UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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 : REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT :

I. INTRODUCTION

Plaintiffs' response memorandum provides no substantive basis for denying the motion to dismiss of Defendants University of Cincinnati ("University"), Daniel Cummins ("Cummins"), Denine M. Rocco ("Rocco"), and Debra Merchant ("Merchant") (Defendants Cummins, Rocco, and Merchant will be referred to collectively as the "Individual Defendants"). Rather, Plaintiffs' response memorandum side-steps the dispositive law and reasoning offered by Defendants by labelling conclusory allegations as fact or evidence and offers the same ineffectual allegations in their Complaint.

Plaintiffs' claims against the Individual Defendants fail because they are barred by the Eleventh Amendment and because the allegations against each of these Defendants in their individual capacities fail to state a claim upon which relief can be granted. Even accepting Plaintiffs' allegations as true, they received constitutional due process protections. They both received notice of the charges, a hearing before an Administrative Review Committee, an appeal, and then a second hearing before an Administrative Review Committee. Even if the Court believes that Plaintiffs have identified due process protections that they were not afforded, such protections were not clearly established.

John Doe II's claims seeking a declaratory judgment should be dismissed as moot. There is no case or controversy remaining as he has graduated with a law degree from the University.

Plaintiffs' claims under Title IX should also be dismissed. Plaintiffs have offered nothing more than conclusory allegations supporting their claims that their disciplinary matters were the result of gender bias. Plaintiffs' attempt to seek a declaratory judgment that the University's policies and procedures do not comply with Title IX should also be dismissed as there is no private right of action allowing them to bring such a challenge. Lastly[1], Plaintiffs' theory of deliberate indifference under Title IX does not apply to their allegations.

II. ARGUMENT

A. Count I of Plaintiffs' Complaint is Barred by the Eleventh Amendment.

"[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)); *see also Pennhurst State Sch. & Hosp.v. Halderman*, 465 U.S. 89, 105 (1984) ("We recognized [in *Edelman*] that the prospective relief authorized by *[Ex parte] Young* 'has permitted the [Fourteenth Amendment] to serve as a sword, rather than merely a shield' . . . . But we declined to extend the fiction of *[Ex parte] Young* to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States.") (internal citation omitted).

[1] Plaintiffs do not dispute that Count V of their Complaint – a stand-alone claim styled "Injunctive Relief" – should be dismissed.

Plaintiffs try to dodge the Eleventh Amendment bar by claiming that they are not seeking retrospective relief because a declaratory judgment for John Doe I would permit him to re-enroll and a declaratory judgment for John Doe II would remove the discipline from his academic record. (Doc. 14 at PAGEID 193) That does not change the retrospective nature of their requested relief. To provide such relief, this Court would have to issue a declaration that prior acts of certain University officials and the prior judgment of the Hearing Panels were in error. *See Brown*, 2010 WL 2629878, at *4 ("Brown is seeking retroactive relief because in order for Brown to be made whole for the alleged constitutional injury, this Court would have to issue a declaration that the prior judgment of the Wayne County Municipal Court was in error, the correction of which would entitle Brown to an injunction.").

Under *Ex parte Young,* "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern v. Jordan,* 440 U.S. 332, 337 (1979); *see also Green*, 474 U.S. at 68 (*Ex parte Young* "held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law.") (citation omitted). Plaintiffs are not seeking to enjoin state officials to conform their **future** conduct to the requirements of federal law. They are seeking an order from this Court finding that the University's Code of Conduct "as applied" to them violated constitutional due process. (Doc. 1 at PAGEID 58); *see Gies v. Flack*, 495 F. Supp. 2d 854, 865 (S.D. Ohio 2007) (holding that plaintiff's claim "seeking a declaration that Defendants violated Plaintiff's constitutional rights by prematurely terminating him without due process" is "dismissed because the Eleventh Amendment bars this Court from hearing" it).

Moreover, and perhaps more importantly, while Plaintiffs attempt to recast their request for injunctive relief as only against the Individual Defendants[2], they have not alleged that any of the Individual Defendants have the power to grant their requested relief – expungement of their disciplinary records. (Doc. 1 at PAGEID 56-58) In reality, their requests for injunctive relief are against the University. All of Plaintiffs' allegations in Count I of their Complaint are alleged against the University. *E.g.*, Doc. 1 at PAGEID 56-57 ("UC has a constitutional obligation to provide a fundamentally fair and reliable hearing process."; "UC conducted biased investigations, which were then provided to the ARC Hearing Panel."; "UC permitted the use of hearsay evidence at the ARC Hearing without providing the Plaintiffs with the opportunity to effectively cross-examine witnesses."). Such a claim is barred by the Eleventh Amendment regardless of whether it is prospective or retrospective. *See Pennhurst*, 465 U.S. at 101-02 ("[A]s when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief"); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 282 (1997) ("Any contention that the State is not implicated by the suit in a manner having an immediate effect on jurisdictional control over important public lands is belied by the complaint itself.").

Count I of Plaintiffs' Complaint is barred by the Eleventh Amendment.

[2] While they have not expressly done so, Plaintiffs' lack of any rebuttal regarding application of the Eleventh Amendment to the University indicates their concession that it bars Count I against the University.

B. Judge Dinkelacker's Reasoning Applies with Equal Force Here.

Defendants agree that Judge Dinkelacker's order dismissing Counts I, III, and V of John Doe II's complaint in Hamilton County Court of Common Pleas case number A1406907 does not provide *res judicata* affect in this case. That, however, does not mean that Judge Dinkelacker's dispositive reasoning regarding those claims should not apply with equal force in this case. John Doe II has graduated with a law degree from the University. Any challenge he could have to the University's Code of Conduct has been mooted by his graduation.[3] *See Bd. of Sch. Comm'rs of City of Indianapolis v. Jacobs*, 420 U.S. 128, 129 (1975) ("[A]ll of the named plaintiffs in the action had graduated from the Indianapolis school system; in these circumstances, it seems clear that a case or controversy no longer exists between the named plaintiffs and the petitioners with respect to the validity of the rules at issue."); *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1030 (6th Cir. 1995) ("[W]e learned that Sandison and Stanley graduated from high school in June 1995, which precludes the repetition of another controversy over whether these same plaintiffs may run on their high school teams.").

Also, Judge Dinkelacker's reasoning for finding that John Doe II's declaratory judgment claims against Defendants were moot, highlights application of the Eleventh Amendment bar in this case. (Doc. 11-2 at PAGEID 155 ("The discipline exacted against Doe II is over and, due to his graduation, he faces no further discipline under the Code. The Court agrees that graduation does render the Code application to Doe II moot.")). Any relief afforded to John Doe II would be retrospective.

[3] "[M]ootness is an element of justiciability and the court has a duty to consider it sua sponte." *Tigrett v. Cooper*, 595 F. App'x 554, 557 (6th Cir. 2014) (citing *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579-583-84 (6th Cir. 2006)).

C. Counts I and II of Plaintiffs' Complaint Should Be Dismissed.

1. Plaintiffs failed to state a procedural due process violation upon which relief can be granted.

"A school is an academic institution, not a courtroom or administrative hearing room." *Board of Curators v. Horowitz,* 435 U.S. 78, 88 (1978). "Similarly, a school disciplinary proceeding is not a criminal trial, and a student is not entitled to all of the procedural safeguards afforded criminal defendants." *Sterrett v. Cowan*, 85 F. Supp. 3d 916, 926 (E.D. Mich. 2015) (citing *Flaim v. Medical Coll. of Ohio,* 418 F.3d 629, 635, n. 1 (6th Cir. 2005); *Jackson v. Dorrier,* 424 F.2d 213, 217 (6th Cir.1970) ("To hold that the relationship between parents, pupils and school officials must be conducted in an adversary atmosphere and accordingly the procedural rules to which we are accustomed in a court of law would hardly best serve the interests of any of those involved.")).

"Notice and opportunity to be heard remain the most basic requirements for procedural due process." *Marshall v. Ohio Univ.*, No. 2:15-cv-775, 2015 WL 7254213, at *11 (S.D. Ohio Nov. 17, 2015) (citing *Flaim*, 418 F.3d at 635; *Goss v. Lopez*, 419 U.S. 565, 579 (1975)). Plaintiffs cannot rationally allege that they did not have notice and an opportunity to be heard. *Id.* (dismissing plaintiff's procedural due process claims despite the fact that plaintiff was not permitted to read the complainant's rebuttal statement, where plaintiff was notified of the complainant's complaint; the plaintiff was notified that the university was going to investigate; the university interviewed plaintiff and five other witnesses; the university conducted a hearing; and the plaintiff was permitted to appeal); *see also Brown v. Univ. of Kan.*, 16 F. Supp. 3d 1275, 1290 (D. Kan. 2014), *aff'd*, 599 F. App'x 833 (10th Cir. 2015) (plaintiff was afforded due process where "Defendants communicated with Plaintiff about the charges against him and

made an effort to hear his side of the story"); *Caiola v. Saddlemire*, No. 3:12-CV-00624 VLB, 2013 WL 1310002, at *4 (D. Conn. Mar. 27, 2013) ("The extensive nature of the notice and procedures afforded to Plaintiff pre-expulsion, and the availability of an appeals process post-deprivation, deem that the University's hearing procedures comport with due process.").

In their response memorandum, Plaintiffs continue to assert that the University has violated due process by placing the burden of proof on accused students.[4] (Doc. 14 at PAGEID 201-203) As Defendants explained in their motion to dismiss, the burden of proof is not placed on accused students in disciplinary hearings. (Doc. 11 at PAGEID 92-93) Even if it was, that would not be a violation of constitutional due process. In *Lavine v. Milne*, the Supreme Court stated: "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." 424 U.S. 577, 585 (1976). Plaintiffs do not discuss or seek to distinguish *Lavine* or its progeny. Rather, ignoring that controlling authority, Plaintiffs ask this Court to follow the reasoning that a Texas Court of Appeals case relegated to a footnote. (Doc. 14 at PAGEID 203-204) This Court should follow *Lavine* and its progeny. *See, e.g., 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.").

Further, regarding cross examination in a student disciplinary matter, Plaintiffs' response memorandum ignores the dispositive Sixth Circuit case law which provides

[4] Notably, Plaintiffs do not allege that any of the Individual Defendants are responsible for allegedly placing the burden of proof on an accused student. This fact helps to confirm that Plaintiffs are seeking to press their procedural due process claims directly against the University in violation of the Eleventh Amendment.

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)[5]; *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."). While the University offers a circumscribed form of cross-examination, it would not be a constitutional violation if the University refused to permit any cross-examination.

Next, Plaintiffs attack the due process they were afforded by claiming that the University's disciplinary process was biased against them. Despite their continued attempt to characterize their allegations as fact or evidence, Plaintiffs' allegations of bias are nothing more than conclusions. These conclusions are insufficient to prevail in the face of a Rule 12(b)(6) challenge, especially where the law affords a presumption of honesty and integrity to these University processes. *See Doe v. Univ. of Cincinnati*, No. 1:15-CV-600, 2015 WL 5729328, at *2 (S.D. Ohio Sept. 30, 2015) ("[I]n the University setting a disciplinary committee is entitled to a presumption of honesty and integrity absent a showing of actual bias.") (citation omitted).

Plaintiffs also continue to allege that they can show bias through outdated training materials, claiming that these materials show a bias toward individuals accused

[5] The *Antone* case involves a suspension and ultimate expulsion of the plaintiff student. 557 F. App'x at 431. Thus, under the *Matthews* balancing test, the outer-bounds of due process were to be afforded. The Sixth Circuit held that the student did not have a right to cross-examine students or school administrators. *Id.*

of sexual assault. (Doc. 14 at PAGEID 208-209) However, similar attempts to establish bias through training materials have been rejected. *See Bleiler v. Coll. of Holy Cross*, No. CIV.A. 11-11541-DJC, 2013 WL 4714340, at *12 (D. Mass. Aug. 26, 2013).

Additionally, allegations regarding multiple roles by University administrators are insufficient to establish bias. "The 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; *see also* (*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).

Further, Plaintiffs again claim that they can establish bias through "statistical evidence." (Doc. 14 at PAGEID 209-10) There is no inference of bias that can be drawn from their purported "statistical evidence." *See Cobb v. The Rector & Visitors of Univ. of Virginia*, 84 F. Supp. 2d 740, 747 (W.D. Va. 2000) (rejecting plaintiff's attempt to rely "on raw statistics to argue that a greater number of minority students are charged with and convicted of honor violations" because "statistics, standing alone, do not create a constitutional violation") (citing *Butler v. Cooper,* 554 F.2d 645, 647 (4th Cir. 1977)); *see also Tsuruta v. Augustana Univ.*, No. 4:15-CV-04150-KES, 2015 WL 5838602, at *4 (D.S.D. Oct. 7, 2015) ("The fact that males are more often the subject of disciplinary (or

criminal) proceedings stemming from allegations of sexual assault does not suggest that those proceedings are tainted by an improper motive.").

Lastly, Plaintiffs' allegation of bias directly contradicts an important fact that John Doe I attempts to gloss over in his Complaint – he was ultimately found "Not Responsible" for the allegations made by Jane Roe II. (Doc. 1 at PAGEID 41)[6] So, accepting John Doe I's allegations as true, the ARC Hearing Panel was biased toward him in finding him "Responsible" for Jane Roe I's allegations, but not biased toward him when it found him "Not Responsible" for Jane Roe II's allegations. Such a position is untenable, especially given that disciplinary committees in the university setting are entitled to a presumption of honesty and integrity. *See Doe v. Univ. of Cincinnati*, , 2015 WL 5729328, at *2.

Plaintiffs have failed to state procedural due process claims upon which relief can be granted. *See Salau v. Denton*, No. 2:14-CV-04326-SRB, 2015 WL 5885641, at *8 (W.D. Mo. Oct. 8, 2015) ("Plaintiff was afforded adequate procedural rights by Defendants by way of notice of the charges, identification of the violations charged, and an opportunity to present his case even though he refused to participate.").

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

Plaintiffs' response memorandum incorrectly describes the state of the law regarding individual liability under 42 U.S.C. § 1983. Citing to *Kentucky v. Graham*, 473 U.S. 159, 166 (1985), Plaintiffs assert that "a Plaintiff need only show that [individuals] were personally involved in the alleged constitutional deprivations." (Doc.

[6] Confusingly, the Complaint states that John Doe I was found "Responsible" for Jane Roe I, but "Not Responsible" for Jane Roe I. (Doc. 1 at PAGEID 41) Defendants assume that this was a typo as John Doe I was found "Not Responsible" for Jane Roe II's allegations. In fact, John Doe I's discussion of his appeal in paragraph 81(a) of the Complaint only mentions Jane Roe I. (*Id.*)

14 at PAGEID 211) That is an incorrect statement of law and unsupported by their citation to *Graham*. In *Graham*, the Supreme Court stated that to establish personal liability under § 1983, a plaintiff must show that the state official "caused the deprivation of a federal right." 473 U.S. at 166; *see also Reed-Bey v. Pamstaller*, 607 F. App'x 445, 451 (6th Cir. 2015) (citing *Graham*). Thus, there must be a causal relationship between the individual defendant's conduct and a due process violation, not mere involvement.

As described in Defendants' motion to dismiss, 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. Plaintiffs' response memorandum does not assert otherwise. The Individual Defendants should be dismissed. *See 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").

Again, Plaintiffs' attempt to plead their procedural due process claims against only the Individual Defendants is belied by their actual allegations. It is obvious that Plaintiffs are attempting to plead these claims directly against the University in violation of the University's Eleventh Amendment immunity.

3. The Individual Defendants are entitled to qualified immunity.

In response to the Individual Defendants' assertion that they are entitled to qualified immunity, Plaintiffs state that "[t]he Sixth Circuit law clearly establishes that the Plaintiffs were entitled to due process in the disciplinary proceedings held at UC." (Doc. 14 at PAGEID 212) Plaintiffs misconstrue the qualified immunity inquiry. When

analyzing qualified immunity, the Court must examine (1) whether a constitutional right would have been violated on the facts alleged and (2) whether the right was clearly established. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009). 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). In other words, it is the contours of due process that must be clearly established, not just the requirement of due process itself.

Even if the Court finds that Plaintiffs have identified due process protections that were not afforded to them, those due process protections have not been clearly established. Because those protections are not clearly established, "it is unfair to subject [those government officials] to money damages . . . ." *Marshall*, 2015 WL 7254213, at *13 (quoting *Wilson v. Layne*, 526 U.S. 603, 618 (1999)).

Additionally, the Court should reject Plaintiffs' request to delay a ruling on qualified immunity until after discovery. "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Regarding application of the qualified immunity doctrine, a trial court "must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings." *Crawford-El v. Britton*, 523 U.S. 574, 597-98 (1998); *see also Henricks v. Pickaway Corr. Inst.*, 782 F.3d 744, 750 (6th Cir. 2015) ("[Q]ualified immunity insulates the defendant from the burdens of litigation as well as from liability."). The Individual Defendants are entitled to qualified immunity, and this Court should not delay that ruling.

D. Plaintiffs Failed to Adequately State Title IX Claims.

1. Plaintiffs failed to plead more than conclusory allegations of gender bias.

"Allegations 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). "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." *Id.* "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.*; *see also Sahm v. Miami Univ.*, No. 1:14-cv-698, 2015 WL 2406065, at* 4 (S.D. Ohio May 20, 2015) (granting University's motion to dismiss because the expelled student's complaint 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).

Plaintiffs do not point to any factual allegation of the type needed to support a plausible Title IX claim. Plaintiffs have not offered any of the "traditional means of demonstrating gender bias" – *i.e.* "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." *Sahm*, 2015 WL 2406065, at *4 (quoting *Mallory v. Ohio Univ.*, 76 F. App'x 634, 640 (6th Cir. 2003)). Rather, Plaintiffs have merely restated the same ineffectual and conclusory allegations from their Complaint.

One thrust of Plaintiffs' Title IX claims continues to be that various pressures from the federal government have created a purported atmosphere of hostility toward

men on college campuses. (Doc. 14 at PAGEID 206-207) Such allegations are insufficient to establish gender bias. *See Sterrett*, 2015 WL 470601, at *15 (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).

Plaintiffs have not offered any fact or evidence to support their conclusory allegations of gender bias. *See Marshall*, 2015 WL 7254213, at *8 ("Even if true, cracking down on perpetrators is not the same as cracking down on men."); *Ludlow v. Nw. Univ.*, No. 14 C 4614, 2015 WL 5116867, at *7 (N.D. Ill. Aug. 28, 2015) ("[A]lleging that the Northwestern investigation was a result of outside pressure groups does not create the plausible inference—even if those groups were women's groups—that Northwestern investigated because Ludlow was a man, not because the charge was rape."). Rather, Plaintiffs' allegation is that the University's procedures and enforcement of its obligations under Title IX have resulted in a disparate impact on men. Such an allegation fails to state a Title IX claim. *See Marshall*, 2015 WL 7254213, at *5 ("[A]lthough Title IX prohibits intentional gender discrimination, it does not support claims of disparate impact.").

As can be seen by Plaintiffs' response memorandum, they are attempting to do exactly what *Yusuf* prohibits – offer allegations of purported procedural wrongs and a request for this Court to construe those as evidence of gender bias. *See Yusuf*, 35 F.3d at 715. Plaintiffs have alleged nothing that would indicate that a female accused of

violating the University's Code of Conduct would have been treated any differently than he was as a male accused of violating the Code of Conduct.

For example, Plaintiffs allege that a "telling suggestion of bias" is seen by the University's use of the word "survivor" to describe alleged victims of sexual assault. (Doc. 14 at PAGEID 207) Even accepting Plaintiffs' allegations as true, if a male was an alleged victim of sexual assault, he would be referred to as a "survivor." Similarly, Plaintiffs believe that the assistance Defendant Cummins provided alleged victims in seeking certain accommodations (which are required to be offered under federal law) is evidence of gender bias. (*Id.*) But if a male student was an alleged victim of sexual assault, Defendant Cummins would also assist him in seeking accommodations. Further, Plaintiffs state that the "most damning evidence of bias" is that Defendant Cummins allegedly failed to include evidence that was favorable to an individual accused of sexual assault. (*Id.* at PAGEID 208) Again, even accepting Plaintiffs' allegations as true, this does not indicate any bias against male students. Plaintiffs have offered no evidence of bias towards males. *See Sahm*, 2015 WL 2406065, at *4 ("Demonstrating that a university official is biased in favor of the alleged victims of sexual assault claims, and against the alleged perpetrators, is not the equivalent of demonstrating bias against male students."); *Haley v. Virginia Com. Univ.*, 948 F. Supp. 573, 579 (E.D. Va. 1996) (favoritism toward the female complainant's attorney and purported bias by a reviewing Dean "at best reflect[s] a bias against people accused of sexual harassment and in favor of victims and indicate[s] nothing about gender discrimination").

Plaintiffs also claim that they have pled facts to support a claim that the University has a "pattern or practice" of discriminating against men. They have not.

"[O]ne case by an individual who was subjectively dissatisfied with a result does not constitute a 'pattern of decision-making.'" *Mallory*, 76 F. App'x at 640. Also, even if Plaintiffs had pled facts to show any differential treatment (which they have not), "a pattern and practice of differential treatment is not enough to allege gender bias unless a plaintiff's complaint contains allegations that make it plausible that gender was the motivating factor behind that differential treatment." *Marshall*, 2015 WL 7254213, at *8. Plaintiffs have offered no plausible contention that their discipline was motivated by a bias against their male gender. "The fact that males are more often the subject of disciplinary (or criminal) proceedings stemming from allegations of sexual assault does not suggest that those proceedings are tainted by an improper motive." *Tsuruta*, 2015 WL 5838602, at *4; *see also Doe v. Case W. Reserve Univ.*, No. 1:14CV2044, 2015 WL 5522001, at *6 (N.D. Ohio Sept. 16, 2015) ("That CWRU's policy disproportionately affects males as a result of the higher number of complaints lodged against males does not demonstrate selective enforcement by the university.").

Plaintiffs also claim throughout their memorandum that there were differences in treatment between them and their female complainants. Plaintiffs then request that this Court construe that as gender discrimination. Such a claim has been routinely rejected: "Even if the University treated the female student more favorably than the Plaintiff, during the disciplinary process, the mere fact that Plaintiff is male and the alleged victim is female does not suggest that the disparate treatment was because of Plaintiff's sex." *Salau*, 2015 WL 5885641, at *3 (citation and internal quotation omitted); *see also Doe v. Case W. Reserve Univ.*, No. 1:14CV2044, 2015 WL 5522001, at *6 (N.D. Ohio Sept. 16, 2015) ("Jane Roe, the complainant against Plaintiff in the disciplinary proceedings, is not a counterpart for the purposes of a selective enforcement claim.").

Another allegation made by Plaintiffs is that the University fails to take into consideration male students' intoxication. (Doc. 14 at PAGEID 218) That argument has already been rejected by the Sixth Circuit in *Mallory v. Ohio Univ.*, 76 F. App'x 634 (6th Cir. 2003). There, the male plaintiff asserted that the defendant university's "focus on [the female complainant's], but not Mallory's, ability to consent . . . reveals that the University holds an antiquated notion that 'men are sexual aggressors and women are victims.'" *Id.* at 639. The Sixth Circuit held, however, that "the University's decision to focus on the ability to consent merely demonstrates the University's policy decision to punish those who engage in sexual conduct with another person when the first person is aware of the other's inability to consent . . . . [T]here is no evidence that this interpretation was discriminatorily applied or motivated by a chauvinistic view of the sexes." *Id.*

Similarly, in *Xiaolu Peter Yu v. Vassar Coll.*, the male plaintiff alleged that the university's failure to consider his intoxication while considering the female student's intoxication was evidence of gender bias. No. 13-cv-4373, 2015 WL 1499408, at *26 (S.D.N.Y. March 31, 2015) The Court noted that the university maintained a policy where "the voluntary intoxication [] by the respondent typically isn't a factor that the panelists are concerned with." *Id.* Ultimately rejecting the male plaintiff's argument, the Court found that "[t]here is simply no indication anywhere in the record that this policy was understood to apply on a gendered basis." *Id.* Said another way, the fact that the university did not consider the respondent's intoxication would apply equally if the respondent was male or female.

The same is applicable to this case. Plaintiffs have offered **no** evidence that an intoxicated male student has alleged that he was sexually assaulted by a female student

because he was unable to consent and that the University has treated the accused female student differently than a similarly situated accused male student. Similar to the above cases, the fact that the University does not permit a student's intoxication to be used as defense to sexual misconduct provides no evidence of gender bias. *See also Routh*, 981 F. Supp. 2d at 211 (rejecting male plaintiff's allegation that the defendant university engaged in "selective prosecution" where there was "no indication that Routh availed himself" of the complaint process).

Plaintiffs' Title IX claims fail as they have not pled anything more than conclusory allegations of gender bias.

2. A deliberate indifference theory is inapplicable to Plaintiffs' allegations and they otherwise fail to offer any support for an allegation of gender bias.

In their response memorandum Plaintiffs indicate that they are attempting to proceed under a "deliberate indifference" theory of liability under Title IX.[7] (Doc. 14 at PAGEID 221) The deliberate indifference theory in the Title IX context is a test courts use to impute liability to an institution when the underlying discrimination is not caused directly by the institution. *See Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644 (1999) ("If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment."). "The deliberate indifference standard applies when a plaintiff seeks to hold a university responsible for sexual harassment." *Marshall*, 2015 WL 7254213, at *8 (citing *Mallory*, 76 F. App'x at 638–39). "The Sixth Circuit has not

[7] Plaintiffs also mention an "archaic assumptions" standard. (Doc. 14 at PAGEID 220) As stated in *Marshall*, "[t]he archaic assumptions standard applies when a plaintiff seeking equal athletic opportunities demonstrates discriminatory intent in actions taken because of classifications based upon archaic beliefs and stereotypes about gender." 2015 WL 7254213, at *8 (citing *Mallory*, 76 F. App'x at 638-39). The Sixth Circuit has never held that this standard applies to allegations akin to Plaintiffs; there is no reason for this Court to do so either. *Id.*

determined that these Title IX standards, which were developed in sexual harassment cases and cases involving unequal athletic opportunities, are applicable when a plaintiff [] claims that intentional gender discrimination occurred in a university disciplinary proceeding." *Id.* (citing *Mallory*, 76 F. App'x at 639–42).

Very recently, a fellow Judge within this District dismissed a "deliberate indifference" Title IX claim related to a university disciplinary proceeding because he would not "broaden the current framework used to analyze allegations about discrimination in a university disciplinary proceeding in the absence of controlling Sixth Circuit precedent." *Id.* This Court should do the same, because the use of a "deliberate indifference" theory in this context would be duplicative. Plaintiffs' allegations are brought against the University. There is no need to attempt to impute liability to the University based upon other acts of harassment. Also, Plaintiffs make *no* allegation that they were sexually harassed. A Title IX claim brought pursuant to a "deliberate indifference" theory is ill-conceived.

Even if this Court finds that the deliberate indifference theory applies to Plaintiffs' allegations, their claims still fail as they have not alleged any facts showing that the University's actions were caused by a gender animus. Any claim brought under Title IX requires a showing that the actions taken against the individual were caused by a gender animus. *See Mallory*, 76 F. App'x 638-69 (stating that even if the deliberate indifference standard applied, the plaintiff's claims failed because he failed to offer any evidence that the university's actions were motivated by his sex). Plaintiffs have offered no support for their conclusory allegations that their disciplinary matters were motivated by their gender.

3. There is no private right of action to challenge a university policy that violates Title IX.

Count III of Plaintiffs' Complaint should be dismissed as there is no private right of action to challenge a university policy that violates Title IX. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291-92 (1998).

III. 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,

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CERTIFICATE OF SERVICE

I certify that on January 25, 2016, I filed the Reply Memorandum in Support of 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
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