IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

JOHN DOE,	)	
	)	
Plaintiff,	)	**Civil Action No. 6:19-cv-23**
	)	
v.	)	
	)	
WASHINGTON & LEE UNIVERSITY	)	**By: Hon. Robert S. Ballou**
	)	**United States Magistrate Judge**
Defendant.	)	

ORDER

Before me is Plaintiff's Motion to Compel in which Plaintiff seeks the production of investigation and hearing records of student disciplinary administrative proceedings. Dkt. 44. I **GRANT** Plaintiff's Motion.

I. Background

Plaintiff John Doe filed this lawsuit against Defendant Washington and Lee University ("W&L") asserting gender discrimination and retaliation in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*[1] Dkt. 1. John Doe alleges that W&L wrongly found him responsible of sexual misconduct with a female student, suspended him from the University, and retaliated against him by refusing to reinstate him despite fulfilling all conditions for readmission. Id.

On July 31, 2019, Plaintiff propounded the following document request:

> All hearing board opinions and appeal decisions relating to proceedings held pursuant to the Sexual Misconduct Policy, from the academic year 2009-10 to the present, with the names of all involved students redacted, but the gender of the students indicated.

[1] Plaintiff asserted additional claims, but they were dismissed on February 10, 2020, and only the Title IX claim remains. Dkt. 42.

W&L objected to the request and refused to produce any responsive documents. On December 13, 2019, John served supplemental discovery requesting that W&L produce:

> The investigation reports (including their appendices) from all cases in which a hearing panel resolved contested allegations of non-consensual sexual penetration or non-consensual sexual touching from academic years 2009-10 through the present.

W&L again objected and did not produce the sought-after documents. Instead, W&L produced a chart which contained the sexual misconduct charges against W&L students from the 2016 – 2017 academic year. The chart provided information regarding each student misconduct charge in the following nine categories: the alleged offense, the names of the investigators, the hearing date, the hearing board's determination of responsibility, any sanctions imposed, the appeal date, the names of the appellate panel, the appeal outcome, and the gender of the complainant and the respondent. Later, W&L expanded the summary chart to include all disciplinary proceedings involving student sexual misconduct from 2009 to the present and provided the academic year and the specific charges brought against the respondent. Thereafter, John Doe identified ten cases from W&L's chart for which he requested the underlying investigation report and decision letters. W&L has steadfastly refused to produce the documents John Doe seeks.

II. Standard

Generally, parties are entitled to discovery regarding any non-privileged matter that is relevant to any claim or defense. Fed.R.Civ.P. 26(b)(1). "Information within this scope of discovery need not be admissible in evidence to be discoverable." Id. The discovery sought must also be proportional to the needs of the case.

As it relates to a motion to compel "the party or person resisting discovery, not the party moving to compel discovery, bears the burden of persuasion." Kinetic Concepts, Inc. v. ConvaTec Inc., 268 F.R.D. 226, 243 (M.D.N.C.2010). When a party makes a *prima facie*

showing of discoverability, the resisting party must show that the requested discovery does not come within the broad scope of relevance as defined under Fed.R.Civ.P. 26(b)(1) or is of such marginal relevance that the potential harm caused outweighs the ordinary presumption of broad discovery. Eramo v. Rolling Stone LLC, 314 F.R.D. 205, 209 (W.D. Va. 2016) (citing Desrosiers v. MAG Industrial Automation Sys., LLC, 675 F.Supp.2d 598, 601 (D. Md. 2009)).

III. Analysis

John Doe's claims under Title IX assert two theories of recovery – erroneous outcome and selective enforcement. See Dkt. 1, ¶¶ 253, 263; Dkt. 44, pp. 5–6. To prevail under an erroneous outcome theory a plaintiff must show 1) facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding and 2) a particularized causal connection between the flawed outcome and the gender bias. Doe v. Marymount Univ., 297 F. Supp. 3d 573, 583– 585 (E.D. Va. 2018) (citing Doe v. Miami University, et al., 882 F.3d 579, 592 (6th Cir. 2018)). To prevail on a selective enforcement claim, a plaintiff must demonstrate that a similarly situated respondent of the opposite sex was treated more favorably than the plaintiff. See Doe 2 by and through Doe 1 v. Fairfax County School Board, 384 F.Supp.3d 598, 608 (2019) (citing Rossley v. Drake Univ., 342 F. Supp. 3d 904, 931 (S.D. Iowa 2018); Doe v. Cummins, 662 F. App'x 437, 452 (6th Cir. 2016)). Virginia courts have held that a Plaintiff alleging a claim of selective enforcement must identify a specific comparator. See Sheppard v. Visitors of Va. State Univ., No. 3:18cv723, 2019 WL 1869856, at *4–5 (E.D. Va. Apr. 25, 2019); Streno v. Shenandoah Univ., 278 F. Supp. 3d 924, 932 (W.D. VA. 2017).

At issue here are the records of ten sexual misconduct disciplinary proceedings including the full investigative reports, appendices to those reports, and hearing decision memos. The material John Doe seeks is substantially relevant to his claims under both an erroneous outcome

and selective enforcement theory that W&L intentionally mistreated him due to "institutional gender bias" manifested through the actions of investigators and decisions by hearing panel members. Dkt. 1, ¶¶ 23–28, 256. The content of investigative reports and hearing decision memos relating to allegations of similar sexual misconduct relates directly his Title IX claims in a level of depth and detail which the W&L summary chart simply does not provide. See DOE v. Ohio State University, No. 2:15–cv–2830, 2015 WL 6082606, at *2 (S.D. Ohio Oct. 16, 2015) (determining whether the university defendant "treats males unfairly in sexual misconduct investigations…necessitates looking at the data and the context surrounding that data"). For example, in Doe v. Marymount, the Court found that a plaintiff had properly pleaded an erroneous outcome claim under Title IX because an adjudicator in the plaintiff's case had made comments indicative of gender bias in a subsequent proceeding. 297 F. Supp. 3d at 585–586. I also find that the broad standard for discovery under Fed.R.Civ.P. 26(b)(1) requires that W&L produce the requested documents. The information sought is probative of the claims asserted, is limited to only ten student misconduct proceedings, and is proportional to the overall needs of the case. I also find particularly relevant the single file in which a female student was accused of sexual misconduct. This record is relevant as a comparator under the selective enforcement theory advanced by John Doe.

W&L is rightfully concerned about production of the sensitive and private information contained in the hearing summaries and investigatory reports. These concerns are properly addressed by redacting the names of all students involved in those proceedings and restricting access of these records to "Attorneys Eyes Only." See Doe v. Rollins College, No. 6:18-cv-01069 (M.D. Fla. Apr. 10, 2019) (ordering college with only slightly higher enrollment than

W&L to produce records of formal and informal adjudications of sexual misconduct with the names of students redacted).

IV. Conclusion

For these reasons, the Motion to Compel is **GRANTED** and W&L shall produce within 14 days from the date of this order the investigative reports, including appendices, and hearing panel decision letters requested. The documents produced shall be redacted of any names of students involved, and are considered restricted for "Attorneys Eyes Only" review. The parties may submit a protective order regarding the use of the produced documents in this case.

It is so **ORDERED**.

Entered: March 25, 2020

Robert S. Ballou

Robert S. Ballou
United States Magistrate Judge