Fifth Annual Symposium on Representing Students Accused of Sexual Assault Misconduct In a Rapidly Changing Legal Landscape

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The Next Frontier: Discovery To Head Off Title IX Summary Judgment Arguments

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Recent Summary Judgment Decisions Shaping Discovery

Doe v. Colgate Univ,
(1st Cir. 2019)

Title IX claim dismissed

Doe v. Colgate Univ., No. 17-3594-cv, 2019 WL 190515 (1st Cir. Jan. 15, 2019)(affirming summary judgment dismissal of Title IX claim).

- *Id.,* *4 (affirming district court's disqualification of plaintiff's expert witness under FRE 702 because expert's "lack of experience investigating sexual assault and lack of familiarity with Title IX training and investigations rendered her unqualified to opine on the propriety of" defendant university's investigation and her "procedural conclusions" were "unhelpful to the trier of fact.").

- *Id.,* *5 (affirming district court summary judgment dismissal of Title IX claim because plaintiff failed to "explain" how the following events resulted in gender bias on the part of the University: (a) "Sexual Climate Forum that took place shortly before Jane Does 1, 2, and 3 accused [plaintiff] of misconduct," (b) "a 2011 letter from the United States Department of Education's Office for Civil Rights," and (c) a "'Winter Message' from the University's president concerning sexual harassment.").

- *Id.,* *5 (rejecting plaintiff's gender bias arguments based on Title IX training provided by university employee that "sometimes refer[ed] to complainants using female pronouns and respondents with male pronouns because in her experience, most complainants were female and most respondents were male."). *Colgate* found this "insufficient evidence to demonstrate that John Doe was expelled based on gender bias" because there was "no indication that [employee's] use of such pronouns reflects anything more than the statistical reality that most respondents are men and most complainants are women, nor that calling complainants of any gender "victims" or "survivors" when speaking to them reflects gender bias, rather than a desire to be sensitive. In addition, the allegation that EGP staff

members were trained to be biased against men is not supported by the record of dispositions decided by EGP panels during the relevant time period: between 2012 and 2015, *three male respondents were found not responsible for any charges against them and two other male respondents were found not responsible for the most serious charges against them, compared with only three male respondents who were found responsible for the most serious charges against them during the same time period (in addition to John Doe) and one male respondent who admitted responsibility*." *Id.,* *6 (emphasis added)(emphasis added).

- *Id.,* *6 (rejecting plaintiff's gender bias arguments based on investigator's bias stemming from her "background as a female former police detective who investigated sexual offenses.") *Colgate* reached this decision by finding the investigators statements/conduct regarding the following issues did not manifest bias against men: (a) statements about how "most victims tell the truth, and that when a long time passes between an incident and a complaint, the memory issues that arise tend to be about specific details rather than whether an incident happened or not," (b) questions to respondents "to the effect of, 'can you think of any reason these women would say this happened if it didn't,'" and (c) posing questions to plaintiff that suggested she assumed he was responsible.) *Id.* In discussing these issues the court noted the investigators: "question to respondents about why a complainant might have said something "happened if it didn't" invites the respondent to inform the investigator of any reason the complainant might have to make a false accusation, such as animosity toward the respondent. [Investigator's] statements about the possibility that complainants may, after the passage of time, have faded memories concerning the details of an event, while still retaining a clear memory of whether it happened does not, on its face, evince bias."

- *Id.,* *6 (finding university employee's "decision to have the same hearing panel decide all three complaints against [plaintiff] . . . does not raise a genuine issue that [employee] was motivated by gender bias, especially because [the employee] provided legitimate, gender-neutral explanations to support her decision."

- *Id.,* *7 (determining plaintiff could not establish gender bias based on accommodations given to complainants – but not to plaintiff - because plaintiff did not establish he "requested and was denied" these accommodations).

- *Id.,* *7 (finding gender bias did not motivate university's rejections of plaintiff's requests for additional time to prepare for hearings.)

- *Id.,* *7 (determining hearing panel did not manifest gender bias because: (a) plaintiff "does not explain how a question about "whether he took responsibility for the charges against him" evidenced "gender bias;" (b) conflict of interest concerns about two panel members lacked merit because panel members testified they were not familiar with the complainants; and (c) a review of the "recording[s] of all three hearings" did not substantiate plaintiff's "subjective perception and speculation" about the panel members' bias).

- *Id.,* *7 (rejecting plaintiff's gender bias arguments based on hearing panel members'

"believ[ing] Jane Does 1, 2, and 3 despite their alleged credibility problems and the inconsistencies in their stories" because "by believing each complainant rather than John Doe, the panel effectively decided that sexual misconduct was more likely to have occurred than not, because each complainant indicated misconduct had occurred that John Doe denied." *Id.*

- *Id.,* *8 (finding university employee's rejection of plaintiff's appeal was not based on gender bias related to her "regularly attend[ing] sexual assault awareness events around campus, Women's Studies Brown Bag Lunches, and [reputation] as someone who 'worked tirelessly on the issue of . . . survivor support' . . . ."). In reaching this decision, *Colgate* noted the university employee's rejection of plaintiff's appeal conformed with university policy. *Id.*

  See also *–Title IX Findings from District Court Decision - Doe v. Colgate Univ.,* Case No. 5:15-cv-1069, 2017 WL 4990629, *8 (N.D.NY. Oct. 31, 2017)(dismissing Title IX claim in summary judgment in part because plaintiff's expert witnesses' opinions regarding the "2011 DCL does not provide insight into the beliefs of administrators incorporating its requirements into their Title IX programs. A "[u]niversity's adoption of positions recommended by the federal government does not in turn suggest that the [u]niversity did so because of gender bias—all it plausibly suggests is that the [u]niversity sought to comply with OCR's recommendations.").

  - *Id.*, *8 (dismissing Title IX claim in summary judgment in part because raising awareness of sexual assault, without drawing gendered assumptions about males, does not raise an inference of anti-male bias.").

  - *Id.,* *15 (N.D.NY. Oct. 31, 2017)(granting motion for summary judgment in Title IX case in part because investigator's previous handling of "sexual assault cases while working for law enforcement" does not independently suggest gender bias against men).

  - *Id.,* *14 (dismissing Title IX claim in summary judgment based in part on: (a) biased training material because the "limited use of gendered pronouns in one training presentation . . . [is] too benign and isolated to permit an inference that [the] training materials caused the training's attendees to become gender-biased," and (b) plaintiff's inability to show university employee "implemented" the "strategies" of an "ATIXA representative" who "advised" defendant university's employee "to implement several allegedly biased strategies in Title IX implementation.");

  - *Id.,* *15 (granting motion for summary judgment in Title IX case investigator's "belief that complainants tell the truth does not reflect gender bias because males can also be victims of sexual assault.");

  - *Id.,* *10 (N.D.NY. Oct. 31, 2017)(dismissing Title IX claim in summary judgment in part because plaintiff's allegation that "male respondents in sexual

misconduct cases . . . are invariably found guilty, regardless of the evidence" was false because "between 2012–14, Colgate held nine EGP hearings related to sexual misconduct (in addition to Plaintiff's), all involving male respondents . . . Three respondents were found responsible and expelled, two were found responsible of only some of the alleged violations and received less severe sanctions, one 'accepted responsibility and received probation and a housing ban,' and three were found not responsible.").

- *See also, Id.,* *8 (finding no "conflict of interest" occurred when plaintiff's accuser asked plaintiff's investigator to speak at a "Sexual Climate Forum" because the investigator "had 'very limited' communication with [accuser] and 'did not develop any familiarity with her,' and therefore did not deem it necessary to recuse herself" from university's investigation of plaintiff).

Contract claim dismissed

Doe v. Colgate Univ., No. 17-3594-cv 2019 WL 190515 (1st Cir. Jan. 15, 2019)(affirming summary judgment dismissal breach of contract and duty of good faith and fair dealing claims after determining plaintiff waived his ability to raise these issues).

NOTE: Doe v. Colgate Univ., Case No. 5:15-cv-1069, 2017 WL 4990629, *8 (N.D.NY. Oct. 31, 2017)(granting motion for summary judgment of breach of contract claim based on breach of policy stating it was the "University aims to complete all investigations within a 60-day calendar period" because the "words 'aim to' indicate that the goal of completing investigations within sixty calendar days is an "aspirational" statement that "is not enforceable" as a contractual obligation. *l*

- *Id.,* *22 (finding university did not breach its contract with plaintiff to provide "a rationale" disciplinary decision where decision "stated that '[t]he Hearing Panel received conflicting accounts of the events in question,' and that the panel found Plaintiff responsible because the panelists found the applicable complainant's 'account to be more credible.'"). *But see, Id.,* *24 (noting plaintiff "did not depose the [hearing] panelists to illuminate any credibility issues, and makes no effort to locate record evidence that would create an issue of fact with respect to the veracity of their testimony.").

- *Id.,* *22-23 (determining university did not breach anti-retaliation policy provision related to peer-on-peer retaliation against students engaging in Title IX proceedings because: (a) "students antagonized [plaintiff] 'for assisting in' the investigation into the Jane Does' complaints rather than 'because [the students] believed he had engaged in the acts of which he was accused;'' (b) plaintiff did not file complaint with university; and (c) "there was little that the University could do to address [peer-on-peer social media harassment] since they 'were entirely anonymous and no one (including [Plaintiff]) knows who posted them.'").

Doe v. Trustees of Boston College
(1st Cir. 2018)

Title IX claim dismissed

Doe v. Trustees of Boston College, 892 F.3d 67, 90-94 (1st Cir. 2018)(affirming dismissal of Title IX claims in summary judgment because plaintiff failed to present "direct or circumstantial" evidence that the outcome of his disciplinary proceeding was motivated by gender bias).

- Plaintiff's gender bias evidence included the fact that "between August 1, 2005 and July 1, 2015, only male students have been accused of sexual assault." *Id.,* 92. The First Circuit rejected this argument because no sexual misconduct complaints had been filed against female students and therefore the "gender makeup of the sexual misconduct cases" was driven by "non-biased reasons." *Id.*

- The First Circuit rejected plaintiff's gender bias arguments regarding university policies use of terms like: "victim," "survivor," "alleged perpetrator," "complainant," or "accused student" because plaintiff presented no evidence that the university identified these terms with the gender of students involved in disciplinary proceedings. *Id*

- Similarly, the First Circuit rejected plaintiff's arguments that his discipline was "influenced by outside" federal pressure related to OCR's April 2011 'Dear Colleague' Letter. *Id.* This was because plaintiffs did "not explained how the Dear Colleague Letter reflects or espouses gender bias . . . [or] infected the proceedings at issue here with gender bias." *Id.*

Contract claims to Jury

Doe v. Trustees of Boston College, 892 F.3d 67, 86 (1st Cir. 2018)(reversing summary judgment decision in breach of contract claim because a university dean told "the Board Chair in the middle of deliberations that one of the verdict options favorable to [plaintiff] ("no finding") was discouraged." The First Circuit reached this conclusion because "it is reasonable for a student to expect that the [handbook's] language stating that "[t]he Board will meet in private to determine whether the accused is responsible or not[,]" means exclusion of outside influences in the Board's deliberations." *Id.*

- *Id.* 87 (reversing summary judgment decision in breach of contract claim because a university dean may have violated handbook's "fair procedure" provision by making comments that could be interpreted as suggesting adjudicators "give special treatment to the prime alternative culprit in a case in which [plaintiff's] key defense is that someone other than [plaintiff] committed the alleged sexual assault.") In doing so, the First Circuit noted: "it is reasonable for a student to expect that a school's basic fairness guarantee excludes outside influences in the Board's deliberations, it is also reasonable for a student to expect that a basic fairness guarantee excludes having an associate Dean of Students request Board members to give special treatment to the prime alternative culprit in a case in which the key defense is that someone other than the accused student committed the alleged sexual assault." *Id.*

- *Id.,* 80 (finding breach of contract claim cannot be dismissed if "facts show that the university has 'failed to meet [a student's] reasonable expectations'" of terms contained in university policies)(citing *Walker v. President & Fellows of Harv. Coll.,* 840 F.3d 57, 61 (1st Cir. 2016); *Cloud v. Trs. of Bos. Univ.,* 720 F.2d 721, 724-25 (1st Cir. 1983).

- *Id.,* 87-88 (reversing summary judgment dismissal of breach of implied covenant of good faith and fair dealing claim because a reasonable juror might determine university violated "basic fairness obligation[s]" located in: (1) student handbook provision that states the "disciplinary process 'exists to protect the rights of the Boston College community and assure fundamental fairness to complainants and to students accused of any breach of the University Code of Student Conduct,' and (2) an independent duty to conduct disciplinary procedures with basic fairness imposed by Massachusetts law.").

- *But see, Id.,* 80-81 (finding university did not breach terms of student handbook by charging plaintiff before interviewing him because handbook stated: "[a] case may be referred directly to a Student Conduct Board or an Administrative Hearing Board if the Dean ... feels that such a referral is appropriate.").

- *See also, Id.,* 81-82 (finding university did not breach terms of student handbook by charging plaintiff before university police conducted an investigation because handbook did not explicitly mandate investigations by university police).

- *See also, Id.,* 82 (determining no breach of student handbook when adjudicators did not wait for a forensic test to become available before disciplining plaintiff because handbook "did not require [adjudicators] to wait for all evidence to become available before . . . reach[ing] a decision."). *Id.,* (noting if adjudicators "had decided to wait for the [forensic test]" they would have breached handbook's "contractual obligation to 'resolve the complaint within [sixty] days.'").

- *See also, Id.,*82-83 (determining no breach of student handbook when university refused to stay disciplinary proceedings against plaintiff/student while criminal case against him were pending because handbook gave university discretion to grant such a stay).

- *See also, Id.,* 82 (determining university complied with student handbook mandates regarding training of adjudicators of claims against student/plaintiff because handbook did not require adjudicators "to have any particular investigatory training in order to be part of the Board . . . and the record shows that all [adjudicators] in the case at hand received [the university's prescribed training before" adjudicating plaintiff's charges).
    - Plaintiff's training argument hinged on defendant university's report which determined the university's "sexual assault trainings for Hearing Board members were insufficient according to 'best practices.'"). *Id.,* 84. The First Circuit rejected this argument because after this report was issued, the adjudicators in plaintiff's case received additional trainings which university developed to address shortcomings in said report. *Id.,* 85.

- *See also, Id.,* 83-84 (rejecting plaintiff's claim that adjudicator's hostility towards plaintiff during "disciplinary proceedings was evidence of bias and a breach of the impartiality requirement" in student handbook). In doing so, the First Circuit noted plaintiff's allegations regarding the adjudicator's hostility did not rebut the "presumption [of impartiality that] favors adjudicators issuing university disciplinary proceedings. *Id.,* 84.
    - To establish evidence sufficient to refute a motion for summary judgment regarding this issue, the First Circuit suggested plaintiff would have need to produce "other evidence of bias showing that the Board was either prejudiced or partial against Doe." *Id.*

- *See also, Id.,* 88-89 (finding e-mail communications between university president and student's parents did not form a contract under Massachusetts law because of a lack of consideration). Specifically, the First Circuit determined no consideration occurred because the record did not suggest the university president's statements were intended as "a contractual offer or promise made to persuade [plaintiffs] to abandon a [threatened] lawsuit." *Id.,* 89.

Negligence and NIOED claims dismissed.

Doe v. Trustees of Boston College, 892 F.3d 67, 94-95 (1st Cir. 2018)(affirming dismissal of negligence and negligent infliction of emotional distress claims in summary judgment because university did not owe a duty, independent of contractual relationship, to student/plaintiff under Massachusetts law). In reaching this decision, the First Circuit noted: "[b]ecause it is clear that Doe's disciplinary proceedings arose from this contractual relationship, we hold that [Boston College] did not owe the Does any additional independent duty outside of their existing contractual relationship. Any remedy for a breach of this contractual obligation must sound in contract, not in tort." *Id.,* 94.

Doe v. Valencia Coll.

(11th Cir. 2018)

Title IX claim dismissed

Doe v. Valencia College, No. 17-12562, 2018 WL 4354223, *12 (11th Cir. Sept. 13, 2018)(affirming summary judgment dismissal of Title IX erroneous result claim because: (a) plaintiff incorrectly believed defendant college "could not regulate off-campus conduct," and (b) plaintiff admitted engaging in prohibited conduct).

1st Amendment claim dismissed

Id., *5-6 (affirming dismissal of First Amendment claim after finding college justified in suspending plaintiff for 1 year for sending unwanted messages to female student - between summer and fall classes – after she repeatedly told him to stop sending messages).

Due Process claims dismissed

- *Id.,* *11 (finding Plaintiff precluded from making procedural due process claim because he did not seek said relief via certiorari proceeding based on Florida law which was the proper venue for raising his alleged procedural deprivation concerns).

- *Id.,* *11 (affirming dismissal of plaintiff's substantive due process claim because "students at a public university do not have a fundamental right to continued enrollment.").

Powell v. Montana State

(2018 Decision From District Court in 9th Cir. Court of Appeals)

Title IX claim for jury

Powell v. Montana State Univ., No. 2:17-cv-15 SEH, 2018 WL 6728061 (D.MT Dec. 21, 2018)(rejecting motion for summary judgment regarding male plaintiff's Title IX claim based on university: (a) disciplining plaintiff for his comments about transgender student Myka Perry ("Perry") while not disciplining Perry for "showing a pocket knife when asked about her concerns about a potential encounter with" plaintiff; and (b) "discriminat[ing] against [plaintiff] based on his gender by conducting a biased investigation in favor of Perry.")

- In evaluating these claims, the court determined "Shaffer's treatment of Perry during the investigation could be found to have been biased." *Id.,*8. As a result, the court determined the "disparate treatment between [plaintiff] and Perry, as claimed by [plaintiff], occurred, and whether, if it did occur, it can be said MSU acted erroneously, cannot be resolved as a matter of law at this point." *Id.*

Due Process claim for jury

Powell v. Montana State Univ., No. 2:17-cv-15 SEH, 2018 WL 6728061, *7-8 (MT Dec. 21, 2018)(rejecting motion for summary judgment regarding plaintiff's procedural due process claim because "issues of bias on the part of persons . . . charged with the responsibility to undertake and carry out the investigation and disciplinary process" that may have "unfairly prejudged" the university's investigation of plaintiff).

- *Id.,* *7 (citing lack of cross examination as basis for rejecting university's summary judgment motion to dismiss a procedural due process claim because "[i]f a university is faced with competing narratives about potential misconduct, the administration must facilitate some form of cross-examination in order to satisfy due process.")

Rossley Jr. v. Drake Univ.
(2018 Decision From District Court in 8th Cir. Court of Appeals)

Title IX – selective enforcement claim to jury

Rossley Jr. v. Drake Univ. et al., 342 F.Supp.3d 904, 933-34 (S.D.IA Oct. 2018)(rejecting summary judgment motion regarding selective enforcement claim because issues of fact related to whether university "dissuaded" plaintiff from filing a sexual misconduct complaint against his accuser Jane Doe).

- Regarding this issue, *Rossley* noted:
    - "Plaintiff claims he chose not to initiate his complaint because he was told it would be retaliatory . . . Defendants respond that all accused students, male or female, receive the same general warning." *Id.* But, "the general warning against retaliation in the Code does not list counter-complaints as an example of retaliatory action" therefore "a reasonable jury could find Plaintiff was dissuaded from filing a complaint." *Id.*
    - "a genuine issue of material fact [exists] as to whether the allegations of Plaintiff and Jane Doe were treated differently and whether this disparate treatment was motivated by gender." *Id.,* 934. *Rossley* reached this decision because "Defendants have provided different explanations for their approach to Plaintiff's allegations. Parker is reported to have told Plaintiff's father that Plaintiff's complaint would not be investigated, while Defendants have argued that the allegations were investigated and found to be without merit." *Id.* (citing *Fitzgerald v. Action, Inc.*, 521 F.3d 867, 873 (8th Cir. 2008) for the following proposition: "defendant employer's varying explanations for its decision to terminate plaintiff employee 'raise a question [as to] the true reason for its decision.'").
    - Noting, "when contrasting the experiences of two alleged victims—one a woman and the other a man—and noting the possible disparate treatment, it is reasonable for a jury to consider gender-biased motivations based on these facts." *Id.,* 935.
        - *But see, Id.,* (citing the *St. Thomas* and *Univ. of Colo. motion to dismiss decisions* in support of the proposition that "[v]ictim-centric disciplinary proceedings do not equate to gender-biased, female-centric disciplinary proceedings.")(citing *Univ. of Colo.*, 255 F.Supp.3d at 1075, 1079; *Univ. of St. Thomas*, 240 F.Supp.3d at 991.).

Title IX – Erroneous Result Claim dismissed

Rossley Jr. v. Drake Univ. et al., 342 F.Supp.3d 904, 925-26 (S.D.IA Oct. 2018)(dismissing erroneous result claim by determining the following did not establish actionable gender bias: (1) investigators and adjudicators' decisions were "taken against the weight of the evidence" because of their gender-biased "trauma" informed views that "allowed them to explain away Jane Doe's inconsistencies and 'counterintuitive' behavior'"; and (2) "victim-centered . . . gender-bias[]"

related to: (i) females filing "most claims of sexual misconduct;" (ii) policies that identified complainants as "survivors;" and (iii) "political pressure" from OCR's "April 2011 'Dear Colleague Letter'" which threatened loss of "federal funding" and created a "female protectionist nature of campus sex tribunals" that "undercut fairness for respondents.").

- To establish gender bias, Plaintiff discussed university's outside "lead" investigator "Howell Sirna" who: (1) also served "Iowa State University's interim Title IX coordinator;" (2) worked "as a prosecutor for thirteen years and prosecuted crimes of sexual violence;" (3) received and provided training on how to handling student complaints of sexual assault; and (4) "was paired with Tricia McKinney, Drake's Assistant Director of Public Safety, to conduct the investigation." *Id.,* 912. Plaintiff' also alleged Sirna contributed to "Defendants' "[r]eliance on hearsay and crediting the female complainant despite the accumulated evidence" that established plaintiff's innocence. *Id.,* 926. Additionally, Plaintiff attributed gender bias to: "Sirna's decisions to interview some witnesses and not others . . . [and a] finding that Plaintiff's [male] roommate's testimony was not credible . . . ." *Id.*

- In support of his gender bias arguments, Plaintiff discussed hearing panel member Jerry Foxhoven's criticism of plaintiff for using his intoxication "to avoid responsibility." *Id.* Plaintiff also alleged university mishandled his "erectile dysfunction and Jane Doe's decision not to be medically examined after the alleged assault that he claims" establish his innocence. *Id.*

- Plaintiff also asserted "that because all 51 respondents in sexual misconduct disciplinary proceedings at Drake during the 2015–2016 academic year were male, the disciplinary system is infected with gender bias." *Id.,* 928. In response, the defendants noted, the "tracking chart provided by the Drake University Title IX coordinator indicates that although no respondents for sexual misconduct are labeled as female, there is no information provided about the gender of the respondent in numerous cases." *Id.,* 928. In evaluating this evidence, the court cited *motion to dismiss decisions* in support of its decision that "[e]ven when viewing the statistics as Plaintiff presents them, this data is not enough to show gender bias." *Id.* (citing *Doe v. Cummins*, 662 F. App'x 437, 454 (6th Cir. 2016) (unpublished) (reasoning there were "more innocent" causes for the gender disparity between male and female respondents in sexual-misconduct cases than gender bias); *Tsuruta v. Augustana Univ.*, No. 4:15-CV-04150-KES, 2015 WL 5838602, at *4 (D.S.D. Oct. 7, 2015) ("The fact that males are more often the subject of disciplinary (or criminal) proceedings stemming from allegations of sexual assault does not suggest that those proceedings are tainted by an improper motive.").

- *Rossley* acknowledged the Sixth and Second Circuits' differing views at the motion to dismiss stage and then distinguishes these decisions based on discovery that occurred in *Rossley. Id.,* (stating: "The Sixth Circuit, on the other hand, has reasoned it is plausible to infer gender bias from data showing all men accused of sexual misconduct during an academic year were found responsible for the alleged violation and data showing nearly ninety percent of students accused of sexual assault over several years had male first names. *Miami Univ.*, 882 F.3d at 593. As with the Second Circuit's decision in *Columbia University*, discussed above, this reasoning is distinguishable from the procedural setting of this case. *Miami University* was decided on a motion to dismiss under Rule 12(b)(6). *Id.* at 584. In noting the allegations were

sufficient to raise an inference of gender bias at the motion to dismiss stage, the Sixth Circuit noted "[d]iscovery may reveal that the alleged patterns of gender-based decision-making do not, in fact, exist." *Id.* at 594. Here, on a motion for summary judgment under Rule 56, the court finds the Court of Appeals for the First Circuit's decision in *Boston College* more persuasive. In *Boston College*, the First Circuit reasoned "after the parties have engaged in substantial discovery, a complete lack of evidence—whether direct or circumstantial—will not allow a party to survive a motion for summary judgment. Conclusory allegations are not enough." *Bos. Coll.*, 892 F.3d at 92. *As in Boston College, the Court concludes no reasonable jury could find the statistics Plaintiff relies on are anything more than conclusory allegations of gender bias*.")(emphasis added).

- Court cited *Boston College* summary judgment decision and three *motion to dismiss* decisions to support its finding that "no reasonable jury could conclude Defendants were influenced by outside pressure to carry out sexual misconduct investigations and disciplinary hearings that impermissibly favored women and unfairly punished men." *Id.,* p.929-30 (citing *Bos. Coll.*, 892 F.3d at 92–93; *Doe v. Purdue Univ.*, 281 F.Supp.3d 754, 780 (N.D. Ind. 2017); *Univ. of Colo.*, 255 F.Supp.3d at 1078 ('Moreover, pressure from the federal government to investigate sexual assault allegations more aggressively—either general pressure exerted by the Dear Colleague Letter or specific pressure exerted by an investigation directed at the University, or both—says nothing about the University's alleged desire to find men responsible because they are men.'); *Univ. of St. Thomas*, 240 F.Supp.3d at 992.").

- The court also rejected Plaintiff's expert's conclusion that "decision-makers relied on "gender biased junk science." *Id., 927-28.* Court described expert's testimony as "demonstrat[ing] the system was slanted toward Jane Doe because of the trauma-based approach . . . ." *But,* Court determined "a trauma-based approach does not mean a gender-biased one. *Id.* In support, the court cited numerous *motion to dismiss* decisions that "found a victim-centered approach does not raise an inference of gender bias." *Id.,* (quoting *Doe v. Univ. of Colo., Boulder ex rel. Bd. of Regents of Univ. of Colo.*, 255 F.Supp.3d 1064, 1075, 1076, 1079 (D. Colo. 2017) by noting "'the possibility of gender-specific stereotypes influencing [an] investigation' when the majority of accusers are women and the accused are men but agreeing with other courts that 'if anything, the inference of pro-victim bias is an obvious alternative explanation that overwhelms any potential of gender bias.'") and *Doe v. St. Thomas,* 240.3d. 984, 991 (D. Minn. 2017) and *Sahm v. Miami Univ.*, 110 F.Supp.3d 774, 778 (S.D. Ohio 2015) which the court noted granted a "motion to dismiss after finding a university official showing bias in favor of alleged victims is not equivalent to demonstrating bias against male students").

- The court "conclude[d] a victim-centered approach does not create an inference of gender bias *without evidence of gender bias in its formulation or application. Id.,* 928 (emphasis added). The court determined the plaintiff did not present this evidence because: Investigator "McKinney stated in her deposition that "people behave differently" after a traumatic event . . . When Sirna was asked if she thought Jane Doe's behavior directly after the traumatic event was relevant to her credibility, Sirna stated: "victims often engage in counterintuitive behavior after a sexual assault. It's very common for them to want to regain control, and so they go and they have sex that's consensual with somebody else." . . . Plaintiff argues a system focused on victims, even if stated in gender-neutral terms, is gender-biased because victims are women . .

. Plaintiff asserts "females being both victims and accused" is a "theoretical but non-existent possibility." . . . Plaintiff does not cite any evidence for this proposition." *Id.,*

- Court rejected plaintiff's arguments based on policy that provided "resources for victims and lists ways to prevent sexual assault but does not provide any resources for accused students." *Id.,* 928. The court did so because these policies "use[d]gender-neutral language" and plaintiff did "not show how victim-centric or trauma-informed language reveals a gender-biased approach." *Id.*

- Note: The court's dismissal of the erroneous result claim suggests a due process, contract claim, or negligence claim based on bias favoring accusing students over accused students must go to the jury. This is because the court noted: *a jury could find the statements and decisions by Defendants and the Policy itself reveal a victim-centered, trauma-informed approach, but could not find they reveal a bias toward one gender*. *Id.,* 928.

Title IX – Deliberate Indifference Claim dismissed

Rossley Jr. v. Drake Univ. et al., 342 F.Supp.3d 904, 929-30 (S.D.IA Oct. 2018)(dismissing deliberate indifference claim because plaintiff did "not claim Defendants' alleged failure to investigate" Jane Doe's sexual assault of plaintiff caused him "to experience any separate harassment following his assault.").

- In reaching this decision *Rossley* cited the Eighth Circuit's *K.T.* decision which required plaintiff "establish the discrimination was 'so severe, pervasive, and objectively offensive that it can be said to deprive [him] access to the educational opportunities or benefits provided by the school.'" *Id.,* 929 (quoting *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1057 (8th Cir. 2017)).

- *Rossley* also rejected the deliberate indifference claim because "the Eighth Circuit and other courts have noted, failure to follow Title IX regulations is not a sufficiently severe form of discrimination to give rise to a deliberate indifference claim." *Id.,* 930 (citing *Roe v. St. Louis Univ.*, 746 F.3d 874, 882, 883-84 (8th Cir. 2014); *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 169 (5th Cir. 2011); *Klocke v. Univ. of Tex. at Arlington*, No. 4:17-CV-285-A, 2018 WL 2744972, at *6 (W.D. Tex. June 7, 2018); *Doe ex rel. Doe v. Saint Paul Conservatory for the Performing Arts*, No. 17-5032 (DWF/FLN), 2018 WL 2431849, at *3 (D. Minn. May 30, 2018).

- In addition, *Rossley* noted "Plaintiff and his ultimate expulsion were triggered by Jane Doe's complaint, rather than by Plaintiff's own assertions regarding the sexual assault he allegedly experience . . . [and] Plaintiff concedes Defendants were required to investigate Jane Doe's complaint against him . . . Consequently, Defendants' decision to investigate Plaintiff and expel him cannot form the basis of his deliberate indifference claim." *Id.*

- Note: Rossley creates extremely high bar for plaintiffs by requiring they detail how University's failure to investigate the sexual misconduct of plaintiff's accuser deprived plaintiff of an educational opportunity or benefit provided by the university.

ADA claim dismissed

Rossley Jr. v. Drake Univ. et al., 342 F.Supp.3d 904, 939-41 (S.D.IA Oct. 2018)(dismissing claim based on Title III of the ADA because the court concluded: (a) "Plaintiff's argument that Defendants were on constructive notice of his need for accommodations fails as a matter of law."; (b) "even if Plaintiff's father could request an accommodation for his adult son," (i) the university was not obligated to act on this request, and (ii) "the record does not provide any indication of what accommodations [plaintiff's father] specifically requested."

Promissory Estoppel & Covenant of Good Faith claims dismissed

Rossley Jr. v. Drake Univ. et al., 342 F.Supp.3d 904, 943-44 (S.D.IA Oct. 2018)(dismissing promissory estoppel claim because: "[a]part from the plain language contained in the Code and the Policy, Plaintiff does not point to any "clear and definite" statements by Defendants relating to these alleged promises.").

- In dismissing the promissory estoppel claim, *Rossley* rejected plaintiff's reliance on statements made by university employees in depositions about how "respondents in sexual misconduct investigations must be treated fairly during the disciplinary process and are entitled to due process." *Id.* This was because plaintiff could not have relied on these statements since they were made "after" he was expelled and he did not identify comparable statements made prior to his expulsion. *Id.*

Contract Claim For Jury

Rossley Jr. v. Drake Univ. et al., 342 F.Supp.3d 904, 945-46 (S.D.IA Oct. 2018)(rejecting motion for summary judgment regarding contract claim because of disputed facts relate to whether "sex discrimination" caused university to "breach" its contract with Doe "by failing to conduct an equitable investigation of Plaintiff's allegations against Jane Doe.")(citing *Doe v. Amherst Coll.,* 238 F. Supp.3d 195, 218 (D. Mass. 2017) for the proposition that "specific factual allegations that 'the [defendant] responded differently to similar reports when the genders of the potential victims and aggressors were different' sufficient to show a breach of an agreement to hold a fair hearing to survive a motion for a judgment on the pleadings.").

But, *Rossley* rejected Doe's contract claims based on university's policies promise of "a prompt, *fair*, and *impartial*" investigation and resolution process. *Id.,* 944-45 (emphasis added). In doing so, *Rossley* claimed plaintiff: "does not demonstrate a genuine issue of material fact that shows the proceeding was not prompt, fair, and impartial." *Id.* 945.

- *Note*: *Rossley* did not reconcile the policy's contractual promise of "fair and impartial" investigations and adjudications with the court's determination that: "*a jury could find the statements and decisions by Defendants and the Policy itself*

reveal a victim-centered, trauma-informed approach, but could not find they reveal a bias toward one gender. *Id.,* 928.

Doe v. Univ. of Denver,
(2017 Decision From District Court in 2nd Cir. Court of Appeals)

Title IX claim dismissed

Doe v. Univ. of Denver, No. 16–cv–00152–PAB–KMT, 2018 WL 1304530, *10 (D. Colo. Mar. 13, 2018)(appeal pending)(dismissing in summary judgement erroneous result claim because "plaintiff's evidence as a whole . . . does not demonstrate a genuine issue of fact as to whether sexual bias was a motivating factor behind" his discipline."). Specifically, the Court noted: "[m]uch of plaintiff's evidence of differential treatment flows from the reality that the majority of complainants of sexual misconduct are female and the majority of respondents are male. As plaintiff notes, of the thirty-five sexual misconduct complaints . . . all but one of the complaints were filed by women and the vast majority of the complaints accused men of sexual misconduct. This disparity is not, however, evidence of gender bias . . . As other courts have observed, universities are "not responsible for the gender makeup of those who are accused *by other students* of sexual misconduct.")(citing *Doe v. Univ. of Colo.*, 255 F. Supp. 3d 1064, 1078 (D. Colo. 2017).

- *Id.* *10 ("The Court also does not find DU's efforts to encourage the reporting of sexual misconduct and to offer support to complainants to be inherently discriminatory . . . Plaintiff accuses DU of taking actions that had the direct effect of increasing the number of sexual misconduct complaints filed with the university . . . *[but] plaintiff offers no evidence that DU's efforts purposefully encouraged the filing of complaints against men.* Similarly, even assuming that DU's Title IX training materials and resources indicate preferential treatment of complainants, such evidence does not, standing alone, support an inference of gender bias" (internal citations and footnote omitted)(emphasis added).

- *Id.,* *10 ("As for plaintiff's argument regarding the resources available to complainants and respondents . . . [that] some of those resources were 'complainant specific' does not support an inference of gender bias.")

- *Id.,* *11 ("Plaintiff's attempt to demonstrate that certain university officials involved in his investigation had a predisposition against male respondents is also unavailing . . . [b]ecause there is no indication that Ms. McAllister had any influence on the investigation, her 'biases' are insufficient to create a genuine dispute of fact.").

- *Id.,* *11 ("Plaintiff also attempts to raise an inference of bias on the part of Ms. Grove and two other unidentified officials who participated in the investigation and Outcome Council. But the fact that Ms. Grove has experience working with survivors of domestic violence does not establish that she harbors pro-female biases. Moreover, the Court rejects plaintiff's suggestion that an individual's personal experience of sexual assault necessarily renders him or her biased against men, a proposition that plaintiff fails to support.")

- *Id.,* *11 ("Absent evidence that women have received lesser sanctions for similar conduct, statements by university officials indicating the impact of gender on the severity of the penalties imposed, or "patterns of decision-making...tend[ing] to show the influence of gender," DU's decision to dismiss plaintiff from the university does not give rise to an inference of gender bias.").

Yu v. Vassar Coll.,
(2015 Decision From N.Y. District Court in 2nd Cir. Court of Appeals)

Title IX claim dismissed

Yu granted summary judgment motion regarding plaintiff's 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;"

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

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. *Yu v. Vassar Coll.,* 97 F. Supp. 3d 448 (S.D.N.Y. 2015) (emphasis added).

Naumov v. McDaniel College Inc
(2017 Decision From Maryland District Court in 4th Cir. Court of Appeals)

Title IX claim dismissed

Naumov v. McDaniel College Inc., No. GJH-15-482, 2017 WL 1214406, *5 (S.D. Md., Mar. 21, 2017)(granting summary judgment dismissal of Title IX erroneous outcome claim because plaintiff: (a) presented no evidence supporting his belief that his adjudicator's "strong feminist views" motivated her recommendation that his tenured faculty member position be terminated, and (b) identified adjudicator's non-gender based animus towards plaintiff which may have contributed to her termination decision).

Portion of contract claim to jury

Naumov v. McDaniel College Inc., No. GJH-15-482, 2017 WL 1214406, *7-8 (S.D. Md., Mar. 21, 2017)(rejecting summary judgment in breach of contract claim because defendant university's policies prohibited university from designating an employee as the "complainant" in a Title IX disciplinary proceeding when the actual complainant elected not to serve as the "complainant."). The Court reached this decision in part because the university's policies did not indicate "the complainant [could] be any person other than the person allegedly harassed and, to the contrary, there are places that affirmatively suggest that the complainant *is* the person harassed and not another individual acting in his or her stead . . . ." *Id.,* *8.

- *See also, Id.,* *10-11 (rejecting defendant university argument that the breach of its policy was excused on public policy grounds because the breach was required "by the [2011] Dear Colleague Letter."). The court rejected this argument because neither the 2011 Dear Colleague Letter nor OCR's other directives gave university the authority to designate an employee as the "complainant" in a Title IX disciplinary proceeding when the actual complainant elected not to serve as the "complainant.").

- *But see, Id.* *9 (granting summary judgment motion to dismiss breach of contract claim based on violation of policy mandating allegations be raised within 90 days of the alleged offensive conduct because the "continuing violation doctrine" allowed the university to investigate "portions of the claim occurring more than 90 days before the report to the advisor because at least one act related to the continuing hostile work environment claim was timely reported.")(citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002).

Doe v. George Washington Univ.

Relevant Non-Title IX Summary Judgment Decision
(2018 Decision From District of Columbia in 4th Cir. Court of Appeals)

Doe v. George Washington Univ. No.18-cv-553, 2018 WL 3869131 (D.C. Aug. 24, 2018) (granting plaintiff's motion for summary judgment on contract claim based on university's violation of code of conduct provisions related to appeals in Title IX disciplinary proceedings).

- *Id.,* *7 (remanding case back to university appeal board because university breached code of conduct's provisions related to the use of "new evidence" in the appeal process);

- *Id.,* *6 (containing code of conduct provision that stated: "Appeals must be based on *new information that is relevant to the case, that was not previously presented at the hearing or conference, and that significantly alters the finding of fact*. . . .")(emphasis added).

- *Id.,* *5 (finding toxicologist report presented in plaintiff's appeal qualified as "new" evidence because plaintiff's accuser "had never quantified the full amount she drank on the night in question until the actual panel hearing so that a toxicologist could not have evaluated the impact of that amount of liquor on someone of her size and weight prior to that hearing.").

- *Id.,* *5 (rejecting university's argument that student's statement presented in plaintiff's appeal was not "new" since it "could have been obtained prior to the hearing" because the code did not state "new" evidence "must have been previously unavailable prior to the panel hearing . . . .")

- *Id.,* *5 (rejecting university's argument that code was not a contract because it gave university the: (a) "unilateral right to modify the Code without notice . . . or the consent of, students;" and (b) "right to modify or change requirements, rules, and fees . . . without notice").

- *Note:* District court remanded case back to university which again found plaintiff responsible. This prompted amended complaint which was addressed in *Doe v. George Washington Univ.* No.18-cv-553, 2018 WL 6700596, *4, fn.8 (D.C. Dec. 20, 2018)(rejecting university's argument that its Title IX discipline of plaintiff was entitled to "judicial deference" because the university "cite[d] no persuasive case law indicating that a university is entitled to similar deference on *non-academic* matters.")

    - *Id.,* *7 (rejecting motion to dismiss contract claim based on appeal board's decision to allow complainant to submit additional evidence in violation of policy that stated: "decision to grant or deny the appeal will be based on information supplied in the written appeal and, when necessary, the record of the original proceedings.").
        - This issue occurred in context of appeal boards rejection of plaintiff's toxicologist's testimony about complainant's blood alcohol level based on height and weight data complainant disputed via new evidence presented to appeals board. *Id.* The Court found the university's policies prohibited complainant from providing this new evidence and it did not provide plaintiff "with a chance to respond to Ms. Roe's supplemental statements." *Id.*

    - *Id.,* *5 (rejecting motion to dismiss contract claim based on policy that stated a "party may challenge a Board member on the grounds of personal bias before the hearing commences" because plaintiff alleged "he was only told the identities of the members of the Hearing Panel when he arrived for the hearing itself and that he had no meaningful opportunity to review their backgrounds or object.");

    - *Id.,* *6 (rejecting motion to dismiss contract claim based on appeal board's affirming discipline of plaintiff despite new evidence containing cell phone records that disproved testimony of his accuser and her witnesses). *Id.,* (noting the: "Appeals Panel excused the failure of evidence as a mere memory lapse by Ms. Roe, who, it concluded (contrary to the Hearing Panel), may have been confused about whom she called from the Uber. However, there is no evidence that Ms. Roe had any recollection of talking to anyone during the Uber ride, at least not prior to the hearing when she heard E.E.'s statements asserting that E.E. had talked with Ms. Roe . . . [defendant university's] motion to dismiss fails to explain how the

Appeals Panel could reasonably scramble the facts and ignore the errors in E.E.'s testimony.").

- *Id.,* *7 (rejecting motion to dismiss contract claim based on appeal board's faulty evaluation of new evidence related to text messages and witness affidavit that contradicted complainant's testimony). *Id.,* (noting: "[t]o put a finer point on the matter, the Code required two determinations: (1) Ms. Roe did not have the capacity to consent; and (2) Mr. Doe should reasonably have known that she was incapacitated. The Appeals Panel was presented with direct contradictions in the evidence and appears to have strained to overlook such contradictions, leaving no trail of reasoning.");

- *Id.,* *7 (rejecting motion to dismiss Title IX claim in part because plaintiff established plausible gender bias by alleging multiple OCR investigations against defendant university and "unwanted public attention, including two other ongoing federal lawsuits, brought by female students against [defendant university] for its recent handling of their sexual assault claims, and public protests . . . [and] Ms. Roe herself is also alleged to have publicly pressured [defendant university] for stronger Title IX enforcement.").

Doe v. Board of Trustees of the Univ. of Ill.
Relevant Non-Title IX Summary Judgment Decision
(2018 Decision From Illinois District Court in 7th Cir. Court of Appeals)

Due Process claims dismissed

Doe v. Board of Trustees of the Univ. of Illinois, No.2:17-cv-2180-CSB-EIL, Docket #54, p.19 (C.D. Ill. Urbana Div. July 24, 2018)(unreported)(granting summary judgment dismissal of due process claims based on alleged loss of "liberty" interest because plaintiff did not attempt to enroll in another university and therefore could not prove he "was denied a continuing education opportunity because of any statement made in public by Defendant about his disciplinary record.")

Id., p.22-23(C.D. Ill. Urbana Div. July 24, 2018)(unreported)(granting summary judgment dismissal of due process claim based on "property" interest because plaintiff did not rely on university's relevant policies since he did not read them prior to enrolling at the university (and) therefore he could not have "promised anything in return for the University making those promises.").

- *But see, Id.,* p.21 (finding a plaintiff who had read and relied on the following university provisions could advance a valid due process claim based on a loss of a property interest: (a) students "have at least the rights and responsibilities common to all citizens" and that "affiliation with the University as a student does not diminish the rights or responsibilities held by a student or any other community member as a citizen of larger communities of the state, the nation, and the world."; (b) "the following enumeration of rights shall not be construed to deny or disparage other rights retained by these individuals in their capacity as members of the campus community or as

citizens of the community at large"; and (c) promises that the university 'disciplinary system is separate from, but coexistent with, "general systems established by society to deal with the conduct of citizens of society.'").

- *But see, Id.,* p.23 fn.2 ("*This was a close decision. Under a different set of facts, this case could have a different outcome. Illinois recognizes that the relationship between a student and an educational institution is, in some of its aspects, contractual. Ross v. Creighton University*, 957 F.2d 410, 416 (7th Cir. 1992). Each side should know what they are promising and receiving in return. *Here, the bargain would have been that Plaintiff pays tuition, and Defendant promises, among other things, that he will not be dismissed from school but for good cause.* There is no doubt in such an arrangement that if the student does not hold up his or her end of the bargain by failing to pay a semester's tuition, the University will notice and take action. Further, *Defendant makes much of the fact that Plaintiff never read the Student Code before the allegations were made. Does the University have an obligation to ensure students read the Code before accepting the University's offer of admittance or enrolling? It would be a simple task for the University to provide a means for the incoming student to indicate they have read and understood the Student Code, such as a signed acknowledgment to be returned with the student's acceptance of admission. By implementing such an easy procedure, situations like this one could be avoided in the future*.")(emphasis added).

- *NOTE: Id.,* p.24-25 ("Although the court need not address the issue of due process, it does feel compelled to state . . . its grave concern and serious doubt over the constitutionality of Defendant's sexual misconduct investigation and adjudication process. To comport with due process, expulsion procedures must provide a student with a meaningful opportunity to be heard. *Remer v. Burlington Area School District*, 286 F.3d 1007, 1010 (7th Cir. 2002) Defendant's process, in the court's mind, is sorely lacking in providing an accused with that meaningful opportunity. An accusation of sexual assault is an extremely serious charge, which can carry legal, personal, and pecuniary consequences for the accused. The stigma which can come from such an accusation and the resulting finding of guilt, even if not from a criminal court, but rather an educational administrative body, is severe, serious, and can follow a person for years. The investigative and adjudicative process employed by Defendant falsely emulates a criminal inquiry, but lacks the ability of the accused to confront witnesses, be heard, or testify before the deciding panel. *Telling one's side of the story to an investigator, and having a chance to make corrections to that investigator's report, is not a real opportunity to be heard. Further, having an "impartial" investigator present their report to the Panel, and make proclamations on the credibility of individuals involved in the case, is a poor substitute for allowing an accused to appear in person and defend themselves*. The court does not believe that Defendant needs to implement a full blown criminal trial with counsel, the right to cross examine witnesses, or the reasonable doubt standard, but, at the very minimum, an accused party should be able to present his or her case to the person or people who *actually decide their fate*. *Defendant should live up to the claim made in § 1.01 of its Student Disciplinary Procedures, that* the disciplinary system at the University is separate from, but coexistent with, "*general systems established by society to deal with the conduct of*

citizens of society." The court urges Defendant to adopt a more fair and thorough procedure for handling sexual assault claims in the future. *Nevertheless, because Plaintiff has not demonstrated the existence of a liberty or property interest, this case is not the appropriate vehicle to address the propriety of Defendant's investigatory process.*")(emphasis added).

FRCP 56(d) Responses to Summary Judgement Motions

Doe v. Williams College, No. 3:16-cv-30184-MGM, Docket 153 (D. Mass., Dec. 13, 2018)(granting plaintiff's Fed. R. Civ. P. 56(d) based motion "to obtain a copy of the 2011-2012 Williams College Handbook in order to support assertions in opposition to Defendant's motion for summary judgment. As Plaintiff has explained, his request is in response to Defendant's factual assertions regarding the 2012 disciplinary case, raised for the first time at summary judgment. Accordingly, Plaintiff has demonstrated "good cause for the failure to have discovered the facts sooner.")

Doe v. St. Joseph's Univ., Case No.18-2044, *Document 24,* Order (E.D. PA. Aug. 3, 2018)(unpublished)(granting Title IX plaintiff's motion to compel discovery while dismissing defendant university's motion for summary judgment without prejudice).

Addressing University Defenses Based on Title VII's Heightened Standards of Proof in Reverse Discrimination Claims

Defendant universities present summary judgment motions that seek to apply Title VII's heightened standards in Title IX claims. 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 Ohio State University ("OSU"). *Waters v. Drake,* 2016 WL 4264350 (S.D. Ohio Aug. 12, 2016). 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." *Id.,* *10.

Responding to "similarly situated" and "different decision maker" Summary Judgment Arguments

Title IX plaintiffs encounter summary judgment arguments alleging: (a) they failed to identify similarly situated female comparators, and/or (b) the gender bias of lower level investigators and/or adjudicators cannot be imputed to higher level decision makers who rejected plaintiff's appeal or imposed sanctions. These arguments were 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. *Id.,* *5-7 *Waters* rejected this argument in part because:

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

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

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;[3] and

[1] *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)).

[2] *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] *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)).

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.[4]

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 often 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. Id.*, *15-16.

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." *Id.,* *15 (quoting *Staub v. Proctor Hosp.,* 562 U.S. 411, 415 n.1 (2011)). *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-decision making individual was] motivated by discriminatory animus; (2) who intended to cause an adverse employment action; and (3) proximately caused the adverse employment action." *Id.,* (internal citations omitted).[5]

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." *Id.,* *16. 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." *Id.* 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

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[4] *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)).

[5] 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 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.").

against men." *Id.* 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." *Id.*

In an attempt to circumvent these facts, the plaintiff in *Waters* alleged the non-decisionmaker investigators conducted an "inept investigation" that applied "faulty methodology." *Id. 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-decisionmakers investigators]. [Plaintiff] has not demonstrated that the investigation was such a sham that one could conclude that it was pretext for discriminatory animus." *Id.*

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.

Waters also 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 made his failings correctable." *Id.,**14 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." *Id.*

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. *Id. Waters* rejected this argument because the "record establishes beyond genuine dispute that [plaintiff] engaged in more serious conduct than" the female cheerleading coach. *Id.* 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." *Id. 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. *Id.*

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. *Id.,*15* In rejecting this argument, *Waters* relied heavily on deposition testimony of university employees. *Id. Waters'* heavy reliance on the depositions of OSU 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." *Id., *16.*

Addressing "Same Actor" Arguments in Summary Judgment

When *male* university employees render disciplinary sanctions against *male* Title IX plaintiffs, universities can 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 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. *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.")

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

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. *See, Hankins v. City of Phila.,* 189 F.3d 353, 366 (3d Cir. 1999). Similarly, 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. *Wexler v. White's Fine Furniture, Inc.,* 317 F.3d 564, 573 (6th Cir. 2003) (en banc). And, the Seventh Circuit has repeatedly rejected "same actor" argument. *See e.g., Kadas v. MCI Systemhouse Corp.,* 255 F.3d 359, 361 (7th Cir. 2001)

Numerous law review articles address the split between circuit courts' handling of "same actor" argument. Consequently, Title IX plaintiffs should consult law review articles and relevant circuit court decisions during the discovery phase to prepare for potential "same actor" arguments.

Addressing "Honest Belief" Arguments In Summary Judgment

Title IX plaintiffs may encounter universities 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 <u>unworthy of credence</u>." *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).

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.

For example, the Sixth Circuit's 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. *Seeger v. Cincinnati Bell Tele. Co., LLC,* 681 F.3d 274, 286 (6th Cir. 2012). 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." *Id. 285.* 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,"[6] or (b) show "more than a dispute over facts upon which the [adverse employment decision] was based." *Braithwaite v. Timken Co.,* 258 F.3d 488, 493-94 (6th Cir. 2001).

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. 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.

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<u>Decisions Addressing Importance of Discovery in Title IX Disputes</u>

The Sixth Circuit's *Miami Univ.* identified "[d]iscovery" as the proper tool for plaintiff's gender bias evidence. *Id.* This was because the "information" required to evaluate the totality of the gender bias alleged was not "controlled" by plaintiff. *Id.* (citing *See Brown Univ.*, 166 F.Supp. at 189; *Marshall v. Ind. Univ.*, 170 F.Supp.3d 1201, 1210 (S.D. Ind. 2016)). And the Sixth Circuit noted "alternative non-discriminatory explanations for the defendants' behavior . . . does not bar [plaintiff's] access to discovery. *Id.,* *10 (citing *16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 505 (6th Cir. 2013) ("[T]he mere existence of more likely alternative explanations does not automatically entitle a defendant to dismissal"); *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011) ("Often, defendants' conduct has several plausible explanations. Ferreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage.")).

In doing so, the Sixth Circuit joined a long line of courts that identify "[d]iscovery" as the method to uncover Gender-Bias-Evidence that might exist in documents "controlled" by defendant universities. *See e.g., Doe v. The Trustees of The Univ. of Penn.,* No.16-5088, 2017 WL 4049033, , *16-17 (E.D. Pa. Sept. 13, 2017)(rejecting motion to dismiss Title IX selective enforcement claim

[6] *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).

that did not specifically identify a similarly situated female" because "we will permit Plaintiff to conduct discovery to ascertain whether, in fact, there are facts to support his allegations, based on information and belief, that similarly situated females are treated more favorably than he was."); *Doe v. Coastal Carolina Univ.,* No.: 4:18-cv-00268-RBH, 2019 WL 142299 (S.C. Jan. 9, 2019)(rejecting motion to dismiss Title IX erroneous outcome claim in part because "Court does not believe that Plaintiff should be barred from discovery because he is unable to give more precise details about this alleged widespread gender bias at CCU; as he points out, such evidentiary materials are within Defendant's control. Given the confidential nature of disciplinary proceedings against students accused of sexual misconduct, it is difficult to imagine how Plaintiff could plead the existence of such proceedings in greater factual detail."). *Doe v. Univ. of Oregon,* No. 6:17-cv-01103, 2018 WL 1474531, *15 (D.OR. Mar. 26, 2018)(rejecting MTD Title IX claim in part because discovery is necessary to resolve disputes over Gender-Bias-Evidence in the possession and control of defendant university); *Doe v. Brown Univ.,* 166 F. Supp.3d 177, 188 (D.RI., 2016)(same); *Doe v. Univ. of Mississippi,* No.3:18-cv-138-DPJ-FKB, Docket 60, p.11, and 20 (S.D.N.D. Miss., Jan. 16, 2019)(unreported)(rejecting motion to dismiss Title IX and procedural due process claims because "discovery" might substantiate allegations of defendant university's gender bias).

Similarly, the recent *Doe v. Marymount Univ.* decision highlights plaintiff's need to access the documents and/or audio recordings related to sexual misconduct disciplinary proceedings that involved the university employees involved in John Doe's discipline. *Doe v. Marymount Univ.,* Case No. 1:17-cv-401-TSE-MSN, 2018 WL 1352158 (E.D.VA. Mar. 14, 2018). In that case, a district court refused to dismiss Title IX complaint in part because plaintiff's adjudicator manifest gender bias behavior in a sexual assault investigation that occurred after the adjudicator found plaintiff engaged in sexual misconduct. *Id.,* *9. In this subsequent investigation, the adjudicator investigated a male student's allegation that "a female student of touching his genitals without his consent." *Id.* The adjudicator asked the male student if he was "aroused by this unwanted touching." *Id.* And, the district court found this question reveled the adjudicator's "decision-making was infected with impermissible gender bias, namely [adjudicator's] discriminatory view that males will always enjoy sexual contact even when that contact is not consensual." *Id.*

Gischel v. University of Cincinnati

Granting Motion To Compel OCR Subpoena
(2018 Decision From Ohio District Court in 6th Cir. Court of Appeals)

Gischel v. Univ. of Cincinnati, Case No. 17-cv-475-SJD, Docket 28, PageId.2664 (S.D.Oh. Jun. 21, 2018)(granting Title IX plaintiff's motion to compel OCR respond to subpoena for documents related to OCR investigations of defendant university in part because DOE's *Touhy* regulations "should not be read" to prohibit courts "from applying the Federal Rules of Civil Procedure to compel the production of documents pursuant to an otherwise enforceable subpoena.")

- *Id.,* PageId.2662-64 (rejecting OCR's argument that plaintiff's only remedy to OCR's rejection of the subpoena was to file a separate action under the Administrative Procedures Act).

- *Id.,* PageId.2665 (granting motion to compel OCR produce documents in response to a subpoena because requested documents are "relevant" to plaintiff's claims that defendant

university "felt pressure from the OCR to discriminate against males accused of sexual misconduct."

- In making this relevancy finding, *Gischel* cited the Sixth Circuit's *Miami Univ.* decision for the following proposition: "[a]n allegation that a university is being investigated by the OCR for potential Title IX violations can tend to suggest that the university might be induced to discriminate in disciplinary proceedings against a male accused of sexual misconduct." *Id.* (citing *Miami Univ.*, 882 F.3d 579, 594 (6th Cir. 2018). *Id.,* (citing *Schaumleffel v. Muskingum Univ.*, No. 2:17-cv-463, 2018 WL 1173043, at *16 (S.D. Ohio Mar. 6, 2018) and how that court determined "'Muskingum's fear of federal funding being cut if no action was taken' as part of the sufficient general allegations of gender bias.").

Doe v. The Ohio State University,
Granting Motion To Compel
(2018 Decision From Ohio District Court in 6th Cir. Court of Appeals)

Doe v. The Ohio State Univ., Case No. 2:16-cv-171, 2018 WL 4958958 (S.D.OH. Oct. 15, 2018)(granting Title IX Plaintiff's motion to compel communications "internal to [defendant university] and between [defendant university] and the Department of Education . . . and its Office of Civil Rights relating to Title IX compliance at [defendant university].")(citing *Doe v. Ohio State Univ.*, 239 F. Supp. 3d 1048, 1070 (S.D. Ohio 2017); *Doe v. Baum*, 903 F. 3d 575, 586 (6th Cir. 2018) *Doe v. Miami Univ.*, 882 F.3d 579, 594 (6th Cir.2018).

- *Id.,* *5 (granting Title IX Plaintiff's motion to compel defendant university's production of all documentation related to 35 Title IX disciplinary proceedings identified on previously produced spreadsheet prepared by university)(citing *Jackson v. Willoughby Eastlake Sch. Dist.*, No. 1:16-cv-3100, 2018 WL 1468666, at *4 (N.D. Ohio Mar. 23, 2018); *Doe v. Ohio*, No. 2:91-CV-0464, 2013 WL 2145594, at *6 (S.D. Ohio May 15, 2013)).

- *Id.,* *7 (granting Title IX Plaintiff's motion to compel all "communications concerning the training or guidance given to any [defendant university] employee who was involved in any way in the investigation, evaluation, prosecution, adjudication, or appeal of the charge against [plaintiff], provided that the training or guidance . . . related to Title IX's requirements relating to sexual misconduct, sexual assault, consent, and sexual harassment, or other [defendant university's] policies related to sexual misconduct."

- *Id.,* *5-6 (granting Title IX Plaintiff's motion to compel defendant university's response to request for admission regarding whether defendant "charge[d]" any female students who "were alleged to have violated" any of the Title IX policies defendant alleged plaintiff violated).

- *Id.,* *3 (ordering plaintiff and defendant university "meet and confer" and reach an "agreed ESI protocol" for searching university's internal documentation and communications with DOE and/or OCER for documents relating defendant's compliance with Title IX's "requirements relating to sexual misconduct, sexual assault, consent, and sexual harassment . . . .").

Montague v. Yale Univ.,
Granting Both Parties' Motions To Compel
(2018 Decision From Connecticut District Court in 2nd Cir. Court of Appeals)

Montague v. Yale Univ., Case No.16-cv-885(AVC), *Document 161,* PageId.11 and 12 of 23 (D. Conn. Aug. 1, 2018)(granting plaintiff's motion to compel defendant university's Title IX/UWC training, including, "documents sufficient to show the date(s) of the annual Title IX/UWC training held in the Fall of 2015; documents reflecting the agenda, syllabus, and/or curriculum for the training; attendance records for the training; any materials presented or distributed in connection with the training; and any recording of the training."

- PageId.13 and 14 of 23: (granting defendant university's motion to compel the following records related to Plaintiff's expert witness Dr. Smith: *"*Dr. Smith's bills, including an itemization as to the tasks performed, the amount of time spent, and the hourly rate for each," and "communications between Dr. Smith and plaintiff's counsel which relate to compensation for Dr. Smith's study or testimony in this matter . . . [and] documents demonstrating Dr. Smith's calculation of the value of the plaintiff's lost wages and benefits.").

- PageId.7 of 23: "While there may exist [FERPA] issues with respect to the documents concerning prior university disciplinary matters, the defendants may redact such documents in order to protect the privacy of the students involved. The court concludes that the information concerning relevant precedential university disciplinary matters . . . is relevant and that the defendants have failed to demonstrate that disclosure of such documents in their redacted form would be overly broad or unduly burdensome. However, disclosure shall be limited to UWC cases in which the respondent was similarly situated to the plaintiff in that he or she was charged with sexual penetration or intercourse without consent and he or she had prior discipline imposed by either the UWC or the Executive Committee."