IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN DOE I, ET AL. Plaintiff, v. DANIEL CUMMINS, et al. Defendants	Case No. 1:15-cv-681 Judge: Beckwith OPPOSITION TO MOTION TO DISMISS

Plaintiffs John Doe I and John Doe II respectfully submits this Memorandum in Opposition to the Motion to Dismiss by Defendants University of Cincinnati ("UC"), Daniel Cummins ("Cummins"), Denine Rocco ("Rocco"), and Debra Merchant ("Merchant"). (Cummins, Rocco and Merchant are referred to collectively as the "Individual Defendants.")

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INTRODUCTION

This case arises amidst a growing national controversy about the responses of colleges and universities to sexual assaults on campuses. After years of criticism for being too lax on campus sexual assault, the Federal Government, through the Department of Education, has been using Title IX to pressure colleges and universities to aggressively pursue investigations of sexual assaults on campuses. This case is a result of Title IX's implementing regulations and guidance. These regulations and guidance require that schools "adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited." 34 C.F.R. § 106.8(b).

Looking at the UC scheme as a whole, the Complaint describes a process that violates the due process guarantees of the Constitution because it is biased against accused students: "it is nearly impossible for a student to be found not responsible." (Complaint ¶36.) In every recent case where a UC student was accused of sexual conduct without consent, the student has faced discipline. (Complaint ¶36(b).) This is not surprising. The context for this is the pressure from the U.S. Department of Education. The Defendants acknowledge that their actions were designed, in part, to comply with directives from the Department of Education, Office of Civil Rights. *See* Letter from Office for Civil Rights, U.S. Dep't of Educ, (Apr. 4, 2011) (the "Dear Colleague Letter").[1] *See also* Def. Memo. at 10 (noting that UC is complying with "Dear Colleague Letter"). Members of the faculty of the University of Pennsylvania Law School summed up the problem succinctly:

> we believe that OCR's approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness. We do not believe that providing justice for victims of sexual assault requires subordinating so many protections long deemed necessary to protect from injustice those accused of serious offenses.

[1]Available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. The Dear Colleague

Open Letter From Members Of The Penn Law School Faculty: Sexual Assault Complaints: Protecting Complainants And The Accused Students At Universities, Feb. 8, 2015.[2] The UC scheme, if allowed to stand, paves the way for future injustices by rejecting the proposition that justice ought to be rendered under the rules of law and would compromise and demean the concept of fundamental fairness

FACTS

John Doe I and John Doe II brought this action for a declaratory judgment, violation of 42 U.S.C. §1983, violation of Title IX, and injunctive relief. This case arises out of the decision of UC to impose disciplinary sanctions against the Plaintiffs in violation of the their Constitutional and federal statutory rights.

A. The UC Disciplinary Process

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

In general, when a complaint of sexual misconduct is made, a Deputy Title IX Coordinator or designee will initiate a meeting with the accused student. A Deputy Title IX Coordinator or designee will begin interviewing witnesses, as appropriate, and review relevant evidence. The complainant and the accused student are supposed to have an equal opportunity to provide

[2] (available at: http://media.philly.com/documents/OpenLetter.pdf)

documents and witnesses during the investigation and adjudication of the complaint. At the conclusion of the investigation, the Deputy Title IX Coordinator prepares an investigatory report which is provided to an Administrative Review Committee ("ARC"). The ARC holds an administrative hearing applying the preponderance of the evidence standard.

In practice, the Complaint alleges, a student accused of sexual misconduct under the UC policies faces a system that is biased at every step towards finding the student "responsible" and imposing significant discipline. At the beginning of the process, UC often imposes restrictions and punishments—sometimes referred to as "interim measures"—based solely on an allegation without allowing for any hearing or even conducting any investigation. The investigatory process focuses on hearsay statements instead of physical evidence and is aimed at finding evidence to support the charges; worse, UC investigators have even suppressed evidence helpful to the accused. (Complaint ¶24(c)(iv).) The ARC members receive biased training designed to encourage findings against accused student and often seek to pursue an independent political agenda. (Complaint ¶35.)

"The ARC Hearings," according to the Complaint, "are nothing more than mock hearings in which the principles of law and justice are disregarded or perverted." (Complaint ¶41.) Prior to the ARC Hearing, UC often provides students accused of sexual assault with less than three days to obtain all documents, testimony or other evidence that they wish to present at the hearing and then restricts the ability of students accused of sexual assault to obtain copies of statements and other evidence. (Complaint ¶40.) At the hearings, students are not presumed to be innocent until proven guilty. (Complaint ¶31(f).) Students may not be provided the opportunity to cross examine witnesses who submit written testimony, and may cross-examine an accuser only through the use of written questions that must be reviewed and approved by the hearing panel chair (often a person with no legal training), (Complaint ¶31.)

The Complaint also alleges that the UC process for adjudicating claims of sexual misconduct is discriminatory. A UC "Resource Guide" refers to those who make accusations of sexual misconduct as "survivors" instead of, as the Department of Education, does, as "complainants." (Complaint ¶21.) The ARC Hearing Panels have received training from the UC Women's Center that focused on the prevalence of sexual assault on campus and referred to those accused of sexual assault as "predators." (Complaint ¶33(a).) The training from the UC Women's Center also used an incorrect, and far more restrictive, definition of "consent." (Complaint ¶33(a).) Other training programs relied on discredited statistics and had "the purpose and effect of informing panel members that they had a job to prevent sexual assault on campus, not to fairly or impartially adjudicate allegations of misconduct." (Complaint ¶ 33(b).)

It is not surprising that, as the Complaint describes in ¶36, no student who has been accused of serious sexual at UC misconduct has ever successfully defended against the accusation. *See also* (Complaint ¶40 ("A review of the recent history of ARC Hearing Panels, obtained through a public records request, shows UC has a pattern and practice of making it impossible for a student to be found not responsible. In other words, if a student is accused of sexual misconduct, it is almost certain that the student will face discipline." It is also not surprising, as the Complaint describes in ¶118, that a review of all recent UC disciplinary cases reveals that UC disproportionately imposes discipline on male students.[3] This is based, in part, on a view at UC of males as "predators" and females as "vulnerable" and guardians of virtue. (Complaint ¶ 120.)

B. The John Doe I Matter

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

[3] The UC process imposes discipline on males beyond what would be expected when compared to national crime statistics. (Complaint ¶120.)

University of Cincinnati Police[4] and ultimately presented to the Hamilton County Grand Jury. The Grand Jury refused to issue an indictment.[5]

UC, through Cummins, initiated disciplinary proceedings against John Doe I and then started an "administrative" investigation. This timing is significant: on April 7, 2014 Cummins scheduled an ARC Hearing for John Doe, but did not interview any witnesses until April 10, 2014 (in other words, Cummins decided to pursue discipline against John Doe I before conducting *any* investigation).[6] Cummins conducted the investigation and, at the same, time, advocated on behalf of Jane Roe I and Jane Roe II to obtain accommodations from the University. Cummins' interviewed a number of witnesses but failed to obtain any physical or forensic evidence. He also failed to include in his report a witness statement that was very favorable to John Doe I.

Two ARC Hearings were initially held on May 2, 2014. The May 2, 2014 ARC Hearings were obviously and embarrassingly biased. One of the members of the ARC Hearing Panel, Carol Tong-Mack, was copied on various emails seeking academic accommodations for the students. The chair of the ARC Hearing Panel, acting on Cummins direction refused to consider evidence from the UC Police investigation presented by John Doe I, refused to ask most of the questions submitted by John Doe I for Jane Roe I, and even refused to follow its own rules. The ARC Panel

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[4] The UC Police are sworn law enforcement officers who operate independently from the UC disciplinary system described in the Complaint. In fact, the Complaint describes how UC officials attempted to interfere with the investigation by the UC police. (*See* Complaint ¶58.)

[5] The UC Police found significant evidence to undermine the allegations of Jane Roe I and Jane Roe II, including surveillance videos and text messages. The two female UC students gave a number of conflicting statements and failed to disclose to UC Officials significant facts, such as that they had smoked marijuana during the evening. In contrast, Doe I gave a voluntary statement, told the UC Police that he was willing to submit to a polygraph examination, and voluntarily submitted DNA evidence. Most significantly, another female student was present in the room when the alleged assault occurred; this student did not witness anything illegal. (*See* Complaint ¶¶ 50-57.)

[6] While this "administrative" investigation was pending, UC's General Counsel attempted to interfere with and obstruct the UC Police investigation, causing one of the lieutenants to complain in an email that "it is very important that we are allowed to conduct a thorough and complete investigation without any appearance of influence." (Complaint ¶58.)

determined that John Doe I had violated the University's Code of Conduct in regards to the claims of Jane Roe I.

John Doe I left before the conclusion of the case brought by Jane Roe II when it became clear that he would not be afforded due process. Instead, he instituted a case in Hamilton County Common Pleas Court. Judge Metz issued a Temporary Restraining Order prohibiting further disciplinary actions against John Doe I. The case was removed to Federal Court, U.S.D.C., S.D. Ohio. The Federal Court (Dlott, J.) subsequently dismissed the case without prejudice, concluding, in effect, that UC was entitled to complete its appellate process prior to the initiation of any litigation. ("The Court will dismiss as premature the procedural due process claim against the University and Cummins in his official capacity without prejudice to re-filing.").

Less than one week after the dismissal of the John Doe I lawsuit, UC agreed that substantial procedural errors had occurred and permitted John Doe I to have a new hearing. On May 18, 2015 and May 19, 2015, John Doe I appeared for new ARC Hearings. While these ARC Hearings were not the same "kangaroo courts" as the original hearing, the ARC Hearing Panels still suffered from the same substantial issues. The ARC Hearing Panel still considered the biased investigative report prepared by Cummins. John Doe I was not permitted to have the complainant answer numerous questions designed highlight inconsistencies in their stories, and the ARC Hearing Panel was not informed that John Doe I should be considered "innocent until proven guilty" or the exact nature of the "accommodations" provided by UC to Jane Roe I and Jane Roe II that could adversely impact their credibility.

The ARC Hearing Panel found John Doe I "Responsible" for a violation of the UC Code of Student Conduct in regards to Jane Roe I, but "Not Responsible" in regards to Jane Roe I. No explanation was provided for this inconsistent decision. On June 11, 2015, the University Appeal Administrator rejected John Doe I's appeal, but failed to address any of the suggestions that the

process employed by UC violated the due process rights of John Doe I. The decision against John Doe I was affirmed by Rocco on July 23, 2015. As a result, John Doe I now faces a three year suspension from UC.

C. The John Doe II Matter

John Doe II was a law student at UC. On March 6, 2014, John Doe II was alleged to have sexually assaulted Jane Roe III. Jane Roe III never reported this allegation to the police.[7] The alleged sexual assault occurred outside of the UC campus, and may not have even been within the jurisdiction of the UC Code of Student Conduct. Jane Roe III, when making the allegations against John Doe II, requested and received additional time to complete her graduate thesis. She later was provided with a job at the UC Women's Center. Cummins assisted Jane Roe in obtaining some or all of these accommodations.

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

The ARC Hearing for John Doe was scheduled April 22, 2014, a time that presented a conflict for John Doe II's advisor; Cummins refused to accommodate the conflict. Like in the John Doe I matter, the ARC Hearing Panel for John Doe II was clearly biased. For example, when Cummins said that Jane Roe III would "get to read a statement about how these events have impacted her." John Doe II's advisor said, "you mean ALLEGED events." Cummins replied, "no,

[7] The alleged misconduct by John Doe II did not occur on the UC campus. The UC Code of Student Conduct is generally not applied to conduct which does not occur on the UC campus or at UC sponsored activities unless there has been a police report. In an effort to obtain jurisdiction over these allegations, Cummins initiated a police report with the UC Police Department. He then sent John Doe II a letter on April 8, 2014 stating misleadingly that he had "received an [sic] UCPD Report or Incident Report documentation that you have allegedly violated the Student Code of Conduct." In other words, Cummins "received" this police report because he is the person who made it.

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

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

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

The second ARC Hearing Panel found John Doe II responsible. No appeal of this decision was allowed. The decision against John Doe II was affirmed by Rocco on November 10, 2014. Even though John Doe II has graduated and his probation has terminated, the finding of responsibility has a significant negative impact on John Doe II, including a notation of a finding of responsibility in an academic record.

ARGUMENT

A. Standard.

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

B. Eleventh Amendment

Defendants argue that Count I should be dismissed because of Eleventh Amendment Immunity. Def. Memo. at 13-14. Under the Eleventh Amendment, each state is a sovereign entity that is not amenable to suit of an individual without its consent. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 1122 (1996). However, under *the Ex parte Young* exception, a federal court can issue prospective injunctive and declaratory relief compelling a state official to comply with federal law. *Doe v. Wigginton*, 21 F.3d 733, 737 (6th Cir. 1994). *See Ex parte Young,* 209 U.S. 123 (1908). "It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14, 103 S. Ct. 2890 (1983) (*citing Ex parte Young*, 209 U.S. at 160-62).

The Plaintiffs are suing the Individual Defendants in their official capacity for declaratory and injunctive relief. Count I seeks a declaration that the UC Policy – which the Individual Defendants enforce in their official capacities – violates the Constitution's due process guarantees. The Sixth Circuit has explained, "when the relief sought is prospective injunctive relief

that would 'merely compel[ ] the state officer['s] compliance with federal law in the future,' then such a request 'is ordinarily sufficient to invoke the *Young* fiction.'" *Nelson v. Miller*, 170 F.3d 641, 646 (6th Cir. 1999) (citations omitted). Consistent with *Nelson,* Count V seeks an injunction restoring the Plaintiffs to their previous positions and prohibiting further enforcement of UC's illegal policies. In ¶90 of the Complaint, John Doe I notes that he has been suspended from the school; a declaratory judgment that UC and the Individual Defendants have violated his constitutional rights would permit him to re-enroll. In ¶110, John Doe II notes that the discipline is noted on his academic record, and adversely affects his ability to seek admissions to the bar in other states and employment; a declaratory judgment that UC and the Individual Defendants have violated his constitutional rights would permit eliminate this ongoing harm. Therefore, consideration of Plaintiff's complaint with respect to Count I is not barred by the Eleventh Amendment

The declaratory judgment, which would permit injunctive relief, is, indeed, prospective and appropriate to the extent that it seeks to order the individual defendants, in their official capacity, to vacate the discipline and, in the case of John Doe I, reinstate him as a student at UC.[8] The main thrust of this prayer for declaratory judgment is non-monetary injunctive relief: Plaintiffs seek to compel state officials – the Individual Defendants -- to comply with the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution. Such relief "is the essence of *Ex parte Young's* prospective relief requirement." *Derezic v. Ohio Dep't of Educ.,* No. 2:14-cv-51, 2014 U.S. Dist. LEXIS 118163, *18 (S.D. Ohio Aug. 25, 2014).

This is the result reached by the Sixth Circuit regarding reinstatement of a medical student. *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 307 (6th Cir. 1984), cert. denied, 469 U.S. 1113 (1985). Similar conclusions have been reached by the Seventh Circuit and Second Circuit. *Elliott v.*

[8] The Defendants do not claim that the Individual Defendants lack the authority to comply with such a Court Order.

Hinds, 786 F.2d 298, 302 (7th Cir. 1986) (reinstatement of pharmacist); *Dwyer v. Regan*, 777 F.2d 825, 836 (2nd Cir. 1985) (reinstatement of employee). *See also Back v. Hall,* 2006 U.S. Dist. LEXIS 71401 (E.D. Ky. Sept. 29, 2006) (noting that prospective injunctive relief is available against state officials in §1983 actions who could reinstate an employee). This is also the result reached by the court in *Gies v. Flack*, 495 F. Supp. 2d 854 (S.D. Ohio 2004) (Rice, J.). In *Gies*, plaintiff, a professor, sought a declaration that university officials violated his constitutional rights in connection with his termination. The Court found plaintiff's request for a declaration that the defendants violated his due process rights qualified as prospective equitable relief because the declaratory judgment request was, in effect, part and parcel of plaintiff's request for injunctive relief.

C. ***Res Judicata***

The Defendants argue that the decision by Judge Dinkelacker dismissing similar claims by John Doe II in a case brought in Hamilton County Common Pleas Court bars this Court from consideration of the claims under the doctrine of *res judicata.* Def. Memo. at 7-8.[9]

Judge Dinkelacker's decision did not resolve all of the claims in the case, but left for further proceedings John Doe II's claim under 42 U.S.C. §1983. Under Ohio law, an order dismissing some claims, but not containing the Ohio Rule Civil Procedure 54(B) language that there is "no just reason for delay," is interlocutory and was not a final appealable order.[10] *See Jackson v. Allstate Ins.*

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[9] The Defendants suggest that this was a decision "with prejudice." Def. memo. at 7. No such language appears in the decision.

[10] The Ohio Rules of Civil Procedure provide:

> When more than one claim for relief is presented in an action . . . the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, . . . the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Ohio R. Civ. P. 54(B).

Co., 2004 Ohio 5775, at ¶18 (2d Dist.). Judge Dinkelacker's decision did not contain the "no just reason for delay" language and, thus, was an interlocutory decision that remained subject to revision or modification by the court until and unless the order was certified as suitable for appeal or the action was finally terminated as to all claims and all parties. *Kocijan v. S & N, Inc.*, 2002 Ohio 3775 (8th Dist.)

Judge Dinkelacker's decision has no *res judicata* effect because on August 18, 2015, John Doe II and the University of Cincinnati filed a Stipulation of Dismissal of all claims without prejudice pursuant to Ohio R. Civ. P. 41(A). *Doe v. University of Cincinnati*, Hamilton County Common Pleas No. A1406907, August 18, 2015 Entry (attached as Exhibit A.) In *Denham v. City of New Carlisle*, 86 Ohio St.3d 594, 597, 1999 Ohio 128, the Ohio Supreme Court held that "a voluntary dismissal pursuant to Civ.R. 41(A) renders the parties as if no suit had ever been filed against only the dismissed parties." Ohio courts, following this decision, have held that when an entire action is dismissed without prejudice pursuant to Civ.R. 41(A), interlocutory orders which did not contain the Civ.R. 54(B) "no just reason for delay" are dissolved and are not appealable. *Fairchilds v. Miami Valley Hosp., Inc.*, 160 Ohio App.3d 363, 2005 Ohio 1712, appeal dismissed as improvidently allowed, 109 Ohio St.3d 1229, 2006 Ohio 3055; *Toledo Heart Surgeons v. The Toledo Hospital*, 2002 Ohio 3577 (6th Dist.); *Klosterman v. Turnkey-Ohio, L.L.C.*, 2010-Ohio-3620, ¶ 12 (10th Dist.) (where voluntary dismissal applies to all defendants, it renders a prior interlocutory summary judgment ruling a nullity). *See also Hutchinson v. Beazer East, Inc.*, 2006-Ohio-6761, ¶ 32 (8th Dist.) ("we have consistently followed the view that a voluntary dismissal of the entire case, pursuant to Civ.R. 41(A), dissolves all prior interlocutory orders made by the trial court in that action, including orders of summary judgment").

The significance of these decisions is that a dissolved decision, like Judge Dinkelacker's decision, has no *res judicata* effect. *Hutchinson v. Beazer East, Inc.*, 2006-Ohio-6761, ¶24 (8th Dist.)

(order granting summary judgment was dissolved by Rule 41(A) decision and had no *res judicata* effect); *Toledo Heart Surgeons*, 2002-Ohio-3577 at ¶35 (an order dismissing less than all claims in a case "is dissolved and has no res judicata effect" after dismissal without prejudice under Rule 41(A)).

D. Due Process

The Complaint states a valid claim against the Individual Defendants for violations of the Plaintiffs' Procedural Due Process rights. The Defendants essentially argue that because the Plaintiffs received notice of the charges, an explanation of the evidence against the Plaintiffs, and an opportunity to be heard, they are unable to assert a procedural due process claim. Def. Memo. at 9. As shown below, this is based on an overly narrow reading of the relevant Supreme Court decisions, which also require a fair and unbiased tribunal as well as a "meaningful" opportunity to be heard.

1. Legal Framework

a. *Goss*

The starting point for analyzing alleged violations of students' procedural due process rights in school suspension cases is *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729 (1975). In *Goss*, the Supreme Court concluded that students facing suspensions of ten days or fewer have a property interest in educational benefits and a liberty interest in their reputations that qualify them for protection against arbitrary suspensions under the Due Process Clause. *See Goss*, 419 U.S. at 576 ("Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary."); *see also id.* at 579 ("The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences."). The *Goss* Court held that the Due Process Clause does not require that hearings in connection with suspensions of ten days or fewer follow trial-type procedures. 419 U.S. at 583.

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

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

419 U.S. at 584. Courts have consistently noted the inapplicability of *Goss* to these situations.[11] *C.Y. v. Lakeview Pub. Schs*, 557 Fed. Appx. 426, 430 (6th Cir.. 2014) ("*Goss* did not address the due-process requirements for suspensions longer than ten days"); *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1381 (C.D. Cal. 1995) ("*Goss*, however, did not address suspensions longer than ten days, and thus is inapplicable to" a longer suspension); *Edwards v. Ctr. Moriches Union Free Sch. Dist.*, 898 F. Supp. 2d 516, 542-543 (E.D.N.Y. 2012) ("Where, as here, long-term suspensions were at issue, greater process[than in *Goss*] was required.").

b. *Mathews* Standard

Since the Supreme Court has not mandated specific procedures for a suspension or other discipline from a public university, this Court must return to Due Process fundamentals. "The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970), *citing Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The hearing provided must be "at a meaningful time and in a meaningful manner." *Goldberg*, 397 U.S. at 267, *quoting Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187 (1965). "Due process is flexible and calls for such

[11] A later Supreme Court decision, *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78 (1978), is inapposite. *Horowitz* was a case of academic misconduct, not a violation of non-academic rules. The Court noted that the *Goss* requirements did not apply to academic violations (such as charges of plagiarism). 435 U.S. at 86 ("The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal."). As a result, *Horowitz* is completely inapposite.

procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, (1976), *quoting Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

As in all cases involving an alleged deprivation of due process, the question for the Court is determining precisely what process was due. *Morrissey*, 408 U.S. at 481. *See also Flaim v. Med. College of Ohio*, 418 F.3d 629, 634 (6th Cir. 2005) (noting that in school discipline cases "the amount of process due will vary according to the facts of each case and is evaluated largely within the framework laid out by the Supreme Court in *Mathews*"), *citing Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) (stating that due process is "not a fixed or rigid concept, but, rather, is a flexible standard which varies depending upon the nature of the interest affected, and the circumstances of the deprivation"). The Defendants recount the procedure UC used in an effort to claim that UC "provided Plaintiffs with sufficient and constitutional due process." Def. Memo. at 21. However, simply having a process does not guarantee that said process is constitutionally sufficient or fundamentally fair, in other words, "meaningful." *Mathews*, 424 U.S. at 333. The question is not whether the Plaintiffs had an opportunity to be heard, for this is only the start of the analysis; instead the question is whether that opportunity to be heard was meaningful, or as Justice Powell explained, "fair." *Vitek v. Jones*, 445 U.S. 480, 500, 100 S. Ct. 1254 (1980) (Powell, J., concurring in part) ("The essence of procedural due process is a fair hearing.").

In determining whether the Plaintiffs received adequate due process, this Court must apply the well-known *Mathews* balancing test and consider the students' interest in their education at UC; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and UC's interest, including the not-insignificant burdens that the additional safeguards would entail. *See Mathews*, 424 U.S. at 335.[12]

[12] *See also Noatex Corp. v. King Constr. of Houston, L.L.C.*, 732 F.3d 479, 484 (5th Cir. 2013) (applying *Mathews* by weighing "such factors as the private interests implicated, the risk of erroneous deprivation, the probable value of additional safeguards, and the interests of the party seeking the prejudgment remedy, coupled with

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

c. The Plaintiffs Have A Protected Property Or Liberty Interest

Numerous federal courts have held that the Due Process Clause is implicated by higher education disciplinary decisions. *See Richards v. McDavis,* 2013 U.S. Dist. LEXIS 134348, 16-20 (S.D. Ohio Sept. 19, 2013), citing, *inter alia, Flaim*, 418 F.3d at 629 ("In this Circuit we have held that the Due Process Clause is implicated by higher education disciplinary decisions."); *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245 (E.D. Mich. 1984), aff'd, 787 F.2d 590 (6th Cir. 1986) (due process clause implicated in suspension from university for cheating)., and has held that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct. *See also Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961) (students have a protected interest in "the right to remain at a public institution of higher learning . . .").

2. The UC Process Violates The Due Process Rights of Students

UC has modified its Code of Student Conduct for cases of sexual assault and sexual harassment. *See* Complaint Exhibit A; OAC 3361:40-5-04. UC, in the Code of Student Conduct, claims to employ procedures that are "consistent with both the customs of a free society and the nature and function of an institution of higher learning." However, as shown below, the reality is that UC employs a number of practices that are more consistent with a Star Chamber. *See Faretta v.*

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the 'ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.'"), *quoting Connecticut v. Doehr*, 501 U.S. 1, 12, 111 S.Ct. 2105 (1991).

California, 422 U.S. 806, 821–22, 95 S. Ct. 2525 (1975).("the Star Chamber has, for centuries, symbolized disregard of basic individual rights.").

a. The Defendants' Improper Atomistic Approach

The Defendants improperly attempt to break the process offered by UC into different technical pieces, ignoring that the Court must consider the UC process as a whole. *See e.g.* Def. Memo at 19-22. The atomistic approach taken by UC looks at the individual procedural safeguards in the UC process to form a checklist of specific provisions, some or all of all of which must be present in some form in a university disciplinary process for it to be constitutional. This 'checklist' approach is contrary to the Supreme Court's teachings. In *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895 (1974), for example, the Supreme Court reviewed pretrial attachment statutes. The Court emphasized that the "requirements of due process of law are not technical," and that a court must consider a scheme "as a whole." 416 U.S. at 610. *See also Shaumyan v. O'Neill*, 716 F. Supp. 65, 73 (D. Conn. 1989) (noting that "*Mitchell* would seem to stand for the proposition that mandatory checklists of procedural safeguards are inappropriate."). Similarly, in *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854 (1975), the Court evaluated state pretrial detention procedures. The Court explained that procedures may vary from state to state, so that they must be viewed "as a whole" to determine if constitutional requirements had been met. 420 U.S. at 124.

In this case, consistent with the Supreme Court's decisions, this Court should adopt a holistic approach. Rather than examining the UC process to determine whether UC has provided a minimum level of protection for every item on the due process checklist, this Court should consider the UC process system as a whole to determine whether it provides adequate protection to accused students. Accordingly, the question in this case, is not simply whether, for example, the process is biased, hearsay is admissible, or if there is an effective right to confront adverse witnesses, but whether UC provided adequate due process when the entire scheme is examined as a whole.

In looking at this system, in terms of the first part of the *Mathews* test, John Doe I's and John Doe II's the interest at stake, an education at a public university, is one that has always had enormous importance in our society. As noted above, courts have recognized a significant property interest in attendance at public universities. Additionally, school discipline is punitive in nature and carries a significant stigma that may prevent a student from obtaining further education or employment. Finally, because these proceedings occur in private, beyond the view of the public, the lack of due process protections creates a situation where government deprivation is too easily accomplished. This aspect of the *Mathews* test is applicable to the below arguments, as each of the aspects of the disciplinary process highlighted in the Complaint create an increased risk of an erroneous deprivation and can be "fixed" with minimal burden on UC.

b. Placing the Burden of Proof On Accused Students

The Amended Complaint states that the UC Administration does not bear any burden of proof in order for the ARC Panel to impose discipline on a student accused of sexual assault or sexual harassment.[13] The Complaint explains that UC employs the "preponderance of evidence"

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

> As we have said, "[t]he term 'burden of proof' is one of the 'the slipperiest members of the family of legal terms.' *Schaffer v. Weast*, 546 U.S. 49, 56, 126 S. Ct. 528, (2005) (quoting 2 J. Strong, McCormick on Evidence § 342, p. 433 (5th ed. 1999) (alteration omitted)). Historically, the term has encompassed two separate burdens: the "burden of persuasion" (specifying which party loses if the evidence is balanced), as well as the "burden of production" (specifying which party must come forward with evidence at various stages in the litigation). *Ibid.* Adding more confusion, the term "burden of proof" has occasionally been used as a synonym for "standard of proof." *E.g., Grogan v. Garner*, 498 U.S. 279, 286, 111 S.Ct. 654, (1991).
>
> Here we use "burden of proof" interchangeably with "burden of persuasion" to identify the party who must persuade the jury in its favor to prevail. We use the term "standard of proof" to refer to the degree of certainty by which the factfinder must be persuaded of a factual conclusion to find in favor of the party bearing the burden of persuasion. *See Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804 (1979). In other words, the term "standard of proof" specifies how difficult it will be for the party bearing the burden of persuasion to convince the jury of the facts in its favor. Various standards of proof are

standard as the standard of proof. (Complaint ¶ 21(e).) This does *not necessarily create a due process issue*, but is different than the "burden of proof," where the due process issue described in the Complaint lies.[14] *Compare* Def. Memo. at 10.

The presumption of innocence – which is an essential component of the placing the burden of proof on the party seeking to prove misconduct by another – remains an essential part of due process "even in the different context of a civil action. That is to say, a legal system is not justified in presuming culpability based on the mere 'possibility' of the same. . ." *Tobey v. Jones*, 706 F.3d 379, 404 (4th Cir. 2013) (Wilkinson, J., dissenting). In this case, the ARC Hearing represents the only meaningful opportunity a UC student has to challenge UC's attempt to impose discipline. Requiring students to prove in this context that they have not committed a sexual assault or engaged in sexual harassment violates due process because it is often difficult to prove a negative. *Cf. Lavine v. Milne*, 424 U.S. 577, 585, 96 S.Ct. 1010 (1976), (recognizing that "where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive"); *Speiser v. Randall*, 357 U.S. 513, 525, 78 S.Ct. 1332 (1958) (acknowledging that "where the burden of proof lies may be decisive of the outcome").

Contrary to the claims of the Defendants, the Complaint explains in detail how UC does not presume that accused students are innocent until proven guilty. (Complaint ¶31(f).) The Complaint sets forth how Defendant Cummins explained, in an email exchange with John Doe II, admitted that UC does not bear any burden of proof in ARC Hearings.[15] He said, "*Neither the complainant nor the respondent bears this burden of proof in an ARC hearing* (emphasis supplied)." (Complaint ¶31(f)(ii).

> familiar--beyond a reasonable doubt, by clear and convincing evidence, and by a preponderance of the evidence.

[14] At least one federal judge and one commentator have argued the Constitution requires student disciplinary hearings to use the "clear and convincing" standard of proof. *Smyth v. Lubbers*, 398 F. Supp. 777, 799 (W.D. Mich. 1975); Nicholas Trott Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J.C. & U.L. 71) (1985).

[15] UC applies the preponderance of evidence standard of proof recommended by the Department of Education. *See* Dear Colleague Letter at 11-12.

Another UC administrator wrote to John Doe I, "*Neither party has any burden of proof.*" (Complaint ¶ 31(f)(iii). *See also* Complaint ¶81(b).)[16]

UC's allocation of burdens and standards of proof requires that student prove a negative, that the student did not commit a sexual assault or engage in sexual harassment, while the UC Administration or the complainant must prove almost nothing. This creates a great risk of an erroneous, irreversible deprivation. "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact-finding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington v. Texas*, 441 U.S. at 423, *quoting In re Winship,* 397 U.S. 358, 370, 90 S. Ct. 1068 (1970) (Harlan, J., concurring). The allocation of burdens and standards of proof implicates similar concerns and is of greater importance since it decides who must go forward with evidence and who bears the risk of loss should proof not rise to the standard set. In the UC ARC Hearings, where students who face discipline are required to present exculpatory evidence, all risks are squarely on the students. The UC Administration, under the current approach, need not produce any evidence beyond the initial allegations and, as a result, may deprive students of the right to an education based on the rankest of hearsay and the flimsiest evidence.[17]

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[16] The Defendants claim that the conclusion that students enjoy the presumption of innocence is "factually" incorrect. Def. Memo. at 10. However, as described in the Complaint, and as must be assumed to be true for purposes of this Motion, "no part of the UC Code of Student Conduct or any policy or procedure contains this statement or an equivalent statement." The Defendants can only point to a contrary statement on its webpage. *Id.* This statement on a webpage is not policy or procedure and, even if it were appropriate to consider such a statement on a Motion to Dismiss, it is contradicted by the explicit statements from the UC Administrators describing how the UC system actually operates, as set forth in the Complaint ¶ 31.

[17] A case from Texas is one of the few directly on point. *University of Tex. Medical Sch. v. Than*, 874 S.W.2d 839 (Tex. App. Houston 1st Dist. 1994), *aff'd in part and vacated in part*, 901 S.W.2d 926 (Tex. 1995). In *Than*, a medical school student was subject to discipline because of a cheating allegation. The hearing officer in that case, in language almost identical to the statements of Defendant Cummins and other UC administrators quoted above, stated that "both parties" had the burden of proof at the hearing. The court found that this had the effect of placing a burden of proof on the student in violation of the student's constitutional due

c. Cross-Examination

The Constitution requires some opportunity for cross-examination in cases like this: "the opportunity to confront and cross-examine witnesses is essential when the information supplied by those witnesses is the reason for the" adverse actions. *Edgecomb v. Hous. Auth. of Vernon*, 824 F. Supp. 312, 315-16 (D. Conn.1993), *citing Goldberg*, 397 U.S. at 269-70. See also *Gorman*, 837 F.2d at 16 (noting while there is no right to "unlimited" cross-examination, due process requires that some cross-examination is required to permit an accused to "elicit[] the truth about the facts and events in issue").

The Defendants appear to concede this legal complaint, and suggest that UC complies with this constitutional requirement by permitting parties to "cross-examine one another by submitting written questions" to the chair of the hearing panel. Def. Memo. at 13-14. The Complaint does not, as the Defendants suggest, assert that the UC system is unconstitutional because there is not direct questioning. Def. Memo. at 13. Instead, the Complaint alleges that UC prohibits "effective" cross-examination by essentially prohibiting follow-up questions and impeachment. (Complaint ¶ 31(d).) For example, the Complaint describes how the UC cross-examination system is constitutionally defective because the chair of the hearing panel refused to permit John Doe I to ask numerous relevant questions. The Complaint states:

> John Doe I was not permitted to have the complainant answer numerous questions designed to elicit the truth about the facts and events in issue.
>
> > i. Significant questions that the panel did not ask include a large number of questions aimed at highlighting inconsistencies in Jane Roe I's and Jane Roe II's story. John Doe I submitted a number of questions to the Panel deigned to illustrate that the story told to the panel was not the same story told to the UC Police, Dean Cummins, or when under oath at a deposition.

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process rights. The court said, "it is not consistent with due process to place a burden on a student accused of cheating to prove that he did not cheat." 874 S.W.2d at 851 and n. 10, *citing Speiser*, 357 U.S. at 525.[17]

> ii. The panel also did not require Jane Roe I and Jane Roe II to answer other questions aimed at discovering whether their alcohol consumption and drug use affected their ability to remember the events of the evening clearly.

(Complaint ¶78(c). *See also* Complaint ¶101 (suggesting that John Doe II could not effectively cross-examine adverse witnesses because no follow-up was possible.)

The Court does not need to determine precisely what limits on effective cross-examination create a due process violation in order to deny the Motion to Dismiss. This is because John Doe II was found to have violated the UC Code of Conduct *even after he had no opportunity to question the alleged victim*. The Complaint states that at John Doe II's second hearing (after remand), Jane Roe III made an inflammatory statement then left before she could be required to answer any questions:

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

(Complain Paragraph 107(h).) The Defendants failure to address this aspect of the Complaint is fatal to their Motion. Any suggestion that this aspect of the Complaint does not state a claim for a due process violation fails to take into account that the opportunity to confront and cross-examine witnesses was essential when the information supplied by those witnesses is the reason for the imposition of discipline. The Second Circuit has noted, for example, that school disciplinary proceedings could require cross-examination if the case "had resolved itself into a problem of credibility." *Winnick v. Manning,* 460 F.2d 545, 550 (2d Cir. 972) (noting that in those circumstances "cross-examination of witnesses might have been essential to a fair hearing."), citing Wright, The Constitution on the Campus, 22 Vand.L.Rev. 1027, 1076 (1969). In recent cases, courts have relied on the fact that students were permitted at least a minimal right of cross-examination to determine that there was not constitutional violation. *See e.g. Johnson v. Temple Univ.*, E.D. Pa No. 12-515, 2013 U.S. Dist. LEXIS 134640 (Sept. 19, 2013) (rejecting due process claim because plaintiff was "able to functionally cross-examine witnesses by presenting questions . . . to be asked to the witness); *Johnson*

v. Collins, 233 F. Supp.2d 241, 248 (D. N.H. 2002) (finding that a student facing expulsion from school is entitled to, among other things, "confront and . . . cross-examine the witnesses against him")

d. Bias

The remainder of the Defendants arguments concerning due process is addressed by the general allegation in the Complaint that UC has provided a biased investigatory and hearing process. Def. Memo. at 14-22. An impartial decision maker is a fundamental due process requirement. *See, e.g., Withrow v. Larkin*, 421 U.S. 35, 46-47, 95 S. Ct. 1456 (1975). The United States Supreme Court has long held that a fair proceeding "in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623 (1955). Bias may be actual, or it may consist of the appearance of partiality in the absence of actual bias. *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995). A showing that the adjudicator has prejudged, or reasonably appears to have prejudged, an issue is sufficient. *Kenneally v. Lungren*, 967 F.2d 329, 333 (9th Cir. 1992).

UC suggests in a conclusory manner that school disciplinary committees are entitled to "a presumption of honesty and integrity." Def. Memo. at 16, *quoting McMillan v. Hunt,* No. 91-3843, 1992 U.S. App. LEXIS 17475, 1992 WL 168827 (6th Cir. 1992). This is undoubtedly true as far as it goes; but it does not end the analysis because such a presumption may be overcome. *Cf. McDonough Power Equipment, Inc. v. Greenwood,*. 464 U.S. 548, 587, 104 S.Ct. 845 (Brennan, J., concurring) ("[A] court should recognize that the bias . . . may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as [a] matter of law." (internal quotation marks omitted)). Notably, the Defendants never suggest that a biased hearing an investigatory process would not be an unconstitutional of the *Mathews-Goldberg* "meaningful" hearing requirement.

In this case, the detailed facts of the Complaint, if assumed to be true, support the claim that the UC investigatory and hearing process is unconstitutionally biased. The Complaint alleges that

UC employs a biased investigatory process in order to "look good" for the Department of Education. (Complaint ¶ 34(a).) The Complaint specifies:

> At UC, administrators and hearing panel members have been trained that the prevention of sexual misconduct is of primary concern following the receipt of the "Dear Colleague Letter." Notably, the same administrators have not received comparable training about the importance of protecting the due process rights of the accused.

(Complaint ¶ 33.) Judge Nancy Gertner, writing in the American Prospect, has observed that the efforts of schools to comply with these "mandates" has led to biased proceedings:

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

Nancy Gertner, Sex, Lies and Justice, American Prospect, Winter 2015.[18]

Evidence of this bias is described in several small and large ways; none of the instances described in the Complaint may, by themselves, be sufficient evidence of bias but combined they paint a distinct and clear picture of a rigged system that resembles a game a "three card monty" in the sense that accused students cannot win. One small but telling suggestion of bias is seen, for example, in UC's use of the term "survivor" to describe alleged victims instead of more neutral language recommended by the federal government, like "complainant," and the fact that UC schedules ARC Hearings before actually conducting any investigation. (Complaint ¶ 34(b), ¶34(c)(ii).) More significant evidence includes the fact that, while acting as an investigator, Defendant Cummins also played a role in seeking accommodations for alleged victims while at the same time claiming to be conducting an impartial investigation. The Defendants, Def. Memo at 17, point our that such accommodations may be required by Federal Law, but fail to note that the Department of Education has warned that having the same person have responsibility to both

[18]Available at http://prospect.org/article/sex-lies-and-justice.

advocate for alleged victims and also conduct an investigation can create an impermissible conflict of interest. *See* Dear Colleague Letter at 7 ("The Title IX Coordinators should not have other job responsibilities that may create a conflict of interest."). (Complaint ¶34(c)(ii).)

The most damning evidence of bias by UC is found in ¶34(c)(iv)-34(c)(v) of the Complaint. These paragraphs states that "Cummins and other UC employees do not include information in investigative reports that is favorable to those accused of sexual assault" and that "High-ranking UC officials have attempted to interfere with investigations of asexual assault being conducted by the UC Police." These actions are described in detail.[19] Specifically, paragraph 64 of the Complaint describes how Cummins failed to include in his investigative report a witness statement in his possession that tended to exonerate John Doe I. And paragraph 58 of the Complaint describes complaints by the UC Police officers that the UC General Counsel was attempting to influence their investigation.

The Complaint further alleges that the UC ARC Hearing Panel, in practice, has shown bias in a number of ways. Hearing panel members have been trained that the prevention of sexual misconduct is their primary concern. These panel members have been given information that is irrelevant to the individual matters they have to adjudicate, but is likely to encourage them to protect alleged victims and rule against accused student. For example, on October 6, 2011, the head of the UC Women's Center provided training to hearing panel members. The training included statistics about the prevalence of sexual assaults on campus and included topics irrelevant to the decision making process, such as "Sexual assault is about POWER & CONTROL," and also included descriptions of the "Profile of a sexual Assault Victim" and the "Profile of a Sex Offender." (Complaint ¶33(a).) This training included irrelevant and inflammatory statements, such as: "most

[19] The Defendants suggest that many of the allegations in the Complaint are merely "on information and belief." Def. Memo. at 17, *citing Doe v. Columbia Univ.* This suggestion is not well taken. The Complaint, as set forth in the main text, provides significant details of biased actions.

rapists are repeat date rapists;" and "undetected rapists" use "alcohol as a weapon." (Complaint ¶33(a)(ii).) Hearing panel members have also received training such as a program titled, "Sexual Assault & Response. Preventing Sexual & Gender Based Violence," that had the purpose and effect of informing panel members that they had a job to prevent sexual assault on campus, not to fairly and impartially adjudicate allegations of misconduct. (Complaint ¶33(b).) This training also led to bias because it included an incorrect definition of the term "consent." (Complaint ¶33(b)(iii).) Notably, these training sessions barely, if at all, included any discussion of due process concerns or the idea that those accused of violating the UC Code of Conduct are presumed to be not guilty.

The Complaint supports the descriptions of bias by including substantial statistical evidence. The use of such statistical evidence when combined with the anecdotal examples provided in the Complaint, is consistent with other areas of the law; the law often permits the inference of bias from statistical evidence in a number of other situations.[20] For example, bias can be inferred from statistical evidence in discrimination cases. *Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1468 (6th Cir. 1990) (finding that, when a plaintiff demonstrates a "significant statistical disparity" in the employment rate, he has provided "strong evidence" that chance is not the cause of the employment pattern). Bias can also be inferred, in a much different context, from statistical evidence in reviewing *Batson* challenges. *See e.g. Terry v. Warden, Leb. Corr. Inst.*, S.D. Ohio No. 1:08cv820, 2010 U.S. Dist. LEXIS 123985 (June 14, 2010), *citing Miller-El v. Dretke*, 545 U.S. 231, 125 S. Ct. 2317 (2005).

In this case, the Complaint creates a *prima facie* case of bias by noting that UC has never had a situation where an allegation of sexual conduct without consent was made by a female student

[20] The Defendants seem to suggest that statistical evidence can never form an inference of bias. This is clearly incorrect. In the discrimination context, for example, statistical evidence is sufficient at the pleading stage, even in the absence of the ability of a plaintiff to show discrimination against any particular person. *See Hazelwood School District v. United States*, 433 U.S. 299, 307-08, 97 S. Ct. 2736 (1977) ("Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination."). In this case, applying the same analysis, the Plaintiffs' initial burden is only to present a *prima facie* case that will support a rebuttable presumption of bias.

against a male student and the male student was subsequently exonerated. A review of the recent history of ARC Hearing Panels, obtained through a public records request, shows that it is nearly impossible for a student to be found not responsible at an ARC Hearing. Put another way: it has never happened. The records paint a simple picture of a situation where if a student is accused of serious sexual misconduct, it is certain that the student will face discipline. UC provided records for eleven alleged violations of the Sexual Misconduct Policy that were presented to an ARC Hearing Panel, aside from the case against John Doe I. In *every case* presented to the ARC Hearing Panel, the respondent was found ultimately found responsible.[21] This statistical evidence, when combined with other facts alleging bias, are sufficient, on a motion to dismiss standard, to support a claim of bias. *See Grant v. Comm'r SSA*, 111 F. Supp. 2d 556, 558-69 (M.D. Penn. 2000) (finding that ALJ was biased against social security claimants based on statements of ALJ combined with statistical evidence from the ALJ's cases); *Pronti v. Barnhart*, 339 F. Supp. 2d 480, 497 (W.D.N.Y. 2004) (same).[22]

[21] In two cases, the appeal officer remanded the matter to the ARC Panel for a new or additional hearing. In one of those cases, the ARC Hearing Panel eventually found the student responsible. In total, UC disclosed 32 separate matters. In only 4 of the 32 cases was a student found "not responsible." None of those four cases concerned "serious" matters or allegations of sexual abuse. Three of the "not responsible" findings related to a dispute in the dorm over personal belongings, and one involved the driver of a van when the passenger allegedly directed a sexual remark to a passing female.

[22] The Defendants suggest that the statistical evidence included in the Complaint is irrelevant. The cases cited by UC, Def. Memo. at 18, to support this claim are inapposite. In those cases, the plaintiffs attempted to rely upon statistical evidence alone, instead of to support anecdotal evidence of bias. In other words, these cases are not helpful to this case because they do not suggest that bias can *never* be inferred from statistical evidence, only that the statistical evidence presented *in the cases cited* was insufficient. For example, the Defendants cite to a case involving California parole board decisions. *Hall v. Kane,* 2008 U.S. Dist. LEXIS 106862 (N.D. Cal. Dec. 23, 2008). However, a later decision found a 99.7% denial rate and concluded this was sufficient to survive a motion to dismiss: "Such an over whelming statistic of denial gives rise to an inference of a pre-ordained determination, i.e., bias on the part of . . . decisionmakers." *Joseph v. Swarthout*, 2011 U.S. Dist. LEXIS 143316 (E.D. Cal. Dec. 12, 2011) (determined on motion to dismiss standard).

e. Individual Defendants

The Defendants suggest that the Complaint does not allege detailed wrongdoing by each of the Individual Defendants. This is not the correct standard. In order to hold the individuals liable in their individual capacities under §1983, a Plaintiff need only show that they were personally involved in the alleged constitutional deprivations. *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). To do so, a Plaintiff should "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).

In this case, the Complaint alleges that each of the Individual Defendants "have responsibility for administering and operating the UC Code of Conduct and Judicial System." (Complaint ¶¶ 8(c), 9(c), 10(c).) The Complaint in this respect is not the type of threadbare, conclusory, and implausible Complaint that would warrant dismissal at this stage under the framework set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 680-81, 129 S. Ct. 1937 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, (2007).

E. Qualified Immunity

The Individual Defendants argues that they are entitled to qualified immunity. Def. Memo at 18-22, 24. The argument pressed by the Individual Defendants for qualified immunity essentially mirrors the arguments in support of the Motion to Dismiss. The response, *supra*, is incorporated here.

Qualified immunity does not prevent the Plaintiff from pursuing declaratory and injunctive relief. *Top Flight Entm't, Ltd. v. Schuette*, 729 F.3d 623, 635 (6th Cir. Mich. 2013); *Flagner v. Wilkinson*, 241 F.3d 475, 483 (6th Cir. 2001). *See also Hydrick v. Hunter*, 669 F.3d 937, 939-40 (9th Cir. 2012) (explaining that qualified immunity "is only an immunity from a suit for money damages, and does

not provide immunity from a suit seeking declaratory or injunctive relief"). As shown below, application of the doctrine does not demonstrate that the Individual Defendants are entitled to a dismissal at this stage of the proceedings.

1. Standard

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Stanton v. Sims*, 134 S. Ct. 3, 4, 187 L. Ed. 2d 341 (2013) (internal quotation marks omitted). Courts generally use a two-step analysis: (1) viewing the facts in the light most favorable to the plaintiff, whether the allegations give rise to a constitutional violation; and (2) whether the right was clearly established at the time of the incident. *Kinlin v. Kline*, 2014 U.S. App. LEXIS 9414, 8-9 (6th Cir. May 21, 2014).

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

See *supra., generally.*

3. The Individual Defendants Violated a Clearly Established Right

A government official will be liable for the violation of a constitutional right only if the right was "'clearly established . . . in light of the specific context of the case.'" *Binay v. Bettendorf*, 601 F.3d 640, 651 (6th Cir. 2010). A right is clearly established if the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). *See also Grawey v. Drury*, 567 F.3d 302, 313 (6th Cir. 2009) ("The key determination is whether a defendant [claiming] . . . qualified immunity grounds was on notice that his alleged actions were unconstitutional.").

The Sixth Circuit law clearly establishes that the Plaintiffs were entitled to due process in the disciplinary proceedings held at UC. *Flaim*, supra.; *Jaksa*, *supra.* (due process clause implicated in suspension from university for cheating). The Dear Colleague Letter from the Department of

Education, Office of Civil Rights, specifically states that schools are obligated to protect the due process rights of students accused of sexual misconduct. For example, on page 12 of the Dear Colleague Letter, the Department of Education states, "Public and state-supported schools must provide due process to the alleged perpetrator." And, on page 22, the Department notes that "The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding.

4. The Court Should Defer Ruling on Qualified Immunity.

This Court should defer ruling on a qualified immunity defense because further factual development is necessary *See Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012). In this case, discovery has started but no depositions have been scheduled. This additional discovery will permit the parties to present to the Court essential information necessary for a qualified immunity determination, most likely on a Rule 56 standard. *See Crawford-El v. Britton*, 523 U.S. 574, 599-600 (1998) (noting that a court "should give priority to discovery concerning issues that bear upon the qualified immunity defense, such as the actions that the official actually took"). Accordingly, the Plaintiff respectfully requests that the Court defer ruling on any request for qualified immunity until additional discovery is completed. *See McKinney v. Lexington-Fayette Urban Cnty. Gov't*, 2015 U.S. Dist. LEXIS 85319 (E.D. Ky. July 1, 2015) (noting that the "Court will defer ruling on whether a particular Defendant-Officer may invoke qualified immunity until the evidence at trial establishes the officer's knowledge . . .. ").

F. Title IX

The Plaintiff has asserted a valid claim against UC based on Title IX, the federal statute designed to prevent sexual discrimination in educational institutions receiving federal funding. 20 U.S.C. § 1681. Title IX claims against universities arising from disciplinary hearings are analyzed under the "erroneous outcome" standard, "selective enforcement" standard, "deliberate

indifference" standard, and "archaic assumptions" standard. *Mallory v. Ohio Univ.*, 76 Fed. App'x 634, 638 (6th Cir. 2003) (internal citations omitted). *See also Wells v. Xavier Univ.*, 7 F. Supp. 3d 746 (S.D. Ohio 2014). The Defendants rely upon *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994). This reliance is appropriate. In *Yusuf*, the court explained that in order to assert a claim based on an erroneous outcome/selective enforcement theory the Plaintiffs need to allege that the hearing was flawed due to the Plaintiffs' gender. The key language from the decision addresses the allegations at the pleading stage:

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

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

1. Erroneous Outcome/Selective Enforcement

In this case, dismissal under a 12(b)(6) standard is not appropriate because the Plaintiff has does exactly what *Yusef* requires: alleged in a non-conclusory manner a pattern of decision-making that shows the influence of gender. Courts have interpreted the selective enforcement language in *Yusef* to require a plaintiff to "allege particular circumstances suggesting a meaningful inconsistency in punishment and particular circumstances suggesting that gender bias was a motivating factor behind the inconsistency.[23] *World Star Hip Hop, Inc.*, U.S.D.C., No. 10 Civ. 9538, 2011 U.S. Dist. LEXIS 123273, at *6 (S.D.N.Y. Oct. 25, 2011); see *Harris v. Saint Joseph's Univ.*, No. 13-CV-3937 (LFR), 2014 U.S. Dist. LEXIS 65452, at *4 (E.D. Pa. May 13, 2014).

[23] To state a selective enforcement claim under Title IX, a plaintiff must allege facts sufficient to give rise to an inference that the school intentionally discriminated against the plaintiff because of his or her sex — that the school acted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon [the protected] group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282 (1979)

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

The Complaint further satisfies the Title IX pleading standard by stating that UC's actions were "motivated, in part, by the gender of John Doe I and John Doe II." The Complaint alleges gender bias in a number of specific ways, including:

- The ARC Hearing Panel received biased significant training from the UC Women's Center. (Complaint ¶ 33.)
- The investigator and, even, members of the hearing panels were responsible for obtaining accommodations for Jane Roe I, Jane Roe II, and Jane Roe III based solely on their claimed status of victims. (Complaint ¶66(b); ¶ 114-115.) The investigators and hearing panel members sought these accommodations for the alleged victims despite the obvious conflict of interest. These accommodations were not disclosed to the hearing panel despite the possible relevance to the credibility of the witnesses. (Complaint ¶¶ 78(h), 114)
- The Hearing Panels were never instructed that accused students are innocent until proven guilty, or an equivalent statement indicating that the Plaintiffs did not bear the burden of proof. (Complaint ¶¶ 78(b).)
- The chair of the Hearing Panel for John Doe I did not permit numerous questions aimed at revealing inconsistencies in the testimony of Jane Roe I and Jane Roe II. (Complaint ¶78(c).) The chair of the hearing panel did not require Jane Roe III to remain present so that she could be questioned by John Doe II. (Complaint ¶ 107(h).)
- The Hearing Panels permitted alleged victims to make derogatory remarks about John Doe I and John Doe II and to submit inflammatory statistical evidence about the incidences of sexual assault against females on college campuses. (Complaint ¶ 112.)
- The hearing panels permitted the alleged victims to provide "impact statements" about the effects of the alleged sexual assault prior to any finding that a sexual assault had, in fact, occurred. (Complaint ¶¶ 78(f); 99(a); 113.)

- UC provided "accommodations" Jane Roe I, Jane Roe II, and Jane Roe III, but failed to disclose those accommodations to the Plaintiffs even though such accommodations could have affected the credibility of the alleged victims.
- The UC investigator, Defendant Cummins, failed to include a witness statement in his investigative report that tended to exonerate John Doe I. (Complaint ¶117.)

These allegations of gender bias, by themselves, should be sufficient to satisfy the 12(b)(6) standard. This is especially true because most people – let alone Ohio public university employees - are smart enough to not explicitly telegraph the intent to discriminate. Title IX plaintiffs, like Title IV plaintiffs, are entitled to expose pretext in these pronouncements via indirect/circumstantial evidence. *See e.g., Waldo v. Consumers Energy Co.*, 726 F.3d 802, 815 (6th Cir. 2013). Indeed, discriminatory intent is often hidden behind seemingly neutral statements and actions, but the intent can be seen in small ways in addition to those delineated above. One such way is the 'coincidental' fact that Cummins informed John Doe I and John Doe II that he had scheduled the ARC Hearings within minutes of each other, at about 11:40 p.m., and then initially sought to require each student to submit any written statements within 36 hours of the notification.

Here, John Doe I and John Doe II have identified numerous pieces of evidence that "tend to show" gender bias motivated the Defendants' unlawful disciplinary decisions. The Court does not need to look any further than the stunning admission by Defendant Cummins in connection with his investigation of a 2014 harassment allegation. In this incident, described in ¶121 of the Complaint, a male student was disciplined after he made an inappropriate threat towards a female staff member who had entered the men's restroom. Cummins admitted that UC treated this matter differently because of the gender of the persons involved: "If this was a male student walking through a female (restroom), it would generate a big buzz." (Complaint ¶121(d). These claims of gender bias in the Complaint are not conclusory and thus are sufficient under the modern 12(b)(6) standard because it is supported by a review of the recent UC investigations of sexual harassment

and sexual assault. This review revealed, for example, that 97% of the cases investigated by UC, men were the subjects of the investigation. (Complaint ¶ 118.) This, the Amended Complaint suggests, is a far different percentage from what would be expected in the population at large.

A recent case involving a claim against Columbia University provides a "road map" for the types of selective enforcement claims that can survive a motion to dismiss. *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356 (S.D.N.Y. 2015). In the case against Columbia, the male plaintiff did not include in the complaint any allegations that similarly situated female students were treated more favorably. *Id.* at *42-43. Instead, the complaint suggested that the university provided inadequate procedural protections provided to students accused of sexual assault had an effect of burdening men more than women, given "the higher incidence of female complainants of sexual misconduct [versus] male complainants of sexual misconduct." *Id.* at *43, *quoting* Am. Compl. In dismissing the complaint, the court noted that a complaint could survive a motion to dismiss if it included either allegations that similarly situated women are were treated differently "or, at a minimum, 'data showing that women rarely, if ever, are accused of sexual harassment . . ." *Doe, at *43,* quoting *Haley v. Virginia Commonwealth Univ.*, 948 F. Supp. 573, 580-81 ((E.D. Va. 1996).[24]

The Complaint in this case contains both of the items suggested in *Doe v. Columbia.*[25] The Complaint describes how UC has treated males and females differently in the investigation of nine similar matters of sexual assault. In every case, the alleged victims were female and the alleged perpetrators were male. (Complaint ¶119(a).) Most important are the matters involving situations, like for John Doe I and John Doe II, where the alleged victim claimed she was unable to consent

[24] The Defendants reliance on *Marshall v. Ohio Univ.*, 2015 U.S. Dist. LEXIS 155291 (S.D. Ohio Nov. 17, 2015), is misplaced. In Marshall, unlike in this case, the plaintiff did not allege the he was "innocent" of a Policy violation.

[25] Bias on the part of Cummins, *see supra,* can also support a Title IX violation. *Doe v. Washington & Lee Univ.*, No. 6:14-cv-00052, 2015 U.S. Dist. LEXIS 102426 (W.D. Va. Aug. 5, 2015) ("Bias on the part of [the investigator] is material to the outcome of John Doe's disciplinary hearing due to the considerable influence she appears to have wielded in those proceedings.")

because of intoxication. In those cases, UC invariably finds that the male student is the initiator of sexual activity and, thus, is the only person subject to potential discipline, *even in cases where both the male and female students are intoxicated.* (Complaint ¶¶119(c)-(d).) The Complaint, thus, asserts sufficient facts to suggest UC has treated female students accused of sexual harassment differently and that the University has acted differently in disciplinary procedures against female students accused of sexual assault and harassment.[26] *Compare Sahm v. Miami Univ.*, 2015 U.S. Dist. LEXIS 65864 (S.D. Ohio May 20, 2015) (dismissing claim where student failed to allege systemic differential treatment).

The Plaintiffs also satisfy the *Doe* standard by presenting a pattern of decision-making that shows the influence of gender. At UC, 97% of the persons investigated for sexual misconduct are male while only 11% of alleged victims were male. (Complaint ¶118.) These numbers are sufficient to raise an inference if discrimination when compared to national survey numbers suggesting that close to50% of all alleged victims are male; "federal surveys detect a high prevalence of sexual victimization among men—in many circumstances similar to the prevalence found among women." Lara Stemple and Ilan H. Meyer. *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions*. Am. J. of Pub. Hlth: June 2014, 104:6 pp. e19-e26. Moreover, in *every* case where discipline was actually imposed by UC, there was a male respondent and a female complainant. These facts, alone, should have been sufficient to establish enough of a pattern to defeat a motion to dismiss.

[26] The Plaintiffs are raising a disparate impact claim under Title IX. Instead, the Plaintiffs cite the statistical evidence as circumstantial evidence of gender bias. *Cf. Hopson v. DaimlerChrysler Corp.*, 306 F.3d 427, 437-38 (6th Cir. 2002) (noting that, in racial discrimination matter, statistical evidence may be sufficient to survive summary judgment).

The statistical evidence in the Amended Complaint is sufficient to defeat the motion to dismiss under traditional discrimination pleading standards.[27] For example, in employment discrimination cases the Supreme Court has explained that "a plaintiff may present statistics evidencing an employer's pattern and practice of discriminatory conduct, which may be helpful to establish a *prima facie* case against the Defendants. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817 (1973). At trial, then UC would have the opportunity "to articulate some legitimate, non-discriminatory reason[s] for" the difference in treatment. *See Texas Dept. of Community Affairs v. Burdines*, 450 U. S. 248, 253, 101 S. Ct. 1089 (1981).

This case falls squarely within the decision of Judge Spiegel in a Title IX claim asserted in case against Xavier University. *Wells, supra.* In *Wells*, the plaintiff alleged that he was falsely accused of sexual assault against a female student by Xavier and that he was wrongly expelled after a flawed disciplinary proceeding motivated by efforts to appease the U.S. Department of Education. The plaintiff in *Wells*, like John Doe I and John Doe II, asserted that Xavier "made him into a scapegoat" to demonstrate to the OCR its better response to sexual assault. The court agreed with the plaintiff's argument that his allegations were sufficient to state an erroneous outcome Title IX claim insofar as he alleged that Xavier had "react[ed] against him, as a male, to demonstrate to the OCR that [Xavier] would take action, as [it] had failed to in the past, against males accused of sexual assault." *Id.* at 751.

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

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

2. Deliberate Indifference/Archaic Standards

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

In the Amended Complaint, the Plaintiff alleges:

> The view of males incorporated into UC's practices and procedures relies on a chauvinistic view of men as "predators" and women as the "guardians" of virtue. Based on a review of all investigations, the UC practices and procedures appear to not necessarily be hostile to men, but can be seen as biased in favor of unfairly protecting "vulnerable" and "virtuous" females.

(Complaint ¶120.) As support for this allegation, the Complaint cites to the fact that "UC has never imposed discipline on a female student in a case involving a male complainant." (Complaint ¶120 (a).) The Complaint also notes that this archaic attitude is found in cases where both male and females engage in sexual activity when intoxicated; in those cases only the male students – viewed as "predators" face discipline from the school despite the fact that males and females engaged in the same conduct. (Complaint ¶¶ 119(c).) The Complaint refers to specific cases where this has occurred:

> UC has engaged in selective enforcement when it comes to cases where one or both parties are intoxicated.
>
> > i. Although the facts of these cases are not easy to discern, it appears that in some of the matters all parties were drinking, yet UC identified the male participant in drunken sexual encounters as the initiator, notwithstanding the comparable intoxication of both participants.
> >
> > ii. For example, in a 2010 matter, the male respondent told Cummins "There is no question in my mind that things would not be so confusing now if we had both been sober than. The fact that she and I had been drinking that night sits near the top of my list of regrets." Yet despite receiving information that both the male and female student were intoxicated, UC only investigated and imposed discipline on the male student.

(Complaint ¶119(d).)

UC's outdated attitudes about women and sexuality are embodied in this approach to enforcement. *See* Laura Kipnis, *Sexual Paranoia Strikes Academe*, Chronicle of Higher Ed., February 27, 2015 (noting that "the myths and fantasies about power [are] perpetuated in these new codes"). This constitutes a Title IX violation. *Compare Pederson v. Louisiana State Univ.*, 213 F.3d 858, 881 (5th Cir. La. 2000) (noting that "Supreme Court precedent demonstrates that archaic assumptions . . . constitute intentional gender discrimination."), *citing United States v. Virginia*, 518 U.S. 515, 533, 116 S.CT. 2264 (1996) (holding that an institution's refusal to admit women is intentional gender discrimination in violation of the Equal Protection Clause because, inter alia, of "overbroad generalizations about the different talents, capacities, or preferences of males and females"); *Roberts v. United States Jaycees*, 468 U.S. 609, 625, 104 S.Ct. 3244 (1984) (warning of the dangers posed by gender discrimination based on "archaic and overbroad assumptions").

The "deliberate indifference" standard is applied where a plaintiff seeks to hold an institution liable for sexual harassment and requires the plaintiff to demonstrate that an official of the institution who had authority to institute corrective measures had actual notice of, and was deliberately indifferent to, the misconduct. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277, 118 S.Ct. 1989 (1998). In this case, the Plaintiffs allege that they were found responsible for sexual misconduct and expelled, which resulted in a deprivation of access to educational opportunity at UH. There is no question that UC administrators were on notice of Plaintiffs' situation, including the selective enforcement issues, and were aware of the procedural deficiencies in the hearing process. These allegations courts have found, are sufficient to state a Title IX claim under a deliberate indifference theory. *Wells*, 7 F. Supp. 2d at 751-52 (complaint survived motion to dismiss where a "liberal reading of Plaintiff's Complaint shows he was subjected to unfounded allegations and an unfair process due in part [because of the Department of Education] and his status as a male student accused of assault.").

CONCLUSION

The Motion to Dismiss should be Denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Evan T Priestle epriestle@taftlaw.com,
Rosemary Doreen Canton Canton@taftlaw.com

/s/ Joshua Adam Engel
Joshua Adam Engel (0075769)

Exhibit A

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IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

JOHN DOE I, et al

Plaintiffs

v.

UNIVERSITY OF CINCINNATI, et al

Defendants

Case No. A1406907

Judge: DINKELACKER

STIPULATION OF DISMISSAL WITHOUT PREJUDICE OF CLAIMS BY DOE I

ENTERED
AUG 18 2015

Pursuant to Civil Rule 41(A)(1)(b), the Plaintiff Doe I and the Defendants hereby stipulate to the dismissal of all claims by Doe I in this action without prejudice.

FOR PLAINTIFF DOE I

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IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

JOHN DOE I, et al	Case No. A1406907
Plaintiffs	Judge: DINKELACKER
v.	ENTRY RE:
UNIVERSITY OF CINCINNATI, et al	STIPULATION OF DISMISSAL WITHOUT PREJUDICE OF CLAIMS BY DOE I
Defendants	

This matter came before the Court on a Stipulation of Dismissal Without Prejudice of the Claims by Doe I pursuant to Civil Rule 41(A)(1)(b).

ACCORDINGLY, IT IS HEREBY ORDERED that this action is dismissed without prejudice as to the claims by Doe I.

COURT OF COMMON PLEAS
ENTER
JUDGE PATRICK DINKELACKER
THE CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED AS COSTS HEREIN.
8-18-15

ELECTRONICALLY FILED 07/22/2015 15:17 / ZZ1 / A 1406907 / CONFIRMATION NUMBER 426825