

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**John Doe,**

**Plaintiff,**

**v.**

**Case No. 2:16–cv–143**

**Denison University, et al.,**

**Judge Michael H. Watson**

**Defendants.**

**Magistrate Judge Jolson**

**OPINION AND ORDER**

Defendants Denison University (“Denison University”) and Mary-Kathleen Clifford (“Clifford”) move to dismiss Plaintiff’s Amended Complaint in this case alleging, *inter alia*, gender discrimination in violation of Title IX. Mot. Dismiss, ECF No. 38; Mot. Dismiss, ECF No. 40. For the following reasons, the Court **GRANTS** Denison University’s Motion to Dismiss, ECF No. 40, and **REMANDS** the remainder of this case to the Licking County Common Pleas Court.<sup>1</sup>

**I. FACTS**

John Doe (“Plaintiff”) alleges that he was falsely accused and wrongly found responsible for sexual misconduct in this case. He brings various state-law claims against the alleged victim, Jane Doe, Denison University, and Clifford, who Denison University hired to conduct the investigation into Jane Doe’s

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<sup>1</sup> Because Plaintiff brings only state-law claims against Clifford, and because the Court remands those claims to the Licking County Common Pleas Court, the Court declines to consider Clifford’s motion to dismiss, ECF No. 38.

allegations against Plaintiff. He also alleges several theories of Title IX liability against Denison University.

Plaintiff's Amended Complaint alleges that on or about March 7, 2014, the United States Department of Education Office of Civil Rights ("OCR") began investigating Denison University, among other institutions of higher learning, for possibly violating Title IX. Plaintiff alleges that the investigation was a result of female students alleging to OCR that Denison University "insufficiently disciplin[ed] male students alleged to have engaged in sexual misconduct." Am. Compl. ¶ 4, ECF No. 29. Such OCR investigations, Plaintiff alleges, pressured universities like Denison University to "severely discipline male students alleged to have engaged in sexual misconduct regardless of their innocence" because OCR "can impose civil penalties and/or suspend institutions from participating in federal student financial aid programs if [OCR finds a university . . . did not do enough to discipline males alleged to have engaged in sexual misconduct with female students." *Id.* ¶¶ 7, 9.

With respect to Plaintiff's discipline in this case, he alleges that he and Jane Doe texted each other throughout the evening of February 13, 2015, about meeting up together later that night. Jane Doe attended various parties that evening while Plaintiff remained mostly in his dorm room. Eventually, Jane Doe went to Plaintiff's dorm room, where the two engaged in consensual sexual activity in the early morning hours of February 14, 2015.

The next morning, Jane Doe came to believe that someone other than Plaintiff had put GHB<sup>2</sup> into one of her alcoholic beverages at a fraternity party she had attended before she went to Plaintiff's dorm room. Jane Doe thereafter publicly alleged that a specific male student, known around campus as "Man Bun," drugged her drink at the fraternity party. Jane Doe's allegations caused the cancellation of the fraternity's upcoming mixer. As a result, Man Bun and other fraternity members began retaliating against Jane Doe for alleging that she was drugged at one of their parties. Plaintiff alleges that "as a result of"<sup>3</sup> that retaliation against Jane Doe, in April of 2015, she accused Plaintiff of sexual misconduct, alleging that she was incapable of consenting to the sexual activity in which they had engaged on February 14.

Denison University launched an investigation into Jane Doe's accusation against Plaintiff and hired Clifford to conduct said investigation. Plaintiff alleges that throughout the investigation, multiple witnesses told Clifford that Jane Doe appeared to be in control of her faculties on the evening in question. He also alleges that throughout the investigation and subsequent disciplinary proceeding, Plaintiff was denied the opportunity to adequately defend himself. Specifically, he alleges that Denison University violated several OCR directives, federal regulations, and Denison University's own policies and Code of Student Conduct in the course of depriving Plaintiff of various "rights" to which he was afforded.

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<sup>2</sup> GHB is commonly referred to as the "date rape" drug.

<sup>3</sup> The correlation between the fraternity members' retaliation against Jane Doe and her claim of sexual misconduct by Plaintiff is not clear from the Amended Complaint.

Plaintiff alleges that as a result of Clifford's investigation and Denison University's disciplinary proceeding, he was wrongly found responsible for sexual misconduct, and a University Conduct Board ("UCB") recommended expulsion.

Plaintiff appealed the decision. Due to a "procedural irregularity" recognized by Denison University, a second UCB was established to reconsider the sanction. The second UCB also recommended expulsion, and Plaintiff was expelled from Denison University after unsuccessfully appealing the determination to the University Appeals Board ("UAB") and, ultimately, to Denison University's Vice President, Dr. Laurel Kennedy ("Vice President Kennedy"), and President, Adam Weinberg ("President Weinberg").

Plaintiff alleges that Denison University has a "pattern and practice of taking unlawful disciplinary actions against male students who were falsely accused of sexual misconduct." *Id.* ¶ 11.

## **II. STANDARD OF REVIEW**

A claim survives a motion to dismiss pursuant to Rule 12(b)(6) if it "contain[s] 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 quotations omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* A complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all of the

complaint's allegations are true." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007) (internal citations omitted).

A court must also “construe the complaint in the light most favorable to the plaintiff.” *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 619 (6th Cir. 2002).

Nonetheless, a plaintiff must provide “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”). “[A] naked assertion . . . gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility . . . .” *Twombly*, 550 U.S. at 557.

### **III. ANALYSIS**

#### **A. Title IX claims**

Counts 6 through 8 of Plaintiff's Amended Complaint set forth three separate theories of Title IX liability and are labelled as: “Count 6: Violation of Title IX – Hostile Environment and/or Discrimination by Denison University;” “Count 7: Violation of Title IX – Deliberate Indifference by Denison University;” “Count 8: Violation of Title IX – Erroneous Outcome by Denison University.” Am. Compl. ¶¶ 153–90, ECF No. 29.

Title IX of the Education Amendments of 1972 is a federal statute designed to prevent sexual discrimination and harassment in educational institutions receiving federal funding. Title IX specifically provides: “[n]o person in the



United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). “Title IX bars the imposition of university discipline where gender is a motivating factor in the decision to discipline.” *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994).

“Neither the Supreme Court nor the Sixth Circuit has set forth a standard for determining when intentional discrimination has occurred in a case where a student has relied on Title IX to challenge either the initiation or the outcome of a disciplinary proceeding.” *Mallory v. Ohio Univ.*, 76 F. App’x 634, 638 (6th Cir. 2003). In *Mallory*, the Sixth Circuit viewed the Title IX claim through the framework established by the Second Circuit in *Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994), which “categorized Title IX claims against universities arising from disciplinary hearings into ‘erroneous outcome’ claims and ‘selective enforcement’ claims.” *Mallory*, 76 F. App’x at 638 (citing *Yusuf*, 35 F.3d at 714–15). Recently, the Sixth Circuit reiterated that it was “not subject to a binding framework in evaluating a student’s Title IX discrimination claim,” but noted that it had looked to *Yusuf* in deciding *Mallory* and reiterated *Yusuf*’s identification of “two categories of Title IX claims related to student-disciplinary hearings: ‘erroneous outcome’ claims and ‘selective enforcement’ claims.” *Doe v. Cummins*, 662 F. App’x 437, 451 (6th Cir. 2016).

The Sixth Circuit has not recognized other categories of Title IX claims in the disciplinary proceeding context. In fact, in both *Mallory* and *Cummins*, the appellant asked the Sixth Circuit “to adopt two additional categories of Title IX claims: (1) ‘deliberate indifference’ claims and (2) ‘archaic assumptions’ claims.” *Cummins*, 662 F. App’x at 451 n.9; *Mallory*, 76 F. App’x at 638. The Sixth Circuit did not, in either case, recognize a “deliberate indifference” or “archaic assumptions” category of Title IX claims in the disciplinary hearing context. See *Mallory*, 76 F. App’x at 639 (assuming, *arguendo*, that the deliberate indifference or archaic assumptions standard applies); *Cummins*, 662 F. App’x at 451 n.9 (expressly declining to adopt, as inapplicable, either the deliberate indifference or the archaic assumptions standards).

Here, Plaintiff asks this Court to recognize a “deliberate indifference” category of Title IX claim.<sup>4</sup> This Court previously rejected an invitation to recognize a deliberate indifference category of Title IX liability in this context in *Marshall v. Ohio Univ.*, No. 2:15–cv–775, 2015 WL 7254213, at \*8 (S.D. Ohio Nov. 17, 2015) (noting that “[t]he Sixth Circuit has not determined that these Title IX standards, which were developed in sexual harassment cases and cases involving unequal athletic opportunities, are applicable when a plaintiff . . . claims that intentional gender discrimination occurred in a university disciplinary

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<sup>4</sup> The phrase “archaic assumptions” appears in Paragraph 12 of Plaintiff’s Amended Complaint, Am. Compl. ¶ 12, ECF No. 29, but Plaintiff does not apparently ask the Court to recognize an “archaic assumption” category of Title IX claim. To the extent he does, that request is denied for the same reasons the Court declines to recognize a “deliberate indifference” category of Title IX claim.

proceeding.” (citing *Mallory*, 76 F. App’x at 639–42)). In *Marshall*, Judge Smith “decline[d] to broaden the current framework used to analyze allegations about discrimination in a university disciplinary proceeding in the absence of controlling Sixth Circuit precedent.” 2015 WL 7254213, at \*8; see also *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744, 757 (E.D. Tenn. 2009) (“‘[D]eliberate indifference’ must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it.” (citation omitted)).

Nonetheless, Plaintiff argues that at least one district court in the Sixth Circuit has recognized such a theory, citing *Wells v. Xavier University*, 7 F. Supp. 3d 746, 751–52 (S.D. Ohio 2014). While *Wells* considered the deliberate indifference theory in this context, “*Wells* is . . . anomalous.” *Doe v. Brown Univ.*, 166 F. Supp. 3d 177 (D.R.I. 2016) (noting that, as of February 22, 2016, *Wells* was the only case of which the *Brown* court was aware that had recognized a deliberate indifference Title IX claim in the disciplinary context).

The Court agrees with Judge Smith’s reasoning in *Marshall* and also declines to recognize a Title IX claim under the deliberate indifference theory in this context absent controlling Sixth Circuit precedent. As such, “Count 7: Violation of Title IX – Deliberate Indifference by Denison University” is **DISMISSED WITH PREJUDICE.**

Plaintiff’s remaining Title IX theories are titled “Count 6: Violation of Title IX – Hostile Environment and/or Discrimination by Denison University” and “Count 8: Violation of Title IX – Erroneous Outcome by Denison University.” Am. Compl.



¶¶ 153–76; 184–90, ECF No. 29. It is difficult to discern whether those claims, in substance, are best construed as erroneous outcome, selective enforcement, or both. For example, the allegations in the “erroneous outcome” claim (Count 8) mostly mirror the allegations in the deliberate indifference claim. *Compare id.* ¶¶ 184–90 *with id.* ¶¶ 177–83. Indeed, the thrust of Count 8 is that Denison University violated its own policies, Title IX, the Violence Against Women Act, “and/or” OCR guidance by expelling Plaintiff and was deliberately indifferent to that fact. *Id.* ¶¶ 184–90. Likewise, it is difficult for the Court to discern from the pleading the thrust of Count 6 and whether, or how, that count differs in substance from Count 8. Construing the Amended Complaint liberally and as a whole, the Court finds that Counts 6 and 8 are most appropriately analyzed together under the erroneous outcome theory.<sup>56</sup>

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<sup>5</sup> To the extent Plaintiff intended to bring a “hostile environment” claim in Count 6, that claim fails. As noted above, based on *Mallory* and *Cummins*, the Sixth Circuit recognizes only the “erroneous outcome” and “selective enforcement” categories of Title IX claims in the disciplinary context. This Court has found no cases recognizing a separate “hostile environment” theory of Title IX liability in the disciplinary proceeding context absent allegations that the plaintiff suffered sexual harassment. Accordingly, the Court finds that Plaintiff’s Title IX claim based on “hostile environment” fails for the same reasons articulated in *Doe v. Salisbury Univ.* 123 F. Supp. 3d 748, 764–65 (D.Md. 2015) (finding that allegations that the university investigated and disciplined the plaintiff’s alleged sexual assault without proper jurisdiction, that the university’s employees lacked proper training to investigate and/or discipline pursuant to Title IX, and that the university’s policies were biased against men in violation of Title IX and due process were insufficient to state a claim for “harassment” for purposes of bringing a hostile environment sexual harassment claim); *compare id.* with Am. Compl. ¶¶ 159–62, ECF No. 29 (alleging lack of jurisdiction, improper training, Denison University’s policies violated Title IX and due process). Plaintiff fails to allege the “harassment” necessary for a hostile environment sexual harassment claim.

<sup>6</sup> To the extent Plaintiff attempted to assert a Title IX claim based on the “selective enforcement” theory of liability, such a claim fails. “To prevail on a ‘selective

"A successful 'erroneous outcome' claim requires the plaintiff to show that the outcome of the University's disciplinary proceeding was erroneous because of sex bias." *Cummins*, 662 F. App'x at 452 (internal quotation marks and citation omitted). "[T]o state an erroneous-outcome claim, a plaintiff must plead: (1) 'facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding' and (2) a 'particularized . . . causal connection between the flawed outcome and gender bias.'" *Id.* (quoting *Yusuf*, 35 F.3d at 715). "Causation sufficient to state a Title IX discrimination claim can be shown via 'statements by members of the disciplinary tribunal, statements by pertinent

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enforcement' claim, the plaintiff must show that a similarly-situated member of the opposite sex was treated more favorably than the plaintiff due to his or her gender." *Cummins*, 662 F. App'x at 452 (citations omitted). A plaintiff must "identif[y] . . . a comparator of the opposite sex who was treated more favorably by the educational institution *when facing similar disciplinary charges*." *Case Western Reserve Univ.*, 2015 WL 5522001, at \*6 (citing *Yusuf*, 35 F.3d at 716) (emphasis added).

Plaintiff pleaded that Jane Doe was treated more favorably than he was throughout the course of his disciplinary proceeding, see e.g., Am. Compl. ¶ 104, 169, ECF No. 29, but such allegations do not state a claim under the selective enforcement theory because Jane Doe was not similarly situated to Plaintiff. See *Case Western Reserve Univ.*, 2015 WL 5522001, at \*6 ("Jane Roe, the complainant against Plaintiff in the disciplinary proceedings, is not a counterpart for the purposes of a selective enforcement claim." (citation omitted)). Plaintiff's conclusory allegation that "[u]pon information and belief, Denison University has not disciplined female student(s) when male student(s) allege these female student(s) engaged in sexual misconduct with the male student(s)," Am. Compl. ¶ 105, ECF No. 29, without any further factual allegations to make that allegation plausible, is insufficient to survive a Rule 12(b)(6) motion. This is especially true where that allegation is contradicted elsewhere in the Amended Complaint where Plaintiff alleges that "in virtually all cases of campus sexual misconduct by Denison University students, the accused student is male and the accusing student is female." *Id.* ¶ 163. If there are no cases in which male students have accused female students of sexual misconduct, Denison University could not have failed to discipline female students who are accused of sexually assaulting male students.

university officials, or patterns of decision-making that also tend to show the influence of gender.” *Id.*

Turning to the first prong of Plaintiff’s erroneous outcome claim, the Court finds Plaintiff has pled facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding. Necessarily taking the well-pleaded facts in the Amended Complaint as true, one could plausibly conclude that Jane Doe was not incapacitated the night on which she and Plaintiff engaged in sexual activity and that she consented to that activity. As such, Plaintiff sufficiently pleaded that the outcome of his disciplinary proceeding was erroneous.

However, “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*, 35 F.3d at 715. Rather, Plaintiff must also plead a particularized causal connection between the flawed outcome and gender bias. *Cummins*, 662 F. App’x at 452 (citation omitted). The issue, therefore, is whether Plaintiff has alleged sufficient facts to make plausible his allegation that Denison University reached an erroneous outcome in his case *because of his gender*. Reading the Amended Complaint liberally, it appears Plaintiff attempts to satisfy this requirement with allegations concerning statements by members of the disciplinary tribunal, statements by pertinent university officials, and patterns of decision-making that tend to show the influence of gender. In addition, Plaintiff

alleges that the discipline took place in the context of OCR's investigation of Denison University such that the Court can infer that Denison University was pressured to crack down on males accused of sexual assault and, accordingly, was biased against males accused of sexual assault. The Court considers each argument.

### **1. Statements by Members of the Disciplinary Tribunal**

Plaintiff argues that he sufficiently alleges that various statements by members of the disciplinary tribunal tend to show Denison University's gender bias.

The Court first considers Plaintiff's allegations concerning Kristin Hausman ("Hausman"), who chaired the first UCB. Plaintiff alleges that Hausman stated during his disciplinary proceeding that the UCB needed to weigh the "future of 1,000 girls" when adjudicating Jane Doe's complaint against Plaintiff. Am. Compl. ¶ 33(a), ECF No. 29. He also alleges that she exhibited gender-biased behavior by pressuring UCB members to impose greater sanctions against Plaintiff than those members sought to impose and by "aggressively" staring at Plaintiff during his testimony, "smiling and laughing" during the proceeding, hindering Plaintiff's ability to cross-examine Clifford, and by taking President Obama's "It's on Us" pledge. *Id.* ¶¶ 33(b), (c), (e). Plaintiff further alleges that Hausman was biased against other males in other disciplinary proceedings, citing the stricken Exhibits 2–6. *Id.* ¶ 33(d).



Plaintiff's argument regarding Hausman is not well taken. Neither Hausman's alleged pressing for greater sanctions, her taking of the "It's On Us" pledge, nor her demeanor during Plaintiff's disciplinary proceeding make plausible any allegation that Hausman was biased against Plaintiff because he is male.

Plaintiff's allegation that Hausman told other UCB members to weigh the "future of 1,000 girls" in adjudicating Jane Doe's allegation of sexual misconduct presents a closer call. The Court must take this allegation as true at this stage of the litigation. However, the statement on its face asked the UCB to consider the risk Plaintiff potentially posed to other victims. Taking all reasonable inferences in favor of Plaintiff, this statement makes plausible an inference that Hausman was biased in favor of the female victim in this case and against Plaintiff and that Hausman believed Plaintiff posed a risk to other females. It does not, however, lead to a plausible inference that Hausman was biased against Plaintiff or believed he posed a risk to other women *because* he was a man and Jane Doe (and other potential victims) was a woman, as opposed to because he was a student whom Hausman believed sexually assaulted another student and would do so again should he be found not responsible. See *Sahm v. Miami Univ.*, 110 F. Supp. 3d 774, 778 (S.D. Ohio 2015) ("Demonstrating that a university official is biased in favor of the alleged victims of sexual assault claims, and against the alleged perpetrators, is not the equivalent of demonstrating bias against male



students.” (citations omitted)). Accordingly, this statement does not raise a plausible inference of gender discrimination.

Plaintiff also contends that Clifford, whom Denison University hired to serve as the outside investigator into Jane Doe’s allegations, exhibited gender bias throughout her investigation and testimony to the UCB.<sup>78</sup>

First, Plaintiff alleges that Clifford is affiliated with the National Center for Higher Education Risk Management (“NCHERM”), and that Denison University’s selection of a NCHERM-affiliated investigator evinces Denison University’s bias against males because NCHERM is, itself, biased against males. Am. Compl. ¶ 36, ECF No. 20. To find a plausible inference of bias, one would have to find that Plaintiff’s allegations concerning NCHERM (detailed *infra*) create an inference of bias against males on the part of NCHERM, infer further that any investigator affiliated with NCHERM is therefore also biased against males, and infer further still that any university that hires an NCHERM-affiliated investigator to investigate a student’s claim of sexual misconduct absorbs NCHERM’s and the affiliated-investigator’s anti-male bias. This chain of inferences is too attenuated, even on a motion to dismiss. Moreover, as discussed *infra*, Plaintiff’s allegations

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<sup>7</sup> Plaintiff does not allege that Clifford was a member of the UCB, the body that actually adjudicated Plaintiff’s responsibility. This Opinion and Order assumes *arguendo* that any anti-male bias held by Clifford could be imputed to the UCB due to the substantial role Clifford allegedly played in the investigation and her eventual testimony to the UCB.

<sup>8</sup> Although the arguments regarding Clifford, except with respect to her allegedly erroneous testimony to the UCB, do not concern a “statement” by Clifford that Plaintiff alleges demonstrates her gender bias, the Court considers the arguments here as part of Plaintiff’s overall argument that Clifford was effectively a member of the UCB due to her substantial involvement in the disciplinary proceeding and that her conduct demonstrated gender bias “by a member of the disciplinary tribunal.”

concerning NCHERM fail to create a plausible inference that NCHERM is biased against males, and Denison University's selection of an NCHERM-affiliated Title IX investigator therefore does not raise a plausible inference of gender bias by Denison University for that independent reason.

Second, Plaintiff argues that Clifford's insufficient investigation evinces her gender bias. Allegations concerning the shortcomings of Clifford's investigation and testimony, include, *inter alia*: Clifford's erroneous testimony to the UCB concerning the effects of GHB and the probability that Jane Doe was administered GHB, which Clifford knew or should have known was false; Clifford's incorrect testimony to the UCB that "incapacitation" defied definition; Clifford's erroneous conclusion that Jane Doe was incapacitated; Clifford's failure to consider the Association of Title IX Administrators' ("ATIXA's") "Tip of the Week" in her investigation; and Clifford's violation of OCR directives throughout her investigation. Am. Compl. ¶¶ 72–83, 102, ECF No. 29.

The Court likewise rejects this argument. The allegations concerning the deficiencies in Clifford's investigation, report, and testimony to the UCB certainly make plausible Plaintiff's allegation that the outcome in this case was erroneous but do not create a plausible inference that Clifford was biased against males. See *Doe v. Case Western Reserve Univ.*, No. 1:14CV2044, 2015 WL 5522001, at \*5 (N.D. Ohio Sept. 16, 2015) ("Plaintiff points to procedural defects in the disciplinary hearings as evidence of discriminatory bias [as well as bias] based on the hostile attitude of the UJB towards [p]laintiff during proceedings. While

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these pleadings may call into question the outcome of the proceedings, they are not factual allegations supporting the conclusion that the procedural flaws and hostility toward [p]laintiff were motivated by sexual bias.”). Accordingly, Plaintiff’s allegations regarding Clifford fail to raise a plausible inference of gender bias on the part of any member of the UCB.

The Court next turns to various university officials involved in the appellate process. Plaintiff appealed the UCB’s decision to the University Appeals Board (“UAB”), which was headed by Dr. Rebecca Kennedy.<sup>9</sup> *Id.* ¶ 96. Plaintiff alleges that Dr. Rebecca Kennedy was biased against males. This bias, Plaintiff alleges, is reflected in Dr. Rebecca Kennedy’s position as Interim Director of Women’s Studies and two of her academic publications, entitled *Legal And ‘Sub-Legal’ Violence Against Metic Women In Classical Athens* and *Sexual Servitude or Domestic Partnership*. *Id.* Plaintiff also alleges that Dr. Rebecca Kennedy’s anti-male bias is evident through her “election to the steering committee of an international organization founded ‘to foster feminist and gender-informed perspectives . . . and to advance the goals of equality and diversity within the profession.’” *Id.* at ¶ 97 (emphasis and ellipses in original).

Plaintiff’s arguments as to Dr. Rebecca Kennedy’s bias are not well taken. Neither her position as the Interim Director of Women’s Studies nor the fact that she published works entitled *Legal And ‘Sub-Legal’ Violence Against Metic*

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<sup>9</sup> The Court refers to Dr. Rebecca Kennedy by her full name and Vice President Laurel Kennedy as “Vice President Kennedy.”

*Women In Classical Athens and Sexual Servitude or Domestic Partnership*

create a plausible inference that she therefore held anti-male bias when serving on the UAB in connection with Plaintiff's disciplinary proceeding. Notably, although Plaintiff alleges that Dr. Rebecca Kennedy was elected "to the steering committee of an international organization founded 'to foster feminist and gender-informed perspectives . . . and to advance the goals of equality and diversity within the profession,'" he cites Exhibit 32, which actually states that she was elected to the steering committee "for the Women's Classical Caucus, an international organization founded 'to foster feminist and gender-informed perspectives *in the study and teaching of the ancient Mediterranean* and to advance the goals of equality and diversity within the profession.'" Am. Compl. Ex. 32, PAGEID # 2363, ECF No. 29-5. An appeal board member's position on a steering committee regarding the study and teaching of the ancient Mediterranean likewise does not create a plausible inference of bias against males. *Cf. Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 31–32 (D. Me. 2005) (finding, on summary judgment, that it was "difficult to take seriously the [p]laintiffs' claim of bias" with respect to the hearing board chair due to her participation in sexual assault victim advocacy programs and the Women's Studies Advisory Committee).

Plaintiff next points to statements contained in open letters issued by Vice President Kennedy and President Weinberg, which were detailed in his Amended Complaint. Plaintiff alleges that he ultimately appealed the UCB's decision to

President Weinberg and Vice President Kennedy, who upheld the erroneous decision. Am. Compl. ¶¶ 100–01. He argues that the statements in their open letters exhibit their bias against males, and, thus, he sufficiently alleges that a decision-maker in his case was biased against him because he is male.

Vice President Kennedy's statement as alleged in the Amended Complaint reads:

University is dedicated to supporting victims of violence and holding students accountable when they violate our expectations . . . [o]ver the last four years, we have assessed our efforts on a continuing basis against the backdrop of quickly evolving federal compliance expectations. We are proud to have revised policies when we discerned ways of improving, including a significant change last summer in our investigation model and in the ways we support students affected by reported incidents.

*Id.* ¶ 21. Similarly, Plaintiff alleges that President Weinberg stated the following in an open letter a mere two months before Jane Doe accused Plaintiff of sexual misconduct in this case:

Title IX and sexual assault issues will be high priorities this semester. Denison has joined an organization called Culture of Respect ([www.cultureofrespect.org](http://www.cultureofrespect.org)), which has developed an excellent assessment tool and a "blueprint" for colleges to expand their prevention programs. We have asked CSMART to take the lead on using the blueprint at Denison University. I would invite interested students to join CSMART.

*Id.* ¶ 22.

Plaintiff's argument regarding these statements is not well taken. These excerpted statements are gender neutral. Moreover, the Court has reviewed the



entire statements,<sup>10</sup> attached as exhibits to Plaintiff's Amended Complaint, and the entirety of both statements is gender neutral. See *Id.* Exs. 13 & 14, PAGEID ## 2065–68, ECF No. 29-3. There is nothing in either statement that leads to a plausible inference that either Vice President Kennedy or President Weinberg was biased against males. See *Id.* Accordingly, these statements are not “statements by members of the disciplinary tribunal” that create an inference of discrimination against males.

In sum, Plaintiff has failed to allege any statement of a member of the disciplinary tribunal that raises a plausible inference of discrimination against men.

## **2. Statements by Pertinent University Officials/OCR Pressure**

Plaintiff argues that the Amended Complaint sufficiently alleges that Denison University was biased against males as a result of an OCR investigation and corresponding “pressure” from the government, as evidenced by certain statements by pertinent University officials.

With respect to this argument, a review of Plaintiff's allegations is helpful. Plaintiff alleges that the OCR launched an investigation into Denison University on or about March 7, 2014, regarding Denison University's compliance with Title IX after a female filed a complaint with OCR. Plaintiff alleges that Denison

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<sup>10</sup> Exhibits attached to Plaintiff's complaint “are part of the pleadings and the Court may properly consider them without converting the motion to dismiss into a motion for summary judgment.” *Clark v. Walt Disney Co.*, 642 F. Supp. 2d 775, 782 (S.D. Ohio 2009).

University is just one such university that was subject to investigation by OCR. He further alleges that the “investigations put millions of dollars in federal student aid at risk. This is because [ ]/OCR can impose civil penalties and/or suspend institutions from participating in federal student financial aid programs if [ ]/OCR finds a university, such as Denison, did not do enough to discipline males alleged to have engaged in sexual misconduct with female students.” Am. Compl. ¶ 7, ECF No. 29. Plaintiff alleges that Denison University received \$9.1 million in federal money in 2015 and thus is susceptible to pressure from OCR “to severely discipline male students alleged to have engaged in sexual misconduct regardless of their innocence.” *Id.* ¶¶ 8–9. Plaintiff alleges this pressure was compounded by another complaint filed with OCR against Denison University in March of 2015.<sup>11</sup> Plaintiff further references in the Amended Complaint a statement from the White House’s Annual 2014 report that references the possibility of a university losing federal funds upon a finding of Title IX violation by OCR. *Id.* ¶¶ 13–14.

Additionally, Plaintiff alleges that ATIXA and NCHERM counseled universities, including Denison University, to limit procedural protections afforded to “male students” accused of sexual misconduct in response to this pressure from the federal government. *Id.* ¶ 15. He alleges moreover that ATIXA and NCHERM are both organizations that harbor bias against males. Specifically, he

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<sup>11</sup> That complaint was closed, and it is not clear whether the complaint was filed by a male or female student or whether it alleged sexual assault by a male or female. Am. Compl. Ex. 1 at PAGEID # 1750–51, ECF No. 29-1.

alleges that NCHERM's gender-biased views are evinced by the fact that it, *inter alia*, uses feminine pronouns on its website when referring to sexual misconduct victims and masculine pronouns when referring to those accused of sexual misconduct and because it stated in an open letter that victims tend to tell the truth. *Id.* ¶ 17. Plaintiff alleges that ATIXA's and NCHERM's gender bias is also shown through their "2014 Whitepaper," which states that "victims are typically women." *Id.* ¶ 18.

Plaintiff alleges that Denison University embraced NCHERM's and ATIXA's gender-biased views. *Id.* ¶¶ 17–20. Specifically, Plaintiff points to Vice President Kennedy's open letter, discussed *supra*, which Plaintiff alleges "acknowledged" that Denison University "adopted ATIXA's call for gender biased prosecutions of male students in response to OCR pressure." *Id.* ¶ 21.

In sum, Plaintiff alleges that "pressure from governmental agencies such as OCR . . . and/or internal forces at Denison, caused Denison to take unlawful and gender biased disciplinary actions against [Plaintiff]." Am. Compl. ¶ 11, ECF No. 29. In other words, Plaintiff alleges that Denison University embraced ATIXA's and NCHERM's gender bias in response to the pressure under which Denison University found itself from OCR, the White House, and internal complaints from students regarding sexual misconduct.

The Court concludes that gender bias on the part of Denison University cannot be inferred from these allegations. First, a clarification is in order between what Plaintiff alleges regarding the OCR investigation and what the

exhibits attached to his Amended Complaint state. Plaintiff alleges that the “investigation [by OCR of Denison] occurred because female student(s) alleged Denison violated Title IX by insufficiently disciplining male students alleged to have engaged in sexual misconduct.” Am. Compl. ¶ 4, ECF No. 29. The Court does not take this allegation as true because the exhibit cited in support of the allegation does not support it. Rather, the OCR letter to Denison University regarding the investigation states that a female student complained that Denison University “failed to promptly and equitably respond to complaints, reports, and/or incidents of sexual violence of which it had notice, including a [particular] report of sexual assault . . . , and, as a result, students . . . were subjected to a sexually hostile environment.” Am. Compl. Ex. 1 at PAGEID # 1741, ECF No. 29-1. The letter says nothing about whether the complaining student was assaulted by a male or female and does not state that the University was being investigated for potentially insufficiently investigating or “disciplining” males, as opposed to females, accused of sexual misconduct. *Id.* at PAGEID ## 1741–46. Nor does it indicate the University was being investigated for subjecting only female students to a sexually hostile environment. *Id.* Rather, the letter states that Denison University was being investigated for potentially creating a sexually hostile environment due to its failure to promptly and equitably respond to complaints of sexual violence of which it had notice. *Id.* at PAGEID # 1741.

Likewise, the White House statement contained in the Amended Complaint and the statement by Vice President Kennedy are gender neutral and do not

raise a plausible inference of gender discrimination. Nor does the allegation that ATIXA or NCHERM use gender-based pronouns or that they published a whitepaper saying that victims are typically women plausibly indicate that those organizations are biased against males.<sup>12</sup>

At bottom, taking all reasonable inferences in favor of Plaintiff, one could plausibly infer that the OCR investigation, the potential consequences of being found in violation of Title IX as a result of the investigation, and the corresponding “pressure” on Denison University and other universities created a bias by Denison University in favor of alleged victims of sexual assault and against those accused of sexual assault.

However, the investigation and related “pressure” do not plausibly lead to a separate inference of bias on the basis of the *gender* of those accused of sexual assault. “Demonstrating that a university official is biased in favor of the alleged victims of sexual assault claims, and against the alleged perpetrators, is not the equivalent of demonstrating bias against male students.” *Sahm v. Miami Univ.*, 110 F. Supp. 3d 774, 778 (S.D. Ohio 2015) (citations omitted); *Marshall*, 2015 WL 7254213, at \*8 (“cracking down on perpetrators is not the same as cracking down on men.” (citations omitted)). In this case, Plaintiff’s insertion of the word

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<sup>12</sup> Even assuming ATIXA or NCHERM were biased against males, Plaintiff’s additional allegation that Denison University “embrace[d]” that gender bias by “‘deconstruct[ing]’ the rights afforded to *male* students accused of sexual misconduct,” Am. Compl. ¶ 20, ECF No. 29 (emphasis added), is wholly conclusory and contradicts the attached policies of Denison University, which afford the same rights to those accused of sexual misconduct, regardless of the accused’s gender. See *Id.* Ex. 8–12, ECF No. 29-2, 29-3.



“male” before the phrase “students accused of sexual misconduct” throughout the Amended Complaint is simply insufficient to turn a plausible inference of bias against students accused of sexual misconduct into a plausible inference of bias against males accused of sexual misconduct.

Plaintiff next argues that certain statements from other pertinent university officials indicate gender bias. He alleges:

- that Denison University’s program coordinator for the Campus Leadership and Involvement Center states on a blog that “[o]ne out of four women are sexually assaulted in college . . . I do not think that we as a community feel comfortable talking about sexual assault openly and honestly.” Am. Compl. ¶ 24, ECF No. 29.
- that Denison University’s Rape Crisis Center stated, “1 out of 6 American women has been the victim of attempted or completed rape . . . .” *Id.* ¶ 25.
- That Denison University’s Center for Women and Gender Action published an allegation that one in five female college students will be sexually assaulted. *Id.* ¶ 25.

None of these statements say anything about the perpetrators of the violence, see Am. Compl., Ex. 15, 16, PAGEID # 2069–70, ECF No. 29-3, or lead to a plausible inference that Denison University was biased against males. These statements certainly do not make plausible Plaintiff’s allegation that Denison University “campaign[ed] to portray a large portion of their [sic] male students as sexual predators.” Am. Compl. ¶¶ 24, 26, ECF No. 29.

Plaintiff also points to President Weinberg’s statement, discussed *supra*, in which he discusses Denison University’s decision to join an organization called

Culture of Respect and corresponding decision to apply Culture of Respect's "blueprint" for the expansion of Denison University's prevention program. Am. Compl. ¶ 22. Plaintiff alleges that Denison University's "decision to apply the 'blueprint' articulated by the Culture of Respect proves Denison's intent to prosecute male students in a gender biased fashion." *Id.* ¶ 23. Plaintiff alleges that Culture of Respect itself assumes males are perpetrators of sexual violence against women, as evinced by its advocating that colleges implement "sex signals": skits which portray male actors as coercing female actors. *Id.* Plaintiff alleges the Culture of Respect's website also: (1) contains a link called "A Call to Men," which identifies males as perpetrators, (2) maintains that 99% of rapists are men, and (3) states that the vast majority of sexual assault victims are women, *id.*, which further demonstrates its bias against men. In other words, Plaintiff alleges that President Weinberg's statement that Denison University joined the Culture of Respect organization shows that Denison University discriminated against males because the Culture of Respect organization is, itself, biased against men. *Id.* at ¶ 24.

Plaintiff's allegations regarding Denison University's joining of the Culture of Respect do not create a plausible inference of Denison University's bias against males for several reasons. First, Plaintiff makes certain allegations about Culture of Respect (i.e., that it *suggests* colleges implement gender-biased educational skits about rape, that it publishes certain statistics that he alleges are biased, and that it was gender-biased by containing a link called "A Call to Men"),

which allegedly demonstrate Culture of Respect's bias. He also alleges that Denison University joined the Culture of Respect. Plaintiff does not, however, allege that Denison University put on one of the so-called gender-biased skits or published to its students the "A Call to Men" link or other "gender-biased statistics" from the website. Plaintiff alleges merely that Denison University applied the "blueprint" from the Culture of Respect's website, Am. Compl. ¶ 22, ECF No. 29, and then exhibited gender bias by failing to provide Plaintiff various "rights" afforded him under the blueprint. *Id.* In other words, Plaintiff does not allege that Denison University in any way incorporated the allegedly gender-biased aspects of Culture of Respect.

Second, and more importantly, the Court finds that a plaintiff cannot create a plausible inference of gender-based discrimination from, without more, an organization's publication of statistics about rape, its use of gender-based pronouns on its website, or its attempt to train and educate men about rape.

Accordingly, Plaintiff's allegation that Denison University joined Culture of Respect and incorporated its "blueprint" does not lead to a plausible inference that Denison University was biased against males.

### **3. Patterns of Decision-Making That Tend to Show the Influence of Gender**

Finally, Plaintiff alleges that Denison University has a "pattern and practice of taking unlawful disciplinary actions against male students who were falsely accused of sexual misconduct." Am. Compl. ¶ 11, ECF No. 29.

Proving a pattern and practice of “decision-making that also tend[s] to show the influence of gender” is one manner in which Plaintiff could establish an erroneous outcome Title IX claim. *Doe v. Cummins*, 662 F. App’x 437, 452 (6th Cir. 2016). However, the mere allegation that Denison University has a “pattern and practice of taking unlawful disciplinary actions against male students who were falsely accused of sexual misconduct” is nothing more than the conclusory recitation of an element of Plaintiff’s Title IX cause of action. Plaintiff failed to plead any facts to make such an allegation plausible.

Plaintiff’s reference to various complaints in other lawsuits, which this Court struck from the record, ECF No. 53, of other male students who accused Denison University of erroneous decision-making does not help. The Court struck those exhibits precisely because they were not evidence of anything more than the fact that other males had made certain allegations against Denison University. As explained in the Opinion and Order striking those complaints from the docket in this case, a complaint in another lawsuit is not evidence of the truth of any of the allegations in the other lawsuit.<sup>13</sup> Accordingly, a complaint in another lawsuit is not evidence that the plaintiff in that lawsuit was disciplined for sexual misconduct or that gender-bias played any role in the discipline of that plaintiff. As such, the other complaints are irrelevant to Plaintiff’s lawsuit and do

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<sup>13</sup> Moreover, while the complaints in Exhibits 2–6 alleged that each plaintiff was wrongly found responsible for sexual misconduct, none of the complaints even *alleged* gender bias.

not support his conclusory allegation that Denison University has a pattern and practice of decision-making that tends to show the influence of gender.<sup>14</sup>

Plaintiff's Amended Complaint contains no factual allegations concerning any other instances in which Denison University disciplined other males for sexual misconduct or that gender-bias played any role in such disciplinary proceedings.<sup>15</sup> Without any plausible factual allegations about other cases in which Denison University disciplined male students for sexual assault, let alone disciplined them in a gender-biased manner, Plaintiff's Amended Complaint comes far short of containing any plausible factual allegations to support his conclusory allegation that Denison University engaged in a pattern and practice of gender-biased decision making.

#### **4. *McDonnell Douglas* Burden-Shifting Framework**

Plaintiff contends that the *McDonnell Douglas* burden-shifting framework applied to discrimination cases brought under Title VII does not apply at the motion to dismiss stage. Therefore, he argues, the Court should not require Plaintiff in this Title IX discrimination case to plead that an asserted gender-neutral explanation for Denison University's bias (which he argues is, in this

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<sup>14</sup> Even assuming that the complaints, as opposed to, for instance, the actual decisions from such lawsuits or even the actual disciplinary decisions underlying such lawsuits, were evidence of other disciplinary proceedings, four such instances would not suffice to constitute a "pattern" of decision-making sufficient for stating an "erroneous outcome" Title IX claim. *Cf. Doe v. Cummins*, 662 F. App'x 437, 454 (6th Cir. 2016) ("[N]ine cases is hardly a sufficient sample size for this court to draw any reasonable inference of gender bias from these statistics.").

<sup>15</sup> The allegations referenced in footnote 8 of Plaintiff's response, ECF No. 44, PAGEID # 2612, do not support his conclusory allegation that Denison University had a "pattern and practice" of gender-biased decision-making.



case, that Denison University was biased against Plaintiff because he was a student accused of sexual misconduct rather than because he was male) was pretext. Rather, Plaintiff contends, he merely had to allege a minimal plausible inference of discrimination (not necessarily gender-based discrimination) at this stage of the litigation. Plaintiff cites *Doe v. Columbia Univ.*, 831 F.3d 46 (2nd Cir. 2016), for support.

*Columbia University* held that *McDonnell Douglas*' burden-shifting framework applies to Title IX claims. It also held that plaintiffs in Title IX cases are held to a "reduc[ed] . . . pleading burden, so that the alleged facts need support only a minimal inference of bias." 831 F.3d at 56. Nonetheless, Plaintiff's argument is not well taken.

First, it does not appear that the Sixth Circuit has adopted the Second Circuit's reasoning in *Columbia University* and applied the *McDonnell Douglas* burden-shifting framework or a reduced pleading burden to Title IX cases. *Cummins*, in which the Sixth Circuit discussed *Columbia University*, makes no mention of *McDonnell Douglas*, burden shifting, or the "minimal plausible inference" of discrimination standard that *Columbia University* adopted.

Second, the Court is not, as Plaintiff seems to contend, requiring him to plead facts that would establish pretext. Part of Plaintiff's *prima facie* Title IX erroneous outcome claim is establishing a particularized causal connection between the flawed outcome and gender bias. *Cummins*, 662 F. App'x at 452 (quoting *Yusuf*, 35 F.3d at 715). Therefore, Plaintiff must plead facts that, if true,

create a plausible inference of gender bias, not just any bias. For the reasons discussed above, Plaintiff has not done so. Accordingly, his Amended Complaint does not state a claim for a Title IX violation based on the erroneous outcome theory, and those claims must be dismissed (Counts 6 through 8). The Court's holding does not rest on any failure of Plaintiff to plead facts regarding pretext, and the Court therefore rejects this argument.

### **B. State-Law Claims**


Having dismissed Plaintiff's federal claims, the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims. See 28 U.S.C. § 1367(c)(3); *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Mallory*, 76 F. App'x at 641. Accordingly, the Court **REMANDS** Plaintiff's state-law claims to the Licking County Commons Pleas Court for adjudication.

## **5. CONCLUSION**

The allegations contained in Plaintiff's Amended Complaint, if true, are troubling, and this Opinion and Order should not be taken as the Court's approval of the process Denison University uses to respond to claims of sexual misconduct in the wake of pressure from OCR. Nonetheless, while Plaintiff has sufficiently alleged that he was treated unfairly, he has not sufficiently alleged that his gender is the motivating factor behind that treatment. Accordingly, for the reasons addressed above, the Court **GRANTS** Denison University's motion to dismiss and **DISMISSES WITH PREJUDICE** Plaintiff's Title IX claim to the extent it is based on a theory of deliberate indifference, **DISMISSES WITHOUT**

**PREJUDICE** his Title IX claim to the extent it is based on a theory of erroneous outcome, and **REMANDS** Plaintiff's remaining state-law claims to the Licking County Commons Pleas Court. The Clerk shall enter judgment and terminate this case.

**IT IS SO ORDERED.**

  
**MICHAEL H. WATSON, JUDGE**  
**UNITED STATES DISTRICT COURT**