UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN DOE	:	
	:	
Plaintiff	:	CIVIL ACTION NO.:
	:	3:15-CV-01608 (AVC)
vs.	:	
	:	
YALE UNIVERSITY, ET AL	:	
	:	
Defendants	:	JANUARY 13, 2016

MEMORANDUM OF LAW IN SUPPORT OF YALE UNIVERSITY'S MOTION TO DISMISS

The defendant, Yale University, has moved to dismiss the First and Second Counts of the Complaint on the ground that the plaintiff fails to state claims under Title IX of the Education Amendments of 1972 and Title VI of the Civil Rights Act of 1964 because he has failed to allege any facts demonstrating that the defendant expelled him because of his gender, race, or national origin. This memorandum of law is submitted in support of that motion.

I. Factual Background

In his complaint, the plaintiff has attempted to assert claims under Title IX and Title VI alleging that Yale University discriminated against him based on his gender, race, and national origin when it expelled him from the University after conducting an investigation into allegations that he violated Yale's sexual misconduct policy.[1] The plaintiff has alleged that he is a Native American and Filipino male who "identifies with the Lakota (Sioux) Nation."

[1] He also has alleged state law claims for breach of contract, promissory estoppel, and negligence.

(Complaint, at ¶ 17.) He alleges, without any factual support, an elaborate conspiracy among the female student, whom he calls "Accuser," and two of her friends, all of whom identify with the Navajo Nation, to wrongfully accuse the plaintiff of sexual misconduct in order to "get rid of" the plaintiff and the Associate Dean of Native Students and Director of the Native American Cultural Center, who also allegedly identifies with the Lakota (Sioux) Nation, so that they could "take over" the Native American Cultural Center. The plaintiff claims that Accuser pursued him and engaged in consensual sexual acts with him in October, 2011 and then purposefully "arranged a situation where [the plaintiff] would be accused of sexual misconduct" in January, 2012 in an effort to further her plan to take over the Native American Cultural Center. (Complaint, at ¶¶ 6, 17, 21-35, 57-58.)

Yale has established a disciplinary body for students and faculty accused of sexual misconduct, known as the University Wide Committee on Sexual Misconduct ("Committee"). The Complaint sets forth some of the procedures governing formal complaints made to the Committee. In his Title IX and Title VI claims, the plaintiff alleges -- again without factual support -- that Yale breached these procedures in its investigation of Accuser's complaint and decision to expel the plaintiff, and that it did so based upon the plaintiff's gender, race, and national origin. (Complaint, at ¶¶ 172-176, 179-185.)

II. Legal Standard

On a motion to dismiss, the Court must accept as true all facts set forth in the complaint and draw all reasonable inferences in the plaintiff's favor. Burch v. Pioneer Credit Recovery, Inc., 551 F.3d 122, 124 (2d Cir. 2008.) However, the Court cannot accept non-

factual matter or conclusory statements as true. See, Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id., citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (Internal quotations and citations omitted.) Id., citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556, 570 (2007). "The plausibility standard…asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." (Internal quotations omitted.) Id., citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557 (2007). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but not shown -- that the pleader is entitled to relief." (Internal quotations omitted.) Id. at 679, citing Fed. Rule Civ. P. 8(a)(2).

III. Argument

A. The Court in *Doe v. Columbia University* Held that *Igbal* and *Twombly* Required the Dismissal of Claims Virtually Identical to the Present Plaintiff's Claims.

Doe v. Columbia Univ., 2015 U.S. Dist. LEXIS 52370 (S.D.N.Y. April 21, 2015), provides an in depth analysis of a Title IX claim attacking university disciplinary proceedings

on the ground of gender bias.[2] Judge Furman, analyzing allegations which are indistinguishable from the allegations made by the present plaintiff, dismissed the Title IX claim on the ground that there were no factual allegations to support the claim of gender bias. The plaintiff in Doe v. Columbia was a male college student who had been suspended from Columbia University after having been found to have engaged in non-consensual sex with a female classmate (referred to as Jane Doe). He brought suit against Columbia University and its Board of Trustees (collectively "Columbia") alleging that the disciplinary process and his resulting suspension violated federal and state law. The gravamen of his Title IX claim was that, in part because of the backlash Columbia confronted for allegedly treating men accused of sexual assault too leniently, the plaintiff was treated unfairly and more harshly on the basis of his gender. Addressing Columbia's motion to dismiss for failure to state a claim, the district court noted that its "narrow task" was to decide whether the non-conclusory allegations of the complaint were sufficient to "plausibly infer" that Columbia's treatment of the plaintiff was motivated in part by his gender. Id. at *1-3. In doing so, the district court assumed the following facts to be true.

Like Yale, Columbia had in place formal policies for adjudicating "Gender-Based Misconduct." The process for both institutions begins with the complaint, after which an investigation is done by a fact finder appointed by the university. There is then a hearing

[2] Title IX mirrors the substantive provisions of Title VI, and courts have interpreted Title IX by looking to the body of law developed under Title VI, as well as the case law interpreting Title VII. Yusuf v. Vassar College, 35 F.3d 709, 714 (1994). Therefore, the present plaintiff's Title IX and Title VI claims are subject to the same analysis.

convened before a hearing panel. Both the complainant and respondent are afforded an opportunity to provide a statement at the hearing and to answer questions posed by the panel. The panelists determine which other witnesses should testify. In the event the panel concludes by a preponderance of the evidence that the respondent has violated the policy, the matter is referred to the Dean of Students who determines the appropriate sanction. Id. at *4-7.

Addressing Columbia's motion to dismiss, Judge Furman noted that "naked assertions of discrimination" without any specific allegation of a causal link between the defendant's conduct and the plaintiff's protected characteristic are too conclusory to withstand a motion to dismiss. Id. at *19-20. Since disparate impact claims cannot be brought under either Title VI or Title IX, the court observed that the plaintiff must show that the defendant discriminated against him because of his gender, that the discrimination was intentional, and that the discrimination was a substantial or motivating factor for the defendant's action. It is not sufficient to prove that a policy or practice disproportionately affects one gender. Id. at *22-23. In reaching this conclusion Judge Furman cited Alexander v. Sandoval, 532 U.S. 275, 280 (2001); Yu v. Vassar Coll., 2015 U.S. Dist. LEXIS 43253 *10 (S.D.N.Y. March 31, 2015); Weser v. Glen, 190 F.Supp.2d 384, 395 (E.D.N.Y. 2002); and Tolbert v. Queens Coll., 242 F.3d 58, 69 (2d Cir. 2001).

Judge Furman explicitly relied upon Yusuf v. Vassar Coll., 35 F.3d 709 (1994), in ruling that the plaintiff's complaint was deficient. In Yusuf, the Second Circuit explained that cases attacking university disciplinary policies on the ground of gender bias fall within two categories: (1) erroneous outcome cases; and (2) selective enforcement cases. In an erroneous

outcome case, the claim is that the plaintiff was innocent and wrongly found to have committed an offense. In a selective enforcement case, the claim asserts that, irrespective of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender. In both types of cases, the plaintiff must plead and prove that the complained-of conduct was discriminatory.

1. The failure to plead particular circumstances suggesting that an erroneous outcome was caused by gender bias requires the dismissal of an erroneous outcome claim under Title IX.

In an erroneous outcome claim, it is necessary, but not sufficient, to allege facts casting some articulable doubt on the accuracy of the outcome of the disciplinary proceedings. In addition, the plaintiff must allege "particular circumstances" suggesting that gender bias was a motivating factor behind the erroneous finding. Allegations of a procedurally or otherwise flawed proceeding that allegedly led to an erroneous outcome combined with a conclusory allegation of gender discrimination will not withstand scrutiny on a motion to dismiss. The plaintiff must allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding. Doe v. Columbia Univ., 2015 U.S. Dist. LEXIS 52370 *23-25 (S.D.N.Y. April 21, 2015), citing Yusuf v. Vassar Coll., 35 F.3d 709, 715 (1994).

Addressing the plaintiff's erroneous outcome claim, Judge Furman in Doe v. Columbia Univ. noted that the plaintiff alleged that the investigation was rife with procedural errors, including a list of alleged inadequacies in the university process that are quite similar to the claims of the present plaintiff. Specifically, the plaintiff there alleged numerous failures on the part of the investigator, including failures to investigate the identities of potential

witnesses, to reconcile conflicting narratives of what happened on the night in question, and to advise the plaintiff of his rights during the investigative process. As evidence of discrimination, the plaintiff cited the ways in which he and Jane Doe were treated differently. Similar to the present plaintiff, the plaintiff in Doe v. Columbia believed the investigator treated Jane Doe with more sensitivity, and then employed a line of questioning akin to cross-examination with him, but not with Jane Doe. He claimed that Jane Doe received information relating to resources available during the process, while he was not informed of his rights or the resources available to him. Again similar to the instant case, the plaintiff in Doe v. Columbia further claimed that the hearing panel allowed Jane Doe to escape critical questioning because she was crying. Id. at *27-28.

Judge Furman, having assumed arguendo that the complaint satisfied the articulable doubt prong of the Yusuf test, concluded that the complaint offered no non-conclusory factual allegations that might create a plausible inference that the erroneous outcome was motivated by the plaintiff's gender. The court found that the complaint did not include any allegations of the sort identified in Yusuf as necessary to suggest that gender bias was a motivating factor; namely statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that tended to show the influence of gender. Instead, the complaint in Doe -- just like the present complaint -- repeatedly made conclusory assertions, most offered "upon information and belief," that the actions of the investigator and Columbia were based on an anti-male gender bias. Judge Furman observed that under Iqbal and Twombly, he was required to ignore those conclusory statements. The fact that the

plaintiff couched allegations as made "upon information and belief" underscored the glaring absence of particularized evidence supporting an inference that gender bias was causally linked to the allegedly erroneous outcome. Id. at 30-32.

The district court noted that, even if Columbia in fact treated Jane Doe more favorably than the plaintiff during the disciplinary process, this did not suggest that the disparate treatment was because of the plaintiff's gender. The alleged treatment could equally have been prompted by lawful, independent goals, such as a desire to take allegations of rape on campus seriously and to treat complainants with a high degree of sensitivity.[3] Similarly, in the present case, the complaint itself suggests a non-discriminatory motive, *i.e.* that the University wished to demonstrate its new "zero tolerance" standard on allegations of sexual misconduct. See, Complaint at ¶ 167.

2. Selective enforcements claims under Title IX must be dismissed if the plaintiff fails to allege particular circumstances suggesting that university policies were inconsistently enforced due to gender bias.

In order to state a selective enforcement claim, the plaintiff is required to plausibly allege that, regardless of his guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the plaintiff's gender. Courts have interpreted that standard to require the plaintiff to allege particular circumstances suggesting a meaningful

[3] In this regard, the district court noted that the plaintiff alleged Columbia had been "under fire" for its handling of sexual assault complaints, culminating in the filing of complaints with the United States Department of Education that Columbia's handling of sexual assault and sexual misconduct on campus violated Title IX and other laws. Therefore, it could have been a desire to avoid Title IX liability or an effort to persuade the Department of Education and others that it took sexual assault complains seriously which caused Columbia to "maladminister" the plaintiff's disciplinary hearing, as the plaintiff alleged. Proof of such a motive would not be sufficient to make out a Title IX claim. Id. at n. 7.

inconsistency in punishment and particular circumstances suggesting that gender bias was a motivating factor behind the inconsistency. Applying that requirement, courts have dismissed claims in the absence of specific factual allegations that a school treated members of the opposite sex facing comparable disciplinary charges differently. See, Scott v. WorldStarHipHop, Inc., 2011 U.S. Dist. LEXIS 123273 *6 (S.D.N.Y. October 24, 2011); Harris v. Saint Joseph's Univ., 2014 U.S. Dist. LEXIS 65452 *4 (E.D. Pa. May 13, 2014); Yusuf v. Vassar Coll., 35 F.3d 709, 716 (1994); Routh v. Univ. of Rochester, 981 F.Supp.2d 184, 211-12 (W.D.N.Y. 2013); Doe v. Univ. of the South, 687 F.Supp.2d. 744, 756-57 (2009); Curto v. Smith, 248 F.Supp.2d. 132, 146-47 (N.D.N.Y. 2003), *aff'd in part, appeal dismissed in part sub nom*; Doe v. Anonymous Unnamed Sch. Employees & Officials of Cornell Univ. Coll. Of Veterinary Med., 87 F.App'x 788 (2d Cir. 2004), *aff'd*, 93 F.App'x 332 (2d Cir. 2004). The complaint in Doe v. Columbia failed to establish gender as a plausible motivating factor, because it failed to include any allegations that female students were treated more favorably in similar circumstances. At most, the complaint identified inadequate procedural protections provided to students accused of sexual assault that had the effect of burdening men more than women, given the higher incidence of female complainants. However, as Judge Furman observed, Title IX does not provide a private right of action to challenge disciplinary policies based on disparate impact. Doe v. Columbia Univ., 2015 U.S. Dist. LEXIS 52370 *43 (April 21, 2015). Because the plaintiff failed to allege facts sufficient to give rise to an inference that the school intentionally discriminated against him because of his gender, the district court dismissed Doe's selective enforcement claim. Id. at *41-44. The same rationale

applies with equal force to the present case; the present plaintiff has failed to allege any facts giving rise to an inference that Yale intentionally discriminated against him because of his gender.

B. The Present Plaintiff Fails to State Claims Under Either Title IX or Title VI Because He Offers No Particularized Evidence Supporting a Plausible Allegation of Gender, Racial, or Ethnic Bias.

Judge Furman in Doe v. Columbia Univ. noted that allegations made "upon information and belief" underscored the "glaring absence of particularized evidence supporting an inference [of] gender bias." Id. at *31-32. The allegations of discrimination in the present case are nothing more than conclusory statements or legal conclusions, not the particularized factual statements required to assert the causal nexus required of a Title IX claim. These allegations, which represent nothing more than the opinions of the plaintiff, include the following:

- the Yale University Police Department's actions were based in part on the plaintiff's Native American and Filipino ancestry;
- on information and belief, the plaintiff was the first student accused of violating the defendant's sexual misconduct policy to have been immediately barred from all University property;
- on information and belief, the plaintiff was the first student accused of any crime to have been effectively expelled from the University with the speed and in the manner of the plaintiff's expulsion;
- the plaintiff was effectively expelled from the University, based in part on his Native American and Filipino ancestry;
- on information and belief, Beverly Hodgson received no training to investigate sexual assault claims, or any training whatsoever prior to being appointed as a fact-finder;

- on information and belief, Judge Hodgson had no cultural sensitivity training or any other training whatsoever regarding Native American cultural communication norms or other aspects of Native American culture, including Native American politics;

- on information and belief, Judge Hodgson did not have knowledge of intertribal relations and conflicts and did not even understand the differences between particular Native American Nations;

- on information and belief, the members of the UWC received only minimal training on analyzing claims of sexual assault, and only minimal training in relation to Native American affairs;

- on information and belief, no member of the UWC received cultural sensitivity training or any other training whatsoever regarding Native American cultural communication norms or other aspects of Native American culture, including Native American intertribal politics;

- on information and belief, Dean Miller of Yale College never received cultural sensitivity training or any other training whatsoever regarding Native American cultural communication norms or other aspects of Native American Culture including Native American affairs, including without limitation intertribal politics;

- on information and belief, during the month of March 2012 the "impartial" fact-finder met and/or spoke with the State's Attorney on at least two occasions, sharing information and assisting each other with the prosecution of their respective cases against the plaintiff in violation of his civil rights, fundamental due process rights, and contractual arrangements with the defendant;

- on information and belief, although Accuser was not a defendant in any criminal proceeding, Yale University assisted her by arranging an attorney for her;

- the defendant has a pattern and practice of treating Native American men differently than other men at the University are treated;

- on information and belief, no non-Native American man has ever been subjected to this type of treatment by the defendant;

- on information and belief, prior to the plaintiff, no other student had been expelled based on a claim of violation of the policy on sexual misconduct;

- on information and belief, other students formally accused of sexual misconduct using force have been given no more than a four semester suspension;

- on information and belief, a University student accused of attempted murder of another University student by strangulation was not barred from the University campus nor was he arrested at gunpoint by four Yale University Police Department officers;

- the plaintiff's decision was rendered and appeal denied based on his gender and his Native American and Filipino ancestry;

- the plaintiff was considered an "easy target" by the defendant because almost all Native American students at the University are perceived by the defendant to be poor and without resources to actively fight the defendant's discriminatory acts;

- the plaintiff was also the whipping boy that Yale needed to demonstrate its new "zero tolerance" standard to deal with allegations of sexual misconduct even though the facts of the plaintiff's case did not warrant discipline at all, and it certainly did not warrant the consequences that were unjustly imposed;

- the investigation against the plaintiff was biased, conclusory and essentially a "witch hunt" and he was expelled based on his gender and Native American and Filipino ancestry, as the defendant rendered its decision regarding his status and imposed the most severe sanction in the absence of any corroborating evidence and in flagrant disregard of its own policies and procedures;

- the defendant discriminated against the plaintiff, on the basis of his sex, through discriminatory, gender-biased implementation of Yale's policies and procedures in the wake of scathing media reports and federal complaints against the College;

- the defendant initiated and conducted the investigation and subsequent hearing in a manner that was biased against the plaintiff due to his gender;

- on information and belief, a female student at Yale has never been disciplined, much less expelled, for alleged sexual misconduct;

- the University discriminated against the plaintiff, on the basis of his race and national origin, through discriminatory implementation of University policies and procedures in the wake of scathing media reports and federal complaints against Yale because the plaintiff was perceived as an "easy target" based on his race;

- from the moment the Yale University Police Department entered the plaintiff's dormitory room, with weapons drawn, and placed the plaintiff on the floor face down, with those weapons pointed at him, the discriminatory attitude of the defendant towards the plaintiff was evident;

- the defendant initiated and conducted the investigation and subsequent hearing in a manner that was biased against the plaintiff due to his race and national origin;

- on information and belief, no non-minority student at the University had ever been disciplined, much less expelled, for alleged sexual misconduct prior to the plaintiff's expulsion;

- the plaintiff was singled out and treated in a disproportionately harsh manner because of his race and national origin;

- on information and belief, no non-minority student (and perhaps no student of any race or national origin) at the University had ever been arrested at gunpoint in his dormitory room based on allegations of any nature by another student, in the 300 year history of the institution prior to the plaintiff's arrest;

- on information and belief, no non-minority student (and perhaps no student of any race or national origin) at the University had ever been barred from campus, even when criminal charges were pending, based on allegations of sexual misconduct by another student;

- On information and belief, no non-minority student (and perhaps no student of any race or national origin) at Yale had ever been barred from campus, when facing criminal charges.

(Complaint, at ¶¶ 76-78, 80, 82-85, 89, 94, 152, 157-159, 164, 166-168, 175, 184.) Since these statements are either conclusory or contain purely legal conclusions, the Court must disregard them when determining whether the plaintiff states discrimination claims under Title IX and Title VI. See, Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. V. Twombly, 550 U.S. 544 (2007).

1. The Court must dismiss the plaintiff's erroneous outcome claim because he has alleged no particular circumstances suggesting that gender, racial, or ethnic bias caused the erroneous outcome.

The present plaintiff appears to allege both an erroneous outcome claim and a selective enforcement claim. In order to withstand the defendant's motion to dismiss, the plaintiff's non-conclusory factual allegations must move his erroneous outcome claim "'across the line from conceivable to plausible.'" Doe v. Columbia Univ., 2015 U.S. Dist. LEXIS 52370 *23-25 (S.D.N.Y. April 21, 2015), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Even assuming arguendo that the plaintiff had alleged sufficient facts casting some doubt on the accuracy of the outcome of the disciplinary proceedings, he has not alleged "particular circumstances" suggesting that bias based on gender, race, or national origin was a motivating factor behind the alleged erroneous finding. Without those particularized allegations, the plaintiff's claims fail as a matter of law.

The non-conclusory factual allegations regarding conduct by the defendant begin with the plaintiff's encounter with the Yale University Police Department and end in the denial of his appeal from Dean Miller's decision to expel him. The plaintiff has made the following allegations, none of which include the requisite factual basis for establishing that discrimination on the basis of gender, race or national origin played a role in the disciplinary process:

- In response to Accuser's complaint of sexual assault against the plaintiff, the defendant appointed Beverly Hodgson, a former Connecticut superior court judge, as the factfinder.

- Judge Hodgson required an interview with the plaintiff, but permitted Accuser to submit the police reports in lieu of an interview in 2012 despite the requirement that the factfinder interview the complainant.[4]

- Judge Hodgson contacted only two of the plaintiff's witness, even though all seven of his witnesses were available for interview.[5]

- Judge Hodgson reviewed evidence and shared confidential information with the State's Attorney, in violation of University policy.[6]

- When Judge Hodgson interviewed Accuser in 2014, she merely asked Accuser to validate the police investigation summary and allowed Accuser to leave the interview when she began to weep and was unable to continue.

- Judge Hodgson did not review Accuser's 45 page statement and declined to interview the plaintiff's experts.[7]

- Judge Hodgson issued a supplemental report on April 29, 2014.

- While Accuser gave her statement during the hearing on May 12, 2014, the plaintiff was required to sit in another room and listen to the statement.[8]

- Accuser was not required to answer questions during the hearing.

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[4] Although the plaintiff alleges that the defendant's policies required the factfinder to interview the complainant, he does not quote that policy anywhere in his complaint. Instead, he alleges that the policy permits the factfinder to "gather documents and conduct interviews as necessary to reach a thorough understanding of the facts and circumstances surrounding the allegations of the complaint." (Complaint, at ¶ 67.) Therefore, Judge Hodgson had discretion to choose which individuals to interview. See, Doe v. Columbia Univ., 2015 U.S. Dist. LEXIS 52370 *17 (S.D.N.Y. April 21, 2015).

[5] As noted in footnote 4, the plaintiff alleges that the policy permits the factfinder to conduct interviews "as necessary." The procedures do not require the fact finder to interview all witnesses suggested by the parties. (Complaint, at ¶ 67.)

[6] The policies cited by the plaintiff in his complaint do not discuss, much less prohibit, this activity.

[7] Again, the factfinder has discretion in deciding the interviews and documentation required for the investigation. (Complaint, at ¶ 67.)

[8] This practice was consistent with the defendant's policies as alleged by the plaintiff, which state: "Unless both parties ask to appear jointly, the complainant and the respondent will not appear jointly before the panel at any stage of the hearing. The party who is not before the committee will be in a private room with audio access to the proceedings." (Complaint, at ¶ 70.)

- The hearing panel refused to consider the plaintiff's expert reports. It also mischaracterized and inaccurately stated the testimony that had been presented and the evidence that had been supplied.

- On May 20, 2014, the panel recommended that the plaintiff be expelled.

- On May 27, 2015, Dean Mary Miller adopted the hearing panel's recommendation and formally expelled the plaintiff.

- The defendant improperly relied upon the criminal investigatory materials when conducting the investigation and hearing and in deciding to expel the plaintiff.[9]

- The defendant allowed the plaintiff to appeal the Dean's decision and to submit additional materials to the Provost for his consideration. Provost Polack thereafter denied the plaintiff's appeal.

(Complaint, at ¶¶ 82, 87, 90, 95, 99-100, 123, 127, 129, 131-133, 135, 144, 147-149, 155.)

Even assuming that all of these allegations are true, none of them -- individually or collectively -- support a conclusion that the plaintiff's gender, race, or national origin was a motivating factor behind the determination that he had engaged in sexual misconduct or the decision to expel him. Like the plaintiff in Doe v. Columbia, the present plaintiff alleges multiple procedural errors in the investigation and hearing, but these allegations do not give rise to a plausible inference that the alleged erroneous outcome of the hearing was motivated by the plaintiff's gender, race, or ethnicity. As noted in Doe v. Columbia Univ., even if the defendant treated Accuser more favorably than the plaintiff during the disciplinary process, this fact does not suggest that the disparate treatment was because of the plaintiff's protected class. See, Doe v. Columbia Univ., 2015 U.S. Dist. LEXIS 52370 *34 (S.D.N.Y. April 21,

[9] The policies cited by the plaintiff specifically allow the consideration of "reports and evidence collected by law enforcement bodies or other investigators." (Complaint, at ¶ 72.)

2015). The complaint does not include any allegations of the sort identified by the Second Circuit as sufficient to establish that the plaintiff's gender, race, or national origin was a motivating factor, namely statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that tend to show the influence of gender, race, or national origin.[10] Yusuf v. Vassar College, 35 F.3d 709, 715 (2d Cir. 1994).

2. The plaintiff's selective enforcement claim fails because he has alleged no particular circumstances suggesting that gender, racial, or ethnic bias caused Yale to selectively enforce its rules in his case.

In support of his selective enforcement claim, the plaintiff alleges that Yale's policies and procedures deprived him, on the basis of his gender, race, and national origin, of basic due process and equal protection rights because they do not allow for the presence of legal counsel to aid in the defense of sexual misconduct charges and deny a student accused of sexual misconduct the right to confront and/or cross-examine his accuser. (Complaint, at ¶¶ 176, 185.) The plaintiff does not assert that the denial of the presence of legal counsel and the ability to confront and/or cross-examine the accuser varies based upon the gender, race, or national origin of the student accused of sexual misconduct. Instead, the plaintiff appears to argue that Yale's procedures have a disparate impact on male students, since in "virtually all" cases the accused student is a male. This argument is unavailing in light of the fact that the Supreme Court has held that there is no private right of action under Title IX and Title VI for

[10] The plaintiff has implied that Accuser and her friends disliked him because he identified with the Lakota (Sioux) Nation and that they conspired against him based upon his identification with a particular Native American Nation. However, the plaintiff makes no similar allegations concerning Judge Hodgson, any of the hearing panel members, Dean Miller, or Provost Polack. Instead, the complaint repeatedly makes conclusory assertions, most offered "upon information and belief," that the actions of the defendant were based on his gender, race, and national origin. This is insufficient to overcome the defendant's motion to dismiss.

disparate impact. See, Alexander v. Sandoval, 532 U.S. 275, 280 (2001) (Title VI "prohibits only intentional discrimination."); Yusuf v. Vassar College, 2015 U.S. Dist. LEXIS 43253 *10 (S.D.N.Y. March 31, 2015) (interpreting Alexander v. Sandoval to mean that there is no private right of action for disparate impact under Title IX); Weser v. Glen, 190 F.Supp.2d 384, 395 (E.D.N.Y. 2002) (same).

In further support of his selective enforcement claim, the plaintiff claims, "on information and belief," that no female or non-minority student has been disciplined for alleged sexual misconduct, that no non-minority student has been arrested at gunpoint based on allegations of any nature by another student, and that no non-minority student has been barred from campus based on allegations of sexual misconduct or when facing criminal charges. (Complaint, at ¶¶ 175, 184.) In order to state a selective enforcement claim, the plaintiff must allege "particular circumstances" suggesting a meaningful inconsistency in punishment and "particular circumstances" suggesting that gender, race, or national origin bias was a motivating favor behind the inconsistency. Doe v. Columbia Univ., 2015 U.S. Dist. LEXIS 52370 *42 (S.D.N.Y. April 21, 2015). The only allegations in the present complaint asserting that the defendant treated female and non-minority students accused of sexual misconduct less harshly than the plaintiff are made "on information and belief." This is insufficient to demonstrate that the plaintiff's gender, race, or national origin was a motivating factor. Indeed, the plaintiff's own allegations offer an alternative reason for the alleged unjustifiably harsh treatment. The plaintiff claims that Yale was under fire and subject to federal investigation for mishandling sexual misconduct complaints and treated the plaintiff

more harshly in an effort to overcorrect past indiscretions. (Complaint, at ¶¶ 175, 184.) Since there are no allegations suggesting that the plaintiff's gender, race, or national origin was a motivating factor behind the expulsion of the plaintiff, the plaintiff cannot prevail on his selective enforcement claim.

C. Courts in Other Jurisdictions Have Dismissed the Complaints of Men Disciplined for Sexual Misconduct, Who, Like the Plaintiff in the Present Case, Failed to Allege Facts Creating a Plausible Inference that They Were Disciplined Because of Their Gender.

Other jurisdictions have reached similar conclusions based on complaints which mirror that of the present plaintiff. In Doe v. Rector & Visitors of George Mason Univ., 2015 U.S. Dist. LEXIS 125230 *1 (E.D.Va September 16, 2015), the plaintiff was expelled from George Mason University following an administrative process which found him responsible for various violations of the student conduct regulations, including regulations pertaining to sexual misconduct. The University's hearing panel initially found in favor of the plaintiff on the charges which had been made against him. The victim filed an appeal, and the Assistant Dean of Students reversed the panel's decision and the plaintiff was summarily expelled. Id. *5-9.

Addressing George Mason's motion to dismiss the plaintiff's Title IX claim, the district court analyzed the plaintiff's erroneous outcome claim under the standard announced in Yusuf v. Vassar Coll., 35 F.3d 709 (2d Cir. 1994). The district court ruled that the allegation that gender bias was the "only" explanation for the outcome of the proceeding was entirely conclusory and entitled to no weight under Twombly. The court explained that, in applying Title IX, many courts borrowed from the law developed under Title VII and looked for allegations such as statements by members of the disciplinary tribunal and pertinent

university officials or patterns of decision-making that tended to show the influence of gender. In the absence of such allegations, mere conclusory statements were insufficient to state a claim under Title IX. The court said that even if it were true that the Assistant Dean of Students treated the complainant more favorably than the plaintiff, it did not necessarily follow that it was because the plaintiff was male. The court noted that a number of lawful, independent goals could have motivated any disparate treatment, including a desire to treat complainants with a high degree of sensitivity. The court concluded that in the absence of any specific factual allegation pointing to gender bias, the discriminatory motive was conceivable, but not plausible. Therefore, the district court granted the motion to dismiss. Id. at *45-49.

The district court in Doe v. Case W. Reserve Univ., 2015 U.S. Dist. LEXIS 123680 (N.D. Ohio September 16, 2015), reached the same conclusion on similar facts. In that case, the plaintiff was charged under the university's sexual assault policy after "Jane Roe" had registered a complaint against him. Prior to the hearing, the plaintiff was permitted to review a redacted version of the case file, but the file did not include all of the evidence collected. The plaintiff was not allowed in the same room as Jane Roe and was required to direct his questions to the hearing board. The board refused to ask certain questions concerning written and verbal exchanges between the plaintiff and Jane Roe. According to the complaint, the hearing board treated the plaintiff in a hostile fashion during the hearing. The board concluded that the plaintiff had violated the sexual misconduct policy, and the plaintiff was ultimately expelled. Id. at *3-7.

The plaintiff asserted both erroneous outcome and selective enforcement claims under Title IX. Ruling on the defendant's motion to dismiss, the district court observed that the plaintiff relied upon conclusory statements in an effort to establish a plausible claim that the defendant was motivated by gender bias in arriving at an erroneous finding against the plaintiff. Like the present plaintiff, the plaintiff in Doe v. Case W. Reserve Univ. pointed to procedural defects in the disciplinary hearings as evidence of discriminatory bias and alleged that the board was hostile towards the plaintiff. While the court acknowledged that those allegations could call into question the fairness of the proceedings, there were no factual allegations supporting the conclusion that the procedural flaws and hostility towards the plaintiff were motivated by gender bias. Therefore, the district court concluded that the plaintiff failed to state an erroneous outcome claim under Title IX. Id. at *12-15.

The district court also found that the plaintiff failed to state a selective enforcement claim, observing that the plaintiff's complaint failed to identify any female comparator. In addition, his allegations that the defendants' guidelines and regulations disproportionately affected male students as a result of the higher incidence of sexual misconduct complaints against males did not demonstrate selective enforcement. Because the plaintiff did not allege facts sufficient to give rise to an inference that the school intentionally discriminated against the plaintiff because of his sex, the district court found that the plaintiff failed to state a selective enforcement claim under Title IX. Id. at *15-16.

The court in Marshall v. Ohio Univ., 2015 U.S. Dist. LEXIS 155291 (S.D. Ohio November 17, 2015), also dismissed the plaintiff's Title IX claim because he failed to allege

facts to support the conclusory allegation that the defendant's decisions were motivated by gender bias. In Marshall, the plaintiff became friendly with a fellow student and sent her several text messages in an effort to engage in a romantic relationship with her. Although the student politely declined, the plaintiff continued sending her text messages, causing the student to make a complaint with the defendant's Office for Institutional Equality. The defendant initiated an investigation and conducted a hearing. The hearing panel concluded that the plaintiff's conduct met the criteria for sexual harassment and recommended a one semester suspension. The plaintiff's appeal was denied. Id. at *6-10.

Opposing the defendant's motion to dismiss, the plaintiff argued that the defendant's disciplinary proceedings were influenced by gender bias and that the defendant had discriminated against him on the basis of his gender. Id. at *12-13. The district court observed that the Sixth Circuit had adopted the analytical framework articulated in Yusuf when determining whether a plaintiff was able to demonstrate that intentional discrimination had occurred in a university disciplinary proceeding. Ruling on the plaintiff's selective enforcement claim under Title IX, the district court concluded that the plaintiff had failed to adequately allege that the defendant's decision to initiate disciplinary proceedings or the penalty imposed was motivated by his gender.[11] The plaintiff alleged that the vast majority of investigations into sexual misconduct involved allegations that a male had violated the university's sexual misconduct policy, but, like the plaintiff in the present case, he failed to

[11] The district court found that the plaintiff could not prevail on his erroneous outcome claim under Title IX because he affirmatively alleged sending the text messages and failed to allege that he had not violated the defendant's sexual misconduct policy. Id. at *15-16.

allege a single instance when the defendant treated a similarly situated female differently. Id. at *18-19. Moreover, the plaintiff in Marshall, like the plaintiff in the present case, failed to allege that any members of the hearing panel or any other university official made a statement indicating a bias against men. Id. at *19-22. In the absence of any such allegation, the district court in Marshall dismissed the Title IX claim. Id. at *25.

Although it did not involve allegations of sexual misconduct, Khan v. Midwestern Univ., 2015 U.S. Dist. LEXIS 1598060 (N.D. Ill. November 30, 2015), is also instructive. In that case, the plaintiff brought a claim of race and national origin discrimination under Title VI, alleging that the defendant refused to provide her with reasonable accommodations for her pregnancy because she was an American of Indian descent. Id. at *4. The court said that in order to state a claim under Title VI, the plaintiff was required to allege facts that would allow the court to draw a reasonable inference that the defendant's actions were because of the plaintiff's race; "threadbare allegations and conclusory statements" were not sufficient. Id. at *5. Because the plaintiff failed to allege such facts, the court granted the defendant's motion to dismiss. Id. at *7-8.

IV. Conclusion

Like the plaintiffs in Doe v. Columbia Univ., Doe v. Rector & Visitors of George Mason Univ., Doe v. Case W. Reserve Univ., Marshall, and Khan the present plaintiff has failed to plead allegations sufficient to state either an erroneous outcome or a selective enforcement claim under either Title IX or Title VI. He has not alleged any specific facts suggesting that the University's finding that he violated its sexual misconduct policy and its

decision to expel him were due to his gender, race, or national origin. He also has not identified any female or non-minority student who faced similar charges and was treated differently. The plaintiff's subjective belief that he was discriminated against because of his gender, race, or national origin is insufficient to overcome a motion to dismiss. See, Doe v. Columbia Univ., 2015 U.S. Dist. LEXIS 52370 *3 (S.D.N.Y. April 21, 2015). As the Supreme Court has admonished: "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). See also, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). Accordingly, the defendant's motion to dismiss the First and Second Counts of the Complaint should be granted.

THE DEFENDANT
YALE UNIVERSITY

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CERTIFICATION

I hereby certify that, on the above-written date, a copy of the foregoing Memorandum of Law in Support of Yale University's Motion to Dismiss was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/
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