UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN DOE I AND JOHN DOE II,	:	Case No. 1:15-CV-681
PLAINTIFFS,	:	Judge Sandra Beckwith
v.	:	Magistrate Judge Gregory Wehrman
UNIVERSITY OF CINCINNATI, et al.,	:	DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT
DEFENDANTS.	:	

Defendants University of Cincinnati ("University"), Daniel Cummins ("Cummins"), Denine M. Rocco ("Rocco"), and Debra Merchant ("Merchant") (collectively "Defendants") move the Court to dismiss all claims alleged against them pursuant to Federal Rule of Civil Procedure 12. Plaintiffs John Doe I and John Doe II have failed to set forth facts or legal claims in their Complaint (Doc. 1) sufficient to state a claim upon which relief may be granted.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

By: /s/ Doreen Canton

Doreen Canton (0040394)
Evan T. Priestle (0089889)
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202
Tel: (513) 381-2838
Fax: (513) 381-0205
canton@taftlaw.com
epriestle@taftlaw.com

Attorneys for Defendants University of Cincinnati, Daniel Cummins, Denine Rocco, and Debra Merchant

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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)).

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JOHN DOE I AND JOHN DOE II, PLAINTIFFS, v. UNIVERSITY OF CINCINNATI, et al., DEFENDANTS.	:	Case No. 1:15-CV-681 Judge Sandra Beckwith Magistrate Judge Gregory Wehrman MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6), Defendants move to dismiss the claims of Plaintiffs John Doe I and John Doe II. Count I should be dismissed on Eleventh Amendment immunity grounds.

Counts I and II, both of which assert a claim that Defendants violated Plaintiffs' procedural due process rights, should be dismissed as Plaintiffs were provided constitutional procedural due process. Even if this Court were to find that Plaintiffs have sufficiently alleged that their procedural due process rights were violated, the elements of due process that Plaintiffs maintain they were not afforded were not clearly established. As such, Defendants Daniel Cummins, Denine Rocco, and Debra Merchant ("Individual University Defendants") are entitled to qualified immunity. Count II should also be dismissed as the allegations directed at the Individual University Defendants in their individual capacities are insufficient to state a claim upon which relief can be granted.

Plaintiffs' claims under Title IX in Counts III and IV fail as a matter of law because Plaintiffs' allegations of gender discrimination are supported only by their speculation. Count V – styled "Injunctive Relief" – is not a stand-alone cause of action.

II. FACTS

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

On March 9, 2014, John Doe I, then a junior at the University's Blue Ash campus, was accused by two female students of sexual assault. (Doc. 1 at ¶¶ 47-48) On March 12, 2014, Defendant Cummins sent John Doe I a notice of the allegations, a notice scheduling the Procedural Review for March 25, 2014, and advising John Doe I of an "interim suspension" from the University's Clifton campus. (*Id*. at ¶ 61(a)) After various issues were discussed regarding scheduling, John Doe I's Procedural Review meeting was rescheduled for March 28, 2014. (*Id*. at ¶ 61(b)) At the Procedural Review, Defendant Cummins discussed the alleged violation of the Student Code of Conduct and asked John Doe I to sign a form that he had received "the evidence supporting the allegation." (*Id*.)

On April 7, 2014, after confirming that he had the number of Administrative Review Committee ("ARC") members necessary, Defendant Cummins sent John Doe I an email notifying him that the ARC hearings for each complainant were scheduled for April 10, 2014. (*Id*. at ¶ 61(c)) However, the two ARC hearings were later postponed until May 2, 2014. (*Id*.) On the morning of May 2, 2014, an ARC hearing took place regarding John Doe I's alleged sexual assault of Jane Roe I. At the conclusion of the hearing, the ARC recommended that John Doe I be found responsible for the allegations leveled against him by Jane Roe I. (*Id*. at ¶ 74)

That afternoon, an ARC hearing regarding John Doe I's alleged sexual assault of Jane Roe II was conducted. (*Id*. at ¶ 75) However, John Doe I chose not to participate in the ARC hearing regarding Jane Roe II. (*Id*.) The ARC hearing proceeded in John Doe I's absence. (*Id*.) Eventually, the ARC also recommended that John Doe I be found

responsible for the allegations leveled by Jane Roe II and that John Doe I be dismissed from the University for those actions.

That same day, before the Vice President of Student Affairs could act on the ARC's recommendation, John Doe I filed a Complaint and Motion for Temporary Restraining order in the Hamilton County Court of Common Pleas. (*Id.* at ¶ 76) Hamilton County Court of Common Pleas Judge Jerome Metz entered a temporary restraining order, prohibiting the University from continuing disciplinary actions or imposing any further disciplinary sanctions against John Doe I. (*Id.*)

The University then removed the case to the Southern District of Ohio. (*Id.*) John Doe I's case was assigned to Judge Susan Dlott at Case No. 1:14-cv-00404-SJD. The University filed a motion to dismiss, and John Doe I's case was ultimately dismissed for lack of ripeness because John Doe I failed to avail himself of the procedural protections afforded by the University. *See Peloe v. Univ. of Cincinnati,* No. 1:14-CV-404, 2015 WL 728309 (S.D. Ohio Feb. 19, 2015).

After John Doe I's complaint in Case No. 1:14-cv-00404-SJD was dismissed on February 19, 2015, the temporary restraining order was dissolved and the University was able to proceed with John Doe I's disciplinary process. *Id.* As permitted by the University's process, John Doe I appealed the ARC panels' findings. After careful review, the University reversed the ARC panels' findings on the basis of procedural errors and ordered that John Doe I be afforded new ARC panel hearings. (Doc. 1 at ¶ 77)

New ARC Hearings took place on May 18, 2015 and May 19, 2015. (*Id.* at ¶ 78) After the hearings, the ARC panel found John Doe I responsible for violating the University's Code of Conduct with regard to his actions toward Jane Roe II, but found John Doe I not responsible for his actions toward Jane Roe I. (*Id.* at ¶ 79) John Doe I

appealed the decision regarding his actions toward Jane Roe II. (*Id.* at ¶ 80) On June 11, 2015, the University Appeals Administrator denied John Doe I's appeal. (*Id.* at ¶ 81)

John Doe I is no longer a student at the University, but rather has transferred to another educational institution. (*Id.* at ¶5)

B. Facts and Procedure of John Doe II's Disciplinary Matter

On March 6, 2014, John Doe II, then a law student at the University, was accused by a female student of sexual assault. (*Id.* at ¶ 84) On March 17, 2014, Defendant Cummins informed John Doe II that a female student had made such allegations. (*Id.* at ¶ 91) Defendant Cummins also requested a meeting with John Doe II. (*Id.*) Defendant Cummins met with John Doe II on March 26, 2014, for the purpose of discussing the allegations. (*Id.* at ¶ 93)

After an investigation was performed, Defendant Cummins notified John Doe II on April 7, 2014, that an ARC Hearing would be scheduled.[1] (*Id.* at ¶ 95) While the ARC Hearing was originally scheduled for April 10, 2014, it was rescheduled for and ultimately held on April 22, 2014. (*Id.* at ¶ 97) After the hearing, the ARC Hearing Panel made a recommendation that John Doe II be found responsible for violating the University's Student Code of Conduct. (*Id.* at ¶ 105) That recommendation was adopted. (*Id.*) John Doe II appealed the finding. (*Id.* at ¶ 106) The University Appeals Administrator found procedural errors had occurred and ordered a new ARC Hearing take place. (*Id.*)

[1] John Doe II's allegations include that there was an issue related to jurisdiction over the disciplinary matter. (Doc. 1 at ¶ 87) However, John Doe II's discussion ignores that the University's Student Code of Conduct also states that it has jurisdiction over off-campus conduct "when such conduct has continuing effects that create a hostile environment in a university program or activity." *See* *https://www.uc.edu/content/dam/uc/conduct/docs/SCOC%20Feb%204-BOARD%20(4)%20(2)%203-31-15%20(2)%204.30%20216p.pdf*

On October 28, 2014, a second ARC Hearing was held. (*Id.* at ¶ 107) The second ARC Hearing panel also found John Doe II responsible for violating the University's Student Code of Conduct. (*Id.* at ¶ 108) John Doe II was placed on disciplinary probation and required to write a research paper as a result. (*Id.* at ¶ 109)

John Doe II is no longer a student at the University. (*Id.* at ¶ 6) He has graduated, passed the bar exam, and is an admitted attorney in the state of Ohio. (*Id.* at ¶¶ 6(a), 110)

On November 25, 2014, John Doe II brought suit in the Hamilton County Court of Common Pleas under case No. A1406907. On January 5, 2015, John Doe II filed his First Amended Complaint in that case, alleging the exact same causes of action that he alleges here. (Ex. A – attached) On February 24, 2015, Judge Patrick Dinkelacker dismissed Counts I, III, and V of John Doe II's Complaint *with prejudice*. (Ex. B - attached) After the University moved to dismiss Counts II and IV, John Doe II voluntarily dismissed those claims without responding to the University's motion.

C. Procedure In This Case

On October 19, 2015, Plaintiffs John Doe I and John Doe II filed suit against the University of Cincinnati, Daniel Cummins, Denine Rocco, and Debra Merchant, alleging violations of procedural due process, a violation of Title IX of the Education Amendments of 1972, and a claim for "Injunctive Relief." (Doc. 1 at ¶¶ 122-168) Count I is purportedly brought against all Defendants and seeks a declaratory judgment that all Defendants violated the due process provisions of the United States and Ohio Constitutions. (*Id.* at ¶¶ 122-135) Count II is a claim brought under 42 U.S.C. § 1983 against the Individual University Defendants in their individual capacities again for purported violations of procedural due process. (*Id.* at ¶¶ 136-142) Count III is a

declaratory judgment action brought under Title IX against the University. (*Id*. at ¶¶ 142-157) Count IV is another Title IX claim brought against the University. (*Id*. at ¶¶ 158-162) Count V is styled as a claim for "Injunctive Relief" against the Individual University Defendants in their official capacities and the University. (*Id*. at ¶¶ 163-68)

III. ARGUMENT

A. Eleventh Amendment Immunity Precludes Plaintiffs From Bringing Count I.

Count I of Plaintiffs' Complaint should be dismissed on Eleventh Amendment immunity grounds. Eleventh Amendment immunity "bars all suits, whether for injunctive, declaratory or monetary relief, against the state and its departments, by citizens of another state, foreigners or its own citizens." *Thiokol Corp. v. Dep't of Treasury,* 987 F.2d 376, 381 (6th Cir. 1993) (internal citations omitted); *see also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 146 (1993) (explaining that the Eleventh Amendment exception for prospective injunctive relief provided by *Ex parte Young,* 209 U.S. 123 (1908), applies only to state officials and not to States or their agencies).

The University of Cincinnati is a public university in the state of Ohio. *See* Ohio Rev. Code § 3361.01. The "University [of Cincinnati], as an arm of the State, is immune from suit under the Eleventh Amendment because it is well-settled that a plaintiff is precluded from directly suing a State in federal court . . . ." *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 571 (6th Cir. 2000).

Additionally, while *Ex Parte Young* permits prospective injunctive relief against state actors in their official capacities in certain circumstances, "a declaratory judgment against state officials declaring that they violated federal law in the past constitutes

retrospective relief, and is barred by the Eleventh Amendment." *Brown v. Strickland*, No. 2:10-CV-166, 2010 WL 2629878, at *4 (S.D. Ohio June 28, 2010) (citing *Green v. Mansour*, 474 U.S. 64, 67 (1985)). All of Plaintiffs' assertions of wrongful conduct in Count I are targeting past conduct. (Doc. 1 at PageID 57) ("The Defendants *have violated* the Plaintiffs' due process rights in the following manner") (emphasis added). Further, Plaintiffs' requested relief for Count I also targets past conduct. (*Id*. at PageID 64) ("On Counts I and III, Judgment in favor of the Plaintiffs declaring that the Defendant *have violated* . . .") (emphasis added). Furthermore, neither Plaintiff is still a student at the University of Cincinnati. Count I of Plaintiffs' Complaint is a request for retrospective relief, and, thus, barred by the Eleventh Amendment.

B. Counts I, III, and V of John Doe II's Complaint Are Barred on Res Judicata Grounds.

On November 25, 2014, John Doe II brought suit in the Hamilton County Court of Common Pleas under case No. A1406907. On January 5, 2015, John Doe II filed his First Amended Complaint in that case, alleging the exact same causes of action that he alleges here. (Ex. A – attached) On January 14, 2015, Defendants University of Cincinnati and Daniel Cummins – the only defendants in that action – moved to dismiss Counts I, III, and V of John Doe II's complaint because those claims requested declaratory and/or injunctive relief and such requests were moot due to the fact that John Doe II had already graduated from the University. (Ex. C – attached) On February 24, 2015, Judge Patrick Dinkelacker dismissed Counts I, III, and V of John Doe II's Complaint *with prejudice*, finding that these claims were moot because of the fact that John Doe II had already graduated from the University. (Ex. B - attached)

"Ohio law recognizes two forms of res judicata: claim preclusion and issue preclusion." *Osborn v. Knights of Columbus*, 401 F. Supp. 2d 830, 832 (N.D. Ohio 2005) (citing *Wead v. Lutz,* 161 Ohio App.3d 580, 587, 831 N.E.2d 482 (2005)). "Issue preclusion mandates that if a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of that issue in another suit involving a party, or one in privity with a party, to the first case." *Id.* (citing *Rizvi v. St. Elizabeth Hosp. Med. Cent.,* 146 Ohio App.3d 103, 108, 765 N.E.2d 395 (2001)). "Under Ohio law, issue preclusion is applicable if: 1) the fact or issue was actually litigated in the prior action; 2) the court actually determined the fact or issue in question; 3) the party against whom issue preclusion is asserted was a party, or in privity with a party, to the prior action." *Id.* at 832-33 (citing *Rizvi.* 146 Ohio App.3d at 108).

Issue preclusion operates to bar John Doe's Counts I, III, and V. The issue of John Doe II's standing to bring these claims was already litigated and Judge Dinkelacker of the Hamilton County Court of Common Pleas dismissed those claims as moot. John Doe II is precluded from relitigating Counts I, III, and V in this Court.

C. Counts I and II of Plaintiffs' Complaint Should Be Dismissed as Plaintiffs Have Failed to State Due Process Claims Upon Which Relief Can Be Granted.

1. Plaintiffs have failed to state a due process violation as they were given notice of the charges against them, notice of the evidence, and an opportunity to tell their 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.

"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." *Ashiegbu v. Williams*, 129 F.3d 1263, 1997 WL 720477, at *1 (6th Cir. Nov. 12, 1997) (citing *Goss v. Lopez,* 419 U.S. 565, 581 (1975); *Newsome v. Batavia Local School Dist.,* 842 F.2d 920, 927 (6th Cir 1988)). "Further, a student faced with expulsion has the right to a pre-expulsion hearing before an impartial trier of fact." *Id.* (citing *Newsome,* 842 F.2d at 927); *see also O'Neal v. Alamo Cmty. Coll. Dist.*, No. SA-08-CA-1031-XR, 2010 WL 376602, at *8 (W.D. Tex. Jan. 27, 2010) ("[F]or tax-supported university students facing expulsion, due process generally requires notice of the specific charges and grounds which, if proven, would justify expulsion, and a hearing.").

a. Plaintiffs' allegation that they shouldered the burden of proof in their disciplinary hearings is incorrect and otherwise insufficient to establish a due process violation.

Use by the University of the preponderance of the evidence (or "more likely than not") standard of proof is directed by the Department of Education and the Office of Civil Rights. *See* Russlyn Ali, Dear Colleague Letter, U.S. Dept. of Educ. at 11 (Apr. 4, 2011), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. The University's Student Code of Conduct ("SCOC") follows that directive – "The standard of proof used to determine whether a student has violated the SCOC shall be based on a preponderance of evidence." 40-5-05(A)(5)(c). A standard of proof is a measure or benchmark for determining whether or not a fact or issue exists. This standard does not place the burden of proof on either party. Rather, it is a measure or benchmark that the ARC panel uses to weigh the evidence that was presented and make a determination about whether or not a fact exists and, ultimately, an overall finding.

Plaintiffs' assertion that this means that a student must prove his or her innocence if accused of sexual assault or sexual harassment is incorrect both factually and legally. First, the University states on its website that respondents are presumed not to have violated the Code of Conduct unless found otherwise through the adjudicatory process: "The university respects the constitutional rights of respondents and does not presume that respondents have violated university policies unless there has been a finding through the adjudicatory process." https://www.uc.edu/titleix/accused-assistance.html (last accessed, November 28, 2015).

Second, this standard of proof does not require any accused student to prove his or her innocence. If a complaining student made accusations against another student, the ARC panel very well could simply choose to disbelieve the complaining student even if the accused student failed to offer any evidence or testimony. While an accused student may scoff at the likelihood of that outcome, the same could be said for most defendants in a civil lawsuit regarding similar accusations. Nonetheless, that does not change the fact that this standard of proof does not require an accused student to prove his or her innocence. *See Doe v. Univ. of Mass.-Amherst*, No. CV 14-30143-MGM, 2015 WL 4306521, at *7 (D. Mass. July 14, 2015) (discussing potential impact of OCR's directive to use a preponderance of the evidence standard).

While the University does not place the burden of proof on the accused, even if it did, that would not compel a finding that due process was violated. "Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Lavine v. Milne*, 424 U.S. 577, 585 (1976).

Some courts have distinguished *Lavine* on the basis that it involved an individual seeking conferral of a property right rather than resisting the deprivation of an existing property right, but no court has held that *Lavine* is inapplicable to a situation involving an existing property right. In fact, a number of courts have cited *Lavine* in the public employment context and held that placing the burden of proof on the employee does not violate due process. *See Soles v. City of Raleigh Civil Serv. Comm'n*, 480 S.E.2d 685, 689 (N.C. 1997) ("Clearly, if it is permissible to dismiss an employee without any evidentiary hearing whatsoever, it is similarly permissible to discharge an employee after an evidentiary hearing in which the burden of proof is placed on the employee.");

Benavidez v. City of Albuquerque, 101 F.3d 620, 626-28 (10th Cir. 1996) (examining the burden of proof issue in the context of the *Matthews* factors and determining that because the employee was given pre-termination protections, placing the burden of proof on the employee in a post-termination hearing did not violate due process); *Saavedra v. City of Albuquerque*, 917 F. Supp. 760, 765 (D.N.M. 1994) *aff'd*, 73 F.3d 1525 (10th Cir. 1996) ("Upon whom the City places the burden of proof in a civil matter is a decision the City is entitled to make uninhibited by due process concerns.").

Also, courts that addressed this issue pre-*Lavine* held that placing the burden of proof on a public employee in a hearing does not violate due process. *See Chung v. Park*, 514 F.2d 382, 387 (3d Cir. 1975) ("[A] a post-decision hearing in which a professor has the burden of proof is adequate to satisfy due process.") (citing *Perry v. Sindermann*, 408 U.S. 593, 603 (1972)); *Keddie v. Penn. State Univ.*, 412 F. Supp. 1264, 1271 (M.D. Penn. 1976) (same).

Again, while the University does not place the burden of proof on the accused, even if it did, that would not constitute a due process violation.

b. Plaintiffs have no constitutional right to be actively represented by counsel in a student discipline proceeding.

"Ordinarily, colleges and universities need not allow active representation by legal counsel or some other sort of campus advocate." *Flaim*, 418 F.3d at 636. "[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.'" *Id.* at 640 (citing *Jaksa v. Regents of Univ. of Mich.,* 597 F. Supp. 1245, 1252 (D. Mich. 1984) *aff'd*, 787 F.2d 590 (6th Cir. 1986)); *see also Carter v. Citadel Bd. of Visitors*, 835 F. Supp. 2d 100, 103 (D.S.C. 2011) ("A student subject to dismissal on disciplinary grounds is not per se

entitled to the presence of an attorney.") (citing *Esfeller v. O'Keefe,* 391 Fed.Appx. 337, 342 (5th Cir. 2010)).

Here, an attorney does not present any party's case and the rules of evidence or procedure involved with the SCOC process are not complex. The University does not prohibit a student at a disciplinary hearing from having his or her attorney present at the disciplinary hearing as an advisor. The fact that the University does not allow the attorney to actively participate (*i.e.*, argue to the ARC panel, cross-examine witnesses, etc.) does not constitute a violation of due process.

c. It is not a due process violation to prohibit students from directly cross-examining each other, witnesses, or University employees.

The Sixth Circuit has 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." *C.Y. ex rel. Antone v. Lakeview Pub. Sch.*, 557 F. App'x 426, 431 (6th Cir. 2014); *see also 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."); *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.").

The complainant and the respondent in University disciplinary hearings are not permitted to directly cross-examine one another. However, these parties may

cross-examine one another by submitting questions to the ARC panel and requesting that those questions be asked of the opposing party. The circumscribed form of cross-examination allowed by the University is consistent with due process. *See 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 v. Batavia Local Sch. Dist.,* 842 F.2d 920, 923–24 (6th Cir. 1988); *B.S. v. Bd. of Schs. Trs.,* 255 F.Supp.2d 891, 900 (N.D. Ind. 2003)).

d. Students involved in university disciplinary proceedings are not entitled to discovery similar to a civil proceeding nor are they entitled to protections similar to a criminal law proceeding.

Plaintiffs make various discovery-related complaints, asserting that they were not given certain materials or that they could not adequately prepare for the hearing. "A student is not entitled to 'discovery' as if he were a litigant in a civil or criminal proceeding." *Johnson v. Temple Univ.--of Commonwealth Sys. of Higher Educ.*, No. CIV.A. 12-515, 2013 WL 5298484, at *12 (E.D. Pa. Sept. 19, 2013). "The requirement of notice 'does not necessarily require students be given a list of witnesses and exhibits prior to the hearing, provided the students are allowed to attend the hearing itself.'" *Id.* (quoting *Gomes v. Univ. of Maine Sys.,* 365 F. Supp. 2d 6, 23 (D.Me. 2005)).

Similarly, many of Plaintiffs' allegations relate to assertions that the University failed to offer procedural protections akin to those seen in a criminal proceeding. Universities are not required to afford such protections. *See, e.g., Tanyi v. Appalachian State Univ.*, No. 5:14-CV-170RLV, 2015 WL 4478853, at *5 (W.D.N.C. July 22, 2015)

("In essence, Tanyi wishes to apply the standards of *Brady* disclosure, developed for federal criminal proceedings, to a university student conduct hearing. Such a standard would be wholly without precedent, and this Court declines to adopt it."); *Sterrett v. Cowan*, 85 F. Supp. 3d 916, 926 (E.D. Mich. 2015) ("[A] school disciplinary proceeding is not a criminal trial, and a student is not entitled to all of the procedural safeguards afforded criminal defendants."); *Wayne v. Shadowen*, 15 F. App'x 271, 288-89 (6th Cir. 2001) (school principal "conducted all the predicate investigation which constitutional due process required" when he interviewed the alleged victim, the alleged perpetrator, the alleged perpetrator's accomplice, and other students reported to have knowledge of the incident). To hold otherwise "might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness" – something the Supreme Court cautioned against forty years ago. *Goss*, 419 U.S. at 583.

Plaintiffs' other various arguments regarding due process also lack merit. *See E.K.*, 557 F. Supp. 2d at 276 (no due process violation in a student's expulsion hearing where the school allowed relevant hearsay evidence at the hearing) (citation omitted); *McDaniels v. Flick*, 59 F.3d 446, 457 (3d Cir. 1995) ("[N]otice of the charges and evidence against an employee need not be in great detail as long as it allows the employee the opportunity to determine what facts, if any, within his knowledge might be presented in mitigation of or in denial of the charges.") (citations and internal quotation omitted).

e. Plaintiffs' allegations related to the timing of the disciplinary process are insufficient to establish a due process violation.

Any allegation Plaintiffs may have regarding a lack of time to prepare for their ARC Hearings would be disingenuous as they were on notice of allegations made against them with plenty of time to prepare for their ARC Hearings. *See Tigrett v. Rector & Visitors of Univ. of Virginia*, 137 F. Supp. 2d 670, 678 (W.D. Va. 2001) *aff'd*, 290 F.3d 620 (4th Cir. 2002) ("While the present case is admittedly one involving a more serious penalty, the Court is of the belief that 48 hours provided Plaintiffs with sufficient notice . . . ."); *Nash v. Auburn Univ.*, 812 F.2d 655, 661 (11th Cir. 1987) ("We agree with the district court that by appellants' express agreement to the timing of the notice, as proposed by the board, appellants have waived objections in this forum to any constitutional infirmity in the timing.").

Furthermore, any lack of actual time to prepare for the ARC hearing is irrelevant as Plaintiffs were both given extra time to prepare for their hearings when continuances were requested. *See Osei v. Temple Univ. of Commonwealth Sys. of Higher Educ.*, No. CIV.A. 10-2042, 2011 WL 4549609, at *10 (E.D. Pa. Sept. 30, 2011) (rejecting plaintiff student's claim that he did not have adequate time to prepare for his hearing where "there is no allegation that he ever requested a continuance or a delay to have more time to prepare for the hearing, or that Temple would not have granted a delay, had they known Plaintiff did not feel adequately prepared").

f. Plaintiffs' allegations of bias are insufficient to support a due process violation.

"In the university setting, a disciplinary committee is entitled to a presumption of honesty and integrity, absent a showing of actual bias." *McMillan v. Hunt,* No. 91–

3843, 1992 WL 168827, at *2 (6th Cir. July 21, 1992); *see also Atria v. Vanderbilt Univ.*, 142 F. App'x 246, 256 (6th Cir. 2005) (quoting *McMillan*); *Richards v. McDavis*, No. 2:12-CV-846, 2013 WL 5297244, at *12 (S.D. Ohio Sept. 19, 2013) ("[M]ere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members.") (citation omitted).

Plaintiffs also note that the University offers victims of sexual assault or misconduct certain accommodations or interim measures. (Doc. 1 at ¶¶ 23-24, 30) This is not evidence of any bias. Rather, federal regulations *require* the University to offer such accommodations or interim measures to victims of sexual assault. *See* 34 C.F.R. § 668.46(b)(11)(v) ("[T]he institution will provide written notification to victims about options for, available assistance in, and how to request changes to academic, living, transportation, and working situations or protective measures. The institution must make such accommodations or provide such protective measures if the victim requests them and if they are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement.").

Additionally, Plaintiffs' pervasive use of the phrase "upon information and belief" is telling in terms of the insufficiency of their allegations. *See Doe v. Columbia Univ.*, 2015 WL 1840402, at *11 ("That Plaintiff couches most of them as made '[u]pon information and belief' merely underscores the glaring absence of particularized evidence supporting an inference that gender bias was causally linked to a flawed outcome.").

Plaintiffs also rely on certain "statistical evidence" to support an assertion that the University is biased and that it always finds accused students responsible for violations of the Student Code of Conduct. (Doc. 1 at PageID 23-25, 52-56) The

purported "statistical evidence" Plaintiffs rely upon shows nothing. *See Hall v. Kane*, No. C05-4426 MMC (PR), 2008 WL 5391196, at *4 (N.D. Cal. Dec. 23, 2008) ("[S]tatistical data as to the rate of denial in other prisoners' cases will not suffice to establish that the Board automatically denies parole, or that the Board otherwise improperly made its determination in petitioner's case, as parole may have been properly denied after the Board's individualized assessment of each of those cases."); *Cobb v. Supreme Judicial Court of Massachusetts*, 334 F. Supp. 2d 50, 59 (D. Mass. 2004) ("[T]he mere existence of a very high rate of BBO proceedings resulting in sanction is, alone, not enough to prove that state court review of BBO decisions generally denies attorneys their federal constitutional right to due process."); *Mirabal v. Ornoski*, No. C-06-02257 MMC, 2007 WL 1232051, at *8 (N.D. Cal. Apr. 26, 2007) ("A showing that a relatively small number of such prisoners were granted parole does not establish that the Board was biased, as opposed to establishing that those prisoners did not merit parole.").

The fallacy behind Plaintiffs' theory is illuminated when it is applied to another scenario. According to the U.S. Department of Justice's statistics for fiscal year 2010, there was a 93% conviction rate[2] for criminal defendants in Federal Courts. *See United States Attorneys' Annual Statistical Report*, http://www.justice.gov/sites/default/files/usao/legacy/2011/09/01/10statrpt.pdf. According to Plaintiffs' theory, there must therefore be an inherent bias against criminal defendants that permeates the Federal criminal justice system. That, of course, is not true because each case comes before the court (or a Hearing Panel) with its own set of

[2] This, of course, includes a high percentage of defendants who plead guilty rather than take their case to trial. However, the "statistical evidence" Plaintiffs offer also includes a number of individuals who accepted responsibility for the allegations rather than proceed to a hearing.

facts and circumstances. To try to make such an inference of bias based upon these statistics would necessarily require the merits of each of those cases to be litigated within this case.

This "statistical evidence" establishes no inference of bias, much less evidence to support any allegation of *actual* bias. *See Marshall v. Ohio Univ.*, No. 2:15-CV-775, 2015 WL 7254213, at *8 (S.D. Ohio Nov. 17, 2015) ("A mere pattern and practice of treating men and women differently does not reflect the reasons for differential treatment.") (citing *Hopkins v. Canton City Bd. of Educ.*, 477 F. App'x 349 (6th Cir. 2012) (explaining that independent circumstantial evidence of discrimination is required in addition to statistical evidence to establish pretext)); *Cosio v. Kane*, No. C 05-1966 CRB PR, 2007 WL 518599, at *6 (N.D. Cal. Feb. 12, 2007) *aff'd*, 381 F. App'x 714 (9th Cir. 2010) (finding that even if plaintiff's purported statistical evidence could show some sort of systematic bias, there was no evidence that any bias affected the parole board's decision where the "parole hearing demonstrates that he received an individualized assessment of his potential parole suitability").

Plaintiffs have not and cannot offer any supported allegation of bias.

g. Defendants provided Plaintiffs with constitutional due process.

The pertinent facts establish that Defendants provided Plaintiffs with constitutional due process. John Doe I was made aware of the allegations against him on March 12, 2014. (Doc. 1 at ¶ 61(a)) John Doe I met with Defendant Cummins on March 28, 2014, for a Procedural Review where John Doe I was permitted to discuss and ask questions about the alleged violation of the Student Code of Conduct. (*Id.* at ¶ 61(b)) On May 2, 2014, two ARC Hearings were conducted regarding John Doe I's

alleged sexual assault of Jane Roe I and Jane Roe II. (*Id*. at ¶ 74) John Doe I chose to participate in his hearing regarding Jane Roe I, but refused to participate in his hearing regarding Jane Roe II. (*Id*. at ¶ 75) John Doe I was initially found responsible for violating the Student Code of Conduct in both cases.

As was his right under the University's Student Code of Conduct, John Doe I appealed both findings. (*Id*. at ¶ 77) The University found procedural errors and ordered that John Doe I be afforded two new ARC Hearings. (*Id*.) Those ARC Hearings took placed on May 18 and May 19, 2015. (*Id*. at ¶ 78) After those hearings, the ARC Hearing panel found that John Doe I violated the Student Code of Conduct regarding his actions toward Jane Roe II, but found that he did not violate the Student Code of Conduct regarding his actions toward Jane Roe I. ((*Id*. at ¶ 79) John Doe I appealed the finding regarding Jane Roe II. (*Id*. at ¶ 80) The ARC Hearing panel's finding was then upheld. (*Id*. at ¶ 81)

John Doe II was notified of the allegations against him on March 17, 2014. (*Id*. at ¶ 91) John Doe II had his Procedural Hearing with Defendant Cummins on March 26, 2014. (*Id*. at ¶ 93) John Doe II was permitted an ARC Hearing and such hearing took place on April 22, 2014. (*Id*. at ¶ 97) After the hearing, the ARC Hearing Panel made a recommendation that John Doe II be found responsible for violating the University's Student Code of Conduct. (*Id*. at ¶ 105) John Doe II appealed and the University Appeals Administrator reversed the finding due to procedural errors. (*Id*. at ¶ 106) On October 28, 2014, a second ARC Hearing was held. (*Id*. at ¶ 107) The second ARC Hearing panel also found John Doe II responsible for violating the University's Student Code of Conduct. (*Id*. at ¶ 108) John Doe II was placed on disciplinary probation and required to write a research paper as a result. (*Id*. at ¶ 109)

Defendants provided Plaintiffs with sufficient and constitutional due process. *See Flaim,* 418 F.3d at 637 (finding no violation of student's procedural due process rights after medical student was expelled following conviction for felony drug crime where student received notice of accusations against him, was afforded a hearing in which he was not permitted to cross examine the arresting officer but was able to present his version of events after hearing officer's testimony, and where hearing committee did not produce written findings; procedures were "fundamentally fair" even where they "were far from ideal and certainly could have been better"); *Brown v. Univ. of Kan.*, 16 F. Supp. 3d 1275, 1290 (D. Kan. 2014) *aff'd*, 599 F. App'x 833 (10th Cir. 2015) (holding that the 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"); *Esfeller v. O'Keefe*, 391 F. App'x 337, 342 (5th Cir. 2010) ("The student must be given notice of the charges against him, an explanation of what evidence exists against him, and 'an opportunity to present his side of the story.'") (quoting *Goss*, 419 U.S. at 581); *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.").

Plaintiffs also complain that the University does not allow them to record the disciplinary hearing. "While due process may not impose upon the university the requirement to produce a record in all cases, fundamental fairness counsels that if the university will not provide some sort of record, it ought to permit the accused to record the proceedings if desired." *Flaim*, 418 F.3d at 636; *see also Jaksa*, 597 F. Supp. at 1252

(no due process violation where the only recording of the hearing were handwritten notes taken by a student member of the academic judiciary). The University does not permit students to record the hearings, but it does record the hearings and makes the audio recording available to the students involved in the disciplinary hearing.[3] (Doc. 1 at ¶70) The University's process comports with due process and "fundamental fairness."

2. The claims alleged against the Individual University Defendants in their individual capacities are insufficient to state a claim under § 1983.

To support a claim under 42 U.S.C. § 1983, "[P]laintiff must set forth facts that, when construed favorably, establish (1) the deprivation of a right secured by the Constitution or laws of the United States (2) caused by a person acting under color of state law." *Heyerman v. Cnty. of Calhoun,* 680 F.3d 642, 647 (6th Cir. 2012). "Persons sued in their individual capacities under § 1983 can be held liable only on their own unconstitutional behavior." *Id.; see also Gibson v. Matthews,* 926 F.2d 532, 535 (6th Cir. 1991) (noting that personal liability "must be based on the actions of that defendant in the situation that the defendant faced, and not based on any problems caused by the errors of others, either defendants or non-defendants").

Here, the allegations levied against each of the Individual University Defendants in their individual capacities fail to state a claim upon which relief can be granted. The only mention of Defendant Debra Merchant in the entire Complaint is to assert that she

[3] Plaintiffs' claim that "[t]he prohibition of recording of the ARC Hearing is contrary to Revised Code 2933.52" is misguided. First, Plaintiffs misquote the actual statute. Second, Ohio Revised Code § 2933.52 is a criminal statute which provides that "[a] person . . . who intercepts a wire, oral, or electronic communication, if the person is a party to the communication or if one of the parties to the communication has given the person prior consent to the interception, and if the communication is not intercepted for the purpose of committing a criminal offense or tortious act in violation of the laws or Constitution of the United States or this state or for the purpose of committing any other injurious act" is not in violation of the law. So, if Plaintiffs secretly recorded the ARC Hearings, they would not be in violation of Ohio Revised Code § 2933.52. But that statute does not give them blanket permission to record anything they please in Ohio.

"has responsibility for administering and operating the UC Code of Conduct and Judicial System." (Doc. 1 at ¶ 9) There are no allegations of wrongdoing made against her. She should be dismissed from this litigation. *See Zdebski v. Schmucker*, 972 F. Supp. 2d 972, 986 (E.D. Mich. 2013) ("Because Plaintiff has failed to allege that the individual defendants were personally involved in the alleged constitutional deprivations, the Court dismisses Plaintiff's claims against Schmucker and Etue in their individual capacities.").

The only allegations made against Defendant Rocco relate to Plaintiffs' appeals of their disciplinary matters. (Doc. 1 at ¶¶ 82, 109) The Sixth Circuit has held that there is no due process right to appeal school discipline. *See C.Y. ex rel. Antone v. Lakeview Pub. Sch.*, 557 F. App'x 426, 434 (6th Cir. 2014) (finding "no reason to depart from [the] precedent" establishing that due process does not require affording a student an appeal in a disciplinary matter); *see also Flaim*, 418 F.3d at 642 (citations omitted). Because due process does not require providing Plaintiffs with the ability to appeal their disciplinary matters, the claims against Defendant Rocco fail to state a claim upon which relief can be granted.

The claims made against Defendant Cummins are equally insufficient. First, Plaintiffs claim that in a 2011 "Resource Guide for Student Survivors of Sexual Assault," Defendant Cummins is "mentioned prominently in the document," and that document refers to a person who made an accusation of sexual assault as a "survivor." (Doc. 1 at ¶ 34(b)) Such allegations are insufficient to show bias. *See Doe v. Columbia Univ.*, 2015 WL 1840402, at *12 (plaintiff's "*ad feminem* allegation" that a university official was "motivated by an anti-male gender bias" because "she had worked for a women's resource center in the past" was "plainly insufficient to show . . . gender bias").

Second, Plaintiffs alleged that Defendant Cummins assists students "who claim to be victims" in obtaining accommodations and that such assistance shows that he is biased. (*Id*. at ¶¶ 35, 62, 90, 115) As discussed above, federal regulations *require* the University to offer such accommodations or interim measures to victims of sexual assault. *See* 34 C.F.R. § 668.46(b)(11)(v). Also, "[t]he mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a later adversary hearing." *Withrow v. Larkin*, 421 U.S. 35, 55 (1975). It is "very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure . . . does not violate due process of law." *Id*. at 56.

The allegations against the Individual University Defendants in their individual capacities are insufficient to state a claim upon which relief can be granted.

3. Even assuming *arguendo* that Plaintiffs have sufficiently pled procedural due process claims, those claims should be dismissed on qualified immunity grounds.

Even if this Court were to find that Plaintiffs have pled procedural due process claims upon which relief can be granted, those claims should still be dismissed as the Individual University Defendants are entitled to qualified immunity.

"[Q]ualified immunity is 'an immunity from suit rather than a mere defense to liability[, and] it is effectively lost if a case is erroneously permitted to go to trial.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985)). The two-step inquiry for the Court when analyzing the assertion of qualified immunity is (1) whether a constitutional right would have been violated on the facts alleged and (2) whether the right was clearly established. *Id*. at 232.

In order to be "clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that his or her conduct violates that right." *Wegener v. City of Covington,* 933 F.2d 390, 392 (6th Cir. 1991). "To be clearly established, a right must have been decided by the United States Supreme Court, the Court of Appeals, or the highest court of the state in which the alleged violation occurred." *Neague v. Cynkar,* 258 F.3d 504, 507 (6th Cir. 2001) (citing *Wegener*, 933 F.2d at 32). "Once the qualified immunity defense is raised, the burden is on the plaintiff to demonstrate that the officials are not entitled to qualified immunity." *Silberstein v. City of Dayton,* 440 F.3d 306, 311 (6th Cir. 2006).

The Sixth Circuit has stated: "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." *Ashiegbu*, 1997 WL 720477, at *1 (citing *Goss,* 419 U.S. at 581; *Newsome,* 842 F.2d at 927). "Further, a student faced with expulsion has the right to a pre-expulsion hearing before an impartial trier of fact." *Id.* (citing *Newsome,* 842 F.2d at 927).

These due process requirements were provided to Plaintiffs. Even if the Court finds that Plaintiff has identified due process protections that were not afforded to him, those due process protections have not been clearly established.

This exact issue was addressed recently by Judge George C. Smith in the Eastern Division of this District. In *Marshall v. Ohio University*, Judge Smith held that a university student's right to procedural due process protections in disciplinary matters is not clearly established. No. 2:15-cv-775, 2015 WL 725213, at **12-13 (S.D. Ohio Nov. 17, 2015). The Court stated:

> Although some courts have concluded that university students have such rights, the existence and contours of those rights appear to remain an issue of judicial debate. "If judges thus disagree on the constitutional question, it is unfair to subject [government officials] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999).

Id. at * 13.

Because this issue is not clearly established, the Individual University Defendants are entitled to qualified immunity.

D. Counts III and IV of Plaintiffs' Complaint Should Be Dismissed As Plaintiffs Have Not Stated Title IX Claims Upon Which Relief Can Be Granted.

Title IX prohibits the University from discriminating "on the basis of sex." 20 U.S.C. § 1681(a). "Under the 'erroneous outcome' or 'selective enforcement' standards, a plaintiff must demonstrate that the conduct of the university in question was motivated by a sexual bias." *Doe v. Univ. of the South*, 687 F. Supp. 2d 744, 756 (E.D. Tenn. 2009) (citing *Mallory v. Ohio Univ.*, 76 F. App'x. 634, 638 (6th Cir. 2003)). Mere "[a]llegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss." *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994).

That is what Plaintiffs have done here. Plaintiffs describe what they believe to be a "flawed proceeding" and ask the Court to accept that it must have been caused by gender animus. Plaintiffs have offered nothing which establishes a causal connection between an allegedly "flawed proceeding" and gender animus.

As the Second Circuit stated in *Yusuf* — the seminal case regarding this cause of action — "[a]llegations of a causal connection in the case of university disciplinary cases

can be of the kind that are found in the familiar setting of Title VII cases." 35 F.3d at 715. "Such allegations might include, *inter alia,* statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." *Id.* Plaintiffs' Complaint includes no comments from any University official relating to a gender bias. Plaintiffs' Complaint includes no viable allegation that the University has engaged in a pattern of decision-making that could tend to show the influence of gender on his disciplinary proceeding. *See Routh v. Univ. of Rochester*, 981 F. Supp. 2d 184, 211-12 (W.D.N.Y. 2013) (dismissing the complaint, in part, because there were no "facts suggesting that the University ever received a complaint against a female student comparable to that filed against [the plaintiff], and treated the female student more favorably").

The fact that Plaintiffs were male students accused of sexual misconduct is insufficient to support an assertion that their gender played a role in finding them responsible for that sexual misconduct. *See King v. DePauw Univ.*, No. 2:14-CV-70-WTL-DKL, 2014 WL 4197507, at *10 (S.D. Ind. Aug. 22, 2014) (emphasis added). ("But DePauw is not responsible for the gender makeup of those who are accused *by other students* of sexual misconduct, and the fact that a vast majority of those accused were found liable might suggest a bias against accused students, but says nothing about gender.") The University has no control over the gender of a student who accuses another student of sexual misconduct.

Plaintiffs dedicate a large portion of their Complaint to the argument that all universities, and the University of Cincinnati in particular, have been induced by the Office of Civil Rights' April 4, 2011 Dear Colleague Letter to discriminate against men.

(Doc. 1 at PageID 4-9) However, beyond that general allegation, Plaintiffs offer no actual support for that assertion. Such a conclusory allegation is insufficient to support a Title IX violation. *See Marshall*, 2015 WL 7254213, at * 8 (finding insufficient at the motion to dismiss stage plaintiff's assertion "that OU has succumbed to pressure from the Department of Education to 'crackdown' on perpetrators of sexual assault and sexual misconduct on university campuses"); *Sterrett v. Cowan*, No. 14-CV-11619, 2015 WL 470601, at *15 (E.D. Mich. Feb. 4, 2015) (plaintiff's "conclusory allegation that Defendants were induced by the 'Dear Colleague' letter to discriminate against him because of his gender fails to state a claim under Title IX"); *Doe v. Columbia Univ.*, No. 14-CV-3573 JMF, 2015 WL 1840402, at *12 n.7 (S.D.N.Y. Apr. 21, 2015) (rejecting plaintiff's allegation that the defendant university was "under fire" with the Department of Education for its handling of sexual assault complaints as support for an allegation of gender bias).

Further, as discussed above, "a school's disciplinary body 'is entitled to a presumption of honesty and integrity absent a showing of actual bias such as animosity, prejudice, or a personal or financial stake in the outcome.'" *Bleiler v. Coll. of Holy Cross*, No. 11-cv-11541-DJC, 2013 WL 4714340, at *13 (D. Mass. Aug. 26, 2013) (quoting *Ikpeozu v. Univ. of Nebraska,* 775 F.2d 250, 254 (8th Cir. 1985)). "That is, 'alleged prejudice of university hearing bodies must be based upon more than mere speculation and tenuous inferences.'" *Id.* (quoting *Buckholz v. Mass. Inst. Of Tech.,* No. 85–2720, 1993 WL 818618, at *3 (Mass. Super. Ct. July 6, 1993)). Plaintiffs have offered nothing more than speculation and tenuous inferences to support their bias allegations.

Plaintiffs' allegations are akin to those seen in the Eastern District of Tennessee's decision in *Doe v. University of the South*, 687 F. Supp. 2d 744 (E.D. Tenn. 2009). In

University of the South, the plaintiff was accused by a female student of sexual assault. *Id*. at 751. Before the disciplinary hearing, a staff member met with the plaintiff and advised him that the university had gathered the relevant information and would provide the witnesses; the plaintiff would only be able to bring character witnesses to the hearing; and the plaintiff needed to provide a written statement of his defense. *Id*. at 753-54.

At the hearing, the plaintiff was only allowed to be present when he was testifying or being questioned and none of the disciplinary panel members had relevant experience in adjudicating alleged sexual assaults. *Id*. at 754. After the hearing, the plaintiff was found responsible for sexual assault and his appeals were eventually denied. *Id*. at 751, 755.

Thereafter, the plaintiff filed suit alleging, *inter alia*, a claim under Title IX against the defendant university. *Id*. at 755. The university filed a motion to dismiss, asserting that the plaintiff failed to state a claim under Title IX. *Id*. At the outset of its discussion, the court noted that it was not tasked with making "an independent determination as to what happened between the Plaintiff John Doe and the Complainant on August 30, 2008." *Id*. Ultimately, after reviewing the plaintiff's allegations, the court dismissed the plaintiff's Title IX claim because he failed to allege facts showing that the university's actions "were motivated by sexual bias or that the University's disciplinary hearing process constitutes a 'pattern of decision-making' whereby the University's disciplinary procedures governing sexual assault claims is 'discriminatorily applied or motivated by a chauvinistic view of the sexes.'" *Id*. at 756 (quoting *Mallory*, 76 F. App'x at 638).

Similar to *University of the South*, the mere fact that Plaintiffs are males who allege that they were found responsible for sexual assault in a flawed proceeding is insufficient under Title IX. As the Second Circuit stated in *Yusuf* , "[a]llegations of a causal connection in the case of university disciplinary cases can be of the kind that are found in the familiar setting of Title VII cases." 35 F.3d at 715. If a plaintiff alleging gender discrimination under Title VII alleged that he was terminated from his employment for a flawed reason — and nothing else — those allegations would be insufficient to plead a cause of action under Title VII. At a minimum, a Title VII plaintiff is required to plead some direct evidence of discrimination (*i.e.*, gender-biased comments or animus) or some circumstantial evidence of discrimination (*i.e.*, replaced by a person of a different gender or a similarly-situated person of a different gender was treated better). *See Sahm v. Miami Univ.*, No. 1:14-cv-698, 2015 WL 2406065, at* 4 (S.D. Ohio May 20, 2015) (dismissing plaintiff's complaint because it was void of allegations of causation sufficient to state a Title IX claim and noting that there were no allegations similar to those sufficient to state a Title VII claim); *Mann v. Navicor Grp., LLC*, 488 F. App'x 994, 998 (6th Cir. 2012) ("Absent direct evidence, [the plaintiff] must demonstrate a prima facie case of gender discrimination through circumstantial evidence.").

Plaintiffs have offered no allegations of direct or circumstantial evidence indicating that their gender played any role in their disciplinary matters. Without evidence of gender bias, Title IX cannot be the appropriate vehicle for Plaintiffs to challenge the outcome of their disciplinary hearings. *See Hall v. Lee Coll., Inc.*, 932 F. Supp. 1027, 1033 (E.D. Tenn. 1996) (dismissing the plaintiff's Title IX claim against the

defendant college where the plaintiff offered no direct or circumstantial evidence that her suspension was as a result of her gender).

Further, Plaintiffs cannot rely on improper "me too" evidence to support their Title IX claim. Regarding the value of "me too" evidence, this Court stated:

> Evidence from a plaintiff's co-workers that they were also discriminated against is improper "because it is at best only slightly relevant and is always highly prejudicial to the defendant." *Jones v. St. Jude Med. S.C., Inc.,* 823 F. Supp. 2d 699, 734 (S.D. Ohio 2011). As stated in *Jones,* "'me too' evidence is typically inadmissible under Rule 403 of the Federal Rules of Evidence because it prejudices the defendant by embellishing plaintiff's own evidence of alleged discrimination and typically confusing the issue of whether the plaintiff, and not others, was discriminated against." *Id.* Although there is no *per se* rule excluding "me too" or "other acts" testimony from non-parties, whether such evidence is relevant is a case-by-case determination and "depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case." *Sprint/United Mgmt. Co. v. Mendelsohn,* 552 U.S. 379, 380–81, 388, n. 9 (2008).

Brabson v. Ohio, No. 1:11-CV-399, 2012 WL 5471832, at *5 (S.D. Ohio Nov. 9, 2012).

These same statements of law should be applied to Plaintiffs' discussion of other University disciplinary matters. Those disciplinary matters do not involve the same facts, the same circumstances, or the same parties. If such evidence is accepted as relevant, the individual facts of each of those cases would necessarily need to be re-litigated within this case. Such prejudice and waste of judicial resources should not be permitted.

E. Injunctive Relief is Not a Stand-Alone Claim.

Count V of Plaintiffs' Complaint should be dismissed because injunctive relief is a remedy not a separate cause of action. *See Goryoka v. Quicken Loan, Inc.*, 519 F. App'x 926, 929 (6th Cir. 2013).

IV. CONCLUSION

For each and all of the foregoing reasons, Defendants request that this Court dismiss all claims alleged against them pursuant to Federal Rule of Civil Procedure 12.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

By: /s/ Doreen Canton
Doreen Canton (0040394)
Evan T. Priestle (0089889)
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202
Tel: (513) 381-2838
Fax: (513) 381-0205
canton@taftlaw.com
epriestle@taftlaw.com

Attorneys for Defendants University of Cincinnati, Daniel Cummins, Denine Rocco, and Debra Merchant

CERTIFICATE OF SERVICE

I certify that on December 21, 2015, I filed Defendants' Motion to Dismiss Plaintiffs' Complaint with the Clerk of Court using the CM/ECF system, which will send notification of the filing to all registered parties.

/s/ Doreen Canton