CASE NO. 16-3334

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

John Doe I, et al.
Plaintiffs-Appellants

v.

Daniel Cummins, et al.
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO
Civil Action No. 1:15-cv-681
Honorable Sandra Beckwith, United States District Judge, presiding

ORIGINAL BRIEF OF PLAINTIFFS-APPELLEES JOHN DOE I AND JOHN DOE II

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CORPORATE DISCLOSURE

Not applicable to Plaintiffs-Appellants.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs respectfully suggest that the Court would benefit from hearing oral argument in this matter. This case raises an issue of significant national concern: the adjudication of allegations of sexual assault by public colleges and universities. Plaintiffs believe oral argument will assist the Court in its analysis of the disputed constitutional issues presented on appeal, and will enable counsel to address any questions the Court may have.

JURISDICTIONAL STATEMENT

This case arose, in part, under the United States Constitution and 42 U.S.C. §§ 1983 and 1988. Accordingly, the District Court had jurisdiction in this matter pursuant to 28 U.S.C. §§ 1331 and 1343. The declaratory and injunctive relief sought by the Plaintiffs in this matter is authorized by 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. § 1983, and Federal Rules of Civil Procedure 57 and 65.

This is an appeal from a final decision of a district court of the United States. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291. A final judgment that disposed of all parties' claims was entered on March 23, 2016. A timely Notice of Appeal was filed on April 4, 2016.

STATEMENT OF ISSUES

Whether the District Court committed reversible error in its May 23, 2016 Order grating Defendants' Motion to Dismiss. Specifically, the issues presented in this appeal include whether the trial court committed reversible error in concluding:

1. The Complaint failed to state a claim that the University of Cincinnati imposed discipline on the Plaintiffs in violation of their due process rights, as guaranteed by the Fourteenth Amendment to the United States Constitution, in the following circumstances:
    a. The University employed a system that, viewed as a whole, failed to provide the Plaintiffs a meaningful opportunity to be heard;
    b. The University required John Doe I and John Doe II to prove that they have not committed misconduct;
    c. The University failed to permit John Doe I the opportunity to effectively cross-examine his accuser and failed to permit John Doe II any opportunity to cross-examine his accuser;
    d. The University's investigatory and hearing process was biased.
2. The Individual defendants may claim qualified immunity in defense against a claim under 42 U.S.C. § 1983.
3. The Complaint failed to state a claim that the University discriminated against the Plaintiffs on the basis of gender in violation of Title IX of the Education Amendments of 1972. 20 U.S.C. § 1681(a)

STATEMENT OF THE CASE

This case arises out of the decision of UC to impose disciplinary sanctions against the Plaintiffs in violation of the their Constitutional and federal statutory rights.

A. The UC Disciplinary Process

UC has adopted certain policies and procedures for the investigation and adjudication of alleged sexual misconduct, as required by Title IX. (Complaint ¶21, R.1, PageID#9.) These policies and procedures are available at http://www.uc.edu/titleix/policies-procedures.html. The UC Code of Student Conduct governs student behavior and provides for sanctions for violations. Revisions to the Policy were adopted in 2012 in part as a direct response to pressure from the Department of Education. The UC Code of Conduct is codified in the Ohio Administrative Code. OAC 3361:40-5-04. (Complaint ¶27, R.1, PageID#11.)

In general, when a complaint of sexual misconduct is made, a Deputy Title IX Coordinator or designee will initiate a meeting with the accused student. A Deputy Title IX Coordinator or designee will begin interviewing witnesses, as appropriate, and review relevant evidence. At the conclusion of the investigation, the Deputy Title IX Coordinator prepares an investigatory report which is provided to an Administrative Review Committee ("ARC"). The ARC holds an administrative hearing applying the preponderance of the evidence standard to determine whether the student violated the UC Code of Conduct.

In practice a student accused of sexual misconduct under the UC policies faces a system that is biased at every step towards finding the student "responsible" and imposing significant discipline. The investigatory process is aimed at finding evidence to support the charges; worse, UC investigators have suppressed evidence helpful to the accused. (Complaint ¶34(c)(iv), R.1, PageID#22.) The ARC members receive biased training designed to encourage findings against accused student and often seek to pursue an independent political agenda. (Complaint ¶35, R.1, PageID#22-23.) "The ARC Hearings," according to the Complaint, "are nothing more than mock hearings in which the principles of law and justice are disregarded or perverted." (Complaint ¶41, R.1, PageID#27.) At the hearings, students are not presumed to be innocent until proven guilty. (Complaint ¶31(f) , R.1, PageID#13.) Students may not be provided the opportunity to cross examine witnesses who submit written testimony, and may cross-examine an accuser only through the use of written questions that must be reviewed and approved by the hearing panel chair (often a person with no legal training). (Complaint ¶31, R.1, PageID#12-14.)

The Complaint also alleges that the UC process for adjudicating claims of sexual misconduct is biased. A UC "Resource Guide" refers to those who make accusations of sexual misconduct as "survivors" instead of, as the Department of Education, does, as "complainants." (Complaint ¶21, R.1, PageID#9-10.) The ARC Hearing Panels have received training from the UC Women's Center that focused on the prevalence of sexual assault on campus and referred to those accused of sexual

assault as "predators." (Complaint ¶33(a), R.1, PageID#14.) Other training programs relied on discredited statistics and had "the purpose and effect of informing panel members that they had a job to prevent sexual assault on campus, not to fairly or impartially adjudicate allegations of misconduct." (Complaint ¶ 33(b), R.1, PageID#15.)

It is not surprising that, as the Complaint describes in ¶36 (R.1, PageID#23-24), no student who has been accused of serious sexual at UC misconduct has ever successfully defended against the accusation. (*See also* Complaint ¶40, R.1, PageID#26 ("A review of the recent history of ARC Hearing Panels, obtained through a public records request, shows UC has a pattern and practice of making it impossible for a student to be found not responsible.").) It is also not surprising, as the Complaint describes in ¶118 (R.1, PageID#52), that a review of all recent UC disciplinary cases reveals that UC disproportionately imposes discipline on male students.

B. The John Doe I Matter

John Doe I was a junior at UC. On or about March 9, 2014, John Doe I was accused by two female UC students of rape, Jane Roe I and Jane Roe II. The case

was investigated by the University of Cincinnati Police[1] and ultimately presented to the Hamilton County Grand Jury. The Grand Jury declined to issue an indictment.[2]

UC, through Cummins, initiated disciplinary proceedings against John Doe I and then started an "administrative" investigation. This timing is significant: on April 7, 2014, Cummins scheduled an ARC Hearing for John Doe, but did not interview any witnesses until April 10, 2014; in other words, Cummins decided to pursue discipline against John Doe I before conducting *any* investigation.[3] (Complaint ¶61, R.1, PageID#32-33.) Cummins conducted the investigation and, at the same, time, advocated on behalf of Jane Roe I and Jane Roe II to obtain accommodations from the University. Cummins' interviewed a number of witnesses but failed to obtain any physical or forensic evidence. He also failed to include in his report a witness statement that was very favorable to John Doe I. (Complaint ¶¶63-64, R.1, PageID#33-34.)

Two ARC Hearings were initially held on May 2, 2014. The May 2, 2014 ARC Hearings were obviously and embarrassingly biased. One of the members of the ARC

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[1] The UC Police are sworn law enforcement officers who operate independently from the UC disciplinary system.

[2] The UC Police found significant evidence to undermine the allegations of Jane Roe I and Jane Roe II, including surveillance videos and text messages. (*See* Complaint ¶¶ 50-57, R.1, PageID#29-31.)

[3] The Complaint describes how UC officials attempted to interfere with the investigation by the UC police. (Complaint ¶58, R.1, PageID#31-32.)

Hearing Panel, Carol Tong-Mack, was copied on various emails seeking academic accommodations for the students. The chair of the ARC Hearing Panel, acting on Cummins direction: refused to consider evidence from the UC Police investigation presented by John Doe I; refused to ask most of the questions submitted by John Doe I for Jane Roe I; and even refused to follow the panel's own rules. The ARC Panel determined that John Doe I had violated the University's Code of Conduct in regards to the claims of Jane Roe I. (Complaint ¶¶66-72, R.1, PageID#34-37.)

John Doe I left before the conclusion of the case brought by Jane Roe II when it became clear that he would not be afforded due process. Instead, he instituted a case in Hamilton County Common Pleas Court. Judge Metz issued a Temporary Restraining Order prohibiting further disciplinary actions against John Doe I. The case was removed to Federal Court. The Federal Court (Dlott, J.) subsequently dismissed the case without prejudice, concluding, in effect, that UC was entitled to complete its appellate process prior to the initiation of any litigation.

Less than one week after the dismissal of the John Doe I lawsuit, UC agreed that substantial procedural errors had occurred and permitted John Doe I to have new hearings. (Complaint ¶77, R.1, PageID#38.) On May 18, 2015 and May 19, 2015, John Doe I appeared for new ARC Hearings. While these ARC Hearings were not the same "kangaroo courts" as the original hearing, the ARC Hearing Panels still suffered from the same substantial issues. The ARC Hearing Panel still considered the biased investigative report prepared by Cummins. John Doe I was not permitted

to have the complainant answer numerous questions designed to highlight inconsistencies in their stories, and the ARC Hearing Panel was not informed that John Doe I should be considered "innocent until proven guilty" or of the "accommodations" provided by UC to Jane Roe I and Jane Roe II that could adversely impact their credibility. (Complaint ¶78, R.1, PageID#38-41.)

The ARC Hearing Panel found John Doe I "Responsible" for a violation of the UC Code of Student Conduct in regards to Jane Roe I, but "Not Responsible" in regards to Jane Roe II. No explanation was provided for this inconsistent decision. On June 11, 2015, the University Appeal Administrator rejected John Doe I's appeal, but failed to address any of the suggestions that the process employed by UC violated the due process rights of John Doe I. The decision against John Doe I was affirmed on July 23, 2015. As a result, John Doe I now faces a three-year suspension from UC. (Complaint ¶¶79-82, R.1, PageID#41-42.)

C. The John Doe II Matter

John Doe II was a law student at UC. On March 6, 2014, John Doe II was alleged to have sexually assaulted Jane Roe III. Jane Roe III never reported this allegation to the police.[4] The alleged sexual assault occurred outside of the UC

[4] The alleged misconduct by John Doe II did not occur on the UC campus. The UC Code of Student Conduct is generally not applied to conduct which does not occur on the UC campus or at UC sponsored activities unless there has been a police report. In an effort to obtain jurisdiction over these allegations, Cummins initiated a police

campus, and may not have even been within the jurisdiction of the UC Code of Student Conduct. (Complaint ¶¶ 83-87, R.1, PageID#42-43.) Jane Roe III, when making the allegations against John Doe II, requested and received additional time to complete her graduate thesis. She later was provided with a job at the UC Women's Center. Cummins assisted Jane Roe in obtaining some or all of these accommodations. (Complaint ¶89, R.1, PageID#43-44.)

On April 7, 2014, at 11:41 p.m. — two minutes before he sent a near identical email to John Doe I — Cummins informed John Doe II that the allegations would be forwarded to an ARC Hearing. As in the John Doe I matter, Cummins decided to initiate the disciplinary proceedings against John Doe II before completing an investigation. (Complaint ¶95, R.1, PageID#45.)

The ARC Hearing for John Doe was scheduled April 22, 2014, a time that presented a conflict for John Doe II's advisor; Cummins refused to accommodate the conflict. (Complaint ¶¶95-96, R.1, PageID#45.) Like in the John Doe I matter, the ARC Hearing Panel for John Doe II was clearly biased. For example, when Cummins said that Jane Roe III would "get to read a statement about how these events have impacted her." John Doe II's advisor said, "you mean ALLEGED events." Cummins

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report with the UC Police Department. He then sent John Doe II a letter on April 8, 2014 stating misleadingly that he had "received an [sic] UCPD Report or Incident Report documentation that you have allegedly violated the Student Code of Conduct."

replied, "no, this HAS impacted her." Similarly, a witness for Jane Roe III, who had no first hand knowledge of the incident, repeatedly stated that John Doe II "raped" the complainant and repeatedly referred to the event as an "assault." The notes of one panel member on the testimony provided by a witness on behalf of John Doe II included the phrase, "Well, rapists can be quite charming." (Complaint ¶99, R.1, PageID#45-47.)

Jane Roe III changed her allegations at the start of the ARC Hearing. Instead of alleging that she had consented to some sexual activity, as she did in her written statement, she alleged for the first time that, upon reflection, she has realized that she was too intoxicated to have consented. The ARC Hearing Panel found that John Doe II was responsible for violating the UC Code of Student Conduct. (Complaint ¶104, R.1, PageID#47.)

John Doe II appealed the finding. Five months later the appeal was granted and a new ARC Hearing was ordered. A second ARC Hearing was held on October 28, 2014. The second ARC Hearing Panel, like the first panel, was biased against John Doe II and had pre-determined the outcome (many of the members were the same). At the re-hearing, Jane Roe III read a lengthy prepared statement addressed directly to John Doe II. The statement began "[John Doe II], you are a rapist," and included derogatory and defamatory remarks, including that John Doe II was "going to Hell." Jane Roe III concluded her statement by stating: "And now I'm going to leave, because this process is a joke." She then stormed out of the hearing. As a result, John

Doe II was denied any opportunity for cross-examination. (Complaint ¶¶107, R.1, PageID#48-49.)

The second ARC Hearing Panel found John Doe II responsible. No appeal of this decision was allowed. The decision against John Doe II was affirmed by Rocco on November 10, 2014. Even though John Doe II has graduated and his probation has terminated, the finding of responsibility has a significant negative impact on John Doe II, including a notation of a finding of responsibility in an academic record. (Complaint ¶¶108-110, R.1, R.1, PageID#49-50.)

D. Procedural History

On October 19, 2015. John Doe I and John Doe II brought this action for a declaratory judgment, violation of 42 U.S.C. §1983, violation of Title IX, and injunctive relief. (Complaint, R.1, Page ID# 1-64.) The Defendants filed a Motion to Dismiss. (Motion to Dismiss, R.11, Page ID# 78-115.)

On March 23, 2016, the trial court granted the Motion to Dismiss. (Order, R.16, Page ID# 246-79.) Final Judgment was entered on this date. This appeal followed.

SUMMARY OF ARGUMENT

This case arises amidst a growing national controversy about the responses of colleges and universities to sexual assaults on campuses. After years of criticism for being too lax on campus sexual assault, the Federal Government, through the Department of Education, has been using Title IX to pressure colleges and universities to aggressively pursue investigations of sexual assaults on campuses. The Defendants-Appellees acknowledged that their actions were designed, in part, to comply with directives from the Department of Education, Office of Civil Rights. *See* Letter from Office for Civil Rights, U.S. Dep't of Educ, (Apr. 4, 2011) (the "Dear Colleague Letter"). *See* Def. Memo. in Support of Motion to Dismiss at 10, R.11, PageID#92)(noting that UC is complying with "Dear Colleague Letter").)

Looking at the UC scheme as a whole, on a motion to dismiss standard, the Complaint adequately describes a process that violates the due process guarantees of the Constitution because it is biased against accused students, fails to provide adequate opportunities to effectively cross-examine essential witnesses, and does not place the burden of proving misconduct on the complainant. Evidence from public records supports this conclusion: "it is nearly impossible for a student to be found not responsible." (Complaint ¶36, R.1, PageID#23-24.) In *every* recent case where a UC student was accused of sexual conduct without consent, the student has faced discipline. (Complaint ¶36(b), R.1, PageID#24.)

The Complaint also adequately states a claim under Title IX. Title IX claims against universities arising from disciplinary hearings are analyzed under the "erroneous outcome" standard, "selective enforcement" standard, "deliberate indifference" standard, and "archaic assumptions" standard. *Mallory v. Ohio Univ.*, 76 Fed. App'x 634, 638 (6th Cir. 2003) (internal citations omitted), *citing Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994). In order to assert a claim based on an erroneous outcome/selective enforcement theory, the Plaintiffs need to allege that the hearing was flawed due to the Plaintiffs' gender, and that evidence of gender bias can be shown, *inter alia*, by a "patterns of decision-making that also tend to show the influence of gender." 35 F.3d at 715. In this case, dismissal under a 12(b)(6) standard was not appropriate because the Plaintiff has does exactly what *Yusef* requires: alleged in a non-conclusory manner a pattern of decision-making that shows the influence of gender. John Doe I and John Doe II have identified numerous pieces of evidence that "tend to show" gender bias motivated the Defendants' unlawful disciplinary decisions. The Complaint describes a flawed process where UC treats males and females differently. A pattern of decision-making is also shown by statistical evidence that in 97% of the cases investigated by UC, men were the subjects of the investigation. In *every* case where discipline was actually imposed by UC, there was a male respondent and a female complainant.

ARGUMENT

A. Standards

This court reviews a decision to grant a motion to dismiss *de novo*. *D'Ambrosio v. Marino*, 747 F.3d 378, 383 (6th Cir. 2014); *Amini v. Oberlin College,* 259 F.3d 493, 497-98 (6th Cir. 2001). In deciding whether to grant a Rule 12(b)(6) motion, the District Court was required to accept all well-pleaded factual allegations of the Complaint as true and construe the complaint in the light most favorable to the plaintiffs. *Reilly v. Vadlamudi*, 680 F.3d 617, 622 (6th Cir. 2012), *quoting Dubay v. Wells*, 506 F.3d 422, 426 (6th Cir. 2007). The Complaint will survive a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" that is, "that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). *See also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

B. Eleventh Amendment Immunity

Under the Eleventh Amendment, each state is a sovereign entity that is not amenable to suit of an individual without its consent. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). The District Court dismissed Count I, to the extent it sought declaratory relief against UC and the Individual Defendants in their official capacities. (Order, R.16, Page ID#257-58.) The District Court's ruling was erroneous to the extent it could have been read to dismiss *any* claim that sought declaratory or injunctive relief. Under *the Ex parte Young* exception, a federal court can issue

prospective injunctive and declaratory relief against the Individual Defendants compelling them to comply with federal law. *Doe v. Wigginton*, 21 F.3d 733, 737 (6th CiR.1994); *Ex parte Young*, 209 U.S. 123 (1908). "It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14 (1983), *citing Ex parte Young*, 209 U.S. at 160-62.

Accordingly, the Eleventh Amendment would not have prohibited the District Court from issuing a declaration that the UC Policy violated the Plaintiffs-Appellants' rights and from issuing an injunction restoring the Plaintiffs to their previous positions and prohibiting further enforcement of the UC Policy against them. *See Nelson v. Miller*, 170 F.3d 641, 646 (6th Cir. 1999)("when the relief sought is prospective injunctive relief that would 'merely compel[ ] the state officer['s] compliance with federal law in the future,' then such a request 'is ordinarily sufficient to invoke the *Young* fiction.'" (citations omitted)); *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 307 (6th Cir. 1984) (reinstatement of medical student), *cert. denied*, 469 U.S. 1113 (1985); *Elliott v. Hinds*, 786 F.2d 298, 302 (7th Cir. 1986) (reinstatement of pharmacist); *Dwyer v. Regan*, 777 F.2d 825, 836 (2nd Cir. 1985) (reinstatement of employee).

C. Due Process Claims

The Complaint stated a valid claim against the Individual Defendants for violations of the Plaintiffs' Procedural Due Process rights. The trial court essentially

concluded that because the Plaintiffs received notice of the charges, an explanation of the evidence against the Plaintiffs, and an opportunity to be heard, they are unable to assert a procedural due process claim. The trial court wrote,

> The minimum requirements are that the student "must be given *some* kind of notice and afforded *some* kind of hearing." *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (emphasis on original). This generally means that the student must be provided an explanation of the evidence against him and an opportunity to present his side of the story. *Id.* at 581.

(Order, R.16, Page ID# 263-64.) As shown below, this is based on an overly narrow reading of the relevant Supreme Court decisions, which also require a fair and unbiased tribunal as well as a "meaningful" opportunity to be heard. The question was not whether the Plaintiffs had notice and an opportunity to be heard; they did. But this is only the start of the analysis. Instead the question is whether that opportunity to be heard was meaningful, or as Justice Powell explained, "fair." *Vitek v. Jones*, 445 U.S. 480, 500, 100 S. Ct. 1254 (1980) (Powell, J., concurring in part) ("The essence of procedural due process is a fair hearing."). *See Doe v. Rector & Visitors of George Mason Univ.,* E.D.Va. No. 1:15-cv-209, 2016 U.S. Dist. LEXIS 24847, at *46-47 (Feb. 25, 2016) ("it may well be that plaintiff deserves to be expelled or otherwise sanctioned for certain behavior, but the Constitution requires that if behavior is to be sanctioned, then the state must ensure the soundness of the decision it reaches as the situation requires.").

1. Legal Framework

a. Goss

The starting point for analyzing alleged violations of students' procedural due process rights in school suspension cases is *Goss v. Lopez*, 419 U.S. 565 (1975). In *Goss*, the Supreme Court concluded that students facing suspensions of ten days or fewer have a property interest in educational benefits and a liberty interest in their reputations that qualify them for protection against arbitrary suspensions under the Due Process Clause. *See Goss*, 419 U.S. at 576 ("Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary."); *see also id.* at 579 ("The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences."). The *Goss* Court held that the Due Process Clause does not require that hearings in connection with suspensions of ten days or fewer follow trial-type procedures. 419 U.S. at 583.

The *Goss* framework is not explicitly applicable to this case, however. The *Goss* Court explicitly rejected the suggestion that the *Goss* rules apply to cases where a student faces expulsion:

> We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.

419 U.S. at 584. This Court has noted the inapplicability of *Goss* to these situations.[5] *C.Y. v. Lakeview Pub. Schs*, 557 Fed. Appx. 426, 430 (6th Cir. 2014) ("*Goss* did not address the due-process requirements for suspensions longer than ten days").

b. *Mathews* Standard

Since the Supreme Court has not mandated specific procedures for a suspension or other discipline from a public university, this Court must return to Due Process fundamentals. "The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970), *citing Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The hearing provided must be "at a meaningful time and in a meaningful manner." *Goldberg*, 397 U.S. at 267, *quoting Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187 (1965). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, (1976), *quoting Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

As in all cases involving an alleged deprivation of due process, the question for the Court is determining precisely what process was due. *Morrissey*, 408 U.S. at 481. *See also Flaim v. Med. College of Ohio*, 418 F.3d 629, 634 (6th Cir. 2005) (noting that in

[5] A later Supreme Court decision, *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78 (1978), is inapposite. *Horowitz* was a case of academic misconduct, not a violation of non-academic rules. The Court noted that the *Goss* requirements did not apply to academic violations (such as charges of plagiarism). 435 U.S. at 86.

school discipline cases "the amount of process due will vary according to the facts of each case and is evaluated largely within the framework laid out by the Supreme Court in *Mathews*"), *citing Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) (stating that due process is "not a fixed or rigid concept, but, rather, is a flexible standard which varies depending upon the nature of the interest affected, and the circumstances of the deprivation").

In determining whether the Plaintiffs received adequate due process, the trial court committed a significant error in not applying the *Mathews* balancing test. This Court has held:

> Notice and an opportunity to be heard remain the most basic requirements of due process. Within this framework -- and the generalized, though unhelpful observation that disciplinary hearings against students and faculty are not criminal trials, and therefore need not take on many of those formalities -- the additional procedures required will vary based on the circumstances and the three prongs of *Mathews*.

Flaim, 418 F.3d at 635. This Court, in *Flaim*, accordingly, instructed that a trial court must apply the well-known *Mathews* balancing test and consider the students' interest in their education at UC; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and UC's interest, including the not-insignificant burdens that the additional safeguards would entail. *See Mathews*, 424 U.S. at 335. Yet, despite the specific instruction from this Court to apply *Mathews*, the District Court's Order does not even cite to *Mathews*. Other courts that have considered the requirements of due

process in cases of long-term suspension or expulsion have consistently applied the balancing test of *Mathews* to determine the type of process was required. *Watson v. Beckel*, 242 F.3d 1237, 1240 (10th Cir. 2001)*, citing Palmer v. Merluzzi*, 868 F.2d 90, 95 (3d CiR.1989); *Newsome v. Batavia Local School Dist.*, 842 F.2d 920, 923-24 (6th CiR.1988); *Gorman,* 837 F.2d at 14; *Nash v. Auburn University*, 812 F.2d 655, 660 (11th CiR.1987).

c. The Plaintiffs Have A Protected Property Or Liberty Interest

The District Court found that the Due Process Clause is implicated by higher education disciplinary decisions. (Order, R.16, PageID#263.) This was correct. *See Richards v. McDavis,* 2013 U.S. Dist. LEXIS 134348, 16-20 (S.D. Ohio Sept. 19, 2013), citing, *inter alia, Flaim*, 418 F.3d at 629 ("In this Circuit we have held that the Due Process Clause is implicated by higher education disciplinary decisions."); *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245 (E.D. Mich. 1984), aff'd, 787 F.2d 590 (6th CiR.1986) (due process clause implicated in suspension from university for cheating); *See also Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th CiR.1961) (students have a protected interest in "the right to remain at a public institution of higher learning . . .").

d. The Plaintiffs Are Not Requesting A Criminal Trial

The District Court stated, "Plaintiffs clearly believe that they were entitled to all of the procedural protections of a criminal trial." (Order at 26, R.1, PageID#271.)

This is incorrect. The Plaintiffs have never made such a claim.[6] (*Compare* Opp. to Motion to Dismiss at 15, R.14, Page ID#198 ("As in all cases involving an alleged deprivation of due process, the question for the Court is determining precisely what process was due.").)

2. The Complaint States A Valid Claim That The UC Process Violates The Due Process Rights of Students

UC has modified its Code of Student Conduct for cases of sexual assault and sexual harassment in response to pressure from the federal Department of Education. *See* Complaint Exhibit A; OAC 3361:40-5-04. UC, in the Code of Student Conduct, claims to employ procedures that are "consistent with both the customs of a free society and the nature and function of an institution of higher learning." However, as shown below, the reality is that UC employs a number of practices that are more consistent with a Star Chamber. *See Faretta v. California*, 422 U.S. 806, 821–22, 95 S. Ct. 2525 (1975) ("the Star Chamber has, for centuries, symbolized disregard of basic individual rights.").

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[6] The Plaintiffs observe, by way of comparison, that a person facing a minor misdemeanor speeding ticket in Ohio receives many more procedural protections than a person facing dismissal from UC, including the presumption of innocence, the ability to directly confront adverse witnesses, the ability to represented by counsel, and a hearing before a fair and impartial tribunal under clearly established rules and procedures.

a. The Trial Court Incorrectly Adopted An Improper Atomistic Approach

The District Court improperly considered the process offered by UC by examining different, individual, technical pieces; in doing so, the District Court improperly ignored that the court was required to consider the UC process as a whole. *See e.g.* Def. Memo at 19-22. The atomistic approach reduces due process guarantees to a checklist of specific provisions, some or all of which must be present in some form in a university disciplinary process for it to be constitutional. This 'checklist' approach is contrary to the Supreme Court's teachings. In *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), for example, the Supreme Court reviewed pretrial attachment statutes. The Court emphasized that the "requirements of due process of law are not technical," and that a court must consider a scheme "as a whole." 416 U.S. at 610. The Court continued:

> Due process of law guarantees "no particular form of procedure; it protects substantial rights." *NLRB v. Mackay Co.*, 304 U.S. 333, 3511 (1938). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Stanley v. Illinois*, 405 U.S. 645, 650 (1972). Considering the . . . procedure *as a whole*, we are convinced that the State has reached constitutional accommodation of the respective interests of buyer and seller.

Mitchell, 416 U.S. at 610 (emphasis added). *See also Shaumyan v. O'Neill*, 716 F. Supp. 65, 73 (D. Conn. 1989) (noting that "*Mitchell* would seem to stand for the proposition that mandatory checklists of procedural safeguards are inappropriate."). Similarly, in *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Court evaluated state pretrial detention

procedures. The Court explained that procedures may vary from state to state, so that they must be viewed "as a whole" to determine if constitutional requirements had been met. 420 U.S. at 124.

This Court has followed this approach. In *Frumkin v. Bd. of Trs.*, and *Levin v. City of Ann Arbor*, this Court explicitly rejected a "checklist" approach followed by the District Court. *Frumkin v. Bd. of Trs.*, 626 F.2d 19 (6th Cir.1980); *Levin v. City of Ann Arbor*, 6th Cir. No. 82-1211, 1983 U.S. App. LEXIS 12736 (July 22, 1983). This Court in *Frumkin* observed:

> The Supreme Court has consistently rejected a concept of due process which would afford all complaining parties, whatever the context of the dispute, an inflexible "checklist" of legal rights. On the contrary, procedural due process issues, originating as they may in diverse situations, demand a more sensitive judicial approach.

In *Levin* this Court said essentially the same thing. "Due process," this Court wrote, "is a flexible concept which must be adapted to the circumstances of the particular case. There is no "checklist" of due process rights applicable in all situations." 1983 U.S. App. LEXIS 12736 at *3. *See also Anderson v. Ohio State Univ.*, S.D.Ohio No. C-2-00-123, 2001 U.S. Dist. LEXIS 25376, at *19 (Jan. 22, 2001) (citing *Frumkin* for the proposition that "the Supreme Court has consistently rejected a concept of due process which would afford all complaining parties, whatever the context of the

dispute, an inflexible 'checklist' of legal rights.").[7] The *seriatim* or checklist approach taken by the District Court is also contrary to the approach taken by other circuits, which review challenged procedures "as a whole." *See Project Release v. Prevost*, 722 F.2d 960, 975 (2d Cir.1983) (reviewing New York civil commitment statute "as a whole"); *Panthers v. Harris*, D.C.Cir. No. 79-1603, 1980 U.S. App. LEXIS 12882, at *5 (Oct. 24, 1980), fn. 8 (individual procedural protection "is a relevant consideration in deciding whether a given procedure, as a whole, satisfies due process"); *Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (interest under the Due Process Clause is "whether an adjudicative procedure as a whole is sufficiently fair and reliable that the law should enforce its result"); *Singh v. AG of the United States*, 421 F.App'x 211, 215 (3d Cir. 2011) (considering whether "procedure, taken as a whole" violated due process guarantees).

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[7] The District Court suggested that in *Flaim* this Court "addressed the alleged procedural defects in the disciplinary hearing *seriatim*." (Order at 19, R.16, PageID#264.) *Flaim*, this Court acknowledged, was "not the ordinary disciplinary case, and [was] (hopefully) rather unique." 418 F.3d at 643. A review of the disciplinary scheme as a whole was not necessary because the *Flaim's* disciplinary matter was "not a case involving factual disputes where many of the additional procedures would be helpful . . ." *Id.* This, the Court concluded, makes *Flaim* "quite different from the ordinary disciplinary case, and rendered many of the ordinarily required procedures constitutionally unnecessary." 418 F.3d at 643.

Moreover, it is not clear whether the plaintiff in *Flaim* requested that this Court review the disciplinary process as a whole.

Consistent with the Supreme Court's decisions, and contrary to the approach of the District Court, this Court should adopt a holistic approach.[8] Rather than examining the UC process to determine whether UC has provided a minimum level of protection for every item on the due process checklist, this Court should consider the UC process system as a whole to determine whether it provides adequate protection to accused students. Accordingly, the question in this case is whether UC provided Plaintiffs-Appellants a "meaningful" opportunity to be heard when the entire scheme is examined as a whole.

In terms of the first part of the *Mathews* test, John Doe I's and John Doe II's interest at stake, an education at a public university, is one that has always had enormous importance in our society. As noted above, courts have recognized a significant property interest in attendance at public universities. Additionally, school discipline is punitive in nature and carries a significant stigma that may prevent a

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[8] The District Court further suggested that under a "holistic theory of procedural due process, there would be almost no way that UC could anticipate whether its disciplinary hearing procedures comport with due process." (Order at 19 n 4, R.16, Page ID#264.) This is true only if UC wishes to push the envelope and provide only the minimal due process required.

The District Court incorrectly suggested that there could be problems for the school if both cross-examination and the use of hearsay are limited. Actually, this illustrates precisely the problem with the atomistic approach. An administrative scheme that permits reliable hearsay may be permissible, but if that scheme also prohibits cross-examination then a student would have no ability to challenge the hearsay evidence presented by questioning the declarant.

student from obtaining further education or employment. Finally, because these proceedings occur in private, beyond the view of the public, the lack of due process protections creates a situation where government deprivation is too easily accomplished. This aspect of the *Mathews* test is applicable to the below arguments, as each of the aspects of the disciplinary process highlighted in the Complaint create an increased risk of an erroneous deprivation and can be "fixed" with minimal burden on UC.

b. Bias

The Complaint, viewed as a whole, alleged in significant detail that UC has provided a biased investigatory and hearing process. (Complaint ¶¶ 33-36, R.1, PageID#14-23). Applying *Mathews*, UC has no interest in a biased process.

The allegations of bias in the Complaint were sufficiently detailed to survive a motion to dismiss under the pleading standards articulated in *Bell Atlantic* and *Iqbal*. Remarkably, the District Court actually acknowledged this is true! The District Court observed, in discussing the dismissal of Title IX claims of the Plaintiffs, "at worst UC's actions were biased in favor of alleged victims of sexual assault and against students accused of sexual assault." (Order at 30, R.16, PageID#275.) This recognition of bias should have been enough to deny the motion to dismiss.

Taken as a whole, the Complaint provides numerous examples of the manner in which the UC investigatory and hearing process is unconstitutionally biased against accused students.[9] The analysis of this claim begins with the observation that an impartial decision maker is a fundamental due process requirement. *See, e.g., Withrow v. Larkin*, 421 U.S. 35, 46-47, 95 S. Ct. 1456 (1975). The United States Supreme Court has long held that a fair proceeding "in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623 (1955). Bias may be actual, or it may consist of the appearance of partiality in the absence of actual bias. *Stivers v. Pierce*, 71 F.3d 732, 741 (9th CiR.1995). A showing that the adjudicator has prejudged, or reasonably appears to have prejudged, an issue is sufficient. *Kenneally v. Lungren*, 967 F.2d 329, 333 (9th CiR.1992).

Yet, despite the later acknowledgement that the UC system was likely biased against accused students, the District Court still suggested in a conclusory manner that school disciplinary committees are entitled to "a presumption of honesty and integrity." (Order at 20, R.16 PageID#265.) This is an accurate observation, but the District Court went further and improperly relied upon *Atria v. Vanderbilt Univ.*, 142

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[9] Many of the elements examined and rejected by the District Court in its *seriatim* analysis – such as accepting impact statements prior to a finding of guilt, applying incorrectly the terms of policies, permitting only written cross-examination, prohibiting students to be represented by counsel – are not by themselves due process violations but contribute to the biased process. (Order at 22-25, R.1, PageID#267-70.)

F.App'x 246 (6th Cir. 2005), for the proposition that there must be a "showing of actual bias" – an almost impossible standard. 142 F.App'x at 252, *citing McMillan v. Hunt*, No. 91-3843, 1992 U.S. App. LEXIS 17475, at *2 (6th Cir. 1992); *Ikpeazu v. Univ. of Nebraska*, 775 F.2d 250, 254 (8th Cir. 1985).[10] *Atria* does not suggest that a presumption against bias may not be overcome by reasonable inferences drawn from the relevant facts. *See McDonough Power Equipment, Inc. v. Greenwood,*. 464 U.S. 548, 587 (1984)(Brennan, J., concurring) ("[A] court should recognize that the bias . . . may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as [a] matter of law." (internal quotation marks omitted)); *Franklin v. McCaughtry*, 398 F.3d 955, 961 (7th Cir. 2005) (bias by judge could be inferred from relevant facts).

The Complaint supported the claim of a biased investigatory and adjudicatory process with significantly more than 'labels and conclusions' or 'formulaic recitations of the elements of a cause of action.' The Complaint alleges that UC employs a biased investigatory process in order to "look good" for the Department of Education. (Complaint ¶ 34(a), R.1, PageID#21.) The Complaint contains significant

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[10] The "actual bias" standard seems to be based on an overly broad reading of the actual holding of *Atria*. In that case, the only evidence of bias evidence was that a school administrator told the student's mother retaining an attorney was not in her son's best interest. This allegation, even if taken as true, would not have constituted bias (either actual or inferred) sufficient to overcome the presumption of impartiality. 142 F.App'x at 252.

details about the enforcement actions of OCR, including the threats to revoke the federal funding of schools. This was not mere speculation but was gleaned form reports in respected publications and direct quotes from the persons responsible for enforcement. The Complaint, for example, quoted the head of OCR extensively to suggest that schools needed to make changes. (Complaint ¶¶ 17(f)-(g), R.1, PageID#6-7.)

The District Court rejected this linkage, suggesting, "it is not reasonable to infer that UC has a practice of railroading students accused of sexual misconduct simply to appease the Department of Education." (Order at 21-22, R.16, PageID#266-67.) Initially, the District Court cited only to cases where the assertion of "ulterior motives" was, unlike the Complaint in this case, based on conclusory allegations. *Id. citing Centerfor Bio-Ethical Reform, Inc. v. Napolitano,* 648 F.3d 365 (6th Cir. 2011); *Moss v. U.S. Secret Serv.,* 572 F.3d 962 (9th Cir.2009). These cases are not good precedents, because they are better understood as a plaintiff not having not satisfied the *Iqbal* standard. *See Center for Bio-Ethical Reform*, 648 F.3d at 378 (noting that case was similar to *Iqbal*); *Moss*, 572 F3.d at 970 (complaint contained "just the sort of conclusory allegation that the *Iqbal* Court deemed inadequate"). In finding this linkage unreasonable, the District Court failed to adequately credit the allegations in ¶18 of the Complaint that described, in a non-conclusory manner, including quotes from Congressional testimony, how the head of OCR had, in fact, threatened federal funding for non-complying schools. (Complaint ¶ 18, R.1, PageID#7-8.) Most

importantly, the District Court in its Order elsewhere acknowledged that that UC enacted biased procedures in order to appease OCR. The District Court, when addressing the Title IX claims, explicitly states that UC appears to have taken certain actions in response to "federal regulations and Title IX guidance." (Order at 31, R.16, PageID#276.)

Moreover, the inference that the District Court rejected as unreasonable is, in fact, so reasonable that other courts have permitted plaintiffs, on a motion to dismiss standard, to draw the inference. In *Doe v. Brandeis University*, a federal court refused to dismiss a lawsuit of a student who was disciplined for unwanted sexual conduct arising in the course of a dating relationship. *Doe v. Brandeis Univ.*, D.Mass. Civil Action No. 15-11557-FDS, 2016 U.S. Dist. LEXIS 43499 (Mar. 31, 2016). The court noted that that the school had, in fact, adopted procedures that "substantially impaired, if not eliminated, an accused student's right to a fair and impartial process" as a direct result of pressure from OCR. The court said:

> When considering the issues presented in this case, it is impossible to ignore entirely the full context in which they arose. In recent years, universities across the United States have adopted procedural and substantive policies intended to make it easier for victims of sexual assault to make and prove their claims and for the schools to adopt punitive measures in response. That process has been substantially spurred by [OCR], which issued a "Dear Colleague" letter in 2011 demanding that universities do so or face a loss of federal funding.

2016 U.S. Dist. LEXIS 43499, at *12-13. In *Doe v. Ohio State Univ.*, a federal court observed that the failure of a school to comply with guidance by the Office of Civil

Rights on Title IX "could jeopardize its federal funding." *Doe v. Ohio State Univ.*, S.D.Ohio No. 2:15-cv-2996, 2016 U.S. Dist. LEXIS 7700, at *30 (Jan. 22, 2016). And in *Doe v. Wash. & Lee Univ* a federal court observed, "it is plausible that [the school] was under pressure to convict students accused of sexual assault in order to demonstrate that the school was in compliance with the OCR's guidance." *Doe v. Wash. & Lee Univ.*, W.D.Va. No. 6:14-cv-00052, 2015 U.S. Dist. LEXIS 102426, at *23-24 (Aug. 5, 2015).[11]

The Complaint contains much more, however, than an allegation of pressure from the Department of Education. The District Court failed to address or consider

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[11] Judge Nancy Gertner, writing in the American Prospect, observed that the efforts of schools to comply with OCR "mandates" has led to biased proceedings:

> The new standard of proof, coupled with the media pressure, effectively creates a presumption in favor of the woman complainant. If you find against her, you will see yourself on 60 Minutes or in an OCR investigation where your funding is at risk. If you find for her, no one is likely to complain.

Nancy Gertner, *Sex, Lies and Justice*, American Prospect, Winter 2015). An article in Inside Higher Ed. noted the same thing:

> Colleges are indeed under pressure, from both the Department of Education and activists, to more aggressively investigate and adjudicate cases of campus sexual assault. Several of the recent court opinions note that the botched hearings occurred soon after a university received criticism for failing to protect a sexual assault victim in a separate case, or after the Department of Education began investigating an institution for violating Title IX.

Jake New, *Out of Balance*, Inside Higher Ed. April 16, 2016.

the substantial evidence of bias described in several small and large ways; none of the instances described in the Complaint may, by themselves, be sufficient evidence of bias but combined ("viewed as a whole" or holistically), they paint a distinct and clear picture of a rigged system that resembles a game of "three card monty" in the sense that accused students cannot win. One small but telling suggestion of bias is seen, for example, in UC's use of the term "survivor" to describe alleged victims instead of more neutral language recommended by the federal government, "complainant," and the fact that UC schedules ARC Hearings before actually conducting any investigation. (Complaint ¶ 34(b), ¶34(c)(ii).) More significant evidence includes the fact that, while acting as an investigator, Defendant Cummins also played a role in seeking accommodations for alleged victims while at the same time claiming to be conducting an impartial investigation -- a practice that OCR has warned can create an impermissible conflict of interest. Dear Colleague Letter at 7 ("The Title IX Coordinators should not have other job responsibilities that may create a conflict of interest."); (Complaint ¶34(c)(ii), R.1, PageID#22.)

The most damning evidence of bias by UC is found in ¶34(c)(iv)-34(c)(v) of the Complaint. (R.1, PageID#21-22.) These paragraphs states that "Cummins and other UC employees do not include information in investigative reports that is favorable to those accused of sexual assault" and that "High-ranking UC officials have attempted to interfere with investigations of asexual assault being conducted by the UC Police." These actions are described in the detail require by *Iqbal*. Paragraph 64 of the

Complaint describes how Cummins failed to include in his investigative report a witness statement in his possession that tended to exonerate John Doe I. (R.1, PageID#33-34.) Paragraph 58 of the Complaint describes complaints by the UC Police officers that the UC General Counsel was attempting to influence their investigation. (R.1, PageID#31-32.)

The Complaint further alleges that the ARC Hearing Panel, in practice, has shown bias in a number of ways. Hearing panel members have been trained that the prevention of sexual misconduct, not the fair and impartial adjudication of claims, is their primary concern. (Complaint R.1, PageID#14-21.) Notably, these training sessions barely, if at all, included any discussion of due process concerns or the idea that those accused of violating the UC Code of Conduct are presumed to be not guilty. The District Court generally ignored these details, and suggested instead that it is "laudable" for UC to "raise awareness of its faculty and staff to sexual assault." (Order at 21, R.14, PageID#266.) However, the District Court ignored the evidence that these panel members have been given information that is irrelevant to the individual matters they have to adjudicate, and failed to address why such a "laudable" act would be limited to hearing panel members. At a trial, UC may wish to argue about the purpose and effect of these training sessions, but on a motion to dismiss standard the District Court was required to accept the following reasonable inference from the facts presented in the Complaint: "The ARC Hearings Panels receive biased

training aimed at encouraging findings of responsibility even when insufficient or unreliable evidence is presented."[12] (Complaint ¶35(c), R.1, PageID#23.)

The District Court's analysis is, in the end, belied by the inclusion in the Complaint of substantial statistical evidence of a biased pattern of decision making. The use of such statistical evidence when combined with the anecdotal examples provided in the Complaint supports the reasonableness of the inference of bias. The District Court failed to consider that the statistics cited in the Complaint sets forth a *prima facie* case of bias. A review of the recent history of ARC Hearing Panels, obtained through a public records request, shows that it is nearly impossible for a student to be found not responsible at an ARC Hearing. Put another way: it has never happened. The records paint a simple picture of a situation where if a student is accused of serious sexual misconduct, it is certain that the student will face discipline. UC provided records for eleven alleged violations of the Sexual Misconduct Policy

[12] For example, on October 6, 2011, the head of the UC Women's Center provided training to hearing panel members. The training included statistics about the prevalence of sexual assaults on campus and included topics irrelevant to the decision making process, such as "Sexual assault is about POWER & CONTROL," and also included descriptions of the "Profile of a sexual Assault Victim" and the "Profile of a Sex Offender." This training included irrelevant and inflammatory statements, such as: "most rapists are repeat date rapists;" and "undetected rapists" use "alcohol as a weapon." (Complaint ¶33(a)(ii), R.1, PageID#15-16.) Hearing panel members have also received training such as a program titled, "Sexual Assault & Response. Preventing Sexual & Gender Based Violence," that had the purpose and effect of informing panel members that they had a job to prevent sexual assault on campus, not to fairly and impartially adjudicate allegations of misconduct. (Complaint ¶33(b), R.1, PageID#17-19.)

that were presented to an ARC Hearing Panel, aside from the cases against the Plaintiffs-Appellants. In *every case* presented to the ARC Hearing Panel, the respondent was ultimately found responsible.[13] This statistical evidence, when combined with other facts alleging bias, should have been sufficient, on a motion to dismiss standard, to support a claim of bias. *See Grant v. Comm'r SSA*, 111 F. Supp. 2d 556, 558-69 (M.D. Penn. 2000) (finding that ALJ was biased against social security claimants based on statements of ALJ combined with statistical evidence from the ALJ's cases); *Pronti v. Barnhart*, 339 F. Supp. 2d 480, 497 (W.D.N.Y. 2004) (same).

c. Hearsay and Cross-Examination

The Constitution requires *some* opportunity for cross-examination in cases like this: "the opportunity to confront and cross-examine witnesses is essential when the information supplied by those witnesses is the reason for the" adverse actions. *Edgecomb v. Hous. Auth. of Vernon*, 824 F. Supp. 312, 315-16 (D. Conn. 1993), *citing Goldberg*, 397 U.S. at 269-70. The District Court, however, held, "there is no general right to cross-examine witnesses in school disciplinary proceedings." (Order at 22, R.16, PageID#267.)

The District Court was incorrect in finding no general right to cross-examination. In *Flaim*, *supra*, this Court explained, "[s]ome circumstances may require

[13] In total, UC disclosed 32 separate matters. In only 4 of the 32 cases was a student found "not responsible." None of those four cases concerned "serious" matters or allegations of sexual assault.

the opportunity to cross-examine witnesses, though this right might exist only in the most serious of cases." 418 F.3d at 636. The best analysis may be the Second Circuit in *Winnick v. Manning*, 460 F.2d 545 (2d Cir.1972). In *Winnick*, the Second Circuit held that there was no requirement that a student be able to cross-examine a witness whose testimony is not determinative to the outcome of the case. 460 F.2d at 549. But, significantly, the *Winnick* court noted, "if this case had resolved itself into a problem of credibility, cross-examination of witnesses might have been essential to a fair hearing." *Id.* at 550. Finally, the First Circuit has similarly observed that a school had complied with constitutional requirements by providing a student "the opportunity to cross-examine his accusers as to the incidents and events in question." *Gorman v. University of Rhode Island*, 837 F.2d 7, 16 (1st CiR.1988). The *Gorman* court further observed that while there is no right to "unlimited" cross-examination, due process requires that some cross-examination to permit an accused to "elicit[ ] the truth about the facts and events in issue". *See also Dillon v. Pulaski County Special School District*, 594 F.2d 699, 700 (8th Cir. 1979) (Benson, J., concurring) (to resolve disputed issue of fact, high school student should have been allowed to cross-examine his accuser, who did not testify at the expulsion hearing).

The District Court failed to acknowledge that John Doe II was found to have violated the UC Code of Conduct *even after he had no opportunity to question the alleged victim.* The Complaint states that at John Doe II's second hearing (after remand), Jane

Roe III made an inflammatory statement then left before she could be required to answer any questions:

> Jane Roe III concluded her statement by stating: "And now I'm going to leave, because this process is a joke." She then stormed out of the hearing, followed by Howton. Because Jane Roe III left the ARC Hearing, John Doe II was denied any opportunity for cross-examination.

(Complaint ¶ 107(h), R.1, PageID#48-49.)

Instead, the District Court suggests that the Complaint does not "explain how additional cross-examination of the hearsay witness would have lowered the risk that they would have been erroneously disciplined." (Order at 23, R.1, PageID#268.) This is a mischaracterization of the Complaint and rejects the idea of cross-examination as a valuable part of the truth finding process. In addition to John Doe II being denied *any* opportunity to cross-examine Jane Roe III, the Complaint describes how the UC cross-examination system is constitutionally defective because John Doe I was not permitted to *effectively* cross-examine Jane Roe I or Jane Roe II. (Complaint ¶¶78(c), 101, R.1, PageID#39, 47.

d. Placing the Burden of Proof On Accused Students

The Complaint states that the UC Administration does not bear any burden of proof in order for the ARC Panel to impose discipline on a student accused of sexual

assault or sexual harassment.[14] The Complaint explains that UC employs the "preponderance of evidence" standard as the standard of proof. (Complaint ¶ 21(e), R.1, Page ID#10.) This does *not necessarily create a due process issue*, but is different than the "burden of proof," where the due process issue described in the Complaint lies.[15] *Compare* Def. Memo. at 10.

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[14] The term "burden of proof" is distinct from the term "standard of proof." This Brief adopts the definition of the terms used by the Supreme Court in *Microsoft Corp. v. i4i Ltd. Pushup*, 594 U.S. 91, 131 S. Ct. 2238, 2245 n. 4 (2011):

> As we have said, "[t]he term 'burden of proof' is one of the 'the slipperiest members of the family of legal terms.' *Schaffer v. Weast*, 546 U.S. 49, 56, 126 S. Ct. 528, (2005) (quoting 2 J. Strong, McCormick on Evidence § 342, p. 433 (5th ed. 1999) (alteration omitted)). Historically, the term has encompassed two separate burdens: the "burden of persuasion" (specifying which party loses if the evidence is balanced), as well as the "burden of production" (specifying which party must come forward with evidence at various stages in the litigation). *Ibid.* Adding more confusion, the term "burden of proof" has occasionally been used as a synonym for "standard of proof." *E.g., Grogan v. Garner*, 498 U.S. 279, 286 (1991).
>
> Here we use "burden of proof" interchangeably with "burden of persuasion" to identify the party who must persuade the jury in its favor to prevail. We use the term "standard of proof" to refer to the degree of certainty by which the factfinder must be persuaded of a factual conclusion to find in favor of the party bearing the burden of persuasion. *See Addington v. Texas*, 441 U.S. 418, 423 (1979). In other words, the term "standard of proof" specifies how difficult it will be for the party bearing the burden of persuasion to convince the jury of the facts in its favor. Various standards of proof are familiar--beyond a reasonable doubt, by clear and convincing evidence, and by a preponderance of the evidence.

[15] At least one federal judge and one commentator have argued the Constitution requires student disciplinary hearings to use the "clear and convincing" standard of

The District Court rejected this argument, holding, "the burden of persuasion is normally not an issue of federal constitutional moment." (Order at 25, R.16, PageID#270, *quoting Lavine v. Milne,* 424 U.S. 577, 585 (1976).) This blanket dismissal of the claim relying on *Lavine* was incorrect. The *Lavine* court also recognized that "where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive." The presumption of innocence – which is an essential component of the placing the burden of proof on the party seeking to prove misconduct by another – remains an essential part of due process "even in the different context of a civil action. That is to say, a legal system is not justified in presuming culpability based on the mere 'possibility' of the same. . ." *Tobey v. Jones*, 706 F.3d 379, 404 (4th Cir. 2013) (Wilkinson, J., dissenting). In this case, the ARC Hearing represents the only meaningful opportunity a UC student has to challenge UC's attempt to impose discipline. Requiring students to prove in this context that they have not committed a sexual assault or engaged in sexual harassment violates due process because it is often difficult to prove a negative. *Cf Speiser v. Randall*, 357 U.S. 513, 525, 78 S.Ct. 1332 (1958) (acknowledging that "where the burden of proof lies may be decisive of the outcome").

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proof. *Smyth v. Lubbers*, 398 F. Supp. 777, 799 (W.D. Mich. 1975); Nicholas Trott Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J.C. & U.L. 71) (1985).

The District Court should have applied the *Mathews* test. UC's allocation of burdens and standards of proof requires that student prove a negative, that the student did not commit a sexual assault or engage in sexual harassment, while the UC Administration or the complainant must prove almost nothing. This creates a great risk of an erroneous, irreversible deprivation. "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact-finding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington v. Texas*, 441 U.S. at 423, *quoting In re Winship,* 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The allocation of burdens and standards of proof implicates similar concerns and is of greater importance since it decides who must go forward with evidence and who bears the risk of loss should proof not rise to the standard set. In the UC ARC Hearings, where students who face discipline are required to present exculpatory evidence, all risks are squarely on the students. The UC Administration, under the current approach, need not produce any evidence beyond the initial allegations and, as a result, may deprive students of the right to an education based on the rankest of hearsay and the flimsiest evidence.[16]

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[16] A case from Texas is one of the few directly on point. *University of Tex. Medical Sch. v. Than*, 874 S.W.2d 839 (Tex. App. Houston 1st Dist. 1994), *aff'd in part and vacated in part*, 901 S.W.2d 926 (Tex. 1995). In *Than*, a medical school student was subject to discipline because of a cheating allegation. The hearing officer in that case, in

D. Qualified Immunity

The District Court concluded that the Individual Defendants were entitled to qualified immunity. (Order at 28, R.16 PageID#273.) Qualified immunity does not prevent the Plaintiff from pursuing declaratory and injunctive relief. *Top Flight Entm't, Ltd. v. Schuette*, 729 F.3d 623, 635 (6th Cir. Mich. 2013); *Flagner v. Wilkinson*, 241 F.3d 475, 483 (6th Cir. 2001). *See also Hydrick v. Hunter*, 669 F.3d 937, 939-40 (9th Cir. 2012) (explaining that qualified immunity "is only an immunity from a suit for money damages, and does not provide immunity from a suit seeking declaratory or injunctive relief"). As shown below, application of the doctrine does not demonstrate that the Individual Defendants are entitled to a dismissal at this stage of the proceedings.

1. Standard

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Stanton v. Sims*, ___ U.S. ___, 134 S.Ct. 3, 4 (2013) (internal quotation marks omitted). Courts

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language almost identical to the statements of Defendant Cummins and other UC administrators quoted above, stated that "both parties" had the burden of proof at the hearing. The court found that this had the effect of placing a burden of proof on the student in violation of the student's constitutional due process rights. The court said, "it is not consistent with due process to place a burden on a student accused of cheating to prove that he did not cheat." 874 S.W.2d at 851 and n. 10, *citing Speiser*, 357 U.S. at 525.

generally use a two-step analysis: (1) viewing the facts in the light most favorable to the plaintiff, whether the allegations give rise to a constitutional violation; and (2) whether the right was clearly established at the time of the incident. *Kinlin v. Kline*, 749 F.3d 573 (6th Cir. 2014).

2. The Complaint Alleges a Constitutional Violation By the Individual Defendants

See *supra., generally.*

3. The Individual Defendants Violated a Clearly Established Right

A government official will be liable for the violation of a constitutional right only if the right was "'clearly established . . . in light of the specific context of the case.'" *Binay v. Bettendorf*, 601 F.3d 640, 651 (6th Cir. 2010). A right is clearly established if the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The Sixth Circuit law clearly establishes that the Plaintiffs were entitled to due process in the disciplinary proceedings held at UC. *Flaim*, supra. The Dear Colleague Letter specifically states that schools are obligated to protect the due process rights of students accused of sexual misconduct. For example, page 12 of the Dear Colleague Letter states, "Public and state-supported schools must provide due process to the alleged perpetrator." And page 22 notes, "The rights established under Title IX must

be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding."

4. The Ruling on Qualified Immunity Was Premature.

The District Court's decision on qualified immunity was premature because further factual development was necessary *See Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012). The Defendants requested that the District Court defer ruling on qualified immunity because additional discovery would have permitted the parties to present to the Court essential information necessary for a qualified immunity determination, most likely on a Rule 56 standard. *See Crawford-El v. Britton*, 523 U.S. 574, 599-600 (1998) (noting that a court "should give priority to discovery concerning issues that bear upon the qualified immunity defense, such as the actions that the official actually took").

F. Title IX

The District Court erroneously held that the Plaintiffs had not asserted a valid claim against UC based on Title IX, the federal statute designed to prevent sexual discrimination in educational institutions receiving federal funding. 20 U.S.C. § 1681. (Order at 30, R.16, PageID#275.)[17]

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[17] The District Court's observed, "UC was required to take certain actions under federal regulations and Title IX guidance." This is not quite accurate. These regulations and guidance require only that schools "adopt and publish grievance procedures providing for the prompt and equitable resolution of student and

Title IX claims against universities arising from disciplinary hearings are analyzed under the "erroneous outcome" standard, "selective enforcement" standard, "deliberate indifference" standard, and "archaic assumptions" standard. *Mallory v. Ohio Univ.*, 76 Fed. App'x 634, 638 (6th Cir. 2003) (internal citations omitted). The District Court properly relied upon *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994). In *Yusuf*, the court explained that in order to assert a claim based on an erroneous outcome/selective enforcement theory the Plaintiffs need to allege that the hearing was flawed due to the Plaintiffs' gender. The key language from the decision addresses the allegations at the pleading stage:

> A plaintiff must . . . also allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding. Allegations of a causal connection in the case of university disciplinary cases can be of the kind that are found in the familiar setting of Title VII cases. Such allegations might include, inter alia, statements by members of the disciplinary tribunal, statements by pertinent university officials, *or patterns of decision-making that also tend to show the influence of gender.*

35 F.3d at 715 (emphasis supplied, citations omitted). *Yusef* has been followed in the Sixth Circuit. *See e.g. Mallory,* 76 Fed. App'x at 640

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employee complaints alleging any action which would be prohibited." 34 C.F.R. § 106.8(b). The regulations do not require the actions taken by UC in this case.

The Dear Colleague Letter is only a "significant guidance document." Dear Colleague Letter at 1 n. 1; 72 Fed. Reg. 3432. It "does not add requirements to applicable law, but provides information and examples to inform recipients about how [the Office for Civil Rights] evaluates whether covered entities are complying with their legal obligations." Dear Colleague Letter at 1 n. l.

1. Erroneous Outcome/Selective Enforcement

Dismissal under a 12(b)(6) standard is not appropriate where a Plaintiff does exactly what *Yusef* requires: allege in a non-conclusory manner a pattern of decision-making that shows the influence of gender. Courts have interpreted the selective enforcement language in *Yusef* to require a plaintiff to "allege particular circumstances suggesting a meaningful inconsistency in punishment and particular circumstances suggesting that gender bias was a motivating factor behind the inconsistency. *World Star Hip Hop, Inc.*, U.S.D.C., No. 10 Civ. 9538, 2011 U.S. Dist. LEXIS 123273, at *6 (S.D.N.Y. Oct. 25, 2011); *Harris v. Saint Joseph's Univ.*, No. 13-CV-3937 (LFR), 2014 U.S. Dist. LEXIS 65452, at *4 (E.D. Pa. May 13, 2014).

This the Plaintiff has done. The Complaint alleges numerous irregularities in the UC procedures that raise articulable doubts about the accuracy of the outcomes for both John Doe I and John Doe II. *Cf. Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 751 (S.D.Ohio 2014) (finding the plaintiff pleaded facts sufficient to cast doubts on the accuracy of a disciplinary proceeding by alleging, *inter alia,* that the defendants rushed to judgment and failed to train the disciplinary hearing panel); *Doe v. Case W. Reserve Univ.*, No. 1:14CV2044, 2015 U.S. Dist. LEXIS 123680, at *5 (N.D. Ohio Sept. 16, 2015) (finding that the plaintiff pleaded facts sufficient to cast doubts on accuracy of a disciplinary proceeding outcome by alleging that the defendant, *inter alia,* did not allow the plaintiff to review that evidence and denied the plaintiff the opportunity to cross examine his accuser).

The Complaint further satisfies the Title IX pleading standard by stating that UC's actions were "motivated, in part, by the gender of John Doe I and John Doe II." The District Court suggests that procedural irregularities were not the result of gender bias. (Order at 31-32, R.16, PageID#276077.) However, the Complaint alleges gender bias in a number of specific ways, including:

- The ARC Hearing Panel received biased significant training from the UC Women's Center. (Complaint ¶ 33(a), R.1, PageID#14-17.)
- The investigator and, even, members of the hearing panels were responsible for obtaining accommodations for Jane Roe I, Jane Roe II, and Jane Roe III based solely on their claimed status of victims. (Complaint ¶66(b); ¶114-115, R.1, PageID#34-35, 51.) These accommodations were not disclosed to the hearing panel despite the relevance to the credibility of the witnesses. (Complaint ¶¶ 37, 78(h), 114, R.1, PageID#25-26, 40-41, 51.)
- The Hearing Panels were never instructed that accused students are innocent until proven guilty, or that the Plaintiffs did not bear the burden of proof. (Complaint ¶¶ 78(b) R.1, PageID#39.)
- The chair of the Hearing Panel for John Doe I did not permit numerous questions aimed at revealing inconsistencies in the testimony of Jane Roe I and Jane Roe II. (Complaint ¶78(c), R.1, PageID#39.) The chair of the hearing panel did not require Jane Roe III to remain present so that she could be questioned by John Doe II. (Complaint ¶ 107(h), R.1, PageID#49.)
- The Hearing Panels permitted alleged victims to make derogatory remarks about John Doe I and John Doe II and to submit inflammatory statistical evidence about the incidences of sexual assault against females on college campuses. (Complaint ¶ 112, R.1, PageID#50.)
- The hearing panels permitted the alleged victims to provide "impact statements" about the effects of the alleged sexual assault prior to any finding that a sexual assault had occurred. (Complaint ¶¶ 78(f); 99(a); 113, R.1, PageID#40, 47, 50-51.)
- The UC investigator, Defendant Cummins, failed to include a witness statement in his investigative report that tended to exonerate John Doe I. (Complaint ¶117, R.1, PageID#52.)

These allegations of gender bias, by themselves, should have been sufficient to satisfy the 12(b)(6) standard. This is especially true because most people – let alone Ohio public university employees - are smart enough to not explicitly telegraph the intent to discriminate. Plaintiffs are entitled at the pleading state to expose pretext in these pronouncements via indirect/circumstantial evidence. *See e.g., Waldo v. Consumers Energy Co.*, 726 F.3d 802, 815 (6th Cir. 2013). Indeed, discriminatory intent is often hidden behind seemingly neutral statements and actions. This is the conclusion reached by the court in *Doe v. Wash. & Lee Univ. supra.* In that case, the court held that a Title IX claim survived a motion to dismiss because "gender bias could be inferred" from an administrators statements and actions. 2015 U.S. Dist. LEXIS 102426, at *28-29.

Here, like in *Doe v. Wash. & Lee Univ.,* John Doe I and John Doe II have identified numerous pieces of evidence that "tend to show" gender bias motivated the Defendants' unlawful disciplinary decisions. This Court does not need to look any further than the stunning admission by Defendant Cummins in connection with his investigation of a 2014 harassment allegation to infer that the outcome of cases at UC differs on the basis of gender. In this incident, described in ¶121 of the Complaint, a male student was disciplined after he made an inappropriate threat towards a female staff member who had entered the men's restroom. Cummins admitted that UC treated this matter differently because of the gender of the persons involved: "If this

was a male student walking through a female (restroom), it would generate a big buzz." (Complaint ¶121(d), R.1, PageID#55-56.)

These claims of gender bias in the Complaint are not conclusory and thus are sufficient under the modern 12(b)(6) standard because they are supported by a review of the recent UC investigations of sexual harassment and sexual assault. This review revealed, for example, that 97% of the cases investigated by UC, men were the subjects of the investigation. (Complaint ¶ 118, R.1, PageID#52.) This, the Complaint suggests, is a far different percentage from what would be expected in the population at large. The District Court rejected this statistical evidence on the grounds that the Complaint "does not eliminate other likely causes for the disparity between males and females in disciplinary cases." The District Court further suggested that this Court, unlike the Second Circuit in *Yusef*, requires evidence that is "statistically significant." (Order at 33, R.16, PageID#278.) But this is not necessary at the pleading stage and before discovery has even started.[18] The cases relied upon by the District Court for this observation about statistical evidence were all before the courts on summary judgment, not motions to dismiss. *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 622 (6th Cir. 2006) (statistical evidence reviewed on summary judgment); *Barnes v. Gencorp, Inc.*, 896 F.2d 1457, 1466 (6th Cir.1990) (same). On a

[18] The District Court would impose an impossible burden on a plaintiff. A plaintiff would have to essentially attach expert affidavits to a Complaint in order to survive a motion to dismiss, but may not be able to do so without discovery.

motion to dismiss, the only question is whether the evidence is specific enough to satisfy *Iqbal*. *See Phillips v. Snyder*, E.D.Mich. No. 2:13-CV-11370, 2014 U.S. Dist. LEXIS 162097, at *30 (Nov. 19, 2014) (at the motion to dismiss stage, statistical evidence used to demonstrate unconstitutional discriminatory action need only support plausible claim); *Jenkins v. New York City Transit Auth.*, 646 F. Supp. 2d 464, 469-70 (S.D.N.Y. 2009) ("It would be inappropriate to require a plaintiff to produce statistics to support her disparate impact claim before the plaintiff has had the benefit of discovery."); *Mata v. Ill. State Police*, N.D.Ill. No. 00 C 0676, 2001 U.S. Dist. LEXIS 3564, at *4 (N.D. Ill. Mar. 22, 2001) (at the motion to dismiss stage, "there is no reason [a plaintiff] would have this kind of statistical evidence yet").

A recent district court case involving a claim against Columbia University provides the base analysis of *Yusef* and, in so doing, provides an appropriate "road map" for the types of selective enforcement claims that can survive a motion to dismiss. *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356 (S.D.N.Y. 2015). In the case against Columbia, the male plaintiff did not include in the complaint any allegations that similarly situated female students were treated more favorably. *Id.* at *42-43. Instead, the complaint suggested that the university provided inadequate procedural protections provided to students accused of sexual assault had an effect of burdening men more than women, given "the higher incidence of female complainants of sexual misconduct [versus] male complainants of sexual misconduct." *Id.* at *43, *quoting* Am. Compl. In dismissing the complaint, the court noted that a complaint could survive a

motion to dismiss if it included either allegations that similarly situated women were treated differently "or, at a minimum, 'data showing that women rarely, if ever, are accused of sexual harassment . . ." *Doe, at *43,* quoting *Haley v. Virginia Commonwealth Univ.*, 948 F. Supp. 573, 580-81 ((E.D. Va. 1996).

The Complaint in this case contains both of the items suggested in *Doe v. Columbia* necessary to satisfy *Yusef*.[19] The Complaint describes how UC has treated males and females differently in the investigation of nine similar matters of sexual assault. In every case, the alleged victims were female and the alleged perpetrators were male. (Complaint ¶119(a), R.1, PageID#53-54.) Most important are the matters involving situations, like for John Doe I and John Doe II, where the alleged victim claimed she was unable to consent because of intoxication. In those cases, UC invariably finds that the male student is the initiator of sexual activity and, thus, is the only person subject to potential discipline, *even in cases where both the male and female students are intoxicated.* (Complaint ¶¶119(c)-(d) R.1, PageID#53-54.) The Complaint, thus, asserts sufficient facts to suggest UC has treated female students accused of sexual harassment differently and that the University has acted differently in disciplinary procedures against female students accused of sexual assault and

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[19] Bias on the part of Cummins, *see supra,* can also support a Title IX violation. *Doe v. Washington & Lee Univ.* ("Bias on the part of [the investigator] is material to the outcome of John Doe's disciplinary hearing due to the considerable influence she appears to have wielded in those proceedings.").

harassment. *Compare Sahm v. Miami Univ.*, 110 F. Supp. 3d 774 (S.D.Ohio 2015) (dismissing claim where student failed to allege systemic differential treatment).

The Plaintiffs also satisfied the *Yusef* standard by presenting a pattern of decision-making that shows the influence of gender. At UC, 97% of the persons investigated for sexual misconduct are male while only 11% of alleged victims were male. (Complaint ¶118 R.1, PageID#52-53.) These numbers are sufficient to raise an inference if discrimination when compared to national survey numbers suggesting that close to 50% of all alleged victims are male; "federal surveys detect a high prevalence of sexual victimization among men—in many circumstances similar to the prevalence found among women." Lara Stemple and Ilan H. Meyer. *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions*. Am. J. of Pub. Hlth: June 2014, 104:6 pp. e19-e26. Moreover, in *every* case where discipline was actually imposed by UC, there was a male respondent and a female complainant.

The statistical evidence in the Complaint should have been sufficient to defeat the motion to dismiss under traditional discrimination pleading standards.[20] For

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[20] The Plaintiff in *Doe v. Columbia University* did not have access, through public records laws, to the disciplinary records of the school and thus could not compare the treatment of males and females. The allegations in *Doe v. Columbia* were conclusory where the allegations in this case are based on actual data.

Similarly, *Doe v. Univ. of the South*, 687 F. Supp. 2d 744 (E.D. Tenn. 2009), is inapposite and was before the court on a motion for partial summary judgment. In *University of the South*, the plaintiff, unlike in this case, failed "to allege that the University's actions against [the plaintiff] were motivated by sexual bias." 687 F.Supp. 2d at 756.

example, in employment discrimination cases the Supreme Court has explained that "a plaintiff may present statistics evidencing an employer's pattern and practice of discriminatory conduct, which may be helpful to establish a *prima facie* case against the Defendants. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817 (1973). At trial, then UC would have the opportunity "to articulate some legitimate, non-discriminatory reason[s] for" the difference in treatment. *See Texas Dept. of Community Affairs v. Burdines*, 450 U. S. 248, 253, 101 S. Ct. 1089 (1981).

2. Deliberate Indifference/Archaic Standards

Under the "archaic assumptions" standard, a plaintiff seeking equal opportunities has "the burden in establishing that a university's discriminatory actions resulted "from classifications based upon archaic assumptions." *Mallory*, 76 Fed. App'x 634 at 638.

In the Complaint, the Plaintiff alleges: "The view of males incorporated into UC's practices and procedures relies on a chauvinistic view of men as "predators" and women as the "guardians" of virtue." (Complaint ¶120.) As support for this allegation, the Complaint cites to the fact that "UC has never imposed discipline on a female student in a case involving a male complainant." (Complaint ¶120 (a).) The Complaint also notes that this archaic attitude is found in cases where both male and females engage in sexual activity when intoxicated; in those cases only the male students – viewed as "predators" face discipline from the school despite the fact that males and females engaged in the same conduct. (Complaint ¶¶ 119(c).) The

Complaint refers to specific cases where this has occurred. (Complaint ¶119(d), R.1, Page ID#53-54.)

The District Court did not address the archaic assumptions aspect of the Complaint. This was error. UC's outdated attitudes about women and sexuality are embodied in this approach to enforcement and result in a Title IX violation. *See* Laura Kipnis, *Sexual Paranoia Strikes Academe*, Chronicle of Higher Ed., February 27, 2015 (noting that "the myths and fantasies about power [are] perpetuated in these new codes"). *Compare Pederson v. Louisiana State Univ.*, 213 F.3d 858, 881 (5th Cir. La. 2000) (noting that "Supreme Court precedent demonstrates that archaic assumptions . . . constitute intentional gender discrimination."), *citing United States v. Virginia*, 518 U.S. 515, 533, 116 S.CT. 2264 (1996) (holding that an institution's refusal to admit women is intentional gender discrimination in violation of the Equal Protection Clause because, inter alia, of "overbroad generalizations about the different talents, capacities, or preferences of males and females"); *Roberts v. United States Jaycees*, 468 U.S. 609, 625, 104 S.Ct. 3244 (1984) (warning of the dangers posed by gender discrimination based on "archaic and overbroad assumptions").

CONCLUSION

The Order Granting the Motion to Dismiss should be reversed and this case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App.P. 32(a)(7), that this brief complies with the type-volume limitation. The word-processing system used to prepare the brief, Microsoft Word, indicates that this brief contains 13,729 words, excluding the parts of the brief exempted by Fed. R. App.P. 32(a)(7)(B)(iii).

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry Number	Description	Date Entered	PageID# Range
1	COMPLAINT WITH JURY DEMAND	October 19, 2015	1-64
11	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND EXHIBITS	December 17, 2015	78-170
14	RESPONSE IN OPPOSITION RE (11) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND EXHIBITS	January 7, 2016	173-224
15	REPLY TO RESPONSE TO MOTION RE (11) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM	January 25, 2016	225-245
16	ORDER GRANTING (11) DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM	March 23, 2016	246-279
17	CLERK'S JUDGMENT	March 23, 2016	280
18	NOTICE OF APPEAL	April 4, 2016	281-82