UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN DOE, Plaintiff, v. UNIVERSITY OF CINCINNATI, et al., Defendants.	:	Case No. 1:16-cv-00987 Judge Michael R. Barrett DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Defendants University of Cincinnati ("UC"), Aniesha Mitchell, and Juan Guardia (collectively "Defendants") submit this Response in Opposition to Plaintiff's Motion for a Preliminary Injunction. (Doc. 2, "Motion") This response in opposition is supported by the following memorandum and the attached declarations.

I. INTRODUCTION

John Doe's Motion should be denied as he fails to show by clear and convincing evidence that he is entitled to the extraordinary remedy of preliminary injunctive relief. Mr. Doe is unlikely to succeed on the merits of his due process claim, his one-year suspension from UC will not subject him to irreparable harm, and Mr. Doe ignores the harm his requested injunctive relief would impose upon others and the public.

II. FACTS

On September 28, 2015, Jane Roe reported to the UC Title IX Office that she had been sexually assaulted by a fellow UC student. (Ex. 1, Karla Phillips Declaration at ¶ 2) On October 30, 2015, Jyl Shaffer, UC's Title IX Coordinator at that time, interviewed Jane Roe regarding her complaint. (*Id*. at ¶ 3) Ms. Shaffer documented the allegations and included her five pages of notes in the Title IX investigation file. (*Id*.)

On November 6, 2015, Ms. Shaffer interviewed Jane Roe again. (*Id.* at ¶ 4) Ms. Shaffer again documented that interview, and included the additional five pages of notes she took in the Title IX investigation file. (*Id.*)

On December 18, 2015, Jane Roe reported to the UC Police Department that she had been sexually assaulted by John Doe at his residence during the late night/early morning hours of September 6-7, 2015. (*Id.* at ¶ 5) A copy of that report was included in the Title IX investigation file. (*Id.*)

On February 19, 2016, Remy Barnett, the Program Coordinator for the UC Title IX Office at that time and the Title IX investigator assigned to this complaint, notified John Doe via email that a complaint of sexual assault had been filed against him by Jane Roe and that, pursuant to the UC Title IX Grievance Procedure for Students and Third Parties, the UC Title IX Office was investigating the complaint. (*Id.* at ¶ 6) That notification also advised John Doe that he was permitted to have an advisor of his choice with him throughout the process, but that advisors are not permitted to speak on the student's behalf throughout the process. (*Id.*) The notice also advised John Doe that he could provide the names of witnesses and evidence that he believed was relevant to the Complaint, but that he was under no obligation to do so. (*Id.*) John Doe was also advised that if he did not participate in the investigation, he could still provide information during the Judicial Affairs process if the complaint was forwarded to the Office of University Judicial Affairs for adjudication under the Student Code of Conduct. (*Id.*) The notice concluded by encouraging John Doe to review the Student Code of Conduct and the Title IX Grievance Procedure, and to contact Ms. Barnett if he had any questions. (*Id.*)

Importantly, the February 19, 2016 correspondence also attached a copy of Jane Roe's Complaint. (*Id.* at ¶ 7) In addition to including specifics about the incident, including the date, location, and specific acts that Jane Roe alleged occurred without her consent, the Complaint also provided a link to the UC Title IX Grievance Procedure for Students and Third Parties, a link to the full UC Code of Conduct, and UC's definitions for consent and sexual/gender-based violence. (*Id.*) The Complaint documents also advised John Doe that he could seek confidential counseling services free of charge through the University and that he could also contact Jyl Shaffer (providing her full contact information) with any questions regarding Title IX. (*Id.*)

John Doe responded to the notice that evening, initially denying that he knew Jane Roe. (*Id.* at ¶ 8) However, John Doe later acknowledged that he remembered Jane Roe, and asked Ms. Barnett about scheduling a time to have a conversation about the events between him and Jane Roe. (*Id.*)

On February 24, 2016, Ms. Barnett interviewed Jane Roe as part of the investigation. (*Id.* at ¶ 9) Similar to the previous interviews, Ms. Barnett documented the interview and included those notes (approximately five more pages) in the Title IX investigation report. (*Id.*) Ms. Barnett followed up with Jane Roe on March 15, 2016, to clarify a few of Jane Roe's prior statements. (*Id.*) Ms. Barnett's notes of that interview were similarly included in the Title IX investigation report. (*Id.*)

On March 4, 2016, Ms. Barnett contacted John Doe to schedule time for an in-person interview. (*Id.* at ¶ 10) On March 7, 2016, Ms. Barnett and Ms. Shaffer met with John Doe for an in-person interview. (*Id.*) Both Ms. Barnett and Ms. Shaffer documented their interview, including seven pages of notes of the interview in the Title IX investigation file. (*Id.*) During the investigation, four individuals identified by Jane

Roe as persons with knowledge relevant to the investigation were also interviewed. (*Id.*) Notes of those interviews were also included in the Title IX investigation file. (*Id.*) On April 1, 2016, Jane Roe emailed Ms. Barnett with "edits for the file." (*Id.*) A copy of that email was included in the Title IX investigation file. (*Id.*)

On April 11, 2016, Aniesha Mitchell, the Director of the Office of Student Conduct and Community Standards (formerly known as University Judicial Affairs), sent John Doe a letter advising him that the Title IX investigation was complete and attempting to schedule a procedural review. (Ex. 2, Declaration of Aniesha Mitchell at ¶ 2) The procedural review was scheduled for April 15, 2016. (*Id.* at ¶ 3) During the procedural review, John Doe was given the opportunity to discuss the Student Code of Conduct, review the incident report, and review all other information related to the allegations that was available at that time. (*Id.*) On April 18, 2016, Ms. Mitchell gave John Doe on-line access to a complete copy of the Title IX investigation file. (*Id.* at ¶ 4) John Doe confirmed that he was able to download the file that evening. (*Id.*)

Eventually, after confirming the parties' availability and the availability of enough students and faculty for an Administrative Review Committee ("ARC") Hearing, Ms. Mitchell sent letters to John Doe and Jane Roe via email on May 27, 2016, advising them that an ARC Hearing was scheduled for June 27, 2016, at 10:00 a.m. (*Id.* at ¶ 5) The parties were advised that they could submit a list of witnesses for the hearing and additional evidence by June 10, 2016. (*Id.*) The parties were advised that the list of witnesses and any other submitted evidence would be provided to both parties by June 20, 2016. (*Id.*) Both parties were notified that they could participate via Skype, conference call, or written statement if they could not attend the hearing. (*Id.*) The parties were notified of each member of the ARC Hearing panel, and advised that they

could challenge any member by June 2, 2016. (*Id.*) Lastly, the parties were again notified that they could have an advisor present (including an attorney), and were again provided a link to the full Student Code of Conduct. (*Id.*)

The ARC Hearing was held on June 27, 2017. (*Id.* at ¶ 6) John Doe did not challenge any member of the ARC Hearing panel. (*Id.*) Neither party submitted a list of any witnesses nor did either party submit additional evidence prior to the hearing. (*Id.*) Jane Roe was not present at the ARC Hearing, but she did submit a statement to the ARC Hearing panel. (*Id.*)

During the hearing, the chair of the ARC Hearing panel reviewed the contents of the Title IX investigation report. (*Id.* at ¶ 7) John Doe was then given an opportunity to give his version of the events as well as provide any additional supporting information. (*Id.* at ¶ 8) John Doe pointed out a number of instances where he specifically disagreed with Jane Roe's version of the events. (*Id.*) The ARC Hearing panel then asked John Doe four questions, one of which was just to clarify John Doe's status as a graduate student. (*Id.*) The other questions were focused on asking John Doe to clarify how he received consent for the sexual activity between him and Jane Roe. (*Id.*)

After this, Jane Roe's statement was read. (*Id.* at ¶ 9) To conclude the hearing, John Doe was permitted to give a closing statement to the panel. (*Id.*) The ARC Hearing panel retired to deliberate, thereafter recommending that John Doe be found responsible for violating the UC Student Code of Conduct. (*Id.*) On July 7, 2016, Daniel Cummins, the Assistant Dean of Students, sent John Doe a letter via email, advising that Mr. Cummins had accepted the ARC Hearing panel's recommendation and imposing a two-year suspension on John Doe. (*Id.* at ¶ 10) Mr. Cummins' letter also advised John

Doe that he could appeal the finding and/or the sanction, and provided a link to the appeal procedures. (*Id.*)

On July 8, John Doe submitted a four-page appeal, and on July 14 and 15, 2016, he submitted an updated seven-page appeal and three character reference letters. (*Id.* at ¶ 11) On September 22, 2016, Rachel Jay Smith, the University's Appeals Administrator, rejected John Doe's appeal of the finding of responsibility, but recommended a lessening of John Doe's sanction to a one-year suspension to begin at the end of the Fall 2016 semester and conclude at the end of the Fall 2017 semester. (*Id.*) On September 23, 2016, Juan Guardia, the Assistant Vice President and Dean of Students, accepted with the Appeals Administrator's recommendations. (*Id.*)

III. ARGUMENT

"Injunctive relief is considered an extraordinary remedy and courts use it cautiously and sparingly." *Draudt v. Wooster City Sch. Dist. Bd. of Educ.*, 246 F. Supp. 2d 820, 825 (N.D. Ohio 2003). In deciding whether to issue a preliminary injunction the Court applies four factors. *See Ne. Ohio Coal. for Homeless & Serv. Emp. Intern. Union, Local 1199 v. Blackwell,* 467 F.3d 999, 1009 (6th Cir. 2006). "Those factors are (1) whether the movant has a strong likelihood of success on the merits, (2) whether the movant would suffer irreparable injury absent [relief], (3) whether granting the [relief] would cause substantial harm to others, and (4) whether the public interest would be served by granting the [relief]." *Id.* "Although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. Nat'l Bd. of Med. Exam'rs,* 225 F.3d 620, 625 (6th Cir. 2000). The party seeking the injunction must establish that these factors exist by clear and convincing evidence. *See Garlock, Inc. v. United Seal, Inc.,* 404 F.2d 256, 257 (6th Cir. 1968). Because Mr. Doe

cannot establish any of the above four factors by clear and convincing evidence, much less all of them, his request for a preliminary injunction should be denied.

A. No Likelihood of Success on the Merits.

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

1. Defendants provided Mr. Doe with constitutional due process.

The pertinent facts established above show that Defendants provided Mr. Doe with constitutional due process. On February 19, 2016, Mr. Doe was made aware of the allegations that were levied against him by Ms. Roe. (Phillips Decl. at ¶ 7) Thereafter, Ms. Barnett investigated the matter by interviewing Ms. Roe, Mr. Doe, and various witnesses. (*Id.* at ¶¶ 9-10)

On April 15, 2016, Ms. Mitchell held a procedural review with Mr. Doe. (Mitchell Decl. at ¶ 3) During the procedural review, Mr. Doe was given the opportunity to discuss the Student Code of Conduct, review the incident report, and review all other information related to the allegations that was available at that time. (*Id.*) Thereafter, Mr. Doe was provided on-line access to the Title IX report on April 18, 2016. (*Id.* at ¶ 4) Mr. Doe knew the relevant parties and the statements that those parties had given to the Title IX investigator no later than that date.

On May 27, 2016, Ms. Mitchell notified the parties that an ARC Hearing was scheduled for June 27, 2016, at 10:00 a.m. (*Id.* at ¶ 5) Both parties were provided the names of the ARC Hearing panel members and advised that they could challenge the participation of any member. (*Id.*)

At the hearing, Mr. Doe was given the opportunity to ask questions to the Title IX investigator, give an uninterrupted version of the events that took place, dispute any allegation made by Jane Roe, and make a closing statement. (*Id.* at ¶¶ 7-8) After the hearing, Mr. Doe filed an appeal. (*Id.* at ¶¶ 10-11) On September 22, 2016, the UC Appeals Administrator rejected Mr. Doe's appeal of the finding of responsibility, but recommended reducing John Doe's sanction to a one-year suspension to begin at the end of the Fall 2016 semester and conclude at the end of the Fall 2017 semester. (*Id.* at ¶ 11) On September 23, 2016, Juan Guardia, the Assistant Vice President and Dean of Students, accepted with the Appeals Administrator's recommendations. (*Id.*)

"A school is an academic institution, not a courtroom or administrative hearing room." *Board of Curators v. Horowitz,* 435 U.S. 78, 88 (1978). "Similarly, a school disciplinary proceeding is not a criminal trial, and a student is not entitled to all of the procedural safeguards afforded criminal defendants." *Sterrett v. Cowan*, 85 F. Supp. 3d

916, 926 (E.D. Mich. 2015) (citing *Flaim,* 418 F.3d at 635, n. 1; *Jackson v. Dorrier,* 424 F.2d 213, 217 (6th Cir.1970) ("To hold that the relationship between parents, pupils and school officials must be conducted in an adversary atmosphere and accordingly the procedural rules to which we are accustomed in a court of law would hardly best serve the interests of any of those involved.")).

"Notice and opportunity to be heard remain the most basic requirements for procedural due process." *Marshall v. Ohio Univ.*, No. 2:15-cv-775, 2015 WL 7254213, at *11 (S.D. Ohio Nov. 17, 2015) (citing *Flaim*, 418 F.3d at 635; *Goss v. Lopez*, 419 U.S. 565, 579 (1975)). Mr. Doe cannot rationally allege that he did not have notice and an opportunity to be heard. *Id.* (dismissing plaintiff's procedural due process claims despite the fact that plaintiff was not permitted to read the complainant's rebuttal statement, where plaintiff was notified of the complainant's complaint; the plaintiff was notified that the university was going to investigate; the university interviewed plaintiff and five other witnesses; the university conducted a hearing; and the plaintiff was permitted to appeal); *see also Brown v. Univ. of Kan.*, 16 F. Supp. 3d 1275, 1290 (D. Kan. 2014), *aff'd*, 599 F. App'x 833 (10th Cir. 2015) (plaintiff was afforded due process where "Defendants communicated with Plaintiff about the charges against him and made an effort to hear his side of the story"); *Caiola v. Saddlemire*, No. 3:12-CV-00624 VLB, 2013 WL 1310002, at *4 (D. Conn. Mar. 27, 2013) ("The extensive nature of the notice and procedures afforded to Plaintiff pre-expulsion, and the availability of an appeals process post-deprivation, deem that the University's hearing procedures comport with due process.").

In *Jahn v. Farnsworth*, the Sixth Circuit recently held that where the plaintiff was facing a long-term suspension, the defendants provided the plaintiff with the

requisite due process by conducting an informal hearing with the plaintiff, "at which point they notified him of the charges and possible consequences facing him, explained their evidence, and gave him an opportunity to defend himself." 617 F. App'x 453, 461-62 (6th Cir. 2015). As shown above (and confirmed by the relevant portions of Mr. Doe's Complaint), Mr. Doe received notice of the charges against him, an explanation of the evidence, and an opportunity to defend himself at a hearing.

Mr. Doe is unlikely to succeed on the merits of his due process claim.

2. It is not a due process violation if a student subject to disciplinary action is unable to cross-examine his/her accuser.

As Mr. Doe states in his motion for preliminary injunction, his motion is based solely on one "aspect of the discipline process faced by John Doe: the failure of UC to permit John Doe to confront his accuser." (Doc. 2 at Page ID # 84) In other words, Mr. Doe's motion is entirely premised upon his assertion that he was unable to cross-examine his accuser.[1]

Mr. Doe's assertion that due process requires that he be permitted to cross-examine his accuser at a student disciplinary hearing is incorrect. This exact issue was analyzed nearly 30 years ago by the Sixth Circuit in *Newsome v. Batavia Local School District*, 842 F.2d 920 (6th Cir. 1988). In *Newsome*, the Sixth Circuit analyzed the due process required in a situation where a student faces discipline greater than a 10-day

[1] It should be noted that Mr. Doe's assertion that UC failed "to permit [him] to confront his accuser" is one of many instances where Mr. Doe plays fast and loose with the facts. As Mr. Doe acknowledges in his Complaint and in his Motion, UC does not prohibit cross-examination. (Doc. 1 at Page ID # 18-19; Doc. 2 at Page ID # 87) Rather, UC's process permits cross-examination by the parties submitting questions to the hearing panel chair for the hearing panel chair to then ask of the opposing party or witnesses at the hearing panel chair's discretion. (*Id.*) So, it is simply incorrect to state that UC failed "to permit John Doe to confront his accuser." Rather, the cross-examination UC does afford was simply unavailable in this case because Jane Roe did not attend the disciplinary hearing. Regardless, as shown by the overwhelming case law in this Circuit, even if UC refused to permit any form of cross-examination, that would not be a due process violation.

suspension. *Id*. at 923. After acknowledging that "[l]onger suspensions or expulsion for the remainder of the school term, or permanently, may require more formal procedures" and specifically citing to the three *Mathews v. Eldridge* factors, the Sixth Circuit concluded that the plaintiff "was not denied due process by not being permitted to cross-examine or to know the names of his student accusers, by not being permitted to cross-examine the school principal and superintendent, and by not being permitted to be present at the school board's closed deliberations even though the school principal and superintendent were allowed to attend." *Id*. at 923-24.

In its further analysis, the Sixth Circuit referenced the fact that allowing the plaintiff "to cross-examine his student accusers, or even merely to know their names, would have afforded [the plaintiff] the opportunity to challenge the students' credibility." *Id*. at 924. Nonetheless, the Sixth Circuit plainly stated: "We hold that the burden of cross-examination on the administration of school discipline outweighs the benefits to be derived from that procedure." *Id*. at 925. Continuing its lengthy analysis of whether cross-examination is a due process requirement, the Sixth Circuit stated, "to require cross-examination . . . would unnecessarily formalize school expulsion proceedings, imposing the additional burden on school administrators of applying, to some extent, the rules of evidence." *Id*. at 925 n.4; *see also Paredes by Koppenhoefer v. Curtis*, 864 F.2d 426, 429 (6th Cir. 1988) ("[A]s we held in *Newsome*, due process did not require that the accused have a right to cross-examine his student accusers or know their identities. In this less serious suspension case the accused similarly does not have that right.") (internal citation omitted).

More recently, the Sixth Circuit again addressed the issue of cross-examination in a school disciplinary proceeding in *C.Y. ex rel. Antone v. Lakeview Pub. Sch.*, 557 F.

App'x 426 (6th Cir. 2014). In *Antone*, the Sixth Circuit analyzed what due process must be afforded to the plaintiff who was suspended and, ultimately, expelled from school. *Id*. at 427. Citing to *Newsome*, the *Antone* Court held that "[s]tudents do have a right to have the evidence against them explained and to be given an opportunity to rebut that evidence, but this right does not entitle them to know the identity of student witnesses, or to cross-examine students or school administrators." *Id*. at 431.

Unsurprisingly, the district court decisions within this Circuit that Defendants could locate have followed the Circuit precedent and held that cross-examination in a student disciplinary hearing is not a due process requirement. *See Sandusky v. Smith*, No. 3:10-CV-00246-H, 2012 WL 4592635, at *7 (W.D. Ky. Oct. 2, 2012) ("[T]he Sixth Circuit has determined that [the right to cross examination] is not necessary to satisfy due process even in long-term school suspension scenarios, because the burden on the government outweighs the benefit to the student."); *T.S. ex rel. B.S. v. Menifee Cty. Bd. of Educ.*, No. CIV.A. 05-12-KSF, 2006 WL 83414, at *2 (E.D. Ky. Jan. 10, 2006) ("[T]he plaintiff's right to due process was not violated because he was not allowed to cross-examine the witnesses against him.").

In fact, Judge Beckwith ruled on this issue in a similar case brought by two plaintiffs against UC approximately seven months ago, acknowledging that the precedent in this Circuit establishes that "there is no general due process right to cross-examine witnesses in school disciplinary hearings." *Doe v. Univ. of Cincinnati*, No. 1:15-CV-681, 2016 WL 1161935, at *10 (S.D. Ohio Mar. 23, 2016) ("[G]iven that there is no general due process right to cross-examine witnesses in school disciplinary hearings, [] it follows that Defendants in this case did not violate Plaintiffs due process rights by

accepting hearsay evidence without permitting Plaintiffs to 'effectively' cross-examine the witness.").[2]

Similarly, many of the courts outside of this Circuit have also held that cross-examination in a school disciplinary hearing is not a due process requirement. *See, e.g., Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1988) ("As for the right to cross-examination, suffice it to state that the right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases."); *E.K. v. Stamford Bd. of Educ.*, 557 F. Supp. 2d 272, 277 (D. Conn. 2008) ("[A] provision that disallowed admission of hearsay statements and required confrontation of student witnesses or disclosure of witness identities would be overly-burdensome to schools due to the increasing challenge of maintaining order and discipline.") (citing *Newsome,* 842 F.2d at 923–24; *B.S. v. Bd. of Schs. Trs.,* 255 F.Supp.2d 891, 900 (N.D. Ind. 2003)).

As briefly discussed in footnote 1 above, Mr. Doe cannot allege that UC does not permit any form of cross-examination. In fact, he admits that UC does permit a form of cross-examination. Rather, Mr. Doe's real gripe appears to be that UC did not force Jane Roe to appear for the disciplinary hearing. Ironically, however, Mr. Doe acknowledges that no one has the ability to compel the attendance of witnesses at a disciplinary hearing. (Doc. 1 at Page ID # 18-19; Doc. 2 at Page ID # 87)

Yet, even if UC were able to compel a party's attendance to a disciplinary hearing and it had refused to do so in this case, "confronting the Complainant, let alone other

[2] The plaintiffs in that case appealed Judge Beckwith's dismissal of their complaint to the Sixth Circuit Court of Appeals. The Sixth Circuit heard oral argument on that matter on September 29, 2016. While the panel has yet to issue its opinion, the panel appeared to be less than receptive to plaintiffs' argument that due process required that they be permitted to cross-examine witnesses and their accusers at their disciplinary hearings. An audio recording of that oral argument can be found on the Sixth Circuit's website. *See http://www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=recent/09-29-2016 - Thursday/16-3334 John Doe I v Daniel Cummins et al.mp3&name=16-3334 John Doe I v Daniel Cummins et al.* (last visited, October 13, 2016).

witnesses, is not an absolute right and is generally not part of the due process requirement in a school disciplinary setting." *Sterrett*, 85 F. Supp. 3d at 929. Citing to *Goss* and *Newsome,* the Sixth Circuit said in *Ashiegbu v. Williams* that, "Before expelling a student for disciplinary reasons, a public institution must provide: 1) notice of the charges against the student; 2) an explanation of the evidence that authorities have against the student; and 3) an opportunity for the student to present his side of the story." 129 F.3d 1263, 1997 WL 720477, at *1 (6th Cir. Nov. 12, 1997). As discussed above, Mr. Doe cannot allege that he was not provided notice of the charges, an explanation of the evidence against him, and an opportunity to present his side to the story. Similarly, at his disciplinary hearing, Mr. Doe had every opportunity to point out whatever flaws or discrepancies he believed existed in Jane Roe's story. Mr. Doe was not restricted in any manner in his ability to "present his side of the story."[3]

While Mr. Doe laments that Jane Roe's statements were not notarized, Mr. Doe has not alleged that he was unaware of Jane Roe's allegations. (Doc. 2 at Page ID # 93) The Sixth Circuit had twice held that there was no due process violation where a student did not even receive the accuser's statements, but instead received an explanation of the statement's contents through some other means. *See Antone*, 557 F. App'x at 432 ("[W]hether or not C.Y. was provided copies of the statements and report, the record leaves no doubt that she received an explanation of their contents adequate to prepare her defense, and thus her due process rights were not infringed.") (citation omitted); *see*

[3] In footnote 7 of his brief, Mr. Doe makes a vague argument regarding the admission of hearsay evidence at his hearing. Courts within this District, citing to Sixth Circuit authority, have held that no due process violation results out of allowing hearsay evidence at a school disciplinary hearing. *See Doe v. Univ. of Cincinnati*, 2016 WL 1161935, at *10 ("There is, however, no prohibition against the use of hearsay evidence in school disciplinary hearings.") (citing *Newsome*, 842 F.2d at 926); *McGath v. Hamilton Local Sch. Dist.*, 848 F. Supp. 2d 831, 840 (S.D. Ohio 2012) ("The court finds that there is no due process violation in either the use of hearsay statements or in the fact that McGath was excluded from portions of the expulsion hearing.").

also Paredes, 864 F.2d at 430 (holding that the plaintiff's inability to review a witness's statement did not violate due process where, *inter alia*, "the essential facts concerning Doe's allegations were laid in front of Paredes through the testimony of [the superintendent]"). Again, Mr. Doe received notice of the charges, an explanation of the evidence against him, and an opportunity to present his side to the story.

Despite ignoring the overwhelming authority cited above, Mr. Doe boldly claims in his brief that there are three courts of appeal which have observed that due process requires some ability of accused students to confront their accusers. (Doc. 4 at Page ID # 96) To support that assertion, Mr. Doe cites to *Flaim v. Medical College of Ohio*, 418 F.3d 629 (6th Cir. 2005), *Winnick v. Manning*, 460 F.2d 545 (2d Cir. 1972), and *Gorman v. University of Rhode Island*, 837 F.2d 7 (1st Cir. 1988). (*Id.*)

None of those cases hold that cross-examination is a due process requirement. Mr. Doe's entire assertion on this issue relies on the Second Circuit's opinion in *Winnick*, as both the Sixth Circuit in *Flaim* and the First Circuit in *Gorman* rely on *Winnick* for their statements regarding the potential that cross-examination may be essential in some cases. However, as observed by a court in this District, the statements in *Winnick* regarding the possibility that cross-examination may be required is clearly *dictum*. *See Doe v. Ohio State Univ.*, No. 2:15-CV-2830, 2016 WL 692547, at *7 (S.D. Ohio Feb. 22, 2016) ("The *Winnick* court also observed that '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, but since that case did not involve such a problem, that statement is *dictum*."). Any claim from Mr. Doe that these cases held that cross-examination was a due process requirement in a case of this nature is simply incorrect.

As established above, Mr. Doe is not likely to succeed on his due process claim as he was given notice of the charges against him, notice of the evidence, and an opportunity to tell his side of the story. Additionally, the fact that UC could not compel Jane Roe to attend the disciplinary hearing, resulting in Mr. Doe's inability to cross-examine her, is not a due process violation.

B. Mr. Doe Cannot Establish That He Will Be Irreparably Harmed If The Court Denies His Request For An Injunction.

A number of courts have held that a suspension from school is not irreparable. *See Doe v. Ohio State Univ.*, 2016 WL 692547, at *11 ("Mr. Doe's medical education pathway has been disrupted by his dismissal from Ohio State. But it is far from clear that, absent an injunction at this point, he will be unable to complete his education or to pursue his chosen profession."); *B.P.C. v. Temple Univ.*, No. CIV.A. 13-7595, 2014 WL 4632462, at *5 (E.D. Pa. Sept. 16, 2014) ("Other courts in this Circuit have held that delays in testing or education do not amount to irreparable harm.") (citations omitted); *Medlock v. Trs. of Ind. Univ.*, No. 1:11-CV-00977-TWP, 2011 WL 4068453, at *9 (S.D. Ind. Sept. 13, 2011) (finding no irreparable harm because the plaintiff would be eligible for reinstatement when his suspension ended, he would have the opportunity to re-take any classes he failed as a result of his suspension, and the record of his suspension was protected by the Federal Educational Rights and Privacy Act). Mr. Doe was not expelled from UC. After serving his one-year suspension, he can petition for readmission.

Further, Mr. Doe's claim that his suspension "may affect his ability to enroll at other institutions of higher education and to pursue a career" is speculative at best. (Doc. 2 at Page ID # 97) In *Caiola v. Saddlemire*, the plaintiff argued "that the stigma of his expulsion will interfere with his academic and teaching career." 2013 WL

1310002, at *2. The court found, however, that "[s]uch interference is speculative." *Id.* The plaintiff in *Caiola* further argued that he had been admitted to a graduate program and that his expulsion may adversely impact that admission. *Id.* Again, the court dismissed that argument on the basis that the plaintiff "failed to offer any evidence that his expulsion did in fact or even was likely to result in a rescission of his admission." *Id.*

Moreover, "courts have held that damages such as the deprivation of income for an indefinite period, embarrassment, humiliation, and damage to an individual's reputation fall short of irreparable harm." *Ashraf v. Boat*, No. 1:13-CV-533, 2013 WL 4017642, at *5 (S.D. Ohio Aug. 6, 2013) (citing *Sampson v. Murray,* 415 U.S. 61, 89 (1974). "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." *Id.* (citation omitted). Mr. Doe's claim that his suspension "would damage his academic and professional reputations" is not irreparable harm. (Doc. 4 at Page ID # 97)

Mr. Doe cannot establish by clear and convincing evidence that he will be subjected to irreparable harm.

C. Granting Injunctive Relief Would Impose a Hardship on Others and Would Not Serve the Public's Interest.

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citing *Railroad Comm'n. v. Pullman Co.*, 312 U.S. 496, 500 (1941)). "Thus, the [Supreme] Court has noted that the award of an interlocutory injunction by courts of equity has never been

regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff, and that where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Id.*

Colleges and universities are afforded great latitude in administering their rules and regulations as courts recognize that those institutions' primary responsibility is to provide an atmosphere conducive to study and learning for all of their students. *See Am. Future Sys., Inc. v. Penn. State Univ.*, 752 F.2d 854, 865 (3d Cir. 1984) ("There can be no doubt that a public university has a significant interest in carrying out its educational mission, and that this interest necessarily gives it some power to regulate its students' lives."). Thus, "[t]he public interest weighs primarily on the defendants' side in maintaining the order necessary to a proper atmosphere conducive to education." *Hart v. Ferris State Coll.*, 557 F. Supp. 1379, 1391 (W.D. Mich. 1983).

UC, as a public entity, has a significant interest in maintaining its disciplinary system. *See Blower v. Univ. of Wash.*, No. C10-1506MJP, 2010 WL 3894096, at *3 (W.D. Wash. Sept. 27, 2010) ("What impresses the Court more in these circumstances is the public's interest in the maintenance of the integrity of a public institution of learning's academic standards, its process for addressing academic dishonesty, and the public's continued faith in the value represented by the highest degree such an institution can offer."). Granting injunctive relief that would disturb UC's ability to enforce its disciplinary procedures is not in the public's interest. *See Doe v. Univ. of Cincinnati*, No. 1:15-CV-600, 2015 WL 5729328, at *3 (S.D. Ohio Sept. 30, 2015)

("[G]ranting a temporary restraining order would likely disturb the University's ability to enforce its disciplinary procedures, which would not be in the public interest."); *Bonnell*, 241 F.3d at 826 ("By issuing the injunction in this case, the district court usurped the College's attempt at maintaining a learning environment free of harassment and hostility in accordance with its sexual harassment policy.").

In addition to the foregoing reasons, this Court should deny Mr. Doe's motion for a preliminary injunction because granting his requested injunctive relief would impose a hardship on others and would not serve the public's interest.

IV. CONCLUSION

For each and all of the foregoing reasons, Defendants request that this Court deny Jon Doe's motion for a preliminary injunction.

Respectfully submitted,

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By: /s/ Doreen Canton

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CERTIFICATE OF SERVICE

I certify that on October 28, 2016, I filed the Defendants' Response in Opposition to Plaintiff's Motion for a Preliminary Injunction with the Clerk of Court using the CM/ECF system, which will send notification of the filing to all registered parties.

/s/ Doreen Canton