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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

NOLAN YOUNGMUN,

Plaintiff,

v.

UNIVERSITY OF ALASKA, BRIAN D. ROGERS, MICHAEL K. POWERS, and MAE MARSH,

Defendants.

Case No. 3:16-cv-00178-HRH

MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

Pursuant to Federal Rule of Civil Procedure 12(b)(6), defendants the University of Alaska, Brian D. Rogers, Michael K. Powers, and Mae Marsh, move to dismiss plaintiff Nolan Youngmun's complaint. In his complaint, Youngmun alleges that the University defendants have wrongfully denied him his diploma pending an ongoing investigation into a report that he sexually assaulted another University student. Youngmun's premature claims, brought before the University has completed its investigation and rendered a final decision

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regarding the report of sexual assault, fail as a matter of law. All of the claims suffer from legal and factual pleading flaws. This is particularly so, given the heightened federal pleading standard which, "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[1] For the reasons addressed below, the University moves to dismiss all of Youngmun's claims.

BACKGROUND

Nolan Youngmun enrolled at the University of Alaska, Fairbanks in September 2011.[2] In April 2015, another University student, K.R., reported that Youngmun sexually assaulted her.[3] Immediately following K.R.'s report, the State of Alaska filed felony sexual assault charges against Youngmun.[4]

After receiving K.R.'s report of assault, the University promptly commenced an investigation.[5] Pending the outcome of that investigation, former Chancellor Brian Rogers advised Youngmun that given the nature of K.R.'s sexual assault claims, the University was imposing interim restrictions.[6] Those provisional restrictions included barring Youngmun from University property.[7] Additionally, the University advised Youngmun that it was delaying conferral of a degree on him pending the University's investigation into K.R.'s report.[8] At the end of February 2016, a jury acquitted Youngmun of the felony charges.[9] The University's investigation remains ongoing.[10]

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[1] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
[2] Complaint ¶ 6.
[3] Complaint ¶¶ 8, 19.
[4] Complaint ¶ 8. *See* Criminal Docket 4FA-15-00829 CR.
[5] Complaint ¶ 16.
[6] Complaint ¶ 33.
[7] Complaint ¶ 33.
[8] Complaint ¶ 33.
[9] Complaint ¶¶ 8, 27; Criminal Docket 4FA-15-00829 CR.
[10] Complaint ¶ 28. Youngmun's acquittal does not preclude the University's Title IX investigation because the Title IX proceeding is based on the preponderance of the evidence

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Prior to a resolution of the University's investigation, Youngmun has sued the University and three University employees – former Chancellor, Brian D. Rogers; Chancellor, Michael K. Powers; and Director of Diversity & Equal Opportunity, Mae Marsh – contending the University wrongfully denied him his degree as an interim restriction and improperly conducted its investigation into K.R.'s sexual assault claims. Based on these contentions, Youngmun asserts the following five claims: (1) a breach of contract claim against the University; (2) a breach of the covenant of good faith and fair dealing claim against the University; (3) a Title IX of the Education Amendments of 1972 claim against all defendants; (4) a negligence claim against all defendants; and (5) a punitive damages request against the individual defendants. He also seeks estoppel and declaratory judgment relief.[11] Youngmun initially filed his complaint in state court. Defendants timely removed the action to federal court based on federal question jurisdiction as established by Youngmun's Title IX claim. The University now seeks to dismiss all five of Youngmun's claims.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a claim.[12] Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient

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standard of proof rather than the beyond a reasonable doubt standard applied in the criminal proceedings. *See e.g.*, *Doe v. Univ. of Massachusetts-Amherst*, No. 14-30143-MGM, 2015 WL 4306521, at *7 (D. Mass. July 14, 2015), *appeal filed*, No. 15-1856 (1st Cir. July 28, 2015) ("In responding to claims of sexual harassment, the University, like all schools, is directed . . . to use the 'preponderance of the evidence' standard of proof").

[11] Youngmun styles these requests for relief as stand-alone claims, yet as pled, the "claims" both appear to be premised entirely on the other claims asserted and merely seek relief based on those claims. Such requests for relief do not constitute stand-alone claims. *See e.g.*, *Lim v. Charles Schwab & Co.*, No. 15-CV-02074-RS, 2015 WL 7996475, at *8 (N.D. Cal. Dec. 7, 2015), *appeal filed*, No. 16-15189 (9th Cir. Feb. 8, 2016); *Bisson v. Bank of Am., N.A.*, 919 F. Supp.2d 1130, 1139-40 (W.D. Wash. 2013) (holding Declaratory Judgment Act creates a remedy, not a cause of action, and that declaratory relief is dependent on a valid substantive claim).

[12] *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

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facts alleged under a cognizable legal theory.[13] To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[14] "Mere conclusory statements in a complaint and formulaic recitations of the elements of a cause of action are not sufficient."[15] A plaintiff must plead factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged, rather than a "sheer possibility that the defendant has acted unlawfully."[16] Thus, while legal conclusions can provide a framework for a complaint, such conclusions must be supported by plausible factual allegations.[17] "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content', and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief."[18]

ARGUMENT

I. Youngmun's Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing Claims Should Be Dismissed

Youngmun first asserts breach of contract and breach of the covenant of good faith and fair dealing claims against the University. Both claims fail as a matter of law and should be dismissed for the following three reasons. First and foremost, Youngmun does not plead sufficient facts to support a reasonable inference that he is in a contractual relationship with the University. Since there is no contractual relationship, there can be no breach of contract

[13] *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).
[14] *Iqbal*, U.S. 556 at 678 (internal quotation marks omitted).
[15] *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (internal quotation marks omitted).
[16] *Iqbal*, 556 U.S. at 678.
[17] *Id.* at 679; *see also Valadez-Lopez v. Chertoff*, 656 F.3d 851, 858-59 (9th Cir. 2011) ("A complaint does not suffice 'if it tenders naked assertions devoid of further factual enhancement'").
[18] *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). *See Hydrick v. Hunter*, 669 F.3d 937, 940-42 (9th Cir. 2012) (dismissing bald and conclusory claims against government officials because the complaint did not include any specific allegations of wrongdoing against each defendant).

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or breach of the covenant of good faith and fair dealing claim. And even if Youngmun did or could plead that a contractual relationship exists between himself and the University, the two contract-based claims should still be dismissed because Youngmun has failed to exhaust his administrative remedies. The University's investigation into K.R.'s report of sexual assault remains ongoing. Depending on the outcome of that investigation, Youngmun's claims of an alleged contractual breach may be moot. Finally, Youngmun's contractual claims should be dismissed because he does not plead with adequate specificity the nature of the contractual promises made and breached by the University.

A. As a matter of law, Youngmun's contractual claims fail because no contractual relationship exists between himself and the University.

Both Youngmun's breach of contract and breach of the covenant of good faith and fair dealing claims should be dismissed because the complaint fails to plead facts sufficient to conclude that a contractual relationship exists between Youngmun and the University. Youngmun only conclusory asserts that the University entered into an express and/or implied contractual relationship with him when it accepted him for admission.[19] Yet he does not cite to a single written or oral agreement that would support a conclusion that a contractual relationship exists between himself and the University. Nor does Youngmun provide any specific facts that would plausibly support a conclusion that by virtue of his admission to the University alone, a contractual relationship was formed. And as explained above, such conclusory statements and formulaic recitations of the elements of a cause of action are insufficient.[20]

The Alaska courts that have addressed the issue of whether the University of Alaska – a public educational institution – shares a contractual relationship with its students have

[19] Complaint ¶ 43.
[20] *Chavez*, 683 F.3d at 1108.

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either answered the question in the negative or declined to squarely address the issue. For instance, in *Horner-Neufeld v. University of Alaska Fairbanks*, an Alaska trial court considered an administrative appeal brought by a former University graduate student, challenging her dismissal from her graduate program.[21] The graduate student argued that the University's dismissal decision breached an implied or quasi contract. But the trial court disagreed, concluding:

> This Court finds that Neufeld has failed to prove that a contract existed between Neufeld and UAF. Neufeld has failed to show, as required by Alaska law governing implied contract formation, that any of UAF's policies or publications manifested intent on the part of UAF to form a contract with Neufeld. Neufeld has likewise failed to satisfy the elements of quasi-contract formation under Alaska law.[22]

In so holding, the court explained that an implied contract only exists when there is mutual assent between the parties and is formed where the parties intended to make a contract yet failed to articulate the contractual promises.[23] Importantly, the court noted that UAF's publications "are clear that UAF does not intend to form a contract with students . . . The Catalog clearly states that 'its contents shall not be construed as a contract between the University of Alaska Fairbanks and prospective or enrolled students.'"[24] The Alaska Supreme Court has likewise declined to recognize a contractual relationship exists between the University of Alaska and its students.[25] Pennsylvania courts are in accord holding that

[21] No. 4FA-10-01740 CI, 2014 WL 8764782, (Alaska Super. Ct. Nov. 7, 2014).
[22] *Id.* at 5.
[23] *Id.*
[24] *Id.* at *5 n.92.
[25] *See Bruner v. Petersen*, 944 P.2d 43 (Alaska 1997) ("While we have not previously decided whether the catalog or handbook of a state university constitutes a contract between the student and the university, we need not reach that issue in this case"); *Hunt v. Univ. of Alaska Fairbanks*, 52 P.3d 739 (Alaska 2002) (declining to determine whether a contractual relationship exists).

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while a contractual relationship may exist between a private college and a student, a public university's student handbook and publications do not constitute a contract between the student and university.[26]

Here, Youngmun has failed to plead sufficiently specific facts to support a reasonable inference that a contract existed between himself and the University. He does not allege that the University and he mutually agreed to form a contract, nor could he. As addressed by the *Neufeld* court, the University's publications explicitly provide that no contractual relationship exists between the University and enrolled students.[27] Since there is no contract between himself and the University, Youngmun's breach of contract claim must necessarily be dismissed. His breach of the covenant of good faith and fair dealing claim also fails as a matter of law because the claim is dependent on the existence of a contractual relationship.[28] As Youngmun's complaint fails to plead sufficient facts to support an inference that a contractual relationship existed between himself and the University, both of his contract-based claims should be dismissed.

B. Even if a contractual relationship exists, the contractual claims should still be dismissed because Youngmun has not yet exhausted his administrative remedies.

Youngmun's two contractual claims should be dismissed for the additional reason that he has failed to exhaust his administrative remedies. The crux of Youngmun's breach of contract and breach of the covenant of good faith and fair dealing claims is that the University has wrongfully denied him his degree pending the outcome of an investigation into a report that he sexually assaulted another student. He similarly alleges that the

[26] *Tran v. State Sys. of Higher Educ.*, 986 A.2d 179, 183 (Pa. Commw. Ct. 2009).
[27] *Neufeld*, 2014 WL 8764782, at *5 n.92.
[28] *Smith v. Anchorage Sch. Dist.*, 240 P.3d 834, 844 (Alaska 2010) (recognizing that the covenant of good faith and fair dealing is dependent on a contractual relationship); *Mitford v. de Lasala*, 666 P.2d 1000 (Alaska 1983) (same).

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University accepted a graduation fee from him, and that despite acceptance of that fee, has not issued him his degree. But Youngmun himself acknowledges that the University's refusal to issue him a degree is an *interim* restriction and that the University has not yet completed its investigation.[29] Consequently, depending on the final outcome of the University's investigation, it may ultimately be that the University lifts the interim restriction and issues Youngmun his degree.[30] If that were to be the case, Youngmun's theory regarding a contractual breach, *i.e.*, that he paid the University fees in exchange for a degree, would be rendered moot.

Under Alaska law, "a party may not seek relief in a judicial forum until that party has exhausted his or her available administrative remedies."[31] Enforcing the requirement of first exhausting administrative remedies is an "expression of administrative autonomy and a rule of sound judicial administration."[32] The exhaustion of remedies doctrine has been applied to proceedings before public governmental bodies.[33] Critical reasons underlying the exhaustion doctrine include the following:

> Judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require

[29] Complaint ¶¶ 28, 33.
[30] As acknowledged by Youngmun in his complaint, the University's policies explicitly authorize the University to initiate disciplinary action and impose sanctions on students found responsible for committing gender-based or sexual misconduct. *See* Complaint ¶ 30. Once the University completes its investigation, disciplinary proceedings may follow, further developing a factual and procedural record for this Court to review.
[31] *Winterrowd v. State Dep't of Admin.*, 288 P.3d 446, 450 (Alaska 2012) (affirming dismissal of complaint based on complainant's failure to exhaust administrative remedies).
[32] *Ben Lomond, Inc. v. Municipality of Anchorage*, 761 P.2d 119, 121 (Alaska 1988) (internal quotation marks and citation omitted).
[33] *Eidelson v. Archer*, 645 P.2d 171, 176 (Alaska 1982).

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> that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of the administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.[34]

Youngmun's complaint is devoid of any facts to support a plausible inference that he should be excused from exhausting his administrative remedies by allowing the University to conclude its investigation. Again, the key purposes of the exhaustion doctrine are to allow an administrative agency to perform functions within its special competence and to afford the agency an opportunity to address any potential deficiencies, thereby mooting any judicial controversies.[35] Indeed, the courts routinely recognize that it "is axiomatic . . . that [the court] have a factual context within which to review a case."[36] If the reviewing agency is not allowed to fully develop the factual record, the court will be "ill-equipped" to address the issues raised by the challenge.[37] Here, Youngmun's premature lawsuit has effectively denied the University both the opportunity to obviate judicial involvement and to utilize its special competence to review student disciplinary matters. The open status of the University's investigation also precludes the development of a complete factual record for this court to review. Requiring exhaustion is particularly appropriate given that the investigation – and any subsequent disciplinary action – implicates the interests of another University student, K.R. In sum, Youngmun's failure to exhaust his administrative remedies bars his contract-based claims.[38]

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[34] *Id.* (citing *McKart v. United States*, 395 U.S. 185, 194-95 (1969)).
[35] *Doubleday v. State*, 238 P.3d 100, 107 (Alaska 2010) (holding claimant required to exhaust claim within administrative appeal process).
[36] *Lomond, Inc.*, 761 P.2d at 122 (holding claimant waived claims because failed to exhaust administrative remedies).
[37] *Doubleday*, 238 P.3d at 108-109.
[38] *See Grant v. Anchorage Police Dep't*, 20 P.3d 553, 555-56 (Alaska 2001) (dismissing contract-based claims due to failure to exhaust).

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C. Youngmun's contract-based claims should be dismissed because he fails to identify specific promises or obligations the University made and subsequently breached.

Youngmun's two contract-based claims should be dismissed for the final reason that the claims are not adequately pled as he only conclusory asserts that the University breached an implied agreement with him. To state a valid contract claim, Youngmun bears the burden to identify a specific contractual promise that the University made and breached.[39] Here, Youngmun does not specify *what* agreement the University violated or *how* the University violated that agreement.

Youngmun alleges that the University breached a contract with him by withholding his degree as an interim restriction even though he had already completed all of his graduation requirements and paid a graduation fee.[40] Additionally, he alleges that the University breached a contractual agreement with him by denying him access to his transcript and other records, failing to promptly complete its Title IX investigation, and depriving him of his due process rights.[41] But Youngmun does not plead or identify the source of any these purported contractual obligations. In other words, Youngmun's complaint does not answer the critical questions of *where* does the University promise to issue him a degree no matter what and even if another student's allegations of sexual assault are being investigated or to promptly complete a Title IX investigation.

By failing to identify the contractual source of the alleged University duties, he improperly asks this Court to arbitrarily impose an array of contractual obligations upon the

[39] *See Prasad v. Cornell Univ.*, No. 5:15-CV-322, 2016 WL 3212079 (N.D.N.Y. Feb. 24, 2016) (dismissing breach of contract claim in reverse Title IX case); *Doe v. Brandeis Univ.*, No. CV15-11557-FDS, 2016 WL 1274533 (D. Mass. 2016) (dismissing aspects of breach of contract claim made in in Title IX context); *Doe v. Brown Univ.*, No. CV 15-144 S, 2016 WL 715794 (D.R.I. Feb. 22, 2016) (same).
[40] Complaint ¶ 44.
[41] *Id.*

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University. This he cannot do.[42] Since Youngmun's contract-based claims are not pled with adequate factual specificity to support a plausible inference that the University breached any contractual obligation – let alone entered into any contractual arrangement – the claims should be dismissed.

II. The Complaint's Title IX Claim Fails as a Matter of Law

Youngmun next asserts a Title IX claim and appears to assert this claim against both the individually named University defendants, as well as the University.[43] Title IX of the Education Amendments of 1972 provides in pertinent part: "No 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."[44] Title IX was enacted to supplement the Civil Rights Act of 1964's ban on racial discrimination to similarly proscribe sex discrimination.[45] In 2011, the Department of Education promulgated a "Dear Colleague" letter which instructs schools that pursuant to Title IX, a university must investigate any allegation of sexual harassment or assault when it knows or should reasonably know about possible harassment or assault.[46] The letter provides additional guidance regarding a university's responsibility with respect to sexual harassment and violence.[47] Since issuance of the letter, there has been a wave of litigation from both student victims and those accused of sexual assault.[48]

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[42] *See Prasad*, 2016 WL 3212079, at *20 ("Because Plaintiff does not specify what agreement Defendant violated, and how it was violated, Plaintiff's breach of contract claim must be dismissed").
[43] Complaint ¶ 55.
[44] 20 U.S.C. § 1681(a) (emphasis added).
[45] *Doe v. Columbia Univ.*, --- F.3d ---, 2016 WL 4056034 (2d Cir. July 29, 2016).
[46] *Brown Univ.*, 2016 WL 715794, at *1; *see also* Dear Colleague letter at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.
[47] *Id.*
[48] *Id.*

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The Title IX claim asserted by Youngman is subject to dismissal for four reasons: (1) Youngmun is barred from asserting a Title IX claim against the individual University defendants; (2) Youngmun has not asserted a cognizable Title IX claim because he has not alleged he was treated unfairly based on his gender or discriminated against because of his sex; (3) to the extent Youngmun challenges the University's investigation outcome, such claims are premature; and (4) Youngmun cannot base a Title IX claim on purported violations of the Department of Education's regulations.

A. Youngmun's Title IX claim as to former Chancellor Rogers, Chancellor Powers, and Diversity Director Marsh should be dismissed with prejudice.

Under well-established federal jurisprudence, a plaintiff such as Youngmun is barred from asserting a Title IX claim against an individual school employee. In Davis *v. Monroe County Board of Education*, the Supreme Court explained that the government's enforcement power may only be exercised against a funding recipient and that damages liability under Title IX is likewise limited to the actual funding recipient.[49] Later, in *Fitzgerald v. Barnstable School Committee*, the Supreme Court reiterated that while Title IX reaches institutions and programs that receive federal funds, "it has consistently been interpreted as not authorizing suit against school officials, teachers, and other individuals."[50] In short, "Title IX does not allow claims against individual school officials; only funding recipients can be held liable for Title IX violations."[51] Based on this unequivocal law, Youngmun's Title IX claim against former Chancellor Rogers, Chancellor Powers, and Diversity Director Marsh should be dismissed with prejudice.[52]

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[49] 526 U.S. 629, 641 (1999).
[50] 555 U.S. 246, 257 (2009).
[51] *Williams v. Bd. of Regents of Georgia*, 477 F.3d 1282, 1300 (11th Cir. 2007).
[52] *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (dismissing claims with prejudice because leave to amend would be futile).

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B. Youngmun's Title IX Claim against the University fails because he does not allege any sex discrimination or gender bias by the University.

Youngmun's Title IX claim against the University is likewise subject to dismissal. As addressed above, the fundamental purpose of Title IX is to prohibit sex discrimination in education. In recent years, several federal courts have considered claims brought by male plaintiffs challenging a university's handling of allegations of sexual misconduct under Title IX.[53] Those cases confirm that no matter the theory of wrongdoing, a Title IX claim must be based on allegations of sex discrimination or impermissible gender bias.[54] Where a complaint does not include sufficient factual allegations of gender bias or discrimination with respect to a university's handling of allegations of sexual misconduct, the Title IX claim must be dismissed.[55]

Here, Youngmun's Title IX theory of liability is unclear as he only makes the bald, and somewhat confusing, allegation that the University defendants deprived him of "his rights to due process and equal protection through improper administration of and/or the existence, in its current state, of Defendant University of Alaska's Guidelines and Regulations."[56] From this allegation, it appears Youngmun challenges the University's

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[53] *See e.g.*, *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994); *Sahm v. Miami Univ.*, 110 F. Supp.3d 774 (S.D. Ohio 2015) (dismissing amended Title IX claim because allegations failed to raise an inference of gender bias); *Sterrett v. Cowan*, 85 F. Supp.3d 916, 936-37 (E.D. Mich. 2015), *appeal dismissed* (Oct. 2, 2015) (denying motion to amend to add Title IX claim because allegations of gender bias were conclusory and failed to allege specific factual allegations which would state a claim of discriminatory animus by the University or its agents); *Salau v. Denton*, 139 F. Supp.3d 989, 998-99 (W.D. Mo. 2015) *appeal dismissed* (Dec. 11, 2015) (dismissing Title IX claim based on failure to plead sufficient facts regarding sex discrimination); *Doe v. Case W. Reserve Univ.*, No. 1:14CV2044, 2015 WL 5522001 (N.D. Ohio Sept. 16, 2015) (same).

[54] *Id.*

[55] *Doe v. Univ. of the South*, 687 F. Supp.2d 744, 756-57 (E.D. Ten. 2009) (dismissing Title IX claim because insufficient allegations that university's actions were motivated by sexual bias or that university's disciplinary process was discriminatorily applied or motivated by a chauvinistic view).

[56] Complaint ¶ 55.

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process for handling sexual assault allegations, as well as the application of that process to K.R.'s report of sexual assault. But Youngmun's complaint is devoid of a single allegation of improper sex discrimination or gender bias in the University's processes or in how the University has conducted its investigation into K.R.'s report. While Youngmun challenges the University's overall handling of K.R.'s report of sexual assault to-date, he in no way attributes that alleged mishandling to a discriminatory motive or gender bias. Again, given the purpose of Title IX, to survive a dismissal motion, a complaint must include specific factual allegations plausibly suggesting gender bias or sex discrimination.[57] Youngmun's "allegations are not articulated in a way to support a plausible inference that the University's actions with respect to [Youngmun] violated Title IX."[58] The Title IX claim should be dismissed.

C. To the extent Youngmun's Title IX claim challenges the outcome of the University's investigation of K.R.'s sexual assault report; the claim should be dismissed as premature.

In his complaint, Youngmun also appears to challenge the outcome thus far of the University's investigation into K.R.'s report of sexual assault. But as addressed above with respect to Youngmun's contract-based claims and his failure to exhaust his administrative remedies,[59] the University's investigation remains ongoing. Youngmun's Title IX claim should be dismissed to the extent it challenges the outcome of the University's disciplinary process as the "disciplinary proceeding has not arrived at an outcome at all. Rather, the

[57] *Salau*, 139 F. Supp.3d at 998-99 (holding that wholly conclusory allegations do not suffice and requiring particularized facts to suggest gender bias was a motivating factor); *Case W. Reserve Univ.*, 2015 WL 5522001, at *6 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations . . . Here, Plaintiff's Complaint fails to plead any factual allegations that support the conclusion that CWRU discriminated against Plaintiff based on his sex" (internal citation omitted)).
[58] *Univ. of Massachusetts-Amherst*, 2015 WL 4306521, at *9 ("Plaintiff has not pled facts from which a plausible inference of gender bias can be drawn").
[59] *See* Motion to Dismiss at 8-10.

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disciplinary proceeding is ongoing."[60] Due to the prematurity of Youngmun's Title IX claim, any claim challenging the outcome of the process should be dismissed so that the University can exercise its expertise in matters of school discipline and render a final outcome. And as previously discussed, requiring Youngmun to exhaust his administrative remedies is in the interests of judicial efficiency as completing the internal process will fully develop a factual record for the court's review and may even eliminate entirely the need for any court involvement.

D. Youngmun's Title IX claim should be dismissed to the extent it is based on alleged violations of the Department of Education's regulations.

Youngmun's Title IX claim should be dismissed for the final reason that he cannot base this claim on alleged violations of the Department of Education's regulations or administrative guidance. The complaint liberally cites to the Department of Education's Title IX regulations and other administrative guidance, including the "Dear Colleague" letter.[61] Youngmun implies that the University violated Title IX by failing to adhere to this administrative guidance.[62] Federal courts, though, routinely hold that alleged failure to comply with the Title IX regulations promulgated by the Department of Education is not a valid cause of action under Title IX.[63] "Although the U.S. Department of Education and other agencies generally have authority to promulgate and enforce requirements that effectuate the statute's non-discrimination mandate, the implied right of action under Title IX does not provide for the recovery in damages for violation of those sorts of administrative

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[60] *Tsuruta v. Augustana Univ.*, No. 4:15-CV-04150-KES, 2015 WL 5838602, at *4 (D.S.D. Oct. 7, 2015) (denying motion for preliminary injunction and holding Title IX claim was unlikely to be successful based on, *inter alia*, prematurity of claim).
[61] Complaint ¶¶ 10-15, 17-18, 21-22, 24, 54.
[62] *Id.*
[63] *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291-92 (1998); *Univ. of the South*, 687 F. Supp.2d at 758.

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requirements."[64]

In *Moore v. Regents of the University of California*, a California federal district court judge recently dismissed a Title IX claim, rejecting pleadings that cited to the Department of Education's administrative requirements.[65] The court explained that the administrative scope of liability is different than the scope of liability in connection with private claims under Title IX for money damages.[66] Federal case law, not the administrative regulations and Dear Colleague letter, govern Title IX pleading requirements.[67] Youngmun's Title IX claim improperly relies upon the Department of Education's regulations and Dear Colleague letter as setting the scope of the University's liability; thus, to the extent his Title IX claim is based on alleged violations of that administrative guidance, the claims should be dismissed.

III. Youngmun's Negligence Claim Should Be Dismissed

The complaint's next cause of action is a negligence claim, wherein Youngmun alleges the University and the individually named University defendants breached their duty of care by failing to "follow the University's policies and regulations, to adequately train and supervise persons participating in the investigatory process and to timely conduct a fair and impartial administrative investigation."[68] This claim appears to be premised entirely on Youngmun's contentions that the University has not complied with the Department of Education's administrative regulations and the Dear Colleague letter.[69] Youngmun's negligence cause of action is merely another attempt to argue that the University violated

[64] *Univ. of the South*, 687 F. Supp.2d at 758 (citing *Gebser*, 524 U.S. at 291-92 (internal quotation marks omitted)).
[65] No. 15-CV-05779-RS, 2016 WL 2961984 (N.D. Cal. May 23, 2016)
[66] *Id.* at *6.
[67] *Id.* (citing *Karasek v. Regents of the Univ. of California*, No. 15-CV-03717-WHO, 2015 WL 8527338, at *13–14 (N.D. Cal. Dec. 11, 2015).
[68] Complaint ¶ 63.
[69] *See e.g.*, Complaint ¶¶ 10-15, 17-18, 21-22, 24, 54.

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Title IX by failing to adhere to administrative guidance. But Youngmun cannot circumvent Title IX's pleading requirements or the law governing Title IX claims for money damages by merely styling the claim as a negligence cause of action. Additionally, the negligence claim should be dismissed as to the University employees as the allegations fail to meet the requisite pleading standards by adequately notifying the defendants of the alleged wrongdoing.

A. Youngmun's negligence claim is an improper attempt to assert a private cause of action under Title IX.

By his negligence claim, Youngmun challenges the University's investigation into K.R.'s report of sexual assault. As with his Title IX claim, Youngmun alleges that the parameters governing the investigation exclusively arise out of the Department of Education's regulations and Dear Colleague letter.[70] Youngman can neither assert a Title IX claim, nor a negligence claim based on purported violations of those administrative guidelines.

Federal courts recognize that negligence claims based upon violations of Title's IX's administrative regulations, such as that brought by Youngmun, are improper attempts to circumvent the scope of Title IX liability in private suits for money damages. For instance, in *Doe v. University of the South*, a university investigated claims against a student that he had sexually assaulted a fellow student.[71] After the university issued a conclusion that the student had committed sexual assault, he filed suit against the university.[72] As part of his claim, he asserted that federal regulations "require[] a school receiving Title IX funds to establish procedures providing for the prompt and equitable resolution of student complaints'

[70] Complaint ¶¶ 13-15, 17, 21-22, 24.
[71] No. 4:09-CV-62, 2011 WL 1258104, at *3 (E.D. Tenn. Mar. 31, 2011).
[72] *Id.*

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relating to all forms of sexual harassment, including sexual assault" and that the university was negligent for failing to do so.[73] The United States District Court for the Eastern District of Tennessee dismissed the negligence claim, explaining:

> Plaintiffs' arguments fail on several grounds, but most importantly, their arguments would vitiate the Supreme Court's ruling in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998). In that case, the Court, interpreting precisely the same regulation at issue here, 34 C.F.R. § 106.8(b), said that "the failure to promulgate a grievance procedure does not itself constitute 'discrimination' under Title IX. Of course, the Department of Education could enforce the requirement administratively ... [but] we have never held, however, that the implied private right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements." *Id.* at 292. If the Court were to allow a regulation used in administering a federally-created right to create a state negligence per se claim, it would effectively eviscerate the *Gebser* rule.[74]

Similarly, in *Ross v. University of Tulsa*, a student asserted that a university was negligent per se for violating Title IX and its implementing regulations by failing to properly investigate her sexual assault claim.[75] The United States District Court for the Northern District of Oklahoma dismissed the negligence claim, stating:

> Therefore, Title IX's implementing regulations may not provide the basis of a negligence per se claim, and Plaintiff's claim fails as a matter of law. To the extent Plaintiff seeks to hold TU liable under a negligence theory, it must do so under common-law principles and without the benefit of any "per se" instruction premised on a Title IX statutory or regulatory violation.[76]

Based on this case law, Youngmun's negligence claim should be dismissed for the same reason his Title IX claim fails. Neither claim can survive based on a theory of liability

[73] *Univ. of the South*, 2011 WL 1258104, at *14 (internal quotation marks omitted).
[74] *Id.*
[75] No. 14–CV–484–TCK–PJC., 2015 WL 4064754, at *1 (N.D. Okla. July 2, 2015).
[76] *Id.* at *4 (citations omitted).

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that the University has failed to adhere to the Department of Education's administrative regulations or guidance. To plead a valid negligence claim, Youngmun bears the burden to plead sufficient factual allegations to plausibly support a valid claim for relief independent of alleged Title IX administrative violations. He has failed to do so and the claim should be dismissed as to all defendants.

B. The negligence claim against the individual defendants fails because it is impermissibly based on bald and conclusory claims of alleged wrongdoing.

Youngmun's negligence claim against the individually named University defendants should be dismissed for the additional reason that it fails to meet the pleading standards previously articulated. This pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[77] A claim will only have facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged, rather than a "sheer possibility that the defendant has acted unlawfully."[78] The complaint must plead specific facts alleging how the individual defendant wronged the plaintiff and may not just be based on conclusory allegations and generalities.[79]

Here, Youngmun's negligence claims against former Chancellor Rogers, Chancellor Powers, and Diversity Director Marsh are based wholly on conclusory allegations. Most egregiously, Youngmun's complaint does not include a single specific factual allegation of wrongdoing against Chancellor Powers. Chancellor Powers is not even mentioned until paragraph 55 of the complaint and that allegation is merely a general statement of all of the named defendants' purported wrongdoing. Such a bare bones claim – a claim that is

[77] *Iqbal*, 556 U.S. at 678.
[78] *Id*.
[79] *Hydrick*, 669 F.3d at 939.

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unsupported by *any* specific factual allegations – must be dismissed.

Similarly, Youngmun's only asserts threadbare allegations of wrongdoing against Rogers and Marsh. Youngmun alleges that Rogers, in his capacity as University Chancellor, sent him a letter in April 2015 outlining the University's decision to impose interim restrictions pending an investigation into K.R.'s report of sexual assault.[80] He also conclusory alleges that Marsh, in her capacity as Diversity Director, "concluded that the complaint was well founded before the University had conducted any investigation."[81] These allegations do not provide a sufficient factual basis to conclude that these University employees owed him a duty of care or violated that duty of care. In the absence of any specific allegations of negligence against these individuals, Youngmun's negligence claims should be dismissed as to the individually named University defendants.

IV. The Punitive Damages Request for Relief Against the Individual University Employees Fails

Youngmun's final "claim" is a request for punitive damages against the individual University employees. This request for relief fails for several important reasons. First, the claim should be dismissed because a punitive damages claim is not a stand-alone claim; rather, it is derivative of Youngmun's other claims.[82] Since both of his claims against the individual University employees are subject to dismissal, there is no remaining cause of action which could support a punitive damages award.[83]

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[80] Complaint ¶ 33-34.
[81] Complaint ¶ 18.
[82] *Franson v. City and Cty. of Honolulu*, No. CV 16-00096 DKW-KSC, 2016 WL 4007549 (D. Haw. July 26, 2016) (dismissing punitive damages claim to the extent plaintiffs asserted it as stand-alone claim); *Adams v. United States*, 622 F. Supp.2d 996, 1005 n.1 (D. Idaho 2009) ("[a] prayer for punitive damages is not a stand-alone cause of action, but flows from an underlying cause of action, such as a breach of contract or a tort, when the conduct of a party meets the threshold level of being oppressive and outrageous").
[83] Even if the claim could be asserted as a stand-alone claim, it should be dismissed because the request for relief is not supported by sufficient specific factual allegations to support such

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As explained above, it has been explicitly held by the Supreme Court that a Title IX claim cannot be brought against school officials.[84] The only remaining claim against the individual University employees is a negligence claim. And for the reasons discussed, that claim should be dismissed. But even if the negligence claim survived the pending motion to dismiss, it still cannot serve as a basis for a punitive damages award against the individual defendants.

Youngmun's complaint does not specify whether he sues Rogers, Powers, and Marsh in their individual or official capacities. To the extent he sues them in their official capacities, the punitive damages remedy request is barred under AS 09.50.280 which precludes punitive damage awards against the State of Alaska. In *University of Alaska v. Hendrickson*, the Alaska Supreme Court squarely addressed this issue, holding that punitive damages cannot be awarded against the University of Alaska.[85] Since an official capacity claim against a government official is tantamount to a suit against the government entity itself, Youngmun cannot recover punitive damages from the individual University defendants in their official capacities. Since it is unclear whether Youngmun sues the University employees in their individual capacities and as there is no basis to award punitive damages, the request for punitive damages should be dismissed.

CONCLUSION

For the foregoing reasons, Youngmun's five claims against the University defendants fail as a matter of law. As explained above, each of Youngmun's claim suffer from fatal

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an award. Youngmun only conclusory alleges that the individual defendant's conduct "was and is outrageous and did and continues to demonstrate reckless indifference" to him. Complaint ¶ 67. This bald allegation merely states the standard for punitive damages. *See* AS 09.17.020. But as held by the Supreme Court in *Iqbal*, mere recitation of the elements of a cause of action do not suffice and will not survive a dismissal motion.

[84] *Davis*, 526 U.S. at 641; *Fitzgerald*, 555 U.S. at 257.

[85] 552 P.2d 148, 149 (Alaska 1976).

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legal and factual deficiencies. From his contract-based claims to his Title IX claim to his request for punitive damages, Youngmun fails to plead sufficient facts to survive a dismissal motion under Federal Rule 12(b)(6)'s pleading standard. Each of the claims should be dismissed.

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2016, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court – District of Alaska by using the CM/ECF system. Participants in Case No. 3:16-cv-00178-HRH who are registered CM/ECF users will be served by the CM/ECF system.

s/ Thomas M. Daniel