No. 19-1842

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN DOE — APPELLANT

v.

UNIVERSITY OF ARKANSAS-FAYETTEVILLE, ET AL. — APPELLEES

BRIEF OF PLAINTIFF-APPELLANT

Heather G. Zachary (AR#2004216)
hzachary@williamsanderson.com
Alec Gaines (AR#2012277)
againes@williamsanderson.com
WILLIAMS & ANDERSON PLC
111 Center Street, Suite 2200
Little Rock, Arkansas 72201
Telephone: 501 372 0800
Facsimile: 501 372 6453

Justin Zachary (AR#2010162)
justin@dentonandzachary.com
Denton & Zachary, PLLC
600 S. German Ln., #101
Conway, AR 72034
Telephone: 501 348 4999
Facsimile: 501 358 4737

Counsel for John Doe

SUMMARY OF THE CASE

This case is an appeal from the order of the district court dismissing the claims of John Doe against the University of Arkansas Board of Trustees *et al.* Doe's complaint sufficiently alleged violations under 20 U.S.C. §§ 1681-88 ("Title IX") and a denial of Fourteenth Amendment due process in connection with the University's adjudication of a sexual assault claim made against him by Jane Roe. The Title IX coordinator found that Doe had not committed sexual assault, but this finding was reversed by the University hearing panel on appeal. The panel's decision finding that Doe had committed sexual assault was in direct violation of the policy requirements, and Doe alleged sufficient facts to create a plausible inference that the decision was influenced by discriminatory intent, including Roe's widely publicized protest of the Title IX coordinator's decision while the panel was considering the appeal.

Furthermore, Doe alleged substantial violations of his due process rights, including that he had not received notice of the charges on which the panel ultimately found him guilty; that there was insufficient opportunity for cross-examination; that the panel shifted the burden to Doe to prove affirmative consent; that the University's use of the preponderance of the evidence standard was improper; that the University failed to interview critical witnesses identified by Doe; and that the University failed to properly train its employees. These allegations were sufficient to withstand a motion to dismiss. Given the legal significance of this case, Appellant respectfully requests oral argument of 30 minutes per side.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §1331 because the action involved a law of the United States. The district court granted Defendants' motion to dismiss on April 3, 2019. Add 1.. Appellant filed a notice of appeal on April 22, 2018. App. 0138. This Court has jurisdiction under 28 U.S.C. § 1291 as an appeal from a final district court decision.

STATEMENT OF THE ISSUES

I. Whether Doe adequately stated a Title IX violation.

- *Yusuf v. Vassar College*, 35 F.3d 709(2d Cir. 1994)
- *Doe v. Baum*, 903 F.3d. 575 (6th Cir. 2018)
- *Doe v. Columbia University,* 831 F.3d 46 (2d Cir. 2016)

II. Whether Doe adequately stated a due process claim.

- *Navato v. Sletten*, 560 F.2d 340 (8th Cir. 1977)
- *Doe v. Baum*, 903 F.3d. 575 (6th Cir. 2018)
- *United States v. Reed*, 287 F.3d 787 (8th Cir. 2002)
- *Doe v. Columbia University,* 831 F.3d 46 (2d Cir. 2016)

III. Whether Defendants were entitled to qualified immunity.

- *Gerlich v. Leath*, 861 F.3d 967 (8th Cir. 2017)

IV. Whether Defendants were entitled to quasi-judicial immunity.

- *Robinson v. Langdon*, 333 Ark. 662, 970 S.W.2d 292 (1998)

STATEMENT OF THE CASE

The events in this case began on October 28, 2017, when John Doe and Jane Roe engaged in sexual activity. Since that night, Doe has worked tirelessly to clear his name and reputation. Doe contends that the University of Arkansas's policies and procedures resulted in a deeply flawed decision by its Title IX Hearing Panel. Despite finding that Doe forcibly raped Roe, the University did not expel him, as was typical; instead, the University "sanctioned" Doe with ten hours of community service and an online training course. Upon completion of his "sanctions," Doe was allowed to graduate from the University with a 3.9 GPA. The University's "sanctions" in this case leads to one of two conclusions: (1) either the University crafted a finding of violation against an innocent man but imparted only a light sentence in an attempt to appease all parties and avoid further scrutiny; or (2) the University does not take sexual assault seriously.

A. Title IX Investigation and Adjudication

On November 6, 2017, Doe was notified that he was under investigation for sexual assault under University Policy 418.1 because Roe "believed sexual contact occurred while she was incapacitated and unable to give consent." App. 16. Policy 418.1 defines sexual assault, stating: "Sexual assault occurs when [sexual] acts are committed either by force, threat, or intimidation, or through the use of the victim's mental or physical helplessness, of which the assailant was aware or should have been aware." App. 13. The notice contained allegations of incapacitation, but Roe did not

allege intercourse through "force, threat, or intimidation," which the University confirmed in writing to Doe. App. 17. After an investigation, the Title IX coordinator found that the evidence was insufficient to establish Roe's incapacitation and that, even if she was incapacitated, Doe did not have reason to know of the incapacitation. App. 20.

B. Roe's Reaction to Title IX Finding

During this time period, the University was under investigation by the federal Office for Civil Rights for failing to properly investigate Title IX allegations. Additionally, the Arkansas legislature opened an investigation into claims that the University was ignoring claims of sexual assault by female students against male students, and this resulted in significant negative press for the University. The University was also the subject of a highly publicized lawsuit alleging that it failed to properly respond to a sexual assault complaint by a female athlete against a male athlete. App. 25–26.

Against that backdrop, the Title IX office issued its findings. Roe immediately organized a campus-wide protest of the Title IX process and the decision in her case. App. 26. She provided comments to various media organizations and was lauded on social media by local politicians, prompting the University to issue a public statement. App. 27.

C. Appeal Adjudication

Roe filed an appeal of the University's determination, arguing (1) that she was incapacitated at the time of the sexual conduct and (2) that the University's categories

of sexual assault, by force or through incapacitation, were not mutually exclusive. App. 21. Doe asked the University to clarify whether he was being tried for sexual assault by force, and whether there would be new evidence presented to the three-person Hearing Panel. App. 22. The University responded that Doe would not know the extent of the charges brought by the University until the hearing and, likewise, would not receive copies of any additional evidence before the hearing. App. 22.

On April 23, 2018, the University conducted a hearing on the appeal of the University's prior findings. Before the hearing, Doe requested a continuance because, despite his timely request, the University refused to produce its Title IX investigator at the hearing, refused to provide notice of the allegations against him, and refused to provide copies of evidence the University intended to introduce. Add. 23. The Panel denied Doe's continuance and allowed the University to present new evidence not previously provided to Doe. App. 23.

During the hearing, the Panel took testimony from Roe and Doe on the issue of consent. Roe testified that she did not recall whether she consented to the sexual activity. Doe testified that she did consent. A Fayetteville police officer also testified that she investigated Roe's complaint and found her allegations not credible. App. 33.

In a 2-1 vote, the Panel found that it was "more likely than not" that Doe violated Policy 418.1. App. 24. On the issue of sexual assault by incapacitation, the Panel essentially affirmed the University's prior findings. Although it held that "at some undetermined point in time, while [Roe] was at [Doe's] residence, she became

incapacitated as defined by University policy," it also held the evidence insufficient to establish "that [Doe] knew or had reason to know of the period of time during which [Roe] was or became incapacitated." App. 23–24.

On the previously un-adjudicated issue of "force," the Panel found the question of consent to be "an extremely close factual determination that [was] very difficult to make." App. 27. Despite no evidence of lack of consent, the Panel concluded that "the record does not support a finding of consent by [Roe]." App. 25. The Panel based its finding solely on a credibility determination of Doe's testimony. The reasons given by the Panel for discrediting Doe's testimony were:

(1) "in your statement and through questions you did not admit or acknowledge her level of intoxication upon arrival at your residence"
(2) "you have motivation to skew the truth"
(3) "the lack of corroboration in your statement since we found your witnesses' statements internally inconsistent or irrelevant on the subject of consent"

Doe filed a complaint against the University on September 14, 2018. App. 1. The Defendants filed a Motion to Dismiss on October 8, 2018. App. 56. The district court granted the motion on April 3, 2019 and dismissed the complaint with prejudice. Add 1. Doe filed a notice of appeal. App. 138.

SUMMARY OF THE ARGUMENT

John Doe appeals the dismissal of his claims against Defendants, the University of Arkansas *et al.*, for violations of his rights under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 ("Title IX"), and Fourteenth Amendment due process under 42 U.S.C. § 1983.

I. TITLE IX

A Title IX "erroneous outcome" claim must plead two types of allegations. First, the plaintiff must allege facts "sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding." *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994). Second, the plaintiff must "allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." *Id.*

Doe's complaint met both requirements. Doe alleged articulable doubt regarding the Panel's ruling because Doe pled that the decision was contrary to the requirements of the sexual assault policy. First, the policy requires that the Panel conclude *both* that the claimant was incapacitated and that the respondent knew or had reason to know of the incapacity, but the Panel expressly found that Doe did not know or have reason to know of any incapacity of Roe. Second, the Panel used the wrong standard in evaluating the evidence, requiring evidence of affirmative consent rather than evidence of lack of consent.

Doe also alleged articulable doubt about the Panel's decision because he showed that the University policy was based on outdated and rescinded guidance, and that the University's adjudication of Doe's case was in violation of the applicable guidance issued in September 2017. Additionally, Doe pled substantial violations of due process, including improper notice, lack of cross-examination, failure of the University to interview exculpatory witnesses, shifting the burden of proof, and convicting Doe without any evidence of guilt. These violations are sufficient to cast articulable doubt on the outcome. *Yusuf v. Vassar College*, *supra*. Finally, the fact that two of the four University decision-makers found that Doe had not committed a violation amounts to articulable doubt on its own.

Doe also alleged that this erroneous outcome was the result of gender bias. To establish gender bias in a Title IX case, a complaint must sufficiently allege gender bias by supporting a minimal "plausible inference" of discriminatory intent. *Yusuf,* 35 F.3d at 713; *Doe v. Columbia Univ.*, 831 F.3d 46, 55 (2d Cir. 2016). In this case, Doe alleged facts establishing federal and local pressure creating a gender bias; specific instances of gender bias in the adjudication of the case; a pattern of discrimination against males in Title IX cases; investigator bias and denial of cross examination; and a failure to train and rush to judgment.

First, Doe alleged substantial federal and local pressure on the University to take seriously claims of sexual assault by females. Such allegations are sufficient to establish a plausible inference of gender bias. *Doe v. Columbia Univ.*, 831 F.3d at 57. In

addition to generalized pressure, Doe also alleged pressure specifically related to his case in the form of a widely publicized campus protest by Roe regarding the University's decision. Allegations that a university is "actively trying to appease a student-led movement" are sufficient to create the necessary nexus between gender bias and the hearing outcome. *Doe v. Amherst College*, 238 F. Supp. 3d 195, 223 (D. Mass. 2017).

Doe also alleged gender bias in the adjudication. Specifically, Doe alleged that the Panel's finding that he was not credible because he "did not admit or acknowledge Roe's level of intoxication" was inconsistent with its finding that he could not know or reasonably know of her incapacitation from alcohol. Further, the Panel credited the testimony of Roe despite testimony by a local police officer that she was not credible. The Panel's choice to credit the testimony of Roe, despite claims of her untrustworthiness, over Doe, given the Panel's disingenuous reasoning for finding him not credible, suggests gender bias.

Doe also alleged a pattern of discrimination against males by the University, and at the pleading stage such allegations are sufficient. "The allegation that males invariably lose when charged with sexual harassment…provides a verifiable causal connection" on which to allege gender bias. *Yusuf v. Vassar College*, 35 F.3d at 716. At the pleading stage, the plaintiff is not required to provide statistics, nor does the court need to consider "what degree of consistency in outcome would constitute a relevant pattern." *Id.*

Doe also alleged that the University's investigator was biased, based on a statement made by the Title IX coordinator, and that the University had refused to allow Doe the ability to cross-examine the investigator before the Panel. Alleged bias of someone with influence on the proceedings, combined with allegations of government pressure to convict male students of sexual assault, is sufficient to allege gender bias. *See, e.g., Doe v. Washington & Lee Univ.*, 2015 WL 4647996, at *10 (W.D. Va. Aug. 5, 2015). Finally, Doe alleged that the University had failed to properly train members of the Panel, and that the Panel rushed to its judgment despite reasonable requests by Doe to postpone the hearing. Failure to train and a "rush to judgment" can plausibly lead to an inference of sex bias. *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 751 (S.D. Ohio 2014).

II. DUE PROCESS

Doe also alleged violations of due process. First, Doe alleged that the University failed to provide him notice or an opportunity to respond to the charges considered by the Panel. Where a university considers additional allegations but does not provide the student notice of those additional allegations, due process is violated. *Navato v. Sletten*, 560 F.2d 340, 346 (8th Cir. 1977). In this case, the University only provided notice to Doe of allegations that Roe was incapacitated during the sexual activity, but the Panel ultimately considered whether the evidence established that she had consented. Doe was not provided notice of allegations of lack of consent, and indeed, the University confirmed to Doe that such allegations were *not* being made.

Doe also alleged that the University failed to allow meaningful cross-examination. "If a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder." *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018). It is undisputed that neither Doe nor any agent of Doe was given the opportunity to cross-examine Roe.

Doe also alleged that the University improperly placed the burden of proof on Doe by requiring proof of affirmative consent rather than proof of lack of consent. Requiring an accused to prove affirmative consent in a Title IX adjudication violates due process. *See Doe v. Cummins,* 662 F. App's 437, 449 (6th Cir. 2016). Additionally, the University's use of the preponderance of the evidence standard, rather than a higher standard, violates due process given the seriousness of the charges against Doe. *Smyth v. Lubbers*, 398 F. Supp. 777, 798 (W.D. Mich. 1975).

Doe also alleged that the University's policy allowed the University a second chance to try Doe after the initial determination that he was not guilty. Such conduct violates due process. *Tanyi v. Appalachian State Univ.*, 2015 WL 4478853 (W.D.N.C. July 22, 2015). Also, the University failed to interview exculpatory witnesses identified by Doe. Finally, Doe alleged that the University failed to train its employees, in deliberate indifference to the rights of its students because the University had "notice that its procedures were inadequate and likely to result in a violation of constitutional rights." *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 461 (8th Cir. 2009). The

Panel's decision evidences a failure to train, given its disregard for the presumption of innocence and improper standard for evaluation of evidence. Doe also alleged similar failures in other Title IX adjudications.

III. QUALIFIED IMMUNITY

The district court erred in concluding that the University employees in their individual capacities were immune. A state actor is not entitled to dismissal based on qualified immunity where the plaintiff alleges a violation of a constitutional or statutory right that was clearly established at the time of the defendant's alleged misconduct. *Gerlich v. Leath*, 861 F.3d 967 (8th Cir. 2017). Because Doe alleged constitutional violations of due process that were clearly established, the individual defendants were not entitled to immunity.

IV. QUASI-JUDICIAL IMMUNITY

Finally, the district court erred in granting quasi-judicial immunity to the members of the Panel. In determining quasi-judicial immunity, the court looks at the following factors: (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal." *Robinson v. Langdon*, 333 Ark. 662, 670, 970 S.W.2d 292, 296 (1998).

First, Arkansas precedent makes clear that quasi-judicial immunity does not extend to claims under Section 1983. *See, e.g.*, *Robinson v. Langdon*, 333 Ark. 662, 670, 970 S.W.2d 292, 296 (1998). Second, the factors for judicial immunity do not support its application here. The Title IX process lacks necessary constitutional safeguards, precedent is not considered, and there is no possibility for correction of errors on appeal. Thus, the Panel members are not entitled to quasi-judicial immunity.

ARGUMENT

The district court erred in dismissing John Doe's complaint against Defendants, the University of Arkansas Board of Trustees *et al.,* because Doe's complaint sufficiently alleged violations under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 ("Title IX"), and a denial of Fourteenth Amendment due process under 42 U.S.C. § 1983. Although the Title IX coordinator initially found Doe had not committed sexual assault, the University Hearing Panel ("the Panel") reversed that decision.

In reaching this conclusion, the University discredited the testimony of Doe because his demeanor "lacked credibility" yet credited the ever-changing narrative of his accuser, Jane Roe, despite testimony by a Fayetteville police officer that she was not credible. Doe was not allowed to cross-examine Roe, and the University refused to bring the Title IX investigator to testify before the Panel, despite Doe's request. Further, the University refused to provide notice to Doe regarding what allegations would be considered by the Panel and ultimately found Doe guilty of sexual assault on a basis not previously articulated or investigated. In its analysis, the University flipped the standard of evidentiary review to require proof of affirmative consent rather than inquiring whether the evidence established a lack of consent. The University's adjudication of Doe's case violated established rights under Title IX as well as the Fourteenth Amendment, and the district court erred in dismissing Doe's claims.

I. DOE ADEQUATELY STATED A TITLE IX VIOLATION.

The district court erred in dismissing Doe's complaint because Doe sufficiently alleged a Title IX violation. A Title IX "erroneous outcome" claim must plead two types of allegations. First, the plaintiff must allege facts "sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding." *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994). Second, the plaintiff must "allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." *Id.* Here, the complaint meets both requirements.

A. Doe's complaint adequately pled an erroneous outcome.

Doe alleged particular facts sufficient to cast articulable doubt on the decision of the Panel. The "pleading burden in this regard is not heavy." *Yusuf v. Vassar College*, *supra*. For example, a complaint may allege "particular evidentiary weakness behind the finding…particularized strengths of the defense, or other reason to doubt the veracity of the charge." *Id.* Alleged procedural flaws alone are sufficient. *Id.*

Even if *Yusuf* demanded a "heavy" pleading burden, Doe would have satisfied it. Doe's complaint noted that despite the University's one-sided procedures, which denied him the opportunity for meaningful cross-examination and allowed Roe to change her theory of the offense during the process, two of the four University decision-makers nonetheless found Doe more credible. It's not hard to see why. Although Roe claimed to have been incapacitated, the Uber driver who took her to Doe's apartment recalled nothing unusual about her. App. 19. Doe's roommate, who

was home, likewise denied that she seemed incapacitated. App. 10. This was, in short, not a he-said/she-said case: the two neutral witnesses with the most relevant testimony on whether Roe was incapacitated corroborated *Doe's* version of events. Furthermore, the Fayetteville police officer who investigated the criminal allegations also commented on the "several inconsistencies" between what Roe told the police and what she told the Title IX investigator. App. 19. The officer shared her concerns about Roe's credibility with the University.

This record makes all the more puzzling the district court's conclusion that Doe failed to satisfy *Yusuf's* "not heavy" first prong because he did not "put forth corroborating evidence that his side of the events is particularly more believable on the issue of incapacitation." Add. 25. But Roe's incapacitation is not at issue in this case. Because the Panel was also required to find that Doe knew or should have known about Roe's incapacitation, and expressly found that he did not and could not have known, it is irrelevant that the Panel found that Roe was incapacitated. Such a finding, on its own, is insufficient to support the decision, according to the University's own definition of sexual assault.

Doe alleged articulable doubt in other ways as well. Doe pled that the University's procedures violated the prevailing guidance issued in September 2017 by the Department of Education on the proper resolution of Title IX claims. Furthermore, Doe alleged substantial violations of due process sufficient to cast doubt on the outcome. Finally, the Title IX coordinator made a finding of No

Violation, and one of the Panel members did not support the Panel's finding of a violation. It is difficult, if not impossible, to imagine a situation in which there could be more articulable doubt about the finding.

1. The University's finding was in violation of its own policy.

Doe adequately pled articulable doubt because the University's finding was made in violation of the express language and requirements of the Sexual Assault policy. Under the policy, a student commits sexual assault when he has sexual contact with another person without that person's consent. Sexual contact without consent can occur either (1) by force, threat, or intimidation or (2) through the exploitation of incapacitation that the accused was or should have been aware of. App. 13.

The district court seemed to believe that the University found Doe guilty because the Panel determined that Roe was too incapacitated to consent to sexual activity. For example, the opinion states, "Doe's entire adjudication process ultimately hinged on the fact-finder's determination of Roe's level of incapacitation the night the two engaged in sexual activity and her ability to consent to that activity as a result."[1] Add 14. Doe does not dispute that the Panel found that Roe was incapacitated at some point in the evening. But this finding does not conclude the inquiry, as the

[1] The Opinion also (incorrectly) states that the issue in the appeal hearing was "Roe's capacity to consent to sexual activity." Add 12. The opinion additionally (incorrectly) states, "The hearing panel determined that at some point during her time at Doe's apartment, Roe became intoxicated and was incapacitated during the sexual encounter" although, in fact, the panel's decision does not indicate that the incapacitation occurred during the sexual encounter. Add 20.

policy requires a separate finding that Doe was or should have been aware of the incapacitation. Importantly, the University expressly found that this was not the case. App. 24 (The Panel stated, "Given the uncertainty of the happenings of the evening, the Panel does not find that it is more likely than not that you knew or had reason to know of the period of time during which [Roe] was or became incapacitated."). Thus, lack of consent due to incapacitation cannot support the University's finding because one of the two required elements was not met.[2]

The University maintains that it properly found Doe in violation of the policy because the Panel found that "the record does not support a finding of consent." App. 25. But this finding, too, disregarded the University's own policy. Under the policy, the University can only find a student guilty where the evidence establishes "more likely than not" that the infraction occurred. App. 15. Here, the University needed to show that more likely than not, there was a lack of consent for the sexual activity that occurred. But there was no evidence to suggest a lack of consent. Not one witness, not even Roe, testified that Roe did not consent. Rather than examining the evidence to see if it "more likely than not" suggested a ***lack*** of consent as required by the policy, the Panel upended the analysis and evaluated whether the evidence supported an affirmative finding of consent. App. 25. While this distinction may seem trivial at first, it is of the utmost importance where the evidence is equally balanced. In

[2] Indeed, the lack of awareness of Doe was one of the bases stated by the Title IX coordinator for his finding of no violation. App. 21.

that case, the evidence does not establish either consent or lack of consent as "more likely than not," meaning a violation has not been shown.

Thus, the University's finding of sexual assault was unsupported and in violation of the Title IX policy for two reasons: both because the Panel found that Doe did not know or have reason to know of Roe's incapacitation and because the evidence failed to support a finding of lack of consent.

2. The University's policy was based on rescinded guidance.

The district court's analysis repeatedly relies on a "Dear Colleague" letter issued by the Department of Education's Office for Civil Rights in April 2011. The court notes that the University "structured its procedures to comply with this guidance." Add 2. But that guidance was explicitly rescinded by the Department of Education in September 2017, *before any of the events in this case took place* and well before Doe's case was adjudicated by the University. The Department of Education simultaneously released updated, interim guidance clarifying the constitutional concerns with the old guidance and the institutional processes propagated under it. According to the letter announcing the rescission, the 2011 guidance "led to the deprivation of rights for many students."[3]

The University's adjudication of Doe's Title IX case runs contrary to the updated 2017 guidance, which was the operative guidance at all relevant times in this case. Perplexingly, the district court's analysis fails to even mention the 2017 guidance.

[3] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf

The 2017 guidance provides critical insight into the proper interpretation of Title IX in the context of campus sexual misconduct allegations. Prompt and comprehensive notice is a cornerstone of the 2017 guidance:

> Once [a school] decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide written notice to the responding party of the allegations constituting a potential violation of the school's sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident.[4]

Notably, the University's policy does not provide any notice to the respondent prior to the first "intake meeting." Here, the University's notice to Doe was woefully insufficient to allow him to adequately respond to the ultimate charge he was convicted of. See *infra* section IIA. The 2017 guidance also mandates that each party must be afforded "the same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings." 2017 guidance at 5. In this case, Doe was not afforded meaningful access to medical records or journal entries of Roe, even though the University allowed Roe to use these materials against Doe. App. 33.

The University's policy and procedures for resolution of Doe's Title IX case were out of step with the applicable guidance, and the district court erred in relying on

[4] Available at https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf. Herein, "2017 guidance."

an earlier, rescinded guidance for its analysis.

3. Doe alleged procedural violations sufficient to cast articulable doubt on the outcome of the proceedings.

Doe has alleged numerous violations of procedural due process, discussed *infra* in Section II, which cast articulable doubt on the University's decision. *See Doe v. Baum,* 903 F.3d. 575, 585-6 (6th Cir. 2018) (due process violations are sufficient to cast articulable doubt). For example, Doe has pled that the University failed to provide constitutionally sufficient notice of the allegations against Doe; failed to allow meaningful cross-examination; did not interview potentially exculpatory witnesses; improperly shifted the burden of proof; utilized an improperly low standard of proof; and convicted him without any evidence of guilt. These allegations are well pled in the complaint, and they are sufficient to state articulable.

4. Conflicting decisions by the University's own employees casts doubt on the outcome.

Finally, the district court's finding that Doe failed to sufficiently allege articulable doubt of the Panel outcome is particularly suspect because two separate University employees disagreed with the Panel's conclusion. First, the Title IX coordinator found that the evidence was insufficient to conclude that Doe had committed sexual assault. App. 20. The Panel itself was split 2—1 on whether to issue a violation. App. 24. The internal disagreement among members of the University staff evaluating Doe's Title IX case itself creates articulable doubt about the outcome of the proceeding, and the district court erred in its conclusion to the contrary.

B. Doe adequately pled that the erroneous outcome was motivated by gender bias.

The district court also erred in concluding that Doe had failed to allege that the erroneous outcome was the result of gender bias. To establish gender bias in a Title IX case, a complaint must sufficiently allege gender bias by supporting a minimal "plausible inference" of discriminatory intent. *Yusuf,* 35 F.3d at 713; *Doe v. Columbia Univ.*, 831 F.3d 46, 55 (2d Cir. 2016). In deciding a motion to dismiss, courts must view all allegations in the complaint as true and in the light most favorable to the plaintiff and "draw all reasonable inferences in favor of the sufficiency of the complaint." *Doe v. Columbia Univ.*, 831 F.3d at 57. Specific allegations need not be linked to particular elements of the plaintiff's causes of action; the complaint is read as a whole. *Doe v. Brown*, 166 F. Supp. 3d 177, 184 (D.R.I. 2016); *see also Doe v. Miami Univ.*, 882 F.3d 579, 594 (6th Cir. 2017) (courts need to consider "all of these factual allegations relating to [the] University's pattern of activity respecting sexual-assault matters"). In short, as the Sixth Circuit held in a similar case, "If it is at all plausible (beyond a wing and a prayer) that a plaintiff would succeed if he proved everything in his complaint, the case proceeds." *Doe v. Baum*, 903 F.3d at 581.

The allegations here are more than adequate. Doe alleges specific, verifiable facts regarding: federal and local pressure on the University to support females who claim sexual assault over male respondents (including by Roe herself), gender bias in the adjudication of his case, a pattern of discrimination against males by the

University in Title IX cases, investigator bias, denial of cross-examination of the investigator, failure to train, and a rush to judgment. Each of these allegations supports inferences of gender bias.

The district court found (1) that because the Title IX coordinator initially found in favor of Doe, gender bias cannot have been implicated in the investigation and (2) that the higher incidence of discipline against males only establishes that female allegations were meritorious. Add 26. Neither of these conclusions is supported by facts as alleged in Doe's complaint or by the law. First, even the Title IX coordinator recognized the implicit gender bias of the Title IX investigator. App. 18. That, notwithstanding this bias, the evidence still failed to support a finding of violation does not show the neutrality of the University; it establishes the feebleness of the University's case against Doe. Furthermore, the district court wholly failed to acknowledge, among other things, the campus-wide protests staged by Roe in response to the finding of the Title IX coordinator and the pressure to convict men for sexual assault. Multiple district courts[5], and at least two appeals courts, have

[5] *See, e.g., Noakes v. Syracuse Univ.,* 369 F. Supp. 3d 397(N.D.N.Y. 2019); *Doe v. Rollins Coll.*, 352 F. Supp. 3d 1205 (M.D. Fla. 2019); *Doe v. Rider Univ.*, No. 3:16-cv-04882 (D.N.J. Oct. 31, 2018); *Doe v. Syracuse Univ.*, 341 F. Supp. 3d 125 (N.D.N.Y. 2018); *Gischel v. Univ. of Cincinnati*, 302 F. Supp. 3d 961 (S.D. Ohio Feb. 5, 2018); *Rolph v. Hobart & William Smith Colls.*, 271 F. Supp. 3d 386 (W.D.N.Y. Sept. 20, 2017); *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195 (D. Mass. 2017); *Neal v. Colo. St. Univ. – Pueblo*, 2017 WL 633045 (D. Colo. Feb. 16, 2017); *Doe v. Lynn Univ.*, 235 F. Supp. 3d 1336 (S.D. Fl. 2017); *Collick v. William Paterson Univ.*, 2016 WL 6824374 (D.N.J. Nov. 17, 2016); *Doe v. Salisbury University*, 123 F. Supp. 3d 748 (D. Md. 2015); *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746 (S.D. Ohio 2014).

concluded that this type of campus pressure can create the "plausible inference of intentional gender discrimination" necessary to survive a motion to dismiss. *Doe v. Miami Univ.*, 882 F.3d 579, 594; *see also Doe v. Columbia Univ.*, 831 F.3d at 55.

1. Federal and local pressure

Allegations of pressure from the federal Office for Civil Rights, local media, and student activists support an inference of discriminatory intent. The inference is particularly strong when, as here, the person lodging the charge is herself an activist. Here, Doe alleges all of these circumstances, and his allegations are more than adequate at the motion to dismiss stage. App. 25-27. The Second Circuit, in *Doe v. Columbia University*, found that gender bias was adequately pled when the complaint alleged criticism by the student body and in the media "accusing the University of not taking seriously complaints of female students alleging assaults by male students." 831 F.3d 46 at 57. "Against this factual background, it is entirely plausible that the University's decision-makers and its investigator were motivated to favor the accusing female over the accused male, so as to protect themselves and the University from accusations that they had failed to protect female students from sexual assault." *Id.*

The Sixth Circuit in *Doe v. Baum* recognized the significance of external pressure in creating gender bias. 903 F.3d. 575 (6th Cir. 2018). "[P]ublic attention and the ongoing [federal] investigation put pressure on the university to prove that it took complaints of sexual misconduct seriously. The university stood to lose millions in federal aid if the Department found it non-compliant with Title IX." *Id.* at 586.

Combined with circumstantial evidence of bias in the investigation and adjudication, allegations of external pressure "[gave] rise to a plausible claim." *Id.*; *see also Doe v. Miami Univ.*, 882 F.3d 579, 594 (6th Cir. 2018) (allegations of "pressure from the government to combat vigorously sexual assault on college campuses and the severe potential punishment—loss of all federal funds—if it failed to comply" were sufficient to plead gender bias). A university's attempt to demonstrate to the government or to the general public that it is "aggressively disciplining male students accused of sexual assault" is a circumstance suggesting the presence of gender bias in a Title IX disciplinary hearing. *Doe v. Salisbury University*, 123 F. Supp. 3d 748, 768 (D. Md. 2015).

In *Doe v. Amherst College*, the court found allegations that the complainant was involved in a student-led protest regarding the college's handling of sexual assault allegations, that the college was aware that the complainant was involved in the movement, and that the college was "actively trying to appease the student-led movement" were sufficient to allege the necessary nexus between gender bias and the hearing outcome. 238 F. Supp. 3d 195, 223 (D. Mass. 2017). Here, the complainant was more than "involved" in the student movement. She personally created and led the movement ***in reaction to the findings of the University's Title IX coordinator in her own case***. App. 26–27. Doe sufficiently alleged that federal and local pressure, negative publicity, and fear of a lawsuit by Roe led to bias against him as a male.

2. Gender bias in the adjudication

Doe also alleges gender bias in the adjudicatory process. App. 37–45. The

Second Circuit accepted similar allegations as giving plausible support to a claim of gender bias. In *Doe v. Columbia University*, the following allegations gave rise to an inference of gender bias in the defendants' investigation and adjudication of the dispute: (1) the female was a willing participant in the sexual encounter and the plaintiff did not coerce her to engage in sexual activity, (2) no evidence was presented to support coercion, (3) the decision-makers "chose to accept an unsupported accusatory version over [p]laintiff's", and (4) the decision-makers declined to consider the testimony of the plaintiff's witnesses. 831 F.3d at 57.

Here, Doe's allegations are almost identical to those deemed sufficient in *Columbia*. He alleges particular circumstances that preclude coercion, including that Roe was a willing participant. App. 9. The Panel chose to accept Roe's unsupported accusation, even when she claimed that she did not remember whether or not she had consented to sexual activity, and despite significant testimony from a neutral third-party police officer challenging her credibility. App. 16–17, 24. On the issue of consent, the Panel found that Doe's testimony was not credible, primarily because he "did not admit or acknowledge [Roe's] level of intoxication upon arrival at [his] residence." App. 40. This statement presumes that Doe, who had not been with Roe during the evening and had no idea what alcohol she had consumed, should have nonetheless been able to assess Roe's intoxication level, even when the Panel *also specifically found* that Doe did not know or have reason to know of Roe's incapacitation. Furthermore, the Panel chose to credit Roe's testimony over Doe's, stating that Doe

"had motivation to skew the truth" and his demeanor "lacked credibility." App. 24. The Panel's disregard of the testimony of a police officer calling Roe's credibility into question (App. 33) but refusal to credit Doe's testimony suggests gender bias.

The Panel generated, *sua sponte*, allegations that the sexual contact was non-consensual, despite the fact that Roe never alleged the use of force, which had been expressly ruled out by the investigator. App. 24 ("There was no evidence in the record suggesting that the sexual contact was nonconsensual"). Despite Doe's testimony that Roe consented to the sexual activity, and with no evidence to the contrary, the Panel still found that there was a lack of evidence of consent. App. 25. These allegations give rise to an inference of bias in the adjudication of the case.

Additional evidence of gender bias can be seen in the University's handling of the investigation. For example, the University interviewed all witnesses proposed by Roe, but failed to interview two key witnesses proposed by Doe. App. 33. Additionally, despite Doe's request for the Title IX investigator to be present at the hearing panel appeal, the University did not secure her attendance. App. 23. This decision was particularly troubling given that the University's own Title IX coordinator had acknowledged to Doe the investigator's biases:

Finally, in weighing the evidence, the Panel flipped the evidentiary standard on its head to ask whether there was affirmative evidence of consent rather than asking whether there was affirmative evidence of lack of consent. In essence, the Panel assumed Doe was guilty until he proved himself innocent. Requiring affirmative

evidence of consent and then disregarding the testimony of Doe, the only person who testified regarding consent at all, reeks of gender bias in the Panel's adjudication.

3. Pattern of discrimination against males in Title IX cases

Doe also alleged a pattern of discrimination against males in University Title IX cases. "The allegation that males invariably lose when charged with sexual harassment…provides a verifiable causal connection" on which to allege gender bias. *Yusuf v. Vassar College*, 35 F. 3d at 716. Alleged "patterns of decision-making" are enough. *Id.* at 715. At the pleading stage, the plaintiff is not required to provide statistics, nor does the court need to consider "what degree of consistency in outcome would constitute a relevant pattern." *Id.*; *see also Doe v. Brown*, 166 F. Supp. 3d 177, 189 (D.R.I. 2016) (requiring a male student to prove at the pleading stage that females accused of sexual assault were treated differently is "practically impossible and inconsistent with the standard used in other discrimination contexts").[6] Doe alleges,

[6] The court in *Marshall v. Indiana University* offered a detailed explanation of why discovery is so critical for students pursuing Title IX claims against their universities:

> [A]lthough [plaintiff's] pleading may lack the contours of more particularized facts, the Defendants do not deny that they are in sole possession of all information relating to the allegations made by and against [plaintiff], notably refusing, at all times, to share such information with [plaintiff] or his attorneys. In this regard, the Defendants cannot have it both ways, restricting access to the facts and then arguing that [plaintiff]'s pleading must be dismissed for failure to identify more particularized facts. Instead, whether the facts alleged sufficiently ultimately support a claim for intentional gender discrimination under Title IX is a question for a later stage in this litigation, after fair and robust discovery by both sides.

"In the time since the criticism and scrutiny of the University began, the University has found a violation in the overwhelming majority of cases where a female student alleges sexual assault by a male student." App. 46. That allegation alone establishes the necessary plausible inference of gender bias. *See Doe v. Pa. St. Univ.,* 2018 WL 317934 at *15 (M.D. Pa. Jan. 8, 2018).

4. Investigator bias and denial of cross-examination

Doe alleges that that the Title IX coordinator stated that Doe's "silence would not be held against him" but that "it would be different if [the Title IX Investigator] was making the decision." App. 18. Courts have held similar allegations sufficient to support an inference of gender bias. *See, e.g., Doe v. Washington & Lee Univ.*, 2015 WL 4647996, at *10 (W.D. Va. Aug. 5, 2015) (alleged bias of someone with influence on the proceedings combined with allegations of government pressure to convict male students of sexual assault was sufficient to allege gender bias). Compounding the injury with a procedural error, the Panel refused Doe's request for the Investigator to be present for cross-examination regarding the investigation. App. 23. These allegations support an inference of bias.

5. Failure to train and rush to judgment

The complaint alleges that the University failed properly to train the members of the Panel. App. 34, 43, 45. Failure to train can plausibly lead to an inference of sex bias.

Marshall v. Indiana Univ., 170 F. Supp. 3d 1201, 1210 (S.D. Ind. 2016).

Wells v. Xavier Univ., 7 F. Supp. 3d 746, 751 (S.D. Ohio 2014). The complaint also alleges that the University denied Doe's request for a continuance to allow the Investigator to be present for cross-examination and also because Roe intended to introduce evidence that Doe had never seen. App. 23. Doe was not informed of the charges against him until the hearing. App. 30. The Panel allowed Roe to change her allegations without notice to Doe and ignored exculpatory evidence. App. 30-31, 44. A "rush to judgment," such as that alleged here, plausibly supports an inference of sex bias. *Wells*, 7 F. Supp. 3d. at 751.

II. DOE ADEQUATELY STATED A DUE PROCESS CLAIM.

The district court erred in dismissing Doe's due process claim because Doe adequately pled that the Defendants failed to provide him due process. The Supreme Court has long held that a state institution "is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause." *Goss v. Lopez*, 419 U.S. 565, 574 (1975). The Due Process Clause also forbids arbitrary deprivations of liberty. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the Clause must be satisfied." *Id.*

A. Doe adequately pled that the University failed to provide notice.

Doe adequately pled that the University failed to provide him notice of the charges adjudicated by the Panel. A university student facing expulsion is entitled to

due process, including "adequate notice, definite charge, and a hearing with opportunity to present one's own side of the case and with all protective measures." *Esteban v. Cent. Missouri State Coll.*, 415 F.2d 1077, 1089 (8th Cir. 1969). A decision-making body's consideration of allegations not included in the notice provided by the University violates due process. *Navato v. Sletten*, 560 F.2d 340, 346 (8th Cir. 1977).

The district court's discussion of this issue reflects a critical misunderstanding of the actual violation adjudicated by the Panel and ultimately lodged against Doe. As previously explained, the University policy provides two ways in which a student can commit sexual assault. One possibility is if sexual activity occurs when the complainant is unable to give consent because of a physical or mental helplessness, of which the accused was or should have been aware. The second possibility is if the accused commits sexual acts by force, threat, or intimidation. The claim that a person was incapacitated during the sexual activity falls within the first possibility and requires an additional finding that the accused was or should have been aware of the incapacitation. The second possibility reflects sexual activity despite an affirmative withholding of consent by the complainant. Notice is particularly important in this regard, since the defense put on by an accused student can depend on the basis for which the University has charged him with sexual assault

In this case, Doe was provided notice that he was being charged with sexual assault on the ground that he engaged in sexual conduct with Roe while she was incapacitated and unable to give consent. This was the only basis contained in the

notice, and the only basis investigated or considered by the Title IX office. Doe confirmed with the University that he was not being charged with sexual assault by force, threat, or intimidation. App. 17. It is indisputable that the University never provided Doe notice regarding an allegation that Roe had expressly withheld consent.

The district court's finding that Roe's appeal letter sufficed as notice that the University was changing the basis of its claim against Doe is unsound. First, Roe is not authorized to speak on behalf of the University concerning which charges the University intended to pursue against Doe. *See Nokes v. Miami Univ.,* 2017 WL 3674910, at **35 (S.D. Ohio Aug. 25, 2017) (rejecting university argument that a "second statement" from the complainant, changing the theory of the offense, was sufficient to satisfy the notice requirement). Indeed, when Doe sought University confirmation regarding the nature of the charges against him in advance of the hearing before the Panel, the only response he received was that he would not be told what charges the University intended to pursue against him or any evidence used to substantiate those charges until he arrived at the hearing. App. 22. The University's refusal to respond to Doe's request for notice of the specific allegation forced him to enter his hearing not knowing with which of the two conflicting theories of the offense he was being charged and violated his due process rights. *Flaim v. Med. Coll. of Ohio,* 418 F.3d 629, 638 (6th Cir. Ohio Aug. 17, 2005) (notice only "satisfies due process if the student had *sufficient notice* of the charges against him and a *meaningful opportunity to prepare for the hearing*" (emphasis added)).

Second, Roe's convoluted allegation conflating sexual assault by force with sexual assault by incapacitation cannot be viewed as "notice" that the University intended to raise an entirely new claim that Roe had withheld consent. In her appeal, Roe stated, "It is my understanding that the University defines sexual assault within two categories: by force and through incapacitation. I do not believe these two terms are mutually exclusive[7]…If an individual is incapacitated while someone performs sexual acts to them, those acts are subsequently 'by force' without question." App. 21. While it is hard to decipher exactly *what* Roe is arguing, the best interpretation is that if a student is incapacitated, it doesn't matter whether the alleged assaulter knows of the incapacitation. The fact that the student is incapacitated is sufficient to render the sexual act "by force." Notably, Roe's revised statement did not state that she actually withheld consent for the sexual acts. Rather, she merely reframed her previous allegations that she was incapacitated at the time the acts occurred.[8] Nothing about this could be reasonably construed as providing notice to Doe that the Panel would consider whether Roe withheld consent. Furthermore, any opportunity Doe received to be heard on those allegations was insufficient because of the flawed Title IX investigation of the University, which did not consider the issue of consent.

The district court's finding that "the appeal hearing was confined to the same incident alleged in the initial allegation notice, by the same complainant, regarding

[7] A plain reading of the policy's use of the word "or" indicates mutual exclusivity.
[8] This interpretation runs contrary to the plain language of the policy, which requires that the accused be aware of the incapacitation.

Roe's capacity to consent to sexual activity" (Add. 14) is a misstatement of the allegations in Doe's complaint and the findings of the Panel. It is clear from the Panel's decision that it first considered the issue of incapacitation and found that Roe was incapacitated but that Doe did not have reason to know of the incapacitation. App. 24. The Panel then proceeded to analyze whether the sexual contact had occurred without consent, even though Roe had never alleged that she withheld consent and that issue had not been investigated.

This Court's decision in *Navato* illuminates that Doe's allegations of a due process violation are sufficient based on the improper notice alone. In *Navato*, a university medical student argued that the imposition of sanctions[9] against him violated due process because the university failed to provide him sufficient notice of the allegations against him. The university argued that he received notice of the charges against him in a meeting between himself and his supervisor in which they discussed concerns the supervisor had regarding his performance. During the panel's consideration of the issue, however, the university raised additional claims regarding other criticisms of his work that were not included in the original notice. The district court found in favor of the university, and the student appealed.

[9] Notably, because the sanction against Navato was an academic sanction rather than a disciplinary sanction as was invoked against Doe, Doe is entitled to even *more* due process protections than Navato. *See, e.g., Ashokkumar v. Elbaum*, 932 F. Supp. 2d 996, 1008 (D. Neb. 2013). Thus if the notice in *Navato* was insufficient, the notice provided by the University in this case is woefully deficient.

On appeal, this Court reversed, finding that the university breached the student's due process rights by failing to provide proper notice regarding the full breadth of allegations against him. Specifically, the Court noted that although Navato was provided notice of the allegations from his supervisor's concerns with his performance, he was not provided notice of the other allegations the committee ultimately relied on in imposing a sanction against him.

Here, the University provided Doe with notice that he was being charged with sexual assault based on Roe's alleged incapacitation. This was the sole ground investigated and the only ground upon which Doe was given an opportunity to offer a defense. He was not given notice that the University would consider whether Roe withheld consent or whether the sexual activity was committed by force. The Panel's consideration of these issues and ultimate finding against Doe violated due process.

B. Doe adequately pled that the University did not allow meaningful cross-examination.

The district court erred in finding that Doe had not stated a valid due process claim based on the University's failure to allow meaningful cross-examination. The importance of meaningful cross-examination in Title IX cases, where the findings often hinge solely on the respective credibility of the complainant and respondent, cannot be overstated. The district court found that Doe had an adequate opportunity to cross-examine Roe, but that finding was based on rescinded guidance and outdated decisions. First, the district court relied on the 2011 Dear Colleague letter, which was

rescinded in September 2017 because it "created a system that lacked basic elements of due process and failed to ensure fundamental fairness."[10]

The district court also relied on the unpublished Sixth Circuit's decision in *Doe v. Cummins*, 662 F. App'x 437 (6th Cir. 2016), but failed to even cite the subsequent published Sixth Circuit opinion in *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), which is the controlling Sixth Circuit precedent on the point raised by Doe. *Baum* held that "if a public university has to choose between competing narratives to resolve a case, the university **must give the accused student or his agent** an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder." *Id.* at 578 (emphasis added).

In *Baum*, the complainant alleged that she was too incapacitated to consent to sexual activity, while the respondent claimed the complainant did not appear incapacitated and was a willing and active participant. *Id.* at 578–79. The Title IX investigator concluded that she was unable to determine the complainant's level of

[10] Press Release, U.S. Department of Education, Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct/. While the 2011 Dear Colleague letter "strongly" discouraged cross-examination, it did not, as the district court's opinion implied, prohibit the practice. Letter from Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., to Colleague (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf, at 12. Also, 2014 guidance clarifying the 2011 letter conceded that "[p]rocedures that ensure the Title IX rights of the complainant, while at the same time according any federally guaranteed due process to both parties involved, will lead to sound and supportable decisions." Office For Civil rights, U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence (2014), at 13.

intoxication/incapacitation and whether respondent would have noticed the alleged incapacitation prior to the sexual activity. *Id.* at 580. The complainant appealed and the review panel reversed the investigator's decision on the basis that complainant's version of events was "more credible" than respondent's. *Id.* Respondent then filed a lawsuit alleging violations of the Due Process Clause and Title IX upon which the lower court granted a motion to dismiss. *Id.*

On appeal, the Sixth Circuit held that the school was required to provide respondent with a hearing and the opportunity to meaningfully cross-examine complainant and other adverse witnesses. *Id.* at 581. *Baum* cited *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), for the principle that the "opportunity to be heard" requires the court to consider the parties' competing interests. *Id.* at 581. The Sixth Circuit has previously held that "(1) if a student is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension, and (2) 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." *Id.* (citations omitted). This is because cross-examination "is the greatest legal engine ever invented for uncovering the truth" and allows for the discovery and probing of inconsistencies in the parties' relative stories. *Id.* "Without the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives." *Id.* at 582.

Because the panel determined that the complainant's story was "more credible"

than the respondent's, the Sixth Circuit held the decision was a credibility determination for which respondent was entitled to cross-examine the complainant and her witnesses. *Id.* The court weighed the due process interests of the respondent and the burden on the university to allow cross-examination:

> Being labeled a sex offender by a university has both an immediate and lasting impact on a student's life. The Student may be forced to withdraw from his classes and move out of his university housing. His personal relationships may suffer. And he could face difficulty obtaining educational and employment opportunities down the road, especially if he is expelled.

Id. Although the Court held the burden on the university to allow cross-examination was very low, it did consider the interest in avoiding procedures that could subject a complainant to harassment such as allowing a respondent to *personally* confront his accuser. *Id.* at 583. Thus, the *Baum* decision did not go so far as to hold the university must allow a respondent to directly question a complainant.[11] *Id.* Instead, the Court held that due process required the university to at a minimum allow "the accused student's agent to conduct cross-examination on his behalf" because "an individual **aligned with the accused student** can accomplish the benefits of cross-examination—its adversarial nature and the opportunity for follow-up—without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker." *Id.* at 583 (emphasis added); *see also Doe v. Belmont Univ.*, 334 F.Supp.3d 877,

[11] In reaction to *Baum,* the University of Michigan will reportedly institute a policy allowing cross-examination of the accuser directly by the accused. https://record.umich.edu/articles/student-sexual-misconduct-policy-include-person-hearing.

894 (M.D. Tenn. 2018) (recognizing that, under *Baum*, "if a public university has to choose between competing narratives to resolve a sexual misconduct case, the university *must give the accused student or his agent* an opportunity to cross-examine the accuser and adverse witnesses" (emphasis added)); *Dillon v. Pulaski Cty. Special Sch. Dist.*, 594 F.2d 699, 700 (8th Cir. 1979) (due process violated where student not allowed to cross-examine accuser during expulsion proceeding). The Sixth Circuit reversed the dismissal of respondent's Title IX erroneous outcome claim on the same ground. *Baum*, 903 F.3d at 585-86.

Here, Doe alleged that neither he nor anyone aligned with him was allowed to cross-examine Roe at the appeal hearing or the witnesses interviewed for the investigative report. App. 32. The district court suggests that allowing Doe to submit questions for the Panel to pose to Roe satisfied due process, but even a cursory examination of this procedure illustrates its deficiency. Add 18. As the Sixth Circuit described in *Baum*, two critical elements for meaningful cross-examination are the adversarial nature of the questioning and the opportunity for follow-up. Neither of these elements exists if the Panel poses the questions. First, the Panel, as a neutral arbitrator, cannot act in an adversarial nature to the parties. Second, posing written questions to the Panel does not allow Doe to ask pertinent follow-up questions during the course of the examination. Finally, the Panel may choose to ask or reject any question posed by Doe, and certainly did so in this case. This is not meaningful cross-examination required by due process.

C. Doe adequately pled that the University improperly placed the burden of proof on Doe.

Doe adequately pled that the Panel violated due process by improperly requiring a showing of affirmative consent rather than inquiring whether a preponderance of the evidence established a lack of consent. The district court found that the Panel's wording, "stating that the record 'is absent of any evidence of consent' emphatically conveys that there was a lack of consent in violation of the policy." Add 20. The district court misreads both the substance and the context of the Panel's wording, and in fact, this language establishes Doe's argument. A record that is absent affirmative evidence of consent does not equate with a record containing evidence of lack of consent, which is the proper evidentiary inquiry under the policy. Requiring an accused to prove affirmative consent in a Title IX adjudication violates due process. *See Doe v. Cummins,* 662 F. App'x 437, 449 (6th Cir. 2016). Although the *Cummins* court ultimately determined that due process was not implicated, it was because the school had not actually shifted the burden to the student but rather evaluated evidence to determine whether a violation was established by a preponderance of the evidence. Critical to the court's conclusion in *Cummins* was that "the facts alleged in [the plaintiff's] complaint tend to show that the [hearing panel] did not place the burden of proof on either party." *Id.*

By contrast, in this case, the Panel's own decision reflects an improper shifting of the burden of proof – by examining whether there was evidence *of* consent rather

than examining whether there was evidence of *lack of consent*, as required by the policy. Specifically, the Panel stated, "The record **on the part of Complainant** is absent of any evidence of consent.…Accordingly, because the record does not support a finding of consent by the Complainant, the panel finds that you are 'responsible' for sexual assault in violation of Policy 418.1." App. 25 (emphasis added). It is clear from the Panel's statement that it evaluated the evidence to determine whether the evidence supported a finding of "no violation" rather than the opposite.

As *Cummins* acknowledges, "[T]he locus of the burden of proof can frequently be dispositive to the outcome of a case." *Id.* Here, the policy requires that the Panel find that the evidence indicates a *lack of consent* to the sexual contact. Thus, if the evidence is perfectly balanced, the Panel is required to make a finding of no violation because the evidence does not support a finding of lack of consent.

Defendants argued to the district court that the evidence was not "perfectly balanced" and that "the Complaint itself describes weighty evidence that the complainant did not consent." App. 69. However, the only "evidence" Defendants offered to support the Panel's decision is the fact that "the Plaintiff testified 'that the sexual contact was consensual' [but] the majority of the Hearing Panel did not believe him." The district court adopted this view, stating, "The panel disregarded large portions of Doe's testimony because they did not find him credible." Add 20. But simply finding the accused not credible cannot be the sole evidentiary basis for a finding of guilt, especially in a case where a neutral law enforcement officer had raised

credibility issues regarding the complainant. As the Eleventh Circuit has explained, due process does not allow conviction of a defendant based *solely* on the fact that the fact-finder disbelieves his statement. Rather, the statement by the defendant may *only* be used as substantive evidence of guilt "where some corroborative evidence exists for the charged offense." *United States v. McCarrick*, 294 F.3d 1286, 1293 (11th Cir. 2002). Unless the government has presented some additional evidence of guilt, the defendant's statement has ***no*** substantive weight. Thus, in *McCarrick*, the Court reversed the conviction because "the government has adduced ***no evidence*** from which the jury could draw a permissible inference [that the defendant committed the crime]." *Id.* (emphasis added). The Eighth Circuit agrees and has held that "the government may not rely solely on the jury's disbelief of a defendant's denials to meet its burden of proof." *United States v. Reed*, 287 F.3d 787, 788 (8th Cir. 2002).

McCarrick and *Reed* are instructive in this case. Here, the record is entirely devoid of *any* evidence that Roe withheld consent. Even Roe herself did not affirmatively state that she did not consent, but rather stated that she did not recall whether she had consented or not. Additionally, none of Roe's witnesses made any statement regarding consent. The only evidence regarding consent was the detailed statement of Doe that Roe *did* consent. Thus, even if the Panel did not believe him, they could not rely solely on their disbelief to find him guilty of a violation given the lack of any other corroborating evidence of guilt. Conviction of an individual without any proof violates due process in and of itself. *Thompson v. City of Louisville*, 362 U.S.

199, 205 (1960).

The Panel's decision constituted an improper shifting of the burden to Doe to prove his innocence, in violation of the University's presumption of innocence policy and due process.

D. Doe adequately pled that the University's application of the preponderance of the evidence standard violated due process.

Due process required that the University utilize a higher standard than preponderance of the evidence. The life-altering consequences of being found guilty of sexual misconduct demand a higher standard of proof than the 50.01% associated with the preponderance of the evidence standard. In *Smyth v. Lubbers*, the court held the standard of proof needed to satisfy due process in a school disciplinary case involving the possession of marijuana was likely clear and convincing evidence. *Smyth v. Lubbers*, 398 F. Supp. 777 (W.D. Mich. 1975). Although *in dicta*, the court cited the "nature of the charges and the serious consequences of a conviction," which had the "power to shatter career goals[] and to make advancement in our highly competitive society much more difficult for an individual than it already is." *Id.* at 798.

That concept has evolved in the Title IX context where the stakes are much higher. Addressing the same argument, the United States District Court for the Southern District of Mississippi recently carried the question of the proper standard of review in a Title IX setting past the pleading stage. *Doe v. Univ. of Miss.*, 2018 WL 3570229, at *11 (S.D. Miss. July 24, 2018) (collecting cases); *see also Doe v. Univ. of*

Colorado, 255 F. Supp. 3d 1064, 1082, n. 13 (D. Colo. 2017) ("at a minimum, there is a fair question whether preponderance of the evidence is the proper standard for disciplinary investigations such as the one that led to Plaintiff's expulsion").

In this case, the district court found that preponderance of the evidence is the proper standard because that standard is used in civil lawsuits with sexual misconduct allegations. Add 21. This overly simplistic view ignores the plethora of procedural safeguards given to civil litigants that Doe was denied in this proceeding. Those safeguards, including experienced and impartial judges, right to discovery, right to see evidence prior to a hearing, right to notice of actual charges, the rules of evidence, sworn testimony and depositions, and the ability to engage in meaningful cross-examination (among others) were flat-out denied to Doe in the University's Title IX setting. Not only was Doe handcuffed by the lowest possible standard of proof on a charge that will burden him for the rest of his life, he was unable to properly defend himself against Roe's false allegations and the Panel's preconceived biases. These concerns mandate use of a higher burden of proof to satisfy due process.

E. Doe adequately pled that the University's appeal process violated due process by allowing the University to adjudicate the claim twice.

Doe has alleged a due process violation because the University held an entirely new fact hearing following the Title IX coordinator's original finding of no violation. In essence, the University failed to prove its case on incapacitation during the first fact-finding investigation and so it granted itself a second bite at the apple.

Furthermore, the Panel adjudicated additional allegations regarding lack of consent, despite Doe receiving no notice of those allegations and despite the lack of any investigation or prior finding by the Title IX coordinator. Such conduct violates due process. *Tanyi v. Appalachian State Univ.*, 2015 WL 4478853 (W.D.N.C. July 22, 2015).

It violates due process to require an accused to stand trial twice. While an appeal can be "*de novo*" wherein the higher tribunal can make its own determinations and credibility findings anew, even *de novo* appeals are based on the existing record and do not contemplate the introduction of new evidence or arguments. As the court in *Tanyi* noted, "The right to appeal is not equivalent to the right to a new hearing." *Id.* Here, as in *Tanyi*, Doe was initially found not responsible for sexual conduct with Roe when she was allegedly incapacitated and unable to consent. The University then allowed Roe an entirely new hearing under the guise of an "appeal" wherein she was allowed to introduce new evidence and retry the case against Doe on the exact same incapacitation claim.

Furthermore, the Panel considered new and previously undisclosed allegations that the sexual contact was without consent, which had not been investigated or adjudicated by the Title IX office. Such adjudication of claims without providing notice to Doe or an investigation violated University policy and due process.

F. Doe adequately pled that the University failed to interview witnesses with exculpatory information.

Doe adequately pled that the University violated due process by failing to

interview critical witnesses including Roe's mother and ex-boyfriend because those witnesses communicated with Roe contemporaneous with the alleged incident and were believed to hold exculpatory information. App. 33.

The district court's analysis on this point fails to appreciate the importance of these witnesses. Doe does not contend that the University has to interview "all potential witnesses that a party believes has information in a given case." Add 18. Doe merely contends that the University's failure to even *attempt to* interview these two critical witnesses denied Doe the opportunity to present a meaningful defense in violation of his due process rights and suggests an improper bias in the investigation. *See e.g., Doe v. Columbia Univ.*, 831 F.3d at 57 (finding plaintiff's complaint met minimal pleading burden where plaintiff alleged that University failed to question witnesses identified by plaintiff as having exculpatory information). Furthermore, the district court's assertion that "Doe could have testified about what Roe may have told the witnesses regarding the incident" misses the point. Doe doesn't know what Roe may have told the witnesses regarding the incident, but whatever she told them would be relevant to the charges against him. The University's failure to interview these witnesses denied Doe due process.

G. Doe adequately pled that the University failed to train its employees.

Doe properly pled a due process claim for failure to properly train. "To establish its failure to train theory, [the plaintiff] must show that the Board's failure to

train its employees in a relevant respect evidences a deliberate indifference to the rights of the students." *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 461 (8th Cir. 2009). Such deliberate indifference is established where the policymaking body had "notice that its procedures were inadequate and likely to result in a violation of constitutional rights." *Id.* Notice for deliberate indifference purposes (1) can be implied when a "failure to train officers or employees is so likely to result in a violation of constitutional rights that the need for training is patently obvious" or (2) where "the plaintiff can establish that a pattern of violations put the policymaking body on notice that the school's response to regularly occurring situations was insufficient to prevent the unconstitutional conduct." *Id.*

Doe sufficiently alleges a failure to train. First, as explained above, the Panel's decision evidences a woeful disregard for the presumption of innocence, the need for evidence to support its conclusions, and the proper conclusion when the preponderance of the evidence is insufficient to establish a violation. Failure to properly train in these fundamental areas is "so likely to result in a violation of constitutional rights that the need for training is patently obvious," and accordingly, deliberate indifference can be inferred. *Larkin v. St. Louis Hous. Auth. Dev. Corp.*, 355 F.3d 1114, 1117 (8th Cir. 2004).

Furthermore, Doe alleged a pattern of similar violations in the resolution of Title IX claims at the University. Specifically, Doe alleged that the University was under investigation by the Office for Civil Rights regarding allegations that the Title

IX investigations demonstrated a pattern and practice of improperly investigating cases (App. 25); that a highly publicized lawsuit had been filed against the University for its failure to properly investigate and adjudicate a Title IX case (App. 26); and that the Arkansas legislature was investigating the University's deficient resolution of claims of sexual assault (App. 26). Furthermore, the University does not make public its training material for Title IX investigators and adjudicators, rendering more specified pleading on the issue impossible before discovery. *See, e.g., Marshall v. Ind. Univ.*, 2016 WL 4541431 (S.D. Ind. Aug. 31, 2016). Doe expects that discovery will reveal further proof that these investigations related directly to a systemic failure to train individuals associated with the Title IX process. But for the purposes of a motion to dismiss analysis, the allegations were sufficiently pled.

Finally, the University has denied Doe the opportunity to review the recording from the hearing before the Panel, but Doe expects that review to reveal that the Panel members evidenced a lack of training in other areas as well, including the handling of witness testimony and improper bias for one party over the other. Again, the fact that Doe cannot conclusively prove his claims is irrelevant at the pleading stage as long as he pleads sufficient specific allegations to support his claims. Doe has met this burden

III. INDIVIDUAL DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

In an individual capacity suit under § 1983, a plaintiff seeks to impose personal

liability on a state actor for actions taken under color of state law. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 n. 55 (1978). Qualified immunity will shield a state actor from individual liability only if her conduct occurred during the course of her state-authorized activities. *Crow v. Montgomery*, 403 F.3d 598, 601 (8th Cir. 2005). Furthermore, a state actor is not entitled to dismissal based on qualified immunity where the plaintiff alleges a violation of a constitutional or statutory right that was clearly established at the time of the defendant's alleged misconduct. *Gerlich v. Leath*, 861 F.3d 967 (8th Cir. 2017). The defendant bears the burden of establishing that the constitutional rights were not clearly established. *Burnham v. Ianni*, 119 F.3d 668, 674 (8th Cir. 1997). In this case, the district court based its application of qualified immunity solely on its previous analysis that Doe had failed to plead any constitutional violations. This analysis was incorrect, as has been illustrated herein, and the district court's grant of qualified immunity should be reversed.

Moreover, the constitutional violations alleged are based on rights that were clearly established at the time of the Defendants' misconduct. To determine whether a right is clearly established, it is not necessary that the Supreme Court has directly addressed the issue, nor does the precise action or omission in question need to have been held unlawful. In the absence of binding precedent, a court should look at all available decisional law, including decisions of state courts, other circuits and district courts. *Norfleet By & Through Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 291 (8th Cir. 1993).

In this case, the majority of Doe's due process claims arise directly from law existing at the time of the infringing action. *See, e.g.*, *Navato v. Sletten*, 560 F.2d 340, 346 (8th Cir. 1977) (establishing right to sufficient notice); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (improper placement of burden on respondent); *United States v. Reed*, 287 F.3d 787, 788 (8th Cir. 2002) (improper attempt to convict respondent solely on Panel's disbelief of his testimony despite lack of corroborating evidence); *Thompson v. City of Louisville*, 362 U.S. 199, 205 (1960) (conviction of defendant without evidence); *Plamp v. Mitchell Sch. Dist. No. 17-2,* 565 F.3d 450, 461 (8th Cir. 2009) (failure to properly train); *Smyth v. Lubbers*, 398 F. Supp. 777, 798 (W.D. Mich. 1975); Q&A on Campus Misconduct by Department of Education, September 2017; *Doe v. Columbia Univ.*, 831 F.3d 46, 57 (2d Cir. 2016) (failure to properly investigate claim). Because Doe alleges that Defendants violated clearly established due process and constitutional rights, Defendants are not entitled to qualified immunity.

IV. PANEL MEMBERS ARE NOT ENTITLED TO QUASI-JUDICIAL IMMUNITY.

The district court erred in granting quasi-judicial immunity to the members of the Panel. Although Arkansas has recognized quasi-judicial immunity in limited circumstances, those circumstances do not extend to the Panel members. First, Arkansas precedent makes clear that quasi-judicial immunity does not extend to claims under Section 1983. *See, e.g.*, *Robinson v. Langdon*, 333 Ark. 662, 670, 970 S.W.2d 292, 296 (1998) (granting judicial immunity to administrative law judge on state law claims but separately analyzing issue of qualified immunity for purposes of 1983

claims). Second, the relevant factors for judicial immunity do not support its application here. In determining quasi-judicial immunity, the court looks at the following factors: (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal." *Robinson v. Langdon*, 333 Ark. 662, 670, 970 S.W.2d 292, 296 (1998).

Analysis of these factors does not support the application of judicial immunity here. Although the Panel needs to perform functions without harassment and with insulation from political influence, and the process is adversarial in nature, the remainder of the factors weigh against judicial immunity. First, the process lacks any safeguards to control for unconstitutional conduct, as explained above. Second, there is no precedent taken into account in the proceedings. And most importantly, there is no way to correct errors on appeal. Accordingly, judicial immunity should not apply.

CONCLUSION

For the foregoing reasons, Appellant Doe respectfully requests that this Court reverse and remand the district court's order dismissing Doe's claims against Defendants.

Respectfully submitted,

WILLIAMS & ANDERSON PLC
111 Center Street, Suite 2200
Little Rock, Arkansas 72201
Telephone: 501 372 0800
Facsimile: 501 372 6453

Heather Zachary (AR#2004216)
hzachary@williamsanderson.com
Alec Gaines (AR#2012277)
againes@williamsanderson.com

and

DENTON & ZACHARY, PLLC
600 S. German Ln., #101
Conway, AR 72034
Telephone: 501 348 4999
Facsimile: 501 358-4737

Justin Zachary (AR#2010162)
justin@dentonandzachary.com

Attorneys for John Doe

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) the undersigned certifies that this brief complies with the applicable type-volume limitations and that, exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 12,912 words. This certificate was prepared in reliance on the word count of the word-processing system (Microsoft Word 2010) used to prepare this. I further certify that the electronic version of this brief has been scanned for viruses and is virus-free.

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2019 I electronically filed the foregoing with the Clerk of Court using the eflex system, which shall send notification of such filing to Counsel of Record.

By:

Heather G. Zachary (AR#2004216)