**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

| | | |
|---|---|---|
| JOHN DOE,<br><br>Plaintiff,<br><br>v.<br><br>THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, G.P. "BUD" PETERSON, President of the Georgia Institute of Technology, sued in his official and personal capacities, JOHN M. STEIN, Dean of Students and Vice President of Student Life at the Georgia Institute of Technology, sued in his official and personal capacities, PETER PAQUETTE, Assistant Dean of Students, Director of the Office of Student Integrity & Deputy Title IX Coordinator for Students at the Georgia Institute of Technology, sued in his official and personal capacities,<br><br>Defendants. | :<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>: | CIVIL ACTION FILE<br>NO. 1:15-CV-4079-SCJ |

**ORDER**

This matter is before the Court on Plaintiff's motion for preliminary injunction [8].

## I. Background

### A. Procedural History and Facts

Plaintiff, John Doe, filed suit against Defendants on November 20, 2015, alleging various causes of action arising out of Georgia Tech's investigation and adjudication of a claim of sexual misconduct brought against him by another student. Plaintiff contends that Defendants violated his Due Process and Equal Protection rights under the United States Constitution. He also alleges a claim under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, and state law claims of breach of contract, breach of the duty of good faith and fair dealing, negligence, and negligence per se.

The Court granted Plaintiff's motion to proceed anonymously and the parties have been careful in their briefing and argument not to refer to any student involved in the case by name. Plaintiff files the instant motion for preliminary injunction seeking a court order permitting him to return to classes in the Spring 2016 semester so that he may complete his degree on time. The Court held an evidentiary hearing on Plaintiff's motion on December 10, 2015.[1]

Plaintiff matriculated at Georgia Tech on August 18, 2011. See Cmplt., ¶ 13. On February 17, 2015, Ms. Jane Roe, a student at Georgia Tech, filed a complaint of sexual misconduct against Mr. Doe with the Office of Student Integrity based on

[1]As the Court considers Plaintiff's request for injunctive relief on an expedited basis, the Court does not yet have a transcript of the December 10, 2015, hearing. The Court notes when it relies on testimony from a witness during the hearing, but does not refer to any particular page of a transcript.



AO 72A
(Rev.8/82)

an incident that occurred at Mr. Doe's fraternity house on October 10, 2013, approximately 16 months earlier. See id., ¶¶ 41-51.[2] The Office of Student Integrity is the division of the Dean of Students Office at Georgia Tech responsible for the investigation and adjudication of sexual misconduct claims.

Georgia Tech's Student Sexual Misconduct Policy "utilizes an investigatory model, not an adversarial model, in resolving allegations of this policy." The standard of proof under the Policy is "preponderance of the evidence." See id., ¶ 28 and the Student Sexual Misconduct Policy. Defendant Peter Paquette, in his capacity as Assistant Dean of Students, Director of the Office of Student Integrity, and Deputy Title IX Coordinator for Students at Georgia Tech, acted as the investigator and adjudicator in this matter. On February 18, 2015, Mr. Paquette informed Mr. Doe that Ms. Roe had made a complaint against him and that Georgia

[2]Plaintiff alleges that Georgia Tech should not have accepted the complaint Ms. Roe filed because the Code of Conduct requires that all complaints be filed within 30 days of the incident. Defendants respond that acts of sexual misconduct are governed not by the Code of Conduct, but rather by the Student Sexual Misconduct Policy which does not contain any kind of statute of limitations. Although Plaintiff argued at the hearing that the "specific" limitations period in the Code of Conduct trumps the silence of the Student Sexual Misconduct Policy, the Court does not have sufficient argument from the parties before it at this time to make any kind of ruling that the Code of Conduct incorporates the Student Sexual Misconduct Policy or that the two should be read together in any fashion. As such, the Court cannot conclude that there is any limitations period in the Student Sexual Misconduct Policy.



AO 72A
(Rev.8/82)

Tech had issued a "no-contact" order to both Mr. Doe and Ms. Roe prohibiting communication between them.

According to his affidavit and testimony given during the hearing on the motion for preliminary injunction, Mr. Paquette began his investigation by speaking with witnesses offered by Ms. Roe because he received information from her more expeditiously. In the spring semester of 2015, Mr. Doe was working in North Carolina as part of the cooperative education portion of his degree program. Mr. Paquette testified that he attempted to reach Plaintiff twice after notifying him via e-mail that Ms. Roe had filed a complaint against him. See Paquette Aff., ¶¶ 9-11. Plaintiff then responded on February 25 and asked to speak on the phone with Mr. Paquette on February 27. Id., ¶ 12. When they spoke, Mr. Paquette informed Mr. Doe that Ms. Roe alleged that Mr. Doe engaged in sexual misconduct on the evening in question, but Mr. Paquette did not provide any specific allegations. He then gave Mr. Doe the option of providing a written statement or an oral one. Plaintiff agreed to provide a written statement by March 2, 2015, but failed to do so. Id., ¶¶ 12-13. Mr. Paquette asked Plaintiff again for a written statement. Id., ¶ 13. Mr. Doe denied any sexual contact and Mr. Paquette confirmed this denial in a follow-up email. Id., ¶ 15.



AO 72A
(Rev.8/82)

On March 3, 2015, Mr. Doe submitted to Mr. Paquette a written statement of his version of events, as well as a list of witnesses, including individuals known as Informants 10 and 11 who were members of Plaintiff's fraternity present on the evening in question. In particular, Informant 11 was a "sober monitor" at the fraternity party that evening and assisted Ms. Roe in calling a friend to come pick her up from the fraternity house almost immediately after the incident which formed the basis for Ms. Roe's complaint. Plaintiff also supplied Mr. Paquette with the names of Witness 1 and Witness 2, other members of his fraternity who were also "sober monitors" on the evening in question, and Witness 3 and Witness 4 fraternity members present that evening.

Mr. Doe informed Mr. Paquette that these witnesses were willing to speak with Mr. Paquette. Mr. Paquette testified that he had received this information two weeks after he had begun his investigation and by the time he received the names, he had already determined that Ms. Roe was intoxicated that evening and the only remaining question in Mr. Paquette's mind was whether a sexual act occurred. As such, Mr. Paquette testified that he did not believe these witnesses possessed relevant information and he did not believe it was necessary to speak with them.

As of March 12, 2015, Mr. Paquette had interviewed seven witnesses, six of whom identified themselves as friends or sorority sisters of Ms. Roe. See Cmplt.,



AO 72A
(Rev.8/82)

¶ 65. When Mr. Paquette spoke with Plaintiff on that day, he again said that he did not intend to interview Informant 11 because Mr. Paquette had already established that Ms. Roe was very drunk that night. Id., ¶ 67. Plaintiff strongly encouraged Mr. Paquette to interview Informant 11 because he was the only person other than Mr. Doe to directly interact with Ms. Roe at the fraternity house. Plaintiff told Mr. Paquette that Ms. Roe had not made any comment to Informant 11 about any untoward activity and Informant 11 believed that Ms. Roe was thankful to both Plaintiff and Informant 11 for helping her. Id., ¶ 68.

On March 18, 2015, Mr. Paquette informed Mr. Doe that he was being charged with non-consensual sexual contact, non-consensual sexual intercourse, and coercion. Id., ¶ 70.[3] On March 26, 2015, Mr. Doe received a copy of a Title IX and Student Sexual Misconduct Policy Investigation Report drafted by Mr. Paquette. Id., ¶ 71. The Report contained "vague, unsubstantiated rumors regarding Mr. Doe's character." Id., ¶ 72. The Report did not contain the names of the witnesses. Id., ¶ 74. The Report showed that Mr. Paqeutte had interviewed only one of the six witnesses Mr. Doe had suggested and had not interviewed

[3]The Student Sexual Misconduct Policy describes "sexual intercourse" to include "anal, oral, or vaginal penetration, however slight." See Student Sexual Misconduct Policy, Section B.2.



AO 72A
(Rev.8/82)

Informant 11, although the Report contained a short written statement from him. Id., ¶¶ 75-76, and 79.

Although Mr. Doe requested that he do so, Mr. Paquette also did not interview the President and Treasurer of Mr. Doe's fraternity. These two individuals had spoken with the President of Ms. Roe's sorority. According to the fraternity President and the Treasurer, the sorority President told them that Ms. Roe had told her that on October 10, 2013, "she had been drinking heavily and believed that something ***could*** have happened with Mr. Doe." Id., ¶ 82 (emphasis in original).

According to Mr. Paquette's affidavit, Plaintiff arranged to speak with Mr. Paquette on March 27, 2015. See Paquette Aff., ¶¶ 21-22. Mr. Doe then asked to reschedule for the following Monday or Tuesday, and Mr. Paquette suggested times for Monday. Having not heard back from Mr. Doe, on Monday, March 30, 2015, Mr. Paquette again emailed Plaintiff attempting to schedule a time. Id., ¶¶ 23-27.

Mr. Paquette told Mr. Doe he wanted to have a "final interview" with him on April 3, 2015. See Cmplt., ¶ 83. Mr. Doe decided to retain counsel for this interview. Id., ¶ 84. Mr. Paquette did not give Mr. Doe the names of the witnesses listed in the Report until 30 minutes before the April 3 meeting. Id., ¶¶ 88-89. During this meeting, Mr. Paquette for the first time also gave Mr. Doe another



AO 72A
(Rev.8/82)

written account of the evening that Ms. Roe had given to Mr. Paquette. Id., ¶ 91 (the parties have referred to this account as a "narrative"). This account contradicted the other statement she made to Mr. Paquette. Id., ¶ 91. During the meeting, Mr. Doe requested that Mr. Paquette re-interview Informant 1 (Ms. Roe's sorority President) in light of the statements she made to the fraternity President and Treasurer. He also asked Mr. Paquette to interview Informant 11. Mr. Paquette declined to take any of these actions. Id., ¶¶ 92-98.[4]

Mr. Paquette testified that the April 3 meeting was the final piece of information he needed before completing his investigation and making a determination. Later that day, Mr. Paquette sent a letter to Mr. Doe informing him that he found him responsible for acts of sexual misconduct and the sanction for that misconduct was expulsion. Under the terms of the Student Sexual Misconduct Policy, Georgia Tech "permanently retains" disciplinary records resulting in expulsion. Moreover, "non-academic misconduct resulting in expulsion is released to third parties indefinitely." See Cmplt., ¶ 37.

[4]During the interview, Mr. Doe also asked Mr. Paquette to look at text messages that Informant 9 had contended were of a sexual nature and had been sent to her by Mr. Doe. Mr. Paquette had not asked Informant 9 to provide him with the texts and he initially refused to look at the texts when they were proffered by Mr. Doe. Finally, Mr. Paquette looked at the text messages and conceded they were not of a sexual nature. He did not, however, remove from his Report Informant 9's unsubstantiated allegations that Mr. Doe had sent her text messages of a sexual nature. See id., ¶¶ 99-106.



AO 72A
(Rev.8/82)

During the course of his investigation, Mr. Paquette also spoke to another student, referred to as V2, who contended she had been sexually assaulted by Plaintiff on August 30, 2014. See Paquette Aff., ¶ (second) 15. Mr. Paquette sent both V2 and Mr. Doe a "no contact" letter and informed Mr. Doe he was beginning an investigation into that incident. Id., ¶ 17. Mr. Paquette and Mr. Doe arranged to speak on March 12, 2015, concerning V2's allegations. Id., ¶ 18. Plaintiff denied that he and V2 had any physical contact. Id., ¶ 19. Mr. Paquette provided Plaintiff with a summary of the information he had given to Mr. Paquette thus far and was asked to verify it with Mr. Paquette. Id., ¶ 20. Mr. Doe did not respond. Id.

At the April 3, 2015 meeting, Plaintiff changed his statement as to V2 and said that they did have sexual intercourse, but when she asked to stop, they did. Id., ¶ 30. Mr. Doe confirmed that he did ask V2 to engage in oral sex, but that he stopped when she asked. Id. "When asked about the variation in accounts [Mr. Doe] stated that he did not know what he was being accused of and believed that all the activities were consensual." Id. Mr. Paquette testified that:

> As the evidence largely was dependent upon the believability of the alleged victims and the accused, credibility became the most important fact in my findings. Since the Plaintiff acknowledged that he had been untruthful on more than one occasion, this swayed the evidence against him and formed the basis of my finding that it was more likely than not that the alleged victims were being truthful about their accounts of events.



AO 72A
(Rev.8/82)

Id., ¶ 34.[5] At the hearing, Mr. Paquette confirmed that due to Plaintiff's admitted falsification of the events with V2, Mr. Paquette did not view him as credible.

Mr. Paquette provided more detail on additional matters at the hearing on the motion for preliminary injunction. He stated that sexual misconduct cases were governed by the Student Sexual Misconduct Policy and not the Code of Conduct. As such, there was no statute of limitations on when a student could file a claim under the Student Sexual Misconduct Policy. Mr. Paquette also testified that Plaintiff had provided him with witness statements on April 3 and that prior to making a determination of responsibility, he read those statements and made them part of his investigatory record.[6]

On cross-examination, Mr. Paquette admitted that although he only referenced one statement of Ms. Roe's in his Report, he actually had received a "narrative" of the event from her earlier in the investigation. Mr. Paquette admitted

---

[5]Mr. Paquette also testified that there was a variation in Mr. Doe's testimony with respect to Ms. Roe. In his prior statement, Mr. Doe said that he and Ms. Roe entered his room together, but in the April 3 interview, Mr. Doe said that she followed him into the room. See Paquette Aff., ¶ 30. Without more, the Court finds no significance in this "variation" of events that occurred almost 18 months prior to Mr. Doe's statements. The Court recognizes that Mr. Paquette testified that whether they walked in together or Ms. Roe was behind Plaintiff might have some relevance to her consent, but the Court finds this to be highly speculative.

[6]At one point in his testimony, Mr. Paquette stated that the written statements of Plaintiff's witnesses had not been made part of his investigatory report, but he later corrected that statement.



AO 72A
(Rev.8/82)

that this "narrative" had some inconsistencies with Ms. Roe's written statement, but that Mr. Paquette did not consider the "narrative" evidence and therefore did not consider the discrepancies between the two statements.

Mr. Paquette testified that he did not re-interview Ms. Roe's sorority President about what Ms. Roe might have said to her concerning the incident because Mr. Paquette had determined that the sorority President was trying to "appease" both parties and therefore her credibility had come into question. Mr. Paquette did not include this reasoning in his Report; rather, Mr. Paquette only informed Mr. Doe and his counsel of this conclusion at their meeting on April 3.

Finally, Mr. Paquette testified that going into the meeting with Mr. Doe and his counsel on April 3, he was not yet sure whether the threshold had been crossed for finding Mr. Doe responsible for the charged events. But when Mr. Doe admitted that he had lied about what happened with V2, Mr. Paquette determined that Mr. Doe had no credibility. Mr. Paquette testified that nothing would have changed his mind after that unless some evidence became available to show that Ms. Roe had made up the whole incident.

As permitted under the Student Sexual Misconduct Policy, on April 10, 2015, Plaintiff appealed Mr. Paquette's finding to a three member appeals panel made up of a designee of the Dean of Students and two trained administrators. Ms. Cara



AO 72A
(Rev.8/82)

Appel-Silbaugh, an Associate Dean of Students at Georgia Tech, provided an affidavit and testified at the hearing on preliminary injunction regarding the appeal.[7]

Appeals are permitted for four reasons: (1) to "determine whether the original investigation was conduct fairly and in conformity with prescribed procedures;" (2) to "determine whether there was sufficient evidence to support the decision;" (3) to "determine whether the Sanctions and Supplementary Requirement imposed were appropriate for the violation for which the Student was found responsible;" and (4) to "determine whether new Information, not available at the time of the investigation, is relevant to the final decision." See Cmplt., ¶ 32.

Ms. Appel-Silbaugh stated that she is the administrative liaison for appeals from findings of the Office of Student Integrity related to claims of sexual misconduct. See Appel-Silbaugh Aff., ¶ 5. Once the appeal was filed, she organized a panel including herself and two faculty members. Id., ¶¶ 6-8. Once all

[7]Due to an improper form letter sent to Mr. Doe, there was initially some confusion as to whether Mr. Doe's appeal had been heard by a three person panel as required under the Student Sexual Misconduct Policy or whether Mr. Stein, Georgia Tech's Dean of Students, made the decision on his own. See Cmplt., ¶¶ 108-11. At this time, Ms. Appel-Silbaugh's testimony is undisputed that she and two faculty members heard the appeal as required under the Student Sexual Misconduct Policy.



AO 72A
(Rev.8/82)

panel members had an opportunity to review the appeal file, they met together to deliberate. Id., ¶ 8-9.

In this case, the panel met twice to consider Plaintiff's appeal, once on April 22 and also on April 29, 2015. Id., ¶ 11. Ultimately, the panel voted to affirm the decision of the Office of Student Integrity with respect to Ms. Roe, but reverse as to V2 because there was not sufficient evidence to justify the finding as to V2. Id. Because the panel affirmed as to Ms. Roe, the sanction of expulsion remained. At the hearing, Ms. Appel-Silbaugh testified that the appeals panel does have the option of remanding the case to the original hearing officer if it determines that additional investigation is warranted.

As permitted under the Student Sexual Misconduct Policy for sanctions of expulsion, Mr. Doe then appealed that decision to Mr. Bud Peterson, President of Georgia Tech. See Cmplt., ¶¶ 35, 112-13. Mr. Peterson denied Mr. Doe's appeal on May 26, 2015. Id., ¶ 113. In his letter, Mr. Peterson stated that a decision could be reversed only for compelling reasons which generally fell into two categories: (1) discovery of new information and (2) failure to properly follow policies or procedures. Id., ¶ 115. Mr. Peterson stated he found no compelling reason to change the decision. Id.



AO 72A
(Rev.8/82)

Finally, on July 9, 2015, Plaintiff appealed the decision of Mr. Peterson to a committee formed by the Board of Regents of the University System of Georgia. Id., ¶ 121. Ms. Kimberly Ballard-Washington, the Assistant Vice Chancellor for Legal Affairs and Title IX coordinator for the Board of Regents, submitted an affidavit and testified at the preliminary injunction hearing. Ms. Ballard-Washington provides administrative oversight for appeals filed with the Board of Regents. She does not participate on the appeals committee, but does sit in on their deliberations. The committee is comprised of the Vice Chancellors (or their designees) for Legal Affairs, Human Resources, Academic Affairs, and Student Affairs. See Ballard-Washington Aff., ¶ 7.

The committee met on September 9, 2015, to consider Mr. Doe's appeal. The committee did not reach a decision on that day and had further questions about the case, specifically the basis for the investigator's credibility determination. Id., ¶ 9. After inquiring, the committee received a written response from Georgia Tech that "the investigator based his credibility decisions upon the admitted lack of candor by the accused and additional discrepancies in the accused student's version of events." Id., ¶ 10. Ms. Ballard-Washington reported this information back to the committee at its next meeting on October 8, 2015. Id. The committee then voted to uphold Mr. Peterson's decision. Id., ¶ 11. Ms. Ballard-Washington testified that the



AO 72A
(Rev.8/82)

appeals committee also could have remanded the case to Georgia Tech for further consideration if it deemed necessary. On October 15, 2015, the committed informed Mr. Doe that it affirmed Georgia Tech's decision to expel him. Mr. Doe then filed this suit.

With respect to his contention that Defendants' actions against him were based on his gender, Plaintiff alleges that Georgia Tech has been under scrutiny since an October 2013, incident involving an e-mail from a fraternity distastefully discussing relationships with women. Id., ¶¶ 128–31. Due to this increased scrutiny, Plaintiff alleges that the Office of Student Integrity has "established a pattern of investigating and adjudicating claims against male students and organizations; predetermin[ing] guilt, refus[ing] to consider evidence that could support the male respondents, and exhibit[ing] overwhelming bias in favor of female students." Id., ¶ 132.

Plaintiff alleges that this bias is further evidenced by the fact that Mr. Paquette endorsed the views of the book Guyland: The Perilous World Where Boys Become Men when he has assigned reading the book and writing an essay on it as a sanction in Office of Student Integrity investigations. Id., ¶¶ 133–36. In this book, author Michael Kimmel writes, "Greeks and jocks live at the epicenter of Guyland." These "intensive all-male peer groups . . . foster rape-supportive behaviors and



AO 72A
(Rev.8/82)

attitudes." "[A]thletes or frat guys are more prone to gang rape . . because being frat guys or athletes confers on them an elite status that is easily translated into entitlement, and because the cement of their brotherhood is intense and intensely sexualized, bonding." Id., ¶ 135.

At the hearing, Mr. Paquette testified that he did assign Guyland as part of an educational exercise with students involved in Code of Conduct violations, but he had not ever assigned it in conjunction with a sexual misconduct investigation. Mr. Paquette stated that he did not endorse all viewpoints in the book, but that he asked students to read it and write an essay about their responses to the themes of the book. Mr. Paquette testified that this is a common pedagogical technique and does not mean that he endorses the viewpoints of the book.

Plaintiff also contends that Mr. Paquette's due process violations in his case closely mirror those he made in a Fall 2015 investigation of a fraternity for violations of Georgia Tech's Code of Conduct and an investigation of another male student accused of sexual misconduct. Id., ¶¶ 138-50.

**B. Contentions**

Plaintiff argues that Georgia Tech's investigation does not meet the requirements of constitutional due process because it vests both the investigatory and fact-finding roles in one individual with little to no restraint on the exercise of



AO 72A
(Rev.8/82)

his authority. Plaintiff was not permitted to cross-examine witnesses against him, or even offer questions for the investigator to pose to the witnesses, nor was he permitted to know the identities of the witnesses until the day the expulsion decision was rendered. Plaintiff contends that he offered witnesses on his behalf and the investigator refused to interview them, and did not pursue any information that might have cast doubt on the allegations of the complainant. He further alleges that Georgia Tech, and in particular, Peter Paquette, its Assistant Dead of Students, is biased against male respondents in sexual misconduct investigations in a manner that violates both Title IX and the Equal Protection Clause of the United States Constitution.

Defendants respond that the investigation did not violate Plaintiff's due process rights because the level of process due afforded to students accused of misconduct in a university setting is not the same as the level required for criminal defendants. Defendants aver that Plaintiff was given notice and an opportunity to be heard in accordance with constitutional requirements. During the course of the investigation, Plaintiff's own admitted lack of veracity with the investigator called his credibility into question and resulted in a finding of responsibility by the investigator. In accordance with Georgia Tech's Student Sexual Misconduct Policy, Plaintiff was given the opportunity, and did challenge, the investigator's finding



AO 72A
(Rev.8/82)

through three levels of appeal. The appeals were demonstrably deliberative because they resulted in the reversal of a finding of responsibility with respect to V2's complaint.

## II. Discussion

The case raises very important questions concerning the rights of students – both complainant and respondent -- involved in sexual misconduct investigations at a public university, as well as the duties and obligations of the public institution to its students. Unfortunately, the significance of the legal issues is only compounded by the increasing frequency of such investigations. Due to the seriousness of these matters for all parties involved, they rightfully demand the attention of the university and the Court.

To succeed on a motion for preliminary injunction, a plaintiff must clearly establish: "(1) a substantial likelihood of success on the merits of the underlying case, (2) the movant will suffer irreparable harm in the absence of an injunction, (3) the harm suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction issued, and (4) an injunction would not disserve the public interest." N. Am. Med. Corp. v. Axiom Worldwide, Inc., 522 F.3d 1211, 1217 (11th Cir. 2008) (internal quotation marks omitted).



AO 72A
(Rev.8/82)

### A. Substantial Likelihood of Success on the Merits[8]

1. Due Process

No party disputes that Georgia Tech is a state supported institution and as such Plaintiff has some level of property and liberty interests in his continued enrollment at Georgia Tech that are protected by some level of due process. In the Eleventh Circuit, the starting point for Plaintiff's due process claim is Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961). The plaintiffs in Dixon were students at Alabama State College in Montgomery, Alabama, who had been expelled for participating in a "sit-in" at the cafeteria lunch counter at the county courthouse in Montgomery, as well as other civil rights activities. Id. at 152 n.3. No process was afforded to the students prior to their expulsion. The court held that:

> Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of the law. The minimum procedural requirements necessary to satisfy due process depend upon the circumstances and the interests of the parties involved.

Id. at 155. The court continued:

> The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the

---

[8]For the purposes of his motion for preliminary injunction, Plaintiff pursues only his claims under the Due Process Clause of the United States Constitution, as well as a claim under Title IX.



AO 72A
(Rev.8/82)

> plaintiffs were in good standing. It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.

Id. at 157. To provide guidance for further proceedings, the court noted that the

> nature of the hearing should vary depending on the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority of the college. By its very nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled.

Id. at 158-59.

The Eleventh Circuit again addressed disciplinary proceedings in higher education in Nash v. Auburn University, 812 F.2d 655 (11th Cir. 1987). There, two students who had been suspended from the University's School of Veterinary Medicine for academic dishonesty contended that they were not provided the constitutionally-required due process. The court reiterated that the "'fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.'" Id. at 660 (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976)). "What process is due is measured by a flexible standard that depends on the practical requirements of the circumstances." Id. (citing Mathews and Goss v. Lopez, 419 U.S. 565, 577-78 (1975)). The flexible standard includes consideration of (1) the private interest affected by the public action, (2) the risk of erroneous deprivation through the procedures used and the value of any additional safeguards, and (3) the government's interests, including both financial and administrative burdens. Id. The court noted that

> the due process clause is not a shield . . . from suspensions properly imposed, nor does it ensure that the academic disciplinary process is a totally accurate, unerring process; it merely guards against the risk of unfair suspension if that may be done without prohibitive cost or interference with the educational process.

Id. at 660-61 (quotation and citation omitted). The plaintiffs argued inter alia that they did not receive sufficient notice, they were denied the opportunity to cross-



AO 72A
(Rev.8/82)

examine witnesses, they were denied a recess during the hearing, and the tribunal was unfairly prejudiced due a contemporaneous undergraduate honor code controversy at the University. Id. at 661.

With respect to the plaintiffs' argument concerning cross-examination, the court declined to extend Goldberg v. Kelly, 397 U.S. 254 (1970) to school disciplinary proceedings. Id. at 663-64. "Where basic fairness is preserved, we have not required the cross-examination of witnesses and a full adversarial proceeding." Id. at 664 (but noting Winnick v. Manning, 460 F.2d 545, 549-50 (2d Cir. 1972) (cross-examination of witnesses might be essential to a fair hearing if credibility is at issue in the suspension of a university student)). Significantly, the court found that "[d]ue process required that appellants have the right to respond, but their rights in the academic disciplinary process are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial." Id.

The Nash court approved of the hearing process where students were not permitted to directly ask questions of adverse witnesses, but they could pose questions to the presiding board chancellor who would then ask the questions of the witnesses. Id. The students were also permitted to present their own statements and witnesses from which the members of the board could have drawn inferences in favor of the students. Id. The court noted that an "impartial decision-



AO 72A
(Rev.8/82)

maker is an essential guarantee of due process." Id. (citing Withrow v. Larkin, 421 U.S. 35, 46-47 (1975)). "Basic fairness and integrity of the fact-finding process are the guiding stars." Id. (quoting Boykins v. Fairfield Bd. of Educ., 492 F.2d 697, 701 (5th Cir. 1974)).

Also factored into the consideration of matters here is the general notion that federal courts should not arbitrarily set aside the "decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." Wood v. Strickland, 420 U.S. 308, 326 (1975); see also Jones v. Board of Governors of Univ. of North Carolina, 704 F.2d 713, 715-16 (4th Cir. 1983) ("The federal judicial power, in cases of this kind, does not run to the imposition of some abstract level of procedural regularity upon academic disciplinary processes but only to ensuring rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusions from school.") (quotations and citations omitted). But other courts have found that decisions based on disciplinary reasons rather than academic reasons generally require a more "searching inquiry." See Flaim v. Medical College of Ohio, 418 F.3d 629, 634 (6th Cir. 2005) (citing Missouri v. Horowitz, 435 U.S. 78, 86 (1978) (academic decisions "call[] for far less stringent procedural requirements")).



AO 72A
(Rev.8/82)

With this context in mind, the Court turns to the instant case. Plaintiff alleges a wide range of due process violations, such as including highly prejudicial, unsupported gossip and innuendo in the investigatory Report; not naming witnesses relied upon in the Report until the day the expulsion decision was made; refusing to permit any kind of cross-examination of adverse witnesses, including posing questions to witnesses through Mr. Paquette; providing only written summaries of the interviews without any transcripts; and refusing to interview witnesses proffered by Mr. Doe, including Informant 11 who saw Ms. Roe immediately after the incident.[9] Plaintiff contends these violations are all the more significant because Georgia Tech's policy invests all power of investigation and

---

[9]In his complaint, Plaintiff alleges that the decision-makers were not impartial because Ms. Roe had posted on Facebook that she had "worked very closely" with Mr. Paquette, Mr. Stein, and Mr. Peterson in her capacity as a peer educator on sexual violence prevention. See Cmplt., ¶ 124. In their affidavits, the University administrators denied this. Plaintiff did not pursue this line of evidence during the hearing on the motion for preliminary injunction. The Court does not discuss it further here.

Plaintiff also contends that Mr. Peterson misunderstood the appeals process and believed that there could be only two bases for appeal. The Court has reviewed the decision letter from Mr. Peterson and finds for the purposes of Plaintiff's motion for preliminary injunction that Mr. Peterson was not limiting Mr. Doe's appeal to only those possibilities, but rather merely noted that typically compelling reasons to reverse a finding fall into one of two categories. The Court finds the wording of Mr. Peterson's letter does not preclude his having considered all four bases of appeal under the Student Sexual Misconduct Policy.



AO 72A
(Rev.8/82)

adjudication in one individual, and because the case against Mr. Doe had no physical or contemporary evidence, but rather centered on credibility.

Even Plaintiff agrees that the Constitution does not require that he be given the opportunity to directly cross-examine adverse witnesses. However, Nash and other cases cited by Plaintiff, approve of a process whereby the respondent may pose questions through the investigator or the chair of a hearing panel. Georgia Tech's Student Sexual Misconduct Policy does not provide an opportunity to cross-examine in any form. Numerous cases recognize the importance of cross-examination in a case such as this where there are no witnesses and the factual dispute of what occurred relies on a resolution of credibility. See, e.g., Donohue v. Baker, 976 F. Supp. 136, 146-47 (N.D.N.Y. 1997) ("[I]n light of the disputed nature of the facts and the importance of witness credibility . . . in this case, due process required that the panel permit the [respondent] to hear all evidence against him and to direct question to his accuser through the panel.").

Furthermore, the Court finds it significant that in most of the cases cited to by the parties, the university has provided some kind of hearing for a student facing expulsion. The Student Sexual Misconduct Policy at Georgia Tech does not allow for a hearing and does not allow for any kind of cross-examination, but rather vests all power in one individual who both investigates and adjudicates. The other due process violations alleged by Plaintiff are also arguably more pressing in light of the



AO 72A
(Rev.8/82)

single investigator/adjudicator model. The inclusion of admittedly extraneous innuendo from witnesses concerning rumors of Plaintiff's general character and the refusal to interview certain witnesses is potentially more problematic in an investigator/adjudicator model. For example, when asked about the witness statements at the beginning of his Report which can fairly be called "rumor" since none of the witnesses had direct knowledge of the events described in them, Mr. Paquette testified he did not consider those comments when making his decision that Mr. Doe was responsible for the charged events. But given the manner in which Mr. Paquette testified that he wrote up his Report – witness summaries merely repeat what the witness said but may not impact the ultimate decision he reached as the adjudicator – it becomes difficult for a respondent to know what he needs to address in a Report or to know what Mr. Paquette actually considered when wearing his "adjudicator" hat.

Moreover, when a single investigator reaches a conclusion as to the direction of his investigation or its result, one could argue that it is more likely that he will refuse the suggestion to further the investigation, as Mr. Paquette did here when Plaintiff asked him to interview Informant 11 and re-interview Ms. Roe's sorority president. Mr. Paquette testified that once he determined that Mr. Doe did not have any credibility, he determined that it was more likely than not that Ms. Roe was telling the truth. The Court understands how Mr. Paquette could come to this



AO 72A
(Rev.8/82)

conclusion but further investigation in regard to Informant 11 and Ms. Roe's sorority president could lead to other possible conclusions.

All of this reflection circles back to the general nature of due process claims – they are very fact-specific. The Court knows what has been approved in Dixon and Nash and like cases. Thus, on a continuum, the procedures offered in those cases stand at one end within the approved due process zone. As circumstances move away from Dixon and Nash, there is a point on the other end of the continuum where the procedures offered will not be enough to satisfy due process. Of course, there is no specific precedential guidance as to where this case fits on that continuum, other than the fact that Plaintiff here was not afforded the due process described in Nash or Dixon.

At the present moment, however, the Court can make certain observations. It came out during the hearing on the motion for preliminary injunction that there is a "trend" among institutes of higher education to split misconduct cases into sexual and non-sexual misconduct. Non-sexual misconduct cases are heard under a school's general code of conduct and typically involve some kind of hearing panel. Cases of sexual misconduct have their own policy – as is the case here – and more and more are considered under what the parties refer to as the "investigator/adjudicator" or "single investigator" model. The Court makes no comment on the propriety of a such a model in general. See, e.g., Withrow v.



AO 72A
(Rev.8/82)

Larkin, 421 U.S. 35, 52 (1975) ("It is not surprising, therefore, to find that the case law, both federal and state, generally rejects the idea that the combination of judging and investigating functions is a denial of due process . . .") (quotation and citation omitted).

But Mathews is a balancing test. It seems only logical that the more the investigation and decision-making power is concentrated in the hands of one individual, the more process a court might find is due. This may be more so in sexual misconduct cases which often – as this case did – boil down to a he said-she said credibility determination. As the Court described above, there are a myriad of factors that go into an investigator's decisions about the course of investigation which impact ultimately what information is before that same individual as an adjudicator of responsibility.

The evidence adduced at the hearing also ably demonstrated that under the umbrella of Title IX, both public and private schools of higher education are receiving more and more specific directives from the Department of Education, Office for Civil Rights as to the manner in which investigations of sexual misconduct are to occur. The Court recognizes that Georgia Tech relies on guidance from the Office for Civil Rights through what is known in the industry as the 2011 "Dear Colleague Letter" to support some of the procedures it has in place for sexual misconduct investigations. Specifically, Georgia Tech notes that the Office for Civil



AO 72A
(Rev.8/82)

Rights frowns upon permitting cross-examination of complainants in sexual misconduct cases. The Court notes, however, that Plaintiff has not argued that Georgia Tech is in the wrong for failing to allow him to directly cross-examine Ms. Roe or any other witness. Rather, Plaintiff avers that there should be some procedures whereby he may pose questions to the investigator to ask the witnesses.

In this order, however, the Court makes no specific holding as to whether the procedure under which Plaintiff was adjudicated provided the constitutionally-required due process for the circumstances. Rather, the Court must determine whether Plaintiff has shown as "substantial likelihood of success" on his due process claim. This is a very high standard. See, e.g., Bloedorn v. Grube, 631 F.3d 1218, 1229 (11th Cir. 2011) ("a preliminary injunction in advance of trial is an extraordinary remedy"); McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998) ("preliminary injunction is an extraordinary and drastic remedy not to be granted unless movant clearly established the burden of persuasion as to each of the four prerequisites") (quotations and citations omitted). It is axiomatic that this standard exceeds that the Court would employ in a motion to dismiss or motion for summary judgment posture, or what a jury might have to apply. The Court finds Plaintiff has not met that high standard here.

Whether Plaintiff can show a substantial likelihood of success on his due process claim is a complex and difficult question. While the Court recognizes the



AO 72A
(Rev.8/82)

appeals available to Plaintiff, the Court is greatly troubled by a number of procedural matters in Mr. Paquette's investigation. It appears from the evidence before the Court that Mr. Paquette did not pursue any line of investigation that may have cast doubt on Ms. Roe's account of the incident, even though such lines were present in this case. Mr. Paquette admitted that Ms. Roe gave inconsistent accounts of the incident, but he simply chose to ignore the "narrative" because he did not believe it to be evidence. Mr. Paquette also did not follow up on the possibility that Ms. Roe may have told her sorority President only that something "could" have happened that night. Mr. Paquette also did not interview Informant 11, the "sober monitor" at the fraternity party who saw Ms. Roe immediately after the incident and who did not see any distress on her part, but rather believed that Ms. Roe was grateful to him and Mr. Doe for their assistance.[10] When faced with Mr. Doe's false statement concerning what happened with V2, Mr. Paquette assumed that if Mr. Doe was lying, then Ms. Roe and V2 were telling the truth. This assumption again avoids any consideration of available evidence concerning the accuracy of Ms. Roe's version of the events.[11]

---

[10]Mr. Paquette did have an abbreviated written statement from Informant 11 who responded quickly to Mr. Paquette's email while he was in a lab class. But Mr. Paquette refused to interview Informant 11.

[11]The problems of limiting the investigation to Mr. Doe only were compounded by the fact that Mr. Paquette included in his Report information he



AO 72A
(Rev.8/82)

But several pieces of evidence tipped the scale in favor of Defendants at the preliminary injunction stage. Even before the hearing, weighing on the Court during its consideration of the parties' briefs is the fact that Plaintiff was not truthful with Mr. Paquette about what occurred with V2. Veracity is a hallmark of credibility and it is without dispute that Mr. Doe falsely told Mr. Paquette that he and V2 did not have sex. At the April 3 meeting, however, Mr. Doe told Mr. Paquette that he and V2 had consensual sex. At the hearing, Mr. Paquette testified that up until the time he met with Plaintiff on April 3, he was not sure of what conclusion he would reach in the investigation, but upon learning that Mr. Doe had lied about a matter of such significance as to whether he and V2 had consensual sex, Mr. Paquette found Mr. Doe to be lacking in credibility and he could not believe anything reported by Mr. Doe.

As Plaintiff's counsel ably argued, the Court recognizes that Mr. Doe was in perilous circumstances during the time of the investigation – working on co-op away from campus, without any kind of representation, and to a certain extent blind-sided without any particular knowledge as to the precise charges made by V2. Even given those difficult circumstances, however, the Court cannot say at this time

knew to be unsubstantiated, such as Informant 9's contention about receiving texts of a sexual nature from Mr. Doe and general gossip concerning Mr. Doe from witnesses with no direct knowledge.



AO 72A
(Rev.8/82)

that Mr. Paquette acted outside of accepted norms in determining credibility issues against Mr. Doe due to his lack of veracity on a very material aspect of Mr. Paquette's investigation.

The Court also carefully considered the evidence adduced at the hearing which shed additional light on the appeals process afforded under Georgia Tech's Student Sexual Misconduct Policy. Mr. Doe had the opportunity to provide information to an appeals panel at Georgia Tech, to the President of Georgia Tech, and finally, to a committee of the Board of Regents of the University System of Georgia. Plaintiff's contentions concerning Informant 11 and Ms. Roe's sorority president could be put before these appellate panels which had the option of remanding the case back to Georgia Tech for further investigation. The Georgia Tech appeals panel clearly deliberated over the matter as it reversed one of Mr. Paquette's findings. The appeals committee of the Board of Regents similarly did not rubber-stamp the prior decisions, but rather engaged in serious deliberations because it reached back to Georgia Tech for additional information.

For all of these reasons, the Court finds that Plaintiff has not shown a substantial likelihood of success on the merits of his due process claim.



AO 72A
(Rev.8/82)

2. Title IX[12]

Title IX prohibits any school receiving federal funds from discriminating on the basis of sex. See 20 U.S.C. § 1681. In relevant part, Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits, of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). A plaintiff may enforce Title IX through an implied private right of action. See, e.g., Cannon v. University of Chicago, 441 U.S. 677 (1979).

Although there are similarities between Title VII of the Civil Rights Act of 1964 and Title IX, courts have held that disparate impact claims may not be brought under Title IX. See, e.g., Alexander v. Sandoval, 532 U.S. 275, 280 (2001). However, a species of claim known as "erroneous outcome" cases have been raised under Title IX which "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). In these cases, the plaintiff contends that he was innocent and the school wrongfully determined he committed misconduct.

---

[12]With regard to his gender-bias allegations, Plaintiff raises both Title IX and Equal Protection Clause claims under the United States Constitution. In his briefing on the motion for preliminary injunction, however, Plaintiff referenced only Title IX in his gender-bias claims. As such, the Court does not further discuss Plaintiff's Equal Protection Clause claim at this time.



AO 72A
(Rev.8/82)

To succeed on an "erroneous outcome" case, a plaintiff must show (1) "particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding" and (2) "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." Id. The Yusuf court offered that examples of such circumstances might include "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 Salau v. Denton, ___ F. Supp. 3d ____, 2015 WL 5885641 (W.D. Mo. Oct. 8, 2015); Sahm v. Miami Univ., ___ F. Supp. 3d ____, 2015 WL 2406065 (S.D. Ohio May 20, 2015); Doe v. Columbia Univ.,101 F. Supp. 3d 356, 367-68 (S.D.N.Y. 2015); Wells v. Xavier Univ., 7 F. Supp. 3d 746, 751 (S.D. Ohio 2014); Doe v. Washington & Lee Univ., Civil Action No. 6:14-CV-00052, 2015 WL 4647996, at *10 (W.D. Va. Aug. 5, 2015).[13]

The Court notes that some courts have held that showing bias in favor of alleged victims of sexual assault claims and against the alleged perpetrators is not the same as showing gender bias against male students. See, e.g., Sahm, ____ F. Supp. 3d at ___, 2015 WL 2406065, at *4-5. However, other courts have found that

[13]Because Plaintiff pursues an "erroneous outcome" claim under Title IX, the Court does not consider the deliberate indifference framework set forth in Williams v. Board of Regents of the Univ. Sys. of Georgia, 477 F.3d 1282 (11th Cir. 2007).



AO 72A
(Rev.8/82)

a plaintiff survives a motion to dismiss a Title IX claim where he contends he was falsely accused and wrongly expelled after a flawed disciplinary proceeding because the university was attempting to show the U.S. Department of Education's Office for Civil Rights that it would "respond better" to allegations of sexual assault. See Wells, 7 F. Supp. 3d at 747-51.

Here, while Mr. Doe has provided newspaper accounts of the treatment of other Georgia Tech respondents to complaints of sexual misconduct, those articles do not constitute evidence from which the Court can find systemic bias. The hearing demonstrated that some of the information in the newspaper accounts will be challenged factually. Mr. Paquette, for example, testified that he did not participate as an investigator or adjudicator in one of the investigations Plaintiff contends shows a pattern of bias in the Office of Student Integrity. Given that Mr. Paquette has testified that once Plaintiff lied about his interactions with V2, there was nothing that could change his mind on the finding of responsibility, there will likely will also be some dispute about whether gender was a "motivating factor" in his findings. Finally, some of the evidence relied upon by Plaintiff also sounds more in "disparate impact," but it is not clear that Title IX recognizes such a claim. For all of these reasons, the Court also finds that Plaintiff does not have a substantial likelihood of demonstrating that Plaintiff's gender was a "motivating factor" in the decision to expel Plaintiff.



AO 72A
(Rev.8/82)

**B. Irreparable Harm**

The showing of irreparable injury is "the sine qua non of injunctive relief." Northeastern Fla. Chapter of the Ass'n of Gen. Contractors v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990) (quotations and citations omitted). Irreparable harm cannot be presumed even from a showing of substantial likelihood of success on a constitutional claim. Id. ("No authority from the Supreme Court or the Eleventh Circuit has been cited to us for the proposition that the irreparable injury needed for a preliminary injunction can properly be presumed from a substantially likely equal protection violation."). A "party has standing to seek injunctive relief only if the party alleges, and ultimately proves, a real and immediate – as opposed to a merely conjectural or hypothetical – threat of future injury." Church v. City of Huntsville, 30 F.3d 1332, 1337 (11th Cir. 1994).

Plaintiff argues that if the Court does not grant his motion for preliminary injunction, he will suffer irreparable harm in that he will have a "gap" in his educational history that he will be forced to explain on all future applications to graduate school and for employment. See, e.g., Jones, 704 F.2d at 716 (holding that without injunction, plaintiff would suffer irreparable harm because "she will be barred from taking courses during the spring semester, delaying the time at which her ability to work as a nurse will come to fruition; she will have a gap in her education which she will be forced to explain throughout her professional life; and



AO 72A
(Rev.8/82)

she will be deprived of the opportunity to complete her education with her fellow classmates").

Plaintiff's argument has initial persuasive appeal; however, ultimately it is based on speculation. Plaintiff offered no evidence as to what questions would be raised if he graduated five years and not four years after his matriculation in an undergraduate engineering program. To be sure, the Court has considered Plaintiff's allegations carefully. The Court recognizes that a reputation once lost cannot be easily regained. The Court finds, however, that based on the record presently before it, there is no evidentiary basis to nudge Plaintiff's irreparable harm argument over the line past speculation to being clearly established.

Because the Court has determined that Plaintiff cannot meet the high threshold of substantial likelihood of success or irreparable harm, the Court need not reach the third and fourth factors of balancing of harms and the public interest. For the foregoing reasons, the Court DENIES Plaintiff's motion for preliminary injunction [8].

The Court reminds the parties, however, that this ruling does not end the matter. The Court has a number of concerns regarding the investigation. To put it bluntly, Mr. Paquette's testimony at the preliminary injunction hearing about the course of the investigation and the manner in which he made certain investigatory decisions was very far from an ideal representation of due process. Much remains



AO 72A
(Rev.8/82)

for the Court's consideration as to whether Mr. Paquette's investigation veered so far from the ideal as to be unconstitutional.

## III. Conclusion

The Court DENIES Plaintiff's motion for preliminary injunction [8].

**IT IS SO ORDERED** this 16th day of December 2015.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE



AO 72A
(Rev.8/82)