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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

This case evidences a myriad of violations of Title IX and due process that the University seeks to sweep under the rug. The University simultaneously argues that it should be allowed to make life-changing determinations without any oversight *and* that it cannot be expected to provide any meaningful level of due process protections. But with great power comes great responsibility. Sexual assault is the most serious charge university disciplinary settings confront. When a university exercises its power without a concomitant exercise of appropriate responsibility, courts should—and do—step in. The district court's refusal to do so here was based on a misreading of existing law and inappropriate factual determinations in the University's favor. It should be reversed.

I. DOE STATES A TITLE IX CLAIM

A. The Erroneous Outcome Standard is Proper

For its opening point, the University challenges the viability of the "erroneous-outcome" standard, arguing that it fails to incorporate the proper intent standard and is invalid following the heightened pleading standards enunciated by the Supreme Court. *See Bell Atl. Corp. v. Twombly,* 550 U.S. 544(2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Neither contention has merit. The test incorporates the proper intent requirement, and every circuit to examine similar cases since 2009 has applied it or a similar standard. This Court should reject the University's invitation to create a circuit

split on this issue and should follow the many well-reasoned decisions of its sister circuits.

First, the University asks this Court to reject the erroneous-outcome standard because it fails to incorporate the "deliberate-indifference" standard. This argument misconstrues both Title IX law generally and the erroneous-outcome standard specifically. Title IX prohibits discrimination by any educational program receiving federal funding. Thus, if a university discriminates against a student because of his gender, such discrimination is actionable. The "deliberate-indifference" standard is a secondary method of establishing a Title IX violation where the University fails to act to prevent discrimination. *See, e.g. Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 642 (1999). Because the erroneous-outcome standard is based on a *direct* action of discrimination against a student and not on an indirect failure to act, the deliberate-indifference standard is wholly inapplicable. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994).

The University's argument that Doe must prove "but-for" causation also evidences a fundamental misreading of Title IX law. This Court evaluates Title IX discrimination claims like Title VII claims and has held that the phrases "because of" (Title VII) and "on the basis of" (Title IX) are interchangeable. *Wolfe v. Fayetteville, Arkansas Sch. Dist.*, 648 F.3d 860, 866 (8th Cir. 2011). The Supreme Court has held that plaintiffs alleging status-based discrimination under Title VII need only establish "that the motive to discriminate was one of the employer's motives, even if the employer also

had other, lawful motives that were causative in the employer's decision." *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 343 (2013). The use of the "but-for" standard is limited to claims of retaliation and not discrimination. *Id.* Furthermore, this Court has held, "Discrimination 'because of' sex occurs when sex is a motivating factor for any employment practice, even though other factors also motivated the practice." *Tyler v. Univ. of Arkansas Bd. of Trustees*, 628 F.3d 980, 990 (8th Cir. 2011). Accordingly, but-for causation does not apply.

Finally, the University's suggestion that the erroneous-outcome test is invalid following the *Iqbal* and *Twombly* decisions fails considering the many recent decisions adopting the standard. *See, e.g. Doe v. Trustees of Bos. Coll.,* 892 F.3d 67 (1st Cir. 2018); *Doe v. Columbia Univ.,* 831 F.3d 46 (2d Cir. 2016); *Doe v. Loh*, 767 Fed. Appx. 489 (4th Cir. 2019); *Plummer v. Univ. of Hous.*, 860 F.3d 767 (5th Cir. 2017); *Doe v. Miami Univ.*, 882 F.3d 579 (6th Cir. 2018); *Austin v. University of Oregon*, 925 F.3d 1133 (9th Cir. 2019); *Doe v. Valencia Coll.*, 903 F.3d 1220 (11th Cir. 2018).

Indeed, the Second Circuit rejected this very argument, noting the traditional burden-shifting framework in Title VII cases and reaffirming that "allegations of a causal connection in the case of university disciplinary cases can be of the kind that are found in the familiar setting of Title VII cases." *Doe v. Columbia Univ.*, 831 F.3d at 55. The court cited its decision in *Littlejohn v. City of New York*, noting that the burden-shifting framework "reduces the facts needed to be *pleaded* under *Iqbal*." 795 F.3d 297, 316 (2d Cir. 2015). Accordingly, the court held that to satisfy the pleading burden, a

Title IX plaintiff must allege facts that "support only a minimal inference of bias." *Id.*; *accord Plummer v. Univ. of Hous., supra.* The Eighth Circuit has adopted the *Littlejohn* analysis, and should also adopt the "minimal inference of bias" test. *See Wilson v. Arkansas Dep't of Human Servs.*, 850 F.3d 368, 372 (8th Cir. 2017).

The Seventh Circuit took a different approach. It declined to adopt the *Yusuf* model, holding that the erroneous-outcome standard does not change the Title IX analysis but "simply describe[s] ways in which a plaintiff might show that sex was a motivating factor in a university's decision to discipline a student." *Doe v. Purdue Univ.*, 928 F.3d 652, 667 (7th Cir. 2019). Instead, the court stated that the question to be answered was whether "the alleged facts, if true, raise a plausible inference that the university discriminated against [the plaintiff] 'on the basis of sex'?" *Id.*

Regardless of whether this Court adopts the erroneous-outcome standard from the Second Circuit, or the Seventh Circuit's holistic test, the result is the same: Doe pled facts which create articulable doubt regarding the outcome of the University disciplinary proceeding and the required minimal plausible inference of discriminatory intent.

B. Doe Pled a Title IX Claim.

The district court erred in dismissing Doe's Title IX claim. First, beyond merely raising the required "articulable doubt," Doe's complaint illustrates his outright

innocence.[1] Furthermore, Doe alleged facts to support the minimal plausible inference of discrimination based on the decisionmakers' indications of bias as well as the heightened publicity and pressure to convict males. At the pleading stage, it is irrelevant that there may have been additional non-discriminatory justifications because the district court was required to draw all reasonable inferences in favor of Doe.

1. Doe Pled Articulable Doubt

Doe's complaint casts articulable doubt on the University's findings. As explained in his opening brief, Doe alleged facts showing that the University Hearing Panel violated its own policy language in convicting Doe; that the investigation and hearing in Doe's case was substantially out of compliance with the relevant guidance from the Department of Education; that the investigation was plagued by violations of due process; and that even the University's own decision-makers could not agree on Doe's guilt or innocence.

a. The Panel's Finding Violated University Policy

The University employs evasive word games in its attempt to distract from the fact that the Panel ignored the plain language of the University policy in its haste to convict Doe. The University supports the Panel's decision using the broad statement that sexual assault occurs when a student has "sexual contact with another person

[1] If the Court adopts the Seventh Circuit formulation, the Court can simply analyze whether Doe's complaint supports the minimal plausible inference of discrimination—which, given his evidence of innocence, it clearly does.

without that person's consent." The University then ignores the remainder of the definition, which explains that a lack of consent exists "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 entire definition of sexual assault is contained in Doe's complaint at Appendix 13, and Doe encourages this Court to review the full definition to discern its meaning. Of specific relevance: the definition begins with a general statement then provides examples of sexual contact and concludes with the statement, "Sexual assault occurs when ***such 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 policy's use of the phrase "such acts" refers to the sexual acts in violation of University policy, and the use of "either/or" indicates the two grounds for establishing a lack of consent.

Tellingly, and in opposition to the district court's analysis, the University does not attempt to defend the Panel's decision on the ground that Roe lacked capacity to consent, because it is undeniable that the Panel found that Doe did not know or have reason to know of Roe's alleged incapacity. App.44. Instead, the University argues that the policy "acknowledges that sexual assault can occur in these situations" but that it can "also occur in other situations in which the victim has not consented." Arg.22.

In this sentence, the University highlights a fundamental problem with the Panel's decision: Throughout the investigation, the only facts identified as suggesting a

lack of consent were based on Roe's alleged incapacitation. Even if the policy did allow for "other situations" outside the ones listed,[2] Doe was never provided notice of any allegations to support such a finding. Thus, either the decision was based on Roe's alleged incapacitation and issued in contravention of the University policy, or it was issued without proper notice and in violation of due process.

On this point, the University's meager attempt to justify the Panel's finding is derisory. It illogically claims that the Panel could have believed *both* that Roe was unable to remember the evening due to incapacitation *and* that "she would have remembered giving her consent if she had done so." Arg.22. It suggests that Doe's "dubious" testimony provided additional justification for the Panel to find a lack of consent—without citing to any part of Doe's testimony that was in conflict or unsupported.[3] And it moves into post hoc rationalization by citing Doe's initial choice not to make a

[2] As a practical matter, despite the University's contention that lack of consent can arise in "other" situations, it is difficult or impossible to think of a circumstance in which lack of consent would not occur either through "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."

[3] The University contends that the Panel could justify their guilty finding based solely on their disbelief of Doe, citing this Court's decision in *United States v. Davidson*, 122 F.3d 531 (8th Cir. 1997), but this analysis only applies where there is "other corroborative evidence of guilt." *Id.* Here there is none.

statement to Farrar—even though, at the time, Farrar promised Doe that his silence would not be held against him.[4]

In this case, the Panel cited no evidence of guilt, and indeed, none existed, rendering the Panel's decision in violation of the Policy requirements that the student be presumed innocent and the violation be proven by a preponderance of the evidence.

b. Noncompliance With Guidance Raises Articulable Doubt

Regarding the University's failure to follow the most recent Title IX guidance, the University again redirects the argument off-course. Astonishingly, the University does not dispute that its policy and procedure violated the applicable OCR guidance. Instead, the University suggests that "[n]oncompliance with guidance from the Department of Education's Office for Civil Rights is not actionable." Arg.24. But Doe does not base his Title IX claim on the University's failure to comply with Title IX guidance. Rather, Doe raises this point because the Department's interpretation of Title IX should be accorded "appreciable deference" and is strong evidence regarding the requirements of the law itself. *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993). Furthermore, the University's refusal to conform its procedures to the most recent Title IX guidance is particularly striking given OCR's caution that the previous 2011 guidance

[4] Even the case cited by the University recognized that a negative inference for lack of testimony can only be used in conjunction with other substantial evidence of guilt, stating, "It is thus undisputed that an inmates' silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board." *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

presented serious due process concerns for the accused. The University's awareness of these concerns for males facing sexual assault accusations and its failure to take any steps to mitigate against such constitutional violations bolsters Doe's claim that the University was motivated by gender and raises articulable doubt regarding the outcome. Finally, Doe's allegations of noncompliance illustrate the University's failures to follow the applicable guidance. [5]

c. Additional Allegations Creating Articulable Doubt

Doe's complaint also casts doubt on the Panel's decision by pleading multiple violations of due process as well as dissension among the University's own decision-makers. The University does not dispute that alleged violations of due process are sufficient to create articulable doubt. As described in his opening brief and below, Doe has sufficiently alleged such violations.

Additionally, the disagreement between the University's own decision-makers is sufficient to allege articulable doubt. The "pleading burden in this regard is not heavy" and can be met by allegations providing "reason to doubt the veracity of the charge." *Yusuf,* 35 F.3d at 715. This Court has defined "reasonable doubt" as "the kind of doubt that would make a reasonable person hesitate to act." *United States v. McCraney*, 612 F.3d

[5] Doe alleged his inability to get records of Roe stating that the Panel "relied on partial and incomplete records and evidence without requiring her to produce the entire record or allow John Doe to examine it." App.33 ¶ 185.

1057, 1063 (8th Cir. 2010). The fact that two of the four University decision-makers refused to find Doe guilty constitutes reasonable and articulable doubt.

2. Doe Alleged Facts To Support An Inference of Discrimination

Doe alleged a plausible inference that gender was a motivating factor in the University's process and decision. Like many other cases in which an inference of discrimination has been found, Doe's case involves clear indications that the investigators and decision-makers were biased against males in favor of females. Additionally, recent caselaw establishes that in factually similar cases involving campus protests and statewide publicity, courts routinely find a plausible inference of discrimination. *See, e.g. Doe v. Baum,* 903 F.3d 575(6th Cir. 2018)*; Doe v. Miami, supra; Doe v. Columbia, supra; Doe v. George Wash. Univ.*, 366 F. Supp. 3d 1, 3 (D.D.C. December 20, 2018).

Indeed, many courts holding to the contrary have been overturned on appeal or have reconsidered their view that allegations only show "pro-victim" bias. *See, e.g. Doe v. Baum,* 227 F. Supp. 3d 784 (E.D. Mich. 2017), *rev'd and remanded*, 903 F.3d 575 (6th Cir. 2018); *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356 (S.D.N.Y. 2015), *vacated,* 831 F.3d 46 (2d Cir. 2016); *Doe v. Regents of the Univ. of California*, 2016 WL 5515711 (C.D. Cal. July 25, 2016), *order rescinded*, 2016 WL 11504216 (C.D. Cal. Dec. 1, 2016).

The "pro-victim" inference as part of a motion to dismiss is improper because it "fails to recognize the court's obligation to draw reasonable inferences *in favor of* the sufficiency of the complaint." *Doe v. Columbia*, 831 F.3d at 57. Indeed, "*Iqbal* does not

require that the inference of discriminatory intent supported by the pleaded facts be *the most plausible* explanation of the defendant's conduct. It is sufficient if the inference of discriminatory intent is plausible." *Id.* (emphasis in original). Here, the district court erred in making presumptions against the sufficiency of the complaint.

a. Federal and Local Pressure

Doe alleged sufficient facts of federal and local pressure to create the minimal plausible inference of discrimination. The University's Response on this point suffers from three fallacies. First, while it is true that general allegations regarding the 2011 OCR guidance letter are insufficient to create a plausible inference of discrimination, even cases cited by the University acknowledge that where such allegations are coupled with "something more," the allegations survive a motion to dismiss. *See, e.g. Doe v. Purdue Univ.*, 928 F.3d at 668(crediting allegations that a college's desire to protect access to federal funds could motivate it to tilt the disciplinary process against men accused of sexual assaults so that it could elevate the number of punishments imposed); *Doe v. Univ. of Dayton*, 766 F. App'x 275, 282 (6th Cir. 2019)(finding no inference of discrimination because plaintiff "does not allege, for example, that the University or the individuals involved in his hearing were facing substantial public pressure or outcry in the weeks leading up to his hearing"); *Doe v. Baum*, *supra* (allegations of federal pressure provide "a backdrop that, when combined with other circumstantial evidence of bias in Doe's specific proceeding, gives rise to a plausible claim"); *Doe v. Miami Univ.*, *supra.*

Indeed, the University cites ***no*** case where a motion to dismiss has been granted notwithstanding allegations of the particularized publicity and outcry regarding the very case under investigation, as exists here.

Second, Doe's allegations are factual, not conclusory. Specifically, Doe pled the following allegations showing highly publicized criticism of the University over its investigation and discipline of males for the alleged sexual assault of females:

- Various media outlets and student organizations reported that the University was not adequately resolving cases involving alleged sexual assault of female students against male students. App.25 ¶139.
- Prior to and during the investigation of the allegations against Doe, the Office for Civil Rights investigated allegations that the University's prior Title IX investigations demonstrated a pattern and practice of improperly investigating Title IX cases. App.25 ¶140.
- A highly publicized lawsuit had recently been filed against the University, alleging that it failed to properly adjudicate a Title IX complaint by a female athlete against a male athlete. App.26 ¶141.
- During the pendency of the investigation against Doe, the Arkansas legislature began an investigation into claims that the University was failing to properly investigate and adjudicate claims of sexual assault by females against males. App.26 ¶142.

- The investigation by the Office for Civil Rights, the lawsuit, and the legislature investigation resulted in numerous news articles being published criticizing the University's handling of sexual assault claims by females. App.26 ¶143.
- After the Title IX coordinator's initial decision that Doe committed no misconduct, Roe began to publicly criticize the University's decision to multiple media outlets and began a widely-followed on-campus protest about the University's decision. App.26 ¶144.
- Roe's media blitz garnered mass, widespread attention prompting the University to issue a public statement. App.27 ¶146.
- The University was under pressure and fearful of sanctions from the Office for Civil Rights during this time and took steps harmful to Doe to alleviate and lessen the scrutiny it was attracting from Roe's media blitz and protests. App.27 ¶148.

Less overwhelming but similar facts involving an OCR investigation, a high-profile lawsuit filed against the university, and publicity generated in part by the complainant were more than enough to survive a motion to dismiss in *Doe v. George Washington University*. 366 F. Supp. 3d at 12.

Finally, the University's argument that any bias exhibited in favor of Roe and against Doe could have been "victim" bias rather than gender bias fails in at least two

ways. First, and most importantly, "At the pleading stage, John's allegations need only create the plausible inference of intentional gender discrimination; although alternative non-discriminatory explanations for the defendants' behavior may exist, that possibility does not bar John's access to discovery." *Doe v. Miami Univ.*, 882 F.3d at 594.

The cases the University relies on for the "pro-victim bias" proposition are easily distinguishable. For example, the court in *Doe v. Univ. of Colorado, Boulder through Bd. of Regents of Univ. of Colorado* explained that "if enforcement officials are regularly presented with a scenario involving the same two potential classifications…there must come a point when one may plausibly infer that stereotypes about the protected classification have begun to infect the enforcement process generally." 255 F. Supp. 3d 1064, 1075 (D. Colo. 2017). The issue was particularly difficult in Title IX cases because "[i]n every case the Court has located, the accuser has been female and the accused has been male—and these individuals were, not surprisingly, the only potential eyewitnesses to the alleged assault." *Id.* at 1076. In this situation, "enforcement officials often must make a credibility judgment as between a male and female, which doubles the possibility of gender-specific stereotypes influencing the investigation (*e.g.*, 'a woman would never falsely accuse anyone of that,' 'men always behave opportunistically toward drunk girls')." *Id.*

Although the court declined to draw an inference of gender bias, it noted that the "credibility determinations as between a male and a female may be the most likely circumstance in which gender bias, explicit or implicit, will have an effect." *Doe v. Univ.*

of Colorado, 255 F. Supp. 3d at 1076. The instant case presents precisely such a situation, rendering the "pro-victim bias" theory inappropriate.[6]

Furthermore, the decision in *Doe v. University of St. Thomas*, cited extensively by the University, is unpersuasive for two reasons. 240 F.Supp.3d 984 (D.Minn.2017). First, the court's rationale for pro-victim bias relies on three cases that have been overruled or reconsidered. *Doe v. Baum,* 227 F.Supp.3d 784 (E.D. Mich. 2017), *rev'd and remanded*, 903 F.3d 575 (6th Cir. 2018); *Doe v. Columbia Univ.*, 101 F.Supp.3d 356 (S.D.N.Y.2015), *vacated*, 831 F.3d 46 (2d Cir. 2016); *Doe v. Regents of the Univ. of California*, 2016 WL 5515711 (C.D. Cal. July 25, 2016), *order rescinded*, 2016 WL 11504216 (C.D. Cal. Dec. 1, 2016).

Equally important, the court in *University of St. Thomas* did not hold that allegations of public pressure cannot inform a plausible inference of gender discrimination—merely that a general reference to federal pressure *by itself* is insufficient. In fact, the court recognized that such claims can create an inference of discrimination but distinguished the allegations in that case stating, "[the plaintiff] did not allege any targeted stress UST faced from government institutions or the public at large for UST's handling of previous sexual misconduct complaints on campus." *Id.* at

[6] The same court, moreover, held that "pro-victim" policies raised *due process concerns*: "[I]n the procedural due process context . . . any type of actual bias [in the investigation] is sufficient." *Doe v. DiStefano*, 2018 WL 2096347, at *23–24 (D. Colo. May 7, 2018).

992. Indeed, the court cited approvingly the decision in *Doe v. Washington & Lee Univ.*, 2015 WL 4647996 (W.D.Va.Aug. 5, 2015), noting that case involved "both governmental pressure and recent actions on campus as evidence of discrimination in the disciplinary procedure." *Id.* at 993.

Here, Doe alleged precisely what the court in *University of St. Thomas* found missing: Targeted stress, arising from (1) a prominent lawsuit by a female claiming that the University did not take sufficient action following her sexual assault claim against a male; (2) the Arkansas legislature's investigation into the University's treatment of female allegations of sexual assault against males; and (3) Roe's campus-wide protest of Doe's initial not-guilty finding.

The University's Response is completely silent regarding Doe's allegations of public pressure. These allegations were specifically targeted to Doe's case and, when coupled with allegations regarding the possibility for loss of federal funding, create a plausible inference that Doe's gender was a motivating factor in the decision.

b. Gender Bias In The Adjudication

In addition to the federal and local pressure on the University to convict males for sexual assault, Doe alleges specific facts relevant to his adjudication that create a reasonable inference that gender was a motivating factor in the investigation and decision. The University wholly ignored these allegations. For example, Doe alleged that the Panel discredited testimony from Doe because of a "lack of corroboration," stating that Doe's witnesses' statements were "internally inconsistent or irrelevant on

the subject of consent" (App.41 ¶221(c)) but did not discount Roe's testimony despite similar lack of corroboration. This allegation alone is sufficient, when set against the backdrop of federal and local pressure, to support an inference of bias. *See, e.g. Doe v. Baum*, 903 F.3d at 586.

Furthermore, the Panel discredited Doe because he had "motivation to skew the truth" but did not consider Roe's comparable motivation—namely that she had mounted a campus-wide campaign against sexual assaults on women that would have been undermined if her allegations were found not credible. Indeed, the only truly neutral witness in the hearing, a Fayetteville police officer, testified that Roe *had* skewed the truth, but the Panel inexplicably disregarded this testimony. The Panel's conclusion suggests that it was influenced by the gender assumption identified in *Doe v. University of Colorado, Boulder* that "a woman would never falsely accuse anyone of that." 255 F. Supp. 3d at 1076. The Panel also discredited Doe because he "did not admit or acknowledge [Roe's] level of intoxication" immediately after finding that he could not have reasonably known that level.

The University also withheld from Doe critical witnesses, including the investigator Barnett for questioning before the Panel and Roe's mother and ex-boyfriend who Doe believed to have exculpating information. Barnett's presence at the hearing was particularly relevant, given Farrar's statement that she would hold Doe's silence against him. Although she was not the ultimate decision-maker, she *was* the individual charged with fairly and neutrally investigating the case. *Doe v. Purdue Univ.*,

928 F.3d at 669 (panel refusing to hear from potentially exculpatory witnesses one factor in determining gender-discrimination claim was plausible).

Finally, the Panel flipped the burden of proof to require proof of consent rather than proof of lack of consent. All these allegations go directly to the gender bias permeating the University's investigation and Panel's hearing.

II. DOE PLED A DENIAL OF DUE PROCESS

A. Doe Was Not Provided Notice of the Charges or the Evidence

Doe has also sufficiently alleged that the University violated his due process rights by failing to provide him notice of the factual allegations he was found guilty of or the evidence to be used against him.[7] At a minimum, proper notice must "contain a statement of the specific charges and grounds" upon which the charges are based. *Dixon v. Alabama State Bd. of Ed.,* 294 F.2d 150, 158 (5th Cir. 1961). "It is not too heavy a burden to require that students facing disciplinary action be informed of the factual basis for the charges against them." *Doe v. Univ. of S. California*, 246 Cal. App. 4th 221, 243 (2016). Failure to provide notice of the specific charges and grounds for discipline, or consideration of grounds not presented in the original notice, violates due process. *Strickland v. Inlow,* 519 F.2d 744, 747 (8th Cir. 1975).

[7] Although the University claims confusion regarding the new evidence that Roe introduced, the complaint is clear that "Roe was, in fact, permitted to introduce new evidence that had not been previously provided or disclosed to John Doe." App.23 ¶ 125; App.22 ¶118. This allegation is a statement of fact that is not "conclusory. At the pleading stage, Doe is not required to allege the content of the evidence; merely that evidence was used against him that had not been provided to him.

The University limits its Response on this issue to a cursory analysis, highlighting the notice Doe received regarding the incapacitation charge, and refusing to address Doe's actual argument. Doe does not contest that he received notice of the charge that he engaged in sexual activity with Roe while she was incapacitated; but as conceded by the University, this is apparently not the ground upon which the Panel found him guilty. Rather, according to the University, the Panel found that he engaged in sexual activity without consent based on some "other" justification. But the notice Doe received in this case alleged only that Roe was "incapacitated and unable to give consent" and provided no other facts to support a finding of lack of consent. At no point during the investigation or hearing, did any facts suggest a lack of consent based on some "other" justification besides the incapacitation of Roe. Where the University limits its notice of violation to one set of facts and later changes the basis of charges, the University violates due process. *Doe v. Rector & Visitors of George Mason Univ.*, 149 F. Supp. 3d 602, 616 (E.D. Va. 2016)(violation of due process where notice to student identified one date but University adjudicated charges involving different dates).

The lack of factual allegations to support any charge other than incapacitation is further exacerbated by the University's confirmation that the only allegation at issue was Roe's incapacitation. App.31 ¶173. "Significant departures from stated procedures of government and even isolated assurances by governmental officers which have induced reasonable and detrimental reliance may, if sufficiently unfair and prejudicial, constitute procedural due process violations." *Jones v. Bd. of Governors of Univ. of N.*

Carolina, 704 F.2d 713, 717 (4th Cir. 1983). Doe relied on this statement when preparing and presenting his defense. To allow the University to change the rationale mid-stream without updating Doe's notice was patently unfair and prejudicial, and violated due process.

Similarly, the University's suggestion that individual statements in Roe's appeal document served as a valid notice fails on at least two fronts. First, even assuming Roe's appeal statement was clear that she did not consent to the sexual activity (which it was not), Roe cannot provide notice for what the University intends to pursue against Doe.

More fundamentally, the University's position seems to be that it is acceptable to provide notice of one set of facts upon which charges are based, to tailor the investigation around those facts, and to confirm to the accused that the disciplinary action is based only on those facts, and then, on appeal, to change the theory upon which the university proceeds. This definition of "notice" is Orwellian, and due process will not condone such a bait-and-switch approach to student discipline. *See, e.g. Doe v. Rector & Visitors of George Mason Univ., supra.*

B. Doe Was Denied Meaningful Cross-Examination

The University acknowledges that "due process may require a limited form of cross-examination" but argues that its procedure of allowing its employees to examine Roe was sufficient. The trending legal position in many circuits dispels this suggestion, holding that "if the 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 at 578.

The University argues that Doe was provided the right to confront his accuser by submitting questions to Roe through the Panel, citing the First Circuit decision in *Haidak v. Univ. of Massachusetts-Amherst*, 2019 WL 3561802 (1st Cir. Aug. 6, 2019). But *Haidak* cannot stretch as far as the University proposes. In fact, the decision reaffirms the basic principles espoused in *Baum* that an accused is entitled to a "mechanism for confronting the complaining witness and probing his or her account." *Id.* at *9. Though the *Haidak* court declined to adopt the categorical rule adopted in *Baum*, it nonetheless pursued a detailed examination to determine whether "the university's inquisitorial approach to ferreting out the truth was so inadequate that it violated [the accused's] procedural due process rights." *Id.* As the court held, "When a school reserves to itself the right to examine the witnesses, it also assumes for itself the responsibility to conduct reasonably adequate questioning. A school cannot both tell the student to forgo direct inquiry and then fail to reasonably probe the testimony tendered against that student." *Id.*

The court in *Haidak* could make this determination because the parties had conducted discovery and the court could analyze the full transcript of the hearing. Accordingly, the court examined the precise questions asked by the board to ascertain whether the board had engaged in a sufficiently probing inquiry. Thus, even assuming the validity of *Haidak's* conclusion that questioning by the university alone can comport

with due process[8], there is no way to reach such a conclusion on the facts as alleged in the complaint in this case. Doe's allegations regarding his ability to confront witnesses, which must be taken as true, are that he was denied the ability to question relevant witnesses directly (App.32 ¶178); that he was not allowed to question Barnett (App.22 ¶ 119, 120); that he was not allowed to question Roe (App.32 ¶¶179); that the Panel had "sole discretion" in determining whether to ask questions suggested by Doe or not, and that the Panel did not ask the questions he posed or ask pertinent follow-up questions (App.32 ¶¶ 179, 180). Striking questions from the list posed by the accused is particularly "concerning" and may "create the possibility that nobody [will] effectively confront [the complainant's] accusations." *Haidak*, 2019 WL 3561802 at *10. At the motion to dismiss stage, these allegations are sufficient to state a due process claim.

C. The University Improperly Placed the Burden of Proof On Doe

The University's insistence that it "does not place the burden of proof on anyone" is almost comical. It is fundamental that in any adjudicatory proceeding there is always placement of a burden of proof. Even the University's attempt to explain the Panel's finding reaffirms the Panel's placing of the burden on Doe by requiring "credible evidence of consent." Arg. at 46 ("The statement acknowledges the lack of record evidence that Roe consented and suggested that the panel would have found Doe not responsible had there been credible evidence of consent.")

[8] Doe maintains that the *Haidak* standard is not sufficiently protective because the Panel is neutral and not "adversarial" as required for proper cross-examination.

The allocation of the burden of proof is particularly important in this case because, as the University acknowledges, where the evidence is perfectly balanced, whoever has the burden of proof loses. Here, even accepting the Panel's questionable credibility findings, the evidence is balanced at zero. Roe offered no evidence regarding consent or the lack thereof, the Panel dismissed Doe's testimony as not credible, and the testimony of remaining witnesses as irrelevant. Since the Panel found no probative evidence for either side, the University failed to establish a policy violation.

A strikingly similar situation was addressed by a Tennessee chancery court in *Mock v. University of Tennessee.* The evidence in that case was even less favorable to the accused, because, due to intoxication, neither the complainant nor the accused could recall whether the complainant had given verbal consent. *Mock v. Univ. of Tenn.*, No. 14-1687-II (Ch. Ct. of Davidson Cnty. Tenn., Aug. 4, 2015)(attached per Fed.R.App. 32.1). But Mock testified that the complainant implicitly consented through her actions. The University found that Mock had failed to prove consent and found him guilty. On appeal, the Tennessee court held that although the policy language placed a burden on the initiator of sexual activity to ensure consent, "This does not shift the burden to [the accused] to disprove the charges against him." *Id.* at *11. The university's position, that it satisfied its burden of proof by requiring the accused to prove affirmative consent "is flawed and untenable if due process is to be afforded the accused." *Id.* Such a policy lacks fundamental fairness due to the difficulties that students would have in proving that they received affirmative consent. This burden shifting requires the accused to

"come forward with proof of an affirmative verbal response that is credibly in an environment in which there are seldom, if any, witnesses to an activity which requires exposing each party's most private body parts." *Id.* at *12. "Absent the tape recording of verbal consent or other independent means to demonstrate that consent was given, the ability of an accused to prove the complaining party's consent strains credulity and is illusory." *Id.*

This evidentiary handcuffing is highlighted in the instant case. Given the Panel's findings that Doe was not credible, in part, because he had "motivation to skew the truth" and its finding that other witnesses' testimony was irrelevant on the issue of consent, Doe had no possible way to defend himself. Twisting the burden to require Doe to prove that Roe consented and then removing the only method by which he could prove that fact – his own statement – is patently unfair and violates due process.

D. The University Failed to Pursue Exculpatory Evidence

Because it cannot deny that it failed to even attempt to reach two witnesses identified by Doe as potentially exculpatory, the University simply argues that Doe's allegations on this point were "conclusory." Not so. Doe does allege that the witnesses had information relevant to the charges against him. Although it is true that Doe cannot allege specifically what testimony these witnesses would give, it would undoubtedly have provided insight to Roe's claim of sexual assault. The University's refusal to make any effort to secure this testimony despite Doe's requests was unreasonable. *See, e.g. Doe v. Purdue Univ.*, 928 F.3d at 664; *Doe v. Columbia Univ.* 831 F.3d at 57.

III. INDIVIDUAL DEFENDANTS ARE NOT IMMUNE

Finally, the individual defendants are not entitled to qualified or quasi-judicial immunity. The University's Response fails to advance any compelling arguments to suggest that the long-standing and fundamental rights identified in this appeal were not clearly established. On the contrary, as illustrated in Doe's opening brief, each issue was supported by clear precedent establishing both the right and the alleged violation. Qualified Immunity does not apply.

Likewise, the Individual Defendants are not entitled to quasi-judicial immunity. While this Court did grant quasi-judicial immunity to members of a state disciplinary commission in the *VanHorn v. Oelschlager*, 457 F.3d 844, 848 (8th Cir. 2006), the regulatory and procedural distinctions between that case and the instant one are substantial. First, in *VanHorn*, the court identified a sizeable list of rights to which parties before the commission were entitled, including the right to remain silent (which the University has disavowed in this case); the right to the benefit of counsel in preparing for a defense (to which the accused is not entitled in a university disciplinary setting); the right to cross-examine witnesses against them (which Doe did not have in this case); the right to be represented by counsel or appear through counsel (which is expressly prohibited by the University); and the right to appeal any decision to the state court. *Id.* at 848. Because these fundamental protections are lacking, there are not

sufficient safeguards in the regulatory framework to control for unconstitutional conduct.[9]

CONCLUSION

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

Respectfully submitted,

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Counsel for John Doe

[9] Yet again, the University's argument misunderstands the law and this case. Doe does not (and cannot) ask for "judicial review" of the Panel's decision. Rather, Doe seeks review of the policies and procedures applied to him. This distinction is critical, because following the Panel's finding of guilt, Doe has no recourse to have the finding itself reviewed.

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 6,496 words. This certificate was prepared in reliance on the word count of the word-processing system (Microsoft Word 2010) used to prepare this brief. I further certify that the electronic version of this brief has been scanned for viruses and is virus-free.

/s/Heather G. Zachary
Heather G. Zachary

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 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.

/s/Heather G. Zachary
Heather G. Zachary

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT, PART II

COREY MOCK

Petitioner,

vs.

UNIVERSITY OF TENNESSEE AT CHATTANOOGA,

Respondent,

MOLLY MORRIS

Intervenor.

NO. 14-1687-II

MEMORANDUM and ORDER

Pursuant to the Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-322 ("APA"), the Petitioner, Corey Mock ("Mr. Mock"), seeks judicial review of a final decision by the Chancellor of the University of Tennessee at Chattanooga ("UTC"), expelling him as a student. UTC submits that the UTC Chancellor's decision is clearly supported by the evidence in the record and that the decision to uphold his expulsion should be affirmed. The Intervenor, Molly Morris ("Ms. Morris"), also submits that the decision to expel Mr. Mock should be upheld. The Court has reviewed the technical record, the exhibits, the pleadings, and the briefs filed on behalf of the parties and the intervenor and rules as follows.

PROCEDUAL BACKGROUND

On June 4, 2014, Mr. Mock was accused by Ms. Morris, another UTC student, of sexually

assaulting her on March 16, 2014. The charges stated that at no time did Ms. Morris consent to have sex with Mr. Mock and further, that Mr. Mock was aware that Ms. Morris was unable to consent due to an alcohol and/or chemical impairment. On June 24, 2014, Administrative Law Judge Joanie Sompayrac ("ALJ") conducted the hearing and issued her Initial Order on August 4, 2014.

In that Initial Order, the ALJ made forty-nine (49) specific findings of fact and concluded that UTC had not carried its burden of proof by a preponderance of the evidence that Ms. Morris was incapable of consenting to have sex and that Mr. Mock was aware of her incapacitation, and dismissed the charges against Mr. Mock.

On August 7, 2014, Ms. Morris personally met with the UTC Chancellor, Steven R. Angle ("UTC Chancellor").

On August 14, 2014, UTC petitioned for reconsideration. On August 25, 2014, the ALJ made no changes to her findings of fact, but reversed her Initial Order by changing her conclusions and held that UTC proved by a preponderance of the evidence that Ms. Morris never consented to sexual activity. In the Revised Initial Order, the ALJ found that Mr. Mock engaged in sexual misconduct in violation of UTC Code of Conduct, Section 7 and ordered his dismissal from UTC as of August 25, 2014.

On August 27, 2014, Ms. Morris emailed a request to the UTC Chancellor that he recuse himself from involvement in her complaint; on August 29, 2014, UTC filed a formal motion for recusal, asking the UTC Chancellor to disqualify himself as an agency head due to his *ex parte* communications with the Assistant General Counsel who informed him of the ALJ's ruling in favor of Mr. Mock, as the next step in the process could be an appeal to the UTC Chancellor and the Office of the General Counsel would not be able to provide him with legal advice regarding his

review of the case and further, that either Mr. Mock or Ms. Morris might initiate litigation in the future regarding the case. Mr. Mock's counsel opposed the recusal on the grounds that Ms. Morris improperly initiated the ex parte communication.

The ALJ stayed the effectiveness of her Revised Order of Dismissal pending Mr. Mock's appeal to the UTC Chancellor

On September 15, 2014, the UTC Chancellor declined to disqualify himself from the proceedings.

On December 2, 2014, the UTC Chancellor found that Mr. Mock had violated the UTC Student Code and ordered his expulsion. On December 4, 2014, Mr. Mock filed his Petition for Review of Agency Decision in the Chancery Court for Davidson County, and sought a stay of the UTC Chancellor's Final Order and an injunction that would allow him to take his final exams for the 2014 fall semester. The injunction issued and he completed his exams.

On December 30, 2015, Mr. Mock filed a motion to be allowed to register for the next semester. On January 9, 2015, after a hearing on Mr. Mock's motion, the Final Order was stayed pending the outcome of the administrative appeal and Mr. Mock was allowed to enroll and continue his studies at UTC, but he was denied any relief as to his scholarship or his varsity wrestling activities.

On June 23, 2015, a hearing on the Petition for Judicial Review was held and the parties and Ms. Morris argued their respective positions and the case was taken under advisement.

FINDINGS OF FACT

The UTC Chancellor made the following findings of fact:

Mr. Mock and Ms. Morris were students of UTC in the Spring of 2014. They met on

Tinder, a social media application that allows individuals to express interest in each other. Both exchanged private messages on Tinder showing interest in each other. Mr. Mock confirmed that he found Ms. Morris to be "very attractive." He started sitting behind her in a class and walking with her to her car after class.

Ms. Morris acted on her interest in Mr. Mock, by giving him her cell phone number and exchanging text messages with him. After several overtures, Mr. Mock and Ms. Morris engaged each other socially. Ms. Morris had breakfast with Mr. Mock at the Bluegrass Grille. Ms. Morris invited him to her apartment to watch a movie and eat chili when her roommate was absent at 1:00 a.m. Mr. Mock invited Ms. Morris to a party at his friend's house on March 15, 2014. She accepted his invitation because she considered him a friend.

The party to which Mr. Mock invited Ms. Morris began at approximately 8 p.m. and went until the early morning hours of March 16, 2014. Mr. Mock admits that he began drinking beer around 8 p.m., and continued drinking beer until Ms. Morris arrived at around 2 a.m., when he planned to start drinking more heavily. He admits that he was "pretty drunk" at some point during the early morning hours of March 16, 2014. Ms. Morris did not bring any alcohol to the party, but unlike Mr. Mock who drank beer, Ms. Morris consumed stronger alcoholic beverages during the party. She drank a "Strawberita," which is an alcoholic beverage, while playing a drinking game known as beer pong with Mr. Mock's friends. Her next drink was a 100 ml flask of Jack Daniel's Whiskey that she mixed with Vanilla Coke. She consumed almost all of the Jack Daniel's and Vanilla Coke while playing another drinking game.

When she requested another drink, someone offered her Fireball, a cinnamon flavored alcoholic drink, but she declined. However, when she took the next sip of her drink, she believes she tasted cinnamon whiskey. Ms. Morris concedes that, in the past, she has had the same amount or more to drink and was "completely fine."

After sipping the drink that she believes tasted like cinnamon whiskey, Ms. Morris recalls very little from the evening and described her memory as being "like a fog" and that everything went black. She recalls being in a bathroom by herself feeling sick and throwing up. She testified that her body felt limp, and that she could not feel or move her arms or legs.

Mr. Mock's recollection of events is more detailed. He recalls going into the bathroom and seeing Ms. Morris sitting on the floor of the bathroom against the wall. He believed that she was sick, was acting a "bit tipsy," and throwing up. Ms. Morris does recall that Mr. Mock tried to sit her up on the side of the bathtub and tried to awaken her by saying her name "over and over again." Mr. Mock did not ask Ms. Morris if she was "okay" in the bathroom. At some point they moved from the bathroom to the adjacent bedroom. Ms. Morris recalls lying on her back on the bed in the dark.

Mr. Mock admits that he removed her pants, but there is no suggestion that Ms. Morris gave him any indication, verbal or non-verbal, that she consented to him removing her pants. Mr. Mock performed oral sex on Ms. Morris, but again there is no suggestion that Ms. Morris gave him any indication verbal or non-verbal, that she consented to him performing oral sex on her.

Mr. Mock then positioned himself on top of Ms. Morris, and without using a condom, entered her and proceeded to have vaginal intercourse with her, but yet again there is no suggestion that Ms. Morris gave him any indication, verbal or non-verbal, that she consented to him performing vaginal intercourse. Mr. Mock claims that he had difficulty inserting his penis into Ms. Morris' vagina, and that she repositioned him to penetrate her.

Ms. Morris recalls being in pain, trying to cry out because it hurt, Mr. Mock covering her mouth, and that she blacked out at some point. She believes that she was dry heaving and, at some point, threw up.

Mr. Mock initiated all of the sexual acts.

The next morning, Ms. Morris woke up, lying at the base of the bed covered with a sheet and completely naked. She began looking for her clothes, found everything but her bra, got dressed and left. Ms. Morris drove herself to her apartment and took a shower.

That same day, Mr. Mock texted Ms. Morris stating, "Well I don't remember much from last night. Did you throw up in bed? If you did it's totally cool." Ms. Morris responded, "I have no clue. I remember next to nothing about last night," and asked Mr. Mock, "Did we sleep together?" "I definitely woke up with no clothes on." Mr. Mock responded, "I mean I assume we slept together because we woke up together and we were both naked."

Later that same day, Ms. Morris told her roommate of the events from the previous night. Her roommate took Ms. Morris to get Plan B (an emergency contraceptive) and a pregnancy test because she was not on birth control. Ms. Morris testified that she submitted to testing in order to determine if she had been drugged during the party. She did not produce the results of the drug test.

From March 17th to March 24th, Ms. Morris and Mr. Mock exchanged text messages with each other. Ms. Morris says she did so because she was "driving (herself) crazy wondering when he would return to class. On March 24th, Ms. Morris spoke to Mr. Mock after class and told him that she did not give consent to having sex with him on March 16th. Mr. Mock responded stating, "I'm sorry this happened." On April 3, 2014, Ms. Morris reported the incident to the Dean. She did not report the incident to the police because she did not believe that she had proof of rape.

After making his findings of fact, the UTC Chancellor proceeded to set forth his 26 conclusions of law. He concluded that Mr. Mock had violated SOC 7 because Mr. Mock did not testify that Ms. Morris consented, and upheld his expulsion from UTC. Mr. Mock requested a stay of the effectiveness of the decision, to which Ms. Morris objected. The UTC Chancellor denied the request for a stay. On December 4, 2014, Mr. Mock filed his petition for judicial review and injunctive relief.

ISSUES

Counsel for Mr. Mock disputes that important conclusions of law made by the UTC Chancellor are supported by substantial and material evidence and further argues that a number of his conclusions of law resulted from embracing standards not contained in UTC's Standard of Conduct Rule 7 ("SOC 7")(which defines sexual assault, sexual misconduct and the mechanisms by which consent is given) in violation of Mr. Mock's due process rights and in violation of his constitutional rights under the 14th Amendment.

He also contends that the UTC Chancellor shifted the burden of proof from UTC and placed it upon Mr. Mock, removing the requirement that UTC prove lack of consent or inability to consent, and instead, required Mr. Mock to prove that he ensured consent, resulting in an erroneous outcome. As a consequence, he argues, the UTC Chancellor found Mr. Mock violated the affirmative consent standard, essentially formalizing a presumption of guilt and requiring Mr. Mock to prove his innocence as an affirmative defense.

Mr. Mock's counsel also argues that the UTC Chancellor declined to consider, let alone give

substantial deference to, the credibility determination made by the ALJ in her Revised Initial Order[1] that "Ms. Morris' own testimony did not convince the hearing officer she was intoxicated" in order to conclude that "Mr. Mock knew or should have known that Ms. Morris' ability to consent to sexual activity was seriously compromised."

He also argues that the UTC Chancellor's ruling is null and void because he chose a standard not in SOC 7, but instead, applied a standard that "Yes Means Yes," which was in excess of statutory authority and made upon an unlawful procedure.

Lastly, Mr. Mock's counsel contends that the UTC Chancellor abused his discretion and acted arbitrarily and capriciously when he expelled Mr. Mock without explanation and without reference to or consideration of the UTC rule prescribing remedies and sanctions.

UTC submits that Mr. Mock acknowledged that SOC 7 is controlling and binding upon him. Further, UTC argues that the record contains substantial and material evidence to support the decision that Mr. Mock violated SOC 7 because he had a duty to obtain Ms. Morris' consent and to ensure that she was capable of consenting. UTC also states that the UTC Chancellor's Findings of Fact provide a reasonably sound factual basis for his decision.

UTC submits that Ms. Morris did not give Mr. Mock an affirmative verbal response to engage in sexual activity, that Mr. Mock failed his two duties, that is, that he was prohibited from engaging in sex with Ms. Morris (1) without her consent or (2) under circumstances in which she was unable to consent due to alcohol/impairment. UTC denies that the decision was arbitrary, capricious, or in violation of authority. Instead, UTC states that the UTC Chancellor correctly

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1. In the Initial Order, the ALJ concluded that "there was no clear evidence that she [Ms. Morris] was intoxicated or drugged during the incident in question." When asked to reconsider her ruling, the ALJ was more definitive and stated "Ms. Morris' own testimony did not convince the hearing officer she was intoxicated."

interpreted SOC 7, using outside authority for context and to explain how "Yes Means Yes" imposed those two duties upon Mr. Mock.

UTC denies that (1) the UTC Chancellor shifted the burden of proof to Mr. Mock, (2) its implementation of SOC 7 violated the Equal Protection Clause, and (3) it violated Mr. Mock's rights to due process.

Finally, UTC submits that expulsion was warranted by law because the UTC Chancellor concluded that Mr. Mock violated SOC 7.

STANDARD OF REVIEW

Judicial review of decisions by administrative agencies following contested case hearings is governed by the Tennessee Uniform Administrative Procedures Act. Tenn. Code Ann. § 4-5-322(a)(1). When the factual support for an administrative decision is challenged, the courts must examine the entire record to determine whether the decision is supported by substantial and material evidence. Tenn. Code Ann. § 4-5-322(h)(5). The substantial and material evidence standard requires a searching and careful inquiry into the record to determine the basis for the administrative decision. *Martin v. Sizemore,* 78 S.W.3d 249, 276 (Tenn. Ct. App. 2001). The court does not reweigh the evidence or substitute its judgment for that of the administrative agency. *Id.* Instead, it reviews the record for such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration. *Id.*

Courts may reject an administrative agency's factual findings only if a reasonable person would necessarily draw a different conclusion from the record. *Jones v. Greene*, 946 S.W.2d 817, 828 (Tenn. Ct. App. 1996). This court may reverse or modify the UTC Chancellor's decision only if Mr. Mock's rights have been prejudiced because the UTC Chancellor's decision is (a) in violation of

constitutional or statutory provisions; (b) in excess of the statutory authority of an agency; (c) made upon unlawful procedure; (d) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (e) unsupported by evidence which is both substantial and material in light of the entire record. Tenn. Code Ann. § 4-5-322(h). However,

> Findings of fact made by the agency may not be reviewed *de novo* by the trial or appellate courts, and courts should not substitute their judgment for that of the agency as to the weight of the evidence on factual issues.

Sanifill of Tennessee, Inc. v. Tennessee Solid Waste Disposal Control Bd., 907 S.W.2d 807, 810 (Tenn. 1995).

An arbitrary and capricious decision "is one that is not based on any course of reasoning or exercise of judgment, or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *Hughes v. Board of Professional Responsibility of Supreme Court of Tennessee*. 259 S.W.3d 613, 641 (Tenn. 2008)(quoting *Jackson Mobilphone Co. Inc. v. Tennessee Public Service Com'n.*, 876 S.W.2d 106, 110-111 (Tenn. Ct. App. 1993)).

An abuse of discretion occurs "when a court strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision." *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010); *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007). "A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence." *Lee Medical*, 312 S.W.3d at 524; *State v. Ostein*, 293 S.W.3d 519, 526 (Tenn. 2009).

ANALYSIS

UTC charged Mr. Mock with violating its Standard of Conduct as follows:

> On or about the early morning hours of March 15, 2014, Mr. Mock sexually assaulted UTC student Mollie Morris. Specifically, Mr. Mock forced Ms. Morris to have sex with him. At no time did Ms. Morris consent to having sex with Mr. Mock. In addition, Mr. Mock was aware that Ms. Morris was unable to consent due to an alcohol and/or chemical impairment.

UTC Standard of Conduct 7, which describes the offense of sexual assault and sexual misconduct, states as follows:

> Sexual assault or misconduct. "Sexual assault" is defined as any sexual act or attempt to engage in any sexual act with another person without the consent of the other person, or in circumstances in which the person is unable to give consent due to age, disability, or an alcohol/chemical or other impairment. "Sexual misconduct" is defined as any intimate touching of another person, or forcing a person to engage in intimate touching of another, without the consent of the other person, or in circumstances in which the person is unable to give consent due to age, disability, or an alcohol/chemical or other impairment. It is the responsibility of the person initiating sexual activity to ensure the other person is capable of consenting to that activity. Consent is given by an affirmative verbal response or acts that are unmistakable in their meaning. Consent to one form of sexual activity does not mean consent is given to another type of sexual activity.

Tenn. R. & Reg. 1720-02-05-.04(7).

Counsel for Mr. Mock argues that UTC had the burden of proving the lack of consent, and that Mr. Mock did not have the burden of proving an affirmative verbal response. He states that the UTC Chancellor never made a finding that Ms. Morris did not consent, only that Mr. Mock failed to prove consent. Further, he asserts that the UTC Chancellor never made a finding that Ms. Morris was unable to consent; he notes that although the UTC Chancellor made a finding that Ms. Morris was impaired and compromised, he never found that she was unable to consent.

As a conclusion of law, the UTC Chancellor stated in his Order that the parties agreed that the burden of proof was on the Dean to produce evidence to persuade the finder of fact by a preponderance of the evidence that Mr. Mock violated SOC 7. Nonetheless, the UTC Chancellor referenced a number of periodical and newspaper articles in his Order to interpret SOC 7 so as to impose upon Mr. Mock a duty to prove an affirmative consent. As defined in the various articles and as adopted by the UTC Chancellor, an affirmative consent standard places the burden on the initiator, i.e., Mr. Mock, to prove that he had ensured Ms. Morris' consent. The language in SOC 7 states that "It is the responsibility of the person initiating sexual activity to ensure the other person is capable of consenting to that activity." However, this does not shift the burden of proof to Mr. Mock to disprove the charges against him. The UTC Chancellor's interpretation of SOC 7 and his implementation of that rule erroneously shifted the burden of proof onto Mr. Mock, when the ultimate burden of proving a sexual assault remained on the charging party, UTC.

The charge brought by UTC against Mr. Mock under SOC 7 presumed that the accused engaged in non-consensual sex based upon the complainant's statement. Accordingly, when an individual is charged with violating SOC 7, it appears that UTC uses the wording of SOC 7 to place the burden upon the accused to prove that consent was secured from the complainant, a person who filed a complaint claiming that no consent was given or who claims to have been incapacitated and unable to knowingly consent. The position of UTC is that it satisfies its burden of proof by requiring the accused to affirmatively prove consent, i.e., no violation of SOC 7. This procedure is flawed and untenable if due process is to be afforded the accused.

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47

L.Ed.2d 18 (1976). Due process is flexible and calls for such procedural protections as the particular situation demands. *Phillips v. State Bd. of Regents,* 863 S.W.2d 45, 50 (Tenn. 1993). The flexible nature of procedural due process requires an imprecise definition because due process embodies the concept of fundamental fairness. *Seals v. State*, 23 S.W.3d 272, 277 (Tenn. 2000). The question here is whether Mr. Mock was afforded a meaningful hearing, which requires "a fair trial before a neutral or unbiased decision-maker," *Martin v. Sizemore*, 78 S.W.3d 249, 264 (Tenn. Ct. App. 2001), if UTC failed to properly assign the burden of proof.

Under the ALJ's Revised Initial Order, a person accused of violating SOC 7 must overcome the presumption inherent in the charge that the violation has been established. Mere denial of the accusation is insufficient. The accused must prove the converse of what is taken as true and credible, i.e., the complainant's statement that no consent was given. He must come forward with proof of an affirmative verbal response that is credible in an environment in which there are seldom, if any, witnesses to an activity which requires exposing each party's most private body parts. Absent the tape recording of a verbal consent or other independent means to demonstrate that consent was given, the ability of an accused to prove the complaining party's consent strains credulity and is illusory. Mr. Mock conceded that he and Ms. Morris engaged in sexual activity; he did not concede that he sexually assaulted her. Indeed, he felt that she had consented through her actions, actions that she did not deny, but which she stated she did not remember, leaving Mr. Mock's testimony about her actions unrebutted. Ms. Morris contends that she was so impaired that she did not remember the events described by Mr. Mock, but the ALJ found her testimony about her intoxication incredible. The UTC Chancellor did not hear the testimony and owed substantial deference to the ALJ's credibility determination on this crucial point.

SOC 7 provides three definitions: one for sexual assault, another for sexual misconduct and a third for consent. As set forth above, the components of a sexual assault as defined therein includes (a) any sexual act or any attempt to engage in any sexual act (b) with another person (c) without the consent of the other person or (d) in circumstances in which the person is unable to give consent due to age, disability, or alcohol/chemical or other impairment. A condensed version of this definition would read "any sexual act with another person without the other person's consent." In SOC 7, consent occurs by "an affirmative verbal response or acts that are unmistakable in their meaning." Thus, SOC 7 provides two ways for a person to consent, by saying "yes" or by the person's conduct.

The UTC Chancellor did not make a finding that Ms. Morris did not consent. Instead, he found Ms. Morris recalled very little from the evening and described her memory as being "like a fog." From her testimony, he concluded that Ms. Morris was impaired because she had been drinking and further concluded "that there was no evidence that Mr. Mock did anything to 'ensure' that Ms. Morris was able to consent." However, he failed to address the credibility determination of the ALJ and failed to address Mr. Mock's testimony regarding Ms. Morris' proactive acts. Instead, he only gave lip service to the ALJ's credibility determination by citing *McEwen v. Tennessee Dep't of Safety*, 173 S.W.3d 815 (Tenn. Ct. App. 2005) in his Order. In *McEwen*, the Tennessee Court of Appeals stated that

> [t]he significance of the hearing officer's or administrative judge's credibility determinations depends largely on the importance of credibility in the particular case. If credibility is not a central ingredient of the agency's decision, then the hearing officer's or administrative judge's credibility determinations are not very significant. If, however, credibility plays a pivotal role, then the hearing officer's or administrative judge's credibility determinations are entitled to substantial deference.

Id. at 824 (internal citations omitted).

There is no indication that the UTC Chancellor gave deference to the ALJ's credibility finding, let alone substantial deference. He never referred to or discussed the substance of the ALJ's credibility determination.

In her Initial Order, the ALJ found that the University failed to carry its burden of proof and dismissed the charges against Mr. Mock. In that Order, the ALJ concluded there was no clear evidence that Ms. Morris was intoxicated or drugged during the incident in question.[2] UTC requested reconsideration of the Initial Order, stating that it only had to prove that Ms. Morris did not have the capacity to consent to a particular sex act initiated by Mr. Mock or that Mr. Mock did not have Ms. Morris' consent to engage in a particular sex act, even if she had the capacity to consent.

UTC stated that

> - UTC only needed to prove one type of incapacity. Even if Ms. Morris was only capacitated [sic] in one sense (i.e., mentally) but not the other (e.g., physically), then she still lacked the capacity to consent to sexual activity. If the Administrative Judge concludes that Ms. Morris did not have memory loss, loss of body control and feeling, and vomiting, then the Administrative Judge should state whether she concludes that Ms. Morris lied about having memory loss and loss of body control and feeling.
>
> - The first finding of fact in the Initial Order on this point was: "Ms. Morris *says* she only recalls limited scenes from the evening after consuming the Fireball." (Initial Order, p. 5, ¶ 25.)(Emphasis added). The next three findings of fact were adopted from UTC's proposed findings of fact and indicate that the Administrative Judge believed Ms. Morris's [sic] undisputed testimony that she suffered memory loss after drinking the Fireball. If the Administrative Judge does not

2. The Initial Order is a relevant and important part of the administrative record. While a reviewing court must focus its attention on the agency's final order, it may consider the initial order when determining whether the agency's final order has sufficient evidentiary support. If the record contains evidence sufficient to support the conflicting findings of the agency and the hearing officer or the administrative judge, the agency's findings must be allowed to stand even though the court might have reached a different conclusion on its own. *McEwen v. Tennessee Dep't of Safety*, supra at 824 (internal citations omitted).

> credit the testimony of Ms. Morris regarding memory loss, which is an indication of mental incapacity, then UTC requests that the Administrative Law Judge so clarify.

The ALJ stated in her revised ruling that after considering UTC's Petition, she was compelled to grant the Petition and revise her Order. In so doing, the ALJ met UTC's demand that she determine if Ms. Morris lied, concluding as a matter of law that

> Ms. Morris' own testimony did not convince the Hearing Officer that she was intoxicated.[3]

As this case turns upon whether Mr. Morris consented to engage in sexual activity with Mr. Mock, Ms. Morris' credibility is pivotal to the ultimate conclusion. Ms. Morris repeatedly testified that she could not recall what happened except for some patches of time, none of which involved her recalling saying "yes." As noted by the UTC Chancellor, her silence does not constitute "yes." By the same reasoning, it does not constitute "no."

Although the ALJ revised her finding that UTC had carried its burden of proof, she did not back away from Ms. Morris' lack of credibility. While Ms. Morris contended that she was unable to remember because she drank to the point of intoxication, she failed to convince the ALJ of this. Without addressing this credibility determination anywhere in his Order, the UTC Chancellor concluded that consuming alcohol impaired Ms. Morris' ability to consent to sexual contact. From that conclusion, the UTC Chancellor stated that when the ability to consent is impaired, SOC 7 placed the duty on Mr. Mock to ensure Ms. Morris was capable of consenting.

The ALJ's finding that Ms. Morris failed to convince her that she was intoxicated negates

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3. The exact wording of the ALJ's second conclusion of law in the Revised Initial Order was as follows:

> The University's claim that Ms. Morris was incapable of consenting to sexual activity and that Mr. Mock was aware of her incapacitation was not proven with a preponderance of the evidence. The other witnesses at the

the conclusion that Ms. Morris was so impaired that she could not consent through her actions. Mr. Mock testified as to two acts by Ms. Morris that were unmistakable in their meaning: taking off her bra and helping to position him to penetrate her. The record contains evidence that Mr. Mock had secured Ms. Morris' consent through her specific actions.

The UTC Chancellor concluded that even if there were proof that Mr. Mock "ensured" that Ms. Morris was able to consent, there is no evidence Ms. Morris in fact consented. As set out above, this conclusion is not supported by the record. In the record, Ms. Morris was not clear that she did not give Mr. Mock an affirmative verbal response until days after the encounter nor was she clear about her actions and behavior. Her testimony was found to be incredible. Mr. Mock's credibility was not questioned by the ALJ and the UTC Chancellor found that Mr. Mock's recollection of events was more detailed.

Mr. Mock's counsel states that Mr. Mock was charged with forcing Ms. Morris to have sex but the UTC Chancellor never found that Mr. Mock forced Ms. Morris to do anything. He stated that Ms. Morris drove herself to the party and that she opened all of the alcoholic beverages that she consumed.[4] If Mr. Mock is believed, and there is nothing to dispute his recollection of events, Ms. Morris removed her bra and helped him perform the sexual act.

When the reviewing court is determining the substantiality of evidence, the UAPA directs it to take into account whatever in the record detracts from the weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Tenn. Code Ann. § 4-5-322(h)(5)(B). Accordingly, this Court has not reweighed the evidence, but reviews the

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hearing testified that they did not believe that Ms. Morris was intoxicated, and Ms. Morris' own testimony did not convince the Hearing Officer that she was intoxicated.

4. Ms. Morris claimed that she initially declined a cinnamon-flavored drink, but when she tasted a cinnamon flavor in her drink, she

record only as to what detracts from the weight given to the evidence by the UTC Chancellor. Both parties spent a considerable portion of their briefs reciting testimony from the transcript and discussing the various findings of fact, all of which reflected that Mr. Mock and Ms. Morris were students at UTC, had a common class and socially knew each, that on March 15-16, 2014, they were at a late-night, very early-morning gathering with other classmates, drinking alcohol and playing drinking games. Ms. Morris gave her version of the events in which she states that she arrived at the gathering by herself at 2 a.m., drank 100 ml of whiskey in the space of an hour, vomited, blacked out and only partially-remembered subsequent events. Mr. Mock, who arrived at 8 p.m., gave a version that closely paralleled Ms. Morris' version until the parties went into a bedroom around 3 a.m.

Ms. Morris did not remember entering the bedroom, nor the events that transpired with the exception that she affirmatively remembered Mr. Mock on top of her, pain and her cry about the pain and Mr. Mock attempting to stifle her cry.[5] Mr. Mock recalled more details about helping Ms. Morris in the bathroom, asking her if she wanted to go to the bedroom, her voluntarily removing her bra, their kissing, his participation in removing her underwear and performing oral sex, her subsequent assistance in positioning him in order to perform vaginal sex.

A thorough reading of the transcript explains and justifies the ALJ's statement in the first Initial Order when she wrote that ". . . it is clear that both parties in this case have exercised poor judgment to their own detriment" and

> [i]t is clear that Ms. Morris should not have engaged in underage drinking, nor should she have been drinking beverages that were not under her control the entire evening, but there was no clear evidence that she was intoxicated or drugged during the

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drank it.

5. Mr. Mock denied that he forced himself on Ms. Morris or that he put his hand over her mouth.

> incident in question. Moreover, if she was indeed as sick as she says (and, again, there evidence [sic] was not clear on this point), Mr. Mock exercised poor judgment in choosing to have sex with her at that time if he really wanted to have a relationship with her.

In that Initial Order, the ALJ stated that charges of sexual assault are taken very seriously and that the case was very troubling because a result based solely on the facts presented at the hearing may or may not reflect what truly happened. She also stated that while such cases can be brutal for a victim to endure, the rights of the accused must also be ensured and that it was imperative for UTC to meet its burden of proof in such cases.

The ALJ initially found that UTC did not meet its burden of proof, but after UTC petitioned for reconsideration, she stated that she was compelled to grant its petition and revised her order. Based upon the same findings of fact which supported her Initial Order, she then concluded that Mr. Mock engaged in a sexual assault and sexual misconduct and ordered Mr. Mock's dismissal from UTC.

In the record, Mr. Mock admitted to having sexual relations with Ms. Morris. Ms. Morris could not remember whether she did or did not have sexual relations, except for her recollection of Mr. Mock on top of her, a strong pain, an effort to say "ow" and Mr. Mock's hand attempting to quiet her. She stated that she did not consent to sexual relations. However, Ms. Morris' inability to remember any other events in the bedroom does not bolster the fact-finder's ability to determine what other conduct occurred there. Mr. Mock denied that he attempted to quiet Ms. Morris with his hand, and stated that she voluntarily removed her bra and that she repositioned him in order to help him enter her. Later that afternoon, Ms. Morris texted Mr. Mock, stating that she could not remember anything and asking if they had had sex. Although Mr. Mock implicitly confirmed that

they had had sex in his reply text, Ms. Morris wanted a personal meeting to secure his affirmation that they had had sex. Only then did she inform him that she had not consented. The transcript reflects that Mr. Mock stated that he was shocked by her accusations and said that he was sorry that she felt that way, but it does not reflect that Mr. Mock admitted that she did not consent.[6] Thereafter, Mr. Mock avoided any contact with Ms. Morris.

UTC has the burden of enforcing its own policies, including SOC 7. The UTC Chancellor, in his conclusions of law, noted that there is an inherent ambiguity in determining consent. He interpreted the language in SOC 7 to mean that the "affirmative verbal response or acts" standard referenced therein was, in part, an effort to change the culture of sexual relations on campus and to clear up the ambiguity surrounding consent. The UTC Chancellor relied upon an article,[7] published months after the Mock-Morris event, that the policy of "Yes Means Yes" requires that the woman consent in advance. Mr. Mock's counsel contends that this conclusion places a burden on the initiator of sexual activity to verify consent, that is, "Yes Means Yes" places the burden on the man[8]

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6. Mr. Mock testified that he felt that everything that happened had been consensual, that he was so stunned and shocked by Ms. Morris' accusations that he did not know what to say. He testified that on the morning of March 16, 2014, he asked Ms. Morris if she wanted to go to the bed, to which she responded "yes" and he "grabbed her hand, helped her up. I made sure on the night in question, she didn't fall over anything. She didn't really like stumble at all. I put my hand on her back just to make sure she was okay. She actually walked first into the bedroom."

7. The UTC Chancellor cited Colb, S., *Making Sense of 'Yes Means 'Yes,'* Verdict (Oct. 29, 2014), http://verdict.justia.com; Bazelon, E., *The Meaning of Yes*, N.Y. Times (Oct. 26 2014), p. 13; Misner, J., *California Shifts to 'Yes Means Yes' Standard for College Sex*, The Chronicles of Higher Education (Sept. 29, 2014), http:chronicle.com/article/California-Shifts-to-Yes/149057/; Wilson, R., *How 'Yes Means Yes' Already Works on One Campus*, The Chronicles of High Education (Sept. 29, 2014), http://chronicle.com/article/How-Yes-Means-Yes-Already/149055; Nicholas Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 V. and L. Rev. 1321, 1347 (2005).

8. Mr. Mock's counsel argued that the UTC Chancellor's use of the standard "yes means yes" as written and explained by Nicholas Little employed an invidious gender distinction because the UTC Chancellor's interpretation of the standard created a binding presumption that sex is not consented to by women, unless an affirmative, prior, verbal consent was secured by the man. As such, his attorney argued that the rule used by the Chancellor was unconstitutional and violated the Equal Protection Clause of the 14th Amendment. This Court assumes that the Chancellor focused on the specific facts in the case, that is, the complainant was female and the accused was a male. By limiting his focus in this way, the Court finds that the Chancellor did not intend to minimize or ignore similar issues pertaining to sexual conduct when the complainant might be a man and the accused might be a woman. Therefore, the Court does not find a viable violation of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

alone and as such, imposes a new rule that was not promulgated in accordance with the Uniform Administrative Procedures Act. ("UAPA").

Mr. Mock's counsel submits that the UTC Chancellor's conclusion that the law presumes a woman does not grant consent unless she is asked and verbally agrees to each specific sexual contact is a different standard from the language in SOC 7 which authorizes consent through "acts that are unmistakeable in their meaning." UTC Rule § 1702-02-.05-04(7). He again argues that this conclusion placed the burden of proof on the accused and imposed the presumption of responsibility upon Mr. Mock, although UTC's rule required the University to prove responsibility. He points out that the UTC Chancellor expanded SOC 7 by declaring that "the responsibility of the person initiating sexual activity to ensure the other person is capable of consenting to that activity" means that silence is not "indicative of a willingness to engage in sexual [intercourse]."

The standard that UTC's SOC 7 imposes, i.e., a responsibility upon the "initiator" of sexual activity to ensure the other person is capable of consenting to that activity, does not alter the assignment of the burden of proof in a subsequent administrative hearing. The UTC Chancellor quoted an article that the recent focus on sexual assault on campuses has resulted in heightened attention and care about how colleges and universities define and respond to allegations of sexual assault and address issues of "consent' that are typically associated with sexual assault allegations. UTC's concern for proper policies regarding sexual assaults does not mean that UTC can condone a sexual assault charge if the victim has consented. Ms. Morris states that she did not tell Mr. Mock that she did not consent until more than a week after the event. If Mr. Mock had testified that Ms. Morris said "Yes," according to her recollection, she was not in a condition to rebut that statement.

With regards to sanctions, Mr. Mock's attorney contends that the UTC Chancellor also

abused his discretion and acted arbitrarily and capriciously in imposing expulsion on Mr. Mock. He cites UTC's rule which states:

> (12) Initial order and final order
>
> (b) An initial order or final order shall be in writing and shall include conclusions of law, the policy reasons therefor, and findings of fact for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of the effective date of the order. Findings of fact shall be accompanied by a concise and explicit statement of the underlying facts of record which support the finding. The order must also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief and the time limits for seeking judicial review of the final order. An initial order shall include a statement of any circumstances under which the initial order may, without further notice, become a final order.

Tenn. R. & Reg. 1720-1-5-.01(12)(b). PROCEDURE FOR CONDUCTING HEARINGS IN ACCORDANCE WITH THE CONTESTED CASE PROVISIONS OF THE UNIFORM ADMINISTRATIVE PROCEDURES ACT

He states that the UTC Chancellor did not abide by this rule and did not make any findings of fact or conclusion of law regarding the "remedy prescribed." He alleges that the Chancellor failed to consider the factors set forth in those rules which are used to guide penalty decision, engaged in no course of reasoning and displayed no exercise of judgment.

UTC responds that the Court's scope of review of the disciplinary penalty imposed on Mr. Mock is extremely limited. This Court concurs. UTC states that the expulsion may only be overturned if the penalty is unwarranted in law or without justification in fact. *Mosley v. Tennessee Dep't of Commerce & Ins.*, 167 S.W.3d 308, 321 (Tenn. Ct. App. 2004). In *Mosley*, the Commissioner concluded his decision by identifying how the sanctions imposed by the administrative tribunal upon Mr. Mosley were clearly warranted in law. *Id.* at 323. The UTC Chancellor provided no facts or conclusions of law in his Opinion for the Court to review regarding

the imposition of sanctions. UTC SOC 8 defines the penalties available[9] to the UTC Chancellor and states

> Disciplinary penalties are primarily intended to educate students and student organizations about appropriate behavior, encourage students and student organizations to take responsibility for misconduct, promote the personal and professional development of students, discourage other students and student organizations from violating the Standards of Conduct, and protect members of the University community. The penalties imposed should be appropriate for the particular case based on the gravity of the offense (including without limitation how the violation affected or reasonably could have affected other members of the University community). Consideration may also be given to the student's or student organization's conduct record, the student's or student organization's responsiveness to the conduct process, student academic classification, and other aggravating or mitigating factors.

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9. The following penalties may be imposed on any student found to have violated the Standards of Conduct:

(a) Warning. A warning is a notice that the student is violating or has violated the Standards of Conduct.
(b) Loss of Privilege. This penalty is intended to serve as a reminder of the Standards of Conduct and is for a specific period of time. Privileges that may be lost include, but are not limited to, scholarships, stipends, participation in extracurricular activities (e.g. intramurals), housing privileges, participation in social activities, and use of certain University-controlled property (e.g., information technology resources).
(c) Educational Sanction. Students may be required to attend classes, at their own expense, dealing with issues such as the consequences of alcohol or drug use, civility, ethics, or other topics as deemed appropriate by the Vice Chancellor for Student Development or his/her designee.
(d) Restitution. Restitution may be required in situations that involve destruction, damage, or loss of property, or unreimbursed medical expenses resulting from physical injury. Restitution may take the form of a monetary payment or appropriate service to repair or otherwise compensate for the destruction, damage, or loss.
(e) Disciplinary Reprimand. A disciplinary reprimand is used for minor violations of the Standards of Conduct. A reprimand indicates that further violations will result in more severe disciplinary actions.
(f) Disciplinary Probation. This penalty permits a student to remain at the University on probationary status but with the understanding that a future violation of the Standards of Conduct may result in suspension. Probation may be for a defined or indefinite period. Other conditions of probation are specific to each individual case and may include a requirement of community service or other requirement or restriction.
(g) Suspension for a Specific Period of Time. Suspension for a specific period of time readmission for a designated period of time. Usually, the period of designated suspension does not exceed one (1) calendar year. Other conditions of suspension are specific to each individual case and may include a requirement of community service or other requirement or restriction. Upon return to the University following a suspension for a specific period of time, the student may be placed on indefinite disciplinary probation.
(h) Permanent Dismissal. Permanent dismissal means that a student is permanently barred from matriculating as a student on the Chattanooga campus. This penalty is used when the violation of one (1) or more of the institution's Standards of Conduct is deemed so serious as to warrant total and permanent disassociation from the University community without the possibility of re-enrollment; or when, by his/her
repeated violation of the institution's Standards of Conduct, a student exhibits blatant disregard for the health and safety of other members of the University community or the University's right to establish rules of conduct.
(i) Revocation of Admission or Degree. Revocation of admission or degree means revoking a student's admission to the University or revoking a degree already awarded by the University. Revocation of a degree shall be approved by the University of Tennessee Board of Trustees.
Tenn. R. & Regs. 1720-02-05-.08(2) PENALTIES(emphasis added).

Tenn. R. & Regs. 1720-02-05-.08(1) PENALTIES.

Were this Court to find that UTC had properly carried its burden of proof, the question of whether expulsion was justified in fact remains. Even absent the numerous conflicts in the testimony, or assumptions of facts that are not support by substantial evidence, and the question of credibility as set out in this record, the penalties imposed would warrant a discussion of the proper sanction(s) that might have been imposed if the burden of proof had been properly fulfilled.

CONCLUSION

As set out above, the UTC Chancellor improperly shifted the burden of proof and imposed an untenable standard upon Mr. Mock to disprove the accusation that he forcible assaulted Ms. Morris. He made no finding that Ms. Morris did not consent, intertwined the definition in SOC 7 of sexual assault and sexual misconduct, and made no distinction as to which acts had occurred. He ignored the ALJ's credibility determination on a crucial issue which adversely impacted his findings and conclusions. Thus, his decision was rendered arbitrary and capricious.

In her first Initial Order, the ALJ heard the testimony of each party and the witnesses. She properly assessed that UTC failed to carry its burden of proof and dismissed the charges against Mr. Mock. The Court reinstates the first Initial Order of the ALJ and reverses the decision of the UTC Chancellor for the reasons set out above. Costs are taxed to the Respondent.

IT IS SO ORDERED.

Carol L. McCoy

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