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

John Doe,	)	
Plaintiff,	)	
V.	)	1:15-CV-4079-SCJ
The Board of Regents for the	)	
University System of Georgia,	)	
Et al,	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I. STATEMENT OF FACTS

The allegations: The Plaintiff in this case was accused of and initially found to have engaged in sexual misconduct against two students at the Georgia Institute of Technology. The first alleged victim (V1) reported that while attending a date night at the Plaintiff's fraternity that she became intoxicated. (Exhibit 1, Affidavit Paquette ¶ 5). Plaintiff began to kiss her and she told him to stop. The plaintiff then pulled her dress up, her panties down and then inserted his fingers into her vagina without consent. When she became ill and started to vomit the act ended. (Exhibit 1 ¶ 5).

During the course of the investigation relating to the alleged assault on V1 another student came forward and claimed Plaintiff had sexually assaulted her. Specifically she claimed that she had been drinking and had used a narcotic. She

arrived at Plaintiff's fraternity where he provided her with 2-3 pulls of rum. (Exhibit 1 ¶ 16). She consented to have sexual intercourse with the Plaintiff but when he was unable to penetrate her he asked her to perform oral sex which she started but declined to continue. V2 reported that he continued to have oral sex with her without her consent. She grabbed her dress and left the room without her bra, shoes or underwear. (Exhibit 1 ¶ 16).

The Process: Peter Paquette is the Assistant Dean of Student and the Director of the Office of Student Integrity for the Georgia Institute of Technology. As part of his job duties he is charged with the oversight of caseloads related to claims of sexual misconduct by students. (Exhibit 1 ¶ 3). Paquette first became aware of the allegation against the Plaintiff when V1 reported her claim on February 17, 2015. (Exhibit 1 ¶ 4). Paquette took her statement and sent it to her to verify. V1 verified her statement on March 5, 2015. (Exhibit 1, ¶ 7). As the claim involved one of sexual misconduct, the sexual misconduct policy defined the process rather than the code of student conduct. (Exhibit 1 ¶ 8, Ex. A). When there's a claim of sexual misconduct by a student, there is no time limit placed for an alleged victim to file a report. (Exhibit 1 ¶ 8).

After a report of sexual misconduct Paquette sends out letters to both individuals to advise them not to have contact with each other. (Exhibit 1 ¶ 17, Ex.

B). In the letter he advised the Plaintiff to contact him to discuss the allegations. Paquette heard from the Plaintiff on February 25th and they arranged to speak on February 27th. Paquette generally advised Plaintiff of the allegations brought by V1 and advised him that he was not required to answer questions, of the process and gave him the opportunity to make a statement. (Exhibit 1¶ 12). Plaintiff advised Paquette that he would provide a written statement to him on the following Monday, March 2nd. (Exhibit 1 ¶ 12). After Paquette did not receive the statement Paquette emailed the Plaintiff again and asked when the statement would be received. (Exhibit 1, Ex. D)

Plaintiff provided a written statement on March 3rd that denied any sexual contact between he and V1 but stated he and V1 attended the party, she entered his room with him and began to throw up. (Exhibit 1, Ex. D). Paquette confirmed with the Plaintiff that he was stating that there had been no physical contact between he and V1. (Exhibit 1, Ex. E). Plaintiff was given the opportunity to review and verify the statements he provided but failed to do so. (Exhibit 1, ¶ 15)

Paquette conducted several interviews. (Exhibit 1, ¶ 14, Ex. F). None of the persons interviewed, other than V1 and the Plaintiff had specific knowledge about the alleged assault on V1. (Exhibit 1, ¶ 14, Ex. F).

While investigating the allegations brought by V1, another student came forward and alleged that she had been sexually assaulted by the Plaintiff on August 30, 2014. (Exhibit 1, ¶ 15). This second student, V2, was interviewed by Paquette and letters were sent to both the Plaintiff and V2 advising them to have no contact with one another. (Exhibit 1, ¶ 17, Ex. F). Paquette asked Plaintiff to speak to him on either March 11 or 12th. Paquette spoke to the Plaintiff who advised him that he had no physical contact with V2. (Exhibit 1 ¶ 19). A summary of this interview was provided to the Plaintiff to verify on March 16, 2015. Plaintiff did not respond. (Exhibit 1, ¶ 20).

Based upon this initial investigation Plaintiff was formally charged with five violations of Georgia Tech's sexual misconduct policy and was given five days to schedule a time to meet to respond to the charges. (Exhibit 1 ¶ 21, Ex. G). Plaintiff set an appoint to meet on March 27th at 3pm. (Exhibit 1 ¶ 22). Plaintiff postponed the meeting asking to move it to the following Monday. Paquette attempted to reach the Plaintiff on Monday, March 30th to reschedule a time to meet to review the charges and Plaintiff's response. (Exhibit 1, ¶ 25). Plaintiff advised that his lawyer would be in contact to set up an appointment. Paquette provided multiple days and times that he was available to meet with the lawyer. (Exhibit 1, ¶ 26-27). Paquette spoke to Plaintiff's counsel, explained the process

and scheduled a meeting with the Plaintiff and his counsel on April 3rd. (Exhibit 1, ¶ 28). On March 26th, Paquette emailed his report to the Plaintiff with names redacted. (Exhibit 1, ¶ 29, Ex. H). A second copy of this report along with additional interviews and attachments was provided to the Plaintiff on March 27th. (Exhibit 1, ¶ 29, Ex. I). While the names of the witnesses were redacted to avoid the dissemination of protected information, the informants are clearly identified by position and knowledge. The names of the informants were provided to the Plaintiff and his counsel prior to the meeting on April 3rd. (Exhibit 1, ¶ 29).

Paquette met with the Plaintiff and his lawyer on April 3rd. Plaintiff varied his description of the incident with V1 by claiming she followed him into his room where previously he stated they entered the room together. When asked about the discrepancy, Plaintiff advised he didn't want to share the details in his prior statement. (Exhibit 1, ¶ 30). Plaintiff completely changed his account of his interaction with V2 in the April 3rd meeting. At the meeting Plaintiff acknowledged he had sexual intercourse with V2 and claimed when she asked him to stop he did and then she performed oral sex and stopped when she said it tasted bad. Plaintiff acknowledged providing a prior false statement and said he did so because he did not know what he was being accused of and because he believed that the activities were consensual. (Exhibit 1, ¶ 30).

After the interview, Peter Paquette made the factual determination that it was more likely than not that the Plaintiff had engaged in non-consensual sexual intercourse with V1 and V2. As the evidence in the case was largely dependent on the believability of the Plaintiff versus the believability of V1 and V2 and Plaintiff admitted to being untruthful on more than one occasion, Paquette determined that based upon a preponderance of the evidence it was more likely that V1 and V2 were being truthful. As a result the Plaintiff was found responsible. (Exhibit 1, ¶ 34, Ex. J) . Plaintiff was provided notice of this finding and the sanction, expulsion which is the only available sanction for sexual misconduct that involves sexual intercourse without consent. (Exhibit 1, ¶ 32). Plaintiff was also provided an opportunity to appeal.

Despite Plaintiff's contention to the contrary, his appeal was heard by an Appellate Committee comprised of the Associate Dean of Students and two members of the faculty. (Exhibit 2, Affidavit Cara Appel-Silbaugh ¶ 10, 11); (Exhibit 3, Affidavit John Stein ¶ 10). In this case the Committee met on two occasions to discuss the merits of the Plaintiff's appeal. After meeting and discussion the Committee affirmed the decision of the Office of Student Integrity for V1 but reversed as to V2. (Exhibit 2, ¶ 11). The Committee found there to be insufficient evidence to support the charge as to V2. (Exhibit 2, ¶ 11). This

decision was memorialized on the appeal cover sheet and sent to the Office of Student Integrity for processing. (Exhibit 2 ¶ 11-12 Ex. A). Initially the incorrect letter containing John Stein's signature was sent to the Plaintiff, once the error was discovered, a corrected letter was sent with the proper signatory. (Exhibit 3, ¶ 11).

Plaintiff next appealed the finding of the appeal committee to the President as did V2. (Exhibit 3, ¶ 12). John Stein prepared a statement and a recommendation for the President. (Exhibit 3, ¶ 12). The President reviewed the appeal to determine whether: the original investigation was conducted fairly and in conformity with prescribed procedures; there was sufficient evidence to support the decision; the Sanctions and Supplementary Requirements imposed were appropriate for the violation for which the Student was found responsible; and/or new information, not available at the time of the investigation, In this case President Peterson affirmed the decision of the Appellate Committee as to both the Plaintiff and V2. (Exhibit 4, Affidavit of President Peterson ¶ 9, 10, 12).

Plaintiff next appealed to the Board of Regents where the committee comprised of the Vice Chancellors for Legal Affairs, Human Resources, Academic Affairs, and Student Affairs (if needed) or their designees review the submitted materials. (Exhibit 5, Affidavit of Kimberly Ballard-Washington, ¶ 5). The initial review of this case occurred on September 9, 2015. The committee had questions

about the basis for the investigator's credibility determination. As a result the Plaintiff was notified that the application was continued for further consideration. (Exhibit 5, Ex. A). The investigator reported that the determination was premised upon the Plaintiff's lack of candor and the additional discrepancies in the Plaintiff's version of events. This reasoning was reported back to the committee and the committee met on October 8th and decided to affirm the decision of the President. (Exhibit 5, Ex. B).

II. ARGUMENT AND CITATION OF AUTHORITY

A preliminary injunction is an extraordinary and drastic remedy, United States v. Jefferson County, 720 F.2d 1511, 1519 (11th Cir. 1983), whose sole purpose is to preserve the relative position of the parties until a trial on the merits can be held. University of Texas v. Camenisch, 451 U.S. 390, 395 (1981). The traditional standards for granting preliminary injunctive relief, which are applied in this Circuit, are that the movant must show (1) a substantial likelihood that he or she will ultimately prevail on the merits; (2) that he or she will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that if issued, the injunction would not be adverse to the public interest. Baker v. Buckeye Cellulose Corp., 856 F.2d 167, 169 (11th Cir. 1988).

In this Circuit these standards are applied stringently as the movant must clearly carry the burden of persuasion on all four standards. United States v. Jefferson County, 720 F.2d 1511, 1519 (11th Cir. 1983), citing Canal Authority v. Calloway, 489 F.2d 567, 573 (5th Cir. 1974). Each prong will be addressed in turn.

A. PLAINTIFF DOES NOT HAVE A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS

Plaintiff raises seven claims in his complaint. Specifically Plaintiff claims that Defendants violated his right to Due Process (Count 1); engaged in a Breach of Contract in failing to conduct a fair investigation (Count II) and breached the covenant of good faith and fair dealing within the contract (Count III); violated Title IX (Count IV) ; violated the Equal Protection Clause (Count V); committed negligence by failing to properly investigation and exercise due care (Count VI) and finally committed Negligence Per Se based upon the failure to comply with the law (Count VII)

1. Counts II, III, VI, and VII are barred by both Eleventh Amendment

Plaintiff alleges that the Board of Regents breached a contract (Counts II and III) and committed Negligent Acts (Counts VI and VII). Even if the State of Georgia has waived its immunity in state court, the State has not waived its Eleventh Amendment immunity from such suits in federal court.

"It is well established that, absent an express waiver by the state, the Eleventh Amendment bars state law claims against a state in federal court." Maynard v. Bd. of Regents, 342 F.3d 1281, 1287 (11th Cir. 2003) (Citing and quoting, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98-99 (1984). The Georgia Constitution provides that "[n]o waiver of sovereign immunity . . . shall be construed as a waiver of any immunity provided to the state or its departments, agencies, officers, or employees by the United States Constitution." Ga. Const. Art. 1, 2, Para. 9(f), reprinted in 2 Ga. Code Ann. (1996 Supp.).

Indeed the Eleventh Circuit specifically found that such claims are barred by the Eleventh Amendment. Barnes v. Board of Regents, 669 F.3d 1295, 1308 (11th Cir. 2012) (Georgia has not waived its Eleventh Amendment Immunity from suit in federal court for breach of contract claims) ; *See also* Maynard v. Bd. of Regents, 342 F.3d 1281 (11th Cir. 2003) (absent express waiver claims against the state for breach of contract are barred by the Eleventh Amendment); Robinson v. Georgia Dep't of Transp., 966 F.2d 637 (11th Cir. 1992) (Georgia expressly preserved its Eleventh Amendment immunity for claims brought in Tort). Because Plaintiff's breach of contract and Tort claims are barred by the Eleventh

Amendment, the Plaintiff does not have a substantial likelihood of prevailing on the merits on these claims and they do not provide a basis for an injunction.[1]

2. Plaintiff has failed to state a valid claim for a violation of his due process rights

It is well-founded that "[a] person is not entitled to procedural due process unless he is deprived of an interest in life, liberty, or property. Bd. of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 84 (1978). The Supreme Court of the United States has also emphasized that "courts should refrain from second guessing the disciplinary decisions made by school administrators." Davis v. Monoe Cty.Davis v. Monoe Cty.,526 U.S. 629, 648 (1999). Plaintiff provides no reason to deviate from this rule.

Although courts have declined to directly address whether receiving post-graduate education rises to the level of a liberty or property interest, the courts have determined that students enjoy *some* level of due process protection, particularly where a student is subject to disciplinary penalties. Bd. Of Curators, *supra*, 435 U.S. at 86-87. Such protection is limited by the nature and

[1] Even if these claims had been brought in the State's courts they would be barred by sovereign immunity. The Plaintiff has not attached a copy of his ante litem notice to his complaint. See O.C.G.A. § 50-21-26 (a) (5) (A through F). There is no waiver of sovereign immunity for claims brought for breach of contract based upon the Board of Regents' failure to follow student discipline procedures. Board of Regents v. Barnes, 322 Ga. App. 47 (2013).

circumstances of the disciplinary action. For instance, students "have the right to respond [to the charges], 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." Nash v. Auburn University, 812 F.2d 655, 664 (11th Cir. 1987) (*citing* Goss v. Lopez, 419 U.S. 565, 583 (1975)). In addition, "the adequacy of the notice and the nature of the hearing vary according to an appropriate accommodation of the competing interests involved." Id. at 660 (citations and quotations omitted). Thus, the student is not necessarily entitled to a "full-dress judicial hearing, with the right to cross-examine witnesses… [but] should be given the opportunity to present to the Board, or at least 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." Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961).

Plaintiff's Due Process claims fall into essentially three categories. First, Plaintiff complains that the process that was provided was inadequate. He suggests that the failure to provide him with the names of the witnesses interviewed, the inclusion of some statements of the witnesses, and the failure to interview other witnesses creates an inadequate protection of his right to attend Georgia Tech. Plaintiff's second contention is that the decision makers in his case were somehow

biased against him. Third Plaintiff contends that Defendants did not follow its process in that the alleged victim's claims were heard out of time, the appeal was heard by only one person rather than a committee and the President failed to view his appeal utilizing the proper standard. Each will be addressed in turn.

As an initial matter, Plaintiff was provided with the reports of the witness statements in advance of his meeting to address the formal charges. (Exhibit 1, ¶ 29). While he complains that the content of these statements were inflammatory, there is no law that supports his contention that evidence should meet a threshold of admissibility prior to being presented in report.

Plaintiff also complains that the charges were brought too late for disciplinary action and cites to the student code of conduct in support of this contention. While he declares that it is the student code of conduct that should control he has no support for this contention. The University has a separate policy for dealing with claims sexual misconduct. (Exhibit 1, ¶ 8, Ex. A). Plaintiff's chief complaint regarding the variance in policies is his assertion that the complainant's accusations were untimely. Both Title IX and GA Tech's policy require a prompt investigation of claims of sexual misconduct. *See* 34 C.F.R. § 106.8 (Title IX regulation requiring educational institutions to adopt and publish grievance procedures that provide for the "prompt and equitable" investigation and resolution

of sexual misconduct allegations); U.S. Dep't of Ed., Office for Civil Rights, 'Dear Colleague' letter (April 4, 2011), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html . Among other things OCR decreed that when a college or University "knows or reasonably should know about student-on-student harassment that creates a hostile environment" the college must "take immediate action to eliminate the harassment, prevent its recurrence and address its effects." *Id.* At 4, 15. Moreover, the OCR requires that institutions adopt a preponderance of the evidence standard. *Id.* at 11. These requirements were further clarified by the United States' Office of Civil Rights in the "Questions and Answers on Title IX and Sexual Violence," (Apr. 29, 2014) available at https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf. Neither GA Tech nor the Department of Justice establish a statute of limitations for such an investigation and resolution of a claim of sexual misconduct.

Plaintiff's second complaint is that he did not have a verbatim account of the adverse witnesses but instead had to rely on written summaries of interviews and that he did not know the identity of the witnesses until 30 minutes before his meeting with Paquette. First, it should be noted that the Plaintiff was provided with the written summaries well before his final meeting. (Exhibit 1, ¶ 29). He

was given most of the information on March 26th and the remaining information on March 27th so he had sufficient time to formulate challenges and respond to the summaries. In addition he was given an opportunity to provide his account of events prior to charges being formalized. While it is true he was not given an opportunity to directly cross examine the witnesses he had opportunities to present inconsistencies or inaccuracies that could have been addressed through further investigation. OCR has made it clear that it does not require a school to allow cross-examination of witnesses by either party. Moreover direct examination is strongly discouraged. *Questions and Answers on Title IX and Sexual Violence*, OCR states:

> Q: May every witness at the hearing, including the parties, be cross-examined?
> A: OCR does not require that a school allow cross-examination of witnesses, including the parties, if they testify at the hearing. But if the school allows one party to cross-examine witnesses, it must do so equally for both parties.

OCR strongly discourages a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence. Allowing an alleged perpetrator to question a complainant directly may be traumatic or intimidating, and may perpetuate a hostile environment.

In this case after V1 came to report the incident the Plaintiff was emailed a letter and told to contact Mr. Paquette. Mr. Paquette did not hear from Plaintiff until February 25th where it was agreed the two would speak on the 27th. After

being advised of the charges the Plaintiff was given an opportunity to respond to the allegations and provide the names of any witnesses. Plaintiff advised he would provide a written statement by the following Monday but failed to do so. Paquette again attempted to reach the Plaintiff to get the statement which arrived a day later on March 3rd. Paquette again spoke to the Plaintiff on March 12th to seek a response to the second alleged victim. On both occasions, the Plaintiff was given an opportunity to know the claims being made against him and to provide a response. He was also given the opportunity to review his responses to the allegations and make any corrections he deemed appropriate. After the initial investigation was completed, Plaintiff was advised that he was being charged with 5 violations of Georgia Tech's sexual misconduct policy and was given 5 business days to schedule a time to meet. Plaintiff arranged an appointment on March 27th. On March 26 he was given a copy of the investigative report (with names redacted), on the 27th he was given the remaining investigative file(with names redacted). Plaintiff canceled the March 27th meeting. The names were provided Plaintiff on April 3rd before the meeting. At the meeting Plaintiff gave conflicting reports regarding V1 and completely changed his account as to V2. Plaintiff admitted that had not previously provided an accurate account of events. Plaintiff was given ample opportunity to present his case and challenge the testimony of others.

Plaintiff was notified of the findings and given 3 opportunities to appeal. The first opportunity the Plaintiff challenged the investigation, findings and consequence. As a result of this challenge the findings as to V2 were reversed. The next appeal the findings of the appellate committee were affirmed as they were at the final stage. While Plaintiff argues that the proceedings were biased or unfair this contention is belied by the record as the appellate panel reversed the finding as to V2. At each stage an independent review occurred as is further evidenced by the Board of Regents subsequent inquiry regarding the decision making process.

Plaintiff complains that all of his witnesses were not interviewed and suggests that this was as a result of bias. Even though Plaintiff makes this complaint he fails to provide any evidence that any additional evidence would have changed any material aspect of the investigation or the findings of the fact.

Throughout Plaintiff's complaint he avers that the process is biased. A biased decision maker is "constitutionally unacceptable." Withrow v. Larkin, 421 U.S. 35, 46-47 (1975). The court may not, however, infer that the Defendants were biased against Plaintiff. Any alleged prejudice on the Defendants must be evident from the record and cannot be based in speculation or inference. Duke v. North Texas State University, 469 F.2d 829, 834 (5th Cir. 1972). Here the Plaintiff's allegation of bias is premised upon his claim that the actors had some relationship with one of the alleged victims. This claim is totally unfounded as

evidenced by the affidavits of Peter Paquette, John Stein and President Peterson. All deny any such relationship. (Exhibit 1, ¶ 35, Exhibit 3, ¶ 13; Exhibit 4 ¶ 14). Plaintiff also suggests that the contents of the report were unfairly prejudicial in that it contained rumor and speculation. Peter Paquette is clear that he summarized the statements as given. As none of the witnesses were privy to the actual event, Paquette did not rely upon the statements given. Indeed it was Plaintiff's own admitted dishonesty that colored the investigation and swayed the evidence such that Paquette believed it was more likely than not that the misconduct had occurred. The fact that the appeal resulted in the reversal of one of these findings and that the appellate committee for the Board of Regents inquired as to these findings further solidifies that no "bias" was present.

3. Plaintiff fails to state a claim for a violation of the equal protection clause.

The Equal Protection Clause requires only that "all persons similarly circumstanced shall be treated alike." Plyer v. Doe, 457 U.S. 202, 216 (1982). To establish an equal protection claim, a plaintiff must show that similarly situated persons have been treated differently and that the defendant's actions were motivated by an unlawful factor. Mickens v. Tenth Judicial Circuit, 181 Fed. Appx. 865, 878 (11th Cir. 2006); Walker v. Cromartie, 287 Ga. 511, 512 (2010). In this context, "similarly situated" requires some specificity. Campbell v. Rainbow City, 434 F.3d 1306, 1314 (11th Cir. 2006). The comparator must be

similarly situated in all relevant respects. Griffin Indus., Inc. v. Irvin, 496 F.3d 1189, 1202-03 (11th Cir. 2007). Even then, equal protection is denied only when the challenged conduct was motivated by an intent to discriminate. Wash. v. Davis, 426 U.S. 229, 239-48 (1976). Plaintiff does not come close to meeting this standard. Here, Plaintiff offers no comparator. While he theorizes that no woman would be subjected to similar consequence he offers no facts to support this theory. There is no allegation that a woman was charged with non-consensual intercourse and treated differently as a result. Plaintiff's claim has no merit.

Further, an equal protection claim also requires a showing that a plaintiff has been the victim of intentional discrimination. Batson v. Kentucky, 476 U.S. 79, 90 (1986). The United States Supreme Court stated in Massachusetts v. Feeney, 442 U.S. 256 (1979) that the requisite discriminatory purpose must be "more than intent as volition or intent as awareness of consequences...It implies that the decisionmaker...selected or reaffirmed a particular course of action at least in part, 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Id. at 279. (cite omitted) See also, Greene v. Georgia Pardons and Parole Board, 807 F. Supp. 748, 755 (N.D. Ga. 1992)(Plaintiff needs to set forth "exceptionally clear proof" to raise an inference of discriminatory purpose). Plaintiff has not presented any evidence whatsoever that the Defendants intended to discriminate against him. Therefore, Plaintiff's equal protection claim fails.

Finally, in order to prevail on his equal protection claim, Plaintiff must show that the Defendants had no rational justification for their actions. Garrett, 531 U.S. at 366-67. The Defendants may discriminate against Plaintiff if they have a legitimate interest in doing so. Id. at 367. It is incumbent upon Plaintiff, however, to show that there is no reasonably conceivable state of facts that could provide a rational basis for the alleged classification/discrimination, see F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313 (1993), and he is unable to do so.

Under a rational basis review, the Court identifies a legitimate government purpose and determines whether a rational basis exists for the government to believe that its action would further the government purpose. Heller v. Doe by Doe, 509 U.S. 312, 319-20, (1993); see also Cook v. Riley, 208 F.3d 1314, 1323 (11th Cir. 2000) (holding that the Bureau of Prisons did not violate the Equal Protection Clause by excluding prisoners convicted under § 922(g) from consideration for a discretionary reduction in sentence, because it neither imposed upon a fundamental right nor isolated a suspect class and it rationally furthered the legitimate governmental objective of preventing the early release of potentially violent criminals).

The Defendants had rational reasons for taking action against Plaintiff. First, Plaintiff was alleged to have committed sexual assaults against two women.

Second, the Plaintiff admittedly lied to the fact finder investigating the claims and altered his version events in his accounts of events. Finally, the University has an obligation to provide its students with a safe environment. In fact, the University has a legal responsibility to protect its students from known potential risks of harm. See Williams, 441 F.3d 1287, 1298 (concluding that the University could be held liable under Title IX where it was alleged that a basketball player, who the University had notice of his prior misconduct, allegedly orchestrated the rape of another student).

The University is on notice that Plaintiff was claimed to have sexually assaulted two women. If the University had taken no action and a subsequent assault occurred, the University could arguably be held liable. For these reasons, Plaintiff has failed to show the absence of a rational basis for the alleged discrimination because the Defendants had a significant interest in taking action against Plaintiff. Therefore, plaintiff's Equal Protection claim cannot survive as a matter of law.

4. Plaintiff has not stated a valid Title IX claim.

Title IX to the Higher Education Amendment Act of 1972 provides in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The statute itself does not provide for a private right of action. Nevertheless, the Supreme Court of the United States has implied a private right of action in "certain limited circumstances"—where a recipient of federal funding engages in intentional discrimination that violates the clear terms of the statute, Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 642-43 (1999).

A plaintiff seeking recovery for a violation of Title IX based on student-on-student harassment must prove four elements: the defendant must be a Title IX funding recipient; an "appropriate person" must have actual knowledge of the discrimination or harassment the plaintiff alleges occurred; a funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities; the discrimination must be so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit. Williams v. Ga. Bd. of Regents, 477 F.3d 1282, 1293 (11th Cir. 2007).

The first element is not in dispute. As to the remaining element, Plaintiff fails to allege sufficient facts to state a claim.

The crux of Plaintiff's claim is that the process used for investigation of allegations of sexual misconduct resulted in unfair treatment. He generally

complains that the investigation itself was poorly done. None of the facts as alleged suggest that these, "flaws" were initiated as result of intentional discrimination because of the Plaintiff's gender. At best Plaintiff's allegations suggest that the process and policies disproportionately impact male students. This impact is a product of the type of claim addressed not discrimination based on gender. Simply stated, there is no "disparate impact" claim under Title IX. While a disparate impact claim may be brought pursuant to Title VII, courts have held that disparate impact claims may not be brought under Title VI and IX. Doe v. Columbia University, 2015 U.S. Dist. 52370 *22 (S.D.N.Y. April 21, 2015). [2] The Supreme Court has found there to be a cause of action where a University has actual notice of sex-based discrimination and is deliberately indifferent to it. Davis v. Monroe County Bd. of Ed., 526 U.S. 629, 633 (1999). Neither the United States Supreme Court nor the Eleventh Circuit have found that allegations of procedural flaws combined with a suggestion of gender bias give way to a cause of action for erroneous outcomes. Indeed to do so would arguably cause courts to become the ultimate arbiter in the re-adjudication of claims involving sexual misconduct.

Essentially Plaintiff suggests that the investigation was unfair and resulted in an erroneous outcome. Assuming for the sake of argument that such a claim

[2] Plaintiff affirmatively states that he is seeking relief from Title IX based upon disparate impact. (doc. 1 ¶ 219).

exists, Plaintiff fails to tie the outcome to intentional gender based discrimination. Plaintiff makes numerous conclusory allegations regarding theorized motivations, there is no factual support for these conclusions. Moreover, the facts of the case at bar compel the conclusion that gender was not a motivating factor by the Defendant. Specifically the fact that one allegation was found unsubstantiated and that decision survived appeal requires an alternate conclusion. While Plaintiff suggests that an erroneous outcome was reached in his case and that the punishment was disproportionate to the offense, the issue is whether that outcome and punishment were motivated by sex or gender bias. *See* Brzonkala v. Virginia Polytechnic Institute, 132 F.3d 949, 961 (4th Cir. 1994) *overturned on other grounds by* Brzonkala v. Virginia Polytechnic, 169 F.3d 820(4th Cir. 1999)(*en banc*); *See also* Yusaf v. Vassar College, 35 F.3d 709, 715 (2d Cir. 1994)(allegations of procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination in not sufficient to survive a motion to dismiss).

Here, Plaintiff fails to allege any particular circumstances that show that gender bias was a factor in the allegedly erroneous finding or consequence. The policy requiring expulsion upon a substantiated finding makes no reference to gender and there is no allegation or suggestion that the investigation would have

been conducted differently if the complainant were a man. Indeed Plaintiff's own evidence suggests that to the extent the investigative process might be flawed this flaw carries to situations where gender isn't an issue. (Doc. 1 ¶ 137-138). Specifically Plaintiff attempts to bolster his claim by offering evidence that the University's investigation of a claim regarding an investigation of a fraternity for the alleged use of racially inflammatory language. *See http://www.wsbtv.com/news/news/local/georgia-tech-fraternity-suspended-over-yelling-rac/nn3cR/(attached as Exhibit 7).* Nothing about that case marginally suggests gender bias.

Plaintiff's other scant offerings of gender bias include anecdotal media reports of "unfair" treatment of those who are accused of sexual assault. Plaintiff suggests this unfair treatment stems from inflammatory news reports of Georgia Tech's treatment who claim sexual assault. Plaintiff avers that this unfavorable press caused Georgia Tech to effectively find against men who are accused of sexual assault in order to distance itself as an institution from these reports. (doc. 1 ¶ 209). Assuming these motivations are true, there is nothing about them that suggests gender bias. To the contrary, a University's desire to maintain a positive public image has absolutely nothing to do with gender.

Plaintiff's final theory is that three of the "decision makers" were biased because one of the alleged victims posted on facebook and claimed, that she had gone through the process, was a trained peer educator, that she has, "worked very closely with Dean Stein, Bud Peterson, Peter Paquette, and the other two investigators." (Dillon Aff. Ex. A). Dillon reports that this post is from the alleged victim in the case and that the post was provided to him by another student. The post itself shows nothing other than that the poster believes she has a working relationship with these three Defendants. There is no indication as to when this alleged "work" took place nor does it compel a finding that this "work" would cause the conclusion that the Defendants reached their decision as a result of gender bias. To the contrary, if the "work" impacted the decision making it would be this relationship that Plaintiff suggests caused the unfair result not gender. Finally all three have stated, under oath, that they do not have such a relationship. This testimony overrides any innuendo that can be derived from this facebook post.

B. PLAINTIFF HAS NOT ALLEGED IRREPARABLE HARM

As an initial matter, when a plaintiff has not shown a likelihood of success on the merits, claims for irreparable injury based on an alleged constitutional injury have no merit. Overstreet v. Lexington-Fayette Urban Cnty. Gov't, 305 F.3d 566, 578 (6th Cir. 2002). Because Plaintiff has failed to show that it is likely to succeed

on the merits of its claims, it has necessarily failed to establish irreparable harm. See id.

Plaintiff alleges two harms the first is the alleged harm to his reputation. The second is the claim that he will be unable to complete his program in the event he ultimately prevails in the matter.

A showing of irreparable injury is "the *sine qua non* of injunctive relief." Siegel v. LaPore, 234 F.3d 1163 (11th Cir. 2000). It cannot be presumed, even where there is a violation of constitutional rights. *See* Siegal, 234 F.3d at 1177. An injury is **"**irreparable" only if it cannot be undone through monetary remedies. "The key word in this consideration is *irreparable***.** Mere injuries**,** however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Sampson, 415 U.S. 61, 90 (1973); Northeastern Florida Chapter v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990). *See* Ferrero v. Associated Materials, Inc., 923 F.2d 1441, 1449 (11th Cir. 1991); Spiegel v. City of Houston, 636 F.2d 997, 1001 (5th Cir. 1981). *See also,* Cate v. Oldham, 707 F.2d 1176, 1189 (11th Cir. 1983).

To the extent that Plaintiff contends that his "reputation" has been impacted by the expulsion, his reinstatement to the University will not change this outcome. This case is not about whether the Plaintiff did or did not sexually assault his accuser. Rather it's about whether the Plaintiff was discriminated against and whether he received adequate process. Nothing about these proceedings at this stage or the preliminary injunctive relief will cure this alleged harm. As to the second contention, Plaintiff's conclusion regarding his programmatic requirements are erroneous. The Plaintiff will be able to complete his program in the event he is reinstated. (Exhibit 6, Affidavit Dr. Lakshmi Sankar, ¶ 5.6). As Plaintiff fails to show irreparable harm his preliminary injunction should be denied.

C. THE DAMAGE TO DEFENDANTS OUTWEIGHS ANY ALLEGED INJURY TO PLAINTIFF

A plaintiff bears the burden of showing that the perceived injury outweighs the damages that the preliminary injunction might cause defendants. Baker v. Buckeye Cellulose Corp., 856 F.2d 167, 169 (11th Cir. 1988). Plaintiff has failed to meet this burden. Here Plaintiff has been charged with two incidents of sexual misconduct and has been found responsible for one involving non-consensual sexual intercourse. In the event he is required back on campus and commits another assault, the University would be subject to liability. *See* Williams v. Ga.

Bd. of Regents, 477 F.3d 1282 (11th Cir. 2007). The impact to the safety to the University community should not be discounted.

In addition, where the preliminary injunction would give a plaintiff all or most of the relief to which it would be entitled if it was successful at a trial on the merits, preliminary relief may "impose a disproportionate burden on defendant." Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.2, p. 181 (2d ed. 1995); *see also* Knapp v. Walden, 367 F. Supp. 385, 388 (S.D. N.Y. 1973) ("It is improper to issue a preliminary injunction where such a grant would effectively provide all the relief sought in the complaint"). The entry of a preliminary injunction would effectively give Plaintiff all of the relief to which he would be entitled were he to prevail on the merits.

D. A PRELIMINARY INJUNCTION WILL NOT SERVE THE PUBLIC INTEREST

Plaintiff also bears the burden of showing that the preliminary injunction would serve the public interest. Baker, 856 F.2d at 169. Indeed the burden in on the Plaintiff to show that, "the public interest would not be disserved." Ebay v. MercExchange, 547 U.S. 388, 390 (2006). Plaintiff has not provided any support for the proposition. While Plaintiff claims that he was treated unfairly and that because he was treated unfairly that he poses no threat to the public safety. In reality this supposition draws a false conclusion. Even assuming the Plaintiff was

treated unfairly, such treatment does not equate to the lack of threat to the University community. Sexual misconduct is a serious, under-reported problem on college and university campuses. To enjoin the University by requiring it to readmit an expelled student found responsible for sexual assault would hamstring the efforts of the Board of Regents to comply with federal law and remedy the effects of sexual misconduct. It would also undermine the very purpose of Title IX and cause uncertainty for other alleged victims. As noted previously, the impact of allowing a student on campus where he was found that "it was more likely than not" that he committed a serious sexual assault puts the University community at risk. It further sends the wrong message to other would be perpetrators who may utilize another's impaired condition to facilitate a non-consensual sexual encounter. Finally it replaces the Court's judgment for that of system officials and has the potential to open the door to other similar challenges when a student is expelled from an institution but claims that the sanction is inappropriate. There is nothing about the facts of the complaint or Plaintiff's argument that supports the findings that the grant of this motion is in the public's best interest.

III. CONCLUSION

As Plaintiff has not met its burden of proof related to any of the standards required for a preliminary injunction, its motion should be denied.

Respectfully submitted this 7th day of December, 2015.

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/s/DEVON ORLAND Senior Assistant Attorney General	554301

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that the foregoing has been prepared in compliance with Local Rule 5.1(B) in 14-point New Times Roman type face.

s/Devon Orland
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CERTIFICATE OF SERVICE

I do hereby certify that I have this day December 7, 2015 served the within and foregoing **RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

Christopher Giovinazzo
Justin Dillon

s/ Devon Orland
Bar No. 554301
Counsel for Defendants