CASE NO. 18-2592

UNITED STATES COURT OF APPEALS
FOR THE
THIRD CIRCUIT

Tafari Haynes,
Plaintiff-Appellant
v.
Clarion University of Pennsylvania, et al,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 2:15-cv-01389
Honorable Bill R. Wilson, Senior United States District Judge (E.D. Ark.), presiding

ORIGINAL BRIEF OF PLAINTIFF-APPELLANT TAFARI HAYNES

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CORPORATE DISCLOSURE

Not applicable to Plaintiff-Appellee.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff respectfully suggests that the Court would benefit from hearing oral argument in this matter. Plaintiffs believe oral argument will assist the Court in its analysis of this disputed issue presented on appeal, and will enable counsel to address any questions the Court may have.

JURISDICTIONAL STATEMENT

This case arose, in part, under Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, and the Civil Rights Act, 42 U.S.C. §§ 1983 and 1988. Accordingly, the District Court had jurisdiction in this matter pursuant to 28 U.S.C. §§ 1331 and 1343.

This is an appeal from a final decision of a district court of the United States. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291. A final judgment that disposed of all parties' claims was entered on June 27, 2018. (JA3.) A timely Notice of Appeal was filed on July 17, 2018. (JA1.)

STATEMENT OF ISSUE

Whether the district court improperly granted summary judgment on Plaintiff-Appellant's claim that Defendants-Appellees violated his Due Process rights, brought under the Civil Rights Act, 42 U.S.C. §§ 1983 and 1988. This issue was ruled on by the District Court in the Order Granting Defendants-Appellees' Motion for Summary Judgment. (Order on Motion for Summary Judgment ("MSJ") at 8-13, JA11-16 (substantive claim); Order on MSJ at 20-21, JA23-24 (qualified immunity).)

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case or proceeding has not been before this court previously, and Plaintiff-Appellant is not aware of any other case or proceeding that is in any way related, completed, pending or about to be presented before this court or any other court or agency, state or federal.

STATEMENT OF THE CASE

This case arises out of the decision of Defendant-Appellee Clarion University of Pennsylvania and its employees, acting under the color of law, (collectively, unless otherwise indicated, "Clarion") to impose disciplinary sanctions against Plaintiff-Appellant Tafari Haynes ("Haynes") in violation of his Constitutional due process rights. Clarion is one of fourteen universities operated by the Commonwealth of Pennsylvania under the auspices of the Pennsylvania State System of Higher Education *See* 24 P.S. §§ 20-2002-A *et seq*.

Haynes was accused of sexually assaulting a fellow Clarion student. He was arrested and criminally charged by the Clarion Police. DNA tests proved he was completely innocent and had been falsely accused; all criminal charges were dropped. Yet, Clarion insisted on expelling Haynes without providing him any opportunity to confront his accuser because, as the College's President told the alleged victim, the school "will not tolerate even having allegations against one of their students." (K.S. Depo. at 59; JA961.)

A. The Clarion Disciplinary Process

This case is one of many amidst a growing national controversy about the responses of colleges and universities to alleged sexual assaults on campuses. After years of criticism for being too lax on campus sexual assault, on April 11, 2011, the U.S. Education Department's Office of Civil Rights ("OCR") sent a "Dear Colleague Letter" to colleges and universities. Letter from Office for Civil Rights, U.S. Dep't of

Educ. (April 11, 2011). (JA1157.) The Dear Colleague Letter indicated that, in order to comply with Title IX, colleges and universities must have transparent, prompt procedures to investigate and resolve complaints of sexual misconduct. Observers on both the left and the right noted that this led colleges to eliminate due process protections for accused students in order to create the appearance of being tough on the problem. Caroline Kitchens, *Overreaching on Campus Rape, National Review,* May 13, 2014 ("Because of the inadequacy of campus courts and lack of procedural safeguards in place to protect students, this has grave consequences for due process"); Emily Yoffe*, The College Rape Overreaction*, Slate Dec. 7, 2014 ("Colleges, encouraged by federal officials, are instituting solutions to sexual violence against women that abrogate the civil rights" of accused students). The procedures adopted by schools have received substantial criticism from federal courts in recent years. For example, one judge observed:

> Sexual assault is a deplorable act of violence… Universities have perhaps, in their zeal to end the scourge of campus sexual assaults, turned a blind eye to the rights of accused students. Put another way, the snake might be eating its own tail. Joe Dryden et. al., *Title IX Violations Arising from Title IX Investigations: The Snake Is Eating Its Own Tail*, 53 Idaho L. Rev. 639 (2017).

Doe v. Ohio State Univ., 311 F. Supp. 3d 881, 892-893 (S.D.Ohio 2018).

On September 22, 2017, the Department of Education withdrew the Dear Colleague Letter and indicated its intent to issue new guidance "through a rulemaking process that responds to public comment." Letter from Office for Civil Rights, U.S.

Dep't of Educ. (September 22, 2017). In withdrawing the Dear Colleague Letter, OCR observed that prior actions

> may have been well-intentioned, but... led to the deprivation of rights for many students — both accused students denied fair process and victims denied an adequate resolution of their complaints.

Id. at 1-2. OCR further said:

> Legal commentators have criticized the [Dear Colleague Letter]... for placing 'improper pressure upon universities to adopt procedures that do not afford fundamental fairness.' [As a result, many schools have established procedures for resolving allegations that] lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation.

Id., *quoting* Open Letter From Members Of The Penn Law School Faculty: *Sexual Assault Complaints: Protecting Complainants And The Accused Students At Universities*, Feb. 8, 2015; *Rethink Harvard's Sexual Harassment Policy*, Boston Globe (Oct. 15, 2014) (statement of 28 members of the Harvard Law School faculty).

Against this background, the Clarion Board of Trustees approved a Sexual Harassment Policy and Procedures ("SHPP") on April 15, 2010. (JA122-136.) The SHPP applies to any "student employee or applicant... who believes that he/she has been the victim of sexual harassment." (SHPP at 3; JA127.) The SHPP provides a procedure to determine if sexual harassment occurred. The SHPP uses neutral language, referring to the individual who made the allegations as the "Complainant" and the individual who alleged committed misconduct as the "Respondent." (SHPP at 3; JA127.) Serious or "egregious" allegations are resolved through a formal review

process. As part of this formal review process, the respondent should be given the opportunity "to respond to the charges... and prepare a response." (SHPP at 3; JA129.) Clarion has the obligation to conduct a "specific, full, impartial, and expeditious investigation." (SHPP at 3; JA129.) If the investigator finds "it is more probable than not" that misconduct by a student occurred, the matter will be referred to the Vice President for Student Affairs for disciplinary proceedings.

Disciplinary proceedings are governed by the Student Rights, Regulations, and Procedures Handbook or the Guide to Clarion University Judicial Policy ("Handbook"). (JA137-200.) A student is entitled to a hearing before the University Conduct Board ("UCB") prior to the imposition of discipline. (Handbook at 24; JA160.) The Handbook provides:

> The conduct of hearings shall ensure that the accused student has had a fair and reasonable opportunity to answer, explain, and defend against the charges.

(Handbook at 23; JA159.) The Handbook provides a number of procedural guarantees for respondents, including:

- "Written notice of the charges containing a description of the alleged acts of misconduct, including time, date, and place of occurrence; and the rules of conduct allegedly violated by the student;"
- "a reasonably sufficient interval between the date of notification of charges and the date of the hearing, to allow the student to prepare a defense;"
- "an opportunity for submission of written, physical, and testimonial evidence, and for reasonable questioning of witnesses by both parties;

- "an impartial hearing... ;" and
- the ability to "identify an advisor, who may be an attorney, to be present at hearings." However, the "advisor may only consult and interact privately with the student."

(Handbook at 23; JA159.) Appeals of findings of misconduct by the UCB must be submitted within three days and are reviewed by the university president or her designee. ((Handbook at 23; JA160.)

B. The Allegations Against Haynes

Haynes was enrolled as a full-time student at Clarion from 2011 until December 3, 2013. (Amended Complaint, at ¶¶ 1, 15-16; JA 39, 42. *See* also Official Academic Transcript, JA307-310.)

On October 27, 2013, another Clarion student, K.S., alleged that she had been raped by Haynes. Haynes was arrested by the Clarion University Police. (Haynes Depo. at 54-61, JA568-575.) The University Police officers notified the Coordinator of Judicial Affairs and Residence Life Education, Defendant Matthew Shaffer, about the alleged assault. Shaffer arranged for the imposition of an interim suspension on Haynes pending a full hearing. (Shaffer Depo. at 55-57, JA674-676.) A subsequent law enforcement investigation showed that Haynes was innocent. K.S. had made false statements to the police about the time of the alleged assault. (K.S. Depo. at 41, JA943 ("I told them it was later than what it actually was."). DNA evidence exonerated Haynes. (Serology Report, JA1301-3111; Expungement Order, JA1314.)

On October 29, 2013, Shaffer and a Clarion administration member, Brenda Dede, met with Haynes at the Clarion County Prison. (Shaffer Report at 2, JA313; Shaffer Dep., at 68-72, JA689-693; Dede Dep., at 18-21, JA-830-833.) Shaffer explained in his deposition:

> [t]he purpose [of the visit] was to ensure that [Haynes] did get a copy of the interim suspension letter, to make sure that he was being treated well, that he had enough had had an opportunity to at least contact somebody at home so that they were aware of what was going on with him, and to talk with him about kind of why he was there, just to explain how he came to be at the county jail.

(Shaffer Dep., at 69, JA688.) During this interview, Haynes denied that had raped K.S. (Shaffer Dep., at 95-97, JA713-715; Dede Dep., at 24-26, 28-29, JA836-838, JA839-840.)

Shaffer attended the preliminary hearing for the criminal charges against Haynes. Shaffer subsequently met with K.S. but did not conduct an interview (Shaffer Dep., at 73-80, JA692-699.) Shaffer did not conduct any investigation. K.S. met with Karen Whitney, Clarion's President. Whitney assured K.S. that Haynes would be expelled:

> Q. So based upon that conversation with [Whitney] you felt confident that Mr. Haynes would be expelled?
>
> A. Yeah.
>
> Q. And that conversation occurred before or after the disciplinary hearing…?
>
> A. Before.
>
> Q. Do you remember what specifically she said to you that made you confident that he was going to be expelled?

> A. She said that they will not tolerate even having allegations against one of their students.

(K.S. Depo. at 59, JA961.)

On November 18, 2013, Haynes was informed that a UCB hearing was scheduled for December 3, 2013. (Nov. 18, 2013 Letter, JA330; Haynes Dep., at 65-70, JA468-69.) Haynes' mother contacted Shaffer and requested that the UCB hearing be continued until after the resolution of the criminal proceedings. Haynes did not attend the UCB hearing on the advice of counsel. (Haynes Depo. at 93, JA475.)

At the UCB hearing, Shaffer acted as a prosecutor. He repeatedly referred to K.S. not as the complainant or accuser, but as a "survivor."[1] (Hearing Transcript at 5-6, JA345-46.) He called and questioned witnesses, including an "expert" from a sexual violence center. The expert told the UCB that victims of sexual assault sometimes delay in reporting or provide inaccurate information. The expert had no formal education or training in psychology and never reviewed any facts of the allegations by K.S. Yet, in testifying the expert gave the false impression that she was familiar with the facts of the case. ((Hearing Transcript at 3; JA344.)

[1] In addressing the false statements by K.S. to the police about the time of the alleged assault, Shaffer said:

> What I will tell you is there is a bit of a time discrepancy between what was initially reported to the police and what was found to be factually accurate…

(Hearing Transcript at 3; JA342.)

Shaffer called himself as a witness to described his view of the allegations. Shaffer described the statement provided by Haynes in the jail. (Hearing Transcript at 3; JA346.) Shaffer also described the testimony at the preliminary hearing and suggested, in doing so, that the alleged victim was credible. He testified before the UCB:

> Looking at the information that was presented at the prelim hearing, the prosecution did call the reported survivor, [K.S.], to the stand to provide direct information for what occurred. No other witnesses were called *and her credibility was not questioned by either the prosecution or the defense*. [K.S.] will have an opportunity to speak with you here and answer questions, obviously, however, what I will say is that she did get cross-examined by the defense attorney and her credibility was not questions at that time…

(Hearing Transcript at 3; JA346 (emphasis supplied).)

Shaffer called K.S. to testify at the UCB hearing. He asked leading questions. (*See e.g.* Hearing Transcript at 10, JA349 ("Did Haynes take you back the hallway to your bedroom and push you into the room?").) In response to the leading questions by Shaffer, K.S. briefly described the alleged assault by Haynes and then was permitted to provide an "impact statement" before the UCB deliberated. (Hearing Transcript at 11; JA350.) The UCB did not ask K.S. any questions. The Chair of the UCB said only, "I'm also sorry that this happened to you and that you've had this experience, and I wish you the best, I really do." (Hearing Transcript at 12; JA351.)

On December 3, 2013, Haynes was informed that the UCB had determined that he had violated the SHPP and would be expelled. Haynes did not file an appeal within the three days provided for in the Handbook. Instead, he waited until he had received the DNA from the crime lab and the criminal charges had been dropped. On January

16, 2015, Haynes submitted an appeal to Clarion. (Haynes Appeal, JA363.) The appeal was denied by President Whitney on January 26, 2015. (January 26, 2015 Letter, JA372.)

C. Procedural History

On October 26, 2015, Haynes brought this action for *inter alia*, violation of 42 U.S.C. §1983 and violation of Title IX. Haynes filed a Second Amended Complaint on April 20, 2016. (JA38-65. *See also* Answer JA66-89.)

On June 27, 2018, following discovery, the District Court granted Defendants' Motion for Summary Judgment. (Order on MSJ, JA4-25.) A final judgment was entered on the same day in favor of Defendants. (JA3.) A Notice of Appeal was filed on July 19, 2018. (JA1-2.)

SUMMARY OF ARGUMENT

The District Court incorrectly concluded that there is was not a genuine dispute as to any material issue of fact and Defendants were entitled to judgment as a matter of law on Plaintiff's Procedural Due Process rights. (*See* Order on MSJ at 9-16, JA12-19.) The District Court also improperly concluded the Amended Complaint, by requesting equitable relief designed to prohibit the imposition of, or reporting of, any disciplinary actions, could not support a claim for prospective injunctive relief and that Defendants were entitled to qualified immunity. (*See* Order on MSJ at 19-22, JA22-24.)

This Court has held, "The Due Process Clause protects students during disciplinary hearings at public institutions." *Phat Van Le v. Univ. of Med. & Dentistry of N.J.*, 379 F. App'x 171, 174 (3d Cir. 2010). The District Court suggested that because Haynes received notice of the charges, an explanation of the evidence against him, and an opportunity to be heard, he is unable to assert a procedural due process claim. As shown below, the District Court adopted an overly narrow reading of the relevant Supreme Court and Circuit Court decisions on the due process rights of students accused of misconduct.

The District Court incorrectly concluded that Plaintiff waived his procedural due process claims. Exhaustion of state remedies is not generally required before a plaintiff can bring suit under §1983 for denial of due process. *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516, (1982). The *Patsy* decision was based upon recognition that

Congress, in enacting §1983, had "assigned to the federal courts a paramount role in protecting constitutional rights." 457 U.S. at 503. This Court has explained that in the absence of a constitutionally sufficient administrative procedure, there can be no waiver from the failure of a plaintiff to participate in administrative hearings. *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000).

Defendants had the burden to show that Clarion provided a constitutionally adequate process. Viewing all evidence in the light most favorable to Haynes, there were three problems with the Clarion process that should have precluded the grant of summary judgment: (i) the process was biased; (ii) Haynes could not have taken part in the process without waiving his Fifth Amendment right to remain silent; and (ii) the process failed to provide the opportunity for Haynes to confront adverse witnesses.

Bias. An impartial hearing in a school disciplinary hearing is a "fundamental requirement" of due process. *Holmes v. Poskanzer*, 342 F. App'x 651, 653 (2d Cir. 2009). Haynes identified a number of specific facts which suggest that bias is rampant within the Clarion system. The Clarion President promised the alleged victim that Haynes would be expelled. The Clarion administrator responsible for conducting a fair and impartial investigation had pre-determined that Haynes was guilty. During the disciplinary hearing, this Clarion administrator acted as a prosecutor who presented the case against Haynes, expressed his view that the alleged victim was "credible," and presented misleading testimony from a so-called expert.

Fifth Amendment. Due process prohibits a school from requiring a student to choose between giving testimony at the disciplinary hearing, a course that may help the criminal prosecutors, and keeping silent, a course that may lead to the loss of his ability to attend school. Clarion violated Hayne's due process rights by failing to delay the disciplinary proceedings until the conclusion of any criminal proceedings. Haynes, thus, faced a legal dilemma: either mount a full defense in the disciplinary case and risk jeopardizing his defense in the criminal case, or risk his college degree by failing to fully defend himself. By going forward with the hearing Clarion essentially imposed a penalty on Haynes for asserting his Fifth Amendment privilege. *See e.g. Garrity v. New Jersey,* 385 U.S. 493 (1967).

Cross-Examination. The Clarion hearing procedure does not allow cross-examination of an alleged rape victim. While this Court has not reached this precise issue, other circuits have held that students have a due process right to confront adverse witnesses when the information supplied by those witnesses is the reason for the adverse action and there is a question of credibility to be resolved by the finder of facts. *Winnick v. Manning*, 460 F.2d 545 (2d Cir. 1972); *Gorman v. University of Rhode Island*, 837 F.2d 7 (1st Cir.1988); *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017).

The due process rights of students facing significant discipline, described here, are clearly established in that the contours of the right were sufficiently clear. Accordingly, Defendant would not be entitled to qualified immunity. *See Mammaro v. New Jersey Div. of Child Prot. & Permanency*, 814 F.3d 164, 169 (3d Cir. 2016) (describing analysis for determining if rights are "clearly established").

ARGUMENT

A. Standard

This Court reviews grants of summary judgment *de novo*. *Luppino v. Mercedes Benz USA*, 718 F.App'x 143, 145 (3d Cir. 2017), *citing Montone v. City of Jersey City*, 709 F.3d 181, 189 (3d Cir. 2013). A court may grant summary judgment only when the record "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *FOP v. City of Camden*, 842 F.3d 231, 238 (3d Cir. 2016) (citations omitted).

B. Defendants Were Not Entitled To Summary Judgment On Plaintiff's Procedural Due Process Claim

The District Court incorrectly concluded that there is was not a genuine dispute as to any material issue of fact and Defendants were entitled to judgment as a matter of law on Plaintiff's Procedural Due Process rights. (*See* Order on MSJ at 9-16, JA12-19.)

The District Court suggested that because Haynes received notice of the charges, an explanation of the evidence against him, and an opportunity to be heard, he is unable to assert a procedural due process claim. To be clear, Haynes acknowledges he had notice and an opportunity to be heard. But this is only the start of the analysis; that opportunity to be heard had to have been meaningful, or as Justice Powell explained, "fair." *Vitek v. Jones*, 445 U.S. 480, 500 (1980) (Powell, J., concurring in part) ("The essence of procedural due process is a fair hearing."). *See Doe v. Rector & Visitors of George Mason Univ.,* E.D.Va. No. 1:15-cv-209, 2016 U.S. Dist. LEXIS 24847, at *46-47 (Feb. 25, 2016) ("it may well be that plaintiff deserves to be expelled or otherwise

sanctioned for certain behavior, but the Constitution requires that if behavior is to be sanctioned, then the state must ensure the soundness of the decision it reaches as the situation requires."). Judge Jones of the Fifth Circuit explained the problem facing colleges and universities in adjudicating allegations of sexual misconduct by students in response to pressure from the Department of Education:

> Sexual assault is not plagiarism, cheating, or vandalism of university property. Its ramifications are more long lasting and stigmatizing in today's society. The University wants to have it both ways, degrading the integrity of its fact finding procedures, while congratulating itself for vigorously attacking campus sexual misconduct. Overprosecution is nothing to boast about.

Plummer v. Univ. of Houston, 860 F.3d 767, 784 (5th Cir. 2017)(Jones, J., dissenting).[2]

[2] Courts have observed that schools may have been motivated by pressure from OCR to adopt a results-oriented approach and find students responsible in order to avoid investigation and the possible loss of federal funding. *See e.g. Doe v. Ohio State Univ.*, S.D. Ohio No. 2:15-cv-2996, 2016 U.S. Dist. LEXIS 7700, at *30 (Jan. 22, 2016) (observing that the failure of a school to comply with guidance by the Office of Civil Rights on Title IX "could jeopardize its federal funding"); *Brandeis*, 177 F.Supp.3d at 572 ("When considering the issues presented in this case, it is impossible to ignore entirely the full context in which they arose."); *Doe v. Wash. & Lee Univ.*, W.D.Va. No. 6:14-cv-00052, 2015 U.S. Dist. LEXIS 102426, at *23-24 (Aug. 5, 2015) ("it is plausible that [the school] was under pressure to convict students accused of sexual assault in order to demonstrate that the school was in compliance with the OCR's guidance"); *Doe v. Ohio State Univ.*, 239 F. Supp. 3d 1048, 1062 (S.D.Ohio 2017) ("There is little doubt that universities around the country have felt pressure to tighten the investigation and punishments in sexual misconduct cases because this is a very sensitive issue."); *Rolph v. Hobart & William Smith Colleges*, 271 F. Supp. 3d 386, 401-402 (W.D.N.Y. 2017) (school "faced pressure from the federal government to take a hard stance on sexual assault on campus"); *Doe v. Syracuse Univ.*, N.D.N.Y. No. 5:17-cv-787, 2018 U.S. Dist. LEXIS 157586, at *32 (Sep. 16, 2018) ("Doe's disciplinary proceeding occurred in the context of public criticism of the University's handling of sexual abuse complaints against males.").

1. Liberty Interest And Nature Of Claim

The Fourteenth Amendment to the United States Constitution forbids a state from depriving persons of life, liberty, or property without due process of law. *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000), *citing* U.S. Const. Amend. XIV, §1. To state a claim under §1983 for deprivation of procedural due process rights, a plaintiff must allege: (i) he was deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of "life, liberty, or property;" and (ii) the procedures available to him did not provide "due process of law." *Hill v. Borough of Kutztown*, 455 F.3d 225, 233-34 (3d Cir. 2006), *citing Alvin*, 227 F.3d at 116.

"The Due Process Clause protects students during disciplinary hearings at public institutions." *Phat Van Le v. Univ. of Med. & Dentistry of N.J.*, 379 F. App'x 171, 174 (3d Cir. 2010), *citing Sill v. Pennsylvania State University*, 462 F.2d 463 (3d Cir. 1972). The District Court accepted this aspect of Plaintiff's claim. (Order on MSJ at 9, JA12, *citing inter alia Simms v. Pennsylvania State Univ.,* W.D.Pa. No. 3:17-cv-201, 2018 U.S. Dist. LEXIS 45051 (Mar. 19, 2018).)

2. Plaintiff Did Not Waive His Due Process Claims

The District Court suggested that Plaintiff waived his procedural due process claims because he "failed to test the fairness and reliability of the existing procedures by skipping the UCB hearing and failing to submit any statements or evidence on his behalf." (Order on MSJ at 11, JA14. *See also* Order on MSJ at 8, JA11 ("Defendants argue that Plaintiff waived these claims by failing to engage in the disciplinary proceedings and skipping the hearing. I agree.").) The District Court was wrong. Exhaustion of state remedies is not generally required before a plaintiff can bring suit under §1983 for denial of due process. *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516 (1982); *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987). The *Patsy* decision was based upon recognition that Congress, in enacting §1983, had "assigned to the federal courts a paramount role in protecting constitutional rights." 457 U.S. at 503.[3]

[3] Courts, relying on *Patsy*, have held that complaints brought by students alleging due process violations in a hearing process should not be dismissed simply because proceedings at the school were available. *Yoder v. Univ. of Louisville*, 2009 U.S. Dist. LEXIS 67241, 13-14 (W.D. Ky. Aug. 3, 2009), rev'd on other grounds 417 Fed. Appx. 529 (2011); *Pomeroy v. Ashburnham Westminster Reg'l Sch. Dist.*, 410 F. Supp. 2d 7, 16 (D. Mass. 2006).

In *Yoder*, a nursing student was dismissed as a student from the University of Louisville School of Nursing after she authored a blog post potentially containing confidential patient information on her MySpace page. She sued, alleging, *inter alia*, a claim under §1983. The university argued that that the action was barred because the student had not exhausted all available university remedies. The court held that a student was not required to pursue remedies within the university system in order to maintain a §1983 claim. The court said, "the law is clear that exhaustion is not a prerequisite to maintenance of an action under §1983." 2009 U.S. Dist. LEXIS 67241 at 13-14, *citing*

The decision of the District Court was premised on the idea that a plaintiff may waive a due process claim by failing to take advantage of a constitutionally sufficient administrative procedure. However, this Court has explained that the contrapositive is also true: in the absence of a constitutionally sufficient administrative procedure, there can be no waiver from the failure of a plaintiff to participate. In *Alvin*, *supra*, this Court said: "In order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to him or her, *unless those processes are unavailable or patently inadequate*." *Alvin*, 227 F.3d at 116. (emphasis supplied).[4] *See also*

Patsy, 457 U.S. at 500-501*; Lawrence v. Chancery Court of Tennessee*, 188 F.3d 687, 692 (6th Cir. 1999).

In *Pomeroy*, a student brought a claim under §1983 that he was denied due process in a school disciplinary hearing. The school district argued that the claim should be dismissed because the student failed pursue an available appeal of the suspension to the superintendent and subsequent judicial review. The court concluded that the §1983 claim survived. 410 F. Supp. 2d at 17 n. 6 (a "plaintiff is not normally required to exhaust state remedies before commencing a §1983 action") (citations omitted).

[4] In *Alvin*, a university professor sought to bring a §1983 action alleging violations of due process resulting from severance of his tenure and transfer to another school within the university. The district court granted summary judgment in favor of defendants on the §1983 procedural due process claim, concluding that the plaintiff had not demonstrated that he had been deprived of a property interest. This Court affirmed on the alternative grounds that the plaintiff could not make out a procedural due process violation because he had not taken advantage of the school's administrative processes. This Court explained that the requirement that a plaintiff take advantage of administrative processes should be distinguished from exhaustion requirements that exist in other contexts. *See, infra, citing Patsy*, 457 U.S. at 516. This Court said:

> [E]xhaustion *simpliciter* is analytically distinct from the requirement that the harm alleged has occurred... [A] procedural due process violation cannot have occurred when the governmental actor provides apparently adequate procedural remedies and the plaintiff has not availed himself of those remedies.

Schultz v. Baumgart, 738 F.2d 231 (7th Cir. 1984) (explaining that if plaintiff was terminated without required due process protections, "the constitutional deprivation was then complete. [The plaintiff] need not have exhausted other state remedies before bringing his section 1983 claim."); *Sutton v. Bailey*, 2012 U.S. Dist. LEXIS 4526 (E.D. Ark. Jan. 13, 2012) (noting that cases finding waiver "involved . . . proceedings that not only satisfied the basic requirements of fair play but were also rigorous and extensive").[5] The District Court was incorrect in finding that Haynes was required to take part in the constitutionally inadequate Clarion process in order to state a claim for deprivation of

Id. citing Zinermon, 494 U.S. at 126. Applying these principles, this Court found that plaintiff did not avail himself of the procedures provided by the university because he did not follow the university regulations regarding the use of the grievance procedure. *Id.* This Court determined that the plaintiff in *Alvin*, unlike the plaintiff in this case, had not brought forth sufficient evidence of bias or other procedural infirmities, such as "that he would not be able to use a lawyer…" 227 F.3d at 119.

[5] This Court in *Alvin* explained, when "there is evidence that the procedures are a sham, the plaintiff need not pursue them to state a due process claim." 227 F.3d at 118, *citing Stauffer v. William Penn Sch. Dist.*, 829 F. Supp. 742, 749 (E.D.Pa. 1993); *Moran v. Burns* D.N.J. No. 92-1765, 1993 U.S. Dist. LEXIS 10365, *13 (July 26, 1993) (recognizing that a plaintiff could present evidence of futility); *W. v. Tirozzi*, 832 F.2d 748, 756 (3d Cir. 1987) (discussing similar requirements when seeking injunctive relief under §1983 and IDEA). This is consistent with the Supreme Court's holding that pursuit of an administrative process is not required if "the administrative body is shown to be biased or has otherwise predetermined the issue before it." *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992). Federal courts have recognized that administrative bias can result in futility and that there is no obligation to pursue such an administrative process. *Joint Bd. of Control v. United States*, 862 F.2d 195, 199-201 (9th Cir. 1988) ("Objective and undisputed evidence of administrative bias would render pursuit of an administrative remedy futile."); *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677-78 (9th Cir. 1988) (pursuit of administrative appeals not required where "evidence of administrative bias which would render pursuit of an administrative remedy futile").

due process. *See Zinermon v. Burch*, 494 U.S. 113, 125 (1990) ("the constitutional violation actionable under § 1983 is complete when the wrongful action is taken"); *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 284 (3d Cir. 2008) ("procedural due process violation is complete at the moment an individual is deprived of a liberty or property interest without being afforded the requisite process."); *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 894 (6th Cir. 1991) ("[c]onceptually, in the case of a procedural due process claim, 'the allegedly infirm process is an injury in itself'"), *quoting Hammond v. Baldwin*, 866 F.2d 172, 176 (6th Cir. 1989).

The District Court failed to adequately or correctly consider what came after the "unless…" in *Alvin*. In order to prevail on their motion for summary judgment, Defendants had the burden to show that Clarion provided a constitutionally sufficient process.[6] Viewing all evidence in the light most favorable to Haynes, there were three problems with the Clarion process that should have precluded the grant of summary judgment: (i) the process was biased (*see* §B(4)); (ii) Haynes could not have taken part in the process without waiving his Fifth Amendment right to remain silent (*see* §B(5)); and

[6] This Court has explained that in order to determine whether a plaintiff was required to take advantage of available procedures, a court must analyze "whether the procedures available provided the plaintiff with 'due process of law.'" *Alvin*, 227 F.3d at 116. This second step is not a question of exhaustion; rather, it goes to the question of whether the plaintiff was actually deprived of procedural due process. *Hidalgo v. Egg Harbor Twp. Bd. of Edn.*, D.N.J. Civil Action No. 15-2929, 2018 U.S. Dist. LEXIS 138717, at *32 (Aug. 16, 2018).

(ii) the process failed to provide the opportunity for Haynes to confront adverse witnesses (*see* §B(6));.

3. Legal Framework For Evaluating School Procedural Due Process Claims

The starting point for analyzing alleged violations of procedural due process rights in school suspension cases is *Goss v. Lopez*, 419 U.S. 565 (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 a more significant penalty:

> 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. *See also 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.").

This Court, in evaluating most[7] due process challenges to disciplinary proceedings, has applied the familiar *Mathews* factors. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Accordingly, this Court weighs: (1) the private interests at stake; (2) the governmental interests at stake; and (3) the fairness and reliability of the existing procedures and the probable value, if any, of additional procedural safeguards. *Palmer v. Merluzzi*, 868 F.2d 90, 95 (3d Cir. 1989) This Court has cautioned, "There is not a specific format that these proceedings have to follow, so long as the university provides sufficient protections to comply with due process." *Phat Van Le*, 379 F. App'x at 174, *citing Sill*, 462 F.2d at 469.

4. Clarion Failed To Provide An Unbiased Process

An impartial hearing in a school disciplinary hearing is a "fundamental requirement" of due process. *Holmes v. Poskanzer*, 342 F. App'x 651, 653 (2d Cir. 2009), *citing Winnick v. Manning*, 460 F.2d 545, 548 (2d Cir. 1972). In *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) the Supreme Court noted that "various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or

[7] *But see infra.* §B(4).

decision-maker is too high to be constitutionally tolerable…" A procedural due process challenge, however, concerns the adequacy and fairness of the mandated procedures. *Schweiker v. McClure*, 456 U.S. 188 (1982). A biased process is not fair; "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." *McClure*, 456 U.S. at 195.

This Court has suggested that it is unnecessary to evaluate claims of bias under the *Mathews* balancing test:

> the requirement of an impartial decisionmaker transcends concern for diminishing the likelihood of error. The unfairness that results from biased decisionmakers strikes so deeply at our sense of justice that it differs qualitatively from the injury that results from insufficient procedures...
>
> If someone is deprived of his right to an impartial tribunal, then he is denied his constitutional right to due process, regardless of the magnitude of the individual and state interest at stake, the risk of error and the likely value of additional safeguards (the factors to be balanced under *Mathews*).

United Retail & Wholesale Emps. Teamsters Union Local No. 115 Pension Plan v. Yahn & Mc Donnell, Inc., 787 F.2d 128, 138 (3d Cir. 1986). *Cf. United States v. Cross,* 128 F.3d 145, 148 (3d Cir. 1997) ("This circuit has also clearly acknowledged the fundamental right to a fair and unbiased adjudication of guilt."), *citing United Retail.*

Haynes acknowledges there is generally a presumption of fairness in administrative proceedings and "alleged prejudice of university hearing bodies must be based on more than mere speculation and tenuous inferences." *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 15 (1st Cir. 1988), *citing Duke v. North Texas State Univ.*, 469 F. 2d 829, 834 (5th Cir. 1972). In this case, there was substantial evidence that the UCB panel

members were pressured into finding Haynes responsible or were provided with biased investigatory information. Thus, even if Clarion's procedural safeguards were sufficient to protect Haynes from any risk of error, and they clearly are not, there was still a sufficient issue of fact about whether the Clarion process was impartial.

The District Court ignored a number of specific facts which suggest that bias is rampant within the Clarion system. An expert in school administration was prepared to testify that the actions of Clarion were not fundamentally fair.

> No objective review… could conclude that the due process Mr. Haynes was afforded by Clarion University in this case met the principles of fundamental fairness and equal treatment.

(Blimling Report at 6, JA1110.)

a. The Promise By The Clarion President

The Clarion President promised K.S. that Haynes would be expelled before a disciplinary hearing was even held. (K.S. Depo. at 59; JA961.) The District Court did not address this evidence in its decision.[8] This was an error as it created an issue of fact. In other school discipline cases, courts have observed that statements and pressure from university officials can affect school disciplinary panels. In *Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016), the Second Circuit suggested that institutional bias could

[8] Haynes submitted an appeal based on evidence that was not available during the disciplinary process (the DNA evidence). The Clarion President declined to exercise her discretion to even consider Haynes appeal. (See Whitney Depo. at 112-113, JA508.) This is consistent with an inference that Clarion simply wanted to expel Haynes without considering the underlying evidence of his guilt or innocence.

affect the entire disciplinary process, leading the decision-makers to reach a different result. The court in *Columbia* specifically suggested that possible bias by non-decision makers is relevant if those with bias "had significant influence" over the decision. Specifically, the *Columbia* court considered whether "the University's administration was cognizant of, and sensitive to, these criticisms" and even specifically referred to the knowledge of the University President. 831 F.3d at 58-59. In another case, a district court case from this Circuit found that statements by the President and Provost that the university was "redoubling [its] efforts" to "tackle [the] problem" were sufficient to suggest "inherent and impermissible... bias…" *Doe v. Trustees of the Univ. of Pennsylvania*, 270 F. Supp. 3d 799, 823-824 (E.D.Pa. 2017). *See also Doe v. Washington & Lee Univ.*, W.D.Va. No. 6:14-cv-00052, 2015 U.S. Dist. LEXIS 102426, at *20-21 (Aug. 5, 2015) ("investigation and hearing occurred in an environment that created pressure for the university to punish male students for sexual misconduct").

b. The Biased Administrator And Hearing

The Clarion administrator responsible for conducting a fair and impartial investigation, Shaffer, had pre-determined that Haynes was guilty. This is not speculation or an inference; this was confirmed by the deposition testimony of K.S.

Q. Did you feel in talking to [Shaffer] that he believed you?

A. Yes.

(K.S. Depo. at 56; JA960.)

Shaffer did not conduct an investigation. He did not interview K.S. (Hearing Transcript at 9, JA348.) He did not interview any witnesses. (Shaffer Depo. at 61-63, JA680-682.) President Whitney testified that she had expected Shaffer to conduct and investigation before taking any actions:

> Q. So it's Mr. Shaffer's job... to make an initial decision as to whether or not a matter should be brought before the [UCB]?
>
> A. That – Yes...
>
> Q. Before making that decision, would you anticipate that he would speak to witnesses?
>
> A. I – he would speak to people who could give him information to help him make that determination.

(Whitney Depo. at 44, JA492.) Another Clarion administrator testified that he was not aware that Shaffer had failed to conduct any investigation beyond interviewing Haynes in the jail on the night of his arrest and "probably would have asked why he had not spoken to the other witnesses." (Tripp Depo. at 91, JA605.) [9]

In a fair and unbiased system, whether someone is a "victim" or "survivor" is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning prior to conducting any investigation. Clarion administrators reversed this process and assumed that Haynes was guilty because he had been charged rather than evaluating the case on its own merits. Shaffer drafted an email few hours after he

[9] Expert: the lack of an investigation was evidence of bias. (Blimling Report at 4, JA1108.)

had learned about the allegations against Haynes; he referred to K.S. as "the female survivor." (October 27, 2013 Email, JA1317-1318.) President Whitney responded in a email that "this is terrible" and referred to K.S. as "the victim." (October 27, 2013 Email, JA1317.) Shaffer repeatedly referred to K.S. as a "survivor" in other emails and during the UCB hearing. (Oct. 30, 2013 Email, JA321, Hearing Transcript at 7, JA346.) This Court does not need to go any further than the testimony of Clarion administrators to recognize the use of this terminology as creating an issue of fact on the question of bias. One administrator testified that the use of this term, "does concern me, but it does not surprise me." (Tripp Depo. at 98, JA612.) A Clarion faculty member who acts as an 'ombudsman' during the process stated that she would not use "that language." (Dede Depo. at 28, JA840.) Even the Clarion Title IX Coordinator stated that this was inappropriate: "if there were a preference, the preference would be either the complainant or the respondent…" (Gant Depo. at 24, JA1077.)

A review of the hearing transcript shows that there was an issue of fact about whether Shaffer infected what was supposed to be a fair UCB hearing process. Shaffer claimed that he was "neutral party during these proceedings" and that his role was to provide the UCB "with all of the facts that we have." (Schaffer Depo. at 39; JA658.) However, Shaffer acted as a prosecutor who presented the case against Haynes and declined to present information that aided the accused student. The chair of the UCB testified that Shaffer does not typically bring evidence before the UCB that undermines the charges against an accused student. (McCarrick Depo. at 34, JA802.) The school's

ombudsman expressed the expectation that Shaffer would have presented inculpatory and exculpatory evidence:

> Q. So you would expect the coordinator to present information that's both favorable and unfavorable to the allegations; is that right?
>
> A. Yes.
>
> Q. Would you expect that if the coordinator had information that was favorable for the accused that the coordinator would present that to the [UCB]?
>
> A. Yes.
>
> Q. Would you think that the hearing was not conducted fairly if the coordinator did not present favorable information for the accused to the [UCB]?
>
> A. I would think so, yes.

(Dede Depo. at 67, JA879.) The expert witness summarized:

> Shaffer's presentation of the case to the UCB… showed no attempt to provide a neutral and objective review of the facts. He functioned in the hearing as an advocate for [K.S.]

(Blimling Report at 5, JA1109.)

The most obvious and disturbing evidence of bias was that Shaffer, during the hearing, expressed his view that the alleged victim was "credible." (Hearing Transcript at 7, JA346.) The ability of this to infect the process is not speculative. Rather, this was a cause of concern to other Clarion administrators. One testified:

> Q. Would it be proper for Mr. Shaffer in presenting this information to the [UCB] to comment on the credibility of the accuser... ?
>
> A. I find it very highly unlikely that he would do that.
>
> Q. If it was done, do you think it was improper as the vice president?

A. I would have concern with that, yes.

(Tripp Depo. at 100, JA615.) Shaffer also presented misleading 'expert' testimony. Shaffer encouraged the expert – who it turned out was completely unqualified – to give the false impression that she was familiar with the facts of the case. (Hearing Transcript at 5; JA344.) The expert did not interview K.S. or have any information about this particular case. (Shaffer Depo. at 86, JA705; Austin Depo. at 31, JA1270.) The expert admitted in her deposition that she had been told "nothing about the case… just where the hearing would take place and what time." (Austin Depo. at 23, JA1263.) The chair of the UCB testified that this testimony was misleading: "I assumed that she was [K.S.'] counselor." (McCarrick Depo. at 36; JA805.)

Shaffer could not conscientiously consider K.S. a 'victim' or 'survivor' while also conducting an impartial investigation of the accused students; his abdication of his role as an investigator shows that this potential conflict had become a reality. Then, Shaffer could not testify as a principal witness while essentially serving as the prosecutor and then insist that the adjudicatory hearing panel agree with his credibility assessment of K.S. by the preponderance of the evidence standard. But he purported to do all these things. To the extent Shaffer's conduct substantially lessened the UCB's fact-finding and adjudicatory autonomy, the integrity of the process was compromised. *See Doe v. Brandeis Univ.*, 177 F.Supp. 3d 561, 606 (D.Mass. 2016). ("The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. No matter how well-intentioned, such a person

may have preconceptions and biases, may make mistakes, and may reach premature conclusions.").

5. Clarion Failed To Delay The Disciplinary Hearing Until The Conclusion Of Criminal Proceedings

Plaintiff presented sufficient evidence that Clarion violated Hayne's due process rights by failing to delay the disciplinary proceedings until the conclusion of any criminal proceedings. Clarion does not have a policy of staying disciplinary proceedings while criminal charges are pending. (Tripp Dep. at 33, JA547.) The context of this request is important: Haynes already had been suspended, on an interim basis, by the school.

Haynes, through his mother, contacted Shaffer and asked that the proceedings be delayed until the criminal proceedings were resolved. She explained that Haynes could not participate in the school proceeding because anything he said could be used against him in the criminal proceeding. Shaffer refused. (Malone Depo. at 62-63, 71, JA1212, JA1214.) Haynes faced a legal dilemma: either mount a full defense in the disciplinary case and risk jeopardizing his defense in the criminal case, or risk his college degree by failing to fully defend himself. *Gabrilowitz v. Newman,* 582 F.2d 100, 103 (1st Cir. 1978).[10] Haynes explained he did not attend the UCB hearing on the advice of counsel:

[10] The District Court cited *Gabrilowitz* for the proposition that there is "no constitutional right to active participation of counsel in student disciplinary hearings." (Order on MSJ at 9-10, JA12-13.) This is not contested, here. *But see Doe v. Baum*, *infra.,* 2018 U.S. App. LEXIS 25404, at *31 (Gilman, J., concurring) (observing that recent decisions on right of cross-examination may conflict with "caselaw… that a student has no constitutional

> [M]y attorney at the time told me that if I did attend the hearing at Clarion, that I possibly could do something that would harm the criminal case. . . So I – I figured that once that was taken care of... I could work on getting back into Clarion if I wanted to after that.

(Haynes Depo. at 93, JA504.)

The Supreme Court has decided a string of so-called "penalty" cases that hold that the government may not impose a penalty on a person for asserting his or her Fifth Amendment privilege. *See Minnesota v. Murphy*, 465 U.S. 420, 434 (1984); *Lefkowitz v. Cunningham*, 431 U.S. 801, 804-808 (1977); *Lefkowitz v. Turley*, 414 U.S. 70, 77-84 (1973); *Sanitation Men v. Comm. of Sanitation*, 392 U.S. 280, 284-285 (1968); *Gardner v. Broderick*, 392 U.S. 273, 276-279 (1968). In all of theses cases, the Court affirmed the idea the Constitution limits "the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.'" *Spevack v. Klein*, 385 U.S. 511, 515 (1967), *quoting Griffin v. California*, 380 U.S. 609, 614 (1965).

In *Garrity* the Court considered whether an unconstitutional penalty was imposed if, in the course of an administrative investigation, the assertion of the Fifth Amendment privilege assertion would have cost police officers their jobs. The Court reasoned that the choice given the officers was either to forfeit their jobs or to incriminate themselves. The Court said, the "option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out

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right to have an attorney actively participate in his disciplinary hearings") *citing Flaim*, 418 F.3d at 629.

or to remain silent." 385 U.S. at 497. Similarly, in *Lefkowitz v. Cunningham* the Court struck down a state statute that required an officer of a political party to either waive the Fifth Amendment or forfeit his office. The Court said, "We have already rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need." 431 U.S. at 808. These cases prohibit a government actor from unconstitutionally placing students between *Scylla* and *Charybdis*. In Greek mythology, *Scylla* (a dangerous rock formation) and *Charybdis* (a whirlpool) posed an inescapable threat to the sailor because avoiding the rocks meant passing too close to the whirlpool and *vice versa*.

In this case, Haynes was impermissibly forced to choose between waiving his right to remain silent (the rock), or waiving his right to defend himself at the UCB (the whirlpool). Applying the *Mathews* test, the first consideration is that the private interest at stake, the right to continuing education at a public institution is a substantial one. While the District Court minimized the student's interest, the District Court failed to appreciate that expulsion from Clarion denied Haynes the benefits of education at his chosen school, damaged his academic and professional reputations, and affected his ability to enroll at other institutions of higher education and to pursue a career.[11] The

[11] The District Court dismissed the interest of the student as speculative, observing that Haynes was able to enroll at a community college and Temple University. (Order on MSJ at 10-11, JA13-14.) This ignored the fact that Haynes was initially rejected by Temple. (Haynes Depo. at 77-79, JA471-472.)

District Court's assessment of this *Mathews* factor was contrary to the weight of authority on this issue. This interest has been described by other circuits as "compelling" for *Mathews* test purposes.[12] The Sixth Circuit said, "A finding of responsibility will… have a substantial lasting impact on [students'] personal lives, educational and employment opportunities, and reputations in the community. *Doe v. Cummins*, 662 F.App'x 437, 446 (6th Cir. 2016)*, citing Goss*, 419 U.S. at 574-75. The Fifth Circuit followed the conclusion of the Sixth Circuit. *Plummer*, 860 F.3d at 773 (following *Cummins* in evaluating this aspect of *Mathews* test). The First Circuit has said, "The interests of students in completing their education, as well as avoiding unfair or mistaken exclusion from the educational environment, and the accompanying stigma are, of course, paramount." *Gorman*, 837 F.2d at14.

The District Court failed to acknowledge Haynes might, in the future, have difficulty getting into graduate school, pursing a degree, or getting a job. The Supreme Court in *Goss* gave significant weight to this possibility. *See* 419 U.S. at 575 (observing that consequences of disciplinary finding includes potential "interfer[ence] with later opportunities for higher education and employment").

[12] In this Circuit, district courts have given significant weight to the interest of the student. *See e.g. Doe v. Pennsylvania State Univ.*, M.D.Pa. No. 4:18-CV-00164, 2018 U.S. Dist. LEXIS 141423, at *11 (Aug. 21, 2018) (observing that "in addition to a tarnished disciplinary record, he is also facing the stigma of being labeled 'responsible' for engaging in nonconsensual sexual intercourse); *Park v. Temple Univ.*, E.D.Pa. No. 16-5025, 2018 U.S. Dist. LEXIS 46765, at *4 (Mar. 20, 2018) ("It is quite obvious that [the student] had an interest in remaining" at the university); *Johnson v. Temple Univ.*, E.D.Pa. No. 12-515, 2013 U.S. Dist. LEXIS 134640, at *22 (Sep. 19, 2013) ("clearly [the student's] private interests are significant").

The District Court inherently misunderstood the second *Mathews* factor. The District Court observed that Clarion had an "interest in campus safety." The District Court later described the interest as "preventing a student arrested and criminally charged with forcible rape of another student from attending classes, and even being on campus…" (Order on MSJ at 11, JA14.) This is true, but not the real interest at stake. Rather, the real interest by Clarion that the District Court *should* have considered was whether to *delay* the UCB hearing until the completion of the criminal proceedings. That consideration is not compelling in this case because Haynes was *already* subject to an interim suspension; he was already not present on campus and, thus, posed no threat to pubic safety. Additionally, the District Court ignored the University's stated interest in impartially adjudicating sexual misconduct allegations in a fundamentally fair manner. The Handbook states:

> The conduct of hearings shall ensure that the accused student has had a fair and reasonable opportunity to answer, explain, and defend against the charges.

(Handbook at 23, JA159.) To the extent that Clarion limits confrontation and counsel participation; allows one officer to direct the investigatory and prosecutorial, and relies on the lowest standard of proof, the integrity of its decisions and commitment to this interest may be questioned and discredited.

In evaluating the third *Mathews* factor, the risk of error in the process employed was relatively high. Clarion does not respect the right of students to remain silent, and

administrators seem to suggest that silence would be held against students. An administrator testified:

> Q. And do you understand that in a criminal hearing that a defendant is not required to speak?
>
> A. I am aware of that.
>
> Q. But it's your position in the disciplinary hearing that a student should come and present his or her case. Is that correct?...
>
> A. I am just saying from my stance, if I was accused of something, I would want to be there and participate.

(Tripp Depo. at 85, JA599.) The risk of an erroneous discipline must be considered in the context of the procedures used at the hearing. Plaintiff was, admittedly, afforded numerous procedural rights, including advance notice and a hearing. However, the hearing was conducted under a preponderance of the evidence standard and Haynes could not have had an attorney ask questions on his behalf or present evidence. Nor could Haynes have asked questions of K.S.[13] Haynes could not present an adequate defense because of his desire to remain silent in the face of the pending criminal charges. Plaintiff's election not to appear, and Clarion's decision to proceed with the hearing, thus, violated Haynes' due process rights.[14]

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[13] *See infra.*

[14] In *Gabrilowitz, supra*, the First Circuit appeared to reach a contrary decision. In that case, a college student faced a choice similar to that of Haynes. The court stated, in the context of a college disciplinary hearing, that the due process rights of the student were not implicated by compelling the student to waive his Fifth Amendment privilege. The court said, "Although the choice facing [the student] is difficult, that does not make it

This Court should find that there is something inherently repugnant to due process in requiring a student to choose between giving testimony at the disciplinary hearing, a course that may help the criminal prosecutors, and keeping silent, a course that may lead to the loss of his ability to attend school. This is the choice at the core of the Supreme Court's 'penalty' jurisprudence. In sum, the affected private interest is

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unconstitutional." 582 F.2d at 104. *Cf. Peiffer v. Lebanon School Dist.*, 673 F.Supp. 147, 151 (M.D.Pa. 1987) (following *Gabrilowitz*).

The *Gabrilowitz* decision is inapposite for three reasons.

First, in *Gabrilowitz* the student was specifically informed of his right to remain silent. Nothing in the record in this case suggested that "the hearing board will consider the silence of an accused as either pointing to or being conclusive evidence of guilt." 582 F.2d at 104. In contrast, in this case Shaffer interrogated Haynes in the jail without informing him of his right, both under the Constitution and Clery Act, 20 U.S.C. § 1092, to have his attorney present. (Shaffer Depo. at 68, JA689; Haynes Depo. at 93, JA475.)

Second, the *Gabrilowitz* court relied on the fact that the accused student could have an attorney present. 582 F.2d at 104. However, in this case while the Clarion rules suggested Haynes could have an attorney present, there is an issue of fact about whether Clarion would follow that rule. Haynes' mother testified that she was told by Shaffer that Haynes' attorney could not be present: "[Shaffer] said no attorney's allowed in the room." (Malone Depo. at 60, JA1211.)

Third, the First Circuit failed to adequately consider *Lefkowitz v. Cunningham*, *supra.* The First Circuit reasoned that *Gabrilowitz* did "not involve compelled testimony." However, in *Lefkowitz v. Cunningham* the Supreme Court observed that *Garrity* and other decision were "concerned with penalties having a substantial economic impact" and may have improperly limited the Supreme Court's 'penalty' jurisprudence on this basis. The *Lefkowitz v. Cunningham* Court extended *Garrity* to more general economic and non-economic impact, including the impact of an adverse state decision on a person's reputation. The Court said that an action is coercive when it "requires [a person] to forfeit one constitutionally protected right as the price for exercising another." 431 U.S. at 808

substantial, the risk of an erroneous deprivation is high, and a delay would not have impacted the interest of the school in safety. Upon balancing the competing interests, the District Court incorrectly concluded that the failure of Clarion to delay the UCB hearing until the completion of criminal charges comported with the requirements of due process. *See Coulter v. E. Stroudsburg* Univ., M.D.Pa. No. 3:10-CV-0877, 2010 U.S. Dist. LEXIS 43866, at *8 (May 5, 2010) ("the University was essentially forcing Plaintiff to choose between exposing herself to criminal liability and the serious consequences associated therewith or protecting herself from possible academic sanctions").

6. Clarion Failed To Provide Adequate Opportunity To Cross-Examine Adverse Witnesses

a. Clarion Does Not Permit Confrontation Of Alleged Victims Of Sexual Misconduct

The District Court correctly observed that the Clarion "hearing procedure did not allow cross-examination of an alleged rape victim." (Order on MSJ at 10, JA13.) The Clarion Handbook suggests that students are permitted a "reasonable questioning of witnesses by both parties." (Handbook at 23; JA161.) However, the record in this case supports a finding that Clarion would not have permitted Haynes to cross-examine K.S. even had he appeared at the hearing. Multiple witnesses explained that the complainant would only answer questions posed by the UCB, not the accused student. One administrator testified:

> Both parties can have the chance to address each other *and answer questions of the board*, and that is how the process is outlined.

(Tripp Depo. at 37, JA551 (emphasis supplied).) Another administrator explained:

> The chair of the hearing panel stated that at the hearing "there was an opportunity for [K.S.] to make a statement *and the [UCB] to ask questions to interact with her*."

(McCarrick Depo. at 30, JA798 (emphasis supplied).) Shaffer explained the process in his deposition:

> When we talk about cases that could potentially result in a suspension or expulsion, those would go to a [UCB] to make those determinations. So you would have a group of faculty[,] staff and students who would review the information, *ask questions*, make a determination, if the charges are founded or not using a preponderance.

(Shaffer Depo. at 20, JA639 (emphasis supplied).)

b. The Constitution Guarantees The Right Of Accused Students To Confront Adverse Witnesses

The District Court – without citation to any authority – suggested that there was no "constitutional right under the Due Process… Clause to cross-examination of alleged sexual assault victims in university disciplinary proceedings."[15] (Order on MSJ at 10, JA13.) The conclusion of the District Court was incorrect. Haynes had the right to confront adverse witnesses when the information supplied by those witnesses is the reason for the adverse action and there is a question of credibility to be resolved by the

[15] The District Court said that "Plaintiff provided no support" for the cross-examination claim. (Order on MSJ at 10, JA13.) However, on page 18 of the Opposition to the Motion for Summary Judgment (Docket#85) Plaintiff cited to *Furey v. Temple Univ.*, 884 F.Supp.2d 223 (E.D.Pa.2012). In that case, the court, relying in part on *Winnick*, *infra.*, the court said: "Due process can require that the student have an opportunity to cross examine witnesses," and, "The Court concludes that due process required that the plaintiff be able to cross-examine witnesses." 884 F.Supp.2d at 252.

finder of facts.[16] *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Winnick,* 460 F.2d at 549; *Gorman,* 837 F.2d at 16; *Univ. of Cincinnati*, 872 F.3d at 401.

In *Goldberg*, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires an evidentiary hearing before a recipient of certain government welfare benefits could be deprived of such benefits. Of relevance to the issue in this case, the Court held that while there is no right to a formal trial, due process requires an opportunity for the aggrieved person to confront and cross-examine adverse witnesses. 397 U.S. at 269-270. The Court said, "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.*

In *Winnick*, the Second Circuit held that there was no requirement that a student be able to cross-examine a witness whose testimony is not determinative to the outcome of the disciplinary hearing. 460 F.2d at 549. But, significantly, the *Winnick* court noted, "if this case had resolved itself into a problem of credibility, cross-examination of witnesses might have been essential to a fair hearing." *Id.* at 550. The First Circuit in *Gorman*, observed that a school had complied with constitutional requirements by providing a student "the opportunity to cross-examine his accusers as to the incidents

[16] Important: Plaintiff-Appellant is *not* claiming an unlimited right to cross-examination in school disciplinary proceedings. Rather, the right claimed in limited to cases where there are disputed facts and the witnesses relied upon provide the evidence for the decision resolving the dispute.

and events in question." 837 F.2d at 16. The *Gorman* court further observed that while there is no right to "unlimited" cross-examination, due process requires some cross-examination to permit an accused to "elicit[] the truth about the facts and events in issue."

More recently, in *University of Cincinnati*, the Sixth Circuit held, "Accused students must have the right to cross-examine adverse witnesses 'in the most serious of cases.'" 872 F.3d at 401, *citing quoting Flaim v. Med. Coll. of Ohio,* 418 F.3d 629, 636 (6th Cir. 2005). The court in *University of Cincinnati* considered a situation where the alleged victim did not appear at an accused student's disciplinary hearing. The court observed that as a general rule, cross-examination is not required to satisfy due process in a school disciplinary proceeding. However, the Sixth Circuit noted that this was not the *full and compete* statement of the law:

> "The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings." *Winnick*, 460 F.2d at 549. However, general rules have exceptions, and "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Goss*, 419 U.S. at 578 (citation and parenthetical omitted).

872 F.3d at 400-401.

In *University of Cincinnati*, the court observed, in applying the *Mathews* test, that the absence of cross-examination violates the due process rights of accused students because it impacts the reliability of the entire process. The court said:

> [The school] assumes cross-examination is of benefit only to [the accused student]. In truth, the opportunity to question a witness and observe her

> demeanor while being questioned can be just as important to the trier of fact as it is to the accused. . . . Few procedures safeguard accuracy better than adversarial questioning.

872 F.3d at 401 (citations omitted). The court further elaborated on the benefit of cross-examination to the entire process:

> But if a university's procedures are insufficient to make "issues of credibility and truthfulness . . . clear to the decision makers," that institution risks removing the wrong students, while overlooking those it should be removing. *See Furey,* 884 F. Supp. 2d at 252. "The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is." Goss, 419 U.S. at 579-80. Cross-examination, "the principal means by which the believability of a witness and the truth of his testimony are tested," can reduce the likelihood of a mistaken exclusion and help defendants better identify those who pose a risk of harm to their fellow students. See *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 924 (6th Cir. 1988) (citation omitted).

872 F.3d at 403. The Sixth Circuit recently re-affirmed this holding. *Doe v. Baum*, 6th Cir. No. 17-2213, 2018 U.S. App. LEXIS 25404, at *10 (Sep. 7, 2018) ("when the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination").

Numerous federal district courts outside of the Sixth Circuit have, in contrast to the District Court in this case, cited and followed these decisions. In most of these cases the court first observes that there is no general right to cross-examination. Then, the courts observe that *Winnick* and the other cases essentially carve out an exception for situations where the fact-finder has to make a credibility determination. Typical of this approach is the decision in *Bridgeforth v. Popovics*, N.D.N.Y. No. 8:09-CV-0545, 2011

U.S. Dist. LEXIS 56904, at *29 (May 25, 2011). In that case, the court first observed, "The right to cross-examine witnesses has not been considered an essential requirement of due process in school disciplinary proceedings." 2011 U.S. Dist. LEXIS 56904, at *29. The *Bridgeforth* court, citing to *Winnick*, continued: "if a case is essentially one of credibility, the 'cross-examination of witnesses might [be] essential to a fair hearing.'" *Id. quoting Winnick*, 460 F.2d at 550. Other cases follow this approach.[17] In *Doe v. Brandeis Univ.* the court considered a situation where a private school did not permit a student to confront his accuser. The court said, "the elimination of such a basic protection for the rights of the accused raises profound concerns," and adopted the *Winnick* framework explicitly by observing, "The ability to cross-examine is most critical when the issue is the credibility of the accuser." 177 F.Supp. 3d at 604-605, *citing Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997); *Winnick*, 460 F.2d at 550. The *Brandeis* court described a situation that mirrors this case:

> Here, there were essentially no third-party witnesses to any of the events in question, and there does not appear to have been any contemporary corroborating evidence. The entire investigation thus turned on the credibility of the accuser and the accused. Under the circumstances, the lack of an opportunity for cross-examination may have had a very substantial effect on the fairness of the proceeding.

[17] *See also Holmes v. Poskanzer,* N.D.N.Y. No. 1:06-CV-0977, 2008 U.S. Dist. LEXIS 13545, at *12 (Feb. 21, 2008) (describing the *Winnick* situation but observing "it is very unusual for due process to require cross-examination of witnesses, [but] it is impossible to rule out").

177 F.Supp. 3d at 604-605. *See also Wolski v. Orange Cnty. Sch. Bd.*, M.D.Fla. No. 6:13-cv-1623-Orl-31TBS, 2015 U.S. Dist. LEXIS 4450 (Jan. 14, 2015 ("Here the accused and accuser's accounts are what the disciplinary matter turned on. Accordingly, cross-examination may have been required to preserve basic fairness.").

Although this Court has not directly addressed the cross-examination issue, additional district courts within this Circuit have reached the same conclusion.[18] In *Furey*, *supra*, a court in this Circuit cited to *Winnick* to support the idea that cross-examination was only unnecessary where the relevant facts were undisputed. The court held that cross-examination was required in a case of student discipline where the facts were in dispute:

> The purpose of cross-examination is to ensure that issues of credibility and truthfulness are made clear to the decision makers. Given the importance of credibility in this Hearing... the Court considers this an important safeguard.

[18] Application of the *Mathews* factors leads clearly to the conclusion that due process includes the right to confront adverse witnesses when the information supplied by those witnesses is the reason for the adverse actions and there is a question of credibility to be resolved by the finder of facts. The potential interest of the student is significant and the risk of erroneous deprivation when no cross-examination is permitted is high. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."). In terms of the third *Mathews* factor, the Clarion administrative proceedings would not become too burdensome if an opportunity to cross-examine adverse witnesses in certain cases were required because Clarion *already* specifically anticipates witnesses would be present and answer questions from the UCB. *See Baum*, 2018 U.S. App. LEXIS 25404, at *11 (describing "the minimal burden that the university would bear by allowing cross-examination").

884 F.Supp.2d at 251. Similarly, in *Doe v. Pennsylvania State Univ*, *supra*, the court relied on both *Winnick* and *University of Cincinnati* to conclude that a student had the right to cross-examine his accuser in a school disciplinary hearing when there was an issue of credibility surrounding the issue of consent. 2018 U.S. Dist. LEXIS 141423, at *14.

C. Plaintiff Is Entitled To Injunctive Relief

The District Court suggested that Plaintiff cannot claim injunctive relief because there is no "ongoing federal violation." (Order on MSJ at 19-16, JA22.) This is incorrect. Haynes, in the Amended Complaint, requested equitable relief designed to prohibit the imposition of, or reporting of, any disciplinary actions. (Amended Complaint at 27, JA64.) This is perspective remedial action that is permissible under 42 U.S.C. §1983. *Cummins*, 662 F.App'x at 444 (describing claim as "prospective" where school officials "would merely be compelled to remove the negative notation from appellants' disciplinary records that resulted from the allegedly unconstitutional disciplinary process").

D. Defendants Were Not Entitled To Qualified Immunity

The District Court incorrectly concluded Defendants would have been entitled to qualified immunity because the due process rights identified by Haynes were not clearly established. (Order on MSJ at 20-21, JA23-24.) Qualified immunity shields government officials from civil damages unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. *Reichle v. Howards*, 566 U.S. 658, 664 (2012); *Kane v. Barger*, 3d Cir. No. 17-3027, 2018 U.S. App. LEXIS 23575, at *10-11 (Aug. 22, 2018). A constitutional right is clearly established when at the time of the challenged conduct, the contours of the right are sufficiently clear. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Mammaro v. New Jersey Div. of Child Prot. & Permanency*, 814 F.3d 164, 169 (3d Cir. 2016), *cert. denied*, 137 S.Ct. 161 (2016). This Court has observed that, in the absence of Supreme Court precedent, courts should "consider whether there is a case of controlling authority in [their] jurisdiction or a 'robust consensus of cases of persuasive authority' in the Courts of Appeals [that] could clearly establish a right for purposes of qualified immunity." *Barna v. Bd. of Sch. Directors of Panther Valley Sch. Dist.*, 877 F.3d 136, 142 (3d Cir. 2017), *quoting Mammaro*, 814 F.3d at 169).

As an initial matter, the fact that the defendants may be entitled to qualified immunity on Haynes' damages claim would not preclude Haynes' claim for injunctive relief. *Hill v. Borough of Kutztown*, 455 F.3d 225, 244 (3d Cir. 2006) ("[T]he defense of qualified immunity is available only for damages claims—not for claims requesting

prospective injunctive relief."); *Montanez v . Sec' y, Pa. Dep't of Corr.*, 763 F.3d 257, 265 (3d Cir. 2014) (qualified immunity provides a defense to claims for monetary damages but not for injunctive relief).

The District Court concluded, "No court has clearly established a constitutional right" to cross examination in university disciplinary hearings. (Order on MSJ at 20, JA23.) This is incorrect. *See, supra, citing Goldberg,* 397 U.S. at 269-270; *Winnick*, 460 F.2d at 550. One district court observed, "The right to some form of cross-examination in university expulsion hearings is a clearly established due process right" when cross-examination is "essential to due process," as in a case that turns on "a choice between believing an accuser and an accused." *Doe v. Ohio State Univ.*, S.D.Ohio No. 2:15-cv-2830, 2016 U.S. Dist. LEXIS 154179, at *27 (Nov. 7, 2016).

The District Court next concluded, "No court has clearly established a constitutional right to an attorney at all stages of university disciplinary proceedings" and questioned whether the constitution prohibits a school from pursuing disciplinary proceedings without the active participation of counsel when a criminal charge is pending. (Order on MSJ at 20, JA23.) This is incorrect. *See supra citing Garrity*, 385 U.S. at 497. One district court observed, "where a student is simultaneously facing criminal sanctions and academic discipline… the student must be allowed to have counsel or some other representative actively participate during the hearing." *Coulter,* 2010 U.S. Dist. LEXIS 43866, at *9.

Finally, the District Court concluded, "there is no clearly established constitutional right to a strictly impartial student disciplinary investigation." (Order on MSJ at 21, JA24.) This, too, is incorrect. *See, supra, citing McClure*, 456 U.S. at 195. Another circuit court has observed that a student's "right to an unbiased decisionmaker" in a school disciplinary hearing is "clearly established." *Heyne v. Metro. Nashville Pub. Schools*, 655 F.3d 556, 568 (6th Cir. 2011).

CONCLUSION

The Order Granting Defendants Summary Judgment on Plaintiff's Procedural Due process claim should be reversed and this matter remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2018, 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:

Kemal Alexander Mericl

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

CERTIFICATE OF ADMISSION

I hereby certify that at least one of the attorneys whose names appear on the brief is a member of the bar of this court.

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

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App.P. 32(a)(7), that this brief complies with the type-volume limitation. The word-processing system used to prepare the brief, Microsoft Word, indicates that this brief contains 12,577 words, excluding the parts of the brief exempted by Fed. R. App.P. 32(a)(7)(B)(iii).

I certify this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface, Garamond 14 pt, using Microsoft Word.

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

CASE NO. 18-2592

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

Tafari Haynes,
Plaintiff-Appellant
v.
Clarion University of Pennsylvania, et al,
Defendants-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 2:15-cv-01389
Honorable Bill R. Wilson, Senior United States District Judge (E.D. Ark.), presiding

JOINT APPENDIX VOLUME I, PAGES 1-25

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CONTENTS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

TAFARI A. HAYNES **Plaintiff,**	:	
v.	:	**Civil Action No. 15-1389**
CLARION UNIVERSITY OF PENNSYLVANIA, et. al **Defendants**	:	

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Plaintiff Tafari A. Haynes, by and through his undersigned attorney, hereby appeals to the United States Court of Appeals for the Third Circuit from each and every part of this Court's final Judgment and Order granting Defendants' Motion for Summary Judgment entered on June 27, 2018 (Doc Nos. 104 and 105), and all other orders, holdings, or rulings merged or incorporated therein, including, but not limited to, this Court's denial of Defendants' Motion in Limine (Doc No. 69) as moot.

Dated: July 17, 2018

By: /s/ Riley H. Ross III

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2018, the above Notice of Appeal was filed via the Court's CM/ECF system, is available for viewing and downloading, and, as such, was served upon opposing counsel.

/s/ Riley H. Ross III
Riley H. Ross III

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TAFARI A. HAYNES **PLAINTIFF**

VS. **2:15-CV-01389-BRW**

CLARION UNIVERSITY OF PENNSYLVANIA, *et al.* **DEFENDANTS**

JUDGMENT

Based on the order entered today granting Defendants' Motion for Summary Judgment, this case is DISMISSED with prejudice.

IT IS SO ORDERED this 27th day of June, 2018.

/s/ Billy Roy Wilson
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TAFARI A. HAYNES **PLAINTIFF**

VS. **2:15-CV-01389-BRW**

CLARION UNIVERSITY OF PENNSYLVANIA, *et al.* **DEFENDANTS**

ORDER

Pending is Defendants' Motion for Summary Judgment. (Doc. No. 65). Plaintiff has responded.[1] Defendants filed a reply[2] and Plaintiff filed a sur-reply.[3] For the reasons set out below, Defendants' motion is GRANTED and this case is DISMISSED with prejudice. Defendants' Motion in Limine (Doc. No. 69) is DENIED as moot.

I. BACKGROUND

Plaintiff, Tafari A. Haynes and K.S. were both full-time students in good academic standing at Clarion University of Pennsylvania ("Clarion") in 2013. On October 26, 2013, Plaintiff attended a party at K.S. house. Plaintiff expressed a romantic interest in K.S. and they went to a room to talk privately. What happens next is disputed. Plaintiff says they started kissing, but he never exposed himself and K.S. left the room.

In the early hours of October 27, 2013, K.S. or her roommate called the Clarion police and alleged Plaintiff raped her.[4] K.S. went to the hospital soon after and hospital staff performed a rape kit.[5] Later that day, Plaintiff was arrested by the Clarion police and eventually the state

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[1]Doc. No. 85.

[2]Doc. No. 93.

[3]Doc. No. 96.

[4]Doc. No. 81, ¶1.

[5]Doc. No. 68-14, p. 7, 9.

filed criminal charges. However, those charges were *nolle prossed* in January 2014 after K.S. advised the prosecution that she no longer wanted to pursue the charges.

After K.S.'s allegations and while the state-court charges were pending, Clarion initiated its own investigation pursuant to its Sexual Harassment Policy and Procedures. The policy provided students facing discipline with a number of procedural protections, including an appeals process, though appeals are at the discretion of Clarion policy also provided for appeals, within three days of receiving the hearing decision, and at the discretion of Karen Whitney, the President of Clarion.

Immediately after learning of the rape allegation, but before any type of hearing, Plaintiff was suspended from Clarion and barred from campus,[6] which is permitted under Pennsylvania law.[7] Upon commencing the investigation, Matthew Shaffer, Clarion's Coordinator of Judicial Affairs and Residence Life Education, interviewed Plaintiff, but Plaintiff generally exercised his constitutional right to remain silent. Mr. Shaffer also told Plaintiff about the suspension.

Plaintiff also received a letter about the suspension, a "trial," and the "student discipline process."[8] His adviser told him he should withdraw from classes, but Plaintiff's mother told him he could not.[9] However, Plaintiff testified that he never contacted any Clarion officials about his suspension or disciplinary hearing.[10]

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[6]Doc. No. 31, ¶¶24-26.

[7]Doc. No. 67, ¶25; 22 Pa. Code § 505.9.

[8]Doc. No. 68-6, pp. 18-19.

[9]Doc. No. 82-2, pp. 18-19, 22.

[10]Doc. No. 68-6, p. 19.

On November 18, 2013, Defendants notified Plaintiff, in writing, that he would have a disciplinary hearing on December 3, 2013.[11] Based on advice from his lawyer, neither Defendant nor his lawyer attended the hearing.

Following the hearing, which involved previously sworn testimony from K.S. (where she was cross-examined by Plaintiff's lawyer) and the presentation of other evidence, Clarion's University Conduct Board ("UCB") decided to expel Plaintiff. Plaintiff had until December 6, 2013 to appeal his expulsion, but he did not appeal until January 26, 2015. The appeal was dismissed as untimely.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided on purely legal grounds.[12] The Supreme Court has established guidelines to assist trial courts in determining whether this standard has been met:

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.[13]

Only disputes over facts that may affect the outcome of the suit under governing law will properly preclude the entry of summary judgment.[14]

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[11]Doc. No. 67, ¶56.

[12]Fed. R. Civ. P. 56.

[13]*Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 (1986).

[14]*Id*. at 248.

III. DISCUSSION

Plaintiff brought seven claims against the Defendants,[15] all based on Plaintiff's suspension and expulsion from Clarion following his UCB hearing.[16] He alleges Defendants' violated Title IX, his right to procedural and substantive Due Process, and his right to Equal Protection.[17] He also brings claims for defamation, negligence, negligent infliction of emotional distress, and for injunctive relief.[18]

A. Title IX

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in exclusion from or participation in any educational program receiving federal financial assistance.[19] Defendants admit they are subject to Title IX.[20]

Both parties acknowledge that neither the Supreme Court nor the Third Circuit has provided a standard for determining intentional discrimination under Title IX based on either the initiation or outcome of a student disciplinary proceeding.[21] They appear to agree, however, that the Second Circuit identified two categories of actionable claims: (1) erroneous outcome, and (2)

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[15]Doc. No. 31.

[16]Doc. No. 67, at ¶¶74-75; Doc. No. 80, at ¶¶74-75 .

[17]Doc. No. 31, pp. 12-22.

[18]*Id*. at 22-26.

[19]20 U.S.C. §1681(a).

[20]Doc. No. 66, p. 3.

[21]Doc. No. 66, pp. 3; Doc. No. 85, p. 2.

selective enforcement.[22] Plaintiff argues he has a free-standing Title IX deliberate indifference claim as well.[23]

1. Erroneous Outcome

To prove a claim of erroneous outcome, a plaintiff must present evidence that casts some articulable doubt on the accuracy of the disciplinary outcome.[24] A plaintiff must also show a causal connection between the "flawed outcome" and gender bias.[25] Plaintiff has failed to provide evidence for doubt in the outcome or gender bias.

Plaintiff can have little complaint about the UCB's ultimate decision, since he failed to appear and give his side of the story or submit a written statement. Plaintiff did not ask his advisor for assistance. He also fails to acknowledge the evidence supporting the outcome.

Plaintiff argues the "absence [of his DNA from the rape kit] goes to the heart of satisfying a showing of an erroneous outcome."[26] However, the DNA evidence is consistent with K.S.'s sworn testimony, which he did not rebut at the hearing.

Plaintiff also belatedly objects to the testimony of a "counselor" given in the UCB hearing. However he waived any objection by failing to participate in the proceedings. Even without the disputed testimony, the UCB had the police report and K.S.'s account of the alleged rape. While some of her statements regarding times of events changed, the details of the alleged rape were consistent between multiple statements and sworn testimony. Moreover, if the UCB

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[22]Doc. No. 66, pp. 3-19; Doc. No. 85, pp. 2-12; *Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994).

[23]Doc. No. 85, pp. 12-13; Doc. No. 31, p. 15.

[24]*Yusuf*, 35 F.3d at 715.

[25]*Id*.

[26]Doc. No. 85, p. 9.

believed K.S.'s statements, then they would expect an absence of Plaintiff's DNA in the rape kit. K.S. testified under oath that she pushed Plaintiff off of her before ejaculation.

The evidence before the UCB, and then before President Whitney, was sufficient to support the outcome. The UCB simply believed K.S., as did the police and prosecutor. Although exculpatory evidence exists, this record cannot support a claim for erroneous outcome.

Plaintiff has also failed to provide a basis for a finding of gender bias. He has not pointed to any instance where a female student facing criminal prosecution for forcible rape of a fellow student was treated more favorably.

Plaintiff attempts to show bias by the difference in treatment between himself and K.S. His argument that Defendants' preferable treatment of an alleged rape victim over an alleged rapist evidences bias is without merit.

2. Selective Enforcement

To support a selective enforcement claim Plaintiff must have some evidence that the decision to initiate the proceeding or the resulting punishment was affected by his gender, regardless of his guilt or innocence.[27] Plaintiff claims "a gender bias can be inferred in [his] case when one considers that [K.S.] was treated much more favorably throughout the administrative process by Clarion officials."[28] This allegation misses the point.

A male plaintiff must have evidence "that a female was in circumstances sufficiently similar to his own and was treated more favorably" to prevail on a selective enforcement claim.[29]

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[27] *Yusuf*, 35 F.3d at 715-716.

[28] Doc. No. 85, p. 11.

[29] *Doe v. The Trustees of the University of Pennsylvania,* 270 F .Supp. 3d 799, 824 (E.D.Pa. 2017).

So the question here is whether Defendants would have initiated disciplinary action and expelled a female student criminally charged with the forcible rape of a fellow student. Plaintiff has not identified a female, or anyone, who was charged with forcible rape, who was treated more favorably by Clarion.

Plaintiff notes that between 2009 and 2013, the UCB heard thirteen separate complaints of sexual harassment or sexual assault filed by women against twelve male students.[30] The male students were found responsible in nine of the thirteen complaints, which is just under 70% of the time.[31] Plaintiff alleges this is proof Clarion disciplinary proceedings "invariably" end adversely to males. Clearly, 70% is not invariably, and Plaintiff's reference to no contact orders between the parties does not change this calculus.[32] Plaintiff failed to provide evidence of a single instance showing a student charged with committing a violent felony against another student being treated differently than Clarion treated Plaintiff based on gender.

3. Deliberate Indifference

Defendants dispute the existence of a stand-alone Title IX deliberate indifference cause of action. I do not find support for the existence of such a claim in either the text of Title IX or the case law in this Circuit. Even if this cause of action exists, the record here supports summary judgment for Defendants.

A stand-alone deliberate indifference claim requires a showing that an institution official had actual notice of misconduct and failed to correct it.[33] The alleged "misconduct" is Ms.

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[30]Doc. No. 81, pp. 18-19.

[31]Doc. No. 85, p. 10.

[32]Clarion instituted no contact orders against students accused of sexual assault.

[33]*Id*. at 12.

Whitney's refusal to reconsider the results of the disciplinary hearing after being presented with DNA evidence.[34]

Again, the evidence before the UCB and Ms. Whitney was sufficient to support their decision. The absence of Plaintiff's DNA in the Rape Kit is consistent with K.S.'s sworn statements, that the forcible rape ended before ejaculation. Public policy would also appear to strongly discourage Ms. Whitney from considering part of the DNA results, whether or not K.S. had consensual sex with anyone other than Plaintiff the night of the alleged rape.[35]

B. Due Process

Plaintiff claims Defendants violated his procedural and substantive Due Process rights when conducting the disciplinary hearing and expelling him.[36] Defendants argue that Plaintiff waived these claims by failing to engage in the disciplinary proceedings and skipping the hearing. I agree. Plaintiff never contacted any Clarion official for any purpose from the date of his suspension until over a year after the hearing. Regardless of waiver, I find no Due Process violations.

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[34]*Id*. at 12-13.

[35]"Evidence of specific instances of the alleged victim's past sexual conduct . . . shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence." 18 Pa.C.S.A. § 3104(a).

[36]Doc. No. 31, pp. 16-19.

1. Procedural Due Process

The Due Process Clause protects students during disciplinary hearings at public institutions.[37] At a minimum, a student is entitled to notice and an opportunity to be heard.[38] A court should also consider the *Mathews* factors when evaluating a Due Process claim: "(1) the private interests at stake, (2) the governmental interests at stake, and (3) the fairness and reliability of the existing procedures and the probable value, if any, of additional procedural safeguards."[39]

Plaintiff received notice of his interim suspension and the reasons for it; notice of his hearing and the hearing procedures; and notice of possible sanctions. The hearing procedures gave Plaintiff the opportunity to be heard. Contrary to Plaintiff's argument, he has no right to publicly defend himself without any potential repercussions.

Clarion's hearing procedures allowed counsel to attend the hearing with Plaintiff, at Plaintiff's expense, but counsel could not participate.[40] I find no constitutional right to active

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[37]*Simms v. Pennsylvania State University-Altoona*, No. 3:17-cv-00201-KRG, 2018 WL 1413098, at *4 (W.D. Pa. Mar. 20, 2018)(citing *Phat Van Le v. Univ. of Med. & Dentistry of N.J.*, 379 Fed. Appx. 171, 174 (3d Cir. 2010) (unpublished)).

[38]*Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

[39]*Palmer v. Merluzzi*, 868 F.2d 90, 95 (3d Cir. 1989) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)); see also *Simms*, 2018 WL 1413098, at *4 (applying *Mathews* factors); *Johnson v. Temple Univ.*, No. 12–515, 2013 WL 5298484, at *7-8 (E.D. Pa. Sept. 19, 2013)(applying *Mathews* factors); *Osei v. Temple University of Commonwealth System of Higher Educ.*, 10–2042, 2011 WL 4549609, at *8 (E.D. Pa. Sept. 30, 2011)(applying *Mathews* factors); *Furey v. Temple Univ.*, 884 F. Supp. 2d 223, 247 (E.D. Pa. 2012)(applying *Mathews* factors).

[40]This satisfied any right Plaintiff had to counsel at the disciplinary hearing. See *Simms*, 2018 WL 1413098, at *5-6; but see *Coulter v. East Stroudsburg University*, No. 3:10–CV–0877, 2010 WL 1816632, at *3 (M.D. Pa. May 5, 2010) (granting preliminary injunction and holding student facing simultaneous criminal sanctions and academic discipline has right to active participation of counsel during disciplinary hearing).

participation of counsel in student disciplinary hearings, even when the student is facing concurrent criminal charges.[41]

The hearing procedures did not allow cross-examination of an alleged rape victim. Plaintiff provided no support for a constitutional right under the Due Process or Confrontation Clause to cross-examination of alleged sexual assault victims in university disciplinary hearings.

Plaintiff ultimately did not attend on advice of counsel. It is undisputed that he received notice and an opportunity to be heard. Accordingly, Plaintiff received all procedural process due under the Constitution.

Considering the *Mathews* factors, I find Plaintiff had a private interest in continuing his education. Expulsion was the most serious sanction available to the UCB. The failing grades and disciplinary mark on Plaintiff's transcript could have negative impacts in the future.

Plaintiff alleged the "negative marks on [his] record inhibited or destroyed his ability to enroll in a similarly ranked and esteemed college or university" and that he suffered "humiliation, mental anguish, severe emotional distress, physical harm, financial loss, and loss of educational, social and occupational opportunities" as a result.[42] The record shows, however, that after a year of community college, Plaintiff enrolled in Temple University.[43] His employment while in college went from McDonald's, while attending Clarion, to Barnes &

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[41]*Simms*, 2018 WL 1413098, at *6 (citing *Gabrilowitz v. Newman*, 582 F.2d 100, 106 (1st Cir. 1978) and *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) for support); but see *Coulter*, 2010 WL 1816632, at *3.

[42]Doc. No. 31, ¶¶137-138.

[43]Doc. No. 68-6, pp. 21-22.

Noble while attending Temple.[44] I cannot assume future, speculative harm when the record evidences none.

Plaintiff was one of many students at Clarion with the same private interest. Clarion's interest in campus safety substantially outweighs each student's interest in continuing their education at a specific institution. Defendants had information that a student alleged another student forcible raped her. The allegations were sufficient to arrest Plaintiff. Plaintiff essentially argues Clarion was required to let him attend classes and travel freely on campus until the criminal proceedings concluded at some indeterminable time in the future. Instead, Defendants took reasonable action in immediately suspending Plaintiff and promptly scheduling a hearing so he could present his side of the story.

By the time of the UCB hearing, Plaintiff had already been through a preliminary criminal hearing where K.S. testified under oath, subject to cross-examination. There was sufficient evidence to sustain the criminal charges against Plaintiff. Clarion's interests in preventing a student arrested and criminally charged with forcible rape of another student from attending classes, and even being on campus, greatly outweighed the individual, private interest at stake.

Plaintiff failed to test the fairness and reliability of the existing procedures by skipping the UCB hearing and failing to submit any statements or evidence on his behalf. Defendants ultimately provided more procedural protections than required under either federal or state law.

I find little, if any, value in the potential, additional procedural safeguards listed by Plaintiff's proposed expert, Gregory S. Blimling, Ph.D.[45] Dr. Blimling's opinions are based on

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[44] *Id*. at 10.

[45] Doc. No. 70-1.

unsupported conclusions and have little basis in law or fact. For instance, I disagree with the conclusion that a student charged with forcible rape of another student poses no physical threat to others. Defendants were under no "obligation" to allow an accused rapist to stay in school and on campus.[46] Dr. Blimling also faults Defendants for both delaying and not delaying the hearing.[47]

Dr. Blimling believes Defendants should have offered the option for Plaintiff to voluntarily withdraw.[48] It is undisputed that Plaintiff's advisor made two attempts to withdraw Plaintiff but his mother convinced him to "stay the course."

Plaintiff and Dr. Blimling fault Defendants for not offering other options he never requested or pursued. Plaintiff never contacted any official at Clarion at any time from his arrest until his appeal a year after expulsion to ask for any accommodation. Moreover, Mr. Tripp's suspension letter specifically advised Plaintiff that he could contact Mr. Shaffer if he wanted to "request to be on campus for a particular business or academic reason."[49]

Dr. Blimling also notes student disciplinary hearings are not designed to adjudicate violent felonies.[50] That is true, but Plaintiff was facing criminal charges in the state court. At the time of the UCB hearing, Plaintiff already had a preliminary criminal hearing where K.S. testified, under oath, subject to cross-examination. There was sufficient evidence to proceed

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[46]Doc. No. 70-1, p. 5.

[47]*Id*. at 5-6, 8-9.

[48]*Id*. at 8.

[49]Doc. No. 67, ¶¶ 43-46.

[50]Doc. No. 70-1, p. 14.

with the prosecution for alleged violent felonies. The argument that Clarion could not suspend Plaintiff and the UCB could not expel him based on this evidence is without merit.

2. Substantive Due Process

Whether or not Plaintiff has any substantive Due Process rights here is questionable.[51] Because I find an interest subject to procedural Due Process protections, I find protections against the arbitrary taking of that interest.

To survive summary judgment, Plaintiff must have evidence Defendants acted "through an arbitrary and deliberate abuse of authority."[52] Plaintiff claims this occurred when Defendants "conducted a biased investigation," expelled Plaintiff with inadequate evidence of guilt, and refused to reconsider their decision.[53]

There is no evidence that Mr. Shaffer's investigation involved sex, gender, or racial bias.[54] A reasonable juror could find, however, that Mr. Shaffer's investigation was not strictly impartial.

It appears clear from the record that Mr. Shaffer believed K.S. and presented the case to the UCB in a light reflecting that belief. Plaintiff, however, does not have a right to a strictly

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[51]See *Simms*, 2018 WL 1413098, at *9 ("interest in pursuing college education differs greatly from the rights which federal courts have found to be fundamental in the Constitutional sense"); *Valentine v. Lock Haven Univ. of Pennsylvania of the State Sys. of Higher Educ*., No. 4:13–cv–00253, 2014 WL 3508257, at *6 (M.D. Pa. July 14, 2014) (payment of tuition and graduate education were not fundamental rights entitled to substantive due process protection.); *Mauriello v. University of Medicine & Dentistry*, 781 F.2d 46, 52 (3d Cir. 1986) (expressing "doubt about the existence" of a substantive due process right in a student's continued enrollment in a university graduate program).

[52]*Kadakia v. Rutgers*, 633 Fed. Appx. 83, 86-87 (3d Cir. 2015)(citing *Nicholas v. Pa. State Univ*., 227 F.3d 133, 139 (3d Cir. 2000)).

[53]Doc. No. 31, ¶92.a-c.

[54]*Id*. at ¶92.a.

impartial presentation of evidence. Instead, Due Process requires only an impartial decision-maker or UCB. Plaintiff does not even allege the UCB was biased.

A decision-maker must generally rely on some evidence, otherwise the decision is arbitrary.[55] Plaintiff argues the evidence of his guilt was inadequate. As noted by Defendants, courts all over the country have found evidence similar to this record sufficient to uphold rape convictions.[56] The constitutional threshold for sufficient evidence cannot be higher for expulsion from a university than for life in prison. Considering the evidence, including the DNA evidence and Plaintiff's deposition testimony, the decision to expel Plaintiff and place that decision on his transcript was well-supported by the record.

Plaintiff had no right requiring Defendants to "reconsider their decision" to expel him. Consideration of an appeal is discretionary.[57] Even if Plaintiff had such a right, Ms. Whitney acted reasonably in denying reconsideration. Plaintiff's appeal was untimely and the grounds for appeal failed, as a matter of law, to establish innocence.

C. Equal Protection

Plaintiff appears to allege Equal Protections violations based on race, sex, and by being an accused rapist.[58] His only plausible Equal Protection claim is based on race.[59]

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[55]*Id*. at ¶ 92.b.

[56]Doc. No. 66, pp. 6-9.

[57]22 Pa. Code § 505.8.

[58]Doc. No. 31, ¶¶99-111.

[59]*Than v*. *Radio Free Asia*, 496 F. Supp. 2d 38, 46 (D.D.C. 2007) (male Title VII claimant was a member of a historically favored group, meaning did not belong to a protected class).

For support, Plaintiff offers Clarion's UCB statistics and an email from Mr. Shaffer. This evidence falls far short of supporting this claim.

Between 2009 and 2013, seven of the twelve students Clarion referred to the UCB for sexual misconduct were African-American. Yet African-Americans made up a small portion of the Clarion student body. It is undisputed, however, that the UCB only heard student complaints alleging sexual misconduct. It did not independently determine whether to initiate proceedings like a prosecutor would. If students made allegations of sexual misconduct against black students when they would not make the same allegation against a white student, that may be evidence of bias or prejudice within the student body. Plaintiff has not provided evidence, required here, showing that any Defendant treated similarly situated students differently based on race as opposed to the accusations in each individual case. Plaintiff has failed to show any instances where a student alleged a white student forcibly raped them and the white student was treated more favorably than Plaintiff.

The limited number of Clarion sexual assault disciplinary hearings show that 57% of African-American students who faced the UCB were expelled while only 33% of "similarly situated" Caucasian students were expelled.[60] These unremarkable statistics do not make up for the absence of evidence specifically supporting Plaintiff's case.

Three out of four UCB exonerations were given to African-American students. Though African-American students made up only 5.9% of the school population, African-American students received 75% of exonerations. So by Plaintiff's flawed calculation, African-American students were 57 times more likely to be found not responsible if faced with sexual misconduct

[60] Doc. No. 85, p. 32.

hearings than "similarly situated" white students. These napkin top statistics can make a point that does not exist. That is why courts must consider the difference in protection for similarly situated individuals or groups.

Despite his arguments to the contrary, Plaintiff has not identified any other student "similarly situated" who was treated differently. There is no evidence any other student was charged with forcible rape and not expelled.

Plaintiff claims an email from Mr. Shaffer comparing Plaintiff's situation to that of O.J. Simpson evidences discrimination.[61] This email was written after expulsion, in reference to Plaintiff's appeal. The email refers to the difference in criminal and noncriminal proceedings, or how O.J. Simpson was found not guilty of murder, but still civilly liable.

Plaintiff all but admitted in his deposition that the O.J. Simpson comment was not discriminatory.[62] This comment by Mr. Shaffer is insufficient evidence Ms. Whitney discriminated against Plaintiff based on his race when declining to reconsider his appeal. At most, the email reflects one of Plaintiff's arguments, that Mr. "Shaffer's not-so-subtle message to [Plaintiff] was that [he] might have wiggled free of the criminal justice system, but that Clarion would hold him accountable."[63]

D. State Law Claims

Plaintiff brings state-law claims for defamation, negligence, and negligent infliction of emotional distress. Defendants are entitled to Sovereign Immunity on these claims.

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[61]Doc. No. 31, ¶¶54-58, 107.

[62]Doc. No. 68-6, p. 24.

[63]Doc. No. 85, p. 33.

Pennsylvania has not waived immunity regarding tort or negligence based claims related to student discipline.[64] The conduct behind Plaintiff's claims all fall within the scope of Defendants' employment.[65] Regardless of immunity, Plaintiff has failed to support these claims.

1. Defamation

At a minimum, Pennsylvania law requires Plaintiff to prove a defamatory communication and resulting harm.[66] A defendant is not liable for an alleged defamatory communication if the communication is "substantially true."[67] The alleged defamatory communication here was substantially true. Clarion's UCB found Plaintiff more likely than not raped another student. As a result, Clarion expelled Plaintiff and he failed classes.

Plaintiff did not allege defamation per se so his claim requires proof of a specific monetary or out-of-pocket loss as a result of the allege defamatory communication.[68] Plaintiff alleged the "negative marks on [his] record inhibited or destroyed his ability to enroll in a similarly ranked and esteemed college or university" and that he suffered "humiliation, mental

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[64]See *Wei Ly v. Varner*, No. 2:13-cv-01102-CRE, 2015 WL 5098736, at *5 (W.D. Pa. Aug. 31, 2015) (listing the areas Pennsylvania has waived immunity involving the negligence of State officials).

[65]See *Aina v. Howard-Vital*, No. 13–2702, 2013 WL 5567798, at *6 (E.D. Pa. Oct. 9, 2013) (allegedly defamatory statements at university disciplinary meeting were within the scope of state actor's employment) (citing in *Obotetukudo v. Clarion University,* 13–0639, 2014 WL 3870003, *12 (W.D.Pa., Aug. 6, 2014)).

[66]*Kelley v. Pittman*, 150 A.3d 59, 67 (Pa. Super. 2016) (defamation claims require proof of: (1) The defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditionally privileged occasion).

[67]*Graboff v. Colleran Firm*, 744 F.3d 128, 136 (3d Cir. 2014).

[68]*Synygy, Inc. v. ZS Associates, Inc.*, 110 F. Supp. 3d 602, 617 (E.D. Pa. 2015).

anguish, severe emotional distress, physical harm, financial loss, and loss of educational, social and occupational opportunities" as a result.[69] Plaintiff has not established harm from any of the Defendants' communications. Instead, the record shows that after a year of community college, Plaintiff enrolled in Temple University.[70] His employment while in college went from McDonald's while attending Clarion to Barnes & Noble while attending Temple.[71] Without both a defamatory communication and resulting harm, Plaintiff's defamation claim fails.

2. Negligence

To prove negligence, Plaintiff must establish a duty owed him by Defendants, breach of that duty, actual harm, and a causal connection between the breach of duty and harm.[72] Future, speculative harm is insufficient.

Plaintiff failed to show either breach of a duty owed him or actual harm. If Defendants owed Plaintiff any duty, it was to accurately reflect his record. Concealing or removing Plaintiff's disciplinary action, expulsion, and failing grades would not accurately reflect the fact that he was expelled for a disciplinary violation and failed classes as a result. In fact, Plaintiff testified he has not suffered the specific harm alleged in his complaint.[73]

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[69]Doc. No. 31, ¶¶137-138.

[70]Doc. No. 68-6, pp. 21-22.

[71]*Id*. at 10.

[72]*Kelley*, 150 A.3d at 67.

[73]Doc. No. 68-6, pp. 10, 21-22.

3. Negligent Infliction of Emotional Distress

Plaintiff's claim for negligent infliction of emotional distress alleges a violation of a contractual or fiduciary duty.[74] Plaintiffs who allege negligent infliction of emotional distress must generally suffer immediate and substantial physical harm.[75] Plaintiff's deposition testimony shows he did not suffer the requisite physical harm. But this claim fails for a another reason.

All of the conduct Plaintiff complains of was intentional, not negligent. Defendants intentionally suspended Plaintiff; intentionally brought student discipline charges against him; intentionally expelled Plaintiff; intentionally recorded his expulsion and failing grades on his transcript; and finally, they intentionally provide the transcript evidencing such when requested. Accordingly, Plaintiff's negligent infliction of emotion distress claim fails as a matter of law.[76]

E. Injunctive Relief

Prospective injunctive relief against a state actor is only appropriate when a party is facing ongoing violations of federal law that cannot be compensated monetarily.[77] The lack of an ongoing federal violation is fatal to this claim.

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[74]Doc. No. 31, ¶¶133-138.

[75]*Doe v. Philadelphia Community Health Alternatives AIDS Task Force*, 745 A.2d 25, 27-28 (Pa. Super. 2000), aff'd, 767 A.2d 548 (Pa. 2001).

[76]*DiSalvio v. Lower Merion High School Dist.*, 158 F. Supp. 2d 553, 561 (E.D. Pa. 2001).

[77]*Christ the King Manor, Inc. v. Secretary U.S. Dept. of Health and Human Services*, 730 F.3d 291 (3d Cir. 2013).

F. Qualified Immunity

Qualified immunity protects state actors from liability when their conduct does not violate clearly established statutory or constitutional rights.[78] To overcome qualified immunity, a plaintiff must show the contours of the right were sufficiently clear that any reasonable state actor would understand their conduct violated that right.[79] Absent Supreme Court precedent clearly establishing the right, a plaintiff must identify a "robust consensus of cases of persuasive authority in the Court[s] of Appeals."[80]

Defendants argue they are entitled to qualified immunity on Plaintiff's Title IX and Due Process claims.[81] I agree with Plaintiff that the statutory right under Title IX to be free from discrimination in an educational setting based on sex is clearly established.[82] Plaintiff, however, does not identify cases outlining the extensive Due Process protections he claims.[83]

No court has clearly established a constitutional right to cross-examine an alleged rape victim during a university disciplinary hearing.[84] No court has clearly established a constitutional right to an attorney at all stages of university disciplinary proceedings.[85] As an adult, Plaintiff had no constitutional right to parental notification or representation.

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[78]*Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

[79]*Mammaro v. N.J. Div. of Child Prot. & Permanency*, 814 F.3d 164, 168-169 (3d Cir. 2016).

[80]*Id.* at 169 (quoting *Taylor v. Barkes*, 135 S.Ct. 2042, 2044 (2015)).

[81]Doc. No. 66, pp. 18-19, 26.

[82]Doc. No. 85, pp. 13-14.

[83]Doc. No. 85, p. 26; Doc. No. 96.

[84]Doc. No. 31, ¶91.b.

[85]Doc. No. 31, ¶91.c.

Due Process may require a meaningful opportunity to appeal a disciplinary finding and sanction. But no court has clearly established a constitutional right to the appeal rights Plaintiff claims.[86] Courts have routinely upheld appeal deadlines. The future existence of exculpatory evidence does not change this. There is also no constitutional requirement that Defendants "reconsider their decision" at indeterminate times after the hearing.[87]

No court has clearly established Plaintiff's asserted constitutional right to "participate [in a university disciplinary hearing], without fear that [the] statements might be used against [the accused] in [an] ongoing criminal investigation.[88] Not even criminal defendants, facing life in prison, loss of child custody, or loss of employment, have a constitutional right to make public statements without fear that the statements could be used against them in the future.

Defendants did not violate any of Plaintiff's procedural due process rights. Even if I found constitutional violations, they would be entitled to qualified immunity on the procedural claims. Defendants are also entitled to immunity on Plaintiff's substantive due process claims.

Absent prohibited discrimination, there is no clearly established constitutional right to a strictly impartial student disciplinary investigation. Certainly no court has found a constitutional right to skip a disciplinary hearing, give no evidence on your own behalf, wait over a year to appeal when the appeal deadline is three days, and then have your disciplinary decision rescinded as though it never happened.

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[86]Doc. No. 31, ¶91.d.

[87]Doc. No. 31, ¶92.c.

[88]Doc. No. 31, ¶91.a.

CONCLUSION

Though I find no constitutional, statutory, or State law violations here, I recognize the impact this case has had on all involved. Courts in the future may recognize or expand federal protections to cover Plaintiff's claims in this case. The State of Pennsylvania could also provide a mechanism for amending university transcripts in situations presented here.

Based on the findings of fact and conclusions of law above, Defendants' motion for summary judgment (Doc. No. 65) is GRANTED and this case is DISMISSED with prejudice Defendants' Motion in Limine (Doc. No. 69) is DENIED as moot.

IT IS SO ORDERED this 27th day of June, 2018.

/s/ Billy Roy Wilson
UNITED STATES DISTRICT JUDGE