No. 16-3334

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN DOE, I; JOHN DOE, II

Plaintiffs-Appellants,

v.

DANIEL CUMMINS; DENINE ROCCO; DEBRA MERCHANT; UNIVERSITY OF CINCINNATI

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio, Western Division
The Honorable Sandra S. Beckwith, U.S. District Judge

BRIEF OF DEFENDANTS-APPELLEES UNIVERSITY OF CINCINNATI, DANIEL CUMMINS, DENINE ROCCO, AND DEBRA MERCHANT

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Defendant-Appellee University of Cincinnati makes the following disclosure:

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Pursuant to 6th Cir. R. 26.1, Defendant-Appellee Debra Merchant makes the following disclosure:

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No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If Yes, list the identity of such corporation and the nature of the financial interest:

No.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellees University of Cincinnati, Daniel Cummins, Denine Rocco, and Debra Merchant respectfully request oral argument because it will assist the Court in its review of the issues presented by this appeal.

I. JURISDICTIONAL STATEMENT

On October 19, 2015, Plaintiffs-Appellants John Doe I and John Doe II filed suit against the University of Cincinnati, Daniel Cummins, Denine Rocco, and Debra Merchant, alleging violations of the Ohio and United States Constitutions, 42 U.S.C. § 1983, Title IX of the Education Amendments of 1972, and a claim for "Injunctive Relief." (Complaint, RE 1, Page ID # 56-63) The District Court had subject matter jurisdiction because the claims arose under the Constitution and the laws of the United States. 28 U.S.C. § 1331.

The District Court entered an order dismissing Plaintiffs-Appellants' claims and a judgment in favor of Defendants-Appellees on March 23, 2016. (Order, RE 16, Page ID # 246-279; Judgment Entry, RE 17, Page ID # 280) Plaintiffs-Appellants filed a timely Notice of Appeal on April 4, 2016. (Notice of Appeal, RE 18, Page ID # 281-82)

II. STATEMENT OF THE ISSUES

The first issue presented by this appeal is whether the District Court properly held that Court I of Plaintiffs-Appellants' Complaint is barred by the Eleventh Amendment where Count I is a claim for injunctive relief solely targeting past conduct and where, despite the fact that it is pled against all defendants, Count I is in reality brought only against the University of Cincinnati, an arm of the State of Ohio.

The second issue presented by this appeal is whether the District Court correctly dismissed Plaintiff-Appellants' due process claims for failure to state a claim upon which relief can be granted where Plaintiffs-Appellants have failed to identify any constitutional due process protection they were not afforded and where Defendants-Appellees Daniel Cummins, Denine Rocco, and Debra Merchant are entitled to qualified immunity because even if Plaintiffs-Appellants had sufficiently alleged that their procedural due process rights were violated, the elements of due process that Plaintiffs-Appellants maintain they were not afforded were not clearly established.

The third issue presented by this appeal is whether the District Court correctly dismissed Plaintiffs-Appellants' Title IX claims for failure to state a claim upon which relief can be granted where Plaintiffs-Appellants offered nothing more than conclusory allegations supporting their claims that their disciplinary

matters were the result of gender bias and where there is no private right of action to challenge a university policy as violating Title IX.

III. STATEMENT OF THE CASE

A. Facts and Procedure of John Doe I's Disciplinary Matter

On March 9, 2014, John Doe I, then a junior at the University's Blue Ash campus, was accused by two female students of sexual assault. (Complaint, RE 1 at Page ID # 28) On March 12, 2014, Cummins sent John Doe I a notice of the allegations, a notice scheduling the Procedural Review for March 25, 2014, and advised John Doe I of an "interim suspension" from the University's Clifton campus. (*Id*. at Page ID # 32) After various issues were discussed regarding scheduling, John Doe I's Procedural Review meeting was rescheduled for March 28, 2014. (*Id*. at Page ID # 32-33) At the Procedural Review, Cummins discussed the alleged violation of the Student Code of Conduct and asked John Doe I to sign a form that he had received "the evidence supporting the allegation." (*Id*.)

On April 7, 2014, after confirming that he had the number of Administrative Review Committee ("ARC") members necessary, Cummins sent John Doe I an email notifying him that the ARC hearings for each complainant were scheduled for April 10, 2014. (*Id*. at Page ID # 33) The two ARC hearings were later postponed until May 2, 2014. (*Id*.) During the morning of May 2, 2014, an ARC hearing took place regarding John Doe I's alleged sexual assault of Jane Roe I. At

the conclusion, the ARC recommended that John Doe I be found responsible for the allegations leveled against him by Jane Roe I. (*Id*. at Page ID # 37)

That afternoon, an ARC hearing regarding John Doe I's alleged sexual assault of Jane Roe II was conducted. (*Id*. at Page ID # 38) John Doe I chose not to participate in that ARC hearing. (*Id*.) The ARC hearing proceeded in John Doe I's absence. (*Id*.) Eventually, the ARC also recommended that John Doe I be found responsible for the allegations leveled by Jane Roe II and that John Doe I be dismissed from the University for those actions.

That same day, before the Vice President of Student Affairs could act on the ARC's recommendation, John Doe I filed a Complaint and Motion for Temporary Restraining Order in the Hamilton County Court of Common Pleas. (*Id*.) Hamilton County Court of Common Pleas Judge Jerome Metz entered a temporary restraining order, prohibiting the University from continuing disciplinary actions or imposing any further disciplinary sanctions against John Doe I. (*Id*.)

The University then removed the case to the Southern District of Ohio. (*Id*.) John Doe I's case was assigned to Judge Susan Dlott at Case No. 1:14-cv-00404-SJD. The University filed a motion to dismiss, and John Doe I's case was ultimately dismissed for lack of ripeness because John Doe I failed to avail himself of the procedural protections afforded by the University. *See Peloe v.*

Univ. of Cincinnati, No. 1:14-CV-404, 2015 WL 728309 (S.D. Ohio Feb. 19, 2015).

After John Doe I's complaint in Case No. 1:14-cv-00404-SJD was dismissed, the temporary restraining order was dissolved and the University was able to proceed with John Doe I's disciplinary process. *Id*. As permitted by the University's process, John Doe I appealed the ARC panels' findings. After careful review, the University reversed the ARC panels' findings on the basis of procedural errors and ordered that John Doe I be afforded new ARC panel hearings. (Complaint, RE 1 at Page ID # 38-41)

New ARC Hearings took place on May 18, 2015 and May 19, 2015. (*Id*.) After the hearings, the ARC panel found John Doe I responsible for violating the University's Code of Conduct with regard to his actions toward Jane Roe II, but found John Doe I not responsible for his actions toward Jane Roe I. (*Id*. at Page ID # 41) John Doe I appealed the decision regarding his actions toward Jane Roe II. (*Id*.) On June 11, 2015, the University Appeals Administrator denied John Doe I's appeal. (*Id*. at Page ID # 41-42)

John Doe I is no longer a student at the University, but rather has transferred to another educational institution. (*Id*. at Page ID # 2)

B. Facts and Procedure of John Doe II's Disciplinary Matter

On March 6, 2014, John Doe II, then a law student at the University, was accused by a female student of sexual assault. (*Id*. at Page ID # 42) On March 17, 2014, Cummins informed John Doe II that a female student had made such allegations. (*Id*. at Page ID # 44) Cummins also requested a meeting with John Doe II. (*Id*.) Cummins met with John Doe II on March 26, 2014, for the purpose of discussing the allegations. (*Id*.)

After an investigation, Cummins notified John Doe II on April 7, 2014, that an ARC Hearing would be scheduled.[1] (*Id*. at Page ID # 45) While the ARC Hearing was originally scheduled for April 10, 2014, it was rescheduled for and ultimately held on April 22, 2014. (*Id*.) After the hearing, the ARC Hearing Panel made a recommendation that John Doe II be found responsible for violating the University's Student Code of Conduct. (*Id*. at Page ID # 48) That recommendation was adopted. (*Id*.) John Doe II appealed the finding. (*Id*.) The University Appeals Administrator found procedural errors had occurred and ordered a new ARC Hearing. (*Id*.)

[1] John Doe II's allegations include that there was an issue related to jurisdiction over the disciplinary matter. (RE 1 at ¶ 87) However, John Doe II's discussion ignores that the University's Student Code of Conduct also states that it has jurisdiction over off-campus conduct "when such conduct has continuing effects that create a hostile environment in a university program or activity." *See* *https://www.uc.edu/content/dam/uc/conduct/docs/SCOC%20Feb%204-BOARD%20(4)%20(2)%203-31-15%20(2)%204.30%20216p.pdf*

On October 28, 2014, a second ARC Hearing was held. (*Id*. at Page ID # 48-49) The second panel also found John Doe II responsible for violating the University's Student Code of Conduct. (*Id*. at Page ID # 49) John Doe II was placed on disciplinary probation and required to write a research paper. (*Id*.)

John Doe II is no longer a student at the University. (*Id*. at Page ID # 2) He has graduated, passed the bar exam, and is an admitted attorney in the state of Ohio. (*Id*. at Page ID # 2, 49)

On November 25, 2014, John Doe II brought suit in the Hamilton County Court of Common Pleas under Case No. A1406907. On January 5, 2015, John Doe II filed his First Amended Complaint in that case, alleging the exact same causes of action that he alleges here. On February 24, 2015, Judge Patrick Dinkelacker dismissed Counts I, III, and V of John Doe II's Complaint *with prejudice*. After the University moved to dismiss Counts II and IV, John Doe II voluntarily dismissed those claims without responding to the University's motion.

C. Procedure In This Case

On October 19, 2015, Plaintiffs John Doe I and John Doe II filed suit against the University of Cincinnati, Daniel Cummins, Denine Rocco, and Debra Merchant, alleging violations of procedural due process, a violation of Title IX of the Education Amendments of 1972, and a claim for "Injunctive Relief." (Complaint, RE 1 at Page ID # 56-63) Count I is purportedly brought against all

Defendants and seeks a declaratory judgment that all Defendants violated the due process provisions of the United States and Ohio Constitutions. (*Id*. at Page ID # 56-58) Count II is a claim brought under 42 U.S.C. § 1983 against Daniel Cummins, Denine Rocco, and Debra Merchant (referred to collectively as the "Individual University Defendants") in their individual capacities again for purported violations of procedural due process. (*Id*. at Page ID # 58-59) Count III is a declaratory judgment action brought under Title IX against the University. (*Id*. at Page ID # 59-62) Count IV is another Title IX claim brought against the University. (*Id*. at Page ID # 62-63) Count V is styled as a claim for "Injunctive Relief" against the Individual University Defendants in their official capacities and the University. (*Id*. at Page ID # 63)

IV. SUMMARY OF THE ARGUMENT

The District Court correctly dismissed Plaintiffs-Appellants' Complaint because it failed to state a claim upon which relief could be granted.

The District Court dismissed Count I to the extent it seeks declaratory relief against the University and the Individual University Defendants in their official capacities because the Eleventh Amendment bars these claims. However, Count I should be dismissed in total because it seeks to remedy only past conduct and because, in reality, Plaintiffs-Appellants' requests for injunctive relief are against the University, not the Individual University Defendants.

Counts I and II, both of which assert a claim that Defendants-Appellees violated Plaintiffs-Appellants' procedural due process rights, were properly dismissed as Plaintiffs-Appellants were provided constitutional procedural due process. Even if Plaintiffs-Appellants had sufficiently alleged that their procedural due process rights were violated, the elements of due process that Plaintiffs-Appellants maintain they were not afforded were not clearly established. As such, the District Court correctly held that Individual University Defendants are entitled to qualified immunity. In addition to the fact that Plaintiffs-Appellants were provided all the constitutional due process to which they are entitled, Count II fails as a matter of law because that claim is brought only against the Individual University Defendants in their individual capacities and the allegations against those defendants individually are insufficient to state a claim.

The District Court also correctly held that Plaintiffs-Appellants' claims under Title IX failed to state a claim upon which relief can be granted. Plaintiffs-Appellants offered nothing more than conclusory allegations supporting their claims that their disciplinary matters were the result of gender bias. Also, Plaintiffs-Appellants' attempt to seek a declaratory judgment that the University's policies and procedures do not comply with Title IX fails because there is no private right of action allowing them to bring such a challenge. Lastly,

Plaintiffs-Appellants' "archaic assumptions" theory under Title IX does not apply to their allegations.[2]

V. STANDARD OF REVIEW

This Court reviews a district court's grant of a motion to dismiss for both lack of jurisdiction and for failure to state a claim *de novo*. *Gilley v. Dunaway*, 572 F. App'x 803, 305 (6th Cir. 2014); *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 979 (6th Cir. 2012). "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). The plausibility standard is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. To permit such an inference, the complaint need not contain "detailed factual allegations," but it must contain more than "labels and conclusions or a formulaic recitation of the elements of a cause of action." *Id.* (internal quotation marks omitted).

[2] Plaintiffs-Appellants did not dispute that Count V of their Complaint – a stand-alone claim styled "Injunctive Relief" – should be dismissed.

VI. ARGUMENT

A. Eleventh Amendment Immunity Precludes Plaintiffs-Appellants From Bringing Count I of Their Complaint.

Count I of Plaintiffs-Appellants' Complaint should be dismissed in total on Eleventh Amendment immunity grounds. Eleventh Amendment immunity "bars all suits, whether for injunctive, declaratory or monetary relief, against the state and its departments, by citizens of another state, foreigners or its own citizens." *Thiokol Corp. v. Dep't of Treasury*, 987 F.2d 376, 381 (6th Cir. 1993) (internal citations omitted). The University of Cincinnati is a public university in the state of Ohio. *See* Ohio Rev. Code § 3361.01. The "University [of Cincinnati], as an arm of the State, is immune from suit under the Eleventh Amendment because it is well-settled that a plaintiff is precluded from directly suing a State in federal court. . . ." *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 571 (6th Cir. 2000).

While *Ex Parte Young*, 209 U.S. 123 (1908) allows prospective injunctive relief against state actors in their official capacities in certain circumstances, "a declaratory judgment against state officials declaring that they violated federal law in the past constitutes retrospective relief, and is barred by the Eleventh Amendment." *Brown v. Strickland*, No. 2:10-CV-166, 2010 WL 2629878, at *4 (S.D. Ohio June 28, 2010) (citing *Green v. Mansour*, 474 U.S. 64, 67 (1985)). All of Plaintiffs-Appellants' allegations of wrongful conduct in Count I are targeting past conduct. (Complaint, RE 1 at Page ID # 57) ("The Defendants *have violated*

the Plaintiffs-Appellants' due process rights in the following manner") (emphasis added). Further, Plaintiffs-Appellants' requested relief for Count I targets past conduct. (*Id*. at Page ID # 64) ("On Counts I and III, Judgment in favor of the Plaintiffs declaring that the Defendant *have violated* . . ."") (emphasis added). Plaintiffs-Appellants are not seeking to enjoin state officials to conform their **future** conduct to the requirements of federal law. They are seeking an order from this Court finding that the University's Code of Conduct "as applied" to them violated constitutional due process. (*Id*. at Page ID # 58)

Plaintiffs-Appellants have not alleged that any of the Individual Defendants have the power to grant their requested relief – expungement of their disciplinary records. (*Id*. at Page ID # 56-58) In reality, Plaintiffs-Appellants' requests for injunctive relief are against the University. All of Plaintiffs- Appellants' allegations in Count I of their Complaint are alleged against the University. (*Id*. at Page ID # 56-57) ("UC has a constitutional obligation to provide a fundamentally fair and reliable hearing process."; "UC conducted biased investigations, which were then provided to the ARC Hearing Panel."; "UC permitted the use of hearsay evidence at the ARC Hearing without providing the Plaintiffs with the opportunity to effectively cross-examine witnesses."). Such a claim is barred by the Eleventh Amendment regardless of whether it is prospective or retrospective. *See Pennhurst State Sch. & Hosp.v. Halderman*, 465 U.S. 89, 101-02 (1984) ("[A]s when the

State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief").

Count I of Plaintiffs-Appellants' Complaint is barred by the Eleventh Amendment.

B. The District Court Correctly Held That Plaintiff-Appellants Failed to State Procedural Due Process Claims Upon Which Relief Can Be Granted.

"It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking in wisdom or compassion." *Wood v. Strickland*, 420 U.S. 308, 326 (1975). "A university is not a court of law, and it is neither practical nor desirable it be one. Yet, a public university student who is facing serious charges of misconduct that expose him to substantial sanctions should receive a fundamentally fair hearing. In weighing this tension, the law seeks the middle ground." *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 n.1 (6th Cir. 2005) (quoting *Gomes v. Univ. of Maine Sys.*, 365 F.Supp.2d 6, 16 (D.Me. 2005)). "[I]n determining the amount of process due, courts are to look at three factors: (1) the nature of the private interest affected—that is, the seriousness of the charge and potential sanctions, (2) the danger of error and the benefit of

additional or alternate procedures, and (3) the public or governmental burden were additional procedures mandated."[3] *Id*. at 635.

"Before expelling a student for disciplinary reasons, a public institution must provide: 1) notice of the charges against the student; 2) an explanation of the evidence that authorities have against the student; and 3) an opportunity for the student to present his side of the story." *Ashiegbu v. Williams*, 129 F.3d 1263, 1997 WL 720477, at *1 (6th Cir. Nov. 12, 1997) (citing *Goss v. Lopez*, 419 U.S. 565, 581 (1975); *Newsome v. Batavia Local School Dist.*, 842 F.2d 920, 927 (6th Cir. 1988)). "Further, a student faced with expulsion has the right to a pre-expulsion hearing before an impartial trier of fact." *Id*. (citing *Newsome*, 842 F.2d at 927).

Regarding the framework of a procedural due process claim, Plaintiffs-Appellants' primary argument is that the District Court erred by using an "atomistic" or "checklist" approach rather than viewing the University's process as a whole. (Appellants' Brief, Doc. 14 at Page 33-37) This same nebulous argument

[3] Plaintiffs-Appellants assert that the District Court "committed a significant error in not applying the *Mathews* balancing test" and lament that the "District Court's Order does not even cite to *Mathews*." (Appellants' Brief, Doc. 14 at Page 30) However, the District Court's order quotes *Flaim* for the proposition that "the type of notice and hearing will vary and be judged for sufficiency based on context in which the dispute arose." (Order, RE 16 at Page ID # 263-64) That quote from *Flaim* was in the context of this Court's application of the framework from *Mathews v. Eldridge*, 424 U.S. 319 (1976). The District Court applied the *Mathews* framework and correctly set forth the procedural safeguards required in this context.

was addressed and properly ruled upon by the District Court. The District Court stated:

> [I]f the case law shows that Plaintiffs were not entitled to various procedural protections on an individual basis – and it does – then it follows that Plaintiffs were not denied due process because UC did not utilize some vague admixture of the missing procedures during their hearings.
>
> For instance, suppose that UC does not permit any cross-examination at all, but does allow each student to be represented by counsel. Does the addition of counsel offset the loss of the ability to cross-examine witnesses in Plaintiffs' due process calculus? What if UC were to deny cross-examination, but exclude hearsay? Under Plaintiffs' holistic theory of procedural due process, there would be almost no way that UC could anticipate whether its disciplinary hearing procedures comport with due process.

(Order, RE 16 at Page ID # 264) The District Court also recognized that this Court, in *Flaim*, addressed the alleged procedural defects in a disciplinary hearing seriatim. (*Id*.) The same approach was taken by this Court in *Newsome v. Batavia Local School District*, 842 F.2d 920 (6th Cir. 1988). While Plaintiff-Appellants' arguments in this regard should be rejected for the same reasoning offered by the District Court, even if this Court used the ambiguous "holistic" approach advocated by Plaintiffs-Appellants, the District Court's opinion should be affirmed.

1. The District Court correctly held that Plaintiffs-Appellants' allegations of bias were insufficient to support a due process violation.

"In the university setting, a disciplinary committee is entitled to a presumption of honesty and integrity, absent a showing of actual bias." *McMillan v. Hunt*, No. 91–3843, 1992 WL 168827, at *2 (6th Cir. July 21, 1992); *see also Atria v. Vanderbilt Univ.*, 142 F. App'x 246, 256 (6th Cir. 2005) (quoting *McMillan*). While Plaintiffs-Appellants have continually attempted to characterize their allegations as fact or evidence, such allegations of bias are nothing more than conclusions. These conclusions are insufficient as a matter of law, especially where the law affords a presumption of honesty and integrity to these University processes. *See Doe v. Univ. of Cincinnati*, No. 1:15-CV-600, 2015 WL 5729328, at *2 (S.D. Ohio Sept. 30, 2015).

The District Court correctly held that Plaintiffs-Appellants' mere belief that the University was biased against them due to pressure from the Department of Education did not state a claim upon which relief could be granted. (Order, RE 16 at Page ID # 266-67) In addition to fact that such conclusory allegations are insufficient as a matter of law, a number of courts have directly addressed this argument, finding it insufficient to withstand a Rule 12(b)(6) challenge. *See Marshall v. Ohio Univ.*, No. 2:15-CV-775, 2015 WL 7254213, at * 8 (S.D. Ohio Nov. 17, 2015) (finding insufficient at the motion to dismiss stage plaintiff's

assertion "that OU has succumbed to pressure from the Department of Education to 'crackdown' on perpetrators of sexual assault and sexual misconduct on university campuses"); *Doe v. Columbia Univ.*, No. 14-CV-3573 JMF, 2015 WL 1840402, at *12 n.7 (S.D.N.Y. Apr. 21, 2015) (rejecting plaintiff's allegation that the defendant university was "under fire" with the Department of Education for its handling of sexual assault complaints as support for an allegation of gender bias).

Plaintiffs-Appellants also continue to allege that they can show bias through outdated training materials, claiming that these materials show a bias toward individuals accused of sexual assault. (Appellants' Brief, Doc. 14 at Page 44-45) However, similar attempts to establish bias through training materials have been rejected. *See Bleiler v. Coll. of Holy Cross*, No. CIV.A. 11-11541-DJC, 2013 WL 4714340, at *12 (D. Mass. Aug. 26, 2013).

Additionally, allegations regarding multiple roles by University administrators are insufficient to establish bias. "The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a later adversary hearing." *Withrow v. Larkin*, 421 U.S. 35, 55 (1975). It is "very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure . . . does not

violate due process of law." *Id*. at 56; *see also Richards v. McDavis*, No. 2:12-CV-846, 2013 WL 5297244, at *12 (S.D. Ohio Sept. 19, 2013) ("[M]ere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members.") (citation omitted).

Further, Plaintiffs-Appellants again claim that they can establish bias through "statistical evidence." (Appellants' Brief, Doc. 14 at Page 45-46) There is no inference of bias that can be drawn from their purported "statistical evidence." *See Cobb v. The Rector & Visitors of Univ. of Virginia*, 84 F. Supp. 2d 740, 747 (W.D. Va. 2000) (rejecting plaintiff's attempt to rely "on raw statistics to argue that a greater number of minority students are charged with and convicted of honor violations" because "statistics, standing alone, do not create a constitutional violation") (citing *Butler v. Cooper*, 554 F.2d 645, 647 (4th Cir. 1977)); *see also 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.").

Plaintiffs-Appellants contend that the "most damning evidence of bias by UC is found in ¶ 34(c)(iv)-34(c)(v) of the Complaint." (Appellants' Brief, Doc. 14 at Page 43) However, those allegations of bias are not made against any individual

who ultimately served on the ARC Hearing Panels that presided over Plaintiffs-Appellants' disciplinary hearings. Additionally, this alleged conduct preceded the first hearings for both Plaintiffs-Appellants. As the District Court correctly recognized, "to the extent that Plaintiffs base their due process claims on alleged defects in their first hearings, those alleged errors were harmless because their appeals were sustained and they both received new hearings." (Order, RE 16 at Page ID # 264) (citing *Harper v. Lee*, 938 F.2d 104, 105–06 (8th Cir. 1991) (administrative reversal and grant of new disciplinary hearing preserved inmate's due process rights and cured any procedural defects in the first hearing)).

Lastly, Plaintiffs-Appellants' allegation of bias directly contradicts an important fact that John Doe I attempts to gloss over in his Complaint – he was ultimately found "Not Responsible" for the allegations made by Jane Roe II. (Complaint, RE 1 at Page ID # 41) So, accepting John Doe I's allegations as true, the ARC Hearing Panel was biased toward him in finding him "Responsible" for Jane Roe I's allegations, but not biased toward him when it found him "Not Responsible" for Jane Roe II's allegations. Such a position is untenable. *See Frumkin v. Bd. of Trustees, Kent State Univ.*, 626 F.2d 19, 21-22 (6th Cir. 1980) ("[T]he record shows that he was in fact successful in convincing a majority of the panel to recommend against his dismissal. In light of the outcome of the hearing, it

is difficult to discern how an expansion of counsel's role would have been of significant benefit to appellant.").

2. It is not a due process violation to prohibit students from directly cross-examining each other, witnesses, or University employees.

The Sixth Circuit has held that "[s]tudents do have a right to have the evidence against them explained and to be given an opportunity to rebut that evidence, but this right does not entitle them to know the identity of student witnesses, or to cross-examine students or school administrators." *C.Y. ex rel. Antone v. Lakeview Pub. Sch.*, 557 F. App'x 426, 431 (6th Cir. 2014)[4]; *see also Sandusky v. Smith*, No. 3:10-CV-00246-H, 2012 WL 4592635, at *7 (W.D. Ky. Oct. 2, 2012) ("[T]he Sixth Circuit has determined that [the right to cross examination] is not necessary to satisfy due process even in long-term school suspension scenarios, because the burden on the government outweighs the benefit to the student."); *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1988) ("As for the right to cross-examination, suffice it to state that the right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases.").

[4] The *Antone* case, which Plaintiffs-Appellants ignore in their brief, involves a suspension and ultimate expulsion of the plaintiff student. 557 F. App'x at 431. Thus, under the *Mathews* balancing test, the outer-bounds of due process were to be afforded. The Sixth Circuit held that the student did not have a right to cross-examine students or school administrators. *Id*.

The complainant and the respondent in University disciplinary hearings are not permitted to directly cross-examine one another. However, these parties may cross-examine one another by submitting questions to the ARC panel and requesting that those questions be asked of the opposing party. The circumscribed form of cross-examination allowed by the University is consistent with due process. *See E.K. v. Stamford Bd. of Educ.*, 557 F. Supp. 2d 272, 277 (D. Conn. 2008) ("[A] provision that disallowed admission of hearsay statements and required confrontation of student witnesses or disclosure of witness identities would be overly-burdensome to schools due to the increasing challenge of maintaining order and discipline.") (citing *Newsome,* 842 F.2d at 923–24; *B.S. v. Bd. of Schs. Trs.*, 255 F. Supp. 2d 891, 900 (N.D. Ind. 2003)).

3. Plaintiffs-Appellants' allegation that they shouldered the burden of proof in their disciplinary hearings is incorrect and otherwise insufficient to establish a due process violation.

The District Court correctly recognized that "[t]he facts alleged in the complaint show that the ARC Panel functioned as a board of inquiry and determined what happened based on a preponderance of the evidence without assigning the burden of proof to either party." (Order, RE 16 at Page ID # 270 (citing Complaint, RE 1 at ¶ 31(f)) In fact, the University states on its website that respondents are presumed not to have violated the Code of Conduct unless found otherwise through the adjudicatory process: "The university respects the

constitutional rights of respondents and does not presume that respondents have violated university policies unless there has been a finding through the adjudicatory process." https://www.uc.edu/titleix/accused-assistance.html (last accessed, May 31, 2016).

Nonetheless, the District Court also correctly recognized that Supreme Court jurisprudence establishes that even if the burden of proof was placed on Plaintiffs-Appellants, doing so would not constitute a due process violation. (Order, RE 16 at Page ID # 270) "Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Lavine v. Milne*, 424 U.S. 577, 585 (1976).

Some courts have distinguished *Lavine* on the basis that it involved an individual seeking conferral of a property right rather than resisting the deprivation of an existing property right, but no court has held that *Lavine* is inapplicable to a situation involving an existing property right. In fact, a number of courts have cited *Lavine* in the public employment context and held that placing the burden of proof on the employee does not violate due process. *See Soles v. City of Raleigh Civil Serv. Comm'n*, 480 S.E.2d 685, 689 (N.C. 1997) ("Clearly, if it is permissible to dismiss an employee without any evidentiary hearing whatsoever, it is similarly permissible to discharge an employee after an evidentiary hearing in which the burden of proof is placed on the employee."); *Benavidez v. City of Albuquerque*,

101 F.3d 620, 626-28 (10th Cir. 1996) (examining the burden of proof issue in the context of the *Mathews* factors and determining that because the employee was given pre-termination protections, placing the burden of proof on the employee in a post-termination hearing did not violate due process); *Saavedra v. City of Albuquerque*, 917 F. Supp. 760, 765 (D.N.M. 1994), *aff'd*, 73 F.3d 1525 (10th Cir. 1996) ("Upon whom the City places the burden of proof in a civil matter is a decision the City is entitled to make uninhibited by due process concerns.").

Also, courts that addressed this issue pre-*Lavine* held that placing the burden of proof on a public employee in a hearing does not violate due process. *See Chung v. Park*, 514 F.2d 382, 387 (3d Cir. 1975) ("[A] a post-decision hearing in which a professor has the burden of proof is adequate to satisfy due process.") (citing *Perry v. Sindermann*, 408 U.S. 593, 603 (1972)); *Keddie v. Penn. State Univ.*, 412 F. Supp. 1264, 1271 (M.D. Penn. 1976) (same).

Again, while the University does not place the burden of proof on the accused, even if it did, that would not constitute a due process violation.

4. The District Court correctly held that Plaintiffs-Appellants were provided constitutional due process.

The pertinent facts establish that Plaintiffs-Appellants were provided constitutional due process. John Doe I was made aware of the allegations against him on March 12, 2014. (Complaint, RE 1 at Page ID # 32-33) John Doe I met with Daniel Cummins on March 28, 2014, for a Procedural Review where John

Doe I was permitted to discuss and ask questions about the alleged violation of the Student Code of Conduct. (*Id*.) On May 2, 2014, two ARC Hearings were conducted regarding John Doe I's alleged sexual assault of Jane Roe I and Jane Roe II. (*Id*. at Page ID # 37) John Doe I chose to participate in his hearing with Jane Roe I, but refused to participate in his hearing with Jane Roe II. (*Id*. at Page ID # 38) John Doe I was initially found responsible for violating the Student Code of Conduct in both cases.

As was his right under the University's Student Code of Conduct, John Doe I appealed both findings. (*Id*.) The University found procedural errors and ordered that John Doe I be afforded two new ARC Hearings. (*Id*.) Those ARC Hearings occurred on May 18 and May 19, 2015. (*Id*. at Page ID # 38-41) After those hearings, the ARC Hearing Panel found that John Doe I violated the Student Code of Conduct regarding his actions toward Jane Roe II, but found that he did not violate the Student Code of Conduct regarding his actions toward Jane Roe I. (*Id*. at Page ID # 41) John Doe I appealed the finding regarding Jane Roe II. (*Id*.) The ARC Hearing Panel's finding was then upheld. (*Id*.)

John Doe II was notified of the allegations against him on March 17, 2014. (*Id*. at Page ID # 44) John Doe II had his Procedural Hearing with Defendant Cummins on March 26, 2014. (*Id*.) John Doe II was permitted an ARC Hearing and the hearing took place on April 22, 2014. (*Id*. at Page ID # 45) After the

hearing, the ARC Hearing Panel made a recommendation that John Doe II be found responsible for violating the University's Student Code of Conduct. (*Id*. at Page ID # 48) John Doe II appealed and the University Appeals Administrator reversed the finding due to procedural errors. (*Id*.) On October 28, 2014, a second ARC Hearing was held. (*Id*.) The second ARC Hearing panel also found John Doe II responsible for violating the University's Student Code of Conduct. (*Id*. at Page ID # 49) John Doe II was placed on disciplinary probation and required to write a research paper as a result. (*Id*.)

Plaintiffs-Appellants received constitutional due process. *See Flaim,* 418 F.3d at 637 (finding no violation of student's procedural due process rights after medical student was expelled following conviction for felony drug crime where student received notice of accusations against him, was afforded a hearing in which he was not permitted to cross examine the arresting officer but was able to present his version of events after hearing officer's testimony, and where hearing committee did not produce written findings; procedures were "fundamentally fair" even where they "were far from ideal and certainly could have been better"); *Brown v. Univ. of Kan.*, 16 F. Supp. 3d 1275, 1290 (D. Kan. 2014), *aff'd*, 599 F. App'x 833 (10th Cir. 2015) (holding that the plaintiff was afforded due process where "Defendants communicated with Plaintiff about the charges against him and made an effort to hear his side of the story"); *Esfeller v. O'Keefe*, 391 F. App'x

337, 342 (5th Cir. 2010) ("The student must be given notice of the charges against him, an explanation of what evidence exists against him, and 'an opportunity to present his side of the story.'") (quoting *Goss*, 419 U.S. at 581); *Caiola v. Saddlemire*, No. 3:12-CV-00624 VLB, 2013 WL 1310002, at *4 (D. Conn. Mar. 27, 2013) ("The extensive nature of the notice and procedures afforded to Plaintiff pre-expulsion, and the availability of an appeals process post-deprivation, deem that the University's hearing procedures comport with due process.").

The District Court properly dismissed Plaintiffs-Appellants' procedural due process claims for failure to state claims upon which relief can be granted. *See Salau v. Denton*, No. 2:14-CV-04326-SRB, 2015 WL 5885641, at *8 (W.D. Mo. Oct. 8, 2015) ("Plaintiff was afforded adequate procedural rights by Defendants by way of notice of the charges, identification of the violations charged, and an opportunity to present his case even though he refused to participate.").

5. The claims alleged against the Individual University Defendants in their individual capacities are insufficient to state a claim under § 1983.

To support a claim under 42 U.S.C. § 1983, "[P]laintiff must set forth facts that, when construed favorably, establish (1) the deprivation of a right secured by the Constitution or laws of the United States (2) caused by a person acting under color of state law." *Heyerman v. Cnty. of Calhoun*, 680 F.3d 642, 647 (6th Cir. 2012). "Persons sued in their individual capacities under § 1983 can be held liable

only on their own unconstitutional behavior." *Id.; see also Gibson v. Matthews*, 926 F.2d 532, 535 (6th Cir. 1991) (noting that personal liability "must be based on the actions of that defendant in the situation that the defendant faced, and not based on any problems caused by the errors of others, either defendants or non-defendants").

Here, the allegations levied against each of the Individual University Defendants in their individual capacities fail to state a claim upon which relief can be granted. The only mention of Debra Merchant in the entire Complaint is to assert that she "has responsibility for administering and operating the UC Code of Conduct and Judicial System." (Complaint, RE 1 at Page ID # 3) There are no allegations of wrongdoing made against her. *See Zdebski v. Schmucker*, 972 F. Supp. 2d 972, 986 (E.D. Mich. 2013) ("Because Plaintiff has failed to allege that the individual defendants were personally involved in the alleged constitutional deprivations, the Court dismisses Plaintiff's claims against Schmucker and Etue in their individual capacities.").

The only allegations made against Rocco relate to Plaintiffs-Appellants' appeals of their disciplinary matters. (Complaint, RE 1 at Page ID # 42, 49) The Sixth Circuit has held that there is no due process right to appeal school discipline. *See C.Y. ex rel. Antone*, 557 F. App'x at 434 (finding "no reason to depart from [the] precedent" establishing that due process does not require affording a student

an appeal in a disciplinary matter); *see also Flaim*, 418 F.3d at 642 (citations omitted). Because due process does not require providing Plaintiffs-Appellants with the ability to appeal their disciplinary matters, the claims against Rocco fail to state a claim upon which relief can be granted.

The claims made against Cummins are equally insufficient. First, Plaintiffs-Appellants claim that in a 2011 "Resource Guide for Student Survivors of Sexual Assault," Cummins is "mentioned prominently in the document," and that document refers to a person who made an accusation of sexual assault as a "survivor." (Complaint, RE 1 at Page ID # 21) Such allegations are insufficient to show bias. *See Doe v. Columbia Univ.*, 2015 WL 1840402, at *12 (plaintiff's "*ad feminem* allegation" that a university official was "motivated by an anti-male gender bias" because "she had worked for a women's resource center in the past" was "plainly insufficient to show . . . gender bias").

Second, Plaintiffs-Appellants alleged that Cummins assists students "who claim to be victims" in obtaining accommodations and that such assistance shows that he is biased. (Complaint, RE 1 at Page ID # 22, 33, 44, 51) Federal regulations *require* the University to offer such accommodations or interim measures to victims of sexual assault. *See* 34 C.F.R. § 668.46(b)(11)(v). Also, "[t]he mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a

later adversary hearing." *Withrow*, 421 U.S. at 55. It is "very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure . . . does not violate due process of law." *Id*. at 56.

The allegations against the Individual University Defendants in their individual capacities are insufficient to state a claim upon which relief can be granted. The District Court should also be affirmed on this basis.

C. The District Court Correctly Held That The Individual Defendants Are Entitled to Qualified Immunity.

As the District Court properly held, even if this Court "were to conclude that the complaint states claims for violations of the Due Process Clause, the factual allegations show that the individual Defendants are entitled to qualified immunity from suit on these claims." (Order, RE 16 at Page ID # 271) When analyzing qualified immunity, the Court must examine (1) whether a constitutional right would have been violated on the facts alleged and (2) whether the right was clearly established. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009). In order to be "clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that his or her conduct violates that right." *Wegener v. City of Covington*, 933 F.2d 390, 392 (6th Cir. 1991).

The Sixth Circuit has stated: "Before expelling a student for disciplinary reasons, a public institution must provide: 1) notice of the charges against the student; 2) an explanation of the evidence that authorities have against the student; and 3) an opportunity for the student to present his side of the story." *Ashiegbu*, 1997 WL 720477, at *1 (citing *Goss*, 419 U.S. at 581; *Newsome,* 842 F.2d at 927). "Further, a student faced with expulsion has the right to a pre-expulsion hearing before an impartial trier of fact." *Id*. (citing *Newsome,* 842 F.2d at 927). Plaintiffs-Appellants received these due process protections. Even if this Court believes that Plaintiffs-Appellants have identified due process protections that were not afforded to them, those due process protections have not been clearly established.

The District Court's holding that the Individual University Defendants are entitled to qualified immunity should be affirmed.

D. The District Court's Finding That Plaintiffs-Appellants Failed To State A Title IX Claim Upon Which Relief Could Be Granted Should Be Affirmed.

The District Court correctly held that Plaintiffs-Appellants' Title IX claim failed as a matter of law because they "have not alleged facts showing that the results of their disciplinary proceedings were motivated by gender bias." (Order, RE 16 at Page ID # 275)

"Allegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss." *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994). "Allegations of a causal connection in the case of university disciplinary cases can be of the kind that are found in the familiar setting of Title VII cases." *Id.* "Such allegations might include, *inter alia*, statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." *Id.*; *see also Sahm v. Miami Univ.*, No. 1:14-cv-698, 2015 WL 2406065, at* 4 (S.D. Ohio May 20, 2015) (granting University's motion to dismiss because the expelled student's complaint was void of allegations of causation sufficient to state a Title IX claim and noting that there were no allegations similar to those sufficient to state a Title VII claim).

Just as they did in their Complaint and in response to Defendants-Appellees' motion to dismiss, Plaintiffs-Appellants' brief to this Court merely restates the same conclusory allegations that were properly rejected by the District Court. (Appellants' Brief, Doc. 14 at Page 57) Plaintiffs-Appellants do not point to any factual allegation of the type needed to support a plausible Title IX claim – *i.e.* "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the

influence of gender." *Sahm*, 2015 WL 2406065, at *4 (quoting *Mallory v. Ohio Univ.*, 76 F. App'x 634, 640 (6th Cir. 2003))[5]. Rather, they assert that their disciplinary proceedings were flawed, and ask this Court (just as they asked the District Court) to assume that these purported flaws were because they are males. Plaintiffs-Appellants have alleged nothing that would indicate that a female accused of violating the University's Code of Conduct would have been treated any differently than they were as a males accused of violating the Code of Conduct. Such allegations are insufficient as a matter of law, and they were properly rejected by the District Court.

Despite mention of these perfunctory allegations, Plaintiffs-Appellants main argument relies upon the purported statistical evidence in their Complaint. (Appellants' Brief, Doc. 14 at Page 59-63) The District Court addressed and properly rejected that "evidence" because it failed to "eliminate the most likely non-discriminatory reason[s] for the disparity," namely that "(1) UC has only received complaints of male-on-female sexual assault; and (2) males are less likely than females to report sexual assault." (Order, RE 16 at Page ID # 277) (internal footnotes omitted)

[5] The only statement that Plaintiffs-Appellants attempt to rely upon is an innocuous statement from Daniel Cummins associated with a disciplinary matter wholly unrelated to the parties here that "a male student walking through a female (restroom) . . . would generate a big buzz." (Appellants' Brief, Doc. 14 at Page 58-59) However, Plaintiffs-Appellants fail to connect how this statement shows animus toward males and, more specifically, toward Plaintiffs-Appellants.

Similar arguments have been addressed and rejected by a number of other courts. "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." *Tsuruta*, 2015 WL 5838602, at *4; *see also Doe v. Case W. Reserve Univ.*, No. 1:14CV2044, 2015 WL 5522001, at *6 (N.D. Ohio Sept. 16, 2015) ("That CWRU's policy disproportionately affects males as a result of the higher number of complaints lodged against males does not demonstrate selective enforcement by the university."); *King v. DePauw Univ.*, No. 2:14-CV-70-WTL-DKL, 2014 WL 4197507, at *10 (S.D. Ind. Aug. 22, 2014) (emphasis added). ("But DePauw is not responsible for the gender makeup of those who are accused *by other students* of sexual misconduct, and the fact that a vast majority of those accused were found liable might suggest a bias against accused students, but says nothing about gender.").

Further, Plaintiffs-Appellants' arguments contradict the actual facts as their "own complaint demonstrates that males <u>are not</u> invariably found responsible when charged with sexual misconduct violations – the ARC panel acquitted Doe I of the charge related to Jane Roe I." (Order, RE 16 at Page ID # 278)

Even if Plaintiffs-Appellants' statistics could be construed as evidence of gender bias, they would at best support a claim that the University's procedures

disproportionately impact men. However, such an allegation fails to state a Title IX claim. As the District Court correctly recognized, because "recovery under Title IX under a disparate impact theory is not permitted, Plaintiffs cannot state a claim by alleging that UC's otherwise gender-neutral disciplinary procedures disproportionately affect men." (Order, RE 16 at Page ID # 278) (citing *Horner v. Kentucky High Sch. Ath. Ass'n*, 206 F.3d 685, 692 (6th Cir. 2000)); *see also Marshall*, 2015 WL 7254213, at *5 ("[A]lthough Title IX prohibits intentional gender discrimination, it does not support claims of disparate impact.").

Plaintiffs-Appellants also continue to assert that an inference of discrimination exists because the female students claimed they were unable to consent due to intoxication but Plaintiffs-Appellants' intoxication was not considered. (Appellants' Brief, Doc. 14 at Page 61) Such an argument has already been rejected by this Court. *See Mallory.*, 76 F. App'x at 639 (rejecting the plaintiff's argument that "the University's focus on DeLong's, but not Mallory's, ability to consent in this instance reveals that the University holds an antiquated notion that 'men are sexual aggressors and women are victims'").

Similarly, in *Xiaolu Peter Yu v. Vassar Coll.*, the male plaintiff alleged that the university's failure to consider his intoxication while considering the female student's intoxication was evidence of gender bias. No. 13-cv-4373, 2015 WL 1499408, at *26 (S.D.N.Y. March 31, 2015). The court noted that the university

maintained a policy where "the voluntary intoxication [] by the respondent typically isn't a factor that the panelists are concerned with." *Id*. Rejecting the male plaintiff's argument, the court found that "[t]here is simply no indication anywhere in the record that this policy was understood to apply on a gendered basis." *Id*. Said another way, the university's consideration of the respondent's intoxication would apply equally if the respondent was male or female.

The same is applicable to this case. Plaintiffs-Appellants have offered **no** allegation that an intoxicated male student has alleged that he was sexually assaulted by a female student because he was unable to consent and that the University has treated the accused female student differently than a similarly situated accused male student. Similar to the above cases, the fact that the University does not permit a student's intoxication to be used as defense to sexual misconduct provides no evidence of gender bias. *See also Routh v. Univ. of Rochester*, 981 F. Supp. 2d 184, 211 (W.D.N.Y. 2013) (rejecting male plaintiff's allegation that the defendant university engaged in "selective prosecution" where there was "no indication that Routh availed himself" of the complaint process).

Lastly, Plaintiff-Appellants address the "archaic assumptions" standard in the final two pages of their brief.[6] (Appellants' Brief, Doc. 14 at Page 63-64) This

[6] The final heading of Plaintiffs-Appellants' brief also mentions the "deliberate indifference" standard. (Appellants' Brief, Doc. 14 at Page 63) Because there is no actual argument regarding this standard, any issue with this standard has been

standard has no application to the case at bar. As stated in *Marshall*, "[t]he archaic assumptions standard applies when a plaintiff seeking equal athletic opportunities demonstrates discriminatory intent in actions taken because of classifications based upon archaic beliefs and stereotypes about gender." 2015 WL 7254213, at *8 (citing *Mallory*, 76 F. App'x at 638-39). This Court has never held that this standard applies to allegations like those presented here. In fact, the only mention by this Court of the "archaic assumptions" in a case with allegations somewhat akin to those at bar was to say that this standard "has been applied where plaintiffs seek equal athletic opportunities." *Mallory*, 76 F. App'x at 638-39. Because the "archaic assumptions" standard does not apply to allegations like these, the District Court did not err in failing to thoroughly address that standard.

E. There Is No Private Right Of Action For Plaintiffs-Appellants To Assert Count III Of Their Complaint.

While it was unnecessary for the District Court to reach this issue, Count III of Plaintiffs-Appellants' Complaint – a request for a declaratory judgment under Title IX – also fails because there is no private right of action to challenge that a university policy violates Title IX. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291-91 (1998).

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waived. *See Kuhn v. Washtenaw Cty.*, 709 F.3d 612, 624 (6th Cir. 2013) ("[A]rguments adverted to in only a perfunctory manner are waived.").

VII. CONCLUSION

For all of the foregoing reasons, Defendants-Appellants University of Cincinnati, Daniel Cummins, Denine Rocco, and Debra Merchant respectfully submit that that the District Court's decision should be affirmed.

June 28, 2016

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the word-processing system used to prepare the brief, Microsoft Word, indicates that this brief contains 8,567 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in14-point Times New Roman font.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of Defendants-Appellees University of Cincinnati, Daniel Cummins, Denine Rocco, and Debra Merchant was filed this 28th day of June, 2016, via the CM/ECF system, which will serve all counsel of record.

s/ Doreen Canton
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VIII. ADDENDUM

Record Entry No.	Description of Document	Date Filed	Page ID Range
1	Complaint	10/19/2015	1-64
11	Defendants' Motion to Dismiss for Failure to State a Claim	12/17/2015	78-115
14	Opposition to Motion to Dismiss	1/17/2016	173-224
15	Reply Memorandum in Support of Defendants' Motion to Dismiss Plaintiffs' Complaint	1/25/2016	225-245
16	Order Granting Defendants' Motion to Dismiss	3/23/2016	246-279
17	Judgment Entry	3/23/2016	280
18	Notice of Appeal	4/4/2016	281-282