

[2] *Id.*

[3] *Doe v. Brown Univ.*, Case No. 16–017 S, 2016 WL 5409241 (D.R.I. Sept. 28, 2016).

accused of sexual misconduct.[4] This pressure is often linked to discredited allegations that "1 in 4" or "1 in 5" female college students are sexually assaulted by their male counterparts.[5]

Complaints detailing how anti-male bias violated plaintiffs' Title IX rights can defeat motions to dismiss.[6] This is because some courts recognize discovery is the tool for Title IX plaintiffs to unearth definitive evidence of the gender-bias.[7] On the other hand, some courts dismiss Title IX complaints after finding plaintiffs did not advance plausible evidence of anti-male

[4] *See e.g.,* Emily D. Safko, *Are Campus Sexual Assault Tribunals Fair?: The Need For Judicial Review and Additional Due Process Protections In Light of New Case Law,* 84 Fordham L. Rev. 2289 (2016), pgs. 2304-5 (discussing universities' concerns regarding enforcement actions by the US Department of Education's Office of Civil rights which commentators believe "incentivizes schools to hold accused students accountable by implementing and conducting proceedings that are unfairly stacked against the accused."). *Id.,* pgs.2320-24 (addressing same).

[5] It should be noted sexual assaults on college campuses are far less prevalent than the often-repeated "1 in 4" and "1 in 5" allegations widely repeated at America's universities. For example, a report issued by The American Association of University Women noted that over 90% of the colleges and universities in the United States reported <u>*none*</u> of their students were raped in 2014. *See,* American Association of University Women, *91 Percent of Colleges Reported Zero Incidents of Rape in 2014,* (Nov. 23, 2015). Similarly, a "special report from the Bureau of Justice Statistics titled 'Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013' . . . found . . . female college . . are less likely to be victims of sexual assault than their peers who are not enrolled in college. The report found . . . the incidence [of sexual assault] . . . was far lower than anything approaching 1 in 5: 0.76 percent for nonstudents and 0.61 percent for students." Emily Yoffe, The Problem with Campus Sexual Assault Surveys, SLATE, Sept. 24, 2015. *http://www.slate.com/articles/double_x/doublex/2015/09/aau_campus_sexual_assault_survey_why_such_surveys_don_t_paint_an_accurate.html*. In addition, academics conducting a research study found approximately 50% of sexual assault allegations at two Midwestern American colleges were false. *See,* Eugene J. Kanin, *False Rape Allegations* Archives of Sexual Behavior, Vol. 23 No.1 (1994) available https://archive.org/details/FalseRapeAllegations). Another academic paper exposed the lack of objective proof behind a "consensus among legal academics that only two percent" of sexual assault allegations are false. *See,* Edward Greer, *The Truth behind Legal Dominance Feminism's Two-Percent False Rape Claim Figure,* 33 Loy. L.A.L. Rev. 947(2000); available http; digitialcommon.Imu.edu/llr/vol33/iss 3/3). Issues such as these are addressed in detail in Stuart Taylor Jr. and KC Johnson's recent book *The Campus Rape Frenzy: The Attack on Due Process at America's Universities.* The rationale behind some of the false allegations is detailed in an academic research paper which reviewed multiple academic studies. *See,* Reggie D. Yager, *What's Missing From Sexual Assault Prevention and Response*, (April 22, 2015) http: ssrn.com/abstract=2697788. This paper determined a high percentage of sexual assault allegations are false and based on the alleged victims': (1) need for a cover story or alibi; (2) retribution for a real or perceived wrong, rejection or betrayal; and/or (3) desire to gain sympathy or attention. *Id.*

[6] *See e.g., Doe v. Salisbury Univ*., No. JKB-15-517, 2015 WL 5005811 (D. Md. Aug. 21, 2015)(finding allegations of governmental pressure to find male students responsible for sexual misconduct coupled with other allegations of gender-bias were sufficient to deny university's motion to dismiss Title IX claim).

[7] *Id.,* *15 (noting that "[w]hile these crucial allegations are all based solely 'upon information and belief,' this is a permissible way to indicate a factual connection that a plaintiff reasonably believes is true but for which the plaintiff may need discovery to gather and confirm its evidentiary basis.").

gender-bias.[8] As a result, plaintiffs filing Title IX complaints must be particularly vigilant in drafting complaints and engaging in discovery. This article is designed to help plaintiffs move closer to these goals.

A. Common Title IX claims filed by students falsely accused of sexual misconduct

(A)(1) Title IX erroneous outcome claims

Federal courts generally rely on the Second Circuit's *Yusuf* decision in evaluating Title IX claims alleging universities erroneously disciplined students alleged to have engaged in sexual misconduct.[9] These claims are referred to as "erroneous outcome" claims. Pursuant to *Yusuf,* an erroneous outcome claim is properly plead when a plaintiff: "asserts that he or she was innocent and wrongly found to have committed the offense. . . (or) regardless of guilt, the severity of the penalty was affected by the student's gender."[10] Stated another way, *Yusuf* contemplates "erroneous outcome" claims based on both:

1. The discipline of students who did *not* engage in sexual misconduct; and

2. *Students who may have engaged in misconduct*, but were disproportionally disciplined because of their male gender.[11]

Consequently, plaintiffs may advance Title IX claims in situations where penalties such as expulsion or extensive suspensions are imposed for relatively minor policy violations. To establish these claims, plaintiffs must allege female students who engaged in similar offenses were subject to lesser sanctions. But, once past the motions to dismiss stage, things can be more complex as detailed in the *Vassar* decision, which rejected a Title IX claim in part because:

1. A male student - other than plaintiff - was found "not responsible in a sexual misconduct case;"

2. Vassar "expelled female students for making false bias claims;"[12]

3. There was "no suggestion that the decision to expel [plaintiff] was motivated by gender-bias;"[13]

[8] *See e.g., Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 2015 US Dist. Lexis 43253 (S.D.N.Y. 2015)

[9] *See e.g., Scott v. WorldStarHipHop, Inc.*, No. 10-CV-9538-PKC, 2011 U.S. Dist. LEXIS 123273, 2011 WL 5082410, at *4 (S.D.N.Y. Oct 25, 2011) (citing *Yusuf v. Vassar Coll*., 35 F.3d 709, 714-16 (2d Cir. 1994)).

[10] *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448; 2015 U.S. Dist. LEXIS 43253, 714-16 (2d Cir. 1994)(citing *Yusuf v. Vassar Coll*., 35 F.3d 709, 714-16 (2d Cir. 1994)).

[11] *Id.*

[12] *Id.*, *87.

[13] *Id.*, *65-66, fn.19.

4. "The fact that another male student was suspended for the same offenses as [plaintiff] while [plaintiff] was expelled" tended to disprove plaintiff's gender-bias argument; and

5. Plaintiff's lack of previous discipline related to sexual misconduct, three character references, and impact statement did not require the university to impose a lesser sanction than expulsion.[14]

However, as detailed below, district courts often issue rulings in favor of Title IX plaintiffs that conflict with *Vassar's* views on Title IX. Nevertheless, plaintiffs should use the discovery process to factually distinguish their Title IX claims from *Vassar* whenever possible.

(A)(2) <u>Title IX selective enforcement /sexual harassment claims</u>

Title IX plaintiffs often advance sexual harassment claims based on the gender-biased application of university polices. These plaintiffs allege their universities treat male students differently than similarly situated female students. A district court in Ohio explained these claims may be advanced even if male plaintiffs admit engaging in sexual misconduct as long as the plaintiff:

> ". . . . allege[s] 'that a female was in circumstances sufficiently similar to his own and was treated more favorably by [defendant university].' Moreover, [plaintiff] must allege facts that would demonstrate that the difference in treatment was because of his gender." [15]

In response, universities sometimes seek to dismiss these claims because male plaintiffs did not allege they were sexually assaulted or demeaned in a sexual way. But, since courts evaluate Title IX by looking to Title VII,[16] this argument may fail. For, Title VII allows hostile environment claims based on "non-sexual conduct" evidencing "anti-[male] animus" which cause "unequal treatment . . . that would not occur but for . . . [plaintiff's] gender . . . ."[17] In back-up arguments, universities may cite facts that suggest they treat all students the same regardless of their gender. However, decisions such as the Sixth Circuit's *Waldo* decision may prohibit such a reinterpretation of a plaintiff's gender-bias evidence because in Title VII cases:

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[14] *Id.*, *64.

[15] *Marshall v. Ohio Univ.*, No. 2:15-cv-775, 2015 U.S. Dist. LEXIS 155291, at *17-18 (S.D. Ohio Nov. 17, 2015)(citations omitted).

[16] *See e.g.*, *Sahm* v. *Miami Univ.*, 2015 U.S. Dist. LEXIS 65864, *11 (S.D. OH. 2015)("*Sahm 2*") (stating, "[t]he allegations of causation sufficient to state a Title IX claim can be similar to those sufficient to state a Title VII discrimination claim.").

[17] *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 815 (6th Cir. 2013) (quoting *Williams v. CSX Transp. Co.*, 643 F.3d 502, 565 (6th Cir. 2011)).

> "'[f]acially neutral incidents may be included' in a hostile-work-environment analysis of the *totality of the circumstances* when there is '*some circumstantial or other basis* for *inferring that incidents sex-neutral on their face were in fact discriminatory*.'"[18]

In advancing Title IX hostile environment claims, Title IX plaintiffs should also look to federal circuit decisions such as the Sixth Circuit's *Klemencic* decision.[19] *Klemencic* identifies the three elements for such a claim as: (1) a "sexually hostile environment"; (2) the university's "actual notice" of this environment and "authority to take corrective action to end discrimination"; and (3) the university's response to the hostile environment "amounted to deliberate indifference."[20]

The Fourth Circuit's *Jennings* decision identifies the four elements of a Title IX hostile environment claim as: (1) plaintiff was a student at an educational institution receiving federal funds, (2) he/she was subjected to harassment based on his/her sex, (3) the harassment was sufficiently severe or pervasive to create a hostile (or abusive) environment in an educational program or activity, and (4) there is a basis for imputing liability to the institution.[21] The Fourth Circuit's *Ziskie* decision noted Title IX's "[s]everity" criteria can be satisfied if a "disparity in power [exists] between the harasser and the victim."[22] In Title IX claims, it should be fairly easy to show the harassing university has far more power than the male student. Finally, the Fourth Circuit's *Brzonkala* decision explained universities can be held liable if the school "knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action."[23] Therefore, falsely accused students should submit written complaints to their universities when their Title IX rights are violated.

In making hostile environment claims, male plaintiffs may feel they face stricter scrutiny than females after reviewing how some courts evaluate females' Title IX claims. One such decision is *Rouse* which rejected Duke University's ("Duke") motion to dismiss a lawsuit because of Duke's mishandling of the female plaintiff's allegations of rape.[24] *Rouse* found this mishandling could be interpreted as creating a "hostile educational environment based on gender . . . ."[25] In

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[18] *Id.,* 726 F.3d 815 (quoting *Alfano v. Costello*, 294 F.3d 365, 378 (2d Cir. 2002)(emphasis added).

[19] *Klemencic v. The Ohio State Univ.*, 263 F.3d 505 (6th Cir. 2001).

[20] *Id.*

[21] *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007), en banc. *See also, Jane Doe v. Erskine Coll.*, No.8:04-23001RBH, 2006 U.S. Dist. LEXIS 35780, *32-38 (D.S.C. May 25, 2006)(rejecting a motion for summary judgment in a Title IX claim filed by a female because "a jury issue" was created with regards to "whether [the college] was deliberately indifferent" to Title IX discrimination); *Doe v. Bd. of Educ*., 982 F. Supp. 2d 641, 652 (D. Md. 2012)(stating "severe or pervasive" harm can occur when Title IX plaintiff suffers "humiliat[ion] . . . serious anxiety, fear, or discomfort . . . .")(citations omitted).

[22] *Ziskie v. Mineta*, 547 F.3d 220, 225 (4th Cir. 2008).

[23] *Brzonkala v. Va. Polytechnic Inst*. 132 F.3d 949, 958 (4th Cir. 1997) overturned on other grounds by *Brzonkala v. Va. Polytechnic Inst.*, (en banc)(applying Title VII case law to Title IX cases).

[24] *Rouse v. Duke Univ*., 869 F. Supp. 2d 674 (M.D.N.C., Apr. 5, 2012).

[25] *Id.*, 684-85.

doing so, *Rouse* relied on the plaintiff's allegations that Duke's conduct was part of Duke's culture of hostility towards students regarding sexual assault issues.[26]

Similarly, a female plaintiff in *Doe v. University of Kentucky* defeated a motion to dismiss her Title IX claims based on the university's handling of her allegations that a male student sexually assaulted her.[27] The female alleged the university violated Title IX by granting an accused male student's internal appeals which were based on:

1. The university's granting of the accused student's first appeal which was based on the university's rejection of his request to continue his initial disciplinary hearing because he was incarcerated and could not attend;

2. Granting the accused student's second appeal which addressed how inadmissible testimony tainted his second disciplinary hearing;

3. The university's granting the accused student's third appeal because his third disciplinary panel "improperly prohibited [him] from whispering to his advisor . . . among other procedural violations."[28]

In evaluating the female plaintiff's claims, *Univ. of Ky.* identified the following "three *prima facie* elements of a Title IX claim arising out of student-on-student sexual harassment: (1) the harassment was so severe, pervasive, and objectively offensive that it deprives the Plaintiff of access to educational opportunities or benefits provided by the university; (2) the funding recipient had actual knowledge of the sexual harassment; and (3) the funding recipient was deliberately indifferent to the harassment."[29] *Univ. of Ky.* went on to discuss these three elements as follows:

1. "Sexual assault of the violent nature described in Plaintiff's complaint 'obviously qualifies as being severe, pervasive, and objectively objective sexual harassment that could deprive [the plaintiff's] of access to the educational opportunities provided by her school'";[30]

2. "To demonstrate Defendant's actual knowledge of the harassment in a case based on a sexual assault, a plaintiff may show the university had preexisting knowledge of the harasser's prior misconduct."[31] and;

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[26] *Id.*

[27] *Handout 17* (containing *Doe v. University of Ky.*, No.5:150cv-296-JMH (E.D. Ky. Aug. 31, 2016).

[28] *Id.*, p.2.

[29] *Id.*, (quoting *Soper v. Hoben,* 195 F.3d 845, 854 (6th Cir., 1999)(summarizing the holding in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999)).

[30] *Id.*, p.3 (citing *Soper v. Hoben,* 195 F.3d 845, 855 (6th Cir., 1999).

[31] *Id.*, (citing *Williams v. Bd. of Regents of the Univ. Sys. of Ga.* (11th Cir. 2007) for the following proposition: defendants' "'preexisting knowledge of [the harasser]'s past sexual misconduct'—committed against people other than the plaintiff' is relevant when determining' whether the plaintiff had stated a claim under Title IX).").

3. "[A] plaintiff may demonstrate defendant's deliberate indifference to discrimination only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."[32]

Regarding the third point, *Univ. of Ky.* determined the university did not engage in deliberate indifference by granting the male student's appeals. But, the court found the Title IX complaint could not be dismissed since it alleged sufficient deliberate indifference because of: (a) the university's "lack of action" regarding scheduling a fourth hearing even though the university maintained plaintiff's lawsuit preempted this hearing, and (b) "information and belief" allegations that the university "failed to schedule a fourth hearing [] because [it] is hesitant to interrupt [the male student's] football schedule at his new school."[33]

As a result, male Title IX plaintiffs may wish to cite *Univ. of Ky.* in opposing motions to dismiss arguments regarding sufficiency of gender-bias evidence and/or hostile environment claims. This is because most well pled Title IX complaints filed by male plaintiffs would likely satisfy *Univ. of Ky.'s* low bar for defeating a motion to dismiss.

(A)(3) Title IX deliberate indifference.

It is common to see falsely accused students include "deliberate indifference" claims in Title IX complaints.[34] The three elements of a Title IX deliberate indifference claim have been described as requiring plaintiffs to establish that:

> (1) "an official of the institution had authority to institute corrective measures had actual notice of, and was deliberately indifferent to, the misconduct;" (2) the university's conduct caused the student "to undergo harassment or make [him/her] liable or vulnerable to it;" and (3) the university's "response to the harassment . . . is clearly unreasonable in light of the known circumstances."[35]

(A)(4) Title IX Retaliation

Increasingly, Title IX plaintiffs suffer retaliation for engaging in protected activities related to defending themselves from false allegations during university disciplinary proceedings. This retaliation takes many forms. Some examples of Title IX retaliation are detailed in complaints

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[32] *Id.,* p.4 (citing *Vance v. Spencer Cty. Pub. Sch. Dist*., 231 F.3d 253,260 (6th Cir. 2000)).

[33] *Id.,* p.4.

[34] It should be noted courts are split on whether "deliberate indifference" is an independent cause of action. *See e.g., Sahm 2*, 2015 U.S. Dist. LEXIS 65864, *9-10 (stating: "[t]he parameters for a Title IX claim based on deliberate indifference are unsettled within the Sixth Circuit. At least one district court in the Sixth Circuit has held that the sexual harassment is a 'critical component' of a Title IX deliberate indifference claim. *See, Univ. of the S.*, 687 F. Supp. 2d 757-58. A sister court in the Southern District of Ohio refused to adopt the reasoning of *University of the South. See Wells*,7 F. Supp. 3d., 751-52. The *Wells* court recognized that sexual harassment is the 'classic case of Title IX deliberate indifference[,]' but it did not limit the deliberate indifference theory to only sexual harassment cases. *Id.* at 751 n.2.").

[35] *Mallory v. Ohio Univ.,* 76 F. App'x. 634, 638 (6th Cir. 2003).

filed against the University of Chicago, Columbia College Chicago, and Salisbury University.[36] For instance, the plaintiff in *Columbia College Chicago* based his retaliation claim in part on his university's failure to discipline students who retaliated against plaintiff.[37] This complaint describes how the university failed to discipline students who physically assaulted, harassed, and defamed plaintiff after he engaged in protected activities by defended himself against false sexual assault allegations made by fellow student/defendant Jane Roe.

The complaints in *Univ. of Chicago* and *Salisbury University* detail how universities charged plaintiffs with engaging in sexual misconduct ***after*** the plaintiffs engaged in protected activities by putting their universities on notice of Title IX violations by fellow students and/or university employees.[38] The plaintiff in *Univ. of Chicago* detailed how the university knowingly prosecuted false sexual assault allegations made by defendant Jane Doe.[39] After filing suit, plaintiff reached a settlement with defendant Jane Doe under with she executed a letter stating:

> "Based on [Jane Doe's] personal knowledge, [John Doe's] conduct did not violate any of the University of Chicago's policies or the laws of the State of Illinois relating to sexual relations involving me or any other persons."[40]

The plaintiff then added Jane Doe's letter to an amended complaint advancing Title IX retaliation and hostile environment claims against The University of Chicago.[41] In *Salisbury Univ.*, a district court in Maryland rejected a motion to dismiss plaintiff's claim based on a retaliatory investigation.[42] After the university lost its motion to dismiss, it settled the lawsuit.

Unfortunately, retaliation is becoming more prevalent as falsely accused students engage in protected activities by filing Title IX complaints with their universities. Gender-biased retaliatory conduct by universities violate Title IX's guarantee that: "[n]o person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[43] As a result, Title IX is violated when a school fails to prevent or remedy sexual harassment or other forms of discrimination.[44]

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[36] *See e.g., Handouts 1-3* (containing Title IX complaints filed by Eric Rosenberg's clients against University of Chicago, Columbia College Chicago, and Salisbury University).

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *See Handout 22* (containing Amended Complaint filed by Eric Rosenberg's clients against the University of Chicago).

[41] *Id.*

[42] *Doe v. Salisbury Univ.*, Case No. JKB-14-3853, 2015 U.S. Dist. LEXIS 70982, *17-19 (June 2, 2015)(rejecting university motion to dismiss Title IX retaliation claim).

[43] *20 U.S.C. § 1681(a).*

[44] *See e.g., Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999) (as to harassment); *Yusuf*, 35 F.3d 709, 715 (2d Cir. 1994) (as to decision to discipline).

The Seventh Circuit applies Title VII's retaliation framework to evaluate retaliation claims under Title IX.[45] Under this framework, a plaintiff establishes a Title IX retaliation claim by showing: (1) he/she engaged in protected activity under Title IX; (2) defendant took an adverse action against plaintiff; and (3) there is a causal connection between plaintiff's protected activity and the adverse action.[46] The plaintiff can prove his/her retaliation claim using either direct or indirect evidence.[47]

Although there have been relatively few Title IX retaliation claims filed by falsely accused male students, some current lawsuits suggest plaintiffs possess the facts to raise such claims. Once such lawsuit involved a 2016 complaint filed by a male student against Cornell University.[48] The male plaintiff and a female student in this case "accused each other of sexual offenses" which allegedly violated Cornell's sexual misconduct policy.[49] During the investigation of these offenses, the male plaintiff "identified numerous instances of . . . gender based bias on the part of [Cornell's] Title IX investigator."[50] He then filed a complaint with Cornell regarding the investigator.[51] While Cornell allowed the male plaintiff to raise gender-bias issues in defending himself against female student's allegations, Cornell refused to investigate the investigator's conduct until ***after*** Cornell adjudicated the female student's allegations.[52] In rejecting this approach, a New York court noted Cornell:

> ". . . . ignores the reality that [Cornell] has placed [plaintiff] in a procedurally more vulnerable position. Rather than pursing his complaint against [Cornell's investigator, plaintiff] is required to pursue his claim while simultaneously defending himself against both his accuser and the investigator . . . further by forcing [plaintiff] to pursue his complaint in the context of his defense [regarding allegations by the female student], he is denied the opportunity to have his complaint promptly investigated and adjudicated on its own merits . . . The Court finds no provision [in Cornell's policy] which would require, much less permit, [Cornell] to treat [plaintiff] any differently than any other student filing a complaint" related to Cornell's sexual misconduct policies.[53]

Although *Cornell* did not address Title IX retaliation, the facts highlight potential Title IX retaliation in situations where universities take disciplinary action against a student prior to addressing the student's Title IX complaint. This is because (a) student complaints regarding a school's Title IX investigator would likely be deemed a "protected activity," and (b) a causal

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[45] *See e.g., Milligan v. Bd. of Trs. of S. Ill. Univ.*, 686 F.3d 378, 388 (7th Cir. 2012).

[46] *Cung Hnin v. TOA (USA), LLC*, 751 F.3d 499, 508 (7th Cir. 2014).

[47] *Milligan*, 686 F.3d 378, 388 (7th Cir. 2012).

[48] *See, Handout 16* (containing Jan. 20, 2017 Order in *Doe v. Cornell Univ., State of N.Y. Sup. Ct., Tomkins Co.* Case No. EF2016-0192).

[49] *Id.*, p.2.

[50] *Id.*

[51] *Id.*, p.2-3.

[52] *Id.*, p.3.

[53] *Id.*, p.6.

connection could be alleged connecting the student's erroneous discipline with the university's failure to investigate his Title IX complaint.

Therefore, plaintiffs may want to add retaliation claims to complaints when possible since these claims may circumvent some of the negative court decisions regarding other Title IX claims. For example, plaintiffs advancing retaliation claims may not be required to establish the adverse actions they suffered were motivated by a gender-bias.[54]

(B) Establishing gender-bias in Title IX

With the possible exception of retaliation claims, Title IX claims require direct or indirect/circumstantial evidence of a defendant university's gender-bias. Generally, gender-bias is established in one of three ways. The first approach is discussed in the *Wells* decision which stated a plaintiff can establish gender-bias by detailing how his university:

> "react[ed] against [the plaintiff], as a male, to demonstrate to [a governmental agency] that [defendant university] would take action, as [it] had failed to in the past, against males accused of sexual assault."[55]

Consequently, when available, Title IX complaints should include facts related to any Title IX investigation of defendant universities by governmental agencies such as the United States Department of Education's ("DOE") Office of Civil Rights ("OCR").

However, the *Waters* decision highlights the importance of obtaining gender-bias documentation related to OCR investigations during the discovery process.[56] *Waters* involved a Title IX claim filed by Ohio State University's ("OSU") band director.[57] In rejecting the band director's gender-bias arguments, *Waters* distinguished OCR's investigation of OSU as being driven by a "compliance review" instead of a "complaint."[58] *Waters* also rejected the band director's OCR argument by relying heavily on OSU employee deposition testimony that downplayed OCR's review and highlighted the university's self-disclosure of Title IX concerns.[59]

Plaintiffs advancing OCR arguments should also be aware of the *Boston College* decision which granted a motion for summary judgment because plaintiff provided "no evidentiary support to show how [] outside pressures" from the federal government "influenced the disciplinary proceedings . . . ."[60] Therefore, to avoid these types of adverse rulings, plaintiffs are advised to issue subpoenas and discovery requests for un-redacted copies of all documents exchanged between defendant universities and OCR. Then, if possible, plaintiffs should use these documents to obtain deposition testimony to thwart *Waters* or *Boston College* arguments.

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[54] *See generally, Infra §B* (discussing same).

[55] *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 751 (S.D. Ohio 2014).

[56] *Waters v. Drake*, Case No: 2:14-cv-1704, 2016 WL 4264350 (S.D. OH. Aug. 12, 2016).

[57] *Id.*

[58] *Id.*, *8.

[59] *Id.*, *8-9.

[60] *Doe v. Trs. of Bos. Coll.*, Case No. 15-cv-10790, 2016 WL 5799297, *24 (D. Mass. Oct. 4, 2016).

The last two methods for establishing gender-bias involve: "statements by pertinent university officials, *or* patterns of decision-making that [] *tend to show* the influence of gender."[61] In *Washington and Lee,* a district court rejected a university's motion to dismiss in part because the plaintiff's complaint alleged all three aforementioned examples of gender-bias.[62] Specifically, the court found plaintiff's complaint:

1. Alleged university disciplinary policies had been modified and/or applied in a gender-biased fashion because of pressure from the federal government.[63]

2. Discussed how gender-bias against males could be attributed in part to the university's fear of losing federal funding; [64]

3. Identified statements by university officials that addressed federal government pressure to discipline more students accused of sexual assault;[65]

4. Presented circumstantial evidence of gender-biased conduct by university employees involved in his disciplinary proceeding;[66]

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[61] *See e.g., Sahm* v. *Miami Univ.,* 2015 U.S. Dist. LEXIS 1404, *11-12 (S.D. OH. Jan. 7, 2015)("*Sahm 1*")(emphasis added); *Yu v. Vassar Coll.,* 97 F. Supp. 3d 448, 2015 US Dist. Lexis 43253 *54-55 (S.D.N.Y. 2015)(same).

[62] *Washington & Lee,* 2015 U.S. Dist. LEXIS 102426, No. 6:14-cv-00052, 2015 U.S. Dist. LEXIS 102426 (W.D. Va., Aug. 5, 2015).

[63] *Id.*, *24 (discussing plaintiff's allegations that in response to "OCR's guidance, W&L made changes that one could infer were designed to secure more convictions. W&L removed protections that had previously been afforded to the accused, such as the right to counsel, and adopted a low burden of proof, preponderance of the evidence, rather than the beyond a reasonable doubt standard used for honor code violations.").

[64] *Id.,* *21 (discussing plaintiff's allegations that Washington and Lee was concerned about federal directives that stated "universities could lose federal funding or face other consequences if they failed to address problems with sexual violence on campus.").

[65] *Id.,* *20-21 (discussing a statement by Washington and Lee's president which "mentioned the fact that many universities were under currently under investigation for violating Title IX.").

[66] *Id.*, *28-29 (stating "gender-bias could be inferred from [W&L's investigator's] alleged . . . presentation, wherein she introduced and endorsed the article, *Is It Possible That There Is Something In Between Consensual Sex And Rape . . . And That It Happens To Almost Every Girl Out There*? That article, written for the female-focused website *Total Sorority Move*, details a consensual sexual encounter between a man and the female author of the article, who comes to regret the incident when she awakens the next morning. As Plaintiff describes it, the article posits that sexual assault occurs whenever a woman has consensual sex with a man and regrets it because she had internal reservations that she did not outwardly express. This presentation is particularly significant because of the parallels of the situation it describes and the circumstances under which Plaintiff was found responsible for sexual misconduct. Bias on the part of [W&L's investigator] is material to the outcome of JD's disciplinary hearing due to the considerable influence she appears to have wielded in those proceedings.")(footnotes omitted).

5. Discussed how the university adopted gender-bias language; [67] and

6. Identified violations of university polices during his disciplinary proceedings. [68]

Similarly, a district court rejected a motion to dismiss Title IX claims filed against Georgia Tech University in part because the male student/plaintiff:

1. Alleged his discipline was tainted by the university's response to pressure related to allegations that it had failed to properly discipline male students' sexual misconduct against female students;[69] and

2. Presented circumstantial evidence that individuals involved in adjudicating his case harbored anti-male gender-bias.[70]

In 2016, similar evidence defeated a motion to dismiss Title IX claims filed by Indiana University.[71] In that case a male student defeated this motion in part because the complaint:

1. Alleged he was treated differently than similarly situated females because the university ignored allegations that males were sexually assaulted by females;[72] and

2. Maintained the university unfairly restricted access to evidence that could have established gender-bias.[73]

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[67] *Id.*, *29-30 (discussing gender specific language in Washington and Lee's sexual misconduct training materials).

[68] *Id.*, *27 (discussing plaintiff's allegations that Washington & Lee violated its policies during plaintiff's disciplinary proceeding).

[69] *Handouts 4-5* (containing unpublished orders from *Doe v. Bd. Of Regents of the Univ. Sys. of Ga.*, case no.1:15-cv-4079)(D.GA. 2015-16)("Georgia Tech"). In particular, *Handout 4*, pages 15, 34-35 – contains *Georgia Tech Docket 31* – which discusses plaintiff's Title IX "erroneous outcome" claim and how news reports and allegations about fraternity members disrespecting females could be interpreted as supporting the plaintiff's claim that gender-bias at defendant university motivated Defendants' discipline of plaintiff). *See also, Handout 5* (containing *Georgia Tech Docket 40* which at pgs.9-10 discusses how plaintiff's Title IX claim could not be dismissed because he cited news reports suggesting gender-bias).

[70] *Handout 4* (containing *Georgia Tech Docket 31* which at pgs. 15-16, 31 discusses circumstantial evidence of gender-bias on the part of the investigator that ultimately found the plaintiff "responsible" for sexual misconduct).

[71] *See generally, Marshall v. Ind. Univ.*, Case No. 1:15-cv-00726, 2016 U.S. Lexis 32999 (S.D. Ind. Mar. 15, 2016).

[72] *Id.* **3-4, 18-19 (discussing how plaintiff established a claim of "selective, gender-based enforcement" because after being charged with sexual misconduct, plaintiff informed defendant university that he "had been sexually assaulted by another female student . . . [yet] Defendants never investigated [plaintiff's] reported sexual assault.").

[73] *Id.* *20 (refusing to dismiss a Title IX complaint for lack of gender-bias evidence in part because defendants restricted plaintiff's access to documents and as a result, "cannot have it both ways, restricting access to the facts and then arguing that [plaintiff's] pleading must be dismissed for failure to identify more particularized facts.").

Furthermore, a plaintiff suing Brown University defeated a motion to dismiss Title IX claims by alleging "upon information and belief":

1. Brown University stacked the deck against male students accused of sexual misconduct;[74]

2. The faculty of Brown University harbored animus against male students and favored female students; [75] and

3. Brown University engaged in a pattern and practice of gender-bias evidenced by: (a) previous lawsuits against the university; and (b) allegations of discrimination against males in years prior to the plaintiffs' unlawful discipline.[76]

It should be noted *Brown* is not alone in finding male Title IX plaintiffs can establish gender-bias via "information and belief" allegations. For, district courts in *Salisbury*, *Prasad*, and *Ritter* cited "information and belief" allegations as a basis for rejecting motions to dismiss Title IX claims.[77]

In an attempt to circumvent a complaint's evidence of gender-bias, universities often argue Title IX complaints must be dismissed because they mirror allegations contained in court decisions dismissing these claims such as *Marshall*.[78] Nevertheless, a properly pled complaint should be able to distinguish itself from *Marshall* which involved a Title IX complaint by a male student that:

1. Did "*not* . . . allege that members of the hearing panel *or* university officials made statements indicating gender bias against men;"

2. Did *not* allege plaintiff was innocent of charges that he violated the university's sexual misconduct policy;

[74] *Doe v. Brown Univ.*, No. 15-144 S, 2016 U.S. Dist. Lexis 21027, *27 (D.R.I. Feb. 22, 2016) (discussing same).

[75] *Id.*

[76] *Id.*, **4, 10, and 27 (discussing how plaintiff established gender-bias in part by citing a lawsuit filed against defendant/university from at least four years prior plaintiff's discipline by defendant/university).

[77] *See e.g., Doe v. Salisbury Univ.*, CIVIL NO. JKB-15-517, 2015 U.S. Dist. LEXIS 110772, *41 (Aug. 21, 2015)(finding alleging gender-bias "based solely 'upon information and belief,' [] is a permissible . . . even after the *Twombly* and *Iqbal* decisions . . . .")(internal citations omitted); *Prasad v. Cornell Univ.*, No.5:15-cv-322, 2016 WL 3212079 (N.D.N.Y. Feb. 24, 2016)(rejecting a motion to dismiss a Title IX claim filed by a male student which was based in part on "information and belief" allegations; *Handout 7* (containing *Ritter v. Oklahoma*, no.16-0438 (U.S. W.D. Ok, (May 6, 2016) which granted– at original p.4 - a temporary restraining order in part because plaintiff established Title IX claim based on "information and belief" allegations).

[78] *Marshall.* 2015 U.S. Dist. LEXIS 155291, at *15.

3. Did *not* maintain the university "failed to follow its disciplinary proceeding procedures or . . . attempted to influence the outcome of the disciplinary proceeding;" and

4. Did "*not* . . . allege the investigator/advocate in the disciplinary proceeding also functioned as the decision-maker who ultimately determined" the plaintiff violated the university's sexual misconduct policy.[79]

Similarly, universities' motions to dismiss commonly rely on the following five court decisions in seeking the dismissal of Title IX claims: (1) *Sahm 2;* (2) *University of the South,* (3) *King*, (4) *Case Western,* and (5) *Vassar.*[80] However, properly pled Title IX complaints should be able to distinguish these cases. This is because the plaintiffs in *Sahm 2*, *Univ. of the South*, *Case Western, Yu,* and *King*, did *not* allege their universities failed to discipline female students for initiating nonconsensual physical contact with male students.[81] *Sahm 2* and *University of the South* involved cases where the plaintiff did *not* establish gender-bias.[82] In addition, during the motion to dismiss stage, a citation to *King* would be unpersuasive because *King* addressed the "likelihood of success" element of a TRO motion – a much higher evidentiary hurdle than required at the motion to dismiss stage.[83]

(B)(1) Causation issues related to biased adjudicators

Title IX complaints filed by male students often raise issues of (a) gender-biased views held by adjudicators in disciplinary proceeding or (b) conflicts of interest between adjudicators

[79] *Id.*, *15-16**.** (emphasis added).

[80] *Sahm 2*, 2015 U.S. Dist. LEXIS 65864; *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744 (E.D. Tenn. 2009); *King v. DePauw Univ.*, No. 2:14-CV-70-WTL-DKL, 2014 WL 4197507, (S.D. Ind. Aug. 22, 2014)); *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448 (S.D.N.Y. 2015); *Doe v. Case W. Reserve.*, U.S. 2015 U.S. Dist. Lexis 123680 (N.D. OH. Sept. 16, 2015).

[81] *Sahm 2*, 2015 U.S. Dist. LEXIS 65864, *12 (granting university's motion to dismiss because the plaintiff "assert[ed] no facts to suggest" university "would have acted differently in a disciplinary procedure against a female accused of sexual assault."); *Univ. of the S.*, 687 F. Supp. 2d 757 (detailing how plaintiff did *not* "plead facts or provide the Court with any evidence that . . . a similarly situated woman would not have been subjected to the same disciplinary proceedings."); *Yu*, 2015 U.S. Dist. LEXIS 43253, *4-7 (containing no discussion of plaintiff alleging gender-bias based on university's failure to discipline female student for violating university policies by initiating physical contact with plaintiff when he was incapacitated); and *Case W. Reserve.*, U.S. Dist. LEXIS 123680 (same).

[82] *Univ. of the S.*, 687 F. Supp.757 (detailing how plaintiff did *not* "plead facts or provide the Court with any evidence that the University's actions against JD were motivated by his gender . . . ."); *Sahm 2*, 2015 U.S. Dist. LEXIS 65864, *11 (dismissing plaintiff's complaint because he did "not allege[] that any members of the disciplinary tribunal made statements indicating gender-bias."); *Id.*, *13 (granting motion to dismiss in part because plaintiff not "established a pattern of biased decision making" by the defendant/university).

[83] *King*, 2014 U.S. Dist. LEXIS 117075, *27-29.

and the plaintiffs' accusers.[84] As discussed in part in Section B above, such circumstances can trigger Title IX violations.[85]

Nevertheless, bias challenges sometimes come up short. The plaintiff in *Bleiler* alleged his disciplinary panel was unlawful in part because: (a) "two student panel members had social connections to [plaintiff's accuser] . . . [but a college administrator] refused to remove them from the panel,"[86] and (b) one panel member participated "in a 'rape play' whose message was that 'when friends who were drinking engaged in sexual activity it was considered rape.'" [87] In dismissing these concerns, *Bleiler* noted the college administrator "concluded [the] panel members believed that they did not have a conflict of interest and . . . did not know [accuser] well and there was no suggestion . . . [they] knew [plaintiff]."[88] More importantly, *Bleiler* found plaintiff failed to establish he was "disciplined and expelled because of his gender."[89] In support of these positions, *Bleiler* cited:

1. The First Circuit's *Gorman* decision which stated: "[i]n the intimate setting of a college or university, prior contact between the participants is likely and does not <u>*per se*</u> indicate bias or partiality;"[90] and

2. The Eighth Circuit's *Ikpeazu* decision which found a university disciplinary body "is entitled to a presumption of honesty and integrity absent a showing of actual bias such as animosity, prejudice, or a personal or financial stake in the outcome."[91]

Defendant universities will also likely cite *Vassar* which rejected a "conflict of interest" argument based on the accuser's father being employed by Vassar.[92] But, *Vassar's* basis for rejecting this argument was plaintiff's inability to establish: (a) "any resulting erroneous outcome

[84] *See e.g., Handouts 1-3, 8-12* (containing Title IX complaints filed by Eric Rosenberg's clients against University of Chicago, Columbia College Chicago, Salisbury University, Ohio State University, Indiana University, Denison University, and Occidental College).

[85] *Supra*, §B. *See also, Doe v. Rector & Visitors of George Mason Univ*., No. 1:15-CV-209, 2015 WL 5553855, at 16 (E.D. Va. Sept. 16, 2015)(determining a plaintiff satisfied the first prong of the *Yusuf* analysis by alleging that the school's procedure was flawed based on its "failure to provide a neutral arbiter without prior involvement in the case").

[86] *Bleiler v. Coll., of the Holy Cross*, No. 11-11541, 2013 U.S. Dist. LEXIS 127775, *39 (D. Ma. Aug. 28, 2013)

[87] *Id.*, *40.

[88] *Id.*, *39-40.

[89] *Id.*, *42.

[90] *Id.*, *40 (quoting *Gorman v. Univ. of R.I.*, 837 F.2d 7, 15 (1st Cir. 1988))(emphasis added).

[91] *Id.*, *40-41 (quoting *Ikpeazu v. University of Neb.*, 775 F.2d 250, 254 (8th Cir. 1985).

[92] *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 2015 US Dist. Lexis 43253 *33-35.

would have been caused by gender-bias . . . .",[93] and (b) "any evidence . . . that would raise a triable issue as to the panelists' bias toward Complainant because of her father."[94]

As a result, most Title IX plaintiffs should navigate *Vassar* and *Bleiler* challenges by including facts in their complaints and/or engaging in discovery that distinguishes these cases. In addition, during university level disciplinary proceedings, falsely accused students should present universities with written questions for disciplinary panel members that might expose conflicts of interest or gender-bias. These students should also document the basis for gender-bias and conflict of interest challenges during disciplinary proceedings to preserve these challenges for litigation.

(B)(2) <u>Direct vs. indirect evidence of gender-bias</u>

Title IX plaintiffs can establish gender-bias via direct or indirect/circumstantial evidence.[95] In defining these terms, courts will likely look to Title VII. Under Title VII, direct evidence is often defined as evidence that does not require an inference to conclude unlawful discrimination motivated an employer's action.[96] In Title IX, an example of direct evidence would likely involve statements favoring female students over male students (or) statements hostile to males with regard to allegations of sexual misconduct. Indirect evidence requires an inference of unlawful discrimination. [97] When relying on indirect/circumstantial evidence, Title VII plaintiffs should identify other indicia of discriminatory conduct to establish temporal causal connections.[98] This evidence sometimes includes campus sponsored events related to the Hunting Ground, Clothesline Project, or affiliations with organizations that portray males as perpetrators of sexual misconduct.

Unfortunately, in Title IX claims, very few courts have evaluated temporal causal links between a plaintiff's discipline and gender-bias. One such case is *Washington and Lee* which rejected a motion to dismiss in part because plaintiff's gender-bias allegations articulated temporal connections between his discipline and a *Rolling Stone* article entitled "*A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA*."[99] Similarly, a district court rejected a motion to dismiss because the plaintiff established gender-bias in part by citing a lawsuit filed against his university at least four years prior plaintiff's discipline.[100]

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[93] *Id.*, *35, fn11.

[94] *Id.*, *34.

[95] *See e.g., Vance v. Spencer Cty. Pub. Sch. Dist.,* 231 F.3d 253, 255 (6th Cir. 2000)(finding Title IX discrimination can be established by "circumstantial evidence.").

[96] *See e.g., Spengler v. Worthington Cylinders,* 615 F.3d 481, 491 (6th Cir. 2010)(defining direct evidence as evidence, which if believed, does not require an inference to conclude that unlawful retaliation motivated an employer's action).

[97] *See e.g., Little v. BP Exploration & Oil Co.,* 265 F.3d 357, 363–64 (6th Cir.2001); *Nguyen v. City of Cleveland,* 229 F.3d 559, 566–67 (6th Cir.2000).

[98] *Id.*

[99] *Washington and Lee*, 2015 U.S. Dist. LEXIS 102426, *20-21

[100] *Brown Univ.,* 2016 U.S. Dist. LEXIS 21027, **4, 10, and 27 (discussing how plaintiff established gender-bias in part by citing a lawsuit filed against defendant/university from at least four years' prior plaintiff's discipline by defendant/university).

On the other hand, *Sahm 2* granted a university's motion to dismiss after maintaining gender-bias evidence 2½ to 4 years old would be too remote in time.[101] Likewise, *Vassar* determined the plaintiff could *not* establish a "pattern" of gender-bias in part because he relied on a single "twenty-year-old decision allowing a complaint to survive a motion to dismiss . . . ."[102] As a result, Title IX plaintiffs should consult Title VII circuit court decisions addressing the outer limits of temporal connections. In doing so, plaintiffs may avoid *Vassar* and *Sahm 2* arguments alleging gender-bias evidence is too old.

In addition to disputes about whether gender-bias evidence is too dated, courts seem to be struggling with how to evaluate individual pieces of gender-bias evidence within the totality of plaintiffs' causation arguments. To address this issue, Title IX plaintiffs may ask courts to view "causation" in non-retaliation claims by looking to cases like the Supreme Court's Title VII decision in *Nassar* which stated:

> "An employee alleging status-based discrimination under [Title VII] need *not* show '*but-for*' causation. It suffices instead to show that the motive to discriminate was *one of* the employer's motives, *even if the employer also had other, lawful motives for the decision*." [103]

If courts adopt this Title VII evidentiary requirement, Title IX plaintiffs should not be required to establish "but for" causation between their discipline and a university's gender-bias in non-retaliation Title IX cases. Rather, Title IX plaintiffs should only be required to prove gender-bias was a "motivating factor" for their discipline.

But, plaintiffs should not be surprised if universities argue *Nassar's* requirement that Title VII retaliation plaintiffs establish "but-for" causation[104] applies in Title IX cases. If this happens, plaintiffs advancing Title IX retaliation claims should note district courts have not determined *Nassar's* "but-for" causation standard applies in Title IX.[105] If *Nassar* applies to Title IX,

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[101] *Sahm 2,* 2015 U.S. Dist. LEXIS 65864, *13-16 (referencing: (a) *Worthy v. Mich. Bell Tel. Co.*, 472 Fed. Appx. 342, 347 (6th Cir. 2012) which found "discriminatory comment made two and one-half years earlier to be "remote in time"; and (b) *Myers v. Cuyahoga Cty., Ohio*, 182 F. App'x 510, 512, 520 (6th Cir. 2006) which noted "a slur made at least one year before performance problems arose and at least three years prior to termination was not evidence of discrimination.").

[102] *Yu v. Vassar Coll.,* 2015 US Dist. Lexis 43253 *69 (quoting *Mallory v. Ohio Univ*., 76 Fed. App'x 634, 640 (6th Cir. 2003) which determined one claim filed six years ago "by an individual who was subjectively dissatisfied with a result does not constitute a 'pattern of decision-making.'")

[103] *Univ. of Tex. Sw. Med. Cent. v. Nassar*, 133 S.Ct. 2517, 2532, 2520 (June 4, 2013)(emphasis added).

[104] *Id.* (requiring Title VII plaintiffs establish "but for" causation).

[105] *See e.g., Miller v. Kutztown Univ.*, 2013 U.S. Dist. LEXIS 173878, at *3 (E.D. Pa. Dec. 11, 2013)(stating: "[w]hile it is true that the legal analysis in Title VII and Title IX is often similar, the Court made clear in *Nassar* that its holding regarding but-for causation applied to Title VII, not Title IX.")(citing *Nassar*, 133 S.Ct. at 2529-30); *Doe v. Rutherford County*, 2014 U.S. Dist. LEXIS 114477, *48-50 (M.D. Tenn., Aug. 24, 2014)(stating, "[i]n the wake of *Nassar*, what are the implications for the causation standard applicable to Title IX claims? The answer is not self-evident . . . [t]he parties have not addressed these potential complexities in their briefing . . . [as a result] the court need not resolve the issue at this stage."); *Meyers v. Cal. Univ. of Pa.,* 2014 U.S. Dist. LEXIS 29828, *41 (W.D. Pa., July 31, 2014)(determining

plaintiffs should be prepared to respond to university arguments that plaintiffs need to establish concrete proof that their protected activities were the sole basis for a university's disciplinary sanction. In doing so, plaintiffs should cite the Supreme Court's *Burrage* decision which clarified *Nassar* by noting plaintiffs need only establish retaliation "was [a] but-for cause of the challenged employment action."[106] In addition, the First Circuit's *Hobgood* decision found *Nassar* does not require "smoking gun" evidence "akin to an admission" to establish but-for causation.[107]

(B)(3) <u>Responding to "disparate impact" challenges to plaintiff's causation evidence</u>

Many universities allege Title IX claims must be dismissed because these claims are allegedly based on "disparate impact" theories which are not permitted under Title IX.[108] But, most well pled Title IX complaints do not include "disparate impact" claims. Instead, plaintiffs use statistics to show how defendant universities are engaging in patterns of decision-making that tend to show gender-bias motivated their unlawful discipline.[109] Courts' confusion between "pattern" and "disparate impact" issues was addressed in *Prasad*.[110] *Prasad* rejected a university's "disparate impact" argument in a motion to dismiss by stating:

> "It is possible that [p]laintiff could, after conducting discovery, produce statistical evidence indicating that males are invariably found guilty in sexual assault proceedings at Cornell . . . [w]hile statistical evidence of a disparate impact on one gender cannot form the basis of a Title IX claim, this type of evidence might support Plaintiff's claim that gender influenced the outcome of his disciplinary proceeding . . . [for] <u>*statistics may be used as circumstantial evidence to support an individual disparate treatment claim*</u>".[111]

Plaintiffs should also look to *Vassar* to fend off disparate impact arguments. This is because *Vassar* determined the plaintiff could <u>*not*</u> establish a "pattern" of gender-bias in part because he: "failed to provide any <u>*statistical evidence*</u> that 'males invariably lose' when charged with sexual

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the court would delay its determination of whether *Nassar*'s but-for causation applied to Title IX until trial in part because of Justice Ginsburg's dissent in *Nassar* which stated: "trial judges [ ] will be obliged to charge discrete causation standards" to jurors who "will puzzle over the rhyme or reason for the dual standards")(citing *Nassar*, 133 S. Ct. at 2535 (Ginsburg, J., dissenting)).

[106] *United States v. Burrage*, 134 S. Ct. 881, 889 (2013)(bracketed [a] in original).

[107] *Hobgood v. Ill. Gaming Bd., et al.*, 731 F.3d 643 (7th Cir. 2013).

[108] *Doe v. Univ. of Cinn.*, 2016 WL 1161935, *14 (S.D. Oh. Mar. 23, 2016)(dismissing at Title IX claim in part because the court maintained the plaintiff was advancing an impermissible disparate impact liability claim).

[109] *See e.g., Sahm 1,* 2015 U.S. Dist. LEXIS 1404, *11-12 (discussing how plaintiff established Title IX liability via patterns of decision-making that tend to show gender-bias motivated their unlawful discipline); *Yu*, 2015 US Dist. Lexis 43253 *54-55 (same).

[110] *Prasad*, 2016 WL 3212079 (emphasis added).

[111] *Id.* (internal citations and quotations omitted).

misconduct . . . .".[112] Therefore, plaintiffs should cite *Prasad* and *Vassar's* "statistical" commentary if universities refuse to provide discovery related to sexual misconduct investigations/adjudications for the 2-4 year period preceding plaintiff's discipline.

(B)(4) Addressing university defenses based on Title VII's heightened standards of proof in reverse discrimination claims

Falsely accused male students may encounter defendant universities arguing courts should apply Title VII's heightened standards in Title IX claims filed by male students. These universities may allege Title IX claims are akin to Title VII reverse discrimination claims filed by Caucasian males. This argument was made in *Waters* which involved a plaintiff/band director at OSU.[113] Although *Waters* rejected the argument in granting OSU's motion for summary judgment, *Waters* detailed the argument as follows:

> "Ohio State . . . [alleges] Waters cannot establish a *prima facie* case . . . [under the] first *McDonnell Douglas* factor, [which requires] a plaintiff in a reverse discrimination case [to] satisfy a heightened standard of establishing that 'background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority.' *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985) (quoting *Parker v. Baltimore and Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981)). Ohio State's position has some support in the case law. *See Sutherland v. Michigan Dep't of Treasury,* 344 F.3d 603, 614 (6th Cir. 2003) (applying *Murray*). In response, Waters argues that the court should reject imposing a heightened standard in reverse discrimination cases. This position too has some support in the case law. *See Zambetti v. Cuyahoga Cmty. Coll.*, 314 F.3d 249, 257 (6th Cir. 2002) ("[W]e note that the 'background circumstances' prong, only required of 'reverse discrimination' plaintiffs, may impermissibly impose a heightened pleading standard on majority victims of discrimination.") (citing cases); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 n.7 (6th Cir. 1994) ("We have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts."). Because Ohio State has so clearly demonstrated that it is entitled to summary judgment on the basis of its second argument (concerning the absence of a similarly-situated individual), the court declines to decide whether it believes the heightened "background circumstances" standard remains good law in reverse discrimination cases in the Sixth Circuit."[114]

A Male Title IX plaintiff should study the court decisions cited by *Waters* if the defendant university alleges plaintiff must show the university is "unusual" in how it "discriminates against" male students. This is because *Waters* determined it did not need to decide whether Title VII's

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[112] *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 2015 US Dist. Lexis 43253 *68-69 (S.D.N.Y. 2015)(emphasis added).

[113] *Waters v. Drake*, 2016 WL 4264350 (S.D. Ohio Aug. 12, 2016).

[114] *Id.*, *10.

reverse discrimination standard applied in Title IX. Moreover, Title IX plaintiffs should anticipate summary judgment arguments based on Title VII's heightened standards by engaging in discovery in accordance with relevant circuit court decisions that address this issue.

(B)(5) Disproving universities' "gender-neutral" arguments

As discussed below, some district courts grant motions to dismiss after providing alternative explanations for gender-bias in Title IX complaints. In doing so, these courts likely violate the Supreme Court's *Twombly* decision which states a *McDonnell Douglas* burden-shifting analysis cannot occur at the motion to dismiss stage.[115]

This issue was prominently discussed in the Second Circuit's *Doe v. Columbia* decision which found a district court erred in dismissing a male student's Title IX claims.[116] In doing so, the Second Circuit clarified its earlier *Yusuf* decision which many courts look to for guidance in addressing Title IX claims.[117] Specifically, the Second Circuit stated that even though it did "not explicitly state in *Yusuf* that we were incorporating *McDonnell Douglas*'s burden-shifting framework into Title IX jurisprudence" this framework applies.[118] As a result, the Second Circuit stated:

> ". . . . a complaint under Title IX, alleging that the plaintiff was subjected to discrimination on account of sex in the imposition of university discipline, is sufficient with respect to the element of discriminatory intent, like a complaint under Title VII, if it pleads specific facts that support a *minimal plausible inference of such discrimination*."[119]

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[115] *See e.g., Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 (2007) (stating that at the motion to dismiss stage, Title VII complaints need *not* contain facts establishing a defendant's alleged legitimate non-discriminatory rationale for an adverse action is a pretext for unlawful discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). *See also, Horner v. Ky. Athletic Ass'n*, 206 F.3d 685, 689-92 (6th Cir. 2000) (discussing how analytical framework of Title VI should be used to interpret Title IX).

[116] *Doe v. Columbia University*, 831 F.3d 46 (2nd Cir. July 29, 2016).

[117] *See e.g., Mallory,* 76 F. App'x. 638-39 (discussing *Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994).

[118] *Columbia*, 2016 U.S. App. Lexis 13773, *22-23. The Second Circuit detailed this burden-shifting framework as follows: "[I]n the initial phase of the case, the plaintiff can establish a prima facie case *without evidence sufficient to show discriminatory motivation* . . . . If the plaintiff can show . . . [among other things] *some minimal evidence suggesting an inference that the employer acted with discriminatory motivation*, such a showing will raise a temporary 'presumption' of discriminatory motivation, shifting the burden of production to the employer and requiring the employer to come forward with its justification for the adverse employment action against the plaintiff. However, once the employer presents evidence of its justification for the adverse action, joining issue on plaintiff's claim of discriminatory motivation, the presumption 'drops out of the picture' and the framework 'is no longer relevant.' At this point, *in the second phase of the case*, the plaintiff must demonstrate that the proffered reason was not the true reason (or in any event not the sole reason) for the employment decision, which merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against her. *Columbia*, 2016 U.S. App. Lexis 13773, *18-19 (citing *Littlejohn v. City of New York*, 795 F.3d 297,307-08 (2d Cir. 2015)(footnote omitted)(emphasis added).

[119] *Id.*, *13-14 (emphasis added).

In discussing this "minimal plausible inference," the Second Circuit looked to its *Littlejohn* decision.[120] For instance, the Second Circuit noted:

> "*McDonnell Douglas* temporary presumption *reduces* the facts . . . needed to be *pleaded* under *Iqbal* . . . [b]ecause '[t]he discrimination complaint, by definition, occurs in the first stage of the litigation . . . the complaint also benefits from the temporary presumption and must be viewed in light of the plaintiff's minimal burden to show discriminatory intent.'"[121]

"For this reason," the Second Circuit noted it has "often vacated 12(b)(6) and 12(c) dismissals of complaints alleging discrimination" and "cautioned district courts against imposing too high a burden on plaintiffs alleging discrimination at the 12(b)(6) stage."[122] In addition, the Second Circuit warned district courts against dismissing Title IX lawsuits based on otherwise reasonable "proffered explanation[s]" of gender-bias.[123] This is because "[i]t is not the court's function in ruling on a motion to dismiss for insufficiency of the complaint to decide which was the defendant's true motivation."[124] After setting forth the law, the Second Circuit detailed reasons why plaintiff's facts satisfied the "minimal plausible inference" standard. Those facts included plaintiff's allegations that

1. "Columbia's hearing panel (which erroneously imposed discipline on the Plaintiff), its Dean (who rejected his appeal), and its Title IX investigator (who influenced the panel and the Dean by her report and recommendation), were all motivated in those actions by pro-female anti-male bias;"[125]

2. "[A]lleged biased attitudes were, at least in part, adopted to refute criticisms circulating in the student body and in the public press that Columbia was turning a blind eye to female students' charges of sexual assaults by male students;"[126]

3. The "investigator and the [disciplinary] panel failed to act in accordance with [u]niversity procedures designed to protect accused students;[127]

4. University officials were reacting to "substantial criticism of the [u]niversity . . . accusing the [u]niversity of not taking seriously complaints of female students alleging sexual assault by male students;"[128] and

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[120] *Id.*, *2, 20-22, 33 (discussing *Littlejohn v. City of New York*, 795 F.3d 297 (2d Cir. 2015).

[121] *Id.*, *20 (quoting *Littlejohn*, 795 F.3d 310-11)(emphasis added).

[122] *Id.*, *21, fn.8 (citations omitted).

[123] *Id.*, *25-26.

[124] *Id.*, *26.

[125] *Id.*, *24.

[126] *Id.*, *25.

[127] *Id.*

[128] *Id*, *27-28.

5. The "investigator, the panel, and the reviewing Dean . . . reached conclusions that were incorrect and contrary to the weight of the evidence."[129]

The rationale in the Second Circuit's *Columbia* decision is echoed in *Brown Univ.* which refused to follow the lead of the now reversed district court's *Columbia* decision by noting:

> "the type of evidence called for by the [district court decision in] *Columbia* [] is more akin to what would be required at summary judgment. . . . *Iqbal* and *Twombly* did not convert the standard for surviving a motion to dismiss into a quasi-summary judgment standard . . . [m]oreover, the court in *Columbia* did not appear to consider how a potential plaintiff would acquire any of this type of information without discovery."[130]

In fact, *Columbia* has had an immediate impact on the way courts construe Title IX complaints with numerous district courts citing *Columbia* as a basis for rejecting motions to dismiss Title IX claims. One such decision is *Doe v. Regents of Univ. of California*.[131] In that case, a district court revisited its earlier dismissal of the plaintiff's Title IX erroneous outcome claim in light of *Columbia* and concluded the Title IX claims withstood the motion to dismiss. Specifically, this court noted that:

> "Although [it] previously held that the Plaintiff's allegations failed to give rise to a plausible inference of gender bias under *Iqbal* and *Twombly*, the Court now finds that the Plaintiff has satisfied the minimal burden necessary to give rise to a temporary presumption of discriminatory intent as outlined in *Columbia*."[132]

The court made clear that it is the plaintiff's version of events that hold sway at the 12(b)(6) stage by noting:

> "It is not the Court's finding that the outcome of the disciplinary proceedings was definitively erroneous. The Court has only considered the Plaintiff's version of events, as is proper at the pleading stage of the litigation, when all inferences must be made in favor of the non-moving party. As a result, it is entirely possible that the Plaintiff's claims are simply untrue, or that there was persuasive evidence to justify the committee's ultimate decision to credit Jane Doe's version of events over the Plaintiff's. After the evidence is collected and presented, the Plaintiff's allegations of an erroneous outcome may no longer be plausible. However, such

[129] *Id*, *25.

[130] *Brown Univ.*, 2016 U.S. Dist. LEXIS 21027, *23-24 (internal citation omitted).

[131] *See, Handout 24* (containing unreported *Doe v. Regents of Univ. of California* 2:15-cv-02478-SVW-JEM (June 8, 2017, C. Dist. CA).

[132] *Id.*

considerations are inappropriate for this Court at the motion to dismiss phase of the trial."[133]

The Southern District of Ohio reached a similar determination in *Ohio State Univ.* when it noted the burden shifting arguments in *McDonnell Douglas* are "an evidentiary standard, not a pleading requirement." This court added:

> "The Supreme Court 'has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss. . . . the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases' . . . Instead, a complaint must contain only a short and plain statement of the claim showing that the pleading is entitled to relief."[134]

In relying on these bedrock legal principles to reject a motion to dismiss a plaintiff's Title IX claim, *Ohio State Univ.* joined *Neal,*[135] *Lynn Univ.,*[136] and *Collick*[137] which rejected motions to dismiss Title IX claims in the wake of *Columbia.*

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[133] *Id.*

[134] *Doe v. Ohio State Univ*., Case No.: 2:16-cv-171 at *21 (quoting *Swierkiewicz v. Sorema N.A*., 534 U.S. 506, 510-511 (2002)).

[135] *Neal v. Colorado State University-Pueblo*, No. 16–cv–873–RM–CBS, 2017 WL 633045, **11-14 (D. Col., Feb. 16, 2017)(citing *Columbia* in rejecting motion to dismiss a male plaintiff's Title IX claim in part because: (a) defendant university subjected plaintiff to disciplinary proceedings despite his accuser's statements acknowledging plaintiff did not engage in sexual misconduct; (b) the university employee charged with investigating allegations of sexual misconduct engaged in conduct that could be interpreted as manifesting gender bias; (c) plaintiff alleged the university took adverse actions against him because of pressure from OCR to "issue more guilty findings against male students accused of sexual misconduct;" (d) the university feared pressure from "internal[]" sources and the federal government to "aggressively discipline male students accused of sexual misconduct;" and (d) university implements policies so as to favor female students alleging males engaged in sexual misconduct.)

[136] *Doe v. Lynn Univ., Inc.*, No. 9:16–cv–80850, 2017 WL 237631, **4-5 (S.D. Fla. Jan. 19, 2017)(citing *Columbia* in rejecting motion to dismiss a male plaintiff's Title IX claim in part because defendant university took adverse actions against plaintiff because of pressure from internal and external sources such as OCR to: (a) produce "false positives" against male student alleged to have engaged in sexual misconduct; and (b) "vouchsafe [the university's] federal funding.")(distinguishing plaintiff's complaint from a Title IX claim dismissed by the Sixth Circuit in *Doe v. Cummins*, No. 16–3334, 2016 WL 7093996 (6th Cir. Dec. 6, 2016).

[137] *Collick v. William Paterson Univ.*, Civ. No. 16–471(KM) (JBC), 2016 WL 6824374, *12 (D.N.J. Nov. 17, 2016)(citing *Columbia* in rejecting a university's motion to dismiss a Title IX claim based on allegations of procedural shortcomings during plaintiff's disciplinary proceeding and anti-male pressure from ORC which the court found warranted a: "commonsense inference that the public's and the policymakers' attention to the issue of campus sexual assault may have caused [defendant] university to believe it was in the spotlight" and therefore caused the university to use plaintiff to show it would sanction males accused

On the other hand, district courts in *Denison,*[138] *Miami,*[139] *Wooster,*[140] and *Austin*[141] sidelined *Columbia* and dismissed Title IX claims. They did so in large part by alleging any bias favoring sexual assault victims is not actionable bias because these victims might be male.[142] In doing so, these district courts violate bedrock U.S. Supreme Court decisions by misconstruing, ignoring, and/or recasting male plaintiffs' gender-bias evidence against the plaintiffs and in favor of defendant universities.

These violations were addressed in Sixth Circuit appeal briefs filed in *Denison* and *Miami*.[143] For, example, the male plaintiff in *Denison* detailed how the district court ignored and/or misconstrued gender-bias evidence which included: (a) court filings from four lawsuits filed against Denison University by male students alleging they were erroneously subjected discipline proceedings after being falsely accused of sexual misconduct; (b) documentation from OCR's investigation of Denison University which triggered gender-bias that contributed to plaintiff's erroneous expulsion; (c) anti-male statements and/or conduct by adjudicators involved in plaintiff's expulsion; and (d) documented examples of how Denison University: (i) equated victim/complainants in sexual misconduct proceedings as being females who must receive preferential treatment, and (ii) severely punished males accused of sexual assault regardless of guilt.[144]

Similarly, the *Miami* appeal details how the following four types of gender-bias evidence was construed against the male plaintiff: (1) the university's gender biased policy application established by its refusal to discipline the female who initiated sexual contact with plaintiff when the female knew plaintiff was incapacitated because of alcohol; (2) an affidavit from an attorney who witnessed examples of the university refusing to discipline female students who initiated sexual contact with male students who were incapacitated because of alcohol; (3) anti-male statements and/or conduct by adjudicators involved in plaintiff's suspension; and (4) the university's embracing internal and external pressure to: (i) equate victim/complainants in sexual

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of sexual misconduct).

[138] *See, Handout 25* (containing unreported *Doe v. Denison Univ.* 2:16-cv-00143-MHW-KAJ (S.D.Oh. Mar. 30, 2017).

[139] *Doe v. Miami Univ.*, No.1:15cv605, 2017 WL 1154086 (S.D.Oh. Mar. 28, 2017).

[140] *Doe v. College of Wooster,* No.5:16-cv-979, 2017 WL 1038982, (N.D.OH. Mar. 17, 2017).

[141] *Austin v. Univ. of Oregon,* No. 6:15-cv-02257-MC, 2016 WL 4708540, (D. Oregon Sept. 8, 2016).

[142] *See e.g., College of Wooster*, 2017 WL 1038982, *5.

[143] *See Handouts 26-27* (containing appellants' Sixth Circuit appeal briefs in *Denison* and *Miami*).

[144] *Id. Handout 26* (containing appellants' Sixth Circuit appeal brief in *Denison*.

misconduct proceedings as being females who must receive preferential treatment, and (ii) severely punish males accused of sexual assault regardless of guilt.[145]

The male Title IX plaintiff in *Wooster* also had his gender bias evidence construed against him. He alleged his erroneous discipline was caused in part by anti-male gender-bias chronicled in the university's newspaper.[146] Nevertheless, the district court dismissed his Title IX claims by alleging his evidence:

> ". . . may supply a possible motive for favoring assault victims. It does not, however, suggest a basis for discrimination against male students. 'Demonstrating that a university official is biased in favor of the alleged victims of sexual assault claims, and against the alleged perpetrators, is not the equivalent of demonstrating bias against male students.'"[147]

In reaching this conclusion, *Wooster* like the district courts in *Denison* and *Miami* likely violated *Twombly* and *Iqbal*. This is because the plausible inferences that should be made from the gender-bias evidence in *Wooster, Denison,* and *Miami* is that the defendant universities: (1) advocated on behalf of females who alleged males engaged in sexual misconduct; (2) manifested minimal or no advocacy on behalf of males alleged to have engaged in sexual misconduct towards females; (3) exhibited minimal or no advocacy for protecting females from sexual misconduct perpetrated by other females; and/or (4) manifests minimal or no advocacy for protecting males from sexual misconduct perpetrated by females.

In addition to likely running afoul of *Twombly* and *Iqbal, Wooster* appears to misapply the Sixth Circuit's *Mallary* decision.[148] With regard to this issue, *Wooster* stated:

> "Wooster [] criticizes plaintiff's reliance on *Doe v. Columbia Univ*. on the ground that it improperly applied the 'minimal plausibility' standard to the plaintiff's pleading requirements under Title IX. Wooster complains that the Sixth Circuit has

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[145] *Id. Handout 27* (containing appellants' Sixth Circuit appeal brief in *Miami*).

[146] *College of Wooster,* 2017 WL 1038982, *4 (detailing how plaintiff's complaint alleged that, "[d]uring the period preceding the disciplinary hearing, there was substantial criticism of the College, both in the student body and in the public media, accusing the College of not taking seriously complaints of female students alleging sexual assault by male students . . . [and] cited articles in the university's newspaper highlighting the need for awareness of a 'rape culture' on campus that was biased against victims of rape. In that same paragraph, he cited a comment from a rape survivor criticizing the school for enabling sexual assaults 'by sweeping them under the rug, and allowing privileged individuals to do whatever they want on campus.' the paragraph ends with a quotation from an article written by a Wooster professor who revealed that she is unnerved "when tensions flare on campus regarding issues of sexual assault and violence.'")(internal citations omitted).

[147] *Id.,* *5 (quoting *Sahm v. Miami Univ.*, 110 F.Supp.3d 774, 778 (S.D. Ohio 2015) (collecting cases).

[148] *College of Wooster,* 2017 WL 1038982, *5 fn.4 (quoting *Austin v. Univ. of Oregon*, 205 F.Supp.3d 1214, 1227 (D. Or. 2016)).

> not adopted this reduced pleading standard, and, instead, continues to apply the traditional *McDonnell Douglas* burden-shifting framework to all Title IX claims, which "requires a plaintiff to demonstrate that the conduct of the university in question was motivated by a sexual bias." (Mot. Amend Opp'n at 755, quoting *Mallory*, 76 Fed.Appx. at 639.) The Court agrees with Wooster."[149]

Wooster's embrace of Wooster Univ.'s interpretation of *Mallory* lacks merit because *Mallory* contains no reference to *McDonnell Douglas.*[150] Rather, *Mallory* cites *Yusef* for the proposition that male Title IX plaintiffs must "demonstrate that the conduct of the university in question was motivated by a sexual bias."[151] At the motion to dismiss stage, *Yusuf* stated the "pleading burden" for establishing gender bias is "not heavy."[152] In fact, the plaintiff in *Yusuf* successfully pled gender bias sufficient to defeat a motion to dismiss by merely alleging:

> "various actions by the presiding official of the disciplinary tribunal [] prevented [plaintiff] from fully defending himself . . . [and] males accused of sexual harassment at [defendant/university] are 'historically and systematically' and 'invariably found guilty, regardless of the evidence or lack thereof.'"[153]

Instead of embracing this low bar for defeating a motion to dismiss, *Wooster* suggested male plaintiffs should be held to a pleading higher standard than females in order to avoid the "double bind" alleged in the district court decision in *Austin.*[154] Specifically, *Austin* declined to implement *Columbia's* "pleading standard" because it:

> "would put universities in a double bind. Either they come under public fire for not responding to allegations of sexual assault aggressively enough or they open themselves to Title IX claims simply by enforcing rules against alleged perpetrators."[155]

To date, no court of appeals has evaluated whether a court can construe gender-bias evidence against a male plaintiff in order to protect universities from "double bind" litigation that occurs when they favor one group of students over another in disciplinary proceedings. But, Title IX plaintiffs encountering the "double bind" argument should point to *Neal* which: (a) found the "double bind" proposition conflicted with the Supreme Court's *Davis* decision and the Second

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[149] *Id.*

[150] *See generally, Mallory v. Ohio Univ.,* 76 F. App'x. 634 (6th Cir. 2003).

[151] *Id.,* 638 (citing *Yusef,* 35 F.3d 709, 714-15 (2nd Cir. 1994).

[152] *Yusuf,* 35 F.3d 715.

[153] *Id.,* 716.

[154] *College of Wooster,* 2017 WL 1038982, *5 fn.4 (quoting *Austin v. Univ. of Oregon,* 205 F.Supp.3d 1214, 1227 (D. Or. 2016)).

[155] *Austin v. Univ. of Oregon,* 205 F.Supp.3d 1214, 1227 (D. Or. 2016).

Circuit's *Columbia* and *Yusuf* decisions; (b) determined *Austin's* "double bind" comment was dicta; and (c) found *Wooster* failed to appreciate the dicta nature of *Austin's* "double bind" comment.[156]

Additionally, Title IX plaintiffs should expect universities to continue to rely on decisions such as *Univ. of Mass.* which likely engaged in the impermissible *McDonnell Douglas* burden shifting calculation rejected by the Second Circuit's *Columbia* decision.[157] For, *Univ. of Mass.* dismissed a plaintiff's Title IX claim after citing the now reversed district court's decision in *Columbia*.[158] A similar error likely occurred in *Doe v. Univ. of Cincinnati* where a district court granted a motion to dismiss after finding gender neutral explanations excused the fact that more males than females were disciplined for sexual misconduct.[159]

Consequently, Title IX plaintiffs should be prepared to explain why the Second Circuit's *Columbia* decision and *Brown* prove *Univ. of Cinn.* and *Univ. of Mass* reached incorrect results. In doing so, plaintiffs should emphasize the decision in *Waters*, where the court rejected a university's motion to dismiss a Title IX claim, notwithstanding the plaintiff's inability to establish the university's alleged non-discriminatory rationale for termination was "pretextual."[160] Specifically, *Waters* noted the burden shifting arguments in *McDonnell Douglas* are:

> "an evidentiary standard, *not a pleading requirement.*' . . . [t]he Supreme Court 'has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss. . . . the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases' . . . Instead, a complaint must contain only a short and plain statement of the claim showing that the pleading is entitled to relief."[161]

Stated another way, a plaintiff should articulate how courts must reject arguments at the motion to dismiss stage that *McDonnell Douglas* burden shifting requirements apply.

However, the summary judgment decision in *Waters* sheds light on the sorts of "pretext" challenges male Title IX plaintiffs will face once *McDonnell Douglas* comes into play. *Waters* identified OSU's legitimate non-discriminatory rationale for terminating the plaintiff/band directors as: plaintiff's "fail[ure] in leadership and destroy[ing] any sense of trust that could have

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[156] *Neal*, 2017 WL 633045, *15 (discussing *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 649 (1999)).

[157] *Doe v. Univ. of Mass.-Amherst*, No. 14-30143-MGM, 2015 U.S. Dist. LEXIS 91995, at *27 (D. Ma. July 14, 2015).

[158] *Id.*, at *27.

[159] *Univ. of Cinn.*, 20116 WL 1161935, *47 (citing Loree Cook-Daniels, *Female Perpetrators and Male Victims of Sexual Assault: Why They Are So Invisible* (2011) for the following proposition: "male sexual assault victims are far less likely than female sexual assault victims to report the crime against them."); *Id.*, *29, 44 (containing district judge's alternative explanations for plaintiff's gender-bias evidence).

[160] *Waters v. Drake*, 105 F. Supp. 3d 780, 803, (S.D. Ohio, Apr. 24, 2015).

[161] *Id.*, p.804 (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002)(emphasis in original).

made his failings correctable."[162] As result, the burden shifted to the plaintiff to establish this rationale was a "pretext" by showing the proffered reason: "(1) has no basis in fact; (2) did not actually motivate the adverse employment action; or (3) was insufficient to warrant the adverse action."[163]

In an attempt to establish pretext under the insufficiency prong, the plaintiff/band director argued he was disciplined more severely than a female cheerleading coach.[164] *Waters* rejected this argument because the "record establishes beyond genuine dispute that [plaintiff] engaged in more serious conduct than" the female cheerleading coach.[165] Next, plaintiff argued pretext existed because the university replaced him with his associate band director even though this associate band director was equally tainted with knowledge of the "band's sexualized culture."[166] *Waters* dismissed this argument because plaintiff – and not the associate band director – had the "authority and responsibility" to correct the sexualized culture and plaintiff's failure to do so caused his termination.[167]

In an attempt to establish OSU's proffered rationale did not actually motivate plaintiff's termination, the plaintiff maintained "the actual motivation for his termination was Ohio State's desire to appease" OCR.[168] In rejecting this argument, *Waters* relied heavily on deposition testimony of university employees.[169] *Waters'* heavy reliance on the depositions of OSU

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[162] *Waters*, 2016 WL 4264350, *14.

[163] *Id.*, (quoting *Ladd v. Grand Trunk W. R.R., Inc.*, 552 F.3d 495, 502 (6th Cir. 2009)).

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*, *15.

[169] *Id.*, (stating: "Plaintiff's theory is not supported by the record. [OSU's Assistant Vice President of Compliance and Investigations, Christopher Glaros] testified that no one at OCR said or did anything to influence how [OSU] conducted the investigation or what conclusions it reached. (Glaros Dep. at 245-46, 248). That is, OCR did not provide any advice on how [OSU] should conduct the Waters investigation, nor did it suggest what action [OSU] should take against him. (*Id*. at 246, 250). OCR did not threaten to fine [OSU] or take away funding or otherwise go easier on [OSU] if it terminated Waters or male employees. (*Id*. at 249-50). Further, no one at . . . [OSU] exhibited any concerns about how OCR might react to the Waters investigation or its resolution. *(Id*. at 247; Tobias Dep. at 90-91). Moreover, this theory offers no support to plaintiff as to the ultimate issue in this case – whether [OSU] terminated Waters because he is a man. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000) ('The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.'); *Bobo v. United Parcel Serv., Inc.*, 665 F.3d 741, 751 (6th Cir. 2012). Even if the real reason that [OSU] terminated Waters was to appease OCR, there is no evidence to support an inference that a discriminatory animus against men motivated the alleged effort to scapegoat Waters. Drake testified that gender played no role in his decision to terminate Waters. (Drake Dep. at 115-17, 284). Glaros testified that he does not have an animus against men and that the Waters investigation was not handled any differently because of Waters's gender. (Glaros Dep. at 243-44). And no one at OCR communicated or conveyed to [OSU] that it had an animus against Waters or against men. (*Id*. at 250-51). Waters makes much of [OSU's] decision to wait until after-the-fact to inform OCR of the investigation and his termination. He contends that [OSU] did this so it could control the narrative of the situation and that it

employees should serve as a guide for future Title IX plaintiffs. Specifically, whenever possible, plaintiffs should seek to establish pretext via subpoenas and discovery requests for documents that undermine defendant universities attempts to portray their institutions as gender neutral. This evidence may include interactions between defendant universities and OCR which support an inference that discriminatory animus against men at the university motivated the discipline underlying their Title IX claims. Regarding this issue, plaintiffs can look to *Waters* which "ordered [OSU] to produce over 800 pages of draft or 'redline' versions of the Investigation Report . . . [which showed] many changes that were made prior to the final Investigation Report."[170]

(B)(6) <u>Responding to universities' "similarly situated" and "different decision maker" arguments</u>

In summary judgment motions, male Title IX plaintiffs should expect arguments alleging: (a) they failed to identify similarly situated female comparators, and/or (b) that their harsh disciplinary sanctions are not actionable because the adjudicators imposing these sanctions were not involved in the university's imposition of lesser sanctions on comparable female students. This argument was successfully made in *Waters* where the terminated plaintiff attempted to establish gender-bias by showing a female coach was initially disciplined less severely when she mishandled issues related to Title IX.[171] *Waters* rejected this argument in part because:

1. The plaintiff and the female coach "did not engage in the same or substantially similar conduct;"[172]

2. The plaintiff and female coach were employed in different departments and received discipline from different supervisors;[173]

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did so successfully, as evidenced by OCR simply accepting [OSU's] findings and recommendations without further scrutiny. Again, this contention in no way suggests gender-based animus. The example of the purported comparator, [a female cheerleading coach named Buchman], is telling. When Buchman became the subject of a complaint and was terminated after an investigation found that she had continued to associate with [other terminated OSU employees] after she became aware that they had engaged in misconduct, [OSU] did not inform OCR of the matter until after-the-fact. In other words, [OSU] took the same approach of informing OCR of the terminated female employee as it did of the terminated male employee.")

[170] *Id.,* *16.

[171] *Id.,* *5-7.

[172] *Id.,* *13 (noting "In order for the conduct of a comparable employee and the Title VII plaintiff to be considered the 'same conduct,' it must be similar in kind and severity.")(quoting *Barry v. Noble Metal Processing, Inc.,* 276 F. App'x 477, 483 (6th Cir. 2008)).

[173] *Id.,* *11 ("Different employment decisions, concerning different employees, made by different supervisors, are seldom sufficiently comparable to establish a prima facie case of discrimination for the simple reason that different supervisors may exercise their discretion differently")(quoting *Radue v. Kimberly-Clark Corp.,* 219 F.3d 612, 618 (7th Cir. 2000).

3. The supervisor who disciplined the plaintiff/band director was not aware of the university's interactions with the female coach when the supervisor terminated the plaintiff;[174] and

4. The university's termination of the plaintiff involved different criteria, standards and policies than those applied in evaluating the allegations against the female coach.[175]

In most Title IX cases involving male students, plaintiffs should be able to distinguish their disciplinary proceedings from *Waters.* This is because student Title IX disciplinary proceedings generally involve the same criteria, standards, and policies. Moreover, student disciplinary proceedings generally involve the same university employees and allegations of sexual misconduct.

Male Title IX plaintiffs should also expect defendant universities to argue a student's internal appeals void any gender-bias occurring prior to the appeal. Specifically, universities will likely allege plaintiffs cannot establish pretext because they cannot prove the person(s) who adjudicated their appeals possessed anti-male bias. In these situations, Title IX plaintiffs may establish pretext via a Title VII concept known as the "cat's paw." This strategy was unsuccessfully employed by the Title IX plaintiff in *Waters.*[176] *Waters* described the "cat's paw theory" as a Title VII liability theory which arises when "one who uses another to accomplish his improper purposes."[177] *Waters* explained the cat's paw theory unfolds in Title VII cases as follows:

> "When an adverse hiring decision is made by a supervisor who lacks impermissible bias, but that supervisor was influenced by another individual who was motivated by such bias . . . the employer may be held liable under a 'rubber-stamp' or 'cat's paw' theory of liability.' A plaintiff proceeding under a cat's paw theory must show: (1) [the non-decisionmaking individual was] motivated by discriminatory animus; (2) who intended to cause an adverse employment action; and (3) proximately caused the adverse employment action."[178]

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[174] *Id.,**12 (noting plaintiffs and comparators, who work in different departments for different supervisors, could still be similarly situated "if plaintiff could establish that his supervisor was 'well-aware of the discipline meted out to past violators' by the employer")(quoting *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 480 (6th Cir. 2003)).

[175] *Id.,* (stating a "managerial employee and non-managerial employee could be similarly situated if a uniform company policy applied the same to both"(citing *White v. Duke Energy-Kentucky, Inc.,* 603 F. App'x 442, 448 (6th Cir. 2015)).

[176] *Id.,* *15-16.

[177] *Id.,* *15 (quoting *Staub v. Proctor Hosp.,* 562 U.S. 411, 415 n.1 (2011)).

[178] *Id.,* (internal citations omitted). It should also be noted, a cat's paw type analysis occurred the Sixth Circuit's recent *Cummins* decision where the court suggested a public university can escape due process liability if a biased investigator was not on the plaintiff's disciplinary hearing panel. *See generally, John Doe 1 v. Cummins,* No. 16-3334, 2016 WL 7093996, *11 (6th Cir. Dec. 6, 2016)(stating: "any claim regarding the allegedly biased investigative report is weakened by the fact that [the investigator] did not

OSU argued the cat's paw theory "should not be allowed in Title IX cases" because "vicarious liability is not available" under "Title IX, [which] unlike Title VII, does not include the actions of an 'agent' in defining the scope of liability."[179] Plaintiff countered by arguing OSU's "distinction regarding agency law makes sense only for harassment claims . . . and not for claims based on an adverse disciplinary action by the educational institution."[180] In the end, *Waters* "decline[d] to address the issue" in part because "the record is devoid of any evidence to support an inference that" OSU's non-decisionmaker investigators were "motivated" by "gender animus against men."[181] This was partly because the non-decisionmaker investigators "cleared" plaintiff of a Title IX complaint that alleged plaintiff "retaliated against a female student for having reported a rape."[182]

In an attempt to circumvent these facts, the plaintiff in *Waters* alleged the non-decisionmaker investigators conducted an "inept investigation" that applied "faulty methodology."[183] *Waters* rejected this argument by stating plaintiff's:

> "critique of the Investigation Report does not in any way show a gender-based animus on the part of [the non-decisonmaker investigators]. [Plaintiff] has not demonstrated that the investigation was such a sham that one could conclude that it was pretext for discriminatory animus."[184]

Although *Waters* did not rule on whether the cat's paw applied in Title IX cases, plaintiffs should engage in discovery designed to support cat's paw arguments which show how: (a) non-decisionmakers' gender-bias contaminated plaintiffs' disciplinary proceeding; and (b) the ultimate decisionmaker(s) did not engage an independent investigation sufficient to break the causal chain of bias created by non-decisionmakers.

(B)(7) Addressing universities' "same actor" arguments

When *male* university employees render disciplinary sanctions against *male* Title IX plaintiffs, universities may attempt to use "same actor" arguments to dismiss Title IX claims. The "same actor" doctrine is a Title VII concept sometimes used to dismiss sex discrimination claims

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ultimately serve on the [Hearing] panels that adjudicated appellants' culpability. Instead, appellants' responsibility was adjudicated by an independent panel that considered all of the evidence allegedly left out of [the investigator's] investigative report.").

[179] *Id.,* *16 (discussing *Gebser v. Lago Vista Indep. Sch. Dist.,* 524 U.S. 274, 283 (1998) which found "Title IX contains no comparable reference to an educational institution's 'agents,' and so does not expressly call for application of agency principles.").

[180] *Id.,* (citing David S. Cohen, *Limiting Gebser: Institutional Liability for Non-Harassment Sex Discrimination Under Title IX,* 39 Wake Forest L. Rev. 311 (2004) for the proposition that "agency principles should be applied to determine institutional liability in non-harassment Title IX cases").

[181] *Id.*

[182] *Id.,* (citing *Voltz v. Erie Cty.,* 617 F. App'x 417, 425 (6th Cir. 2015) which held "a cat's paw theory failed where the purported influencer had drafted a report exonerating the plaintiff of wrongdoing.").

[183] *Id.*

[184] *Id.*

if the defendant's employee - who engaged in an adverse employment action - is the same gender as the plaintiff/employee. Title IX plaintiffs should understand how these arguments work since some federal circuit courts dismiss discrimination claims when decisionmakers implementing adverse employment actions belong to the same protected group as the plaintiff.[185] Such courts proceed under this rationale despite the Supreme Court's *Oncale* decision finding that:

> "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."[186]

This may be why, the Third, Sixth, and Seventh Circuits, often reject "same actor" arguments. For instance, the Third Circuit emphasized triers of fact, not courts, should decide whether an exculpatory inference should be drawn from the fact that a plaintiff and decisionmaker were members of the same protected group.[187] The Sixth Circuit held that it was reversible error for a district court to draw an exculpatory inference from the fact that the decisionmaker in an ADEA case was older than the plaintiff.[188] And, the Seventh Circuit has repeatedly rejected "same actor" arguments.[189] Numerous law review articles address the split between circuit courts'

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[185] *See e.g., Brown v. CSC Logic, Inc.,* 82 F.3d 651, 658 (5th Cir. 1996)(granting summary judgment in an ADEA case in part because the plaintiff "was hired at the age of 54, by the then 56 year old" decision maker while noting: "[t]he fact that the actor involved in [the] employment decision[] is also a member of the protected class … enhances the inference [that there was no discrimination]. By expressing our approval of this inference, we do not rule out the possibility that an individual could prove a case of discrimination in a similar situation. We hold only that the facts in this particular case are not sufficiently egregious to overcome the inference that CSC Logic's stated reason for discharging Davis was not pretext for age discrimination. Because Davis has failed to meet his evidentiary burden on the issue of pretext, his case must be dismissed."); *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 94 (2d Cir.), *cert. denied*, 534 U.S. 951 (2001)(holding summary judgment in an ADEA case was warranted in part because plaintiff's "supervisors at the time were also members of the protected class.")

[186] *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 78, (1998) (internal quotation marks omitted).

[187] *Hankins v. City of Phila.,* 189 F.3d 353, 366 (3d Cir. 1999)(noting that while "[t]he District Court … found it "virtually inconceivable that [Dr. Ross] [the plaintiff's black supervisor] would intentionally discriminate against plaintiff because he is black." … [w]e concede that th[is] argument [is a] valid one for the City to raise in attempting to convince the trier of fact that plaintiff was not the victim of intentional discrimination.… [but] [w]e find especially troublesome the District Court's implication that because Dr. Ross is black, he would not have intentionally discriminated against another African-American. The Supreme Court has long counseled against such reasoning.").

[188] *Wexler v. White's Fine Furniture, Inc.,* 317 F.3d 564, 573 (6th Cir. 2003) (en banc).

[189] *See e.g., Kadas v. MCI Systemhouse Corp.,* 255 F.3d 359, 361 (7th Cir. 2001) (explaining the Seventh Circuit's "emphatic" rejection in a prior case of the idea that one member of a protected class is unlikely to discriminate against another member of the same protected class in race-discrimination cases "applies with equal force to proof of age discrimination"); *Haywood v. Lucent Technologies, Inc.,* 323 F.3d 524, 530 (7th Cir. 2003)(rejecting defendant's argument that there should be a presumption of nondiscrimination where an African-American supervisor is the person who fired an African-American employee because: "[i]t is wrong; no such presumption exists, nor should one be created. To the contrary, the Supreme Court has explicitly rejected exactly this idea: 'Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.'")(quoting *Castaneda v. Partida,* 430 U.S. 482, 299 (1976)); *Baker v. Macon Resources, Inc.,* 750 F.3d 674 (7th Cir. 2014)(finding triers of fact, not

handling of "same actor" argument.[190] Consequently, Title IX plaintiffs should consult law review articles and relevant circuit court decisions during the discovery phase and/or in motions to dismiss where universities raise "same actor" arguments.

(B)(8) Addressing universities' "honest belief" arguments

Title IX plaintiffs may encounter university defendants asserting "honest belief" defenses which are frequently used by employers in Title VII cases. This defense stems from the Supreme Court's *Burdine* decision which states plaintiffs satisfy their pretext burden by either: "directly persuading the court that a discriminatory reason more likely motivated the employer *or* indirectly by showing that the employer's proffered explanation is *unworthy of credence*."[191] In the Title IX context, a university would allege its rationale for disciplining a male plaintiff was worthy of credence even if it was wrong because it was based on an honest mistake that did not involve gender-bias.

Courts' acceptance of Title VII "honest belief" arguments in motions for summary judgment vary depending on the federal circuit in which a plaintiff files suit.[192] The Sixth Circuit's

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courts should determine what inference if any should be drawn from the age of a decisionmaker in part because of the Supreme Court noted "it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.")(quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998)).

[190] *See e.g.*, Natasha Martin, *Pretext in Peril*, 75 Mo. L. Rev. 313, 358 (2010); Natasha Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 Conn. L. Rev. 1117, 1117 (2008); Note, *Putting Pretext in Context: Employment Discrimination, the Same-Actor Inference, and the Proper Roles of Judges and Juries*, 93 Va. L. Rev. 1533, 1535 (2007); Jennifer Taylor, *The "Same Actor Inference:" A Mechanism for Employment Discrimination?,* 101 W. Va. L. Rev. 565, 581-82 (1999); Anna Bryant, *Using The Same Actor "Inference" in Employment Discrimination Cases*, 1999 Utah L. Rev. 255, 256 (1999).

[191] *Tex. Dept. of Cmt.y Affairs v. Burdine*, 450 U.S. 248, 256, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)(emphasis added).

[192] *See e.g., Kariotis v. Navistar Int'l Trans. Corp.,* 131 F.3d 672, 676 (7th Cir. 1997)(granting summary judgment to employer who provided an honest reason for firing the plaintiff/employee, as long as "the company honestly believed in those reasons [for the termination] . . . even if the reasons are foolish or trivial or baseless."); *Plotke v. White,* 405 F.3d 1092, 1104 (10th Cir. 2005)(finding "credibility determination is appropriately made only by the fact finder" in determining the timing and reasoning for terminating plaintiff was "unworthy of credence" because a reasonable jury could infer defendant's decision was covering up a discriminatory purpose). *Jones v. Gerwens*, 874 F.2d 1534, 1540 (11th Cir. 1989) ("The law is clear that, even if a Title VII claimant did not in fact commit the violation with which he is charged, an employer successfully rebuts any *prima facie* case of disparate treatment by showing that it honestly believed the employee committed the violation."); *Parker v. Verizon, Inc.*, 309 Fed. Appx. 551, 563 (3rd Cir. 2009) (stating an "employer who discharges employee based on reasonable and honest belief that employee has been dishonest would not be in violation of the FMLA even if its conclusion is mistaken…. [r]egardless of [plaintiffs] denial that he actually misrepresented his health condition, [defendant employer's] honest suspicion that [plaintiff] misused his leave prevents it from being found liable for violating the FMLA."); *Deines v. Tex. Dep't of Protective & Reg. Servs.,* 164 F.3d 277, 281 (5th Cir. 1999) ("In Title VII cases, 'we do not try in court the validity of [an employer's] good faith belief as to [one] employee's competence [in comparison to another.]'")(internal citations omitted);

sometimes grant summary judgment motions even if employers' adverse employment actions are "mistaken, foolish, trivial, or baseless" as long as employers have an "honest belief" for taking the adverse action.[193] An "employer's proffered reason is considered honestly held if the employer can establish it reasonably reli[ed] on particularized facts that were before it at the time the decision was made."[194] To rebut the assertion, a Title VII plaintiff may: (a) present evidence of "an error on the part of the employer that is too obvious to be unintentional,"[195] or (b) show "more than a dispute over facts upon which the [adverse employment decision] was based."[196]

There do not appear to be any judicial opinions evaluating "honest belief" defenses in Title IX cases, but courts sometimes give "deference" to university decisions in granting universities' motions for summary judgment in complaints filed by falsely accused students.[197] This fact

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Fercello v. County of Ramsey, 612 F.3d 1069, 1082 (8th Cir. 2010) ("[T]he essential question is not whether [the plaintiff] was actually unqualified for the position; it is whether the School District *honestly believed* that she was unqualified."); *Villiarimo v. Aloha Island Air, Inc.,* 281 F.3d 1054, 1061 (9th Cir. 2002) ("Rather, courts 'only require that an employer honestly believed its reason for its actions, even if its reason is foolish or trivial or even baseless."); *Fischbach v. D.C. Dep't of Corrections,* 86 F.3d 1180, 1183 (D.C. Cir. 1996) ("Once the employer has articulated a nondiscriminatory explanation for its action, as did the District here, the issue is not 'the correctness or desirability of [the] reasons offered … [but] whether the employer honestly believes in the reasons it offers.'")(internal citations omitted).

[193] *Seeger v. Cincinnati Bell Tele. Co., LLC,* 681 F.3d 274, 286 (6th Cir. 2012).

[194] *Id.,* 285.

[195] *Id. See also, Smith v. Chrysler Corp.,* 155 F.3d 799, 807-08 (6th Cir. 1998). *But see, Manzer v. Diamond Shamrock Chems. Co.,* 29 F.3d 1078, 1084 (6th Cir. 1994)(finding the honest belief rule applies in the event a plaintiff alleges defendant's proffered reason has no basis in fact or is insufficient to warrant the conduct, but does not apply where a plaintiff is asserting that the defendant's reason did not actually motivate the conduct).

[196] *Braithwaite v. Timken Co.,* 258 F.3d 488, 493-94 (6th Cir. 2001). But, it should be noted, Sixth Circuit decisions often contain dissenting opinions regarding the majority's decision to reject plaintiff's arguments and dismiss Title VII complaints. *See e.g., Loyd v. Saint Joseph Mercy Oakland,* 766 F.3d 580, 596-597 (6th Cir. 2014) (Clay, J., dissenting and noting disagreement in application of honest belief rule); *Lynch v. ITT Educ. Servs.,* 571 Fed. Appx. 440, 458 (6th Cir. Jul. 8, 2014) (quoting *Anderson,* 477 U.S. at 255) (Daughtrey, J., dissenting) ("This circuit has developed an unfortunate practice of resolving the overwhelming majority of civil rights cases that come before it by routinely affirming summary judgment granted to defendants by the district courts, thereby depriving arguably meritorious plaintiffs of their day in court. It is time we adopted a more respectful approach, one that recognizes that employment actions are inherently fact-based. In so doing, we would honor the admonition of the Supreme Court that 'credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'")(internal citation omitted).

[197] *Doe v. Trustees of Boston Coll.,* 2016 WL 579297, *18 (noting defendant Boston college "moves for summary judgment on the ground that ample evidence existed to support the outcome of the proceeding. The Court need only find that there was enough 'evidence, which, if believed, could have supported the board's decision.' *Schaer*, 432 Mass. at 479 n.9. Simply because conflicting evidence exists does not mean that the burden of proof was not met. *Id.* That this Court or a jury may have come to a different outcome than the hearing board is not the determinative test. *See Walker*, 82 F. Supp. 3d at 531-32 (stating '[i]t is not the business of lawyers and judges to tell universities what statements they may consider and what statements they must reject') (quoting *Schaer*, 432 Mass. at 481); *Havlik*, 509 F.3d at 35; Morris, 2004 WL 369106, at *2 (2004) (stating, when evaluating a breach of contract claim, '[g]reat deference is

notwithstanding, the Third Circuit noted: "academic institutions . . . are not *ipso facto* entitled to special treatment under federal laws prohibiting discrimination."[198] Therefore, Title IX plaintiffs should utilize the discovery process to rebut "honest belief" and "deference" arguments defendant universities may raise in motions for summary judgment.

(C) Intoxication v. incapacitation

Disputes about whether a female accuser's alcohol intake rendered her incapable of consenting to sexual contact are common in Title IX lawsuits filed by male plaintiffs.[199] For instance, some complaints allege universities discipline male students after erroneously determining a female student was incapable of consenting to sexual activity due to incapacitation.[200] Other times, complainants detail how universities: (a) failed to discipline female students who initiated sexual contact with the male plaintiff while he was incapacitated, while (b) simultaneously disciplining the plaintiff who engaged in these sexual contacts.[201]

In advancing these claims, some plaintiffs reference organizations that train colleges on how to implement Title IX policies.[202] One of these groups is the Association of Title IX Administrators ("ATIXA") which published a "Tip of the Week" that addressed how universities should adjudicate sexual misconduct allegations involving alcohol.[203] This "Tip" explained how five colleges "got it completely wrong" in finding male students responsible for "hook-ups" when

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extended to university decision-making on academic and disciplinary matters'). Instead, the issue is whether there was sufficient evidence to support the board's decision, that it was more likely than not, that Doe committed the indecent assault and battery for which the board found him responsible.")(internal cites to evidence in the record omitted).

[198] *See e.g., Kunda v. Muhlenberg College*, 621 F.2d 532, 545 (3rd Cir. 1980). *See also, Elghanmi v. Franklin Coll. of Ind., Inc.*, 2000 U.S. Dist. Lexis 16667, *23 (S.D. Ind., Indianapolis Div. Oct. 2, 2000)(finding, "Congress did not intend that institutions of higher learning enjoy immunity from the Nation's anti-discrimination statutes.")(citing *Davis v. Weidner*, 596 F.2d 726, 731 (7th Cir. 1979)); *Schneider v. Northwestern*, 925 F. Supp. 1347, 1368 (N.D. Ill. 1996)(observing "courts will not subject institutions to a more deferential standard of review or a lesser obligation to repair the adverse effects of discrimination")(quoting William A. Kaplin and Barbara A. Lee, *The Law of Higher Education* § 3.3.2.1 at 214-15 (Jossey-Bass, 3d ed. 1995).

[199] *See e.g., See e.g., Handouts 2, 10-12* (containing Title IX complaints filed by Eric Rosenberg's clients against Columbia College Chicago, Indiana University, Denison University, and Occidental College).

[200] *Id.*

[201] *Handout 13* (containing Title IX complaints filed by Eric Rosenberg's clients against Miami University of Ohio).

[202] *See e.g., Handouts 2, 11 and 13* (containing Title IX complaints filed by Eric Rosenberg's clients against Columbia College Chicago, Denison University and Miami University of Ohio which reference ATIXA).

[203] *Id.,* (containing discussions of ATIXA's "Tip of the Week).

alcohol was involved.[204] ATIXA expressed concerns that these colleges were manufacturing male "Title IX Plaintiffs" by imposing erroneous discipline.[205] ATIXA also noted:

> "A common policy problem comes from failing to distinguish between intoxicated and incapacitated. Yet, the most serious issue comes from failing to implement a ***mens rea***, if you will, within the definition. Certainly, criminal concepts like mens rea are not strictly applicable to the campus conduct process, ***but if we agree*** as I stated above ***that having sex with a willing, yet intoxicated person is not an offense, there must be something that the respondent does, beyond having sex, that makes a lawful act (sex) into a policy violation*** . . . ***there has to be something more than an intent to have sex to make this an offense. Otherwise, men are simply being punished for having sex, which is gender discrimination under Title IX, because their partners are having sex too and are not being subject to the code of conduct for doing so. Without a knowledge standard, a respondent will suffer an arbitrary and capricious application of the college's rules***."[206]

Nevertheless, *Vassar* relied on the Federal Rules of Evidence to reject "credibility" challenges to testimony regarding an accuser's level of intoxication during her sexual encounter with plaintiff.[207] In doing so, however, *Vassar* left the door open for future plaintiffs by noting the plaintiff's Title IX claim failed because he could not show gender-bias motivated the adjudicators' acceptance of testimony that his accuser was incapacitated rather than just intoxicated.[208]

On the other hand, *Vassar* rejected plaintiff's argument that Vassar violated his rights by failing to recognize plaintiff's "own intoxication was 'relevant to whether he knew or should have known [his accuser] was incapacitated since his own judgment was clouded that evening."[209] In support of this argument, the plaintiff presented the following email exchange involving Vassar's President as evidence that a gender-biased "double standard" existed:

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[204] *See e.g., Handouts 7 and 8* (containing Title IX complaints filed by Eric Rosenberg's clients against Denison University and Miami University of Ohio which reference ATIXA).

[205] *Id.*

[206] *Id.*

[207] *Yu v. Vassar Coll.*, 2015 US Dist. Lexis 43253 *54-55 ("In a judicial proceeding under the Federal Rules of Evidence, '[t]here is near universal agreement that lay opinion testimony about whether someone was intoxicated is admissible . . . .' *United States v. Horn*, 185 F. Supp. 2d 530, 560 (D, Md. 2002). The Federal Rules do not require a specific definitional breakdown of the components of intoxication, nor past familiarity with an individual's drunken habits, but merely a direct statement, 'assuming adequate observation and common experience,' that the person 'seemed drunk . . .'" *Id.* (the witness is 'not confined to descriptions of glazed eyes, problems in speech or motor coordination, changes in behavior or mood or affect, but may say directly . . . that the person seemed drunk or under the influence' (quoting *Mueller and Kirkpatrick*, Evidence § 7.4 (4th ed. 1995)). [Plaintiff] gives no reason why a school disciplinary proceeding would be held to a higher evidentiary standard than a federal court proceeding, nor why the only witnesses competent to testify as to drunkenness are those who are familiar with a particular person's drunkenness, or why commonplace testimony as to intoxication could not be accepted as credible but for gender-bias.").

[208] *Id.*, *56.

[209] *Id.*, *80.

> Vassar President: "It is very scary, though. Two drunk kids, both out of it. Is it always the male at risk?"
>
> Vassar Title IX employee: "She was drunk. He wasn't according to the panel."[210]

In evaluating this email exchange, *Vassar* determined neither the president's "questions" about "whether male students are more likely than female students to be the accused in sexual misconduct cases," nor the Title IX employee's response suggested "any sort of intentional gender-bias."[211] This was partly because Vassar's policies did not allow the college to consider the plaintiff's subjective belief regarding his intoxication level. Instead, Vassar's policies required plaintiff's conduct be evaluated through the eyes of what a "reasonable person in the position of the accused should have known" regarding whether "the complainant was incapacitated."[212]

Title IX plaintiffs sometimes address their universities' double standard regarding alcohol in complaints that detail how universities fail to investigate and discipline female students who initiated sexual contact with plaintiffs when they are impaired by alcohol.[213] At the university level, these plaintiffs sometimes disprove their accusers' allegations of incapacitation by submitting toxicologist expert reports, polygraph reports, and/or witness testimony during their university disciplinary proceedings.[214] If universities attempt to prohibit the introduction of this type of evidence during university level proceedings, students should direct universities to OCR guidelines which suggest expert testimony from toxicologists and polygraph examiners should be allowed.[215] If all else fails, falsely accused students should proffer their evidence into the

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[210] *Id.*

[211] *Id.*

[212] *Id.,* p.80-81.

[213] *See e.g., Handouts 10, 12-13* (containing Title IX complaints filed by Eric Rosenberg's clients against Miami University of Ohio, Occidental College, and Indiana University).

[214] *See e.g., Handout 2* (containing Eric Rosenberg's clients' Title IX complaint filed against Columbia College Chicago).

[215] OCR's 2014 *Questions and Answers On Title IX and Sexual Violence*, p. 25 ("[w]hen investigating an incident of alleged sexual violence for Title IX purposes, to the extent possible, a school should coordinate with any other ongoing school or criminal investigations of the incident and establish appropriate fact-finding roles for each investigator . . . If the investigation includes forensic evidence, it may be helpful for a school to consult with local or campus law enforcement or a ***forensic expert*** to ensure that the evidence is correctly interpreted by school officials" (emphasis added). *Id.,* p. 26 "If the school permits one party to submit third-party ***expert testimony***, it must do so equally for both parties." (emphasis added). Available at http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf). However, one district court determined the "right to present live expert-witness testimony is not a clearly established due process right in the student disciplinary context." *Doe v. The Ohio State Univ.,* Case No. 2:15-cv-2830 2016 WL 6581843, *11 (S.D. Ohio Nov. 7, 2016). *Id.,* (finding the "fiscal and administrative burden on a university would be significant if it had to retain experts, present live expert testimony at student disciplinary hearings, and prepare a cross-examination of the other side's expert witness. In short, the *Mathews* test tilts away from requiring this procedure, even in this case where there was only one expert witness offered.")(citing *Mathews v. Eldridge,* 424 U.S. 319, 335, (1976)).

university record and create a paper trail detailing the universities' exclusion of the evidence and the prejudice resulting from the exclusion.[216]

(D) <u>Universities': (i) ignoring exculpatory evidence, (ii) withholding exculpatory evidence; and/or (iii) biased dispensations of accommodations to students involved in Title IX disciplinary proceedings</u>

Title IX lawsuits will often highlight how universities turn a blind eye to evidence proving a female student consented to sexual contact.[217] However, <u>*absent a showing of gender-bias*</u>, *Vassar* refused to find a disciplinary proceeding flawed even though the plaintiff's accuser authored the following three Facebook posts which undermined her allegation that plaintiff sexually assaulted her:

1. "I'm really sorry I led you on last night;"

2. "I had a wonderful time last night I'm just too close to my previous relationship to be in one right now;" and

3. "I will stand up for you because you were not [hurting anyone]."[218]

As a result, Title IX plaintiffs' complaints and/or discovery should focus on identifying instances where a university's anti-male gender-bias motivated the university's decision to ignore exculpatory evidence.

Male falsely accused students also frequently encounter universities that secretly provide academic and other accommodations to female students who allege sexually assaults.[219] This issue was successfully raised in *Doe v. The Ohio State University.*[220] In that case, a district court rejected a motion to dismiss a due process claim because OSU withheld exculpatory evidence related to "accommodations" that OSU provided plaintiff's female accuser in a sexual misconduct case.[221] This was because the plaintiff alleged he could have relied on these "accommodations" to impeach his accuser's credibility during his disciplinary hearing.[222]

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[216] *See e.g., Handout 2* (containing Eric Rosenberg's clients' Title IX complaint filed against Columbia College Chicago).

[217] *See e.g., Handouts 1-2, 12* (containing Title IX complaints filed by Eric Rosenberg's client against University of Chicago, Columbia College Chicago, and Occidental College).

[218] *Yu v. Vassar Coll.*, 2015 US Dist. Lexis 43253 *70, 69-77.

[219] *See e.g., Handout 2* (containing Eric Rosenberg's clients' Title IX complaint filed against Columbia College Chicago).

[220] *Doe v. The Ohio State Univ.*, Case No. 2:15-cv-2830 2016 WL 6581843, *11-12 (S.D. Ohio Nov. 7, 2016).

[221] *Id.*

[222] *Id.*, *12 (stating: "[t]he right to some form of cross-examination in university expulsion hearings is a

On the other hand, *Vassar* addressed a related issue in rejecting an argument that gender-bias caused Vassar to provide plaintiff's accuser with assistance not provided to male students accused of sexual misconduct.[223] *Vassar* rejected this argument because plaintiff "admitted in his deposition that he had never requested such assistance."[224] Therefore, during university level disciplinary proceedings, male falsely accused students should - when possible - document: (a) their requests for accommodations and/or services; (b) university's gender-biased rejections of these requests; and/or (c) similarities between accommodations and/or services provided to female students which were requested but denied to the falsely accused.

clearly established due process right when cross-examination is 'essential to due process,' as in a case that turns on 'a choice between believing an accuser and an accused.' *See Flaim,* 418 F.3d at 641 (dicta). Given the facts alleged, it is plausible that Doe's right to cross examination was effectively denied by the Administrators' failure to turn over critical impeachment evidence. But the right to mandatory disclosures of any impeachment evidence is not a clearly established constitutional right in the student disciplinary context. Given the flexibility of the Due Process Clause, this situation may call for the disclosure of key impeachment evidence. If the Administrators knew that Jane Roe lied about the timing of her accommodation at the hearing and permitted her testimony to stand unrebutted, that plausibly violated John Doe's right to a fundamentally fair hearing, regardless of whether the issue is construed as one of cross-examination or disclosure.")(quoting *Flaim v. Med. Coll. of Ohio,* 418 F.3d 629, 641 (6th Cir. 2005).

[223] *Yu v. Vassar Coll.,* 2015 US Dist. Lexis 43253 *84-86.

[224] *Id.,* *85.

(E) Universities' policy violations during a sexual misconduct proceedings

Plaintiffs frequently advance Title IX claims that factually overlap with their breach of contract and/or tort claims based on a university's failure to comply with university policies.[225] Courts often reject attempts to dismiss these claims.[226] For example, *Brandeis* noted a university's:

> "authority to discipline its students is *not entirely without limits* . . . *the university's disciplinary actions may [] be reviewed by the courts to determine whether it provided 'basic fairness' to the student*. While that concept is not well-defined, and no doubt varies with the magnitude of the interests at stake, *it is nonetheless clear that the university must provide its students with some minimum level of fair play*."[227]

Brandeis manifests a court's willingness to look behind the curtains of university policies to determine if the university's adjudication of sexual misconduct allegations are implemented with fairness towards the accused. This practice is supported by the First Circuit's *Cloud* decision which determined school disciplinary hearings must be "conducted with basic fairness."[228] In this regard, two district court decisions involving Brown University are worth reviewing. The first

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[225] *See e.g., Handouts 1-3, 7-13* (containing Title IX complaints filed by Eric Rosenberg's client against University of Chicago, Columbia College Chicago, Salisbury University, Ohio State University, Indiana University, Denison University, Occidental College, and Miami University of Ohio).

[226] *See e.g., Doe v. Brandeis Univ.,* No. 15-11557, 2016 U.S. Dist. Lexis 43499, (D. Mass. Mar. 31, 2016); *Doe v. Middlebury Coll.,* No.1:15-cv-192, 2015 U.S Dist. Lexis 124540, *11-12 (D. Vt. Sept. 16, 2015)(granting a male student's motion for preliminary injunction based on breach of contract and/or Title IX because plaintiff "demonstrated sufficiently serious questions . . . [regarding] breached duties . . . [during] instituting and prosecuting [of] investigation. . . ."); *Salisbury,* 2015 U.S. Dist. LEXIS 110772, *23-27 (refusing to dismiss negligence and Title IX claims – pled in the alternative - against a university that violated the rights of male students disciplined for allegedly sexual misconduct); *Univ. of the South,* 2011 U.S. Dist. LEXIS 35166, *47-55 (rejecting a university's motion for *summary judgment* to dismiss male student's contract and quasi-contract claims based on violations of university polices occurring during a sexual misconduct investigation); *Dempsey v. Bucknell Univ.,* No. 4:11-cv-1679, 2012 U.S. Dist. LEXIS 62043, *18-*19 (M.D. Pa. May 3, 2012)(finding valid breach of contract claim when "Defendant Bucknell withheld *some relevant* information that [a plaintiff's] attorney requested" when the handbook required "Bucknell . . . provide an accused with a copy of the charges against him, along with supporting information . . . .")(emphasis added); *Bleiler v. Coll., of the Holy Cross,* 2013 U.S. Dist. LEXIS 127775, *15 (finding Massachusetts law recognizes that student handbooks and other college materials create a contract between a school and a student). *See also,* Samantha Harris, *Heritage Found., Campus Judiciaries on Trial*: An Update from the Courts 6 (2015), http://thf_media.s3.amazonaws.com/2015/pdf/LM165.pdf, p.7. *But see Wash. & Lee Univ*., 2015 WL 4647996, *11 (stating: "[c]ourts applying Virginia law routinely reject the notion that a 'Student Handbook' creates a mutuality of engagement where the terms of the handbook are subject to change."); Harvey A. Silverglate, Josh Gewold, William Creeley, *FIRE's Guide To Due Process and Campus Justice,* p. 41-47 (discussing contractual obligations of private universities to adhere to university polices), available at https://www.thefire.org/fireguides/firesguidetodueprocessandcampusjustice/.

[227] *Brandeis Univ.,* 2016 U.S. Dist. Lexis 43499, **12* (emphasis added).

[228] *Cloud v. Trustees of Boston Univ*., 720 F.2d 721, 725 (1st Cir. 1983).

case involved a district court's rejection of Brown University's motion to dismiss the complaint of a male student because he alleged:

1. A violation of university polices in part because of pressure from OCR;[229] and

2. Brown University improperly discounted or excluded exculpatory evidence which caused the artificial inflation of evidence of alleged wrongdoing.[230]

The second case involved a plaintiff who prevailed – in a bench trial against Brown University – in a breach of contract claim after the court rejected of his gender-bias arguments.[231] In explaining its decision the district court noted:

> " . . . . certain procedures Brown employed in conducting Doe's hearing ***fell outside of a student's reasonable expectations*** based on the Code of Student Conduct . . . ***and that these procedural errors likely affected the panel's decision in Doe's case***. Accordingly, Doe is entitled a new [university level disciplinary] hearing that remedies these infirmities."[232]

The plaintiff in *Brown* raised policy violations commonly found in many Title IX complaints. For instance, *Brown* involved the retroactive imposition of definitions of sexual misconduct which did not exist when the plaintiff sexually engaged with his accused. Specifically, at the time of the disciplinary proceeding, the university's Title IX Policy stated "consent" could not be obtained through "coercion."[233] But, in 2014-15, when plaintiff sexually interacted with his accuser, the policy required sexual misconduct stem from "force or threat of force."[234] Nevertheless, the university found plaintiff "responsible" for violating the university's subsequently issued policy and suspended him "until after [his accuser] graduated."[235] Plaintiff then obtained a temporary restraining order based on the university's retroactive application of policies.[236] *Brown* elaborated on this issue after a bench trial with at least three findings relevant to Title IX claims:

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[229] *Doe v. Brown Univ.*, 2016 U.S. Dist. Lexis 21027, *37-38.

[230] *Id.*, *42-43.

[231] *Doe v. Brown Univ.*, 2016 WL 5409241, *25.

[232] *Id.*, *2 (emphasis added). *But see, Id.*, (noting: "[t]his is not to say that the Court passes judgment on whether the outcome—that Doe was found responsible—was an error. The Court makes no finding as to Doe's responsibility; that is for the Brown panel to decide if it chooses to represent the matter after correcting the errors cited.").

[233] *Doe v. Brown Univ.*, 2016 U.S. Dist. Lexis 21027, *12. It should be noted, other district courts have found retroactive application of university policies can trigger Title IX violations. *See e.g., Doe v. Western New England Univ.*, No. 15-30192-MAP, 2017 WL 113059 (D. Mass. Jan. 11, 2017)(finding a plaintiff "adequately alleged that the proceeding was flawed—and the outcome possibly erroneous—due to the [defendant university's] retroactive application of the Title IX Policy's definition of sexual misconduct); *See also, Salisbury Univ.*, 123 F. Supp. 3d at 766 (quoting *Yusuf*, 35 F.3d at 715).

[234] *Id.*

[235] *Id.*, *13.

[236] *Id.*, *14.

1. ". . . courts interpret the terms of a student handbook '*in accordance with the parties' reasonable expectations, giving those terms the meaning that the university reasonably should expect the student to take from them*." [*Gorman v. St. Raphael Acad.*, 853 A.2d 28, 39 (R.I. 2004)] (citing *Mangla v. Brown Univ.*, 135 F.3d 80, 84 (1st Cir. 1998)). *Any "[a]mbiguities in a contract must be construed against the drafter of the document*," *Haviland v. Simmons*, 45 A.3d 1246, 1259–60 (R.I. 2012), which in the case of a student handbook is the university."[237]

2. "Most, if not all, of the issues in this case—including the main issue regarding the definition of consent—stem from this fundamental disconnect. While the new Complaint Process procedures applied, Doe retained his *substantive rights under the 2014–15 Code*. Some of these rights, such as the right to "[t]o be given every opportunity to articulate relevant concerns and issues, express salient opinions, and offer evidence before the hearing body or officer" are in tension with the [Brown's subsequently enacted] Complaint Process, which allows the investigator substantial discretion to determine what information to present to the panel . . . [therefore] *for this case and any others remaining under the 2014–15 Code, Brown is contractually required to provide the rights it promised students in the Code*."[238] and;

3. Brown breached the terms of its 2014-15 Code by denying plaintiff the opportunity to present a rebuttal statement during his disciplinary hearing.[239]

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[237] *Id.*, *16. *But see, id.*, ("However, '[b]ecause contracts for private education have unique qualities, we must construe them in a manner that leaves the school administration broad discretion to meet its educational and doctrinal responsibilities.' *Gorman v. St. Raphael Acad.*, 853 A.2d 28, 34 (R.I. 2004); *see also Schaer v. Brandeis Univ.*, 432 Mass. 474, 735 N.E.2d 373, 381 (2000) ('[C]ourts are chary about interfering with academic and disciplinary decisions made by private colleges and universities. ... 'A college must have broad discretion in determining appropriate sanctions for violations of its policies.'" (quoting *Coveney v. President & Trs. of the Coll. of the Holy Cross*, 388 Mass. 16, 445 N.E.2d 136, 139 (1983)). Therefore, the rules set out in a university's handbook are 'enforceable as long as [they are] not against public policy or law.' *Gorman*, 853 A.2d at 39. A rule 'violates public policy only if it is: '[1] injurious to the interests of the public, [2] interferes with the public welfare or safety, [3] is unconscionable; or [4] tends to injustice or oppression.' *Id.* (quoting *City of Warwick v. Boeing Corp.*, 472 A.2d 1214, 1218 (R.I. 1984)). Courts may also 'provid[e] a judicial remedy to members of private voluntary organizations aggrieved by the arbitrary and capricious application of otherwise reasonable rules by the officers of those organizations.' *King v. Grand Chapter of R.I. Order of E. Star*, 919 A.2d 991, 998 (R.I. 2007))."

[238] *Id.*, *17. (internal citations omitted)(emphasis added).

[239] *Id.*, *23 (stating: "[t]he 2014–15 Code gives Doe the right to have "every opportunity to articulate relevant concerns and issues, express salient opinions, and offer evidence before the hearing body or officer." At the hearing, Doe was required to give his statement before Ann. He asked for the opportunity to give a rebuttal, but that request was denied because the Complaint Process does not provide for rebuttal statements. This is another, perhaps less critical, example of where the rights promised by the 2014–15

Brown is also pertinent to Title IX claims with regard to issues related to a university's training on how to adjudicate sexual misconduct allegations. In *Brown,* this training included sessions taught by "a Sexual Harassment & Assault Resources & Education ('SHARE') advocate [who] presented a training session to Title IX Council members" regarding "[t]he impacts of trauma on sexual assault victims."[240] *Brown* explained the university:

> " provided this training to comply with guidance documents issued by OCR, which state that decision-makers in Title IX processes should understand the potential impacts of trauma. During [this training the instructor] stated that some reactions of sexual assault survivors might be counterintuitive, for example not being able to recount a consistent set of facts, or 'communicating with someone who has assaulted them or having any kind of interaction with someone who has assaulted them.'"[241]

This victim centered training likely triggered bias against the plaintiff. For, one hearing panel member testified at trial that:

> " . . . . she did not consider any of [the accusers] post-encounter conduct, including the text messages and the testimony of [a witness for the accuser], as evidence as to whether or not [the accuser] had been sexually assaulted one way or another.' This was, at least in part, based on the SHARE Advocate training about counterintuitive behaviors exhibited by sexual assault survivors. [The hearing panel member] concluded, based on the SHARE presentation, 'that it was beyond [her] degree of expertise to assess [the accuser's] post-encounter conduct ... because of a possibility that it was a response to trauma.'"[242]

Code are in conflict with the later adopted Complaint Process. Again, Brown has every right to design its process so that each party presents in the order the panel requests, and may deny rebuttal statements. The problem is that, in this case, this process runs up against Doe's right to have "every opportunity to articulate relevant concerns and issues, express salient opinions, and offer evidence before the hearing body or officer." As the Court stated in a previous decision, "Brown chose to draft its Code to give students the right to 'every opportunity' to 'articulate relevant concerns' and 'offer evidence'; now it must abide by that decision.' *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 195 (D.R.I. 2016). Therefore, for cases adjudicated under the 2014–15 Code, Brown must, if requested, allow respondents to give a rebuttal statement at the hearing. That said, while this error, standing alone, would not be enough for Doe to get a new hearing because he has presented no evidence that, if he had been given the opportunity to give a rebuttal, the panel would not have found him responsible; when combined with other errors as set forth herein, it is clear that Doe's contract rights were violated.")(internal citations footnotes and evidence presented at bench trial omitted).

[240] *Id.,* *6.

[241] *Id.,* (internal citations omitted).

[242] *Id.,* *13 (internal citations and footnote omitted).

Brown found this hearing panel's testimony "concerning"[243] and suggested the university take steps to correct any bias caused by the victim centered sexual misconduct training.[244]

A third relevant issue is how Brown University - like many universities across the country – revised its sexual misconduct policies to strip away rights previously afforded the accused. In *Brown,* the university's previous disciplinary proceeding allowed evidence to be "presented directly to a [university level] hearing panel."[245] These types of proceedings generally involve quasi administrative law settings were accusers and accused present evidence and arguments directly to disciplinary panels. In its place, Brown University's 2015-16 policy imposed a single investigator ("SI") model whose role was:

> ". . . . to gather 'information through interviews of the complainant, respondent, and witnesses and synthesize the information in a report.' 'The investigator has the discretion to determine the relevance of any witness or other evidence and may exclude information in preparing the investigation report if the information is irrelevant, immaterial, or more prejudicial than informative.' The Complaint Process dictates that '[t]he investigator's report will include credibility assessments based on their experience with the complainant, respondent, and witnesses, as well as the evidence provided.' However, it also states that "[t]he investigator will not make a finding or recommend a finding of responsibility.' The investigator model has become increasingly popular among colleges and universities, particularly 'peer institutions of Brown."[246]

Not only did the SI possess great discretion on how to conduct her investigation, the SI also reported to Brown's Title IX Officer who both: (a) participated in edits to the SI's report prior to plaintiff receiving the report; and (b) oversaw the selection of plaintiff's all female disciplinary hearing panel.[247] During plaintiff's disciplinary hearing, the SI testified about text messages exchanged between plaintiff and his female accuser and maintained the female accusers' allegations of hesitancy towards engaging in sexual interactions

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[243] *Id.,* *24.

[244] *Id.,* *25 (stating: "[i]t appears what happened here was that a training presentation was given that resulted in at least one panelist completely disregarding an entire category of evidence. Although for the reasons stated, the Court need not decide whether this rises to the level of arbitrary and capricious conduct, it clearly comes close to the line. The Court is not suggesting that Brown is not permitted to give training on the effects of trauma, or that it should provide the same process that occurs in court. However . . . Brown would be wise to consider some sort of explicit instruction to panelists before they deliberate, reminding them that all the evidence in the investigator's report has been deemed relevant, and they, as fact-finders, are fully capable of, and obligated to, consider it. And moreover, if certain evidence could be considered counter-intuitive such that expertise may be helpful in order for the fact-finder to properly consider it, this could be presented through the investigator, which in turn would give both parties the notice and opportunity to deal with it. In contrast, if no one is making this claim, it might be useful to tell the panel this so that situations like this could be avoided.").

[245] *Id.,* *5.

[246] *Id.,* (citations omitted).

[247] *Id.,* *6, 9-11.

"appear[d] to be more consistent with the pattern that is in the text messages."[248] In providing this testimony, *Brown* determined the SI violated plaintiff's contractual rights by "making a recommendation of a finding of responsibility . . . ."[249] *Brown* also discussed additional deficiencies in SI's investigation and subsequent report relevant in Title IX cases. For example, *Brown* noted:

> The SI's "commentary on the merits of [plaintiff's] conspiracy claim [involving collusion between his accuser and her witness] comes, at a minimum, dangerously close to an improper recommendation on responsibility and effectively doubles down on the improper implicit recommendation made by [SI] discussed above. [SI] does not simply say that, based on her interviews, she found [the accuser] credible; she says that there is insufficient evidence for the panel to find that [accuser] fabricated the claim, which of course she must have done if [plaintiff] were to be believed. Second, [SI's] assessment that there was insufficient evidence to support [plaintiff's] fabrication claim was particularly problematic given that she had refused to ask for evidence that might have proven it so and been exculpatory to [plaintiff] . . . The problem here was that [SI] made the initial decision to include the conspiracy claim and corresponding character evidence, but then chose not to complete the evidence-gathering and went on to say that there was insufficient evidence to support [Plaintiff's] fabrication claim. Because of this, her failure to request the text messages between [accuser] and [accuser's witness] was a violation of Doe's right '[t]o be given every opportunity to ... offer evidence before the hearing body or officer.'"[250]

As a result, Title IX plaintiffs should draft complaints that highlight how university investigators engaged in the erroneous violations of policies addressed in *Brown.*

On the other hand, plaintiffs should be aware courts sometimes reject breach of contract/Title IX claims involving policies that explicitly manifest a bias against the accused.[251] For instance, a district court recently granted Boston College's motion for summary judgment even though it's "policies identified accusers as 'victims' and 'survivors' and accused students as 'perpetrator[s].'"[252] In doing so, the district court cited other district court decisions that

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[248] *Id.,* *12.

[249] *Id.,* *20.

[250] *Id.,* *22.

[251] *See e.g., Yu v. Vassar Coll.,* 97 F. Supp. 3d 448, 481-82, (S.D.N.Y. 2015); *Bleiler v. Coll., of the Holy Cross,* 2013 U.S. Dist. LEXIS 127775, *15 (finding college adequately followed its procedures and therefore did not breach its contract to plaintiff).

[252] *Doe v. Trs. of Bos. Coll.,* 2016 WL 579297, *25. *Id.,* (stating in footnote 7 that "Doe contends that *Doe v. Columbia*, No. 15-1536, 2016 WL 4056034 (2d Cir. July 29, 2016), provides support that Doe's erroneous outcome claim should survive summary judgment. The Court disagrees. The Columbia court largely based its decision to allow the plaintiff's claim to survive because "minimal support to a plausible inference of sex discrimination [will] survive a Rule 12(b)(6) motion to dismiss." In this case, however, the parties have reached the summary judgment stage and Doe must demonstrate a genuine issue of material fact, not merely allegations of a plausible inference of gender-bias. In his summary judgment

determined university policies that "favor[] alleged victims of sexual assault claims [are] not the equivalent of demonstrating bias against male students, even if accused students are generally male."[253] Moreover, *Boston College,* largely rejected[254] plaintiff's arguments that Boston College violated 13 different provisions of its policies when it found plaintiff responsible for sexual misconduct.[255] Then, the court dismissed plaintiff's Title IX erroneous outcome claim in part

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record, Doe provides no evidence to support his Title IX erroneous outcome based upon gender-bias claim.")(internal citations omitted).

[253] *Id.*, *25 (*Citing, Univ. of Cincinnati*, 2016 WL 1161935, at *14; *King v. DePauw Univ.*, No. 14-cv-70-WTL-DKL, 2014 WL 4197507, at *10 (S.D. Ind. Aug. 22, 2014); *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 579 (E.D. Va. 1996)).

[254] *Id.*, *13* (stating a breach of contract claim could have been made if the plaintiff could have shown: (a) "how his defense would have been different if he had received notice of the lessor included offense of which he was found responsible; and (b) what evidence plaintiff would have proffered or different arguments he would have made if [the college] had provided express prior notice of this lesser included charge."). The court also left open the possibility of a breach of contract claim based on the college policy that gave plaintiff the right to "adequate time to prepare a response to the charges" under certain circumstances. *Id.*, *13. In advancing this argument, the plaintiff alleged he needed additional time to present "forensic evidence" such as DNA evidence that would have proved his innocence. *Id.* But, the court found the DNA evidence that plaintiff wanted to produce did not explicitly exonerate him. *Id.* The plaintiff made a similar argument regarding a need for extra time to obtain an "enhanced" version of a video that would have established his innocence. *Id.* However, the court found plaintiff did not provide the college any indication of when this video would become available. *Id.* As a result, when falsely accused students need additional time to present forensic evidence, these students should request additional time and inform their universities when that evidence can be obtained.

[255] *Id*, *10-21 (D. Mass. Oct. 4, 1026). It should be noted the plaintiff in *Boston College* appealed the district court's rejection of plaintiff's argument that the college breached its policies by not conducting its own investigation independent. Regardless of the outcome of this appeal, a quick review of *Boston College's* handling of the breach of contract claims is relevant for the Title IX practitioner. For example, *Boston College* addressed a policy provision that stated the college "will probably conduct an [its own] investigation of the alleged incident . . . ." *Id.*, *11. The court found this language "does not require" the college to conduct an investigation separate from that conducted by the college's hearing panel that adjudicated the claims against plaintiff. *Id.* In addition, *Boston College* rejected a breach of contract claim based on the college's refusal to stay the disciplinary proceeding until after a criminal proceeding had been resolved. *Id.*, *12-13. This was because the college policy stated it "may elect to stay the disciplinary process if a student is summarily suspended and the criminal matter remains open." *Id.*, *12. The court also dismissed plaintiff's breach of contract claim based on a policy that limited the role his attorney could play during disciplinary proceeding. *Id.*, *15.* It did so because the policy put plaintiff on notice that his lawyer would be limited in such a fashion. *Id.* Similarly, *Boston College* rejected a breach of contract claim based on the college prohibiting plaintiff from calling his private investigator as a witness at the hearing. *Id.*, *15-16. This was because the court construed the college's policy to limit witness testimony to those who had first-hand knowledge of the incident in question. *Id.* Additionally, the court dismissed plaintiff's argument that the college violated its policy prohibting hearing board members who "are not able to be impartial in the hearing of the case." *Id.*, *16. It did so even though one hearing panel member was affiliated with a group that advocated for women harmed by men in the context of domestic violence. *Id.* Similarly, *Boston College* rejected plaintiff's argument that his hearing was not impartial because a hearing panel member "acted as a prosecutor and was hostile toward Doe" as evidenced by her cross-examination questions of Doe while "providing 'softball' questions to other witnesses." *Id.* Additionally, the court rejected evidence presented by plaintiff's expert witness who

because plaintiff provided no "causal relationship between the alleged procedural irregularities in [his disciplinary proceeding] and a pattern of decision-making based upon gender-bias."[256] Finally, the court dismissed plaintiff's Title IX deliberate indifference claim because he could not establish: (a) gender-bias or (b) that Boston College's "response or inaction [were] clearly unreasonable given the known circumstances."[257]

Only decisions by federal courts of appeals will provide guidance on wildly diverging decisions like *Brown University*, *Brandeis*, and *Boston College*. In the meantime, students facing false allegations of sexual assault should be prepared to detail how their facts: (a) mirror *Brown* and *Brandeis* rather than *Boston College,* and (b) are distinguishable from court decisions that suggest universities can violate university policies without incurring Title IX liability.

(F) Universities' vaguely written disciplinary policies, ambiguous disciplinary decisions, and poor record keeping that undermine students' defense

Increasingly, universities attempt to head off lawsuits by enacting vaguely worded policies that eliminate previously afforded rights afforded to students accused of sexual misconduct. These vaguely worded policies allow universities to: (a) issue disciplinary decisions devoid of rationale necessary draft university level appeals, and/or (b) withhold or destroy materials plaintiffs need to support defend themselves against false allegations. But, even though constitutional due process

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maintained the college's Title IX training violated college policy "training" requirements. *Id.,* *17-18. The court also dismissed plaintiff's claim that the college breached its obligations to create a record of the hearing. *Id.,* *19-20. In doing so, the court relied on a provision of the college's policy prohibiting parties involved in the hearing from making "any type of" recording of the hearing. *Id. *19.* Likewise, the court rejected a breach of contract argument based on improper interference with the hearing board deliberations by the college's dean and general counsel. *Id.,* *19. The plaintiff advanced this argument because: (a) the student code required the hearing board to "meet in private to determine whether the accused is responsible or not…"; and (b) the dean's office communicated to a board member that the dean discouraged any attempt by the hearing panel to issue a "no findings" result. *Id.* The court found the college circumvented plaintiff's arguments because board members testified they did not recall hearing that the Dean's office discouraged "no finding" results. *Id.* The court also dismissed a breach of contract claim based on a lack of meaningful notice of the charges. *Id.,* *13-14. The court did so because the college provided plaintiff a generalized version of the charges against him as well as his accuser's statements against him which put plaintiff on notice of the charges. *Id., *14.* In reaching this decision, the court rejected plaintiff's argument that he should have been provided notice of any lesser included charges. *Id. Boston College* rejected this argument because the college's policies state plaintiff could have been found "responsible for a lesser inclusive charge." *Id.*

[256] *Id.,* *26 (citing *Mallory v. Ohio Univ.,* 76 Fed.Appx. 634, 640 (6th Cir. 2003) (holding that plaintiff did not demonstrate a genuine issue of material fact because he did not show how alleged procedural irregularities were based upon sex); *Univ. of Cincinnati*, 2016 WL 1161935, at *14 (concluding that plaintiff "fail[ed] to create a reasonable inference that the disciplinary hearing procedures adopted ... were motivated by a desire to discriminate against male students"); *Salau*, 139 F. Supp. 3d at 999 (dismissing claim when plaintiff pointed to his case only and not a broader pattern of decision-making to show gender-bias); *Doe v. Case W. Reserve Univ*. 2015 WL 5522001, at *5 (explaining that the pleadings do not show how sexual bias motivated the procedural flaws).").

[257] *Id.,* *26-27.

does not apply at private universities, a Massachusetts district court in *Bleiler* determined a "private university, college, or school may not arbitrarily or capriciously dismiss a student."[258]

Similarly, the First Circuit's *Cloud* decision noted school disciplinary hearings must be "conducted with basic fairness."[259] Therefore, plaintiffs sometimes advance Title IX claims based on universities denying certain rights ***not*** appearing in a university's policies. Plaintiffs do so in part because *Bleiler* suggests a disciplinary proceeding may be "flawed" if a university failed to honor mandates contained in OCR's Dear Colleague Letter which *Bleiler* described as requiring a:

> "'prompt and equitable resolution" of sexual misconduct allegations under which "schools should provide notice to students of the procedures, conduct an 'adequate, reliable, and impartial investigation of complaints,' provide 'the opportunity for both parties to present witnesses and other evidence,' and provide prompt notice of the final outcome . . . 'a school's investigation and hearing processes cannot be equitable unless they are impartial[,] [t]herefore, any real or perceived conflict of interest between the fact-finder or decision-maker and the parties should be disclosed' . . . [e]very person involved in implementing the procedures and deciding a complaint in a sexual violence case 'should have adequate training or knowledge regarding sexual violence.'"[260]

Consequently, plaintiffs' Title IX complaints should include breaches of the Cleary Act[261] and/or OCR mandates which include: (a) "equitable grievance procedures," (b) equal opportunities for both parties in the disciplinary proceeding to present witnesses and evidence, (c) the ability to review the opposing party's statements, and (d) the ability to appeal disciplinary proceeding outcomes.[262] Plaintiffs should do so even though OCR has been widely viewed as undermining the rights of accused students under President Obama's administration[263] through mandates issued

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[258] *Bleiler,* 2013 U.S. Dist. LEXIS 127775, *14.

[259] *Cloud,* 720 F.2d 721, 725 (1st Cir. 1983).

[260] *Bleiler,* 2013 U.S. Dist. LEXIS 127775, *9-10 (quoting OCR's 2011 Dear Colleague Letter).

[261] *Infra,* fn.297 (containing the Cleary Act's mandates regarding Title IX disciplinary proceedings involving allegations of sexual misconduct).

[262] *See e.g.,* Dear Colleague Letter (2011) [hereinafter Dear Colleague Letter], http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/AVD5-K5R6].

[263] *See e.g.,* Emily D. Safko, *Are Campus Sexual Assault Tribunals Fair?: The Need For Judicial Review and Additional Due Process Protections In Light of New Case Law,* 84 Fordham L. Rev. 2289 (2016), pgs. 2304-5 (discussing universities' concerns regarding OCR enforcement actions that commentators believe "incentivizes schools to hold accused students accountable by implementing and conducting proceedings that are unfairly stacked against the accused."). *Id.,* pgs.2320-24 (addressing same); *Handout 14* (containing *Open Letter From Sixteen Members of Penn Law School Faculty* (Feb. 17. 2014) which states in part: "Although we appreciate the efforts of Penn and other universities to implement fair procedures, particularly in light of the financial sanctions threatened by OCR, we believe that OCR's approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness."); Barclay Sutton Hendrix, *A Feather On One Side, A Brick On The Other: Tilting The Scale Against Males Accused of Sexual Assault In Campus Disciplinary Proceedings,* 47 Ga. L. Rev. 591,

by OCR.[264] Yet, surprisingly, in the waning days of the Obama presidency OCR actually took a different approach in determining Wesley College violated male students' rights in sexual misconduct disciplinary proceedings.[265] As a result, Title IX complaints should cite OCR's Wesley decision if their universities engage in the following prohibited practices outlined in that decision:

1. Violating Title IX by destroying documents related to sexual misconduct disciplinary proceedings;[266]

(2013); Stephen Henrick, *A Hostile Environment for Student Defendants*: *Title IX and Sexual Assault on College Campuses*, 40 N. Ky. L. Rev. 49 (2013); *Handout 15* (containing *Rethink Harvard's Sexual Harassment Policy,* LETTER TO EDITOR, BOSTON GLOBE, Oct. 15, 2015); Janet Halley, *Trading the Megaphone for the Gravel Gavel in Title IX Enforcement,* HARV. L. REV. F. 103, 103-17, (2014); Samantha Harris, *Campus Judiciaries on Trial: An Update from the Court*, HERITAGE FOUNDATION, Oct. 6. 2015; http://www.heritage.org/research/reports/2015/10/campus-judiciaries-on-trial-an-update-from-the-courts (accessed 1/4/17); Janet Napolitano, "*Only Yes Means Yes": An Essay on University Policies Regarding Sexual Violence and Sexual Assault,* Yale Law and Policy Review Volume 33; Issue 2 (2015); Robin Wilson, *Presumed Guilty,* CHRONICLE OF HIGHER EDUCATION (Sept. 3. 2014) http://chronicle.com/article/Presumed-Guilty/148529/?cid=a&utm_medium=en (accessed 1/4/17) (noting: "Under current interpretations of colleges' legal responsibilities, if a female student alleges sexual assault by a male student after heavy drinking, he may be suspended or expelled, even if she appeared to be a willing participant and never said no. That is because in heterosexual cases, colleges typically see the male student as the one physically able to initiate sex, and therefore responsible for gaining the woman's consent."); *Dershowitz and Other Professors Decry 'Pervasive and Severe Infringement' of Student Rights*, Jacob Gershman (May 18, 2016), http://blogs.wsj.com/law/2016/05/18/dershowitz-and-other-professors-decry-pervasive-and-severe-infringement-of-student-rights/ (accessed 1/4/17).

[264] It should be noted many college presidents have expressed an intent to continue to enforce OCR mandates issued under President Obama's administration even if President Trump's administration rolls back some of these mandates. *See e.g., See e.g.,* Jake New's January 26, 2017 article for insidehighered.com entitled *Do Not Step Away.* Available at *https://www.insidehighered.com/news/2017/01/26/collegeleadersdiscussfuturetitleixsexualassaultpreventionefforts;* Bradford Richardson, *Trump faces uphill battle undoing campus rape scares inherited from Obama*, available http://www.washingtontimes.com/news/2017/feb/8/campus-rape-epidemic-still-facing-trump-after-inhe/.

[265] OFFICE FOR CIVIL RIGHTS LETTER TO ROBERT E. CLARK, Oct. 12, 2016, *available at:* http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf

[266] *Id.,* p.18 (stating: "While Title IX does not require a recipient to make a recording of hearings, to the extent that such a recording is made, it constitutes a record and must be kept in order to be available to enable OCR to ascertain whether the College is carrying out its legal obligations under the Title IX regulations. Destroying hearing records after the hearing or appeal necessarily means that the College was undertaking steps that would result in relevant information not being available to OCR during its investigation and monitoring to assess whether the College is carrying out its legal obligations under the Title IX regulations. OCR is obligated to review pertinent practices and policies of the College, the circumstances in which the noncompliance occurred, and other factors relevant to a determination of whether the College has corrected its noncompliance with Title IX. Similarly, the document destruction prevents any external review, including pursuant to judicial proceedings, should a participating student wish to challenge the equity of the College's administrative process in court. Finally, destruction of the hearing records prevents the College itself, and specifically its Title IX Coordinator, from being able to

2. Running afoul of Title IX by: "failing to offer the opportunity to accused students to provide witnesses and other evidence. . . ."[267]; and

3. Violating Title IX if the accused student is ***not***: (a) "given an opportunity to share his version of events and to benefit from an investigation of the accuracy of that version of events;" (b) "provided with the opportunity to challenge evidence that the College relied upon in imposing his interim suspension;" (c) "afforded his resolution options;" (d) "provided an adequate opportunity to defend himself at the Hearing;" or (e) "provided sufficient time to participate in the process."[268]

In response, defendant universities will likely cite *Vassar* which was decided ***prior to*** OCR's Wesley decision. For, *Vassar* cited OCR's "Dear Colleague Letter" as a basis for rejecting a "flawed proceeding" argument which relied on: (a) the university's vaguely written disciplinary decisions and (b) "inaudible" audio recordings of plaintiff's disciplinary hearing.[269] If universities rely on *Vassar*, plaintiffs should note how *Vassar* determined the plaintiff might have survived Vassar's summary judgment if he established facts showing:

> "he would have more effectively appealed his case if these purported obstacles were not in his way ***or*** how these purported procedural flaws were motivated by gender-bias."[270]

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review information to determine whether patterns of conduct exist, or whether further steps are necessary for the College to take to ensure student safety, or whether the College is satisfied with the fairness of its own administrative process as applied in particular cases."); *Id.*, p.26 (finding that a review of Wesley's sexual assault disciplinary files proved ". . . . the College violated the requirements of Title IX by, in many cases, failing to offer the opportunity to accused students to provide witnesses and other evidence, failing to provide students who alleged sexual harassment including sexual assault with appropriate interim remedies including counseling and/or academic services, and by failing to provide the complainant with written notice of the outcome of the complaint.").

[267] *Id.*, p. 26.

[268] *Id.*, p.24-25.

[269] *Yu v. Vassar Coll.*, 2015 US Dist. Lexis 43253 *57-58 ("Indeed, the Dear Colleague Letter provides that, to comply with Title IX, a school must provide notice of the outcome of the disciplinary proceeding to the complainant and the respondent, 'i.e., whether harassment was found to have occurred.' *Dear Colleague Letter* at 13. There is no mention of any detailed written finding. Moreover, as the Dear Colleague Letter points out, postsecondary institutions are subject to the Clery Act, which requires that '[b]oth the accuser and the accused must be informed of the outcome of any institutional disciplinary proceeding brought alleging a sex offense,' and defines 'outcome' as 'only the institution's final determination with respect to the alleged sex offense and any sanction that is imposed,' with no requirement of a detailed factual finding. *Dear Colleague Letter* at 14; 34 C.F.R. § 668.46(b)(11)(vi)(B)").

[270] *Id.* *58 (emphasis added).

In summary, falsely accused students should use their university level disciplinary proceedings to document how universities prejudiced them by: (a) refused to honor OCR or Cleary Act mandates; (b) issuing vague investigative reports or disciplinary decisions which hogtied students' defense; (c) withheld or destroyed materials plaintiffs need to defend themselves during disciplinary proceedings; and/or (d) otherwise undermined students' ability to defend themselves.

(G) Universities' gender-biased Title IX Training

During disciplinary hearings, it is fairly common for universities to refuse falsely accused students' requests for access to university Title IX training materials.[271] This is likely because universities fear these training materials will fuel students' gender-bias arguments. Universities also likely withhold training materials because Title IX complaints often detail how defendant universities fail to properly train adjudicators of sexual misconduct allegations.[272]

Doe v. The Ohio State Univ. provides an example of how gender-biased Title IX training can trigger the rejection of a university's motion to dismiss. In that case, a district court refused to dismiss a due process claim advanced by a male plaintiff who alleged anti-male training corrupted adjudicators involved in his sexual misconduct disciplinary proceeding.[273] However, the district court noted it would likely grant a motion for summary judgment if OSU offset this gender-bias training with other training about adjudicators' need to serve as "fair and neutral" adjudicators.[274] *Vassar* similarly rejected a plaintiff's lack of training argument because there was: "nothing in the record suggesting that 'a few hours of [training] is somehow inconsistent with Vassar's understanding of 'specialized training' or that [a] failure to remember certain specifics about the training at a later date is in violation of the [r]egulations."[275]

In 2016 and 2017, two United States Courts of Appeals affirmed the dismissal of Title IX and due process claims.[276] One of these decisions was the Sixth Circuit's *Cummins* decision

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[271] *See e.g., Handout 2* (containing Title IX complaint filed by Eric Rosenberg's client against University Columbia College Chicago).

[272] *See e.g., See e.g., Handouts 1-3, 8-12* (containing Title IX complaints filed by Eric Rosenberg's clients against University of Chicago, Columbia College Chicago, Salisbury University, Ohio State University, Indiana University, Denison University, and Occidental College).

[273] *Doe v. The Ohio State Univ.,* 2016 WL 6581843, *8 (rejecting a university's motion to dismiss plaintiff's due process claims in part because the complaint alleged plaintiff's disciplinary hearing panel received "statistical evidence that '2–57% of college men report perpetrating a form of sexual aggressive behavior.' . . . And, '[c]ollege men view verbal coercion and administration of alcohol or drugs as permissible means to obtain sex play or sexual intercourse.' . . . 'Repeat perpetrators are aware of myths and how to present and empathic.' . . . 'Sex offenders are experts in rationalizing behavior.' . . . [and] panel members were trained to 'identify and understand characteristics of individuals who pose a risk to the safety of the community.'")(internal citations omitted).

[274] *Id.,* *9.

[275] *Yu v. Vassar Coll.,* 2015 US Dist. Lexis 43253 *59-60.

[276] *John Doe 1 v. Cummins,* No. 16-3334, 2016 WL 7093996 (6th Cir. Dec. 6, 2016); *Plummer v. Univ. of Houston,* No.15-20350, 2017 WL 2704014, *7 (5th Cir. June 26, 2017)(affirming dismissal of Title IX claim in summary judgment properly because the defendant university: (a) made "no finding" against 41 percent

which addressed gender-bias allegations based on: "panel members receiv[ing] biased training that emphasized the rights of the complaining party over the due-process rights of the accused, and that the panel members had a history of finding in favor of victims in sexual-misconduct cases."[277] But, at least three facts suggest *Cummins* is distinguishable from many Title IX and/or due process complaints. First, the university had granted plaintiffs' new disciplinary hearings after their appeals highlighted "inadequate [] procedures" in their initial hearings.[278] Second, the university found one of the plaintiffs "not responsible" for an allegation of sexual misconduct.[279] Third, *Cummins* determined plaintiffs' complaint did not include plausible evidence of gender-bias against male students.[280]

Until additional courts weigh in on these issues, plaintiffs should continue drafting Title IX complaints based in part on: (a) biased training materials, and (b) roadblocks universities erect to plaintiffs' access to these materials. For, *Marshall* rejected a motion to dismiss a Title IX claim in part because the university withheld documents critical to plaintiff's ability to establish gender bias.[281] In discussing this issue, the court noted the university:

> "cannot have it both ways, restricting access to the facts and then arguing that [plaintiff's] pleading must be dismissed for failure to identify more particularized facts. Instead, whether the facts alleged sufficiently support a claim for intentional gender discrimination under Title IX is a question for a later stage of this litigation, after fair and robust discovery on both sides."[282]

Consequently, *Marshall* should be cited to substantiate properly pled "information and belief" allegations when defendant universities refuse to provide Title IX plaintiffs documentation that may evidence gender-bias.

(H) Universities' insufficient notice, denial of opportunities to be heard, and/or restricted access to attorneys

of the predominately male students charged with sexual misconduct, and (b) "treated" the male and female plaintiffs "equally" with regard to their sexual assault of another female student).

[277] *Cummins*, 2016 WL 7093996, *12-13 (finding plaintiffs "alleged due-process violations—e.g., the limited right to cross-examination, the limited access to an advisor, and the improper allocation of the burden of proof—evidence gender discrimination in UC's disciplinary process" cannot substantiate Title IX claims because plaintiffs "fail to show how these alleged procedural deficiencies are connected to gender-bias . . . these deficiencies at most show a disciplinary system that is biased in favor of alleged victims and against those accused of misconduct. But this does not equate to gender-bias because sexual-assault victims can be both male and female.")(internal footnote omitted).

[278] *Id.*

[279] *Id.*

[280] *Supra*, fn.250 (discussing same).

[281] *Marshall v. Ind. Univ.*, 2016 U.S. LEXIS 32999, *18-20.

[282] *Id.*, *20.

As OCR's investigation of Wesley College proves, universities can violate Title IX if students are disciplined without granting them sufficient time and/or opportunity to defend themselves. [283] However, universities will still maintain decisions like *Vassar* sanction short deadlines that limit male students' ability to mount defenses. This is because *Vassar* determined a disciplinary proceeding was not flawed when Vassar: (a) expelled plaintiff eight days after giving him notice of the charges against him, and (b) conducted a hearing three days after giving the plaintiff access to documents contained in the university's disciplinary file.[284] In fact, plaintiffs should expect universities to point to court decisions that suggest "one day" notice of a hearing "would seem [to be] sufficient."[285]

Consequently, male students in Title IX university level disciplinary proceedings regularly face incredibly short deadlines to respond to reports or directives that universities commonly issue late on Friday afternoon or just before holiday weekends. But if these deadlines conflict with the universities policies – and are driven by gender-bias – Title IX violations should be pled in Title IX complaints. Additionally, male plaintiffs should pursue Title IX claims when universities deny their requests for deadline extensions while granting extensions requested by female accusers.

Title IX complaints also involve universities' denial of plaintiffs' access to attorneys during interrogations, hearings, and other segments of Title IX disciplinary proceedings.[286] This issue was raised in *Brandeis* which refused to dismiss a complaint filed by a male student who was denied an attorney in a sexual misconduct proceeding.[287] Universities violate the Cleary Act and the Violence Against Women Reauthorization Act ("VAWA") when they prohibit attorneys from assisting students involved in Title IX disciplinary proceedings.[288] For instance, VAWA states "the accuser and the accused [are] entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to <u>*any related meeting or proceeding by an advisor of their choice*</u>."[289] This "advisor of choice" can be an attorney as detailed in the Federal Register/Violence Against Women Act which states:

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[283] *Supra,* p.44-45 (discussing OCR's investigation of Wesley College).

[284] *Yu v. Vassar Coll.,* 2015 US Dist. Lexis 43253 *36-37 (S.D.N.Y. 2015).

[285] *Id.,* *38 (citing *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744, 755 (E.D. Tenn. 2009) and noting *Donohue v. Baker*, 976 F. Supp. 136,145-46 (N.D.N.Y. 1997) found "telephonic notice of charges at least three days prior to the hearing and written notice one day before the hearing 'would seem [to be] sufficient'). *See also, Tanyi v. Appalachian State Univ.*, No. 5:14-CV-170RLV, 2015 WL 4478853, at 6 (W.D.N.C. July 22, 2015) (finding that 'at a minimum due process requires adequate notice' and that less than twenty-four-hours' notice of a charge against plaintiff warranted denying the defendant's motion to dismiss (citing *Goss v. Lopez*, 419 U.S. 565, 579 (1975)).''

[286] *See e.g., Handout 11* (containing Title IX complaint filed by Eric Rosenberg's client against Denison University).

[287] *Brandeis,* 2016 U.S. Dist. Lexis 43499, *100-105.

[288] Violence Against Women Reauthorization Act of 2013. *Infra,* fn.297 (containing the Cleary Act's requirement" that the accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice.").

[289] SEC. 304. CAMPUS SEXUAL VIOLENCE, DOMESTIC VIOLENCE, DATING, VIOLENCE, AND STALKING EDUCATION AND PREVENTION. VAWA (emphasis added).

> "At the outset of the discussion of this issue, the Department made clear that its interpretation of the statutory language was that the ***accused*** and the accuser are ***entitled to an advisor of their choice***, ***including an attorney***… [and] that the institution cannot limit the choice or presence of advisor for either the accuser or the accused in any meeting or institutional disciplinary proceeding."[290]

Despite these protections, universities commonly conduct initial interrogations of students when neither attorneys nor advisors are present. These interrogations often prejudice the falsely accused. In fact, attorneys who regularly represent students at disciplinary proceedings often talk to students who were expelled solely on basis of their initial statements to university police and/or Title IX employees. This situation often arises when a female student tells another student something sexual may have happened with a male student while the female was drinking alcohol. This information then circulates within the female student's community and ultimately reaches a resident advisor or other "mandatory reporter" who is required to inform the university's Title IX office of the allegations. Since OCR requires universities investigate all allegations of sexual misconduct,[291] the Title IX office or campus police then interrogate the male student. This interrogation is often conducted without providing the male student: (a) specific information about the allegations against him; (b) notice of his right to an attorney; (c) notice that his statements will be used against him; (d) notice that the students' statements can be provided to law enforcement officials; or (e) notice of the exact provisions of the university's sexual misconduct policy the student allegedly violated. Instead, the student is lulled into a belief that the truth will set him free. So, the male student tells the university how the female student either initiated or consented to engaging in sexual contact when she was not incapacitated. After making these statements, the male student's own testimony is then used to suspend or expel him even though his female accuser: (a) did not definitively identify what sexual contact allegedly occurred between herself and the male student, and (b) may have initial never wanted disciplinary charges filed against the male student. Stated another way, if the male student had remained silent regarding his interactions with the female student, his university would not have been able to discipline him.[292]

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[290] 10/30/2014 Federal Register | Violence Against Women Act https://www.federalregister.gov/articles/2014/06/20/2014-14384/violence-against-women-act#print_view 68/104 (emphasis added).

[291] OCR's 2014 *Questions and Answers on Title IX and Sexual Violence*, p.2 ("When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E))." Available at http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf).

[292] But, it should be noted, the author does ***not*** suggest falsely accused students refuse to provide statements to investigators in all university level Title IX disciplinary proceedings. This is because universities routinely construe a male student's silence as evidence of guilt. As a result, the falsely accused should document a desire to potentially provide exculpatory testimony and evidence ***after*** the university provides the student full access to the allegations against them. In addition, falsely accused students should review their university polices carefully to determine how long they can delay telling their side of the story without incurring prejudice. On the other hand, if criminal charges are pending or likely, falsely accused students must understand prosecutors routinely subpoena university Title IX investigatory files. In these situations, the author sometimes advises clients against providing personal narratives of their interactions with accusers. Instead, the author helps clients mount defenses via evidence such as polygraphs, toxicologist experts, security camera footage, and/or third-party affidavits.

Attorneys regularly involved in university Title IX proceedings attempt to help falsely accused students support their initial unrepresented statements to university officials by presenting polygraphs, toxicologist reports, and third-party affidavit testimony proving accusers were not incapacitated when they initiated or consented to sexual contact.[293] But, this evidence does not always prevent universities from expelling the students.[294] As a result, some national organizations such as SAVE are advocating for legislation that would return traditional due process concepts of fairness and equity to university level disciplinary hearings.[295]

Except in certain circumstances, plaintiffs should continue to expect courts to push back on arguments based on restrictions placed on attorneys' advocacy and participation in university level disciplinary proceedings.[296] The Sixth Circuit's *Cummins* decision defines one of these exceptions.[297] *Cummins* determined a student's due process rights may allow a more active role for attorneys in public university level disciplinary "hearings" that are "unusually complex or when the university itself utilizes an attorney."[298] Moreover, an Ohio district court determined "due

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Additionally, the author helps clients develop strategies to minimize prejudice which will likely occur during disciplinary hearings where the client presents this type of evidence while also refusing to personally testify about his interactions with the accused.

[293] *See e.g., Handout 2* (containing Title IX complaint filed by Eric Rosenberg's client against University Columbia College Chicago).

[294] *Id.*

[295] *See, http://www.saveservices.org/sexual-assault/cefta/* (detailing Stop Abusive And Violent Environments' model bill designed to bring fairness to the campus sexual assault issue. This legislation is titled the Campus Equality, Fairness, and Transparency Act (CEFTA) which supports the rights and interests of both the complainant and accused student and encourages the involvement of local criminal justice authorities).

[296] *See e.g., Yu v. Vassar Coll.*, 2015 US Dist. Lexis 43253 *37 (maintain the "general consensus . . . .[is] that 'at most the student has a right to get the advice of a lawyer; the lawyer need not be allowed to participate in the proceeding in the usual way of trial counsel. . . .'")(quoting *Johnson v. Temple Univ,-Of Commonwealth Svs. of Higher Educ.*, 2013 U.S. Dist. LEXIS 134640, 2013 WL 5298484, at *10 (E.D. Pa. Sept. 19, 2013) (quoting Osteen v. Henley, 13 F.3d 221, 225 (7th Cir. 1993))).

[297] *John Doe 1 v. Cummins*, 2016 WL 7093996.

[298] *Id.*, *10 (stating: "We have recognized that a student may have a constitutional right to counsel in academic disciplinary proceedings where the hearing is unusually complex or when the university itself utilizes an attorney. *See Flaim*, 418 F.3d at 640 (citing *Jaksa*, 597 F.Supp. at 1252). Neither scenario is present here. And appellants fare no better under *Mathews* balancing. Although appellants' advisors were not allowed to actively participate in the hearing, they were still permitted to be present and advise appellants in presenting their cases. The added benefit of allowing active participation by an advisor here is minimal given the limited cross-examination of witnesses, the lack of complexity, and the fact that knowledge of evidentiary rules was not required. Moreover, the burden on UC of allowing this level of participation by counsel in every disciplinary hearing would be significant due to the added time, expense, and increased procedural complexity. *See Flaim*, 418 F.3d at 640–41 ('Full-scale adversarial hearings in school disciplinary proceedings have never been required by the Due Process Clause and conducting these types of hearings with professional counsel would entail significant expense and additional procedural complexity.'). The inability of appellants' advisors to actively participate in their hearings, therefore, does not present a due-process violation under *Mathews*."). *Id.*, *13 (finding plaintiffs' 'alleged

process" may allow attorneys to actively participate in university level disciplinary proceedings when the student faces criminal charges related to the disciplinary proceeding.[299]

Although universities often insist attorneys in Title IX disciplinary proceedings must assume the role of "potted plants," attorneys sometimes workaround these restrictions. For instance, some attorneys assist clients with ghostwriting documentation during disciplinary proceedings. This documentation includes: (a) emails to college employees involved in the disciplinary proceeding; (b) responses to accuser's allegations and/or investigators' reports; (c) opening and closing statements; (d) cross examination and direct questions to be asked at hearings; and (e) appeals of disciplinary findings.[300] Falsely accused students engaging attorneys familiar with preparing these types of documents can greatly increase their chances of being found "not responsible" and/or developing facts necessary for a Title IX complaint. This is because attorneys who regularly represent falsely accused students are better equipped to navigate the Stalinist disciplinary proceedings employed by many universities.

One example of the star-chamber qualities of some Title IX proceedings are barriers universities erect to prohibit the exposure of the truth by prohibiting the accused student from presenting witnesses or cross-examining his accuser or her witnesses. Fortunately, many district courts have determined a university's denial of a student's opportunity to present witnesses can

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due-process violations—e.g. . . . the limited access to an advisor' cannot substantiate Title IX claims because plaintiffs "fail to show how these alleged procedural deficiencies are connected to gender-bias.").

[299] *Doe v. The Ohio State Univ.*, 2016 WL 6581843, *10 (citing *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005)).

[300] It should be noted, some universities erect roadblocks that prohibit falsely accused students from having attorney/advisors that help students defend themselves. For instance, Stanford University's "Student Title IX Process" provides: "[w]hile an advisor may offer guidance to a party, each party is expected to submit their own work, which should be signed by the party attesting it is their work. The Support Person may not speak or advocate on behalf of the party in University proceedings. Stanford students are expected to speak for themselves, and express themselves, including in writing, on all matters relating to University concerns, including Title IX-related matters and Prohibited Conduct. Any Support Person who violates these expectations may be directed to resign as the Support Person." https://titleix.stanford.edu/investigationgrievance-administrative-policy-and-procedures. Policies such as these violate the letter and spirit of VAWA and/or the Cleary Act. Moreover, Stanford's limitation of students' advocacy abilities may have triggered a student backlash as detailed in Stanfordreview.org's Feb. 7, 2016 article entitled *Dear Betsy: Restore Justice to Title IX*. https://stanfordreview.org/dearbetsy-restorejusticetotitleixc7c72df7616c#.dys995lkg. In this article, Stanfordreview.org's editorial board detailed how Stanford's implementation of OCR's "preponderance of evidence" standard is a "lose-lose" for both accusers and accused students. *Id.* For example, this article noted: "[r]ather than imposing legally dubious standards that failed to stem the tide of sexual assault, the Department of Education should allow colleges to pioneer their own, more effective sexual assault investigation policies. We could imagine a burden of proof proportional to the punishment: low evidence could result in the victim or accused being moved to a different residence hall, while clear and convincing evidence could trigger expulsion. Individually tailored policies would serve justice while still protecting due process so long as Title IX's other requirements remain in place." *Id.*

trigger a flawed proceeding.[301] Additionally, a university's disregard of exculpatory evidence and or obstructionism during disciplinary proceedings can trigger Title IX liability.[302] Numerous district courts have also determined Title IX liability can occur when students accused of sexual misconduct are prohibited from questioning their accused and/or witnesses.[303]

But, district courts have also determined universities may require students to submit their questions to panel members and allow the panel to decide which questions to ask.[304] This type of restriction is likely attributed to OCR's "Dear Colleague" letter which "strongly discouraged schools from allowing the parties personally to question or cross-examine each other during the hearing."[305]

Even so, *Vassar* noted a disciplinary panel's decision to prohibit a student from asking particular questions could be considered a Title IX violation if the questions could have caused the panel to erroneously find the student responsible.[306] Ultimately, however, *Vassar* determined the plaintiff could not establish a "genuine issue of material fact as to whether [Vassar's impediments

[301] *Sahm 2*, 110 F. Supp. 3d 774, 778-79 (finding the Title IX investigator's "discouraging a witness from testifying at the disciplinary hearing ... troubling"); *Wells v. Xavier Univ*., 7 F. Supp. 3d 746, 750 (S.D. Ohio 2014).

[302] *See e.g., George Mason Univ*., 2015 WL 5553855, at 16 (finding university's "failure to consider witness statements" when combined with other alleged flaws in the complaint satisfied the first prong of the *Yusuf* analysis); *Univ. of Mass.-Amherst*, 2015 WL 4306521, *8 (stating plaintiff's "difficulties getting information" with respect to his disciplinary along with other alleged defects was "sufficient to raise at least some questions about the outcome of his disciplinary proceeding"); *Id.* (noting "the misuse of witness testimony by the hearing board" contributed to court's determination that a flawed disciplinary proceeding occurred); *Doe v. Salisbury Univ*., 2015 WL 5005811, *13 (finding plaintiffs' Title IX complaint could not be dismissed in part because their university barred plaintiffs from reviewing witness statements and the list of witnesses prior to the hearing, and failed to provide plaintiffs with all evidence that was to be presented to the Board."); *Wash. & Lee Univ.*, 2015 WL 4647996, *10 (finding a flawed disciplinary proceeding occurred in part because of "critical omissions" by university investigators in preparing witness summaries).

[303] See, e.g., *Doe v. Salisbury*, 2015 WL 5005811, *13 (discussing concerns with a university's denial of plaintiffs' ability to ask witnesses particular questions); *Univ. of Mass.-Amherst*, 2015 WL 4306521, *8 (finding "limits placed on [the plaintiff's] ability to cross-examine witnesses" in conjunction with other procedural flaws was "sufficient to raise at least some questions about the outcome of his disciplinary proceeding"); *Brandeis*, 2016 U.S. Dist. Lexis 43499, *13-14 (discussing a lack of cross-examination in a university disciplinary hearing as follows: [h]ere, there were essentially no third-party witnesses to any of the events in question, and there does not appear to have been any contemporary corroborating evidence. The entire investigation thus turned on the credibility of the accuser and the accused. Under the circumstances, the lack of an opportunity for cross-examination may have had a very substantial effect on the fairness of the proceeding."). *See also Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir. 1972)(noting; "if this case had resolved itself into a problem of credibility, cross examination of witnesses might have been essential to a fair hearing.").

[304] *Yu v. Vassar Coll*., 97 F. Supp. 3d 448, 465-66 (S.D.N.Y. 2015).

[305] Dear Colleague Letter, at p.12.

[306] *Yu v. Vassar Coll*., 97 F. Supp. 3d 448, 465-66 (S.D.N.Y. 2015).

to plaintiff asking questions] led to an erroneous outcome *or* was motivated by gender-bias."[307] Regarding the erroneous outcome prong, *Vassar* maintained the plaintiff could not: (a) identify the questions the hearing panel refused to ask; (b) prove the questions were "relevant to the proceedings;" (c) establish that the questions were not "redundant"; or (d) detail how plaintiff was "prejudiced" by the hearing panel's refusal to ask the questions.[308]

Similarly, within the due process context, the Eleventh Circuit's *Nash* decision determined there "was no denial of appellants' constitutional rights to due process [during a university disciplinary proceeding] by their inability to question the adverse witnesses *in the usual, adversarial manner*."[309] In *Cummins,* the Sixth Circuit cited *Nash* in dismissing due process claims filed by male students who alleged unlawful discipline by the University of Cincinnati.[310] But, the Sixth Circuit determined a complete denial of a student's rights to cross examination could trigger a valid due process claim if the student's potential disciplinary penalties involved "[l]ong[] suspensions or expulsions."[311] In addition, just prior to *Cummins*, two district courts in Ohio acknowledged the importance of cross examination in college Title IX disciplinary hearings within the context of a due process claims filed against OSU and the University of Cincinnati.[312] Specifically, both courts noted: " . . . where a disciplinary proceeding depends on 'a choice between believing an accuser and an accused . . . cross-examination is not only beneficial, but essential to due process."[313]

In the *Univ. of Cincinnati* decision, the court determined "cross-examination was essential to due process" because university adjudicators lacked "'particularized knowledge of a student's trustworthiness that exists in a high school with a smaller student population."[314] Consequently, the court found the university denied the plaintiff the right to cross examine his accuser with: (a) questions at the disciplinary hearing, or (b) written questions submitted to the hearing panel in the event his accuser did not appear at the hearing.[315] However, *Ohio State University* found no error

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[307] *Id.,* (quoting *Donohue v. Baker,* 976 F. Supp. 136,147 (N.D.N.Y. 1997)(emphasis added).

[308] *Id.,*

[309] *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987)(emphasis added); *Yu v. Vassar Coll.,* 97 F. Supp. 3d 448, 465-66 (same).

[310] *John Doe 1 v. Cummins,* 2016 WL 7093996, *10 (discussing *Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987*). *Id.,* *13 (finding plaintiffs' "alleged due-process violations—e.g., the limited right to cross-examination" cannot substantiate Title IX claims because plaintiffs "fail to show how these alleged procedural deficiencies are connected to gender-bias).

[311] *Id.*, *10 (discussing *Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987*)(quoting *Goss v. Lopez,* 419 U.S. 565, 584 (1975).

[312] *Doe v. The Ohio State Univ.,* 2016 WL 6581843, *10 (quoting *Flaim v. Med. Coll. of Ohio,* 418 F.3d 629, 641 (6th Cir. 2005)). *Doe v. Univ. of Cincinnati* 2016 WL 6996194, *4-5 (same).

[313] *Id.*

[314] *Doe v. Univ. of Cincinnati* 2016 WL 6996194, *4-5 (citing *Newsome v. Batavia Local School District,* 842 F.2d 920 (6th Cir. 1988)).

[315] *Id.* (noting: "The Student Code of Conduct provides: '[t]he accused and the complainant shall have the right to submit evidence and written questions to be asked of all adverse witnesses who testify in the

in a hearing panel's "re-wording[]" of questions plaintiff wished to ask his accuser in a sexual misconduct hearing.[316]

In *Heredia,* a state court addressed a male student's rights to cross examine his accuser in a case which did not involve a Title IX claim.[317] The university received the plaintiff's written cross examination questions but failed to include the questions in the "record" required for "judicial review" under Washington state law.[318] Fortunately, the record reflected how the university did not honor plaintiff's request that his accuser be asked questions about a text message she sent a friend suggesting the accuser wanted to interact sexually with plaintiff on the night in question.[319] In remanding the case to the university for a new hearing, *Heredia* stated:

> "The credibility of the [accuser] and [plaintiff] was a primary issue that each Board member had to resolve . . . [and] the existence of the 'Shackin' text message, which was purportedly the subject of some of [plaintiff's] written cross-examination questions, was highly relevant to the issue of consent and to [accuser's] credibility."[320]

Although it is impossible to read the tea leaves to predict where future courts will travel regarding a Title IX student's right to question his accuser and/or adverse witnesses, students should – when appropriate – ensure the disciplinary record includes documents detailing the

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matter. The hearing chair, in consultation with the ARC, has the right to review and determine which written questions will be asked.'").

[316] *Doe v. The Ohio State Univ.,* 2016 WL 6581843, *10 (finding, "none of the panel's re-wordings so blunted Doe's questions as to render them useless. Furthermore, nothing prevented Doe from arguing these points in his closing statement. Further still, all of the questions Doe alleges the panel re-worded do not so alter their content that the panel could not understand their significance.").

[317] *Handout 20* (containing *Heredia v. Wash. State Univ.*, Case No. 16-2-000085-0, Whitman County Superior Court, Oct. 12 2016 Memorandum Decision and Order On Judicial Review of Administrative Order). It should be noted, some states like Washington, Arizona, California, and Tennessee have laws that allow students to appeal some types of university level disciplinary proceedings to state courts. In these types of states, falsely accused students who do not avail themselves to administrative appeals may find their lawsuits dismissed under a Title VII doctrine which allows employers to dismiss lawsuits if plaintiffs did not exhaust their administrative remedies. In addition, students filing administrative appeals should include §1983 and/or Title IX arguments within these appeals because at least one federal district court determined the doctrine of *res judicata* barred a falsely accused male student/plaintiff from prosecuting §1983 claims and other causes of actions not contained in his earlier state court filed pursuant to Arizona's Administrative Review Act. *See generally, Handout 23* (containing *Hemington v. Arizona Bd. of Regents,* No.CV-11-58-TUC-FRZ (D.AZ. July 1, 2015).

[318] *Id.,* p.7.

[319] *Id.,* p.4-5.

[320] *Id.,* p.8. *See also, Handout 21* (containing *Arishi v. Washington State Univ.*, Case No. 33306-0-III, Wash. St. Ct. of Appeals Div. III, Dec. 1 2016 in which a Washington Court of appeals determined Washington State University violated a student's rights by not engaging in a "brief" disciplinary proceeding instead of a "full adjudication" proceeding which are required for sexual misconduct allegations which "amount to a felony under criminal law" or trigger a potential "expulsion" sanction).

questions they want asked. That way, in subsequent litigation, these students can circumvent pitfalls in cases like *Vassar* by articulating how their university's failure to ask these questions triggered Title IX violations.

(I) Flawed university investigations of allegations of sexual misconduct

Plaintiffs often base Title IX claims on their university's flawed and/or gender-biased investigation of allegations of sexual misconduct.[321] In fact, at least one Title IX plaintiff brought breach of contract and tort claims against his university's third-party investigator.[322] In advancing claims based on flawed investigations, *Bleiler* suggested plaintiffs look beyond the four corners of university polices to OCR's Dear Colleague Letter which states:

> ". . . *a school's investigation* and hearing processes *cannot be equitable unless they are impartial*[,] [t]herefore, *any real or perceived conflict of interest between the fact-finder* or decision-maker *and the parties should be disclosed*' . . . [e]very person involved in implementing the procedures and deciding a complaint in a sexual violence case 'should have adequate training or knowledge regarding sexual violence.'[323]

Moreover, if universities allege their policies need not incorporate OCR mandates that might benefit the accused, plaintiffs should look to the Cleary Act which codified many OCR mandates.[324] But, facts matter. This is because *Vassar* determined a plaintiff did not establish a

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[321] *See e.g., Handout 13* (containing Title IX complaint filed by Eric Rosenberg's clients against Denison University).

[322] *Id.* It should be noted, many of complaints filed by Rosenberg & Ball's Title IX clients also include tort claims against their false accusers. *Id.* During university level disciplinary proceedings, these clients often advise their universities and accusers that they will be forced to file a lawsuit if they are erroneously found responsible. *Id.* Threatened litigation was addressed in *Ha v. Northwestern Univ.*, No. 14 C 895, 2014 WL 5893292 (N.D. Ill. Nov. 13, 2014)). In that case, a female Title IX plaintiff alleged a college professor-who she claimed sexually assaulted her - engaged in retaliation by threatening to "to file a defamation lawsuit . . . ." *Id.*, *2. But, *Ha* rejected this argument stating: "the threatened suit does not constitute retaliation either. *Mlyncxak v. Bodman*, 442 F.3d 1050, 1061 (7th Cir.2006) ('The lawsuit-at least in the absence of a showing not made here that it was independently an abuse of process-was not the kind of adverse action that the retaliation statute reaches.')"). *Id.,**3.

[323] *Bleiler v. Coll., of the Holy Cross*, 2013 U.S. Dist. LEXIS 127775, *9-10 (quoting OCR's 2011 Dear Colleague Letter)(emphasis added).

[324] *See e.g., 20 U.S.C. §1092(f)(8)(B)* (stating: "The policy described in subparagraph (A) shall address the following areas: (i)Education programs to promote the awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking, which shall include—(I) primary prevention and awareness programs for all incoming students and new employees, which shall include— (aa) a statement that the institution of higher education prohibits the offenses of domestic violence, dating violence, sexual assault, and stalking; (bb) the definition of domestic violence, dating violence, sexual assault, and stalking in the applicable jurisdiction; (cc) the definition of consent, in reference to sexual activity, in the applicable jurisdiction; (dd) safe and positive options for bystander intervention that may be carried out by an individual to prevent harm or intervene when there is a risk of domestic violence, dating violence, sexual assault, or stalking against a person other than such individual; (ee) information on risk reduction

Title IX claim based on a flawed investigation in part because he did not present "material evidence" favoring plaintiff's innocence which a good faith investigator would reasonably uncover during an investigation (or) anti-male gender-bias on the part of the investigator.[325] As a result, when possible, accused students should: (a) document how gender-bias taints investigators and/or

to recognize warning signs of abusive behavior and how to avoid potential attacks; and (ff) the information described in clauses (ii) through (vii); and (II) ongoing prevention and awareness campaigns for students and faculty, including information described in items (aa) through (ff) of subclause (I). (ii) Possible sanctions or protective measures that such institution may impose following a final determination of an institutional disciplinary procedure regarding rape, acquaintance rape, domestic violence, dating violence, sexual assault, or stalking. (iii)Procedures victims should follow if a sex offense, domestic violence, dating violence, sexual assault, or stalking has occurred, including information in writing about— (I) the importance of preserving evidence as may be necessary to the proof of criminal domestic violence, dating violence, sexual assault, or stalking, or in obtaining a protection order; (II) to whom the alleged offense should be reported; (III) options regarding law enforcement and campus authorities, including notification of the victim's option to— (aa) notify proper law enforcement authorities, including on-campus and local police; (bb) be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses; and (cc) decline to notify such authorities; and (IV) where applicable, the rights of victims and the institution's responsibilities regarding orders of protection, no contact orders, restraining orders, or similar lawful orders issued by a criminal, civil, or tribal court. (iv) Procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault, or stalking, which shall include a clear statement that— (I) such proceedings shall— (aa) provide a prompt, fair, and impartial investigation and resolution; and (bb) be conducted by officials who receive annual training on the issues related to domestic violence, dating violence, sexual assault, and stalking and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability; (II) the accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice; and (III) both the accuser and the accused shall be simultaneously informed, in writing, of— (aa) the outcome of any institutional disciplinary proceeding that arises from an allegation of domestic violence, dating violence, sexual assault, or stalking; (bb) the institution's procedures for the accused and the victim to appeal the results of the institutional disciplinary proceeding; (cc) of any change to the results that occurs prior to the time that such results become final; and (dd) when such results become final. (v) Information about how the institution will protect the confidentiality of victims, including how publicly-available recordkeeping will be accomplished without the inclusion of identifying information about the victim, to the extent permissible by law. (vi) Written notification of students and employees about existing counseling, health, mental health, victim advocacy, legal assistance, and other services available for victims both on-campus and in the community. (vii) Written notification of victims about options for, and available assistance in, changing academic, living, transportation, and working situations, if so requested by the victim and if such accommodations are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement. (C) A student or employee who reports to an institution of higher education that the student or employee has been a victim of domestic violence, dating violence, sexual assault, or stalking, whether the offense occurred on or off campus, shall be provided with a written explanation of the student or employee's rights and options, as described in clauses (ii) through (vii) of subparagraph (B)."

[325] *Yu v. Vassar Coll.,* 2015 US Dist. Lexis 43253 *41-49 (S.D.N.Y. 2015)(quoting *Donohue v. Baker,* 976 F. Supp. 136,147 (N.D.N.Y. 1997). *See also, Doe v. The Ohio State Univ.,* 2016 WL 6581843, *8 (rejecting plaintiff's due process claim based on inadequate and biased investigation because he "identifie[d] no violation of a clearly established right to a thorough and neutral investigation.").

others involved in disciplinary proceedings, and (b) provide investigators and adjudicators exculpatory evidence which disproves the false allegations against them, such as polygraphs, expert reports, security camera footage, medical records, and/or notarized affidavits from witnesses.

A related issue is whether universities lack Title IX authority to discipline students for allegations of sexual misconduct occurring off-campus. This issue was well researched by teams participating in the American Bar Association's 2016 moot court competition.[326] Falsely accused students in these types of disciplinary proceedings should review these briefs and/or OCR rulings that address Title IX's limits on addressing off-campus allegations of sexual misconduct.[327]

(J) Universities' violations of generally accepted rules of evidence

Attorneys involved in university level disciplinary proceedings regularly witness irreparable damage inflicted upon the falsely accused by the absence of the most basic rules of evidence such as relevancy and hearsay. Yet, courts oftentimes find defendant universities need not apply traditional evidence rules in sexual misconduct disciplinary proceedings.[328] Nevertheless, Title IX plaintiffs should not abandon evidentiary arguments if they can: (a) establish a gender-biased application of evidentiary decision making, and (b) detail how these decisions contributed to an erroneous finding that they engaged in sexual misconduct. This is partly because the Sixth Circuit's *Cummins* decision determined public universities may violate due process if plaintiffs' complaints explicitly articulate how "hearsay was actually [used] against them in their hearings."[329]

Cummins also addressed commonly used "victim impact statements" in sexual misconduct disciplinary proceedings. These statements result from university policies which request accusers detail how the alleged sexual assault impacted them. In an attempt to mirror criminal proceedings where juries do not hear this often highly prejudicial evidence unless the defendant is found guilty, university policies generally state adjudicators cannot review victim impact statements until ***after*** a student is found "responsible." This is a sound practice because attorneys regularly involved in

[326] *Handout 18* (containing ABA's 2016 Moot Court Competition Brief of Team 489).

[327] *Id., See also, Handout 19* (containing *OCR's June 10, 2004 Determination Letter Case No. 06032054 Oklahoma State Univ.* which states: "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.").

[328] *See e.g., Doe v. Brown Univ.*, 2016 WL 5409241, *21 (finding universities are not required to adjudicate sexual misconduct allegations pursuant to rules of evidence applicable in America's courts).

[329] *John Doe 1 v. Cummins*, 2016 WL 7093996, *9 (stating: "[a]ppellants make several arguments regarding the procedures actually employed at their ARC hearings, all of which ultimately fail to state a due-process violation. First, appellants challenge the use of hearsay evidence without adequate safeguards. Appellants' complaint, however, fails to indicate what hearsay was actually allowed against them in their hearings. The only reference to the use of hearsay involves appellants' initial hearings. As discussed above, any procedural deficiencies in appellants' initial hearings were cured when they received new hearings. Because there is no claim that hearsay evidence was introduced in the second hearings, this allegation is irrelevant to our analysis.").

Title IX disciplinary proceedings often see victim impact statements containing highly prejudicial hearsay and inflammatory commentary that their male clients have never seen before.

But even though university policies state adjudicators should not receive victim impact testimony prior to determining "responsibility," this testimony is commonly provided to adjudicators prior to these decisions. As a result, *Cummins* determined public universities may violate a plaintiff's due process right if adjudicators receive "victim impact testimony" ***before*** making a responsibility finding.[330] Therefore, whenever possible, Title IX complaints should: (a) identify all victim impact testimony provided to adjudicators ***prior to*** adjudicators issuing a responsibility finding; (b) identify how this testimony caused erroneous results; and (c) detail – if necessary through "information and belief" allegations – how gender-bias caused adjudicators to rely on victim impact testimony in rendering an erroneous responsibility finding.

(K) Expungement of sexual misconduct disciplinary from university records

The primary motivation of most male plaintiffs who file Title IX claims is the removal of erroneous sexual misconduct findings from the student's academic record. This is because such a notations devastate the student's educational and lifetime career opportunities, earnings potential, and emotional well-being. For, as the *Brandeis* Court found:

> " . . . . the stakes [male college students face in sexual misconduct disciplinary proceedings are] very high . . . carry[ing] the potential for substantial public condemnation and disgrace. . . . . [which] may permanently scar [the student's] life and career."[331]

[330] *Id.*, *9 (noting: "[w]hile due process does not necessarily require that formal 'rules of evidence, [or] rules of civil or criminal procedure' be applied in a school-disciplinary setting, *Flaim*, 418 F.3d at 635, this allegation is potentially problematic under *Mathews.* Exposure to victim-impact statements prior to an adjudication on the merits may prejudice the accused and lead to an erroneous outcome based on emotion, as opposed to reason. This is especially true in Doe II's case given that the victim testified that Doe II was 'a rapist' and was 'going to Hell.' . . . But UC has a strong interest in avoiding the bifurcation of proceedings into multiple phases—i.e., a guilt phase and a punishment phase—that would add time, expense, and complexity to every disciplinary hearing. Additionally, there were procedural protections in place to counteract any potential for error from allowing the victims' statements, including the panel's ability to make credibility determinations of the victims' statements and appellants' own opportunity to refute the victims' accounts. Moreover, the limited prejudicial impact of allowing the ARC panels to consider the victim-impact statements prior to determining appellants' responsibility is illustrated in this case. Although the victim's statements in Doe II's hearing were more prejudicial than those in Doe I's, Doe II ultimately received a more lenient punishment. On balance, therefore, we find that the introduction of victim-impact statements prior to determining appellants' responsibility did not impact appellants' due-process rights under *Mathews*.')(citing *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005) and *Mathews v. Eldridge*, 424 U.S. 319, (1976)).").

[331] *Brandeis*, 2016 U.S. Dist. Lexis 43499, *109.

Similarly, Second Circuit Judge Edith Jones noted in her dissenting opinion in a Title IX case that:

> "Sexual assault is not plagiarism . . . [i]ts ramifications are more longlasting and stigmatizing in today's society. The University wants to have it both ways, degrading the integrity of its factfinding procedures, while congratulating itself for vigorously attacking campus sexual misconduct. Overprosecution is nothing to boast about."[332]

In attempting to avoid these scars, it is important to note the Sixth Circuit's *Cummins* decision determined complaints seeking the expungement of sexual misconduct disciplinary notations from a plaintiff's college records at a public university: (a) cannot be dismissed pursuant to the 11th Amendment, and (b) qualifies as "prospective equitable relief" amounting to a "continuing violation sufficient to trigger the *Ex Parte Young* exception"[333] In addition, plaintiffs seeking the expungement of their records should direct courts to OCR's Wesley College decision which recommended monetary damages and the expungement of sexual misconduct disciplinary notations in male students' college transcripts when these students' Title IX rights are violated.[334]

[332] *Plummer v. Univ. of Houston*, 2017 WL 2704014, *13 (5th Cir. June 26, 2017).

[333] *John Doe 1 v. Cummins*, 2016 WL 7093996, *6 (discussing *Ex Parte Young*, 209 U.S. 123, 155–56 (1908).

[334] OFFICE FOR CIVIL RIGHTS LETTER TO ROBERT E. CLARK, Oct. 12, 2016, *available at:* http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pd. p. 28 (stating: "[i]n accordance with the Agreement, the College agrees to . . . provide specific remedial actions if warranted, including, but not limited to, removal of each expulsion from all relevant educational records, as well as an offer to allow the accused Student and/or Students 1, 2 and 3 to complete their degrees at the College and reimburse them for documented costs incurred for enrollment at a different educational institution, and any other appropriate measure.").