No. 16-4693

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN DOE

Plaintiff-Appellee,

v.

UNIVERSITY OF CINCINNATI; ANIESHA MITCHELL, Director of the Office of Student Conduct and Community Standards; JUAN GUARDIA, Assistant Vice President for Student Affairs and Dean of Students

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Ohio, Western Division
The Honorable Michael R. Barrett, U.S. District Judge

BRIEF OF DEFENDANTS-APPELLANTS UNIVERSITY OF CINCINNATI, ANIESHA MITCHELL, AND JUAN GUARDIA

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Defendant-Appellant University of Cincinnati makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If Yes, list the identity of such corporation and the nature of the financial interest:

No.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Defendant-Appellant Aniesha Mitchell makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If Yes, list the identity of such corporation and the nature of the financial interest:

No.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Defendant-Appellant Juan Guardia makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If Yes, list the identity of such corporation and the nature of the financial interest:

No.

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STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellants University of Cincinnati, Aniesha Mitchell, and Juan Guardia respectfully request oral argument because it will assist the Court in its review of the issues presented by this appeal.

I. JURISDICTIONAL STATEMENT

On October 7, 2016, Plaintiff-Appellee John Doe filed suit against the University of Cincinnati, Aniesha Mitchell, and Juan Guardia, alleging violations of the Ohio and United States Constitutions, 42 U.S.C. § 1983, and Title IX of the Education Amendments of 1972. (Complaint, RE 1, Page ID # 34-40) The District Court had subject matter jurisdiction because the claims arose under the Constitution and the laws of the United States. 28 U.S.C. § 1331.

Plaintiff-Appellee John Doe also filed a Motion for Preliminary Injunction on October 7, 2016. (Motion for Preliminary Injunction, RE 2, Page ID # 84-100) On November 30, 2016, the District Court entered an order granting Plaintiff-Appellee's Motion for a Preliminary Injunction. (Opinion and Order, RE 20, Page ID # 226-239) Defendants-Appellants filed a timely Notice of Appeal on December 6, 2016, pursuant to 28 U.S.C. § 1292(a)(1). (Notice of Appeal, RE 22, Page ID # 275-76)

II. STATEMENT OF THE ISSUES

The issue presented by this appeal is whether the District Court erred in granting John Doe's motion for a preliminary injunction. Specifically, Defendants-Appellants assert that the District Court erred in holding the John Doe has a due process right to confront and cross-examine his accuser in a University disciplinary hearing. Defendants-Appellants also assert that the District Court erred in finding that John Doe had shown by clear and convincing evidence that he would suffer irreparable harm without the issuance of an injunction and that issuing an injunction during the pendency of the proceedings is in the public's interest.

III. STATEMENT OF THE CASE

A. Facts and Procedure of John Doe's Disciplinary Matter

On September 28, 2015, Jane Roe reported to the UC Title IX Office that she had been sexually assaulted by a fellow UC student. (Phillips Declaration; RE 11-1 at Page ID # 143) On October 30, 2015, Jyl Shaffer, UC's Title IX Coordinator at that time, interviewed Jane Roe regarding her complaint. (*Id.*) 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.*) 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 Page ID # 144) 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*.) 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*.) 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*. at Page ID # 144-45) 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.* at Page ID # 145)

John Doe responded to the notice that evening, initially denying that he knew Jane Roe. (*Id.*) 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.*) 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.*) 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. (Mitchell Declaration; RE 11-2 at Page ID # 147) The procedural review was scheduled for April 15, 2016. (*Id*.) 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*.) 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 Page ID # 147-48) The parties were advised that they could submit a list of witnesses for the hearing and additional evidence by June 10, 2016. (*Id*. at Page ID # 148) 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*.) 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*.) John Doe was then given an opportunity to give his version of the events as well as provide any additional supporting information. (*Id*.) 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 Page ID # 149) 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*.) 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*.) 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 the Appeals Administrator's recommendations. (*Id*.)

B. Procedure In This Case

On October 7, 2016, John Doe filed suit against the University of Cincinnati, Aniesha Mitchell, and Juan Guardia, alleging violations of the Ohio and United States Constitutions, 42 U.S.C. § 1983, and Title IX of the Education Amendments of 1972. (Complaint, RE 1, Page ID # 34-40)

John Doe also filed a Motion for Preliminary Injunction on October 7, 2016. (Motion for Preliminary Injunction, RE 2, Page ID # 84-100) Despite having brought multiple claims against Defendants-Appellants, the "likelihood of success on the merits" prong of John Doe's Motion for Preliminary Injunction was 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." (*Id*. at Page ID # 84) On November 21, 2016, the District Court held oral argument on John Doe's Motion for Preliminary Injunction. (Minute Entry, RE 18, Page ID # 224)

On November 30, 2016, the District Court granted John Doe's Motion for a Preliminary Injunction. (Opinion and Order, RE 20, Page ID # 226-239) Defendants-Appellants filed a timely Notice of Appeal on December 6, 2016, pursuant to 28 U.S.C. § 1292(a)(1). (Notice of Appeal, RE 22, Page ID # 275-76)

IV. SUMMARY OF THE ARGUMENT

The District Court erred in granting Plaintiff-Appellee John Doe's Motion for Preliminary Injunction. First, the District Court erred in holding that John Doe is likely to succeed on the merits of his due process claim. John Doe's Motion for Preliminary Injunction, and the District Court's opinion granting that motion, was based on one "aspect of the discipline process faced by John Doe: the failure of UC to permit John Doe to confront his accuser" at his school disciplinary hearing. In other words, the District Court held that John Doe was likely to succeed on his due process claims because John Doe was unable to cross-examine his accuser at his disciplinary hearing. This Court analyzed this issue nearly 30 years ago and, after examining the factors set forth in the Supreme Court's decision in *Mathews v. Eldridge*, held that confronting and cross-examining witnesses in a school disciplinary hearing was not a due process requirement because of the significant burden that would be placed on the educational institution by such a requirement. The District Court erred in holding that John Doe was likely to succeed on the merits of his due process claim.

Similarly, the District Court erred in holding that John Doe was likely to succeed on the merits of his due process claim because the factual allegations show that John Doe received constitutional due process throughout his student disciplinary process. John Doe received notice of the charges against him, an

explanation of the evidence, and an opportunity to present a defense at a formal hearing. Because this is what constitutional due process requires in student discipline matters, the District Court's holding that John Doe is likely to succeed on the merits of his due process claim should be reversed.

Second, the District Court erred in finding that John Doe had shown by clear and convincing evidence that he would suffer irreparable harm without the issuance of an injunction. A number of courts have held that a suspension from school is not irreparable. Additionally, the possible harm to John Doe's academic career and his reputation are both speculative and not irreparable.

Last, the District Court erred in holding that issuing an injunction during the pendency of the proceedings is in the public's interest. The District Court cited no authority for its conclusion that a minor deviation from a public institution's policy (one which is not a due process violation) supports a finding that it is in the public's interest to significantly diminish an educational institution's ability to enforce its disciplinary rules and regulations. Because the public's interest favors denying John Doe's motion for preliminary injunction, the District Court's opinion should also be reversed for this reason.

V. STANDARD OF REVIEW

This Court reviews decisions to grant or deny a preliminary injunction for an abuse of discretion. *Obama for America v. Husted*, 697 F. 3d 423, 428 (6th Cir. 2012). However, this Court reviews the District Court's legal conclusions which underlie a decision to grant or deny a preliminary injunction de novo. *Id*. For example, "[w]hether the movant is likely to succeed on the merits is a question of law [this Court will] review de novo." *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (citing *NAACP v. City of Mansfield*, 866 F.2d 162, 169 (6th Cir. 1989)).

VI. 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 four factors are at issue. *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).

A. The District Court Erred In Holding That John Doe Is Likely To Succeed On The Merits of His Due Process Claim.

The District Court erred in holding that John Doe is likely to succeed on his due process claim because due process does not require that John Doe be permitted to cross-examine witnesses in his student disciplinary hearing and because 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. This Court very recently held:

> In the school-disciplinary context, an accused student must at least receive the following pre-expulsion: (1) notice of the charges; (2) an explanation of the evidence against him; and (3) an opportunity to present his side of the story before an unbiased decisionmaker. *Heyne v. Metro. Nashville Pub. Schs.*, 655 F.3d 556, 565–66 (6th Cir. 2011) (citing *Goss v. Lopez*, 419 U.S. 565, 581, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)). We have recognized, however, that "disciplinary hearings against students . . . are not criminal trials, and therefore need not take on many of those formalities." *Flaim*, 418 F.3d at 635. Although a university student must be afforded a meaningful opportunity to present his side, a full-scale adversarial proceeding is not required. *See id.* at 640. The focus, rather, should be on whether the student had an opportunity to "respond, explain, and defend," and not on whether the hearing mirrored a criminal trial. *Id.* at 635 (quoting *Gorman v. Univ. of R.I.*, 837 F.2d 7, 13 (1st Cir. 1988)).

Doe v. Cummins, --- F. App'x ----, 2016 WL 7093996, at *8 (6th Cir. Dec. 6, 2016).

1. The District Court erred in holding that John Doe was likely to succeed on the merits of his procedural due process claim because he was unable to confront and cross-examine his accuser at the disciplinary hearing.

John Doe's Motion for Preliminary Injunction was based on one "aspect of the discipline process faced by John Doe: the failure of UC to permit John Doe to confront his accuser." (Motion for Preliminary Injunction; RE 2 at Page ID # 84) In other words, John Doe's motion was entirely premised upon his assertion that his constitutional due process rights were violated because he was unable to cross-examine his accuser.

Following John Doe's directive, the District Court's opinion also focused on John Doe's inability to confront his accuser at the disciplinary hearing, resulting in the District Court erroneously holding that John Doe was likely to succeed on the merits of his due process claim because he was unable to cross-examine his accuser at his disciplinary hearing. *Doe v. Univ. of Cincinnati*, No. 1:16CV987, 2016 WL 6996194, at *4 (S.D. Ohio Nov. 30, 2016).

The issue of cross-examination in a student disciplinary hearing was first addressed 30 years ago with this Court affirming the Eastern District of Michigan in a four-sentence Per Curiam opinion. In *Jaksa v. Regents of University of Michigan*, the Eastern District of Michigan held: "The Constitution does not confer on plaintiff the right to cross-examine his accuser in a school disciplinary proceeding." 597 F. Supp. 1245, 1252-53 (E.D. Mich. 1984), *aff'd*, 787 F.2d 590

(6th Cir. 1986) (citing *Boykins v. Fairfield Bd. of Educ.*, 492 F.2d 697, 701–02 (5th Cir. 1974), *cert. denied*, 420 U.S. 962, 95 S.Ct. 1350, 43 L.Ed.2d 438 (1975) ("It well may be that all *Morrissey* [*v. Brewer*] contemplates [is] . . . a right to confront and cross-examine such adverse witnesses *as appear* . . ."); *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972) ("The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings."); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir.), *cert. denied*, 368 U.S. 390 (1961) (Due process does not require "a full-dress judicial hearing, with the right to cross-examine witnesses ...."); *Dillon v. Pulaski Cnty. Special Sch. Dist.*, 468 F. Supp. 54 (E.D. Ark. 1978), *affd.* 594 F.2d 699 (8th Cir. 1979)).

This issue was next analyzed two years later, in much more depth, 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 faced discipline greater than a 10-day 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 citing to the three *Mathews v. Eldridge*, 424 U.S. 319 (1976) factors, this Court 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 further analysis, the *Newsome* Court 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, this Court 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, this Court 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.

Over the next ten years, this Court cited to *Newsome* twice, both times confirming in an unqualified manner that due process in a school disciplinary manner does not require the right to cross-examination. *See Doe v. Bd. of Educ. of Elyria City Sch.*, 149 F.3d 1182, 1998 WL 344061, at *5 (6th Cir. May 27, 1998) ("We have held that the right to cross-examine a school witness or official during a school disciplinary hearing exceeds the parameters of a disciplinary due process hearing, placing upon laymen a quasi-judicial burden, one they are ill-equipped to

handle.") (citing *Newsome*, 842 F.2d at 926); *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.") (internal citation omitted).

This Court's next mention of cross-examination in school disciplinary cases comes in *Flaim v. Medical College of Ohio*, 418 F.3d 629 (6th Cir. 2005). In *Flaim*, this Court began by acknowledging that in *Jaksa*, the court concluded that "[t]he Constitution does not confer on [an accused student] the right to cross-examine his accuser in a school disciplinary proceeding," but then cited to the Second Circuit's opinion in *Winnick v. Manning* for the proposition that if a "case had resolved itself into a problem of credibility, cross-examination of witnesses might have been essential to a fair hearing." *Id*. at 641 (citing *Winnick*, 460 F.2d at 550). However, because this Court ultimately concluded that "cross-examination would have been a fruitless exercise" in that case, it was unnecessary for the *Flaim* Court to engage in the same *Matthews v. Eldridge* analysis that this Court did in *Newsome*. In other words, this Court's statement about the possibility that cross-examination may be essential in certain circumstances was dictum.

In 2014, this Court 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*, this Court 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."[1] *Id.* at 431.

In the case at bar, the District Court acknowledged *Newsome*, but distinguished it on the basis that it was a secondary school disciplinary case whereas this case involves a university setting. *Doe v. Univ. of Cincinnati*, 2016 WL 6996194, at * 5. To bolster its position, the District Court recited the discussion from *Newsome* where this Court stated that the value of cross-examination is often muted in school disciplinary cases because the school administration typically knows of (or has access to) records regarding the accusing

[1] It should be noted that 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)).

student's disciplinary history, which can serve as a valuable gauge in evaluating the believability of the accusing student's account. *Id*.

While this point made in *Newsome* may be distinguishable from a university setting as outlined by the District Court, the District Court's manner of distinguishing these cases ignores the remainder of the *Newsome* opinion and the number of panels from this Court that have followed *Newsome*. The discussion of *Newsome* quoted by the District Court is only part of the *Newsome* Court's discussion. In fact, the *Newsome* Court followed with an almost two-page analysis of the *Mathews v. Eldridge* factors which "instructs [the Court] to balance the benefit that would be derived from the cross-examination of school authorities during pre-expulsion proceedings, together with the important interest that a public school student has in his education, against the burden that cross-examination would place on the school board or other decisionmaker." 842 F.2d at 925. The *Newsome* Court went on to discuss the fact that school administrators "are charged with a variety of responsibilities critical to the effective operation of our public schools" and that "[t]o saddle them with the burden of overseeing the process of cross-examination (and the innumerable objections that are raised to the form and content of cross-examination) is to require of them that which they are ill-equipped to perform." *Id*. at 925-26. There is no reason why this same line of analysis

would not apply to a university setting where this Court has already held that it applies to secondary schools.

In *Osteen v. Henley*, a Seventh Circuit case involving a disciplinary hearing in a university setting, Judge Posner discussed the plaintiff's argument that due process should allow him to be represented by counsel in a university disciplinary hearing, stating:

> [W]e do not think [a student] is entitled to be represented in the sense of having a lawyer who is permitted to examine or cross-examine witnesses, to submit and object to documents, to address the tribunal, and otherwise to perform the traditional function of a trial lawyer. To recognize such a right would force student disciplinary proceedings into the mold of adversary litigation. The university would have to hire its own lawyer to prosecute these cases and no doubt lawyers would also be dragged in—from the law faculty or elsewhere—to serve as judges. The cost and complexity of such proceedings would be increased, to the detriment of discipline as well as of the university's fisc. Concern is frequently voiced about the bureaucratization of education, reflected for example in the high ratio of administrative personnel to faculty at all levels of American education today. We are reluctant to encourage further bureaucratization by judicializing university disciplinary proceedings, mindful also that one dimension of academic freedom is the right of academic institutions to operate free of heavy-handed governmental, including judicial, interference. *Piarowski v. Illinois Community College Dist. 515*, 759 F.2d 625, 629 (7th Cir. 1985), and cases there. The danger that without the procedural safeguards deemed appropriate in civil and criminal litigation public universities will engage in an orgy of expulsions is slight. The relation of students to universities is, after all, essentially that of

> customer to seller. That is true even in the case of public universities, though they are much less dependent upon the academic marketplace than private universities are.

13 F.3d 221, 225–26 (7th Cir. 1993).

While the issue in the case at bar is cross-examination in a student disciplinary hearing rather than representation by counsel like in *Osteen*, the same analysis applies. If this Court were to affirm the District Court's opinion that due process requires a student to be permitted to cross-examine witnesses in a disciplinary hearing, the "cost and complexity of such proceedings would be increased," thereby "encourage[ing] further bureaucratization by judicializing university disciplinary proceedings." If cross-examination were permitted, where would the limitations lie? For example, should schools be expected to apply rules such as Federal Rules of Evidence 608 and 609 or rape shield laws like Ohio Rev. Code § 2907.05(E) ? If so, it follows that the school would then likely need an attorney present at all proceedings to deal with the undoubtedly complex issues that arise from cross-examination.

This leads to the next point – one that circles us back to Judge Posner's opinion in *Osteen*. This Court stated in *Flaim* that "a right to counsel may exist if 'an attorney presented the University's case, or [ ] the hearing [was] subject to complex rules of evidence or procedure.'" 418 F.3d at 640. If this Court were to agree with the District Court that constitutional due process requires that a student

be permitted to cross-examine witnesses, including an accuser, the rules associated with UC's Student Code of Conduct would certainly become more complex. This is exactly why the *Newsome* Court 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." 842 F.2d at 925 n.4. In other words, the ramifications of holding that universities or colleges are required to permit cross-examination in disciplinary hearings would be great.

After the District Court issued its opinion that is the subject of this appeal, this Court issued its Opinion in *Doe v. Cummins*, --- F. App'x ----, 2016 WL 7093996 (6th Cir. Dec. 6, 2016). In *Cummins*, this Court acknowledged the dictum in *Flaim* which provides that due process may require a limited ability to cross-examine witnesses in school disciplinary hearings where credibility is at issue, but (just like every other case that has made such a statement) went on to hold that there was no due process violation in that case. *Id*. at * 10.

This Court did hold, however, that the form of cross-examination that UC permits – submitting questions to the ARC panel for the panel to review and then possibly ask of the opposing party – does satisfy due process. *Id*. Because this Court has already held that UC's procedures comport with due process, it appears that John Doe's real gripe is that UC did not compel Jane Roe to appear for the

disciplinary hearing. However, John Doe acknowledges that UC has no ability to compel the attendance of witnesses at a disciplinary hearing. (Motion for Preliminary Injunction; RE. 2 at Page ID # 87; Complaint, RE 1, Page ID # 18-19)

Nonetheless, 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 a complainant or other witnesses is not required to provide due process in a school disciplinary setting. *See Jaksa*, 597 F. Supp. at 1253, *aff'd*, 787 F.2d 590 (6th Cir. 1986) ("I hold that plaintiff had no due process right to confront the anonymous student who reported plaintiff's cheating."); *see also Osei v. Univ. of Maryland Univ. Coll.*, No. CV DKC 15-2502, 2016 WL 4269100, at *7 (D. Md. Aug. 15, 2016) ("But even if Plaintiff had attended the hearing, and even if the school had prevented him from confronting his accusers at the hearing, there still would have been no due process deprivation.") (citations omitted); *E.K. v. Stamford Bd. of Educ.*, 557 F. Supp. 2d at 277 ("[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 at 900).

In its opinion, the District Court briefly addressed this issue, but in a confusing manner, stating:

> [I]n this case, Plaintiff was effectively denied the right to cross-examination because he was not notified in advance of the hearing that Jane Roe would not be present at the ARC Hearing. It was plain at the hearing that Plaintiff intended to ask certain questions, but because Jane Roe was not present at the hearing, he was not able to ask those questions. While this is not to say that UC's procedures must require the complainant to be present, at the very least, Plaintiff should have had the opportunity to submit written cross-examination questions to the ARC Chair in accordance with the Student Code of Conduct.

Doe v. Univ. of Cincinnati, 2016 WL 6996194, at * 5.

It appears from the District Court's brief analysis of this issue that it recognized that Defendants-Appellants were not required to compel a complaining party to be present at a disciplinary hearing in order to provide procedural due process to the respondent party. But, the District Court then appears to signal that Defendants-Appellants violated John Doe's due process rights by not giving him the opportunity to submit cross-examination questions to the ARC Chair in accordance with UC's Student Code of Conduct.

What possible purpose would there have been to accept John Doe's cross-examination questions to be asked of Jane Roe when Jane Roe was not present? It is perhaps conceivable that the substance of the cross-examination questions themselves would have provided some evidentiary value, but such an argument collapses due to the fact that it is undisputed that John Doe was given an unfettered opportunity to give his version of the events as well as provide any additional

supporting information to the panel at the hearing. (Mitchell Declaration; RE 11-2 at Page ID # 148) In fact, John Doe pointed out to the panel a number of instances where he specifically disagreed with Jane Roe's version of the events. (*Id*.) To conclude the hearing, John Doe was then permitted to give a closing statement to the panel. (*Id*. at Page ID # 149)

In *Ashiegbu v. Williams*, this Court said, "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." 29 F.3d 1263, 1997 WL 720477, at *1 (6th Cir. Nov. 12, 1997). John Doe was provided notice of the charges, an explanation of the evidence against him, and an opportunity to present his side to the story. John Doe had every opportunity to point out whatever flaws or discrepancies he believed existed in Jane Roe's story. John Doe was not restricted in his ability to "present his side of the story."[2]

[2] John Doe also claims that allowing the use of hearsay evidence at a school disciplinary hearing is a due process violation. (Complaint, RE 1 at Page ID # 35) Courts in this Circuit have held that no due process violation results out of allowing hearsay evidence at a school disciplinary hearing. *See Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 602 (S.D. Ohio 2016) ("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.").

Although John Doe did not specifically make this argument in support of his Motion for Preliminary Injunction, the District Court also appears to have concluded that John Doe is likely to succeed on the merits of his due process claim because Jane Roe's statement that was read at the disciplinary hearing was not notarized, although the Student Code of Conduct requires that it be notarized. *Doe v. Univ. of Cincinnati*, 2016 WL 6996194, at * 5.

In *Doe v. Ohio State University*, a case the District Court relied upon heavily in its opinion, the court cited to *Flaim* and held that "the [school disciplinary] hearing need not be open to the public, formal rules of evidence and procedure need not be applied, nor do witnesses need to be placed under oath." No. 2:15-CV-2830, 2016 WL 6581843, at *7 (S.D. Ohio Nov. 7, 2016) (citing *Flaim*, 418 F.3d at 635). The only reason why a statement would need to be notarized is because it requires the notary to administer an oath to the author before the notary can affix his/her seal and signature. Ohio Rev. Code § 147.07. But, if due process does not require a witness to be placed under oath at a student disciplinary hearing, it follows that due process does not require a statement to be notarized.

As this Court acknowledged in *Cummins*, an argument that UC violated due process because it failed to follow its own procedures in a limited circumstance "clearly lacks merit" because "the Constitution – and the case law interpreting it – mandates what procedures are constitutionally required following the deprivation

of a property or liberty interest, and not internal school rules or policies." 2016 WL 7093996, at * 7 n. 2. The fact that UC may have deviated from its own process by accepting a non-notarized statement is not a due process violation as there is no due process requirement that statements provided in disciplinary hearings be notarized or that witness testimony be "under oath." *See Jaksa*, 597 F. Supp. at 1251, *aff'd*, 787 F.2d 590 (6th Cir. 1986) ("A state agency's disregard of its own regulation is a constitutional deprivation only where there is an independent due process right to the procedure contained in the agency's rule.") (citing *Bates v. Sponberg*, 547 F.2d 325, 329-30 (6th Cir. 1976); *Bills v. Henderson*, 631 F.2d 1287, 1298 (6th Cir. 1980)).

John Doe admits he had notice of Jane Roe's allegations. (Motion for Preliminary Injunction, RE 2, Page ID # 93) This Court has twice held that there was no due process violation where a student did not 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 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, John Doe received notice of the charges, an explanation of the evidence against him, and an opportunity to present his side of the story.

The fact that UC did not compel Jane Roe to attend the disciplinary hearing, resulting in John Doe's inability to cross-examine her, is not a due process violation. The District Court's opinion holding that John Doe is likely to succeed on the merits of his due process claim because UC did not compel Jane Roe to attend the disciplinary hearing, resulting in John Doe's inability to cross-examine her, should be reversed.

2. Because John Doe received constitutional due process, the District Court erred in holding that John Doe was likely to succeed on the merits.

The pertinent facts show that John Doe received constitutional due process. On February 19, 2016, John Doe was made aware of the allegations that were levied against him by Ms. Roe. (Phillips Declaration; RE. 11-1 at Page ID # 144) Thereafter, Ms. Barnett investigated the matter by interviewing Jane Roe, John Doe, and various witnesses. (*Id*. at Page ID # 144-45)

On April 15, 2016, Ms. Mitchell held a procedural review with John Doe. (Mitchell Declaration; RE 11-2 at Page ID # 147) 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*.) Thereafter, John Doe was provided on-line access to the Title IX report on April 18, 2016. (*Id*.) John 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 Page ID # 147-48) 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 Page ID # 148)

At the hearing, John Doe was given the opportunity to give an uninterrupted version of the events that took place, dispute any allegation made by Jane Roe, and make a closing statement. (*Id*.) After the hearing, John Doe filed an appeal. (*Id*. at Page ID # 149) On September 22, 2016, the UC Appeals Administrator rejected John 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*.) On September 23, 2016, Mr. Guardia accepted the Appeals Administrator's recommendations. (*Id*.)

"A school is an academic institution, not a courtroom or administrative hearing room." *Bd. of Curators v. Horowitz*, 435 U.S. 78, 88 (1978). "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." *Jackson v. Dorrier*, 424 F.2d 213, 217 (6th Cir. 1970). "While a university cannot ignore its duty to treat its students fairly, neither is it required to transform its classrooms into courtrooms." *Jaksa*, 597 F. Supp. at 1250, *aff'd*, 787 F.2d 590.

"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. at 579). Similarly, as this Court recently stated, the focus of the procedural due process inquiry in cases such as this one should be on whether the student had an opportunity to "respond, explain, and defend." *Cummins*, 2016 WL 7093996, at *8.

John Doe has not plausibly alleged that he did not have notice and an opportunity to be heard or that he was unable to "respond, explain, and defend." *Marshall*, 2015 WL 7254213, at *11 (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"); *Gorman*, 837 F.2d at 16 (holding that the plaintiff's "hearings were fair and comported with requirements of due process" where he "was given the opportunity to explain fully his version of the facts" and "had the opportunity to appeal the adverse decisions, and did in fact avail himself of the University's appeal process"); *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*, this Court 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). In the case at bar, which is also a long-

term suspension case, John Doe was given much more due process than was given to the plaintiff in *Jahn*. John Doe was given a formal hearing, notification of the charges and possible consequences facing him far in advance of his hearing, an explanation of the evidence gathered during the investigation, an opportunity to defend himself at the formal hearing, and an opportunity for an appeal.

Because John Doe received notice of the charges against him, an explanation of the evidence, and an opportunity to present a defense at a formal hearing, the District Court erred in holding that John Doe is likely to succeed on the merits of his due process claim.

B. The District Court Erred In Finding That John Doe Had Shown By Clear And Convincing Evidence That He Would Suffer Irreparable Harm Without The Issuance Of An Injunction.

The District Court held that John Doe's allegations that his "suspension would damage his academic and professional reputation" and that "the one-year suspension could affect his ability to pursue a career" was sufficient to establish that he would suffer irreparable harm without the issuance of an injunction. *Doe v. Univ. of Cincinnati*, 2016 WL 6996194, at *6. "[C]ourts 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). The District Court erred in holding that potential damage to John Doe's academic and personal reputation constitutes irreparable harm.

Also, 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). John Doe was

not expelled from UC. After serving his one-year suspension, he can petition for readmission.

Further, the District Court's own opinion shows that John Doe's claims regarding damage to his career are speculative. The District Court stated that "the one-year suspension could affect [John Doe's] ability to pursue a career." *Doe v. Univ. of Cincinnati*, 2016 WL 6996194, at *6 (emphasis added). 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 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 could 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*.

The District Court erred in holding that that John Doe had shown by clear and convincing evidence that he would suffer irreparable harm without the issuance of an injunction.

C. The District Court Erred In Holding That Issuing An Injunction During The Pendency Of The Proceedings Is In The Public's Interest.

The District Court held that because Jane Roe was permitted to submit a non-notarized statement instead of a notarized statement as UC's policy requires,

that this was enough to conclude that issuing an injunction is in the public's interest. *Doe v. Univ. of Cincinnati*, 2016 WL 6996194, at *6. The District Court, however, cites no authority for the conclusion that a minor deviation from a public institution's policy (one which is not a due process violation) supports a finding that it is in the public's interest to significantly diminish the institution's ability to enforce its disciplinary rules and regulations.

"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, e.g.*, *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."). Allowing injunctive relief that would disturb UC's ability to enforce its disciplinary procedures, as the District Court has in this case, 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 v. Lorenzo*, 241 F.3d 800, 826 (6th Cir. 2000) ("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.").

Because the District Court erred in holding that issuing an injunction during the pendency of the proceedings is in the public's interest, its opinion should also be reversed for this reason.

VII. CONCLUSION

For all of the foregoing reasons, Defendants-Appellants University of Cincinnati, Aniesha Mitchell, and Juan Guardia respectfully submit that that the District Court's opinion and order granting John Doe's Motion for Preliminary Injunction should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the word-processing system used to prepare the brief, Microsoft Word, indicates that this brief contains 9,134 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that I filed the Brief of Defendants-Appellants University of Cincinnati, Aniesha Mitchell, and Juan Guardia this 20th day of January, 2017, via the CM/ECF system, which will serve all counsel of record.

s/ Doreen Canton
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VIII. ADDENDUM

Record Entry No.	Description of Document	Date Filed	Page ID Range
1	Complaint	10/7/2016	1-81
2	Motion for Preliminary Injunction	10/7/2016	84-100
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11-2	Mitchell Declaration	10/28/2016	147-149
14	Reply in Support of Motion for Preliminary Injunction	11/2/2016	156-167
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22	Notice of Appeal	12/6/2016	275-276
28	Sealed Transcript of PI Hearing	12/14/2016	383-420