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November 3, 2017 Presentation on Title IX and School Disciplinary Hearings

Materials:

1. Slides from Presentation
2. Materials from Department of Education
    a. 2011 Dear Colleague Letter
    b. 2014 Questions and Answers on Title IX and Sexual Violence
    c. 2017 Dear Colleague Letter
    d. 2017 Q&A on Campus Sexual Misconduct
3. Judge Nancy Gertner Article
4. Selected Cases:
    a. *Doe v. Univ. of Cincinnati*, 2017 U.S. App. LEXIS 18458
    b. *Doe v. Cummins*, 662 Fed. Appx. 437
    c. *Plummer v. Univ. of Houston*, 860 F.3d 767
    d. *Nokes v. Miami Univ.*, 2017 U.S. Dist. LEXIS 136880
    e. *Doe v. Ohio State Univ.*, 219 F. Supp. 3d 645

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Title IX and the Investigations of Sexual Assault on College and University Campuses

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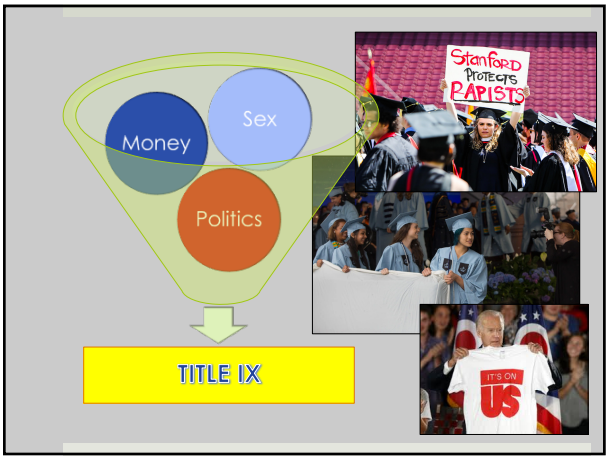
Quick Bio

- Education
  - B.A. University of Pennsylvania
  - J.D. Harvard University Law School
- Experience
  - Choate, Hall & Stewart
  - Prosecutor in Massachusetts and Ohio
  - State of Ohio
  - Private Practice
- Married to a Professor



How I Started: Cummins Case

- Allegation: Rape of two women after a party
- Investigation by Police
- No Bill by Grand Jury
- School Kangaroo Court

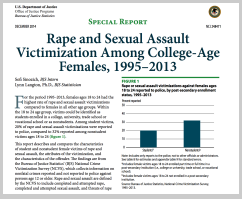
How I Started: Cummins Case

- Allegation: Rape of two women after a party
- Investigation by Police
- No Bill by Grand Jury
- School Kangaroo Court
- Tortured Procedural History
- Contradictory Court Decision:
  - No bias to violate Due Process
  - Bias in favor of victims is OK because not gender discrimination

Current Lawsuits – Engel & Martin

- Public Schools:
  - University of Houston
  - University of Cincinnati
  - The Ohio State University
  - Wright State University
  - Miami University
- Private Schools:
  - William and Hobart
  - College of Wooster
  - Syracuse University

The Problem



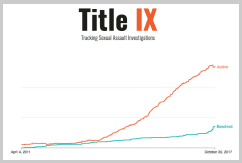
2011 Dear Colleague Letter

- On April 11, 2011, "Dear Colleague"
- Required schools "adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited."
- "Significant guidance document"
  - Did "not add requirements to applicable law"
  - No Notice and Comment Rulemaking
- Key Provisions:
  - Fair and Equitable Process
  - Employ Preponderance of the Evidence Standard
  - Allow accusers to appeal not-guilty findings
  - 60-day limit, and not defer to criminal process
  - Discouraged direct cross-examination of accusers

Threat of Loss of Funding

- OCR Director told NPR: "I will go to enforcement, and I am prepared to withhold federal funds."
- The White House issued a report entitled "Not Alone" in April 2014, which includes a warning that if the OCR finds that a Title IX violation, the "school risks losing federal funds"
- July 2016, Vice President Biden suggested that schools that do not comply with administration guidelines could be stripped of federal funding.
- Chronicle of Higher Education: college presidents took as "crisp marching orders from Washington."

Investigations



- As of October 30, 2017:
  - 449 Investigations
  - 94 Resolved
  - 355 Remain Open
- Investigation is punishment
  - Public knowledge
  - Burdensome

Response of Schools

- University of Pennsylvania Law School Faculty:

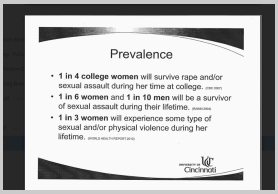
  we believe that OCR's approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness. We do not believe that providing justice for victims of sexual assault requires subordinating so many protections long deemed necessary to protect from injustice those accused of serious offenses.

- Judge Nancy Gertner

  The new standard of proof, coupled with the media pressure, effectively creates a presumption in favor of the woman complainant. If you find against her, you will see yourself on 60 Minutes or in an OCR investigation where your funding is at risk. If you find for her, no one is likely to complain.

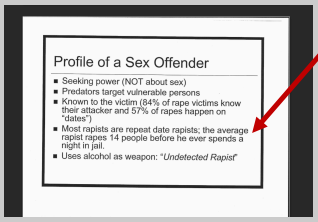
UC Hearing Panel Training

- Bias:
  - Makes a claim of sexual assault seem more credible
  - Encourage panel members to find an alleged sex offender responsible before he can commit another sexual assault.
- Deviation from fact finding role: protect the campus



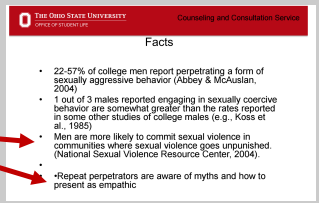
Creation of Community Pressure

- Creates risk of "letting a guilty person go"

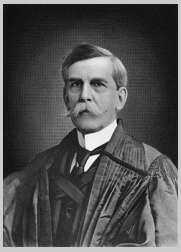


Ohio State Training Materials

- Encourages decisions based on statistics and stereotypes
  - College men are likely to commit offenses
  - If not punished, will be more crime
  - Encourages discounting of persuasive testimony
- Does not matter if statistics are true or not



The Key To Understanding



Vengeance imports a feeling of blame and an opinion, however distorted by passion, that a wrong has been done. It can hardly go very far beyond the case of a harm intentionally inflicted; ***even a dog distinguishes between being stumbled over and being kicked***

Holmes, *The Common Law* (1909)

Due Process 101

Public Institutions

- Students have a liberty or property interest in continuing their education
- Constitution requires due process before student can be suspended or expelled

Private Institutions

- No constitutional protections
- Possible sources
  - Student handbook
  - Values of a liberal education

Doe v. University of Cincinnati

- Allegation of sexual assault during a Tinder hookup
- Complainant provides statement to investigator
- UC conducted a haring to determine if student had violated the Student Code of Conduct.
  - Complainant did not appear at the ARC Hearing.
  - The "Investigative File" was read to the hearing panel.
    - The investigator and the Title IX coordinators were not present.
    - Included statements of the four people Complainant told her story to
  - No Physical evidence presented
- Result: Responsible

Doe v. UC: Hearing

[ARC CHAIR:] Okay, so the complainant is not here. At this time I would have given them [sic] time to ask questions of the Title IX report. But again, they [sic] are not here. So we'll move on. So now, do you, as the respondent, [REDACTED], have any questions of the Title IX report?

[DOE]: Well, since she's not here, I can't really ask anything . . .

Confrontation of Witnesses

- Why have cross-examination? Answer: Accuracy
  - *Blackstone*, Commentaries on the Laws of England (1768): "This open examination of witnesses . . . is much more conducive to the clearing up of truth"
  - *Pointer v. Texas*(1965): "Probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth . . ."
- Need to acknowledge costs
  - Victims can be traumatized
  - School administrators don't have the training or experience to control
- Schools create some of the problems through process
  - Inexperience or untrained chairs
  - No attorney participation

Doe v. UC: Result = Injunction

- *"In this case, the ARC Hearing Committee was given the choice of believing either Jane Roe or Plaintiff, and therefore, cross-examination was essential to due process."*
  - Distinguish cases with high school students
  - Judge Barrett's Decision suggests that written question process could have been acceptable
- Arguments of School:
  - Opportunity to be heard is a chance to point out inconsistencies/problems with statements
  - Real complaint is lack of subpoena power

Doe v. UC: Sixth Circuit

- Purpose of due process is to aid the trier of fact, not the accused student:
  - "the present case left the ARC panel with a choice between believing an accuser and an accused. Yet, the panel resolved this "problem of credibility" without assessing Roe's credibility. *Id.* (citation omitted). In fact, it decided plaintiff's fate without seeing or hearing from Roe at all. That is disturbing and, in this case, a denial of due process."
  - "One-sided determinations are not known for their accuracy. Jane Roe deserves a reliable, accurate outcome as much as John Doe."
- Extended: *Nokes v. Miami University*

Doe v. The Ohio State University

- Students at The Ohio State University College of Medicine
  - Accused student going into final year
  - Complainant started in 2013.
- **December 2013**: Complainant requested permission to take a leave of absence and to restart the first year of medical school
- **July 2014**: Complainant and Accused Student have sex after meeting at a bar. NO COMPLAINT.
- **March 23, 2015**: Academic Program Director informs Complainant he was referring her to the ABRC with the recommendation that the Committee "consider dismissal from the College of Medicine."

Doe v. OSU Reporting Timeline

- **March 25, 2015**: Complainant contacted the OSU Counseling and Consultation Service
- **April 2, 2015**: Complainant met with victim advocate and (later) Title IX Coordinator
- **April 15, 2015**: Med School Hearing
  - Advocate accompanied and helped prepare a statement
  - OSU Title IX director sent letter of support; affirmatively stated that Ms. Roe was "a victim of a crime sexual in nature,"
  - Complainant told ABRC that she had been sexually assaulted in July, 2014
- **April 21, 2015**: Allowed to restart Med School

False Statements at Hearing

"I had to present this case to the [Med School Committee] and tell them about this assault and how it affected me throughout this year. . . . their decision to keep me in school and allow me continue next year in the fall ***was already decided before my decision to report this assault.****"*

Reported assault to Advocate and Title IX Coordinator prior to Med School decision

"this [reporting the assault] ***doesn't give me any benefit*** *other than holding him responsible and meeting an ethical obligation — or responsibility, rather."*

Letter: Allowed to stay in school in "acknowledgment of the apparent impact of the personal incident [i.e. the sexual assault] which you described as affecting your performance ...."

Disclosure of Helpful Evidence

- Example: Accused Student often asked: why would she make up this allegation?
- Possible answers in possession of school:
  - Academic records
  - Victim advocacy
- Accommodations could affect credibility
  - Creates incentive for students to fabricate to obtain accommodation
  - Locks in a story
- Mistakes:
  - Not trusting finder of fact to evaluate this evidence
  - Inclusion of "hearsay" reports of assault to bolster credibility of victim

Court Decision: Need to Disclose

. . . without discovery or mandatory disclosures, Doe is left to rely on the beneficence of the university administrators. Doe only has what he can unearth and what OSU provides to form the basis of any cross-examination. In this case, Doe alleges that he had no way to know about critical evidence that would impeach his accuser's credibility, and this was a case where the panel's decision hinged on a credibility decision

If the Administrators knew that Jane Roe lied about the timing of her accommodation at the hearing and permitted her testimony to stand unrebutted, that plausibly violated John Doe's right to a fundamentally fair hearing. . .

Supreme Court . . .

Problem: the Supreme Court has provided very little guidance on this issue

Goss v. Lopez

- Facts
  - High school students suspended for 10 days for destroying property
  - Generally, no hearings.
- Student must be given "oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story"
- Limitation:
  - "We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days."
  - "Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures."

University of Missouri v. Horowitz

- Facts:
  - Medical Student
  - Dismissed after poor performance in clinicals
- "A school is an academic institution, not a courtroom or administrative hearing room."
- Limitations:
  - Notes "the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct."
  - Goss requirements did not apply to academic violations (such as charges of plagiarism)

Due Process Framework

- *Goldberg v. Kelly*
  - "The fundamental requisite of due process of law is the opportunity to be heard."
  - The hearing provided must be "at a meaningful time and in a meaningful manner.
- Mathews v. Eldridge
  - "Due process is flexible and calls for such procedural protections as the particular situation demands."
  - Balancing Test
- Balance:
  - Students' interest in their education
  - Risk of an erroneous deprivation
  - Probable value, if any, of additional or substitute procedural safeguards
  - Burdens that the additional safeguards would entail on the school

Due Process Includes . . .

- Notice
- Full and Fair Investigation
- Presumption of Innocence
- Opportunity to Present Evidence and Witnesses
- Ability to compel witnesses to attend
- Confront Adverse Witnesses
- Representative
- Unbiased Hearing Panel
- Checklist approach is wrong
- Holistic Approach
  - Protections interact and reinforce each other
  - Cannot look at each protection in isolation
- Not a criminal trial, BUT . . . Due Process guarantees enhance accuracy and reliability

Where Are We Going?

- September 22, 2017: Department Rescinded Dear Colleague Letter

  many schools have established procedures for resolving allegations that "lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation."

Dear Colleague Letter:

. . . led to the deprivation of rights for many students—both accused students denied fair process and victims denied an adequate resolution of their complaints. The guidance has not succeeded in providing clarity for educational institutions or in leading institutions to guarantee educational opportunities on the equal basis that Title IX requires.

DOE Plans

- Department plans to institute new rules through a Notice and Comment process
- DOE has no real idea what it wants to do in this area
- Issues to be addressed:
  - Training and Experience
  - Standard of Proof
  - Cross-Examination
  - Procedural Protections
  - Concurrent law enforcement jurisdiction
- Have to ask: any evidence Trump Administration has a commitment to due process?

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Best way to get update information on this issue

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UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

April 4, 2011

Dear Colleague:

Education has long been recognized as the great equalizer in America. The U.S. Department of Education and its Office for Civil Rights (OCR) believe that providing all students with an educational environment free from discrimination is extremely important. The sexual harassment of students, including sexual violence, interferes with students' right to receive an education free from discrimination and, in the case of sexual violence, is a crime.

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX. In order to assist recipients, which include school districts, colleges, and universities (hereinafter "schools" or "recipients") in meeting these obligations, this letter[1] explains that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence.[2] Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape,

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[1] The Department has determined that this Dear Colleague Letter is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), *available at:* http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/012507_good_guidance.pdf. OCR issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to us at the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, DC 20202.

[2] Use of the term "sexual harassment" throughout this document includes sexual violence unless otherwise noted. Sexual harassment also may violate Title IV of the Civil Rights Act of 1964 (42 U.S.C. § 2000c), which prohibits public school districts and colleges from discriminating against students on the basis of sex, among other bases. The U.S. Department of Justice enforces Title IV.

sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.

The statistics on sexual violence are both deeply troubling and a call to action for the nation. A report prepared for the National Institute of Justice found that about 1 in 5 women are victims of completed or attempted sexual assault while in college.[3] The report also found that approximately 6.1 percent of males were victims of completed or attempted sexual assault during college.[4] According to data collected under the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092(f), in 2009, college campuses reported nearly 3,300 forcible sex offenses as defined by the Clery Act.[5] This problem is not limited to college. During the 2007-2008 school year, there were 800 reported incidents of rape and attempted rape and 3,800 reported incidents of other sexual batteries at public high schools.[6] Additionally, the likelihood that a woman with intellectual disabilities will be sexually assaulted is estimated to be significantly higher than the general population.[7] The Department is deeply concerned about this problem and is committed to ensuring that all students feel safe in their school, so that they have the opportunity to benefit fully from the school's programs and activities.

This letter begins with a discussion of Title IX's requirements related to student-on-student sexual harassment, including sexual violence, and explains schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence. These requirements are discussed in detail in OCR's *Revised Sexual Harassment Guidance* issued in 2001 (*2001 Guidance*).[8] This letter supplements the *2001 Guidance* by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence. This letter concludes by discussing the proactive efforts schools can take to prevent sexual harassment and violence, and by providing examples of remedies that schools and OCR may use to end such conduct, prevent its recurrence, and address its effects. Although some examples contained in this letter are applicable only in the postsecondary context, sexual

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[3] CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT xiii (Nat'l Criminal Justice Reference Serv., Oct. 2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf. This study also found that the majority of campus sexual assaults occur when women are incapacitated, primarily by alcohol. *Id.* at xviii.

[4] *Id.* at 5-5.

[5] U.S. Department of Education, Office of Postsecondary Education, Summary Crime Statistics (data compiled from reports submitted in compliance with the Clery Act), *available at* http://www2.ed.gov/admins/lead/safety/criminal2007-09.pdf. Under the Clery Act, forcible sex offenses are defined as any sexual act directed against another person, forcibly and/or against that person's will, or not forcibly or against the person's will where the victim is incapable of giving consent. Forcible sex offenses include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. 34 C.F.R. Part 668, Subpt. D, App. A.

[6] SIMONE ROBERS ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY: 2010 at 104 (U.S. Dep't of Educ. & U.S. Dep't of Justice, Nov. 2010), *available at* http://nces.ed.gov/pubs2011/2011002.pdf.

[7] ERIKA HARRELL & MICHAEL R. RAND, CRIME AGAINST PEOPLE WITH DISABILITIES, 2008 (Bureau of Justice Statistics, U.S. Dep't of Justice, Dec. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/capd08.pdf.

[8] The *2001 Guidance* is available on the Department's Web site at http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. This letter focuses on peer sexual harassment and violence. Schools' obligations and the appropriate response to sexual harassment and violence committed by employees may be different from those described in this letter. Recipients should refer to the *2001 Guidance* for further information about employee harassment of students.

harassment and violence also are concerns for school districts. The Title IX obligations discussed in this letter apply equally to school districts unless otherwise noted.

Title IX Requirements Related to Sexual Harassment and Sexual Violence

Schools' Obligations to Respond to Sexual Harassment and Sexual Violence

Sexual harassment is unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment prohibited by Title IX.[9]

As explained in OCR's *2001 Guidance*, when a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. For instance, a single instance of rape is sufficiently severe to create a hostile environment.[10]

Title IX protects students from sexual harassment in a school's education programs and activities. This means that Title IX protects students in connection with all the academic, educational, extracurricular, athletic, and other programs of the school, whether those programs take place in a school's facilities, on a school bus, at a class or training program

[9] Title IX also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature. The Title IX obligations discussed in this letter also apply to gender-based harassment. Gender-based harassment is discussed in more detail in the *2001 Guidance,* and in the 2010 Dear Colleague letter on Harassment and Bullying, which is available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

[10] *See*, *e.g.*, *Jennings v. Univ. of N.C.*, 444 F.3d 255, 268, 274 n.12 (4th Cir. 2006) (acknowledging that while not an issue in this case, a single incident of sexual assault or rape could be sufficient to raise a jury question about whether a hostile environment exists, and noting that courts look to Title VII cases for guidance in analyzing Title IX sexual harassment claims); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 259 n.4 (6th Cir. 2000) ("'[w]ithin the context of Title IX, a student's claim of hostile environment can arise from a single incident'" (quoting *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 62 (D. Me. 1999))); *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999) (explaining that rape and sexual abuse "obviously qualif[y] as…severe, pervasive, and objectively offensive sexual harassment"); *see also Berry v. Chi. Transit Auth.*, 618 F.3d 688, 692 (7th Cir. 2010) (in the Title VII context, "a single act can create a hostile environment if it is severe enough, and instances of uninvited physical contact with intimate parts of the body are among the most severe types of sexual harassment"); *Turner v. Saloon, Ltd.*, 595 F.3d 679, 686 (7th Cir. 2010) (noting that "'[o]ne instance of conduct that is sufficiently severe may be enough,'" which is "especially true when the touching is of an intimate body part" (quoting *Jackson v. Cnty. of Racine*, 474 F.3d 493, 499 (7th Cir. 2007))); *McKinnis v. Crescent Guardian, Inc.*, 189 F. App'x 307, 310 (5th Cir. 2006) (holding that "'the deliberate and unwanted touching of [a plaintiff's] intimate body parts can constitute severe sexual harassment'" in Title VII cases (quoting *Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 436 (5th Cir. 2005))).

sponsored by the school at another location, or elsewhere. For example, Title IX protects a student who is sexually assaulted by a fellow student during a school-sponsored field trip.[11]

If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.[12] Schools also are required to publish a notice of nondiscrimination and to adopt and publish grievance procedures. Because of these requirements, which are discussed in greater detail in the following section, schools need to ensure that their employees are trained so that they know to report harassment to appropriate school officials, and so that employees with the authority to address harassment know how to respond properly. Training for employees should include practical information about how to identify and report sexual harassment and violence. OCR recommends that this training be provided to any employees likely to witness or receive reports of sexual harassment and violence, including teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors.

Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity. If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator's friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment. The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.

Regardless of whether a harassed student, his or her parent, or a third party files a complaint under the school's grievance procedures or otherwise requests action on the student's behalf, a school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. As discussed later in this letter, the school's Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct. The specific steps in a school's

[11] Title IX also protects third parties from sexual harassment or violence in a school's education programs and activities. For example, Title IX protects a high school student participating in a college's recruitment program, a visiting student athlete, and a visitor in a school's on-campus residence hall. Title IX also protects employees of a recipient from sexual harassment. For further information about harassment of employees, see *2001 Guidance* at n.1.

[12] This is the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief. *See 2001 Guidance* at ii-v, 12-13. The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. *See Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 643, 648 (1999).

investigation will vary depending upon the nature of the allegations, the age of the student or students involved (particularly in elementary and secondary schools), the size and administrative structure of the school, and other factors. Yet as discussed in more detail below, the school's inquiry must in all cases be prompt, thorough, and impartial. In cases involving potential criminal conduct, school personnel must determine, consistent with State and local law, whether appropriate law enforcement or other authorities should be notified.[13]

Schools also should inform and obtain consent from the complainant (or the complainant's parents if the complainant is under 18 and does not attend a postsecondary institution) before beginning an investigation. If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation. If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant that its ability to respond may be limited.[14] The school also should tell the complainant that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs.

As discussed in the *2001 Guidance*, if the complainant continues to ask that his or her name or other identifiable information not be revealed, the school should evaluate that request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. Thus, the school may weigh the request for confidentiality against the following factors: the seriousness of the alleged harassment; the complainant's age; whether there have been other harassment complaints about the same individual; and the alleged harasser's rights to receive information about the allegations if the information is maintained by the school as an "education record" under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. Part 99.[15] The school should inform the complainant if it cannot ensure confidentiality. Even if the school cannot take disciplinary action against the alleged harasser because the complainant insists on confidentiality, it should pursue other steps to limit the effects of the alleged harassment and prevent its recurrence. Examples of such steps are discussed later in this letter.

Compliance with Title IX, such as publishing a notice of nondiscrimination, designating an employee to coordinate Title IX compliance, and adopting and publishing grievance procedures, can serve as preventive measures against harassment. Combined with education and training programs, these measures can help ensure that all students and employees recognize the

[13] In states with mandatory reporting laws, schools may be required to report certain incidents to local law enforcement or child protection agencies.

[14] Schools should refer to the *2001 Guidance* for additional information on confidentiality and the alleged perpetrator's due process rights.

[15] For example, the alleged harasser may have a right under FERPA to inspect and review portions of the complaint that directly relate to him or her. In that case, the school must redact the complainant's name and other identifying information before allowing the alleged harasser to inspect and review the sections of the complaint that relate to him or her. In some cases, such as those where the school is required to report the incident to local law enforcement or other officials, the school may not be able to maintain the complainant's confidentiality.

nature of sexual harassment and violence, and understand that the school will not tolerate such conduct. Indeed, these measures may bring potentially problematic conduct to the school's attention before it becomes serious enough to create a hostile environment. Training for administrators, teachers, staff, and students also can help ensure that they understand what types of conduct constitute sexual harassment or violence, can identify warning signals that may need attention, and know how to respond. More detailed information and examples of education and other preventive measures are provided later in this letter.

Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence

Recipients of Federal financial assistance must comply with the procedural requirements outlined in the Title IX implementing regulations. Specifically, a recipient must:

(A) Disseminate a notice of nondiscrimination;[16]

(B) Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX;[17] and

(C) Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.[18]

These requirements apply to all forms of sexual harassment, including sexual violence, and are important for preventing and effectively responding to sex discrimination. They are discussed in greater detail below. OCR advises recipients to examine their current policies and procedures on sexual harassment and sexual violence to determine whether those policies comply with the requirements articulated in this letter and the *2001 Guidance.* Recipients should then implement changes as needed.

(A) *Notice of Nondiscrimination*

The Title IX regulations require that each recipient publish a notice of nondiscrimination stating that the recipient does not discriminate on the basis of sex in its education programs and activities, and that Title IX requires it not to discriminate in such a manner.[19] The notice must state that inquiries concerning the application of Title IX may be referred to the recipient's Title IX coordinator or to OCR. It should include the name or title, office address, telephone number, and e-mail address for the recipient's designated Title IX coordinator.

The notice must be widely distributed to all students, parents of elementary and secondary students, employees, applicants for admission and employment, and other relevant persons. OCR recommends that the notice be prominently posted on school Web sites and at various

[16] 34 C.F.R. § 106.9.
[17] *Id.* § 106.8(a).
[18] *Id*. § 106.8(b).
[19] *Id.* § 106.9(a).

locations throughout the school or campus and published in electronic and printed publications of general distribution that provide information to students and employees about the school's services and policies. The notice should be available and easily accessible on an ongoing basis.

Title IX does not require a recipient to adopt a policy specifically prohibiting sexual harassment or sexual violence. As noted in the *2001 Guidance*, however, a recipient's general policy prohibiting sex discrimination will not be considered effective and would violate Title IX if, because of the lack of a specific policy, students are unaware of what kind of conduct constitutes sexual harassment, including sexual violence, or that such conduct is prohibited sex discrimination. OCR therefore recommends that a recipient's nondiscrimination policy state that prohibited sex discrimination covers sexual harassment, including sexual violence, and that the policy include examples of the types of conduct that it covers.

(B) *Title IX Coordinator*

The Title IX regulations require a recipient to notify all students and employees of the name or title and contact information of the person designated to coordinate the recipient's compliance with Title IX.[20] The coordinator's responsibilities include overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints. The Title IX coordinator or designee should be available to meet with students as needed. If a recipient designates more than one Title IX coordinator, the notice should describe each coordinator's responsibilities (*e.g.*, who will handle complaints by students, faculty, and other employees). The recipient should designate one coordinator as having ultimate oversight responsibility, and the other coordinators should have titles clearly showing that they are in a deputy or supporting role to the senior coordinator. The Title IX coordinators should not have other job responsibilities that may create a conflict of interest. For example, serving as the Title IX coordinator and a disciplinary hearing board member or general counsel may create a conflict of interest.

Recipients must ensure that employees designated to serve as Title IX coordinators have adequate training on what constitutes sexual harassment, including sexual violence, and that they understand how the recipient's grievance procedures operate. Because sexual violence complaints often are filed with the school's law enforcement unit, all school law enforcement unit employees should receive training on the school's Title IX grievance procedures and any other procedures used for investigating reports of sexual violence. In addition, these employees should receive copies of the school's Title IX policies. Schools should instruct law enforcement unit employees both to notify complainants of their right to file a Title IX sex discrimination complaint with the school in addition to filing a criminal complaint, and to report incidents of sexual violence to the Title IX coordinator if the complainant consents. The school's Title IX coordinator or designee should be available to provide assistance to school law enforcement unit employees regarding how to respond appropriately to reports of sexual violence. The Title IX coordinator also should be given access to school law enforcement unit investigation notes

[20] *Id.* § 106.8(a).

and findings as necessary for the Title IX investigation, so long as it does not compromise the criminal investigation.

(C) *Grievance Procedures*

The Title IX regulations require all recipients to adopt and publish grievance procedures providing for the prompt and equitable resolution of sex discrimination complaints.[21] The grievance procedures must apply to sex discrimination complaints filed by students against school employees, other students, or third parties.

Title IX does not require a recipient to provide separate grievance procedures for sexual harassment and sexual violence complaints. Therefore, a recipient may use student disciplinary procedures or other separate procedures to resolve such complaints. Any procedures used to adjudicate complaints of sexual harassment or sexual violence, including disciplinary procedures, however, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution.[22] These requirements are discussed in greater detail below. If the recipient relies on disciplinary procedures for Title IX compliance, the Title IX coordinator should review the recipient's disciplinary procedures to ensure that the procedures comply with the prompt and equitable requirements of Title IX.[23]

Grievance procedures generally may include voluntary informal mechanisms (*e.g.*, mediation) for resolving some types of sexual harassment complaints. OCR has frequently advised recipients, however, that it is improper for a student who complains of harassment to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the school (*e.g.*, participation by a trained counselor, a trained mediator, or, if appropriate, a teacher or administrator). In addition, as stated in the *2001 Guidance*, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. Moreover, in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis. OCR recommends that recipients clarify in their grievance procedures that mediation will not be used to resolve sexual assault complaints.

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[21] *Id.* § 106.8(b). Title IX also requires recipients to adopt and publish grievance procedures for employee complaints of sex discrimination.

[22] These procedures must apply to all students, including athletes. If a complaint of sexual violence involves a student athlete, the school must follow its standard procedures for resolving sexual violence complaints. Such complaints must not be addressed solely by athletics department procedures. Additionally, if an alleged perpetrator is an elementary or secondary student with a disability, schools must follow the procedural safeguards in the Individuals with Disabilities Education Act (at 20 U.S.C. § 1415 and 34 C.F.R. §§ 300.500-300.519, 300.530-300.537) as well as the requirements of Section 504 of the Rehabilitation Act of 1973 (at 34 C.F.R. §§ 104.35-104.36) when conducting the investigation and hearing.

[23] A school may not absolve itself of its Title IX obligations to investigate and resolve complaints of sexual harassment or violence by delegating, whether through express contractual agreement or other less formal arrangement, the responsibility to administer school discipline to school resource officers or "contract" law enforcement officers. *See* 34 C.F.R. § 106.4.

Prompt and Equitable Requirements

As stated in the *2001 Guidance*, OCR has identified a number of elements in evaluating whether a school's grievance procedures provide for prompt and equitable resolution of sexual harassment complaints. These elements also apply to sexual violence complaints because, as explained above, sexual violence is a form of sexual harassment. OCR will review all aspects of a school's grievance procedures, including the following elements that are critical to achieve compliance with Title IX:

- Notice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;
- Application of the procedures to complaints alleging harassment carried out by employees, other students, or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence;
- Designated and reasonably prompt time frames for the major stages of the complaint process;
- Notice to parties of the outcome of the complaint;[24] and
- An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

As noted in the *2001 Guidance*, procedures adopted by schools will vary in detail, specificity, and components, reflecting differences in the age of students, school sizes and administrative structures, State or local legal requirements, and past experiences. Although OCR examines whether all applicable elements are addressed when investigating sexual harassment complaints, this letter focuses on those elements where our work indicates that more clarification and explanation are needed, including:

(A) *Notice of the grievance procedures*

The procedures for resolving complaints of sex discrimination, including sexual harassment, should be written in language appropriate to the age of the school's students, easily understood, easily located, and widely distributed. OCR recommends that the grievance procedures be prominently posted on school Web sites; sent electronically to all members of the school community; available at various locations throughout the school or campus; and summarized in or attached to major publications issued by the school, such as handbooks, codes of conduct, and catalogs for students, parents of elementary and secondary students, faculty, and staff.

(B) *Adequate, Reliable, and Impartial Investigation of Complaints*

OCR's work indicates that a number of issues related to an adequate, reliable, and impartial investigation arise in sexual harassment and violence complaints. In some cases, the conduct

[24] "Outcome" does not refer to information about disciplinary sanctions unless otherwise noted. Notice of the outcome is discussed in greater detail in Section D below.

may constitute both sexual harassment under Title IX and criminal activity. Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation. In addition, a criminal investigation into allegations of sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably.

A school should notify a complainant of the right to file a criminal complaint, and should not dissuade a victim from doing so either during or after the school's internal Title IX investigation. For instance, if a complainant wants to file a police report, the school should not tell the complainant that it is working toward a solution and instruct, or ask, the complainant to wait to file the report.

Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and, if needed, must take immediate steps to protect the student in the educational setting. For example, a school should not delay conducting its own investigation or taking steps to protect the complainant because it wants to see whether the alleged perpetrator will be found guilty of a crime. Any agreement or Memorandum of Understanding (MOU) with a local police department must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation.[25] Moreover, nothing in an MOU or the criminal investigation itself should prevent a school from notifying complainants of their Title IX rights and the school's grievance procedures, or from taking interim steps to ensure the safety and well-being of the complainant and the school community while the law enforcement agency's fact-gathering is in progress. OCR also recommends that a school's MOU include clear policies on when a school will refer a matter to local law enforcement.

As noted above, the Title IX regulation requires schools to provide equitable grievance procedures. As part of these procedures, schools generally conduct investigations and hearings to determine whether sexual harassment or violence occurred. In addressing complaints filed with OCR under Title IX, OCR reviews a school's procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints. The Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* Like Title IX,

[25] In one recent OCR sexual violence case, the prosecutor's office informed OCR that the police department's evidence gathering stage typically takes three to ten calendar days, although the delay in the school's investigation may be longer in certain instances.

Title VII prohibits discrimination on the basis of sex.[26] OCR also uses a preponderance of the evidence standard when it resolves complaints against recipients. For instance, OCR's Case Processing Manual requires that a noncompliance determination be supported by the preponderance of the evidence when resolving allegations of discrimination under all the statutes enforced by OCR, including Title IX.[27] OCR also uses a preponderance of the evidence standard in its fund termination administrative hearings.[28] Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred). The "clear and convincing" standard (*i.e.*, it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.

Throughout a school's Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing.[29] For example, a school should not conduct a pre-hearing meeting during which only the alleged perpetrator is present and given an opportunity to present his or her side of the story, unless a similar meeting takes place with the complainant; a hearing officer or disciplinary board should not allow only the alleged perpetrator to present character witnesses at a hearing; and a school should not allow the alleged perpetrator to review the complainant's

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[26] *See*, *e.g.*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) (noting that under the "conventional rule of civil litigation," the preponderance of the evidence standard generally applies in cases under Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-55 (1989) (approving preponderance standard in Title VII sex discrimination case) (plurality opinion); *id.* at 260 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment). The *2001 Guidance* noted (on page vi) that "[w]hile *Gebser* and *Davis* made clear that Title VII agency principles do not apply in determining liability for money damages under Title IX, the *Davis* Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX." *See also Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

[27] OCR's Case Processing Manual is available on the Department's Web site, at http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html.

[28] The Title IX regulations adopt the procedural provisions applicable to Title VI of the Civil Rights Act of 1964. *See* 34 C.F.R. § 106.71 ("The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference."). The Title VI regulations apply the Administrative Procedure Act to administrative hearings required prior to termination of Federal financial assistance and require that termination decisions be "supported by and in accordance with the reliable, probative and substantial evidence." 5 U.S.C. § 556(d). The Supreme Court has interpreted "reliable, probative and substantial evidence" as a direction to use the preponderance standard. *See Steadman v. SEC*, 450 U.S. 91, 98-102 (1981).

[29] Access to this information must be provided consistent with FERPA. For example, if a school introduces an alleged perpetrator's prior disciplinary records to support a tougher disciplinary penalty, the complainant would not be allowed access to those records. Additionally, access should not be given to privileged or confidential information. For example, the alleged perpetrator should not be given access to communications between the complainant and a counselor or information regarding the complainant's sexual history.

statement without also allowing the complainant to review the alleged perpetrator's statement.

While OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties. Additionally, any school-imposed restrictions on the ability of lawyers to speak or otherwise participate in the proceedings should apply equally. OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment. OCR also recommends that schools provide an appeals process. If a school provides for appeal of the findings or remedy, it must do so for both parties. Schools must maintain documentation of all proceedings, which may include written findings of facts, transcripts, or audio recordings.

All persons involved in implementing a recipient's grievance procedures (*e.g.*, Title IX coordinators, investigators, and adjudicators) must have training or experience in handling complaints of sexual harassment and sexual violence, and in the recipient's grievance procedures. The training also should include applicable confidentiality requirements. In sexual violence cases, the fact-finder and decision-maker also should have adequate training or knowledge regarding sexual violence.[30] Additionally, a school's investigation and hearing processes cannot be equitable unless they are impartial. Therefore, any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed.

Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.

(C) *Designated and Reasonably Prompt Time Frames*

OCR will evaluate whether a school's grievance procedures specify the time frames for all major stages of the procedures, as well as the process for extending timelines. Grievance procedures should specify the time frame within which: (1) the school will conduct a full investigation of the complaint; (2) both parties receive a response regarding the outcome of the complaint; and (3) the parties may file an appeal, if applicable. Both parties should be given periodic status updates. Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint. Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment. For example, the resolution of a complaint involving multiple incidents with multiple complainants likely would take longer than one involving a single incident that

[30] For instance, if an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner.

occurred in a classroom during school hours with a single complainant.

(D) *Notice of Outcome*

Both parties must be notified, in writing, about the outcome of both the complaint and any appeal,[31] *i.e.*, whether harassment was found to have occurred. OCR recommends that schools provide the written determination of the final outcome to the complainant and the alleged perpetrator concurrently. Title IX does not require the school to notify the alleged perpetrator of the outcome before it notifies the complainant.

Due to the intersection of Title IX and FERPA requirements, OCR recognizes that there may be confusion regarding what information a school may disclose to the complainant.[32] FERPA generally prohibits the nonconsensual disclosure of personally identifiable information from a student's "education record." However, as stated in the *2001 Guidance*, FERPA permits a school to disclose to the harassed student information about the sanction imposed upon a student who was found to have engaged in harassment when the sanction directly relates to the harassed student. This includes an order that the harasser stay away from the harassed student, or that the harasser is prohibited from attending school for a period of time, or transferred to other classes or another residence hall.[33] Disclosure of other information in the student's "education record," including information about sanctions that do not relate to the harassed student, may result in a violation of FERPA.

Further, when the conduct involves a crime of violence or a non-forcible sex offense,[34] FERPA permits a postsecondary institution to disclose to the alleged victim the final results of a

[31] As noted previously, "outcome" does not refer to information about disciplinary sanctions unless otherwise noted.

[32] In 1994, Congress amended the General Education Provisions Act (GEPA), of which FERPA is a part, to state that nothing in GEPA "shall be construed to affect the applicability of title VI of the Civil Rights Act of 1964, title IX of Education Amendments of 1972, title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any applicable program." 20 U.S.C. § 1221(d). The Department interprets this provision to mean that FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions. *See 2001 Guidance* at vii.

[33] This information directly relates to the complainant and is particularly important in sexual harassment cases because it affects whether a hostile environment has been eliminated. Because seeing the perpetrator may be traumatic, a complainant in a sexual harassment case may continue to be subject to a hostile environment if he or she does not know when the perpetrator will return to school or whether he or she will continue to share classes or a residence hall with the perpetrator. This information also directly affects a complainant's decision regarding how to work with the school to eliminate the hostile environment and prevent its recurrence. For instance, if a complainant knows that the perpetrator will not be at school or will be transferred to other classes or another residence hall for the rest of the year, the complainant may be less likely to want to transfer to another school or change classes, but if the perpetrator will be returning to school after a few days or weeks, or remaining in the complainant's classes or residence hall, the complainant may want to transfer schools or change classes to avoid contact. Thus, the complainant cannot make an informed decision about how best to respond without this information.

[34] Under the FERPA regulations, crimes of violence include arson; assault offenses (aggravated assault, simple assault, intimidation); burglary; criminal homicide (manslaughter by negligence); criminal homicide (murder and

disciplinary proceeding against the alleged perpetrator, regardless of whether the institution concluded that a violation was committed.[35] Additionally, a postsecondary institution may disclose to anyone—not just the alleged victim—the final results of a disciplinary proceeding if it determines that the student is an alleged perpetrator of a crime of violence or a non-forcible sex offense, and, with respect to the allegation made, the student has committed a violation of the institution's rules or policies.[36]

Postsecondary institutions also are subject to additional rules under the Clery Act. This law, which applies to postsecondary institutions that participate in Federal student financial aid programs, requires that "both the accuser and the accused must be informed of the outcome[37] of any institutional disciplinary proceeding brought alleging a sex offense."[38] Compliance with this requirement does not constitute a violation of FERPA. Furthermore, the FERPA limitations on redisclosure of information do not apply to information that postsecondary institutions are required to disclose under the Clery Act.[39] Accordingly, postsecondary institutions may not require a complainant to abide by a nondisclosure agreement, in writing or otherwise, that would prevent the redisclosure of this information.

Steps to Prevent Sexual Harassment and Sexual Violence and Correct its Discriminatory Effects on the Complainant and Others

Education and Prevention

In addition to ensuring full compliance with Title IX, schools should take proactive measures to prevent sexual harassment and violence. OCR recommends that all schools implement preventive education programs and make victim resources, including comprehensive victim services, available. Schools may want to include these education programs in their (1) orientation programs for new students, faculty, staff, and employees; (2) training for students who serve as advisors in residence halls; (3) training for student athletes and coaches; and (4) school assemblies and "back to school nights." These programs should include a

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non-negligent manslaughter); destruction, damage or vandalism of property; kidnapping/abduction; robbery; and forcible sex offenses. Forcible sex offenses are defined as any sexual act directed against another person forcibly or against that person's will, or not forcibly or against the person's will where the victim is incapable of giving consent. Forcible sex offenses include rape, sodomy, sexual assault with an object, and forcible fondling. Non-forcible sex offenses are incest and statutory rape. 34 C.F.R. Part 99, App. A.

[35] 34 C.F.R. § 99.31(a)(13). For purposes of 34 C.F.R. §§ 99.31(a)(13)-(14), disclosure of "final results" is limited to the name of the alleged perpetrator, any violation found to have been committed, and any sanction imposed against the perpetrator by the school. 34 C.F.R. § 99.39.

[36] 34 C.F.R. § 99.31(a)(14).

[37] For purposes of the Clery Act, "outcome" means the institution's final determination with respect to the alleged sex offense and any sanctions imposed against the accused. 34 C.F.R. § 668.46(b)(11)(vi)(B).

[38] 34 C.F.R. § 668.46(b)(11)(vi)(B). Under the Clery Act, forcible sex offenses are defined as any sexual act directed against another person forcibly or against that person's will, or not forcibly or against the person's will where the person is incapable of giving consent. Forcible sex offenses include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. Non-forcible sex offenses include incest and statutory rape. 34 C.F.R. Part 668, Subpt. D, App. A.

[39] 34 C.F.R. § 99.33(c).

discussion of what constitutes sexual harassment and sexual violence, the school's policies and disciplinary procedures, and the consequences of violating these policies.

The education programs also should include information aimed at encouraging students to report incidents of sexual violence to the appropriate school and law enforcement authorities. Schools should be aware that victims or third parties may be deterred from reporting incidents if alcohol, drugs, or other violations of school or campus rules were involved.[40] As a result, schools should consider whether their disciplinary policies have a chilling effect on victims' or other students' reporting of sexual violence offenses. For example, OCR recommends that schools inform students that the schools' primary concern is student safety, that any other rules violations will be addressed separately from the sexual violence allegation, and that use of alcohol or drugs never makes the victim at fault for sexual violence.

OCR also recommends that schools develop specific sexual violence materials that include the schools' policies, rules, and resources for students, faculty, coaches, and administrators. Schools also should include such information in their employee handbook and any handbooks that student athletes and members of student activity groups receive. These materials should include where and to whom students should go if they are victims of sexual violence. These materials also should tell students and school employees what to do if they learn of an incident of sexual violence. Schools also should assess student activities regularly to ensure that the practices and behavior of students do not violate the schools' policies against sexual harassment and sexual violence.

Remedies and Enforcement

As discussed above, if a school determines that sexual harassment that creates a hostile environment has occurred, it must take immediate action to eliminate the hostile environment, prevent its recurrence, and address its effects. In addition to counseling or taking disciplinary action against the harasser, effective corrective action may require remedies for the complainant, as well as changes to the school's overall services or policies. Examples of these actions are discussed in greater detail below.

Title IX requires a school to take steps to protect the complainant as necessary, including taking interim steps before the final outcome of the investigation. The school should undertake these steps promptly once it has notice of a sexual harassment or violence allegation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow students to change academic or living situations as appropriate. For instance, the school may prohibit the alleged perpetrator from having any contact with the complainant pending the results of the school's investigation. When taking steps to separate the complainant and alleged perpetrator, a school should minimize the burden on the

[40] The Department's Higher Education Center for Alcohol, Drug Abuse, and Violence Prevention (HEC) helps campuses and communities address problems of alcohol, other drugs, and violence by identifying effective strategies and programs based upon the best prevention science. Information on HEC resources and technical assistance can be found at www.higheredcenter.org.

complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain. In addition, schools should ensure that complainants are aware of their Title IX rights and any available resources, such as counseling, health, and mental health services, and their right to file a complaint with local law enforcement.[41]

Schools should be aware that complaints of sexual harassment or violence may be followed by retaliation by the alleged perpetrator or his or her associates. For instance, friends of the alleged perpetrator may subject the complainant to name-calling and taunting. As part of their Title IX obligations, schools must have policies and procedures in place to protect against retaliatory harassment. At a minimum, schools must ensure that complainants and their parents, if appropriate, know how to report any subsequent problems, and should follow-up with complainants to determine whether any retaliation or new incidents of harassment have occurred.

When OCR finds that a school has not taken prompt and effective steps to respond to sexual harassment or violence, OCR will seek appropriate remedies for both the complainant and the broader student population. When conducting Title IX enforcement activities, OCR seeks to obtain voluntary compliance from recipients. When a recipient does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation.

Schools should proactively consider the following remedies when determining how to respond to sexual harassment or violence. These are the same types of remedies that OCR would seek in its cases.

Depending on the specific nature of the problem, remedies for the complainant might include, but are not limited to:[42]

- providing an escort to ensure that the complainant can move safely between classes and activities;
- ensuring that the complainant and alleged perpetrator do not attend the same classes;
- moving the complainant or alleged perpetrator to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;
- providing counseling services;
- providing medical services;
- providing academic support services, such as tutoring;

[41] The Clery Act requires postsecondary institutions to develop and distribute a statement of policy that informs students of their options to notify proper law enforcement authorities, including campus and local police, and the option to be assisted by campus personnel in notifying such authorities. The policy also must notify students of existing counseling, mental health, or other student services for victims of sexual assault, both on campus and in the community. 20 U.S.C. §§ 1092(f)(8)(B)(v)-(vi).

[42] Some of these remedies also can be used as interim measures before the school's investigation is complete.

- arranging for the complainant to re-take a course or withdraw from a class without penalty, including ensuring that any changes do not adversely affect the complainant's academic record; and
- reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the harassment and the misconduct that may have resulted in the complainant being disciplined.[43]

Remedies for the broader student population might include, but are not limited to:

Counseling and Training

- offering counseling, health, mental health, or other holistic and comprehensive victim services to all students affected by sexual harassment or sexual violence, and notifying students of campus and community counseling, health, mental health, and other student services;
- designating an individual from the school's counseling center to be "on call" to assist victims of sexual harassment or violence whenever needed;
- training the Title IX coordinator and any other employees who are involved in processing, investigating, or resolving complaints of sexual harassment or sexual violence, including providing training on:
    - the school's Title IX responsibilities to address allegations of sexual harassment or violence
    - how to conduct Title IX investigations
    - information on the link between alcohol and drug abuse and sexual harassment or violence and best practices to address that link;
- training all school law enforcement unit personnel on the school's Title IX responsibilities and handling of sexual harassment or violence complaints;
- training all employees who interact with students regularly on recognizing and appropriately addressing allegations of sexual harassment or violence under Title IX; and
- informing students of their options to notify proper law enforcement authorities, including school and local police, and the option to be assisted by school employees in notifying those authorities.

Development of Materials and Implementation of Policies and Procedures

- developing materials on sexual harassment and violence, which should be distributed to students during orientation and upon receipt of complaints, as well as widely posted throughout school buildings and residence halls, and which should include:
    - what constitutes sexual harassment or violence
    - what to do if a student has been the victim of sexual harassment or violence
    - contact information for counseling and victim services on and off school grounds
    - how to file a complaint with the school
    - how to contact the school's Title IX coordinator

[43] For example, if the complainant was disciplined for skipping a class in which the harasser was enrolled, the school should review the incident to determine if the complainant skipped the class to avoid contact with the harasser.

    - what the school will do to respond to allegations of sexual harassment or violence, including the interim measures that can be taken
- requiring the Title IX coordinator to communicate regularly with the school's law enforcement unit investigating cases and to provide information to law enforcement unit personnel regarding Title IX requirements;[44]
- requiring the Title IX coordinator to review all evidence in a sexual harassment or sexual violence case brought before the school's disciplinary committee to determine whether the complainant is entitled to a remedy under Title IX that was not available through the disciplinary committee;[45]
- requiring the school to create a committee of students and school officials to identify strategies for ensuring that students:
    - know the school's prohibition against sex discrimination, including sexual harassment and violence
    - recognize sex discrimination, sexual harassment, and sexual violence when they occur
    - understand how and to whom to report any incidents
    - know the connection between alcohol and drug abuse and sexual harassment or violence
    - feel comfortable that school officials will respond promptly and equitably to reports of sexual harassment or violence;
- issuing new policy statements or other steps that clearly communicate that the school does not tolerate sexual harassment and violence and will respond to any incidents and to any student who reports such incidents; and
- revising grievance procedures used to handle sexual harassment and violence complaints to ensure that they are prompt and equitable, as required by Title IX.

School Investigations and Reports to OCR

- conducting periodic assessments of student activities to ensure that the practices and behavior of students do not violate the school's policies against sexual harassment and violence;
- investigating whether any other students also may have been subjected to sexual harassment or violence;
- investigating whether school employees with knowledge of allegations of sexual harassment or violence failed to carry out their duties in responding to those allegations;
- conducting, in conjunction with student leaders, a school or campus "climate check" to assess the effectiveness of efforts to ensure that the school is free from sexual harassment and violence, and using the resulting information to inform future proactive steps that will be taken by the school; and

[44] Any personally identifiable information from a student's education record that the Title IX coordinator provides to the school's law enforcement unit is subject to FERPA's nondisclosure requirements.

[45] For example, the disciplinary committee may lack the power to implement changes to the complainant's class schedule or living situation so that he or she does not come in contact with the alleged perpetrator.

- submitting to OCR copies of all grievances filed by students alleging sexual harassment or violence, and providing OCR with documentation related to the investigation of each complaint, such as witness interviews, investigator notes, evidence submitted by the parties, investigative reports and summaries, any final disposition letters, disciplinary records, and documentation regarding any appeals.

Conclusion

The Department is committed to ensuring that all students feel safe and have the opportunity to benefit fully from their schools' education programs and activities. As part of this commitment, OCR provides technical assistance to assist recipients in achieving voluntary compliance with Title IX.

If you need additional information about Title IX, have questions regarding OCR's policies, or seek technical assistance, please contact the OCR enforcement office that serves your state or territory. The list of offices is available at http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm. Additional information about addressing sexual violence, including victim resources and information for schools, is available from the U.S. Department of Justice's Office on Violence Against Women (OVW) at http://www.ovw.usdoj.gov/.[46]

Thank you for your prompt attention to this matter. I look forward to continuing our work together to ensure that all students have an equal opportunity to learn in a safe and respectful school climate.

Sincerely,

/s/

Russlynn Ali
Assistant Secretary for Civil Rights

[46] OVW also administers the Grants to Reduce Domestic Violence, Dating Violence, Sexual Assault, and Stalking on Campus Program. This Federal funding is designed to encourage institutions of higher education to adopt comprehensive, coordinated responses to domestic violence, dating violence, sexual assault, and stalking. Under this competitive grant program, campuses, in partnership with community-based nonprofit victim advocacy organizations and local criminal justice or civil legal agencies, must adopt protocols and policies to treat these crimes as serious offenses and develop victim service programs and campus policies that ensure victim safety, offender accountability, and the prevention of such crimes. OVW recently released the first solicitation for the Services, Training, Education, and Policies to Reduce Domestic Violence, Dating Violence, Sexual Assault and Stalking in Secondary Schools Grant Program. This innovative grant program will support a broad range of activities, including training for school administrators, faculty, and staff; development of policies and procedures for responding to these crimes; holistic and appropriate victim services; development of effective prevention strategies; and collaborations with mentoring organizations to support middle and high school student victims.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

Questions and Answers on Title IX and Sexual Violence[1]

Title IX of the Education Amendments of 1972 ("Title IX")[2] is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. All public and private elementary and secondary schools, school districts, colleges, and universities receiving any federal financial assistance (hereinafter "schools", "recipients", or "recipient institutions") must comply with Title IX.[3]

On April 4, 2011, the Office for Civil Rights (OCR) in the U.S. Department of Education issued a Dear Colleague Letter on student-on-student sexual harassment and sexual violence ("DCL").[4] The DCL explains a school's responsibility to respond promptly and effectively to sexual violence against students in accordance with the requirements of Title IX.[5] Specifically, the DCL:

- Provides guidance on the unique concerns that arise in sexual violence cases, such as a school's independent responsibility under Title IX to investigate (apart from any separate criminal investigation by local police) and address sexual violence.

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[1] The Department has determined that this document is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), *available at* www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf. The Office for Civil Rights (OCR) issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C. 20202.

[2] 20 U.S.C. § 1681 *et seq*.

[3] Throughout this document the term "schools" refers to recipients of federal financial assistance that operate educational programs or activities. For Title IX purposes, at the elementary and secondary school level, the recipient generally is the school district; and at the postsecondary level, the recipient is the individual institution of higher education. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that the law's requirements conflict with the organization's religious tenets. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a). For application of this provision to a specific institution, please contact the appropriate OCR regional office.

[4] Available at http://www.ed.gov/ocr/letters/colleague-201104.html.

[5] Although this document and the DCL focus on sexual violence, the legal principles generally also apply to other forms of sexual harassment.

- Provides guidance and examples about key Title IX requirements and how they relate to sexual violence, such as the requirements to publish a policy against sex discrimination, designate a Title IX coordinator, and adopt and publish grievance procedures.

- Discusses proactive efforts schools can take to prevent sexual violence.

- Discusses the interplay between Title IX, the Family Educational Rights and Privacy Act ("FERPA"),[6] and the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act ("Clery Act")[7] as it relates to a complainant's right to know the outcome of his or her complaint, including relevant sanctions imposed on the perpetrator.

- Provides examples of remedies and enforcement strategies that schools and OCR may use to respond to sexual violence.

The DCL supplements OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, issued in 2001 (*2001 Guidance*).[8] The *2001 Guidance* discusses in detail the Title IX requirements related to sexual harassment of students by school employees, other students, or third parties. The DCL and the *2001 Guidance* remain in full force and we recommend reading these Questions and Answers in conjunction with these documents.

In responding to requests for technical assistance, OCR has determined that elementary and secondary schools and postsecondary institutions would benefit from additional guidance concerning their obligations under Title IX to address sexual violence as a form of sexual harassment. The following questions and answers further clarify the legal requirements and guidance articulated in the DCL and the *2001 Guidance* and include examples of proactive efforts schools can take to prevent sexual violence and remedies schools may use to end such conduct, prevent its recurrence, and address its effects. In order to gain a complete understanding of these legal requirements and recommendations, this document should be read in full.

Authorized by

/s/

Catherine E. Lhamon
Assistant Secretary for Civil Rights

April 29, 2014

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[6] 20 U.S.C. §1232g; 34 C.F.R. Part 99.
[7] 20 U.S.C. §1092(f).
[8] Available at http://www.ed.gov/ocr/docs/shguide.html.

Notice of Language Assistance
Questions and Answers on Title IX and Sexual Violence

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TABLE OF CONTENTS

A. A School's Obligation to Respond to Sexual Violence

A-1. What is sexual violence?

Answer: Sexual violence, as that term is used in this document and prior OCR guidance, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent (*e.g.*, due to the student's age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent). A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion. Sexual violence can be carried out by school employees, other students, or third parties. All such acts of sexual violence are forms of sex discrimination prohibited by Title IX.

A-2. How does Title IX apply to student-on-student sexual violence?

Answer: Under Title IX, federally funded schools must ensure that students of all ages are not denied or limited in their ability to participate in or benefit from the school's educational programs or activities on the basis of sex. A school violates a student's rights under Title IX regarding student-on-student sexual violence when the following conditions are met: (1) the alleged conduct is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's educational program, *i.e.* creates a hostile environment; and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.[9]

A-3. How does OCR determine if a hostile environment has been created?

Answer: As discussed more fully in OCR's *2001 Guidance*, OCR considers a variety of related factors to determine if a hostile environment has been created; and also considers the conduct in question from both a subjective and an objective perspective. Specifically, OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. Indeed, a single or isolated incident of sexual violence may create a hostile environment.

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[9] This is the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief. *See 2001 Guidance* at ii-v, 12-13. The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. *See Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629, 643 (1999).

A-4. When does OCR consider a school to have notice of student-on-student sexual violence?

Answer: OCR deems a school to have notice of student-on-student sexual violence if a responsible employee knew, or in the exercise of reasonable care should have known, about the sexual violence. See question D-2 regarding who is a responsible employee.

A school can receive notice of sexual violence in many different ways. Some examples of notice include: a student may have filed a grievance with or otherwise informed the school's Title IX coordinator; a student, parent, friend, or other individual may have reported an incident to a teacher, principal, campus law enforcement, staff in the office of student affairs, or other responsible employee; or a teacher or dean may have witnessed the sexual violence.

The school may also receive notice about sexual violence in an indirect manner, from sources such as a member of the local community, social networking sites, or the media. In some situations, if the school knows of incidents of sexual violence, the exercise of reasonable care should trigger an investigation that would lead to the discovery of additional incidents. For example, if school officials receive a credible report that a student has perpetrated several acts of sexual violence against different students, that pattern of conduct should trigger an inquiry as to whether other students have been subjected to sexual violence by that student. In other cases, the pervasiveness of the sexual violence may be widespread, openly practiced, or well-known among students or employees. In those cases, OCR may conclude that the school should have known of the hostile environment. In other words, if the school would have found out about the sexual violence had it made a proper inquiry, knowledge of the sexual violence will be imputed to the school even if the school failed to make an inquiry. A school's failure to take prompt and effective corrective action in such cases (as described in questions G-1 to G-3 and H-1 to H-3) would violate Title IX even if the student did not use the school's grievance procedures or otherwise inform the school of the sexual violence.

A-5. What are a school's basic responsibilities to address student-on-student sexual violence?

Answer: When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E). If an investigation reveals that sexual violence created a hostile environment, the school must then take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its

effects. But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

Title IX requires a school to protect the complainant and ensure his or her safety as necessary, including taking interim steps before the final outcome of any investigation.[10] The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. If the school determines that the sexual violence occurred, the school must continue to take these steps to protect the complainant and ensure his or her safety, as necessary. The school should also ensure that the complainant is aware of any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement. For additional information on interim measures, see questions G-1 to G-3.

If a school delays responding to allegations of sexual violence or responds inappropriately, the school's own inaction may subject the student to a hostile environment. If it does, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately. For example, if a school's ignoring of a student's complaints of sexual assault by a fellow student results in the complaining student having to remain in classes with the other student for several weeks and the complaining student's grades suffer because he or she was unable to concentrate in these classes, the school may need to permit the complaining student to retake the classes without an academic or financial penalty (in addition to any other remedies) in order to address the effects of the sexual violence.

A-6. Does Title IX cover employee-on-student sexual violence, such as sexual abuse of children?

Answer: Yes. Although this document and the DCL focus on student-on-student sexual violence, Title IX also protects students from other forms of sexual harassment (including sexual violence and sexual abuse), such as sexual harassment carried out by school employees. Sexual harassment by school employees can include unwelcome sexual advances; requests for sexual favors; and other verbal, nonverbal, or physical conduct of a sexual nature, including but not limited to sexual activity. Title IX's prohibition against

[10] Throughout this document, unless otherwise noted, the term "complainant" refers to the student who allegedly experienced the sexual violence.

sexual harassment generally does not extend to legitimate nonsexual touching or other nonsexual conduct. But in some circumstances, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment. For example, a teacher repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment. Early signs of inappropriate behavior with a child can be the key to identifying and preventing sexual abuse by school personnel.

A school's Title IX obligations regarding sexual harassment by employees can, in some instances, be greater than those described in this document and the DCL. Recipients should refer to OCR's *2001 Guidance* for further information about Title IX obligations regarding harassment of students by school employees. In addition, many state and local laws have mandatory reporting requirements for schools working with minors. Recipients should be careful to satisfy their state and local legal obligations in addition to their Title IX obligations, including training to ensure that school employees are aware of their obligations under such state and local laws and the consequences for failing to satisfy those obligations.

With respect to sexual activity in particular, OCR will always view as unwelcome and nonconsensual sexual activity between an adult school employee and an elementary school student or any student below the legal age of consent in his or her state. In cases involving a student who meets the legal age of consent in his or her state, there will still be a strong presumption that sexual activity between an adult school employee and a student is unwelcome and nonconsensual. When a school is on notice that a school employee has sexually harassed a student, it is responsible for taking prompt and effective steps reasonably calculated to end the sexual harassment, eliminate the hostile environment, prevent its recurrence, and remedy its effects. Indeed, even if a school was not on notice, the school is nonetheless responsible for remedying any effects of the sexual harassment on the student, as well as for ending the sexual harassment and preventing its recurrence, when the employee engaged in the sexual activity in the context of the employee's provision of aid, benefits, or services to students (*e.g.*, teaching, counseling, supervising, advising, or transporting students).

A school should take steps to protect its students from sexual abuse by its employees. It is therefore imperative for a school to develop policies prohibiting inappropriate conduct by school personnel and procedures for identifying and responding to such conduct. For example, this could include implementing codes of conduct, which might address what is commonly known as grooming – a desensitization strategy common in adult educator sexual misconduct. Such policies and procedures can ensure that students, parents, and

school personnel have clear guidelines on what are appropriate and inappropriate interactions between adults and students in a school setting or in school-sponsored activities. Additionally, a school should provide training for administrators, teachers, staff, parents, and age-appropriate classroom information for students to ensure that everyone understands what types of conduct are prohibited and knows how to respond when problems arise.[11]

B. Students Protected by Title IX

B-1. Does Title IX protect all students from sexual violence?

Answer: Yes. Title IX protects all students at recipient institutions from sex discrimination, including sexual violence. Any student can experience sexual violence: from elementary to professional school students; male and female students; straight, gay, lesbian, bisexual and transgender students; part-time and full-time students; students with and without disabilities; and students of different races and national origins.

B-2. How should a school handle sexual violence complaints in which the complainant and the alleged perpetrator are members of the same sex?

Answer: A school's obligation to respond appropriately to sexual violence complaints is the same irrespective of the sex or sexes of the parties involved. Title IX protects all students from sexual violence, regardless of the sex of the alleged perpetrator or complainant, including when they are members of the same sex. A school must investigate and resolve allegations of sexual violence involving parties of the same sex using the same procedures and standards that it uses in all complaints involving sexual violence.

Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation. Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school's obligations. Indeed, lesbian, gay, bisexual, and transgender (LGBT) youth report high rates of sexual harassment and sexual violence. A school should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it

[11] For additional informational on training please see the Department of Education's Resource and Emergency Management for Schools Technical Assistance Center – Adult Sexual Misconduct in Schools: Prevention and Management Training, available at http://rems.ed.gov/Docs/ASM_Marketing_Flyer.pdf.

uses in all complaints involving sexual violence. The fact that incidents of sexual violence may be accompanied by anti-gay comments or be partly based on a student's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy those instances of sexual violence.

If a school's policies related to sexual violence include examples of particular types of conduct that violate the school's prohibition on sexual violence, the school should consider including examples of same-sex conduct. In addition, a school should ensure that staff are capable of providing culturally competent counseling to all complainants. Thus, a school should ensure that its counselors and other staff who are responsible for receiving and responding to complaints of sexual violence, including investigators and hearing board members, receive appropriate training about working with LGBT and gender-nonconforming students and same-sex sexual violence. See questions J-1 to J-4 for additional information regarding training.

Gay-straight alliances and similar student-initiated groups can also play an important role in creating safer school environments for LGBT students. On June 14, 2011, the Department issued guidance about the rights of student-initiated groups in public secondary schools under the Equal Access Act. That guidance is available at http://www2.ed.gov/policy/elsec/guid/secletter/110607.html.

B-3. What issues may arise with respect to students with disabilities who experience sexual violence?

Answer: When students with disabilities experience sexual violence, federal civil rights laws other than Title IX may also be relevant to a school's responsibility to investigate and address such incidents.[12] Certain students require additional assistance and support. For example, students with intellectual disabilities may need additional help in learning about sexual violence, including a school's sexual violence education and prevention programs, what constitutes sexual violence and how students can report incidents of sexual

[12] OCR enforces two civil rights laws that prohibit disability discrimination. Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits disability discrimination by public or private entities that receive federal financial assistance, and Title II of the American with Disabilities Act of 1990 (Title II) prohibits disability discrimination by all state and local public entities, regardless of whether they receive federal funding. *See* 29 U.S.C. § 794 and 34 C.F.R. part 104; 42 U.S.C. § 12131 *et seq.* and 28 C.F.R. part 35. OCR and the U.S. Department of Justice (DOJ) share the responsibility of enforcing Title II in the educational context. The Department of Education's Office of Special Education Programs in the Office of Special Education and Rehabilitative Services administers Part B of the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. 1400 *et seq*. and 34 C.F.R. part 300. IDEA provides financial assistance to states, and through them to local educational agencies, to assist in providing special education and related services to eligible children with disabilities ages three through twenty-one, inclusive.

violence. In addition, students with disabilities who experience sexual violence may require additional services and supports, including psychological services and counseling services. Postsecondary students who need these additional services and supports can seek assistance from the institution's disability resource office.

A student who has not been previously determined to have a disability may, as a result of experiencing sexual violence, develop a mental health-related disability that could cause the student to need special education and related services. At the elementary and secondary education level, this may trigger a school's child find obligations under IDEA and the evaluation and placement requirements under Section 504, which together require a school to evaluate a student suspected of having a disability to determine if he or she has a disability that requires special education or related aids and services.[13]

A school must also ensure that any school reporting forms, information, or training about sexual violence be provided in a manner that is accessible to students and employees with disabilities, for example, by providing electronically-accessible versions of paper forms to individuals with print disabilities, or by providing a sign language interpreter to a deaf individual attending a training. See question J-4 for more detailed information on student training.

B-4. What issues arise with respect to international students and undocumented students who experience sexual violence?

Answer: Title IX protects all students at recipient institutions in the United States regardless of national origin, immigration status, or citizenship status.[14] A school should ensure that all students regardless of their immigration status, including undocumented students and international students, are aware of their rights under Title IX. A school must also ensure that any school reporting forms, information, or training about sexual violence be provided in a manner accessible to students who are English language learners. OCR recommends that a school coordinate with its international office and its undocumented student program coordinator, if applicable, to help communicate information about Title IX in languages that are accessible to these groups of students. OCR also encourages schools to provide foreign national complainants with information about the U nonimmigrant status and the T nonimmigrant status. The U nonimmigrant status is set

[13] *See* 34 C.F.R. §§ 300.8; 300.111; 300.201; 300.300-300.311 (IDEA); 34 C.F.R. §§ 104.3(j) and 104.35 (Section 504). Schools must comply with applicable consent requirements with respect to evaluations. *See* 34 C.F.R. § 300.300.
[14] OCR enforces Title VI of the Civil Rights Act of 1964, which prohibits discrimination by recipients of federal financial assistance on the basis of race, color, or national origin. 42 U.S.C. § 2000d.

aside for victims of certain crimes who have suffered substantial mental or physical abuse as a result of the crime and are helpful to law enforcement agency in the investigation or prosecution of the qualifying criminal activity.[15] The T nonimmigrant status is available for victims of severe forms of human trafficking who generally comply with a law enforcement agency in the investigation or prosecution of the human trafficking and who would suffer extreme hardship involving unusual and severe harm if they were removed from the United States.[16]

A school should be mindful that unique issues may arise when a foreign student on a student visa experiences sexual violence. For example, certain student visas require the student to maintain a full-time course load (generally at least 12 academic credit hours per term), but a student may need to take a reduced course load while recovering from the immediate effects of the sexual violence. OCR recommends that a school take steps to ensure that international students on student visas understand that they must typically seek prior approval of the designated school official (DSO) for student visas to drop below a full-time course load. A school may also want to encourage its employees involved in handling sexual violence complaints and counseling students who have experienced sexual violence to approach the DSO on the student's behalf if the student wishes to drop below a full-time course load. OCR recommends that a school take steps to ensure that its employees who work with international students, including the school's DSO, are trained on the school's sexual violence policies and that employees involved in handling sexual violence complaints and counseling students who have experienced sexual violence are aware of the special issues that international students may encounter. See questions J-1 to J-4 for additional information regarding training.

A school should also be aware that threatening students with deportation or invoking a student's immigration status in an attempt to intimidate or deter a student from filing a Title IX complaint would violate Title IX's protections against retaliation. For more information on retaliation see question K-1.

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[15] For more information on the U nonimmigrant status, see http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/questions-answers-victims-criminal-activity-u-nonimmigrant-status.

[16] For more information on the T nonimmigrant status, see http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status.

B-5. How should a school respond to sexual violence when the alleged perpetrator is not affiliated with the school?

Answer: The appropriate response will differ depending on the level of control the school has over the alleged perpetrator. For example, if an athlete or band member from a visiting school sexually assaults a student at the home school, the home school may not be able to discipline or take other direct action against the visiting athlete or band member. However (and subject to the confidentiality provisions discussed in Section E), it should conduct an inquiry into what occurred and should report the incident to the visiting school and encourage the visiting school to take appropriate action to prevent further sexual violence. The home school should also notify the student of any right to file a complaint with the alleged perpetrator's school or local law enforcement. The home school may also decide not to invite the visiting school back to its campus.

Even though a school's ability to take direct action against a particular perpetrator may be limited, the school must still take steps to provide appropriate remedies for the complainant and, where appropriate, the broader school population. This may include providing support services for the complainant, and issuing new policy statements making it clear that the school does not tolerate sexual violence and will respond to any reports about such incidents. For additional information on interim measures see questions G-1 to G-3.

C. Title IX Procedural Requirements

Overview

C-1. What procedures must a school have in place to prevent sexual violence and resolve complaints?

Answer: The Title IX regulations outline three key procedural requirements. Each school must:

(1) disseminate a notice of nondiscrimination (see question C-2);[17]

(2) designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX (see questions C-3 to C-4);[18] and

[17] 34 C.F.R. § 106.9.
[18] *Id.* § 106.8(a).

(3) adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee sex discrimination complaints (see questions C-5 to C-6).[19]

These requirements apply to all forms of sex discrimination and are particularly important for preventing and effectively responding to sexual violence.

Procedural requirements under other federal laws may also apply to complaints of sexual violence, including the requirements of the Clery Act.[20] For additional information about the procedural requirements in the Clery Act, please see http://www2.ed.gov/admins/lead/safety/campus.html.

Notice of Nondiscrimination

C-2. What information must be included in a school's notice of nondiscrimination?

Answer: The notice of nondiscrimination must state that the school does not discriminate on the basis of sex in its education programs and activities, and that it is required by Title IX not to discriminate in such a manner. The notice must state that questions regarding Title IX may be referred to the school's Title IX coordinator or to OCR. The school must notify all of its students and employees of the name or title, office address, telephone number, and email address of the school's designated Title IX coordinator.[21]

Title IX Coordinator

C-3. What are a Title IX coordinator's responsibilities?

Answer: A Title IX coordinator's core responsibilities include overseeing the school's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints. This means that the Title IX coordinator must have knowledge of the requirements of Title IX, of the school's own policies and procedures on sex discrimination, and of all complaints raising Title IX issues throughout the school. To accomplish this, subject to the exemption for school counseling employees discussed in question E-3, the Title IX coordinator must be informed of all

[19] *Id.* § 106.8(b).
[20] All postsecondary institutions participating in the Higher Education Act's Title IV student financial assistance programs must comply with the Clery Act.
[21] For more information on notices of nondiscrimination, please see OCR's Notice of Nondiscrimination (August 2010), available at http://www.ed.gov/ocr/docs/nondisc.pdf.

reports and complaints raising Title IX issues, even if the report or complaint was initially filed with another individual or office or if the investigation will be conducted by another individual or office. The school should ensure that the Title IX coordinator is given the training, authority, and visibility necessary to fulfill these responsibilities.

Because the Title IX coordinator must have knowledge of all Title IX reports and complaints at the school, this individual (when properly trained) is generally in the best position to evaluate a student's request for confidentiality in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students. A school may determine, however, that another individual should perform this role. For additional information on confidentiality requests, see questions E-1 to E-4. If a school relies in part on its disciplinary procedures to meet its Title IX obligations, the Title IX coordinator should review the disciplinary procedures to ensure that the procedures comply with the prompt and equitable requirements of Title IX as discussed in question C-5.

In addition to these core responsibilities, a school may decide to give its Title IX coordinator additional responsibilities, such as: providing training to students, faculty, and staff on Title IX issues; conducting Title IX investigations, including investigating facts relevant to a complaint, and determining appropriate sanctions against the perpetrator and remedies for the complainant; determining appropriate interim measures for a complainant upon learning of a report or complaint of sexual violence; and ensuring that appropriate policies and procedures are in place for working with local law enforcement and coordinating services with local victim advocacy organizations and service providers, including rape crisis centers. A school must ensure that its Title IX coordinator is appropriately trained in all areas over which he or she has responsibility. The Title IX coordinator or designee should also be available to meet with students as needed.

If a school designates more than one Title IX coordinator, the school's notice of nondiscrimination and Title IX grievance procedures should describe each coordinator's responsibilities, and one coordinator should be designated as having ultimate oversight responsibility.

C-4. Are there any employees who should not serve as the Title IX coordinator?

Answer: Title IX does not categorically preclude particular employees from serving as Title IX coordinators. However, Title IX coordinators should not have other job responsibilities that may create a conflict of interest. Because some complaints may raise issues as to whether or how well the school has met its Title IX obligations, designating

the same employee to serve both as the Title IX coordinator and the general counsel (which could include representing the school in legal claims alleging Title IX violations) poses a serious risk of a conflict of interest. Other employees whose job responsibilities may conflict with a Title IX coordinator's responsibilities include Directors of Athletics, Deans of Students, and any employee who serves on the judicial/hearing board or to whom an appeal might be made. Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest.

Grievance Procedures

C-5. Under Title IX, what elements should be included in a school's procedures for responding to complaints of sexual violence?

Answer: Title IX requires that a school adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of sex discrimination, including sexual violence. In evaluating whether a school's grievance procedures satisfy this requirement, OCR will review all aspects of a school's policies and practices, including the following elements that are critical to achieve compliance with Title IX:

(1) notice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;

(2) application of the grievance procedures to complaints filed by students or on their behalf alleging sexual violence carried out by employees, other students, or third parties;

(3) provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and alleged perpetrator to present witnesses and evidence;

(4) designated and reasonably prompt time frames for the major stages of the complaint process (see question F-8);

(5) written notice to the complainant and alleged perpetrator of the outcome of the complaint (see question H-3); and

(6) assurance that the school will take steps to prevent recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate.

To ensure that students and employees have a clear understanding of what constitutes sexual violence, the potential consequences for such conduct, and how the school processes complaints, a school's Title IX grievance procedures should also explicitly include the following in writing, some of which themselves are mandatory obligations under Title IX:

(1) a statement of the school's jurisdiction over Title IX complaints;

(2) adequate definitions of sexual harassment (which includes sexual violence) and an explanation as to when such conduct creates a hostile environment;

(3) reporting policies and protocols, including provisions for confidential reporting;

(4) identification of the employee or employees responsible for evaluating requests for confidentiality;

(5) notice that Title IX prohibits retaliation;

(6) notice of a student's right to file a criminal complaint and a Title IX complaint simultaneously;

(7) notice of available interim measures that may be taken to protect the student in the educational setting;

(8) the evidentiary standard that must be used (preponderance of the evidence) (*i.e.*, more likely than not that sexual violence occurred) in resolving a complaint;

(9) notice of potential remedies for students;

(10) notice of potential sanctions against perpetrators; and

(11) sources of counseling, advocacy, and support.

For more information on interim measures, see questions G-1 to G-3.

The rights established under Title IX must be interpreted consistently with any federally guaranteed due process rights. Procedures that ensure the Title IX rights of the complainant, while at the same time according any federally guaranteed due process to both parties involved, will lead to sound and supportable decisions. Of course, a school should ensure that steps to accord any due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.

A school's procedures and practices will vary in detail, specificity, and components, reflecting differences in the age of its students, school size and administrative structure, state or local legal requirements (*e.g.*, mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

C-6. Is a school required to use separate grievance procedures for sexual violence complaints?

Answer: No. Under Title IX, a school may use student disciplinary procedures, general Title IX grievance procedures, sexual harassment procedures, or separate procedures to resolve sexual violence complaints. However, any procedures used for sexual violence complaints, including disciplinary procedures, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution (as discussed in question C-5), including applying the preponderance of the evidence standard of review. As discussed in question C-3, the Title IX coordinator should review any process used to resolve complaints of sexual violence to ensure it complies with requirements for prompt and equitable resolution of these complaints. When using disciplinary procedures, which are often focused on the alleged perpetrator and can take considerable time, a school should be mindful of its obligation to provide interim measures to protect the complainant in the educational setting. For more information on timeframes and interim measures, see questions F-8 and G-1 to G-3.

D. Responsible Employees and Reporting[22]

D-1. Which school employees are obligated to report incidents of possible sexual violence to school officials?

Answer: Under Title IX, whether an individual is obligated to report incidents of alleged sexual violence generally depends on whether the individual is a responsible employee of the school. A responsible employee must report incidents of sexual violence to the Title IX coordinator or other appropriate school designee, subject to the exemption for school counseling employees discussed in question E-3. This is because, as discussed in question A-4, a school is obligated to address sexual violence about which a responsible employee knew or should have known. As explained in question C-3, the Title IX coordinator must be informed of all reports and complaints raising Title IX issues, even if the report or

[22] This document addresses only Title IX's reporting requirements. It does not address requirements under the Clery Act or other federal, state, or local laws, or an individual school's code of conduct.

complaint was initially filed with another individual or office, subject to the exemption for school counseling employees discussed in question E-3.

D-2. Who is a "responsible employee"?

Answer: According to OCR's *2001 Guidance*, a responsible employee includes any employee: who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.[23]

A school must make clear to all of its employees and students which staff members are responsible employees so that students can make informed decisions about whether to disclose information to those employees. A school must also inform all employees of their own reporting responsibilities and the importance of informing complainants of: the reporting obligations of responsible employees; complainants' option to request confidentiality and available confidential advocacy, counseling, or other support services; and complainants' right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement.

Whether an employee is a responsible employee will vary depending on factors such as the age and education level of the student, the type of position held by the employee, and consideration of both formal and informal school practices and procedures. For example, while it may be reasonable for an elementary school student to believe that a custodial staff member or cafeteria worker has the authority or responsibility to address student misconduct, it is less reasonable for a college student to believe that a custodial staff member or dining hall employee has this same authority.

As noted in response to question A-4, when a responsible employee knows or reasonably should know of possible sexual violence, OCR deems a school to have notice of the sexual violence. The school must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E), and, if the school determines that sexual violence created a hostile environment, the school must then take appropriate steps to address the situation. The

[23] The Supreme Court held that a school will only be liable for money damages in a private lawsuit where there is actual notice to a school official with the authority to address the alleged discrimination and take corrective action. *Gebser v. Lago Vista Ind. Sch. Dist*., 524 U.S. 274, 290 (1998), and *Davis*, 524 U.S. at 642. The concept of a "responsible employee" under OCR's guidance for administrative enforcement of Title IX is broader.

school has this obligation regardless of whether the student, student's parent, or a third party files a formal complaint. For additional information on a school's responsibilities to address student-on-student sexual violence, see question A-5. For additional information on training for school employees, see questions J-1 to J-3.

D-3. What information is a responsible employee obligated to report about an incident of possible student-on-student sexual violence?

Answer: Subject to the exemption for school counseling employees discussed in question E-3, a responsible employee must report to the school's Title IX coordinator, or other appropriate school designee, all relevant details about the alleged sexual violence that the student or another person has shared and that the school will need to determine what occurred and to resolve the situation. This includes the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location. A school must make clear to its responsible employees to whom they should report an incident of alleged sexual violence.

To ensure compliance with these reporting obligations, it is important for a school to train its responsible employees on Title IX and the school's sexual violence policies and procedures. For more information on appropriate training for school employees, see question J-1 to J-3.

D-4. What should a responsible employee tell a student who discloses an incident of sexual violence?

Answer: Before a student reveals information that he or she may wish to keep confidential, a responsible employee should make every effort to ensure that the student understands: (i) the employee's obligation to report the names of the alleged perpetrator and student involved in the alleged sexual violence, as well as relevant facts regarding the alleged incident (including the date, time, and location), to the Title IX coordinator or other appropriate school officials, (ii) the student's option to request that the school maintain his or her confidentiality, which the school (*e.g.*, Title IX coordinator) will consider, and (iii) the student's ability to share the information confidentially with counseling, advocacy, health, mental health, or sexual-assault-related services (*e.g.*, sexual assault resource centers, campus health centers, pastoral counselors, and campus mental health centers). As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request

and should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.

D-5. If a student informs a resident assistant/advisor (RA) that he or she was subjected to sexual violence by a fellow student, is the RA obligated under Title IX to report the incident to school officials?

Answer: As discussed in questions D-1 and D-2, for Title IX purposes, whether an individual is obligated under Title IX to report alleged sexual violence to the school's Title IX coordinator or other appropriate school designee generally depends on whether the individual is a responsible employee.

The duties and responsibilities of RAs vary among schools, and, therefore, a school should consider its own policies and procedures to determine whether its RAs are responsible employees who must report incidents of sexual violence to the Title IX coordinator or other appropriate school designee.[24] When making this determination, a school should consider if its RAs have the general authority to take action to redress misconduct or the duty to report misconduct to appropriate school officials, as well as whether students could reasonably believe that RAs have this authority or duty. A school should also consider whether it has determined and clearly informed students that RAs are generally available for confidential discussions and do not have the authority or responsibility to take action to redress any misconduct or to report any misconduct to the Title IX coordinator or other appropriate school officials. A school should pay particular attention to its RAs' obligations to report other student violations of school policy (*e.g.*, drug and alcohol violations or physical assault). If an RA is required to report other misconduct that violates school policy, then the RA would be considered a responsible employee obligated to report incidents of sexual violence that violate school policy.

If an RA is a responsible employee, the RA should make every effort to ensure that *before* the student reveals information that he or she may wish to keep confidential, the student understands the RA's reporting obligation and the student's option to request that the school maintain confidentiality. It is therefore important that schools widely disseminate policies and provide regular training clearly identifying the places where students can seek confidential support services so that students are aware of this information. The RA

[24] Postsecondary institutions should be aware that, regardless of whether an RA is a responsible employee under Title IX, RAs are considered "campus security authorities" under the Clery Act. A school's responsibilities in regard to crimes reported to campus security authorities are discussed in the Department's regulations on the Clery Act at 34 C.F.R. § 668.46.

should also explain to the student (again, before the student reveals information that he or she may wish to keep confidential) that, although the RA must report the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location to the Title IX coordinator or other appropriate school designee, the school will protect the student's confidentiality to the greatest extent possible. Prior to providing information about the incident to the Title IX coordinator or other appropriate school designee, the RA should consult with the student about how to protect his or her safety and the details of what will be shared with the Title IX coordinator. The RA should explain to the student that reporting this information to the Title IX coordinator or other appropriate school designee does not necessarily mean that a formal complaint or investigation under the school's Title IX grievance procedure must be initiated if the student requests confidentiality. As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request and should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.

Regardless of whether a reporting obligation exists, all RAs should inform students of their right to file a Title IX complaint with the school and report a crime to campus or local law enforcement. If a student discloses sexual violence to an RA who is a responsible employee, the school will be deemed to have notice of the sexual violence even if the student does not file a Title IX complaint. Additionally, all RAs should provide students with information regarding on-campus resources, including victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. RAs should also be familiar with local rape crisis centers or other off-campus resources and provide this information to students.

E. Confidentiality and a School's Obligation to Respond to Sexual Violence

E-1. How should a school respond to a student's request that his or her name not be disclosed to the alleged perpetrator or that no investigation or disciplinary action be pursued to address the alleged sexual violence?

Answer: Students, or parents of minor students, reporting incidents of sexual violence sometimes ask that the students' names not be disclosed to the alleged perpetrators or that no investigation or disciplinary action be pursued to address the alleged sexual violence. OCR strongly supports a student's interest in confidentiality in cases involving sexual violence. There are situations in which a school must override a student's request

for confidentiality in order to meet its Title IX obligations; however, these instances will be limited and the information should only be shared with individuals who are responsible for handling the school's response to incidents of sexual violence. Given the sensitive nature of reports of sexual violence, a school should ensure that the information is maintained in a secure manner. A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence. In the case of minors, state mandatory reporting laws may require disclosure, but can generally be followed without disclosing information to school personnel who are not responsible for handling the school's response to incidents of sexual violence.[25]

Even if a student does not specifically ask for confidentiality, to the extent possible, a school should only disclose information regarding alleged incidents of sexual violence to individuals who are responsible for handling the school's response. To improve trust in the process for investigating sexual violence complaints, a school should notify students of the information that will be disclosed, to whom it will be disclosed, and why. Regardless of whether a student complainant requests confidentiality, a school must take steps to protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. For additional information on interim measures see questions G-1 to G-3.

For Title IX purposes, if a student requests that his or her name not be revealed to the alleged perpetrator or asks that the school not investigate or seek action against the alleged perpetrator, the school should inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator. The school should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate

[25] The school should be aware of the alleged student perpetrator's right under the Family Educational Rights and Privacy Act ("FERPA") torequest to inspect and review information about the allegations if the information directly relates to the alleged student perpetrator and the information is maintained by the school as an education record. In such a case, the school must either redact the complainant's name and all identifying information before allowing the alleged perpetrator to inspect and review the sections of the complaint that relate to him or her, or must inform the alleged perpetrator of the specific information in the complaint that are about the alleged perpetrator. *See* 34 C.F.R. § 99.12(a) The school should also make complainants aware of this right and explain how it might affect the school's ability to maintain complete confidentiality.

and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary. See question K-1 regarding retaliation.

If the student still requests that his or her name not be disclosed to the alleged perpetrator or that the school not investigate or seek action against the alleged perpetrator, the school will need to determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. As discussed in question C-3, the Title IX coordinator is generally in the best position to evaluate confidentiality requests. Because schools vary widely in size and administrative structure, OCR recognizes that a school may reasonably determine that an employee other than the Title IX coordinator, such as a sexual assault response coordinator, dean, or other school official, is better suited to evaluate such requests. Addressing the needs of a student reporting sexual violence while determining an appropriate institutional response requires expertise and attention, and a school should ensure that it assigns these responsibilities to employees with the capability and training to fulfill them. For example, if a school has a sexual assault response coordinator, that person should be consulted in evaluating requests for confidentiality. The school should identify in its Title IX policies and procedures the employee or employees responsible for making such determinations.

If the school determines that it can respect the student's request not to disclose his or her identity to the alleged perpetrator, it should take all reasonable steps to respond to the complaint consistent with the request. Although a student's request to have his or her name withheld may limit the school's ability to respond fully to an individual allegation of sexual violence, other means may be available to address the sexual violence. There are steps a school can take to limit the effects of the alleged sexual violence and prevent its recurrence without initiating formal action against the alleged perpetrator or revealing the identity of the student complainant. Examples include providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred; providing training and education materials for students and employees; changing and publicizing the school's policies on sexual violence; and conducting climate surveys regarding sexual violence. In instances affecting many students, an alleged perpetrator can be put on notice of allegations of harassing behavior and be counseled appropriately without revealing, even indirectly, the identity of the student complainant. A school must also take immediate action as necessary to protect the student while keeping the identity of the student confidential. These actions may include providing support services to the student and changing living arrangements or course schedules, assignments, or tests.

E-2. What factors should a school consider in weighing a student's request for confidentiality?

Answer: When weighing a student's request for confidentiality that could preclude a meaningful investigation or potential discipline of the alleged perpetrator, a school should consider a range of factors.

These factors include circumstances that suggest there is an increased risk of the alleged perpetrator committing additional acts of sexual violence or other violence (e.g., whether there have been other sexual violence complaints about the same alleged perpetrator, whether the alleged perpetrator has a history of arrests or records from a prior school indicating a history of violence, whether the alleged perpetrator threatened further sexual violence or other violence against the student or others, and whether the sexual violence was committed by multiple perpetrators). These factors also include circumstances that suggest there is an increased risk of future acts of sexual violence under similar circumstances (e.g., whether the student's report reveals a pattern of perpetration (e.g., via illicit use of drugs or alcohol) at a given location or by a particular group). Other factors that should be considered in assessing a student's request for confidentiality include whether the sexual violence was perpetrated with a weapon; the age of the student subjected to the sexual violence; and whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence).

A school should take requests for confidentiality seriously, while at the same time considering its responsibility to provide a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. For example, if the school has credible information that the alleged perpetrator has committed one or more prior rapes, the balance of factors would compel the school to investigate the allegation of sexual violence, and if appropriate, pursue disciplinary action in a manner that may require disclosure of the student's identity to the alleged perpetrator. If the school determines that it must disclose a student's identity to an alleged perpetrator, it should inform the student prior to making this disclosure. In these cases, it is also especially important for schools to take whatever interim measures are necessary to protect the student and ensure the safety of other students. If a school has a sexual assault response coordinator, that person should be consulted in identifying safety risks and interim measures that are necessary to protect the student. In the event the student requests that the school inform the perpetrator that the student asked the school not to investigate or seek discipline, the school should honor this request and inform the alleged perpetrator that the school made the decision to go forward. For additional information on interim measures see questions G-1 to G-3. Any school officials responsible for

discussing safety and confidentiality with students should be trained on the effects of trauma and the appropriate methods to communicate with students subjected to sexual violence. See questions J-1 to J-3.

On the other hand, if, for example, the school has no credible information about prior sexual violence committed by the alleged perpetrator and the alleged sexual violence was not perpetrated with a weapon or accompanied by threats to repeat the sexual violence against the complainant or others or part of a larger pattern at a given location or by a particular group, the balance of factors would likely compel the school to respect the student's request for confidentiality. In this case the school should still take all reasonable steps to respond to the complaint consistent with the student's confidentiality request and determine whether interim measures are appropriate or necessary. Schools should be mindful that traumatic events such as sexual violence can result in delayed decisionmaking by a student who has experienced sexual violence. Hence, a student who initially requests confidentiality might later request that a full investigation be conducted.

E-3. What are the reporting responsibilities of school employees who provide or support the provision of counseling, advocacy, health, mental health, or sexual assault-related services to students who have experienced sexual violence?

Answer: OCR does not require campus mental-health counselors, pastoral counselors, social workers, psychologists, health center employees, or any other person with a professional license requiring confidentiality, or who is supervised by such a person, to report, without the student's consent, incidents of sexual violence to the school in a way that identifies the student. Although these employees may have responsibilities that would otherwise make them responsible employees for Title IX purposes, OCR recognizes the importance of protecting the counselor-client relationship, which often requires confidentiality to ensure that students will seek the help they need.

Professional counselors and pastoral counselors whose official responsibilities include providing mental-health counseling to members of the school community are not required by Title IX to report *any* information regarding an incident of alleged sexual violence to the Title IX coordinator or other appropriate school designee.[26]

[26] The exemption from reporting obligations for pastoral and professional counselors under Title IX is consistent with the Clery Act. For additional information on reporting obligations under the Clery Act, see Office of Postsecondary Education, *Handbook for Campus Safety and Security Reporting* (2011), available at http://www2.ed.gov/admins/lead/safety/handbook.pdf. Similar to the Clery Act, for Title IX purposes, a pastoral counselor is a person who is associated with a religious order or denomination, is recognized by that religious

OCR recognizes that some people who provide assistance to students who experience sexual violence are not professional or pastoral counselors. They include all individuals who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers ("non-professional counselors or advocates"), including front desk staff and students. OCR wants students to feel free to seek their assistance and therefore interprets Title IX to give schools the latitude not to require these individuals to report incidents of sexual violence in a way that identifies the student without the student's consent.[27] These non-professional counselors or advocates are valuable sources of support for students, and OCR strongly encourages schools to designate these individuals as confidential sources.

Pastoral and professional counselors and non-professional counselors or advocates should be instructed to inform students of their right to file a Title IX complaint with the school and a separate complaint with campus or local law enforcement. In addition to informing students about campus resources for counseling, medical, and academic support, these persons should also indicate that they are available to assist students in filing such complaints. They should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary.

In order to identify patterns or systemic problems related to sexual violence, a school should collect aggregate data about sexual violence incidents from non-professional counselors or advocates in their on-campus sexual assault centers, women's centers, or

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order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition as a pastoral counselor. A professional counselor is a person whose official responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope of his or her license or certification. This definition applies even to professional counselors who are not employees of the school, but are under contract to provide counseling at the school. This includes individuals who are not yet licensed or certified as a counselor, but are acting in that role under the supervision of an individual who is licensed or certified. An example is a Ph.D. counselor-trainee acting under the supervision of a professional counselor at the school.

[27] Postsecondary institutions should be aware that an individual who is counseling students, but who does not meet the Clery Act definition of a pastoral or professional counselor, is not exempt from being a campus security authority if he or she otherwise has significant responsibility for student and campus activities. See fn. 24.

health centers. Such individuals should report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting personally identifiable information about a student. Non-professional counselors and advocates should consult with students regarding what information needs to be withheld to protect their identity.

E-4. Is a school required to investigate information regarding sexual violence incidents shared by survivors during public awareness events, such as "Take Back the Night"?

Answer: No. OCR wants students to feel free to participate in preventive education programs and access resources for survivors. Therefore, public awareness events such as "Take Back the Night" or other forums at which students disclose experiences with sexual violence are not considered notice to the school for the purpose of triggering an individual investigation unless the survivor initiates a complaint. The school should instead respond to these disclosures by reviewing sexual assault policies, creating campus-wide educational programs, and conducting climate surveys to learn more about the prevalence of sexual violence at the school. Although Title IX does not require the school to investigate particular incidents discussed at such events, the school should ensure that survivors are aware of any available resources, including counseling, health, and mental health services. To ensure that the entire school community understands their Title IX rights related to sexual violence, the school should also provide information at these events on Title IX and how to file a Title IX complaint with the school, as well as options for reporting an incident of sexual violence to campus or local law enforcement.

F. Investigations and Hearings

Overview

F-1. What elements should a school's Title IX investigation include?

Answer: The specific steps in a school's Title IX investigation will vary depending on the nature of the allegation, the age of the student or students involved, the size and administrative structure of the school, state or local legal requirements (including mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

For the purposes of this document the term "investigation" refers to the process the school uses to resolve sexual violence complaints. This includes the fact-finding investigation and any hearing and decision-making process the school uses to determine: (1) whether or not the conduct occurred; and, (2) if the conduct occurred, what actions

the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include imposing sanctions on the perpetrator and providing remedies for the complainant and broader student population.

In all cases, a school's Title IX investigation must be adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence. The investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing.[28] Furthermore, neither Title IX nor the DCL specifies who should conduct the investigation. It could be the Title IX coordinator, provided there are no conflicts of interest, but it does not have to be. All persons involved in conducting a school's Title IX investigations must have training or experience in handling complaints of sexual violence and in the school's grievance procedures. For additional information on training, see question J-3.

When investigating an incident of alleged sexual violence for Title IX purposes, to the extent possible, a school should coordinate with any other ongoing school or criminal investigations of the incident and establish appropriate fact-finding roles for each investigator. A school should also consider whether information can be shared among the investigators so that complainants are not unnecessarily required to give multiple statements about a traumatic event. If the investigation includes forensic evidence, it may be helpful for a school to consult with local or campus law enforcement or a forensic expert to ensure that the evidence is correctly interpreted by school officials. For additional information on working with campus or local law enforcement see question F-3.

If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without additional remedies, likely will not be sufficient to eliminate the hostile environment and prevent recurrence as required by Title IX. If a school typically processes complaints of sexual violence through its disciplinary process and that process, including any investigation and hearing, meets the Title IX requirements discussed above and enables the school to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, then the school may use that process to satisfy its Title IX obligations and does not need to conduct a separate Title IX investigation. As discussed in question C-3, the Title IX coordinator should review the disciplinary process

[28] This answer addresses only Title IX's requirements for investigations. It does not address legal rights or requirements under the U.S. Constitution, the Clery Act, or other federal, state, or local laws.

to ensure that it: (1) complies with the prompt and equitable requirements of Title IX; (2) allows for appropriate interim measures to be taken to protect the complainant during the process; and (3) provides for remedies to the complainant and school community where appropriate. For more information about interim measures, see questions G-1 to G-3, and about remedies, see questions H-1 and H-2.

The investigation may include, but is not limited to, conducting interviews of the complainant, the alleged perpetrator, and any witnesses; reviewing law enforcement investigation documents, if applicable; reviewing student and personnel files; and gathering and examining other relevant documents or evidence. While a school has flexibility in how it structures the investigative process, for Title IX purposes, a school must give the complainant any rights that it gives to the alleged perpetrator. A balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions.[29] Specifically:

- Throughout the investigation, the parties must have an equal opportunity to present relevant witnesses and other evidence.
- The school must use a preponderance-of-the-evidence (*i.e.*, more likely than not) standard in any Title IX proceedings, including any fact-finding and hearings.
- If the school permits one party to have lawyers or other advisors at any stage of the proceedings, it must do so equally for both parties. Any school-imposed restrictions on the ability of lawyers or other advisors to speak or otherwise participate in the proceedings must also apply equally.
- If the school permits one party to submit third-party expert testimony, it must do so equally for both parties.
- If the school provides for an appeal, it must do so equally for both parties.
- Both parties must be notified, in writing, of the outcome of both the complaint and any appeal (see question H-3).

[29] As explained in question C-5, the parties may have certain due process rights under the U.S. Constitution.

Intersection with Criminal Investigations

F-2. What are the key differences between a school's Title IX investigation into allegations of sexual violence and a criminal investigation?

Answer: A criminal investigation is intended to determine whether an individual violated criminal law; and, if at the conclusion of the investigation, the individual is tried and found guilty, the individual may be imprisoned or subject to criminal penalties. The U.S. Constitution affords criminal defendants who face the risk of incarceration numerous protections, including, but not limited to, the right to counsel, the right to a speedy trial, the right to a jury trial, the right against self-incrimination, and the right to confrontation. In addition, government officials responsible for criminal investigations (including police and prosecutors) normally have discretion as to which complaints from the public they will investigate.

By contrast, a Title IX investigation will never result in incarceration of an individual and, therefore, the same procedural protections and legal standards are not required. Further, while a criminal investigation is initiated at the discretion of law enforcement authorities, a Title IX investigation is not discretionary; a school has a duty under Title IX to resolve complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students, free from sexual harassment and sexual violence. Because the standards for pursuing and completing criminal investigations are different from those used for Title IX investigations, the termination of a criminal investigation without an arrest or conviction does not affect the school's Title IX obligations.

Of course, criminal investigations conducted by local or campus law enforcement may be useful for fact gathering if the criminal investigation occurs within the recommended timeframe for Title IX investigations; but, even if a criminal investigation is ongoing, a school must still conduct its own Title IX investigation.

A school should notify complainants of the right to file a criminal complaint and should not dissuade a complainant from doing so either during or after the school's internal Title IX investigation. Title IX does not require a school to report alleged incidents of sexual violence to law enforcement, but a school may have reporting obligations under state, local, or other federal laws.

F-3. How should a school proceed when campus or local law enforcement agencies are conducting a criminal investigation while the school is conducting a parallel Title IX investigation?

Answer: A school should not wait for the conclusion of a criminal investigation or criminal proceeding to begin its own Title IX investigation. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, it is important for a school to understand that during this brief delay in the Title IX investigation, it must take interim measures to protect the complainant in the educational setting. The school should also continue to update the parties on the status of the investigation and inform the parties when the school resumes its Title IX investigation. For additional information on interim measures see questions G-1 to G-3.

If a school delays the fact-finding portion of a Title IX investigation, the school must promptly resume and complete its fact-finding for the Title IX investigation once it learns that the police department has completed its evidence gathering stage of the criminal investigation. The school should not delay its investigation until the ultimate outcome of the criminal investigation or the filing of any charges. OCR recommends that a school work with its campus police, local law enforcement, and local prosecutor's office to learn when the evidence gathering stage of the criminal investigation is complete. A school may also want to enter into a memorandum of understanding (MOU) or other agreement with these agencies regarding the protocols and procedures for referring allegations of sexual violence, sharing information, and conducting contemporaneous investigations. Any MOU or other agreement must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably, and must comply with the Family Educational Rights and Privacy Act ("FERPA") and other applicable privacy laws.

The DCL states that in one instance a prosecutor's office informed OCR that the police department's evidence gathering stage typically takes three to ten calendar days, although the delay in the school's investigation may be longer in certain instances. OCR understands that this example may not be representative and that the law enforcement agency's process often takes more than ten days. OCR recognizes that the length of time for evidence gathering by criminal investigators will vary depending on the specific circumstances of each case.

Off-Campus Conduct

F-4. Is a school required to process complaints of alleged sexual violence that occurred off campus?

Answer: Yes. Under Title IX, a school must process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity.

A school must determine whether the alleged off-campus sexual violence occurred in the context of an education program or activity of the school; if so, the school must treat the complaint in the same manner that it treats complaints regarding on-campus conduct. In other words, if a school determines that the alleged misconduct took place in the context of an education program or activity of the school, the fact that the alleged misconduct took place off campus does not relieve the school of its obligation to investigate the complaint as it would investigate a complaint of sexual violence that occurred on campus.

Whether the alleged misconduct occurred in this context may not always be apparent from the complaint, so a school may need to gather additional information in order to make such a determination. Off-campus education programs and activities are clearly covered and include, but are not limited to: activities that take place at houses of fraternities or sororities recognized by the school; school-sponsored field trips, including athletic team travel; and events for school clubs that occur off campus (*e.g.*, a debate team trip to another school or to a weekend competition).

Even if the misconduct did not occur in the context of an education program or activity, a school must consider the effects of the off-campus misconduct when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity because students often experience the continuing effects of off-campus sexual violence while at school or in an off-campus education program or activity. The school cannot address the continuing effects of the off-campus sexual violence at school or in an off-campus education program or activity unless it processes the complaint and gathers appropriate additional information in accordance with its established procedures.

Once a school is on notice of off-campus sexual violence against a student, it must assess whether there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment and, if so, address that hostile environment in the same manner in which it would address a hostile environment created by on-campus misconduct. The mere presence on campus or in an

off-campus education program or activity of the alleged perpetrator of off-campus sexual violence can have continuing effects that create a hostile environment. A school should also take steps to protect a student who alleges off-campus sexual violence from further harassment by the alleged perpetrator or his or her friends, and a school may have to take steps to protect other students from possible assault by the alleged perpetrator. In other words, the school should protect the school community in the same way it would had the sexual violence occurred on campus. Even if there are no continuing effects of the off-campus sexual violence experienced by the student on campus or in an off-campus education program or activity, the school still should handle these incidents as it would handle other off-campus incidents of misconduct or violence and consistent with any other applicable laws. For example, if a school, under its code of conduct, exercises jurisdiction over physical altercations between students that occur off campus outside of an education program or activity, it should also exercise jurisdiction over incidents of student-on-student sexual violence that occur off campus outside of an education program or activity.

Hearings[30]

F-5. Must a school allow or require the parties to be present during an entire hearing?

Answer: If a school uses a hearing process to determine responsibility for acts of sexual violence, OCR does not require that the school allow a complainant to be present for the entire hearing; it is up to each school to make this determination. But if the school allows one party to be present for the entirety of a hearing, it must do so equally for both parties. At the same time, when requested, a school should make arrangements so that the complainant and the alleged perpetrator do not have to be present in the same room at the same time. These two objectives may be achieved by using closed circuit television or other means. Because a school has a Title IX obligation to investigate possible sexual violence, if a hearing is part of the school's Title IX investigation process, the school must not require a complainant to be present at the hearing as a prerequisite to proceed with the hearing.

[30] As noted in question F-1, the investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing. Although Title IX does not dictate the membership of a hearing board, OCR discourages schools from allowing students to serve on hearing boards in cases involving allegations of sexual violence.

F-6. May every witness at the hearing, including the parties, be cross-examined?

Answer: OCR does not require that a school allow cross-examination of witnesses, including the parties, if they testify at the hearing. But if the school allows one party to cross-examine witnesses, it must do so equally for both parties.

OCR strongly discourages a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence. Allowing an alleged perpetrator to question a complainant directly may be traumatic or intimidating, and may perpetuate a hostile environment. A school may choose, instead, to allow the parties to submit questions to a trained third party (*e.g.*, the hearing panel) to ask the questions on their behalf. OCR recommends that the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case.

F-7. May the complainant's sexual history be introduced at hearings?

Answer: Questioning about the complainant's sexual history with anyone other than the alleged perpetrator should not be permitted. Further, a school should recognize that the mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence. The school should also ensure that hearings are conducted in a manner that does not inflict additional trauma on the complainant.

Timeframes

F-8. What stages of the investigation are included in the 60-day timeframe referenced in the DCL as the length for a typical investigation?

Answer: As noted in the DCL, the 60-calendar day timeframe for investigations is based on OCR's experience in typical cases. The 60-calendar day timeframe refers to the entire investigation process, which includes conducting the fact-finding investigation, holding a hearing or engaging in another decision-making process to determine whether the alleged sexual violence occurred and created a hostile environment, and determining what actions the school will take to eliminate the hostile environment and prevent its recurrence, including imposing sanctions against the perpetrator and providing remedies for the complainant and school community, as appropriate. Although this timeframe does not include appeals, a school should be aware that an unduly long appeals process may impact whether the school's response was prompt and equitable as required by Title IX.

OCR does not require a school to complete investigations within 60 days; rather OCR evaluates on a case-by-case basis whether the resolution of sexual violence complaints is prompt and equitable. Whether OCR considers an investigation to be prompt as required by Title IX will vary depending on the complexity of the investigation and the severity and extent of the alleged conduct. OCR recognizes that the investigation process may take longer if there is a parallel criminal investigation or if it occurs partially during school breaks. A school may need to stop an investigation during school breaks or between school years, although a school should make every effort to try to conduct an investigation during these breaks unless so doing would sacrifice witness availability or otherwise compromise the process.

Because timeframes for investigations vary and a school may need to depart from the timeframes designated in its grievance procedures, both parties should be given periodic status updates throughout the process.

G. Interim Measures

G-1. Is a school required to take any interim measures before the completion of its investigation?

Answer: Title IX requires a school to take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow the complainant to change academic and extracurricular activities or his or her living, transportation, dining, and working situation as appropriate. The school should also ensure that the complainant is aware of his or her Title IX rights and any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement. If a school does not offer these services on campus, it should enter into an MOU with a local victim services provider if possible.

Even when a school has determined that it can respect a complainant's request for confidentiality and therefore may not be able to respond fully to an allegation of sexual violence and initiate formal action against an alleged perpetrator, the school must take immediate action to protect the complainant while keeping the identity of the complainant confidential. These actions may include: providing support services to the

complainant; changing living arrangements or course schedules, assignments, or tests; and providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred.

G-2. How should a school determine what interim measures to take?

Answer: The specific interim measures implemented and the process for implementing those measures will vary depending on the facts of each case. A school should consider a number of factors in determining what interim measures to take, including, for example, the specific need expressed by the complainant; the age of the students involved; the severity or pervasiveness of the allegations; any continuing effects on the complainant; whether the complainant and alleged perpetrator share the same residence hall, dining hall, class, transportation, or job location; and whether other judicial measures have been taken to protect the complainant (*e.g.*, civil protection orders).

In general, when taking interim measures, schools should minimize the burden on the complainant. For example, if the complainant and alleged perpetrator share the same class or residence hall, the school should not, as a matter of course, remove the complainant from the class or housing while allowing the alleged perpetrator to remain without carefully considering the facts of the case.

G-3. If a school provides all students with access to counseling on a fee basis, does that suffice for providing counseling as an interim measure?

Answer: No. Interim measures are determined by a school on a case-by-case basis. If a school determines that it needs to offer counseling to the complainant as part of its Title IX obligation to take steps to protect the complainant while the investigation is ongoing, it must not require the complainant to pay for this service.

H. Remedies and Notice of Outcome[31]

H-1. What remedies should a school consider in a case of student-on-student sexual violence?

Answer: Effective remedial action may include disciplinary action against the perpetrator, providing counseling for the perpetrator, remedies for the complainant and others, as well as changes to the school's overall services or policies. All services needed to remedy the hostile environment should be offered to the complainant. These remedies are separate from, and in addition to, any interim measure that may have been provided prior to the conclusion of the school's investigation. In any instance in which the complainant did not take advantage of a specific service (*e.g.*, counseling) when offered as an interim measure, the complainant should still be offered, and is still entitled to, appropriate final remedies that may include services the complainant declined as an interim measure. A refusal at the interim stage does not mean the refused service or set of services should not be offered as a remedy.

If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without more, likely will not be sufficient to satisfy its Title IX obligation to eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. Additional remedies for the complainant and the school community may be necessary. If the school's student disciplinary procedure does not include a process for determining and implementing these remedies for the complainant and school community, the school will need to use another process for this purpose.

Depending on the specific nature of the problem, remedies for the complainant may include, but are not limited to:

- Providing an effective escort to ensure that the complainant can move safely between classes and activities;

[31] As explained in question A-5, if a school delays responding to allegations of sexual violence or responds inappropriately, the school's own inaction may subject the student to be subjected to a hostile environment. In this case, in addition to the remedies discussed in this section, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately.

- Ensuring the complainant and perpetrator do not share classes or extracurricular activities;

- Moving the perpetrator or complainant (if the complainant requests to be moved) to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;

- Providing comprehensive, holistic victim services including medical, counseling and academic support services, such as tutoring;

- Arranging for the complainant to have extra time to complete or re-take a class or withdraw from a class without an academic or financial penalty; and

- Reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the sexual violence and the misconduct that may have resulted in the complainant being disciplined.[32]

Remedies for the broader student population may include, but are not limited to:

- Designating an individual from the school's counseling center who is specifically trained in providing trauma-informed comprehensive services to victims of sexual violence to be on call to assist students whenever needed;

- Training or retraining school employees on the school's responsibilities to address allegations of sexual violence and how to conduct Title IX investigations;

- Developing materials on sexual violence, which should be distributed to all students;

- Conducting bystander intervention and sexual violence prevention programs with students;

- Issuing policy statements or taking other steps that clearly communicate that the school does not tolerate sexual violence and will respond to any incidents and to any student who reports such incidents;

[32] For example, if the complainant was disciplined for skipping a class in which the perpetrator was enrolled, the school should review the incident to determine if the complainant skipped class to avoid contact with the perpetrator.

- Conducting, in conjunction with student leaders, a campus climate check to assess the effectiveness of efforts to ensure that the school is free from sexual violence, and using that information to inform future proactive steps that the school will take;

- Targeted training for a group of students if, for example, the sexual violence created a hostile environment in a residence hall, fraternity or sorority, or on an athletic team; and

- Developing a protocol for working with local law enforcement as discussed in question F-3.

When a school is unable to conduct a full investigation into a particular incident (*i.e.*, when it received a general report of sexual violence without any personally identifying information), it should consider remedies for the broader student population in response.

H-2. If, after an investigation, a school finds the alleged perpetrator responsible and determines that, as part of the remedies for the complainant, it must separate the complainant and perpetrator, how should the school accomplish this if both students share the same major and there are limited course options?

Answer: If there are limited sections of required courses offered at a school and both the complainant and perpetrator are required to take those classes, the school may need to make alternate arrangements in a manner that minimizes the burden on the complainant. For example, the school may allow the complainant to take the regular sections of the courses while arranging for the perpetrator to take the same courses online or through independent study.

H-3. What information must be provided to the complainant in the notice of the outcome?

Answer: Title IX requires both parties to be notified, in writing, about the outcome of both the complaint and any appeal. OCR recommends that a school provide written notice of the outcome to the complainant and the alleged perpetrator concurrently.

For Title IX purposes, a school must inform the complainant as to whether or not it found that the alleged conduct occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the school has taken to eliminate the hostile environment, if the school finds one to exist, and prevent recurrence. The perpetrator should not be notified of the individual remedies offered or provided to the complainant.

Sanctions that directly relate to the complainant (but that may also relate to eliminating the hostile environment and preventing recurrence) include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending school for a period of time, or transferring the perpetrator to another residence hall, other classes, or another school. Additional steps the school has taken to eliminate the hostile environment may include counseling and academic support services for the complainant and other affected students. Additional steps the school has taken to prevent recurrence may include sexual violence training for faculty and staff, revisions to the school's policies on sexual violence, and campus climate surveys. Further discussion of appropriate remedies is included in question H-1.

In addition to the Title IX requirements described above, the Clery Act requires, and FERPA permits, postsecondary institutions to inform the complainant of the institution's final determination and any disciplinary sanctions imposed on the perpetrator in sexual violence cases (as opposed to all harassment and misconduct covered by Title IX) not just those sanctions that directly relate to the complainant.[33]

I. Appeals

I-1. What are the requirements for an appeals process?

Answer: While Title IX does not require that a school provide an appeals process, OCR does recommend that the school do so where procedural error or previously unavailable relevant evidence could significantly impact the outcome of a case or where a sanction is substantially disproportionate to the findings. If a school chooses to provide for an appeal of the findings or remedy or both, it must do so equally for both parties. The specific design of the appeals process is up to the school, as long as the entire grievance process, including any appeals, provides prompt and equitable resolutions of sexual violence complaints, and the school takes steps to protect the complainant in the educational setting during the process. Any individual or body handling appeals should be trained in the dynamics of and trauma associated with sexual violence.

If a school chooses to offer an appeals process it has flexibility to determine the type of review it will apply to appeals, but the type of review the school applies must be the same regardless of which party files the appeal.

[33] 20 U.S.C. § 1092(f) and 20 U.S.C. § 1232g(b)(6)(A).

I-2. Must an appeal be available to a complainant who receives a favorable finding but does not believe a sanction that directly relates to him or her was sufficient?

Answer: The appeals process must be equal for both parties. For example, if a school allows a perpetrator to appeal a suspension on the grounds that it is too severe, the school must also allow a complainant to appeal a suspension on the grounds that it was not severe enough. See question H-3 for more information on what must be provided to the complainant in the notice of the outcome.

J. Title IX Training, Education and Prevention[34]

J-1. What type of training on Title IX and sexual violence should a school provide to its employees?

Answer: A school needs to ensure that responsible employees with the authority to address sexual violence know how to respond appropriately to reports of sexual violence, that other responsible employees know that they are obligated to report sexual violence to appropriate school officials, and that all other employees understand how to respond to reports of sexual violence. A school should ensure that professional counselors, pastoral counselors, and non-professional counselors or advocates also understand the extent to which they may keep a report confidential. A school should provide training to all employees likely to witness or receive reports of sexual violence, including teachers, professors, school law enforcement unit employees, school administrators, school counselors, general counsels, athletic coaches, health personnel, and resident advisors. Training for employees should include practical information about how to prevent and identify sexual violence, including same-sex sexual violence; the behaviors that may lead to and result in sexual violence; the attitudes of bystanders that may allow conduct to continue; the potential for revictimization by responders and its effect on students; appropriate methods for responding to a student who may have experienced sexual violence, including the use of nonjudgmental language; the impact of trauma on victims; and, as applicable, the person(s) to whom such misconduct must be reported. The training should also explain responsible employees' reporting obligation, including what should be included in a report and any consequences for the failure to report and the procedure for responding to students' requests for confidentiality, as well as provide the contact

[34] As explained earlier, although this document focuses on sexual violence, the legal principles apply to other forms of sexual harassment. Schools should ensure that any training they provide on Title IX and sexual violence also covers other forms of sexual harassment. Postsecondary institutions should also be aware of training requirements imposed under the Clery Act.

information for the school's Title IX coordinator. A school also should train responsible employees to inform students of: the reporting obligations of responsible employees; students' option to request confidentiality and available confidential advocacy, counseling, or other support services; and their right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement. For additional information on the reporting obligations of responsible employees and others see questions D-1 to D-5.

There is no minimum number of hours required for Title IX and sexual violence training at every school, but this training should be provided on a regular basis. Each school should determine based on its particular circumstances how such training should be conducted, who has the relevant expertise required to conduct the training, and who should receive the training to ensure that the training adequately prepares employees, particularly responsible employees, to fulfill their duties under Title IX. A school should also have methods for verifying that the training was effective.

J-2. How should a school train responsible employees to report incidents of possible sexual harassment or sexual violence?

Answer: Title IX requires a school to take prompt and effective steps reasonably calculated to end sexual harassment and sexual violence that creates a hostile environment (*i.e.*, conduct that is sufficiently serious as to limit or deny a student's ability to participate in or benefit from the school's educational program and activity). But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

OCR therefore recommends that a school train responsible employees to report to the Title IX coordinator or other appropriate school official any incidents of sexual harassment or sexual violence that may violate the school's code of conduct or may create or contribute to the creation of a hostile environment. The school can then take steps to investigate and prevent any harassment or violence from recurring or escalating, as appropriate. For example, the school may separate the complainant and alleged perpetrator or conduct sexual harassment and sexual violence training for the school's students and employees. Responsible employees should understand that they do not need to determine whether the alleged sexual harassment or sexual violence actually occurred or that a hostile environment has been created before reporting an incident to the school's Title IX coordinator. Because the Title IX coordinator should have in-depth knowledge of Title IX and Title IX complaints at the school, he or she is likely to be in a better position than are other employees to evaluate whether an incident of sexual

harassment or sexual violence creates a hostile environment and how the school should respond. There may also be situations in which individual incidents of sexual harassment do not, by themselves, create a hostile environment; however when considered together, those incidents may create a hostile environment.

J-3. What type of training should a school provide to employees who are involved in implementing the school's grievance procedures?

Answer: All persons involved in implementing a school's grievance procedures (*e.g.*, Title IX coordinators, others who receive complaints, investigators, and adjudicators) must have training or experience in handling sexual violence complaints, and in the operation of the school's grievance procedures. The training should include information on working with and interviewing persons subjected to sexual violence; information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence; the proper standard of review for sexual violence complaints (preponderance of the evidence); information on consent and the role drugs or alcohol can play in the ability to consent; the importance of accountability for individuals found to have committed sexual violence; the need for remedial actions for the perpetrator, complainant, and school community; how to determine credibility; how to evaluate evidence and weigh it in an impartial manner; how to conduct investigations; confidentiality; the effects of trauma, including neurobiological change; and cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.

In rare circumstances, employees involved in implementing a school's grievance procedures may be able to demonstrate that prior training and experience has provided them with competency in the areas covered in the school's training. For example, the combination of effective prior training and experience investigating complaints of sexual violence, together with training on the school's current grievance procedures may be sufficient preparation for an employee to resolve Title IX complaints consistent with the school's grievance procedures. In-depth knowledge regarding Title IX and sexual violence is particularly helpful. Because laws and school policies and procedures may change, the only way to ensure that all employees involved in implementing the school's grievance procedures have the requisite training or experience is for the school to provide regular training to all individuals involved in implementing the school's Title IX grievance procedures even if such individuals also have prior relevant experience.

J-4. What type of training on sexual violence should a school provide to its students?

Answer: To ensure that students understand their rights under Title IX, a school should provide age-appropriate training to its students regarding Title IX and sexual violence. At the elementary and secondary school level, schools should consider whether sexual violence training should also be offered to parents, particularly training on the school's process for handling complaints of sexual violence. Training may be provided separately or as part of the school's broader training on sex discrimination and sexual harassment. However, sexual violence is a unique topic that should not be assumed to be covered adequately in other educational programming or training provided to students. The school may want to include this training in its orientation programs for new students; training for student athletes and members of student organizations; and back-to-school nights. A school should consider educational methods that are most likely to help students retain information when designing its training, including repeating the training at regular intervals. OCR recommends that, at a minimum, the following topics (as appropriate) be covered in this training:

- Title IX and what constitutes sexual violence, including same-sex sexual violence, under the school's policies;
- the school's definition of consent applicable to sexual conduct, including examples;
- how the school analyzes whether conduct was unwelcome under Title IX;
- how the school analyzes whether unwelcome sexual conduct creates a hostile environment;
- reporting options, including formal reporting and confidential disclosure options and any timeframes set by the school for reporting;
- the school's grievance procedures used to process sexual violence complaints;
- disciplinary code provisions relating to sexual violence and the consequences of violating those provisions;
- effects of trauma, including neurobiological changes;
- the role alcohol and drugs often play in sexual violence incidents, including the deliberate use of alcohol and/or other drugs to perpetrate sexual violence;
- strategies and skills for bystanders to intervene to prevent possible sexual violence;
- how to report sexual violence to campus or local law enforcement and the ability to pursue law enforcement proceedings simultaneously with a Title IX grievance; and
- Title IX's protections against retaliation.

The training should also encourage students to report incidents of sexual violence. The training should explain that students (and their parents or friends) do not need to determine whether incidents of sexual violence or other sexual harassment created a

hostile environment before reporting the incident. A school also should be aware that persons may be deterred from reporting incidents if, for example, violations of school or campus rules regarding alcohol or drugs were involved. As a result, a school should review its disciplinary policy to ensure it does not have a chilling effect on students' reporting of sexual violence offenses or participating as witnesses. OCR recommends that a school inform students that the school's primary concern is student safety, and that use of alcohol or drugs never makes the survivor at fault for sexual violence.

It is also important for a school to educate students about the persons on campus to whom they can confidentially report incidents of sexual violence. A school's sexual violence education and prevention program should clearly identify the offices or individuals with whom students can speak confidentially and the offices or individuals who can provide resources such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. It should also identify the school's responsible employees and explain that if students report incidents to responsible employees (except as noted in question E-3) these employees are required to report the incident to the Title IX coordinator or other appropriate official. This reporting includes the names of the alleged perpetrator and student involved in the sexual violence, as well as relevant facts including the date, time, and location, although efforts should be made to comply with requests for confidentiality from the complainant. For more detailed information regarding reporting and responsible employees and confidentiality, see questions D-1 to D-5 and E-1 to E-4.

K. Retaliation

K-1. Does Title IX protect against retaliation?

Answer: Yes. The Federal civil rights laws, including Title IX, make it unlawful to retaliate against an individual for the purpose of interfering with any right or privilege secured by these laws. This means that if an individual brings concerns about possible civil rights problems to a school's attention, including publicly opposing sexual violence or filing a sexual violence complaint with the school or any State or Federal agency, it is unlawful for the school to retaliate against that individual for doing so. It is also unlawful to retaliate against an individual because he or she testified, or participated in any manner, in an OCR or school's investigation or proceeding. Therefore, if a student, parent, teacher, coach, or other individual complains formally or informally about sexual violence or participates in an OCR or school's investigation or proceedings related to sexual violence, the school is prohibited from retaliating (including intimidating, threatening, coercing, or in any way

discriminating against the individual) because of the individual's complaint or participation.

A school should take steps to prevent retaliation against a student who filed a complaint either on his or her own behalf or on behalf of another student, or against those who provided information as witnesses.

Schools should be aware that complaints of sexual violence may be followed by retaliation against the complainant or witnesses by the alleged perpetrator or his or her associates. When a school knows or reasonably should know of possible retaliation by other students or third parties, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and witnesses and ensure their safety as necessary. At a minimum, this includes making sure that the complainant and his or her parents, if the complainant is in elementary or secondary school, and witnesses know how to report retaliation by school officials, other students, or third parties by making follow-up inquiries to see if there have been any new incidents or acts of retaliation, and by responding promptly and appropriately to address continuing or new problems. A school should also tell complainants and witnesses that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation, but will also take strong responsive action if it occurs.

L. First Amendment

L-1. How should a school handle its obligation to respond to sexual harassment and sexual violence while still respecting free-speech rights guaranteed by the Constitution?

Answer: The DCL on sexual violence did not expressly address First Amendment issues because it focuses on unlawful physical sexual violence, which is not speech or expression protected by the First Amendment.

However, OCR's previous guidance on the First Amendment, including the 2001 Guidance, OCR's July 28, 2003, Dear Colleague Letter on the First Amendment,[35] and OCR's October 26, 2010, Dear Colleague Letter on harassment and bullying,[36] remain fully in effect. OCR has made it clear that the laws and regulations it enforces protect students from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S. Constitution. Therefore, when a school works to prevent

[35] Available at http://www.ed.gov/ocr/firstamend.html.
[36] Available at http://www.ed.gov/ocr/letters/colleague-201010.html.

and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers.

Title IX protects students from sex discrimination; it does not regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under Title IX. Title IX also does not require, prohibit, or abridge the use of particular textbooks or curricular materials.[37]

M. The Clery Act and the Violence Against Women Reauthorization Act of 2013

M-1. How does the Clery Act affect the Title IX obligations of institutions of higher education that participate in the federal student financial aid programs?

Answer: Institutions of higher education that participate in the federal student financial aid programs are subject to the requirements of the Clery Act as well as Title IX. The Clery Act requires institutions of higher education to provide current and prospective students and employees, the public, and the Department with crime statistics and information about campus crime prevention programs and policies. The Clery Act requirements apply to many crimes other than those addressed by Title IX. For those areas in which the Clery Act and Title IX both apply, the institution must comply with both laws. For additional information about the Clery Act and its regulations, please see http://www2.ed.gov/admins/lead/safety/campus.html.

M-2. Were a school's obligations under Title IX and the DCL altered in any way by the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, including Section 304 of that Act, which amends the Clery Act?

Answer: No. The Violence Against Women Reauthorization Act has no effect on a school's obligations under Title IX or the DCL. The Violence Against Women Reauthorization Act amended the Violence Against Women Act and the Clery Act, which are separate statutes. Nothing in Section 304 or any other part of the Violence Against Women Reauthorization Act relieves a school of its obligation to comply with the requirements of Title IX, including those set forth in these Questions and Answers, the 2011 DCL, and the *2001 Guidance*. For additional information about the Department's negotiated rulemaking related to the Violence Against Women Reauthorization Act please see http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa.html.

[37] 34 C.F.R. § 106.42.

N. Further Federal Guidance

N-1. Whom should I contact if I have additional questions about the DCL or OCR's other Title IX guidance?

Answer: Anyone who has questions regarding this guidance, or Title IX should contact the OCR regional office that serves his or her state. Contact information for OCR regional offices can be found on OCR's webpage at https://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm. If you wish to file a complaint of discrimination with OCR, you may use the online complaint form available at http://www.ed.gov/ocr/complaintintro.html or send a letter to the OCR enforcement office responsible for the state in which the school is located. You may also email general questions to OCR at ocr@ed.gov.

N-2. Are there other resources available to assist a school in complying with Title IX and preventing and responding to sexual violence?

Answer: Yes. OCR's policy guidance on Title IX is available on OCR's webpage at http://www.ed.gov/ocr/publications.html#TitleIX. In addition to the April 4, 2011, Dear Colleague Letter, OCR has issued the following resources that further discuss a school's obligation to respond to allegations of sexual harassment and sexual violence:

- Dear Colleague Letter: Harassment and Bullying (October 26, 2010), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf
- *Sexual Harassment: It's Not Academic* (Revised September 2008), http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf
- *Revised Sexual Harassment Guidance: Harassment of Students by Employees, Other Students, or Third Parties* (January 19, 2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf

In addition to guidance from OCR, a school may also find resources from the Departments of Education and Justice helpful in preventing and responding to sexual violence:

- Department of Education's Letter to Chief State School Officers on Teen Dating Violence Awareness and Prevention (February 28, 2013)
  https://www2.ed.gov/policy/gen/guid/secletter/130228.html

- Department of Education's National Center on Safe Supportive Learning Environments
  http://safesupportivelearning.ed.gov/

- Department of Justice, Office on Violence Against Women
  http://www.ovw.usdoj.gov/

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

U.S. Department of Education
Office for Civil Rights

Notice of Language Assistance

Notice of Language Assistance: If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN
(1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

Aviso a personas con dominio limitado del idioma inglés: Si usted tiene alguna dificultad en entender el idioma inglés, puede, sin costo alguno, solicitar asistencia lingüística con respecto a esta información llamando al 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o envíe un mensaje de correo electrónico a: Ed.Language.Assistance@ed.gov.

給英語能力有限人士的通知: 如果您不懂英語， 或者使用英语有困难，您可以要求獲得向大眾提供的語言協助服務，幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊，請致電 1-800-USA-LEARN (1-800-872-5327) (聽語障人士專線：1-800-877-8339),或電郵: Ed.Language.Assistance@ed.gov.

Thông báo dành cho những người có khả năng Anh ngữ hạn chế: Nếu quý vị gặp khó khăn trong việc hiểu Anh ngữ thì quý vị có thể yêu cầu các dịch vụ hỗ trợ ngôn ngữ cho các tin tức của Bộ dành cho công chúng. Các dịch vụ hỗ trợ ngôn ngữ này đều miễn phí. Nếu quý vị muốn biết thêm chi tiết về các dịch vụ phiên dịch hay thông dịch, xin vui lòng gọi số 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), hoặc email: Ed.Language.Assistance@ed.gov.

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Paunawa sa mga Taong Limitado ang Kaalaman sa English: Kung nahihirapan kayong makaintindi ng English, maaari kayong humingi ng tulong ukol dito sa inpormasyon ng Kagawaran mula sa nagbibigay ng serbisyo na pagtulong kaugnay ng wika. Ang serbisyo na pagtulong kaugnay ng wika ay libre. Kung kailangan ninyo ng dagdag na impormasyon tungkol sa mga serbisyo kaugnay ng pagpapaliwanag o pagsasalin, mangyari lamang tumawag sa 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o mag-email sa: Ed.Language.Assistance@ed.gov.

Уведомление для лиц с ограниченным знанием английского языка: Если вы испытываете трудности в понимании английского языка, вы можете попросить, чтобы вам предоставили перевод информации, которую Министерство Образования доводит до всеобщего сведения. Этот перевод предоставляется бесплатно. Если вы хотите получить более подробную информацию об услугах устного и письменного перевода, звоните по телефону 1-800-USA-LEARN (1-800-872-5327) (служба для слабослышащих: 1-800-877-8339), или отправьте сообщение по адресу: Ed.Language.Assistance@ed.gov.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

September 22, 2017

Dear Colleague:

The purpose of this letter is to inform you that the Department of Education is withdrawing the statements of policy and guidance reflected in the following documents:

- Dear Colleague Letter on Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 4, 2011.

- Questions and Answers on Title IX and Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 29, 2014.

These guidance documents interpreted Title IX to impose new mandates related to the procedures by which educational institutions investigate, adjudicate, and resolve allegations of student-on-student sexual misconduct. The 2011 Dear Colleague Letter required schools to adopt a minimal standard of proof—the preponderance-of-the-evidence standard—in administering student discipline, even though many schools had traditionally employed a higher clear-and-convincing-evidence standard. The Letter insisted that schools with an appeals process allow complainants to appeal not-guilty findings, even though many schools had previously followed procedures reserving appeal for accused students. The Letter discouraged cross-examination by the parties, suggesting that to recognize a right to such cross-examination might violate Title IX. The Letter forbade schools from relying on investigations of criminal conduct by law-enforcement authorities to resolve Title IX complaints, forcing schools to establish policing and judicial systems while at the same time directing schools to resolve complaints on an expedited basis. The Letter provided that any due-process protections afforded to accused students should not "unnecessarily delay" resolving the charges against them.

Legal commentators have criticized the 2011 Letter and the 2014 Questions and Answers for placing "improper pressure upon universities to adopt procedures that do not afford fundamental fairness."[1] As a result, many schools have established procedures for resolving allegations that "lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation."[2]

The 2011 and 2014 guidance documents may have been well-intentioned, but those documents have

[1] Open Letter from Members of the Penn Law School Faculty, *Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities*, WALL ST. J. ONLINE (Feb. 18, 2015), http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf (statement of 16 members of the University of Pennsylvania Law School faculty).

[2] *Rethink Harvard's Sexual Harassment Policy*, BOSTON GLOBE (Oct. 15, 2014) (statement of 28 members of the Harvard Law School faculty); *see also* ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLLEGE DUE PROCESS RIGHTS AND VICTIM PROTECTIONS, RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT (2017); AMERICAN COLLEGE OF TRIAL LAWYERS, TASK FORCE ON THE RESPONSE OF UNIVERSITIES AND COLLEGES TO ALLEGATIONS OF SEXUAL VIOLENCE, WHITE PAPER ON CAMPUS SEXUAL ASSAULT INVESTIGATIONS (2017).

led to the deprivation of rights for many students—both accused students denied fair process and victims denied an adequate resolution of their complaints. The guidance has not succeeded in providing clarity for educational institutions or in leading institutions to guarantee educational opportunities on the equal basis that Title IX requires. Instead, schools face a confusing and counterproductive set of regulatory mandates, and the objective of regulatory compliance has displaced Title IX's goal of educational equity.

The Department imposed these regulatory burdens without affording notice and the opportunity for public comment. Under these circumstances, the Department has decided to withdraw the above-referenced guidance documents in order to develop an approach to student sexual misconduct that responds to the concerns of stakeholders and that aligns with the purpose of Title IX to achieve fair access to educational benefits. The Department intends to implement such a policy through a rulemaking process that responds to public comment. The Department will not rely on the withdrawn documents in its enforcement of Title IX.

The Department refers you to the *Q&A on Campus Sexual Misconduct*, issued contemporaneously with this letter, and will continue to rely on its *Revised Sexual Harassment Guidance*, which was informed by a notice-and-comment process and issued in 2001,[3] as well as the reaffirmation of that *Guidance* in the Dear Colleague Letter on Sexual Harassment issued January 25, 2006.[4] As always, the Department's enforcement efforts proceed from Title IX itself[5] and its implementing regulations.[6]

In the forty-five years since the passage of Title IX, we have seen remarkable progress toward an educational environment free of sex discrimination. That progress resulted in large part from the vigorous enforcement of Title IX by the Office for Civil Rights at the Department of Education. The Department remains committed to enforcing these critical protections and intends to do so consistent with its mission under Title IX to protect fair and equitable access to education.

The Department has determined that this letter is a significant guidance document under the Final Bulletin for Agency Good Guidance Practices of the Office of Management and Budget, 72 Fed. Reg. 3432 (Jan. 25, 2007). This letter does not add requirements to applicable law.[7]

Sincerely,

/s/
Candice Jackson
Acting Assistant Secretary for Civil Rights
U.S. Department of Education

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[3] The *Revised Sexual Harassment Guidance* is available at https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.
[4] The 2006 Dear Colleague Letter is available at https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html.
[5] 20 U.S.C. §§ 1681-88.
[6] 34 C.F.R. § 106.1 *et seq*.; *see also* 34 C.F.R. § 668.46(k) (implementing requirements of the Violence Against Women Act).
[7] If you have questions or are interested in commenting on this letter, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339).

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

September 2017

Q&A on Campus Sexual Misconduct

Under Title IX of the Education Amendments of 1972 and its implementing regulations, an institution that receives federal funds must ensure that no student suffers a deprivation of her or his access to educational opportunities on the basis of sex. The Department of Education intends to engage in rulemaking on the topic of schools' Title IX responsibilities concerning complaints of sexual misconduct, including peer-on-peer sexual harassment and sexual violence. The Department will solicit input from stakeholders and the public during that rulemaking process. In the interim, these questions and answers—along with the *Revised Sexual Harassment Guidance* previously issued by the Office for Civil Rights[1]—provide information about how OCR will assess a school's compliance with Title IX.

SCHOOLS' RESPONSIBILITY TO ADDRESS SEXUAL MISCONDUCT

Question 1:

What is the nature of a school's responsibility to address sexual misconduct?

Answer:

Whether or not a student files a complaint of alleged sexual misconduct or otherwise asks the school to take action, where the school knows or reasonably should know of an incident of sexual misconduct, the school must take steps to understand what occurred and to respond appropriately.[2] In particular, when sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student's ability to participate in or benefit from the school's programs or activities, a hostile environment exists and the school must respond.[3]

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[1] Office for Civil Rights, *Revised Sexual Harassment Guidance* (66 Fed. Reg. 5512, Jan. 19, 2001), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [hereinafter 2001 Guidance]; *see also* Office for Civil Rights, Dear Colleague Letter on Sexual Harassment (Jan. 25, 2006), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html.

[2] 2001 Guidance at (VII).

[3] *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 631 (1999); 34 C.F.R. § 106.31(a); 2001 Guidance at (V)(A)(1). Title IX prohibits discrimination on the basis of sex "under any education program or activity" receiving federal financial assistance, 20 U.S.C. § 1681(a); 34 C.F.R. § 106.1, meaning within the "operations" of a postsecondary institution or school district, 20 U.S.C. § 1687; 34 C.F.R. § 106.2(h). The Supreme Court has explained that the statute "confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs." *Davis*, 526 U.S. at 644. Accordingly, OCR has informed institutions that "[a] university does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient." Oklahoma State University Determination Letter at 2, OCR Complaint No. 06-03-2054 (June 10, 2004); *see also* University of Wisconsin-Madison Determination Letter, OCR Complaint No. 05-07-2074 (Aug. 6, 2009) ("OCR determined that the alleged assault did not occur in the context of an educational program or activity operated by the University."). Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities. Under the Clery Act, postsecondary institutions are obliged to collect and report statistics on crimes that occur on campus, on noncampus properties controlled by the institution or an affiliated student organization and used for educational purposes, on public property within or immediately adjacent to campus, and in areas within the patrol jurisdiction of the campus police or the campus security department. 34 C.F.R. § 668.46(a); 34 C.F.R. § 668.46(c).

Each recipient must designate at least one employee to act as a Title IX Coordinator to coordinate its responsibilities in this area.[4] Other employees may be considered "responsible employees" and will help the student to connect to the Title IX Coordinator.[5]

In regulating the conduct of students and faculty to prevent or redress discrimination, schools must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech.[6]

THE CLERY ACT AND TITLE IX

Question 2:

What is the Clery Act and how does it relate to a school's obligations under Title IX?

Answer:

Institutions of higher education that participate in the federal student financial aid programs are subject to the requirements of the Clery Act as well as Title IX.[7] Each year, institutions must disclose campus crime statistics and information about campus security policies as a condition of participating in the federal student aid programs. The Violence Against Women Reauthorization Act of 2013 amended the Clery Act to require institutions to compile statistics for incidents of dating violence, domestic violence, sexual assault, and stalking, and to include certain policies, procedures, and programs pertaining to these incidents in the annual security reports. In October 2014, following a negotiated rulemaking process, the Department issued amended regulations to implement these statutory changes.[8] Accordingly, when addressing allegations of dating violence, domestic violence, sexual assault, or stalking, institutions are subject to the Clery Act regulations as well as Title IX.

INTERIM MEASURES

Question 3:

What are interim measures and is a school required to provide such measures?

Answer:

Interim measures are individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending.[9] Interim measures include counseling, extensions of time or other course-related adjustments, modifications of work or class schedules, campus escort services, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar accommodations.

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[4] 34 C.F.R. § 106.8(a).
[5] 2001 Guidance at (V)(C).
[6] Office for Civil Rights, Dear Colleague Letter on the First Amendment (July 28, 2003), *available at* https://www2.ed.gov/about/offices/list/ocr/firstamend.html; 2001 Guidance at (XI).
[7] Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, Pub. L. No. 101-542, 20 U.S.C. § 1092(f).
[8] *See* 34 C.F.R. § 668.46.
[9] *See* 2001 Guidance at (VII)(A).

It may be appropriate for a school to take interim measures during the investigation of a complaint.[10] In fairly assessing the need for a party to receive interim measures, a school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party. Interim measures should be individualized and appropriate based on the information gathered by the Title IX Coordinator, making every effort to avoid depriving any student of her or his education. The measures needed by each student may change over time, and the Title IX Coordinator should communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective based on the students' evolving needs.

GRIEVANCE PROCEDURES AND INVESTIGATIONS

Question 4:

What are the school's obligations with regard to complaints of sexual misconduct?

Answer:

A school must adopt and publish grievance procedures that provide for a prompt and equitable resolution of complaints of sex discrimination, including sexual misconduct.[11] OCR has identified a number of elements in evaluating whether a school's grievance procedures are prompt and equitable, including whether the school (i) provides notice of the school's grievance procedures, including how to file a complaint, to students, parents of elementary and secondary school students, and employees; (ii) applies the grievance procedures to complaints filed by students or on their behalf alleging sexual misconduct carried out by employees, other students, or third parties; (iii) ensures an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; (iv) designates and follows a reasonably prompt time frame for major stages of the complaint process; (v) notifies the parties of the outcome of the complaint; and (vi) provides assurance that the school will take steps to prevent recurrence of sexual misconduct and to remedy its discriminatory effects, as appropriate.[12]

Question 5:

What time frame constitutes a "prompt" investigation?

Answer:

There is no fixed time frame under which a school must complete a Title IX investigation.[13] OCR will evaluate a school's good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.

Question 6:

What constitutes an "equitable" investigation?

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[10] 2001 Guidance at (VII)(A). In cases covered by the Clery Act, a school must provide interim measures upon the request of a reporting party if such measures are reasonably available. 34 C.F.R. § 668.46(b)(11)(v).
[11] 34 C.F.R. § 106.8(b); 2001 Guidance at (V)(D); *see also* 34 C.F.R. § 668.46(k)(2)(i) (providing that a proceeding which arises from an allegation of dating violence, domestic violence, sexual assault, or stalking must "[i]nclude a prompt, fair, and impartial process from the initial investigation to the final result").
[12] 2001 Guidance at (IX); *see also* 34 C.F.R. § 668.46(k). Postsecondary institutions are required to report publicly the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, and stalking, 34 C.F.R. § 668.46 (k)(1)(i), and to include a process that allows for the extension of timeframes for good cause with written notice to the parties of the delay and the reason for the delay, 34 C.F.R. § 668.46 (k)(3)(i)(A).
[13] 2001 Guidance at (IX); *see also* 34 C.F.R. § 668.46(k)(3)(i)(A).

Answer:

In every investigation conducted under the school's grievance procedures, the burden is on the school—not on the parties—to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred and, if so, whether a hostile environment has been created that must be redressed. A person free of actual or reasonably perceived conflicts of interest and biases for or against any party must lead the investigation on behalf of the school. Schools should ensure that institutional interests do not interfere with the impartiality of the investigation.

An equitable investigation of a Title IX complaint requires a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including both inculpatory and exculpatory evidence—and take into account the unique and complex circumstances of each case.[14]

Any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms.[15] Restricting the ability of either party to discuss the investigation (e.g., through "gag orders") is likely to deprive the parties of the ability to obtain and present evidence or otherwise to defend their interests and therefore is likely inequitable. Training materials or investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially.[16]

Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide written notice to the responding party of the allegations constituting a potential violation of the school's sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident.[17] Each party should receive written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation. The investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence. The reporting and responding parties and appropriate officials must have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.[18]

INFORMAL RESOLUTIONS OF COMPLAINTS

Question 7:

After a Title IX complaint has been opened for investigation, may a school facilitate an informal resolution of the complaint?

Answer:

If all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.

[14] 2001 Guidance at (V)(A)(1)-(2); *see also* 34 C.F.R. § 668.46(k)(2)(ii).
[15] 2001 Guidance at (X).
[16] 34 C.F.R. § 106.31(a).
[17] 2001 Guidance at (VII)(B).
[18] 34 C.F.R. § 668.46(k)(3)(i)(B)(3).

DECISION-MAKING AS TO RESPONSIBILITY

Question 8:

What procedures should a school follow to adjudicate a finding of responsibility for sexual misconduct?

Answer:

The investigator(s), or separate decision-maker(s), with or without a hearing, must make findings of fact and conclusions as to whether the facts support a finding of responsibility for violation of the school's sexual misconduct policy. If the complaint presented more than a single allegation of misconduct, a decision should be reached separately as to each allegation of misconduct. The findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard.[19]

The decision-maker(s) must offer each party the same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report.[20] The parties should have the opportunity to respond to the report in writing in advance of the decision of responsibility and/or at a live hearing to decide responsibility.

Any process made available to one party in the adjudication procedure should be made equally available to the other party (for example, the right to have an attorney or other advisor present and/or participate in an interview or hearing; the right to cross-examine parties and witnesses or to submit questions to be asked of parties and witnesses).[21] When resolving allegations of dating violence, domestic violence, sexual assault, or stalking, a postsecondary institution must "[p]rovide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice."[22] In such disciplinary proceedings and any related meetings, the institution may "[n]ot limit the choice of advisor or presence for either the accuser or the accused" but "may establish restrictions regarding the extent to which the advisor may participate in the proceedings."[23]

Schools are cautioned to avoid conflicts of interest and biases in the adjudicatory process and to prevent institutional interests from interfering with the impartiality of the adjudication. Decision-making techniques or approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the adjudication proceeds objectively and impartially.

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[19] The standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases. In a recent decision, a court concluded that a school denied "basic fairness" to a responding party by, among other things, applying a lower standard of evidence only in cases of alleged sexual misconduct. *Doe v. Brandeis Univ*., 177 F. Supp. 3d 561, 607 (D. Mass. 2016) ("[T]he lowering of the standard appears to have been a deliberate choice by the university to make cases of sexual misconduct easier to prove—and thus more difficult to defend, both for guilty and innocent students alike. It retained the higher standard for virtually all other forms of student misconduct. The lower standard may thus be seen, in context, as part of an effort to tilt the playing field against accused students, which is particularly troublesome in light of the elimination of other basic rights of the accused."). When a school applies special procedures in sexual misconduct cases, it suggests a discriminatory purpose and should be avoided. A postsecondary institution's annual security report must describe the standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of dating violence, domestic violence, sexual assault, or stalking. 34 C.F.R. § 668.46(k)(1)(ii).

[20] 34 C.F.R. § 668.46(k)(3)(i)(B)(3).

[21] A school has discretion to reserve a right of appeal for the responding party based on its evaluation of due process concerns, as noted in Question 11.

[22] 34 C.F.R. § 668.46(k)(2)(iii).

[23] 34 C.F.R. § 668.46(k)(2)(iv).

DECISION-MAKING AS TO DISCIPLINARY SANCTIONS

Question 9:

What procedures should a school follow to impose a disciplinary sanction against a student found responsible for a sexual misconduct violation?

Answer:

The decision-maker as to any disciplinary sanction imposed after a finding of responsibility may be the same or different from the decision-maker who made the finding of responsibility. Disciplinary sanction decisions must be made for the purpose of deciding how best to enforce the school's code of student conduct while considering the impact of separating a student from her or his education. Any disciplinary decision must be made as a proportionate response to the violation.[24] In its annual security report, a postsecondary institution must list all of the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of dating violence, domestic violence, sexual assault, or stalking.[25]

NOTICE OF OUTCOME AND APPEALS

Question 10:

What information should be provided to the parties to notify them of the outcome?

Answer:

OCR recommends that a school provide written notice of the outcome of disciplinary proceedings to the reporting and responding parties concurrently. The content of the notice may vary depending on the underlying allegations, the institution, and the age of the students. Under the Clery Act, postsecondary institutions must provide simultaneous written notification to both parties of the results of the disciplinary proceeding along with notification of the institution's procedures to appeal the result if such procedures are available, and any changes to the result when it becomes final.[26] This notification must include any initial, interim, or final decision by the institution; any sanctions imposed by the institution; and the rationale for the result and the sanctions.[27] For proceedings not covered by the Clery Act, such as those arising from allegations of harassment, and for all proceedings in elementary and secondary schools, the school should inform the reporting party whether it found that the alleged conduct occurred, any individual remedies offered to the reporting party or any sanctions imposed on the responding party that directly relate to the reporting party, and other steps the school has taken to eliminate the hostile environment, if the school found one to exist.[28] In an elementary or secondary school, the notice should be provided to the parents of students under the age of 18 and directly to students who are 18 years of age or older.[29]

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[24] 34 C.F.R. § 106.8(b); 2001 Guidance at (VII)(A).
[25] 34 C.F.R. § 668.46(k)(1)(iii).
[26] 34 C.F.R. § 668.46(k)(2)(v). The Clery Act applies to proceedings arising from allegations of dating violence, domestic violence, sexual assault, and stalking.
[27] 34 C.F.R. § 668.46(k)(3)(iv).
[28] A sanction that directly relates to the reporting party would include, for example, an order that the responding party stay away from the reporting party. *See* 2001 Guidance at vii n.3. This limitation allows the notice of outcome to comply with the requirements of the Family Educational Rights and Privacy Act. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.10; 34 C.F.R. § 99.12(a). FERPA provides an exception to its requirements only for a postsecondary institution to communicate the results of a disciplinary proceeding to the reporting party in cases of alleged crimes of violence or specific nonforcible sex offenses. 20 U.S.C. § 1232g(b)(6); 34 C.F.R. § 99.31(a)(13).
[29] 20 U.S.C. § 1232g(d).

Question 11:

How may a school offer the right to appeal the decision on responsibility and/or any disciplinary decision?

Answer:

If a school chooses to allow appeals from its decisions regarding responsibility and/or disciplinary sanctions, the school may choose to allow appeal (i) solely by the responding party; or (ii) by both parties, in which case any appeal procedures must be equally available to both parties.[30]

EXISTING RESOLUTION AGREEMENTS

Question 12:

In light of the rescission of OCR's 2011 Dear Colleague Letter and 2014 Questions & Answers guidance, are existing resolution agreements between OCR and schools still binding?

Answer:

Yes. Schools enter into voluntary resolution agreements with OCR to address the deficiencies and violations identified during an OCR investigation based on Title IX and its implementing regulations. Existing resolution agreements remain binding upon the schools that voluntarily entered into them. Such agreements are fact-specific and do not bind other schools. If a school has questions about an existing resolution agreement, the school may contact the appropriate OCR regional office responsible for the monitoring of its agreement.

Note: The Department has determined that this Q&A is a significant guidance document under the Final Bulletin for Agency Good Guidance Practices of the Office of Management and Budget, 72 Fed. Reg. 3432 (Jan. 25, 2007). This document does not add requirements to applicable law. If you have questions or are interested in commenting on this document, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339).

[30] 2001 Guidance at (IX). Under the Clery Act, a postsecondary institution must provide simultaneous notification of the appellate procedure, if one is available, to both parties. 34 C.F.R. § 668.46(k)(2)(v)(B). OCR has previously informed schools that it is permissible to allow an appeal only for the responding party because "he/she is the one who stands to suffer from any penalty imposed and should not be made to be tried twice for the same allegation." Skidmore College Determination Letter at 5, OCR Complaint No. 02-95-2136 (Feb. 12, 1996); *see also* Suffolk University Law School Determination Letter at 11, OCR Complaint No. 01-05-2074 (Sept. 30, 2008) ("[A]ppeal rights are not necessarily required by Title IX, whereas an accused student's appeal rights are a standard component of University disciplinary processes in order to assure that the student is afforded due process before being removed from or otherwise disciplined by the University."); University of Cincinnati Determination Letter at 6, OCR Complaint No. 15-05-2041 (Apr. 13, 2006) ("[T]here is no requirement under Title IX that a recipient provide a victim's right of appeal.").

Sex, Lies and Justice

Can we reconcile the belated attention to rape on campus with due process?

By Nancy Gertner

January 12, 2015

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Campus sexual assaults are horrifying, made all the worse because the settings are bucolic and presumed safe—leafy campuses, ivy-walled universities. Assaults are reported in dormitories, off-campus apartments, and fraternity houses, in elite and non-elite institutions, from one end of the country to the other. Title IX (of the Education Amendments of 1972) was supposed to promote equal opportunity in any educational program receiving federal money. But until recently, Title IX was dormant and largely ignored. The enforcer, the federal government, had been a paper tiger. Universities were not reporting, much less dealing with, either sexual harassment or explicit sexual violence. Sexual misconduct impairs a woman's ability to function as an equal in an academic environment—and by extension menaces all women. Unless a woman is safe, all the other guarantees of equal treatment are irrelevant.

President Barack Obama, in a January 25, 2014, speech, assured his listeners that "anyone out there who has ever been assaulted: You are not alone. We have your back. I've got your back."

In 2011, the government's approach changed dramatically: A "Dear Colleague" letter on sexual violence was sent to colleges and universities from the Department of Education's Office for Civil Rights (OCR), pointedly reminding them of their obligations under Title IX and presaging aggressive enforcement. By August 2013, the public face of the department's enforcement efforts was Catherine Lhamon, assistant secretary at the Office for Civil Rights, a zealous advocate, formerly head of impact litigation at Public Counsel, a public interest law firm; before that, she was assistant legal director of the ACLU of Southern California. At a July 2014 meeting of college administrators, Lhamon made the threat of disciplinary action unmistakable: While no school accused of violating Title IX had ever lost its federal funding, "do not think it's an empty threat," she warned them. A department **website** announced the campaign against sexual violence on campus, **Not Alone**. President Barack Obama, in a January 25, 2014, speech, assured his listeners that "anyone out there who has ever been assaulted: You are not alone. We have your back. I've got your back." Even the department's language changed, no longer referring

antiseptically to a complainant and an accused but rather to victims or survivors, and perpetrators.

To feminists—I among them—it was about time that pressure was brought to bear on educational institutions. Too often colleges and universities had excused or turned a blind eye to the crimes of serial sexual predators. The media, after often dismissing the claims of rape victims, was finally more sympathetic, covering accounts of sexual violence from the University of Virginia to Yale and Harvard. This kind of sustained attention was precisely what was needed to come to grips with the problem. Nothing less would have done the trick. Indeed, nothing had worked before. It was as if women, especially young women, had to speak especially loudly and especially often to finally be heard—a not unfamiliar concept.

The problem was that the issues surrounding campus sexual assault were more complicated than the public debate reflected. How were universities and colleges to deal with the range of campus sexual encounters—a continuum from violent rape, to sex fueled by alcohol impairing all involved, to the expectations about women and men in the so-called "hookup culture," to consensual sex followed by second thoughts. There are plenty of bright lines such as forcible rape—but also blurry ones. Genuine ambivalence and ambiguous signals seem almost inherent in courtship and sexuality, especially in first encounters. Where should the Title IX violation line be? What was a reasonable adjudication process? What was the role of the criminal justice system in cases in which university conduct codes overlapped with possible prosecutions?

Further, how were colleges and universities to balance the interests of the complainant with those of the accused? Just as the complainants must be treated with dignity and their rights to a fair resolution of their charges be respected, so too must those accused of sexual misconduct. You don't have to believe that there are large numbers of false accusation of sexual assault—I do not—to insist that the process of investigating and adjudicating these claims be fair. In fact, feminists should be especially concerned, not just about creating enforcement proceedings, but about their fairness. If there is a widespread perception that the balance has tilted from no rights for victims to no due process for the accused, we risk a backlash. Benighted attitudes about

rape and skepticism about women victims die hard. It takes only a few celebrated false accusations of rape to turn the clock back.

Rape, I insisted, is a crime to which women—including me—feel uniquely vulnerable, no matter who they are, no matter what their class, their race, their status.

I come to this issue—campus sexual assault—from all sides. This is not because I was a federal judge for 17 years, where "considering all sides" was part of the job definition. I left the bench in 2011 to teach at Harvard Law School, among other things. I am an unrepentant feminist, a longtime litigator on behalf of women's rights, as my memoir, *In Defense of Women*, reflects. Rape, I insisted, is a crime to which women—including me—feel uniquely vulnerable, no matter who they are, no matter what their class, their race, their status. No one should have been surprised that I supported stronger enforcement of Title IX, more training for investigators, more services for complainants, systematic assessments of the state of enforcement on college campuses, and other tough remedies. What surprised many, however, was that I was one of 28 Harvard professors who signed a letter opposing Harvard University's new sexual harassment and sexual assault policies, policies introduced ostensibly in response to pressures from the Department of Education.

When I was a lawyer, I understood how inadequate the law was in addressing sexual violence at all. I worked for changes to the retrograde definition of rape in statutes around the country and their disrespectful treatment of rape victims, laws that were a throwback to medieval conceptions about women. I lobbied for rape shield laws that limited the defense counsel's cross-examination of a woman about her prior sexual experiences. So little did the law trust a woman's account of rape that some states required that a woman's accusations be corroborated by independent evidence, a requirement to which no other crime victim was subject. The definition of the crime focused on the woman's conduct, whether she had resisted "to the utmost;" a simple "no" did not suffice. To the extent that the man's conduct was considered at

all, the statutes required that he use force before his acts amounted to rape; drugging a woman, or having sex with one wholly incapacitated by alcohol, was not enough. And date rape was never prosecuted no matter what the circumstances.

But I was also a criminal defense lawyer. I understood more than many how unfair the criminal process could be, how critical the enforcement of a defendant's rights were to the integrity and, even more, to the reliability of the criminal justice system. I understood what it meant to have a defendant's liberty hanging in the balance, how long terms of imprisonment could wreak havoc on the lives of defendants and their families. I appreciated the stigma of the very accusation, which persists—especially today on the Internet—even if the accused is exonerated. And I understood the racial implications of rape accusations, the complex intersection of bias, stereotyping, and sex in the prosecution of this crime.

I reconciled the pressures pushing me in opposite directions by choosing not to represent men accused of rape, while bringing civil lawsuits for women against the universities or the building owners that failed to provide them with adequate security, or against psychiatrists and psychologists who sexually abused them. I steered clear of prosecutions for rape—except for one case.

A young man, a freshman at a local college at the time the incident happened and a friend of a former roommate of mine, was referred to me. (In my memoir, I call him "Paul.") He'd had sex with a classmate, his very first sexual encounter; he believed his classmate had consented. And while we can never know what went on between them, the facts—her actions, her words, the testimony of others—made her charges wholly unconvincing. A few examples: She went out of her way to invite him to her parents' home a short time after the sex to stay for the weekend. Nine months after their sexual encounter, she claimed to have been raped and mentioned his name following the breakup of a different relationship and her hospitalization for depression. She accused Paul during a conversation with her father, but accused another male student while speaking to a classmate. Witnesses reported nothing out of the ordinary that evening, no evidence of drinking, no impairment, not even anxiety about what had occurred. Her account itself was improbable, internally inconsistent, and contradicted by the evidence and the testimony of her own classmates.

While from decades of work on rape and my women's rights advocacy, I understood that this young woman could be telling the truth—that her behavior in the days and weeks after the sex, and even her multiple accounts of what went on, could be explained by post-traumatic stress disorder, or simply embarrassment—her account seemed unlikely.

By the late 1980s, when the accusations against Paul were brought, the women's movement had succeeded in making some of the changes for which I and others had fought. The popular media finally reported on the horror of date rape and its consequences. District attorneys and police belatedly began to prosecute the offense. The definition of rape changed in states across the country, although progress was far from uniform. Gone was the mandatory corroboration requirement and limitless attacks on a woman's "chastity," whatever that meant in the late 20th century. Still, we were a long way from adequately dealing with these issues. There were many jurisdictions where change came slowly or not at all, where prosecutors and even courts not so subtly sided with perpetrators and blamed victims.

While I believed that Paul had been wrongly accused, and would be exonerated, true to my practice I declined to represent him. I asked one of my law partners to step in, and then watched with horror as the prosecution unfolded.

The atmosphere surrounding date rape had changed more dramatically than I had appreciated, at least in Massachusetts. The district attorney, though he fully understood the weaknesses of the case, felt compelled to bring the charges lest he face political repercussions, for being yet another politician ignoring a woman's pain. Even the grand jury ignored their serious doubts about the case and indicted Paul. As I later learned from one of its members, they felt comfortable indicting Paul because I was rumored to be representing him and they assumed he would be acquitted. And the judge—with life tenure—likewise felt the pressure. The judge was critical; my partner decided to waive the jury when a program on date rape was aired on the eve of the trial. While the judge expressed his skepticism throughout the trial—every single comment of his pointed to reasonable doubt about Paul's guilt—his verdict was "guilty." He did not say so explicitly, but the message seemed clear. If he acquitted Paul, he would be pilloried in the press. "Judge acquits rapist," the headlines would scream. But if he convicted Paul, no one would notice.

Just because the legal system has moved away from the view that all rape accusations are contrived does not mean it must move to the view that none are.

I took over the appeal. The brief my firm filed was what I described as a feminist brief: Just because the legal system has moved away from the view that all rape accusations are contrived does not mean it must move to the view that none are. This conviction was not just technically imperfect, I argued, it was a true injustice. I was successful. The Massachusetts Supreme Judicial Court reversed Paul's conviction on a procedural error, the trial court's evidentiary rulings. The prosecutor could have retried the case, but, thankfully, chose not to do so.

After decades of feminist advocacy (the case establishing the right to choose abortion in Massachusetts, the first introduction of Battered Woman Syndrome in a defense to a murder charge, and on and on), I was picketed by a women's rights group when I spoke on a panel following the reversal of Paul's case; I was a "so-called women's rights attorney," one sign announced, simply because I had represented a man accused of rape. When I explained why, including the fact that I believed he was innocent, a demonstrator yelled, "That is irrelevant!" The experience was chilling; to the picketers, a wrongful conviction and imprisonment simply did not matter. Paul would have been incarcerated, but for my firm's advocacy and the appellate court's independent review. Still, advocacy and appellate review could only go so far: Though the charges against Paul were dropped, he was expelled from the college he had been attending; he struggled to reapply years later and finally get his degree. Worse yet, he continues to suffer from the stigma of the accusation to this day, many, many decades later.

As a federal judge, I did not have much occasion to address the issues with which I had been so concerned as a lawyer. Rape is principally a state, not federal, crime. I did deal with accusations of sexual harassment in the workplace, fully appreciating the extent to which sexual harassment obstructs equal opportunity and discriminates against women. I wrote articles decrying the state of civil rights enforcement in the federal courts. And on the criminal side, while I did everything I could to mitigate the harsh effects of onerous

drug sentencing, I had no problem sentencing sex traffickers as harshly as the law allowed.

Still, I could not forget Paul's case. It shaped the context in which I saw the university sexual assault controversy. As in the '80s, women mobilized against institutions that had woefully failed to deal with sexual violence and sexual harassment. While the movement had successfully raised public awareness about violence and harassment in homes, on the streets, and in workplaces, many police, prosecutors, and courts were stuck in an earlier era of victim-blaming. And progress seemed to have stalled at the doors of the academy, where at least some institutions still dissuaded women from bringing complaints while they shielded alleged perpetrators.

In the summer of 2014, Harvard issued its new *Sexual Harassment Policy and Procedures*. It contained both new procedures for when students are accused of Title IX violations and new definitions of the covered conduct. While ostensibly in response to the Office for Civil Rights' pressures, they were released without OCR's approval. In some respects, they go beyond what the 2011 "Dear Colleague" letter spelled out.

OCR has clearly mandated that universities and colleges evaluate accusations of rape under a preponderance of the evidence standard. A preponderance of the evidence is in fact the lowest standard of proof that the legal system has to offer. In effect, if the evidence leans in favor of the victim to any degree, say 50.01 percent, that is sufficient. OCR's rationale was that this was the standard for suits alleging civil rights violations, like sexual harassment. True enough, except for the fact that civil trials at which this standard is implemented follow months if not years of discovery—where each side finds out about the other's case, knows the evidence and the accusations, and has lawyers to ask the right questions. Not so with the new Harvard regime, which has no lawyers, no meaningful sharing of information, no hearings. It is the worst of both worlds, the lowest standard of proof, coupled with the least protective procedures.

The new standard of proof, coupled with the media pressure, effectively creates a presumption in favor of the woman complainant. If you find against

her, you will see yourself on *60 Minutes* or in an OCR investigation where your funding is at risk. If you find for her, no one is likely to complain.

But Harvard's new policy goes further than OCR's mandated preponderance standard. Harvard establishes a fact-finding process that takes place entirely within the four corners of a single office, the Title IX compliance office. The Title IX officer has virtually unreviewable power from the beginning of the proceeding to its end. The officer deals directly with the complaining witness, advises her, determines if the case should be investigated, proceeds to an informal or to a formal resolution. If there is a formal investigation, the Title IX officer appoints and trains the "Investigative Team," which consists of one investigator, who is also an employee of the Title IX office, and a designee of the school with which the accused is affiliated. The investigative team notifies the accused of the written charges, giving him one week to respond. While he has a short deadline, there is no time limit for the complainant's accusations, no period of time within which she must complain—what the law calls a statute of limitations.

Thereafter, the team interviews the parties and, if it deems appropriate, witnesses identified by the parties as well as any others it decides to consult. The team issues a final report on a preponderance standard and working jointly with the Title IX officer—who was in fact involved in the investigation throughout—may provide recommendations concerning the appropriate sanctions to the individual schools. There is an appeal, but it is to that same Title IX officer and only on narrow grounds. While the final sanction is determined by the individual school, the fact-findings on which that sanction is based—this critical administrative report—cannot be questioned.

As the letter of the 28 faculty members noted, this procedure does not remotely resemble any fair decision-making process with which any of us were familiar: All of the functions of the sexual assault disciplinary proceeding—investigation, prosecution, fact-finding, and appellate review—are in one office, we wrote, and that office is a Title IX compliance office, hardly an impartial entity. This is, after all, the office whose job it is to see to it that Harvard's funding is not jeopardized on account of Title IX violations, an office which has every incentive to see the complaint entirely through the eyes of the complainant.

Nothing in the new procedure requires anything like a hearing at which both sides offer testimony, size up the respective witnesses, or much less cross-examine them. Nothing in the new procedure enables accuser and accused to confront each other in any setting, whether directly (which surely may be difficult for the accuser) or at the very least through their representatives. Nor is there any meaningful opportunity for discovery of the facts charged and the evidence on which it is based; the respondent gets a copy of the accusations and a preliminary copy of the team's fact findings, to which he or she can object—again within seven days, a very short time—but not all of the information gathered is necessarily included. Everything is filtered through the investigative team, which decides the scope of the investigation, the credibility of witnesses, and whom to interview and when.

Nothing in the OCR's 2011 "Dear Colleague" letter called for a proceeding remotely like this. Indeed, the letter underscored the need for an "adequate, reliable and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence," and to have access to any information that would be used at the "hearing." And while the 2014 White House "Not Alone" report mentioned that some schools had a "single, trained investigator" doing "the lion's share of fact finding," as in Harvard's policy, it did not—and I would argue, should not—require such an approach.

Nor is there any meaningful role for lawyers in the Harvard policy. The parties may use a "personal adviser" who can be a lawyer, but that adviser may not speak for their advisees at the only relevant stage in this policy, the interview with the investigative team, "although they may ask to suspend the interviews briefly if they feel their advisees would benefit from a short break." (Indeed, this description sounds like a grand jury proceeding, which is notoriously one--sided, controlled entirely by the prosecutor with no role for the defendant's lawyer, within the hearing room.) Harvard makes no provision for representation of the accused, particularly for students unable to afford counsel, as the letter of the 28 professors notes. Richer students will have lawyers; poorer students will not. Nothing should prevent a university with Harvard's resources from providing lawyers for those who cannot afford them, as, for example, Columbia University does. In contrast, the complainant has advisers and advocates from the Title IX office at the outset of the proceeding, advocates especially provided for under the policy. The respondents are left to their own resources.

As the 28 law school faculty members' letter noted, even the definition of the misconduct is skewed. The new Harvard standards governing sexual conduct between students when both are impaired or incapacitated are "starkly one sided" and "inadequate to address the complex issues involved in these unfortunate situations involving extreme use and abuse of alcohol and drugs by our students." "Impairment" and "incapacitation" are not the same, under the law. Sex with an individual who is incapacitated or unconscious, who does not understand what is happening, is plainly egregious, and is rape by any modern definition. But "impairment" because of alcohol is surely a different matter. Worse yet, the policy is not equally applied: The accused's "impairment" based on drugs or alcohol is not at all relevant; it is not an argument for his "diminished capacity" as it might be under the criminal law of some jurisdictions. Instead, the policy treats him as if he were fully sober, fully responsible for his acts. The complainant's "impairment" is another matter. If both parties are drunk, but not unconscious, not incapacitated, and only impaired by their drinking, and they have sex, only he is responsible under Harvard's policy.

In fact, there is no reason to believe that the students themselves define what Professor Janet Halley of Harvard Law School calls "drunk/drunk" cases as rape at all. While 10 percent of female MIT undergraduates in a recent study identified themselves as having "been sexually assaulted," 44 percent reported having sex while being incapacitated by drugs or alcohol. Plainly, some of the students did not regard sex under those circumstances as sexual assault. The unfairness of this policy is nowhere clearer when the misconduct allegations are also the subject of a criminal investigation. The policy requires that the respondent be advised to get a lawyer—again on his own dime—before he provides any statement, but the investigation may well proceed at the discretion of the Title IX office. And should that investigation continue—given his silence—he stands a good chance of losing the disciplinary proceeding and being subject to academic sanctions. At the same time, should a legal prosecution end with dismissed charges or an acquittal, there is no provision for a reconsideration of the academic sanctions.

Sexual assault advocates will argue that this is as it should be. It will be traumatic for the complainant to confront her accuser, even if only through her representatives rather than directly. It will be traumatic for the complainant to be asked to repeat her story over again. A speedy resolution is

critical to her recovery, they would suggest. These arguments, however, assume the outcome—that the complainant's account is true—without giving the accused an opportunity to meaningfully test it. However flawed, the way we test narratives of misconduct—on whichever side—is by questioning the witness, by holding hearings, by sharing the evidence that has been gathered, by giving everyone access to lawyers, by assuring a neutral fact-finder. While we know from the Innocence Project that even these "tests" can produce wrongful convictions, they are at least more likely to produce reliable results than the opposite—a one-sided, administrative proceeding, with a single investigator, judge, jury, and appeals court.

Indeed, the Office for Civil Rights has agreed to investigate a claim of a wrongful accusation of sexual assault at Brandeis University. A male student was found guilty of assaulting his ex-lover, also a man. He claims that the school's investigation was skewed, that he was not permitted to respond fully to the accusations, that his accuser had counsel while he did not, and that his counter allegations were not sufficiently credited in Brandeis's investigation. In effect, the complainant is arguing that a flawed, unfair process undermines his Title IX rights to equal participation in university life. While all of the details of the Brandeis complaint are not clear at this time, to the extent that Harvard's new procedures mirror those of Brandeis, Harvard may also be vulnerable to wrongful-accusation charges.

Some will say that all of this shows that a university has no business at all dealing with sexual misconduct accusations, which amount to a crime. The police should be called; the sanction should not simply be suspension or expulsion but prison. And in a criminal trial, there is no question about due process; the accused has the benefit of all the rights guaranteed in the Constitution. Indeed, Yale Law Professor Jed Rubenfeld argues that recourse to university remedies rather than a criminal prosecution for rape trivializes the offense, and may even enable serial predators to get away with their crimes.

Yet women are right to be skeptical about the criminal justice system—about full-blown criminal trials and appeals and the toll they take on witnesses and accusers, about the higher standard of criminal proof, beyond a reasonable doubt, which, though justified by the risk of imprisonment, can leave many claims un-redressed. To be sure, there is overlap between the two—when a student accused of misconduct under Title IX is also vulnerable to a criminal

prosecution—but they cannot be mutually exclusive. In any event, Title IX's definition of sexual misconduct and sexual harassment is appropriately broader, more nuanced than even the recent statutory definitions of rape. While the colleges and universities abandoned their role as parens patriae (de facto parents) decades ago, in a sense, Title IX has invited them back in, policing sexual activities and misconduct—although, according to some commentators, not paying enough attention to the conditions that make that misconduct possible, like alcohol and drugs. Still, just because prison is not a risk hardly means that Title IX disciplinary proceedings are without serious consequences for those accused, and surely does not justify a process as one-sided as is Harvard's.

There are plainly other options, other ways of protecting the rights of both students who bring complaints and of those they accuse. The policy adopted by Oberlin College offers an instructive counter-example. This is all the more interesting, since Oberlin has a reputation as a left-wing and politically correct college. Indeed, the college was widely ridiculed last year when a professor proposed a conduct code requiring teachers to give "trigger warnings" when a class included material that might upset some students. (Oberlin quickly shelved that proposal.) Yet Oberlin's procedure on sexual misconduct may be a model for other schools.

Oberlin has devised a symmetrical due process proceeding. In language suggested by the students, the parties to the case are termed "reporting party" and "responding party" rather than victim and perpetrator. After a preliminary assessment, designed both to provide support to the complainant and to determine whether there is reasonable cause to move to a fact-finding panel, a disciplinary proceeding may be called. Both parties may present information, call witnesses, and, in lieu of a cross-examination, may forward questions that they want the panel to ask the other party. The three panelists are trained administrators, none of whom is part of the Title IX office. "That would be a conflict of interest," says Meredith Raimondo, Oberlin's Title IX director. In the event that punishment is meted out, the responding party has the right of appeal to the dean of students, who is also not affiliated with the Title IX office. If the complainant feels the outcome is unfair, she may also appeal. This policy was created by a task force that included students, faculty, and administrators meeting over the course of 18 months. "We feel there can be great harm when the process is seen as biased against reporting parties,"

says Raimondo, “and there can be great harm when it is perceived to be biased against responding parties.”

We put our work at risk when the media can dredge up the shibboleths about false accusations of rape, a collective “We told you so” tapping into old attitudes.

Feminists should be concerned about fair process, even in private institutions where the law does not require it, because we should be concerned about reliable findings of responsibility. We put our decades-long efforts to stop sexual violence at risk when men come forward and credibly claim they were wrongly accused. We put our work at risk when the media can dredge up the shibboleths about false accusations of rape, a collective “We told you so” tapping into old attitudes. The recent feeding frenzy around Rolling Stone’s account of a gang rape at the University of Virginia campus shows just how much damage can be done by the claim that a rape report was flawed—damage to the women making the accusations, to the men who are accused, and to the cause of combating sexual violence.

There is no question that we have to confront sexual misconduct on campus and elsewhere as aggressively and comprehensively as we can. There is no question that we have to lift the protection offered the star athlete, confront the administrators more concerned with the man’s future than with a woman’s trauma, challenge the atmosphere of impunity at fraternity houses and social clubs. And we can do so without turning every disciplinary proceeding into a full-blown trial, without imposing the maximum due process protections, on the one hand, or an administrative Star Chamber, on the other. It isn’t necessary to jettison every modicum of a fair process to redress decades-long inattention to these issues. It never is. As I argued in Paul’s case, we should not substitute a regime in which women are treated without dignity for one in which those they are accusing are similarly demeaned. Indeed, feminists should be concerned about fair process, not just because it makes fact-findings more reliable and more credible, but for its own sake.

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Doe v. Ohio State Univ.

United States District Court for the Southern District of Ohio, Eastern Division

November 7, 2016, Decided; November 7, 2016, Filed

Case No. 2:15-cv-2830

Reporter
219 F. Supp. 3d 645 *; 2016 U.S. Dist. LEXIS 154179 **; 2016 WL 6581843

John Doe, Plaintiff, v. The Ohio State University, et al., Defendants.

Prior History: Doe v. Ohio State Univ., 2015 U.S. Dist. LEXIS 141218 (S.D. Ohio, Oct. 16, 2015)

Counsel: [**1] For John Doe, Plaintiff: Joshua A Engel, LEAD ATTORNEY, Engel & Martin, LLC, Mason, OH.

For The Ohio State University, Javaune Adams-Gaston, Matthew Page, Defendants: Christina Louise Corl, LEAD ATTORNEY, Plunkett Cooney, Columbus, OH; Reid T Caryer, Ohio Attorney General's Office, Columbus, OH.

For Jeff Majarian, Kellie Brennan, Natalie Spiert, Defendants: Christina Louise Corl, LEAD ATTORNEY, Plunkett Cooney, Columbus, OH.

For Jane Roe, Movant: Chanda LaVelle Brown, LEAD ATTORNEY, WALTON + BROWN, LLP, Columbus, OH; Christina Louise Corl, LEAD ATTORNEY, Plunkett Cooney, Columbus, OH; Seth P. Cox, PRO HAC VICE, McGuireWoods LLP, Los Angeles, CA.

Judges: JAMES L. GRAHAM, United States District Judge. Magistrate Judge Kemp.

Opinion by: JAMES L. GRAHAM

Opinion

[*650] **OPINION & ORDER**

The Ohio State University ("OSU") expelled one of its students, John Doe[1], for sexual misconduct. A university hearing panel found that Doe engaged in sexual misconduct by having sex with a classmate who lacked the capacity to consent because she was inebriated. John Doe claims OSU expelled him because of a fundamentally unfair disciplinary process. He argues that, among other things, OSU and some of its personnel knew that his accuser had a reason [**2] to fabricate her charge of sexual misconduct, but they failed to provide him with this information before the hearing and instead permitted her to make false or misleading statements to the hearing panel. Doe sued OSU and five of its administrators (the "Administrators") alleging they violated his procedural due process rights. Doe alleges claims against two of the Administrators in their official capacity and alleges claims against all five in their individual capacity. Now, OSU and its administrators (collectively, "Defendants") move to dismiss Doe's claims based on Eleventh Amendment immunity and qualified immunity.

I. Background

A. Factual allegations

John Doe was a joint degree M.D./M.B.A. student at OSU. (Am. Compl. at ¶ 3, Doc. 44). The woman who accused him of sexual misconduct, Jane Roe[2], is a female medical student at OSU. (*Id.* at ¶ 40). OSU is a public university created by the Ohio Legislature. (*Id.* at ¶ 4). The five Administrators each have different roles at OSU.

Defendant Javaune Adams-Gaston is the Vice President for Student Life at OSU. (*Id.* at ¶ 5). Doe alleges that Adams-Gaston is responsible for OSU's Student Code of Conduct and Judicial System and made the ultimate decision to expel Doe from OSU. (*Id.*).

Defendant Matthew Page is the Associate Director for Student Life at OSU. (*Id.* at ¶ 6). Doe alleges Page "has responsibility for helping to enforce and manage the disciplinary hearings" at OSU, and he "is also a Deputy Title IX Coordinator at OSU." (*Id.*).

[1] He proceeds anonymously per this Court's order. (Doc. 17).

[2] Judge Frost indicated in his order denying Doe's motion for a preliminary injunction that the Court entered an oral order that the parties should refer to the alleged victim [**3] as "Jane Roe." (Doc. 75 at 2 n.2).

Defendant Jeff Majarian is an Associate Director for Student Life at OSU. (*Id.* at ¶ 7). Doe alleges Majarian was responsible for the investigation into Jane Roe's allegations that ultimately led to Doe's expulsion. (*Id.*).

Defendant Kellie Brennan is the Title IX Coordinator for OSU. (*Id.* at ¶ 8). Doe alleges that Brennan was responsible for OSU's Title IX compliance, including providing education and training and ensuring the "university responds appropriately, effectively and equitably to Title IX issues." (*Id.*). Doe alleges that Brennan is responsible for "helping alleged victims obtain accommodations from OSU" and must serve "as consultant to any disciplinary [**4] hearing panel." (*Id.* at ¶ 27).

Defendant Natalie Spiert is the Sexual Violence Support Coordinator in OSU's Office for Student Life. (*Id.* at ¶ 9). Doe alleges Spiert "provides support and resources for students who have experienced sexual violence" in her capacity as the [*651] Sexual Violence Support Coordinator at OSU. (*Id.*). Doe alleges that Spiert knew that Doe's accuser made a false or misleading statement to the hearing panel. (*Id.* at ¶ 67).

The factual background of this case is laid out in great detail in Magistrate Judge Kemp's Report and Recommendation ("R&R"). (*See* Doc. 66 at 2-10). For purposes of this motion, a summary of the factual allegations will suffice.

John Doe was enrolled at OSU in a joint M.D./M.B.A. program. He was set to graduate from the program in May 2016, but OSU expelled him on September 10, 2015. He was expelled following a hearing before OSU's Conduct Board where he responded to an allegation that he had engaged in sexual misconduct with a medical student, Jane Roe. At the hearing, Doe testified that his sexual encounter with Jane Roe was consensual; Jane Roe testified that she had no memory of the encounter. Other witnesses testified about Doe and Roe's characters [**5] and the events of that night, including their perception of Jane Roe being intoxicated. Ultimately, the hearing panel found Doe had violated the OSU Code of Conduct or Sexual Misconduct Policy.

Doe alleges that throughout the investigation, hearing, and appeal process, the Defendants denied him procedural due process in a number of different ways. The basis for many of his due process claims is that OSU denied him the opportunity to present his story: that he and Jane Roe had consensual sex, and she fabricated the no-consent story when she faced failing out of medical school for the second time. Key to John Doe's allegations is a timeline of events.

On July 12, 2014, John Doe and Jane Roe had sex at John Doe's apartment. On March 23, 2015, Jane Roe received a copy of a letter informing her that she was being "referred to the ABRC [Academic Behavioral Review Committee] for consideration of her dismissal from the OSU Medical School." (Am. Compl. at ¶ 47). Dr. Danforth, the chair of the ABRC, made it clear to Jane Roe that "[h]er expectation that she will be permitted to continue in the curriculum is unrealistic." (*Id.*). Doe alleges that on March 25, 2015, for the first time, Jane Roe contacted [**6] the Office of Student Life at OSU to report that she was the victim of a sexual assault. (*Id.* at ¶¶ 48-49). Doe met with the ABRC on April 15, 2015. (*Id.* at ¶ 51). On April 17, 2015, Jane Roe scheduled an appointment to meet with Majarian as part of the process of reporting the incident to another university body, the Student Conduct Office. (*Id.* at ¶ 53). On April 21, 2015, the ABRC granted Jane Roe the opportunity to repeat the first year of medical school. (*Id.* at ¶¶ 52, 54).

Doe alleges that the Administrators knew that Jane Roe received this accommodation—the chance to repeat the first year of medical school—and knew that she didn't report the incident until after facing the prospect of failing out of medical school for the second time. OSU failed to turn over this key piece of evidence before Doe's disciplinary hearing. Further still, at the disciplinary hearing, Jane Roe indicated she only reported the sexual misconduct after OSU's decision to allow her to again repeat the first year of medical school. (*Id.* at ¶ 67).

Doe argues he would have been able to use evidence of Roe's accommodation at the hearing to impeach Roe's credibility, to refute her statement that she only reported [**7] the incident after the university's decision to allow her to repeat her first year of medical school again, and to answer one of the panel member's questions about Jane Roe's incentive to fabricate her story. Since the outcome of the hearing appeared [*652] to turn on a question of credibility, by denying Doe this critical evidence, Doe argues that OSU denied him procedural due process.

B. Procedural Background

In September 2015, John Doe filed a verified complaint seeking a declaratory judgment, injunctive relief, and damages, arguing that OSU and the Administrators violated his due process rights and Title IX. (Doc. 1). Doe also moved for a Temporary Restraining Order, (Doc. 2), which the Court denied in October 2015, (Doc. 20). After a first motion to dismiss from Defendants, (Doc. 28), Doe filed an amended complaint, (Doc. 44). Shortly thereafter, Defendants filed a motion to dismiss the claims in the amended complaint. (Doc. 55). Later that month, Magistrate Judge Kemp recommended that the motion for preliminary injunction be denied. (Doc. 66). Judge Frost adopted the R&R in April 2016. (Doc. 75). Judge Frost noted, in his order denying the motion for preliminary injunction, that "Plaintiff [**8] has introduced evidence that has given this Court significant pause as to many of the practices that the

university employs and the rules it has established to govern its investigative and disciplinary hearing process." (*Id.* at 6). However, for Judge Frost, "not even these concerns—taken together or viewed individually—suggest that Plaintiff can prevail on his due process claim." (*Id.*). The Court stayed discovery pending the outcome of the present motion to dismiss.

Defendants move to dismiss under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).

II. Legal Standard

> Under Rule 12(b)(6), the complaint is viewed in the light most favorable to plaintiffs, the allegations in the complaint are accepted as true, and all reasonable inferences are drawn in favor of plaintiffs. *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008). However, "a legal conclusion couched as a factual allegation" need not be accepted as true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Plaintiffs' obligation to provide the "grounds" for their claimed entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* The factual allegations must "raise the right to relief above the speculative level." *Id.* The complaint must state a claim that is plausible on its face, i.e., the court must be [**9] able to draw a "reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). This "plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. 1955).

Rondigo, L.L.C. v. Twp. of Richmond, 641 F.3d 673, 680 (6th Cir. 2011).

While generally "matters outside the pleadings may not be considered in ruling on a 12(b)(6) motion to dismiss" without converting it into a summary judgment motion, *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999) (quoting *Weiner v. Klais & Co.*, 108 F.3d 86, 88 (6th Cir. 1997)), *abrogated on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002), [*653] "when a document is referred to in the pleadings and is integral to the claims, it may be considered without converting a motion to dismiss into one for summary judgment," *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 335-36 (6th Cir. 2007). If both parties reference and quote extensively from particular documents, and neither party contests the appropriateness of considering the documents on review of a motion to dismiss, the Court may consider the documents. *See In re Fair Fin. Co.*, 834 F.3d 651, 2016 WL 4437606, at *1 n.1 (6th Cir. 2016).

Here, the parties don't dispute the appropriateness of considering the transcript of the disciplinary hearing, which [**10] both parties quote and reference throughout their briefs. The key contents of the hearing transcript are alleged in the Amended Complaint. To the extent the Court relies on any part of the hearing transcript that is not quoted in the Amended Complaint, the Court considers it integral to Doe's claims and therefore appropriate to consider.

> Challenges to subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) are categorized as either a facial attack or a factual attack. "Under a facial attack, all of the allegations in the complaint must be taken as true.... Under a factual attack, however, the court can actually weigh evidence to confirm the existence of the factual predicates for subject-matter jurisdiction." *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 440 (6th Cir. 2012).

McCormick v. Miami Univ., 693 F.3d 654, 658 (6th Cir. 2012). Here, Defendants move to dismiss for lack of subject matter jurisdiction, arguing they are entitled to Eleventh Amendment immunity. They do not categorize their attack on subject-matter jurisdiction as facial or factual. But the Court construes it as a facial attack because Defendants do not dispute the facts alleged for purposes of Eleventh Amendment immunity.

III. Discussion

Defendants move to dismiss all of Doe's claims. Defendants claim Eleventh Amendment immunity for OSU and the Administrators in their official capacity. Defendants claim qualified [**11] immunity for the Administrators sued in their personal capacity.

A. Eleventh Amendment immunity

Defendants argue that OSU and the Administrators sued in their official capacity are immune from suit under the Eleventh Amendment. Doe concedes that OSU enjoys Eleventh Amendment immunity. But Doe argues that he is suing the Administrators in their official capacity for prospective declaratory and injunctive relief, which is one of the narrow exceptions to Eleventh Amendment immunity.

The Eleventh Amendment grants the states sovereign immunity from suits for money damages. Specifically, the judicial power of the United States, exercised through the federal courts, does not extend to a suit against a state brought by one of that state's citizens. *McCormick*, 693 F.3d at 661.[3] So, if Eleventh Amendment [*654] immunity applies, the Court lacks subject-matter jurisdiction. *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1046 (6th Cir. 2015).

A suit against OSU is the same as a suit against [**12] Ohio because OSU, like Ohio's other public universities, qualifies as an arm of the state. *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 571 (6th Cir. 2000). Likewise, claims against state officers in their official capacity are "no different from a suit against the State itself." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). So OSU and the Administrators sued in their official capacity enjoy immunity. This includes immunity even from declaratory-judgment actions where a declaratory judgment would have "much the same effect as a full-fledged award of damages or restitution by the federal court." *Green v. Mansour*, 474 U.S. 64, 73, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985) (permitting declaratory judgments would result in "a partial 'end run' around" the Supreme Court's Eleventh Amendment jurisprudence).

But Eleventh Amendment immunity permits an exception: "federal courts [may] enjoin state officers in their official capacity from prospectively violating a federal statute or the Constitution." *Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 904 (6th Cir. 2014). So "the Eleventh Amendment does not preclude a suit against [state officers] for prospective injunctive relief." *McCormick*, 693 F.3d at 662 (citing *McKay v. Thompson*, 226 F.3d 752, 757 (6th Cir. 2000)); *see Ex parte Young*, 209 U.S. 123, 129, 28 S. Ct. 441, 52 L. Ed. 714 (1908). A claim for reinstatement constitutes prospective injunctive relief whether it is reinstatement to a job, *Whitfield v. Tennessee*, 639 F.3d 253, 257 (6th Cir. 2011), or reinstatement to a medical school, *see Hall v. Med. Coll. of Ohio at Toledo*, 742 F.2d 299, 307 (6th Cir. 1984).

Here, Doe does not state a claim for reinstatement or any other kind of prospective relief. In his Amended Complaint, Doe seeks, on Count I, "[j]udgment in favor [**13] of the Plaintiff declaring that the Defendants have violated the United States Constitution, the Ohio Constitution, the Ohio Administrative Code, and Title IX." (Am. Compl. at 57). On its face, Count I seeks retrospective relief. On Count II, Doe seeks "damages in an amount to be determined at trial." (*Id.*). In both counts, Doe appears to seek retrospective rather than prospective relief. Doe counters with two arguments.

First, Doe argues that his expulsion now noted on his academic record adversely affects his ability to seek employment, and a declaratory judgment would "eliminate this ongoing harm." (Pl.'s Resp. at 12, Doc. 69). If the Court did issue a declaratory judgment, it would do so to correct a previous error in the disciplinary process OSU used in this case. Of course, without this discipline on his record, Doe's employment prospects might improve. But any plaintiff could make a similar argument that a declaratory judgment to right past wrongs would cause some prospective benefit. But here, if the Court issued the declaratory judgment Doe seeks, that judgment wouldn't correct "an ongoing violation of federal law." *Diaz v. Mich. Dep't of Corr.*, 703 F.3d 956, 965 (6th Cir. 2013).

Second, Doe argues that he does seek reinstatement because [**14] that would be the practical effect of a declaratory judgment that OSU and the individual defendants have violated his constitutional rights. A claim for reinstatement would be prospective relief. *Hall*, 742 F.3d at 307. The Court is not persuaded that Doe seeks reinstatement. It would have been simple for Doe to ask for reinstatement: he had a [*655] chance to amend his complaint and did so without adding a request for reinstatement. While vacating OSU's discipline might have the effect of clearing the way for Doe to return to OSU, or as Doe says, it would "permit him to re-enroll," Doe doesn't even plead that he wants to re-enroll, or that it would be automatic.

Doe argues that this Court has previously held that a "plaintiff's request for a declaration that the defendants violated his due process rights qualified as prospective equitable relief because the declaratory judgment request was, in effect, part and parcel of plaintiff's request for injunctive relief." (Pl.'s Resp. at 13-14) (citing *Gies v. Flack*, 495 F. Supp. 2d 854 (S.D Ohio 2004)). In *Gies*, the eponymous plaintiff's claims for a name-clearing hearing and reinstatement to his university post were not prohibited by the Eleventh Amendment. *Id.* at 865. These claims, styled as claims for declaratory judgments, were not prohibited [**15] by the Eleventh Amendment because they were prospective, and in the case of the request for a name-clearing hearing, would "have only an incidental or ancillary effect on the state treasury." *Id.* But Gies's other claims for declaratory judgment—that the defendants violated his procedural due process rights by 1) failing to follow university procedure for detenurization[4] procedures, 2) removing the

[3] The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. But the Supreme Court has interpreted the amendment to include another class of individuals who may not sue one of the United States: a state's own citizens. *See Hans v. Louisiana*, 134 U.S. 1, 21, 10 S. Ct. 504, 33 L. Ed. 842 (1890).

[4] "Detenurization" is the process of removing tenure from a tenured

trappings of his tenure pre-detenurization, and 3) prematurely terminating him without due process—were barred by the Eleventh Amendment. *Id.* at 863-64.

Here, Doe did not request a name-clearing hearing or reinstatement. Granting Doe the relief he seeks would not have the practical effect of prospective equitable relief. Doe's claims against OSU and the Administrators in their official capacity are dismissed "because the Eleventh Amendment bars this Court from hearing them." *Id.* at 865.

B. Qualified Immunity

Now, what remains are Doe's claims against the Administrators in their individual capacity. Doe claims each played a role in violating his procedural due process rights. Doe identifies seven discrete violations of procedural due process. One: the investigation into Jane Roe's claims was inadequate [**16] and biased. (Am. Compl. at ¶ 57). Two: the hearing panel received training that biased the panel against Doe. (*Id.* at ¶¶ 37-39). Three: Doe was not permitted to conduct any discovery. (*Id.* at ¶ 91). Four: Doe was not permitted to effectively cross-examine Jane Roe due to questions being re-worded by the hearing panel coordinator, Matthew Page. (*Id.* at ¶ 63). Five: John Doe was denied the effective assistance of an attorney at the hearing. (*Id.* at ¶ 62). Six: Doe should have been allowed to present exculpatory expert testimony at the hearing. (*Id.* at ¶ 72). Seven: OSU should have disclosed to Doe key evidence that he would have used to impeach his accuser, Jane Roe. (*Id.* at ¶ 67).

While each individual claim has applicable due-process law, some general procedural-due-process rules will help set the framework for this discussion.

At the pleadings stage, a plaintiff must set forth facts that satisfy a two-part test to determine "whether qualified immunity applies: '(1) whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated, and (2) whether that right was clearly established.'" *Heyne v. Metro. Nashville Pub. Sch.*, 655 F.3d 556, 562 (6th Cir. 2011) (quoting *Colvin v. Caruso*, 605 F.3d 282, 290 (6th Cir. 2010)). [*656] This is not a heightened pleading [**17] standard. *Id.* "[D]amage claims against government officials arising from alleged violations of constitutional rights must allege, with particularity, facts that demonstrate what *each* defendant did to violate the asserted constitutional right." *Lanman v. Hinson*, 529 F.3d 673, 684 (6th Cir. 2008) (quoting *Terrance v. Northville Reg'l Psychiatric Hosp.*, 286 F.3d 834, 842 (6th Cir. 2002)). The Court "cannot ascribe the acts of all Individual Defendants to each individual defendant." *Heyne*, 655 F.3d at 564.

The Court "review[s] an assertion of qualified immunity to determine only whether the complaint 'adequately alleges the commission of acts that violated clearly established law.'" *Back v. Hall*, 537 F.3d 552, 555 (6th Cir. 2008) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)). "A constitutional right is clearly established where its contours are sufficiently clear that a reasonable official would understand that what he is doing violates that right—in other words, where it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Daily Servs., LLC v. Valentino*, 756 F.3d 893, 900 (6th Cir. 2014) (internal quotation marks omitted) (citations omitted). "To be clearly established, a right must have been decided by the United States Supreme Court, the Court of Appeals, or the highest court of the state in which the alleged violation occurred." *Neague v. Cynkar*, 258 F.3d 504, 507 (6th Cir. 2001).

A student has a right to procedural due process in serious school disciplinary proceedings, like suspensions or expulsions. [**18] *See Goss v. Lopez*, 419 U.S. 565, 576, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975). So here, due process applies, but how many procedural protections should Doe be afforded? In short, a person must "be given some kind of notice and afforded some kind of hearing." *Id.* at 579. But the Court must be mindful that the Due Process Clause only "sets a floor or lower limit on what is constitutionally adequate." *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 639 (6th Cir. 2005).

The type of notice and the type of hearing "to which a student may be entitled depend[s] on the competing interests of those involved." *Jahn v. Farnsworth*, 617 F. App'x 453, 459 (6th Cir. 2015).

> [T]he specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

The Sixth Circuit has already considered a procedural-due-process challenge to an Ohio medical school's disciplinary process for an expelled medical student. *See generally Flaim*, 418 F.3d 629. There, the medical school used procedures that "were far from ideal and [**19] certainly could have been better[, but] they were in the end . . . fundamentally fair." *Id.* at 637. The Sixth Circuit found a strong private interest implicated by

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professor.

expulsion from medical school. *Id.* at 638. This strong interest merited more and more formal procedures than required for a lesser sanction, but even expulsion did not merit trial-type procedures. *Id.* at 635. While *Flaim*, doesn't require trial-type procedures, it outlined what the Constitution [*657] requires for a fundamentally fair hearing process.

Generally, the hearing must be meaningful. *Id.* If the hearing is live, the accused has the right to be present. *Id.* But the hearing need not be open to the public, formal rules of evidence and procedure need not be applied, nor do witnesses need to be placed under oath. *Id.* "[U]niversities need not allow active representation by legal counsel," but in certain circumstances it may be necessary to "ensure fundamental fairness." *Id.* at 636. The accused has the right to make a statement and present evidence; this may include the right to cross-examine witnesses. *Id.* Due process may require at least the ability to create a record of the proceeding. *Id.* The student is generally not entitled to a reasoned opinion supporting the decision against [**20] them, nor is the student generally entitled to an appeal. *Id.* The Court uses the term "generally" because due process is a flexible concept and may require more or less process depending on the situation. *See id.* at 641 (discussing varying rights to cross-examination depending on what was required for a fair hearing).

The parties disagree about how the Court should structure its analysis. Defendants say that the Court needs to look at the allegations against each individual defendant. Doe argues that this "atomistic" approach is wrong; the Court should instead analyze each of the procedural problems he identifies. Both sides present part of the answer. The Court must analyze each claim against each defendant—their liability does not necessarily rise and fall together. However, their liability is related to the extent that they each played a role in the various parts of the disciplinary process. This will be reflected in the Court's analysis structure: the Court adopts Doe's problem-centric approach, analyzing each due process deficiency Doe identifies, and then, if Doe states a plausible claim for relief, the Court analyzes which Administrators were allegedly responsible for that deficiency.

[**21] **1. The investigation into Jane Roe's claims was inadequate and biased**

Defendants argue that procedural due process does not guarantee any investigation, only that the accused will receive notice and an opportunity to be heard. Doe argues that Majarian was biased and his bias led him to conduct an incomplete investigation where he was aware of the likely existence of facts that would undermine Roe's credibility but chose to make no effort to find that evidence. Specifically, Doe alleges that Majarian knew of the existence of several facts that could have impugned Roe's credibility, but he chose not to seek that evidence.

Doe provides no authority for the proposition that the Due Process Clause requires certain thoroughness to an investigation. To be sure, the aim of due process is a fair process. But "[t]he Due Process Clause does not require a particular kind of investigation . . . ." *Nguyen v. Univ. of Louisville*, No. CIV.A. 3:04-CV-457-H, 2006 U.S. Dist. LEXIS 20082, 2006 WL 1005152, at *4 (W.D. Ky. Apr. 14, 2006). The procedural-due-process analysis focuses on the decision-maker, not the investigator. *See Kolley v. Adult Protective Servs.*, 725 F.3d 581, 586-87 (6th Cir. 2013) (dismissing procedural-due-process claims against social workers and investigators because it was the juvenile court's duty, and not the investigators' duty, to provide notice and a hearing). Due [**22] process provides, not a guarantee of a perfect investigation, but notice and an opportunity to be heard by a neutral decisionmaker. Here, any claims of bias in the investigation don't implicate these due process concerns.

[*658] Since Doe identifies no violation of a clearly established right to a thorough and neutral investigation, the Administrators are entitled to qualified immunity on this point. And since the only allegations against Majarian are that he performed an inadequate investigation, he is entitled to qualified immunity.

2. The hearing panel members received training that biased them against Doe

Doe argues that the five-member hearing panel was trained in a manner to produce bias. Specifically, Doe alleges the panel members received training on sexual assault prevention and understanding sexual coercion and aggression. Doe alleges that this training encouraged the panel members to empathize with victims rather than to evaluate each case dispassionately on the merits. Defendants argue that Doe's allegations cannot overcome the legal presumption that adjudicators act with honesty and integrity.

"[A] biased decisionmaker [is] constitutionally unacceptable, [and] 'our system of law [**23] has always endeavored to prevent even the probability of unfairness.'" *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955)). But "[i]n the university setting, a disciplinary committee is entitled to a presumption of honesty and integrity, absent a showing of actual bias." *McMillan v. Hunt*, 968 F.2d 1215 (6th Cir. 1992) (unpublished table decision) (citing *Ikpeazu v. Univ. of Neb.*, 775 F.2d 250, 254 (8th Cir. 1985)); *see also Hill v. Bd. of Trs. of Mich. State Univ.*, 182 F. Supp. 2d 621, 628 (W.D. Mich. 2001). Actual bias could be "personal animosity, illegal prejudice, or a personal or financial stake in the outcome." *Ikpeazu*, 775 F.2d at

254. To survive a motion to dismiss, Doe needs to allege specific, non-conclusory facts that if taken as true show actual bias.

Doe alleges, generally, that the panel members were trained in a manner intended to produce bias against men accused of sexual misconduct. He alleges that the panel members received training on sexual misconduct and how to prevent sexual assault but did not receive any training on the due process rights of students accused of sexual misconduct. Doe alleges the training included viewing presentations and videos that had the effect of biasing the panel members in favor of victims and prejudicing the panel members against men accused of sexual misconduct. For example, the panel members were presented statistical evidence that "22-57% of college men report perpetrating a form of sexual [**24] aggressive behavior." (Am. Compl. at ¶ 38). And, "[c]ollege men view verbal coercion and administration of alcohol or drugs as permissible means to obtain sex play or sexual intercourse." (*Id.*). "Repeat perpetrators are aware of myths and how to present and empathic." (sic). (*Id.*). "Sex offenders are experts in rationalizing behavior." (*Id.*). Doe alleges panel members were trained to "identify and understand characteristics of individuals who pose a risk to the safety of the community." (*Id.*).

The Court must accept these allegations as true, view them in the light most favorable to Doe, and draw all reasonable inferences in favor of him. Doe has alleged specific, non-conclusory facts to state a plausible claim that OSU's training produced biased panel members. He does not allege that the panel members received any other training; in fact, he alleges that the panel members received no training about "protecting the due process rights of the accused." (Am. Compl. at ¶ 38). If the training Doe alleges was the only training given to the panel members, it's plausible that OSU trained its panel members in a [*659] manner that produced actual bias. Admittedly, he presents no allegations that any specific [**25] panel member had any particular animus towards him. But with only his allegations to go on, the Court is left to analyze a plausibly one-sided training process.

The Court does not mean to say that any of OSU's training is untrue or not worthwhile or that the university's alleged goal of aiding victims and creating a safer campus community should not be lauded. Indeed,

> [t]here is not exactly a constituency in favor of sexual assault, and it is difficult to imagine a proper member of the Hearing Committee not firmly against it. It is another matter altogether to assert that, because someone is against sexual assault, she would be unable to be a fair and neutral judge as to whether a sexual assault had happened in the first place.

Gomes v. Univ. of Maine Sys., 365 F. Supp. 2d 6, 31-32 (D. Me. 2005).

The Court could assume that the training Doe alleges is not the only training the panel members received, but at the Rule 12 stage, the Court is required to accept the plaintiff's allegations as true and view them in the light most favorable to the plaintiff. This means operating under the assumption that the panel members received only the training Doe alleges and no training or direction on their role as fair and neutral judges. This, if true, plausibly alleges the panel [**26] members had illegal prejudice to individuals in Doe's position, which amounts to actual bias.

But Doe does not specifically identify which of the Administrators were responsible for the training. The Amended Complaint implicates Brennan as the official responsible for Title XI compliance and training. (Am. Compl. at ¶ 8). Doe does not allege that any of the other Administrators played any role in the allegedly bias-inducing training. The Court will deny the motion to dismiss as to Administrator Kellie Brennan, but will grant the motion as to the other Administrators because Doe has not alleged that any of them were responsible for the training. The Court will permit limited discovery on the issue of the panel members' training in order to resolve the issue of whether Brennan is entitled to qualified immunity.

3. Doe was not permitted to conduct any discovery before the hearing

Doe raised this generic allegation, but he fails to pursue it in his response to Defendants' motion to dismiss. In any event, there is no clearly established due process right to formal discovery in university disciplinary hearings. *See, e.g., Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 520 (10th Cir. 1998) ("The Due Process Clause does not guarantee that parties to an adversarial proceeding [**27] may discover every piece of evidence they desire. Indeed, civil litigants in federal court do not have a claim for a violation of their Fourteenth Amendment rights every time a federal district judge or a federal magistrate rules against them in a discovery dispute."). The Court will later address in detail Doe's claims that he is entitled to some specific disclosures, but on Doe's claim that he is entitled to general discovery before the disciplinary hearing, the Administrators are entitled to qualified immunity.

4. Doe was not permitted to effectively cross-examine Jane Roe because the hearing panel re-worded some of Doe's questions

The Due Process Clause generally does not guarantee the right to cross-examination in school disciplinary proceedings. *See Newsome v. Batavia Local Sch. [*660] Dist.*, 842 F.2d 920, 925-26 (6th Cir. 1988). But where a disciplinary proceeding depends on

"a choice between believing an accuser and an accused . . . cross-examination is not only beneficial, but essential to due process." *Flaim*, 418 F.3d at 641 (holding that due process was not violated when cross-examination would have been a fruitless exercise, so this language is dictum).

Here, Doe was permitted to cross-examine witnesses at the hearing, but Doe alleges that he was denied the right to cross-examine witnesses effectively. He couldn't [**28] do so effectively because the hearing panel reworded his questions and thereby dulled their effectiveness. Here's an example:

"John Doe attempted to ask Jane Roe, 'You waited ten months to bring this forward. Why is that?' Page changed the question to, '[Jane Roe], would you like to explain that, why you brought it in the time you did?'" (Am. Compl. at ¶ 63) (quoting hearing transcript).

But none of the panel's re-wordings so blunted Doe's questions as to render them useless. Furthermore, nothing prevented Doe from arguing these points in his closing statement. Further still, all of the questions Doe alleges the panel re-worded do not so alter their content that the panel could not understand their significance. Since Doe was permitted to cross-examine witnesses at the hearing, and he has no clearly established right to a trial-type cross-examination, Defendants are entitled to qualified immunity on this point.

5. Doe was denied the effective assistance of an attorney

Doe alleges that he was denied the effective assistance of an attorney at his disciplinary hearing because Doe's attorney was only permitted to pass him notes and whisper advice. But there is no due process right to active [**29] representation by legal counsel in a university disciplinary hearing. *Flaim*, 418 F.3d at 636. However, the Due Process Clause may require counsel "to ensure fundamental fairness when the school proceeds through counsel or the procedures are overly complex. . . . [or] the student is also facing criminal charges stemming from the incident in question." *Id.* (citation omitted).

Here, Doe does not allege that OSU proceeded through counsel, or that the hearing procedures were overly complex, or that he faced any criminal charges stemming from the incident. In any event, Doe was advised by counsel throughout the process. Because Doe did not have a clearly established right to active representation by legal counsel, and because a lawyer did advise Doe throughout the hearing process, the administrators are entitled to qualified immunity on this point.

6. Doe should have been allowed to present exculpatory expert testimony at the hearing

Doe retained an expert from the medical school who formed an opinion about Jane Roe's blood alcohol level at the time of the incident after reviewing evidence of how many drinks she consumed and her height and weight. Doe alleges that he was denied due process because Page would not permit Doe's expert [**30] witness to testify at the hearing.

But there is no due process right to expert testimony in student disciplinary hearings, let alone is such a right clearly established. Doe argues that the *Mathews* test counsels in favor of permitting this testimony because the risk of erroneously expelling Doe from OSU increased when the evidence was excluded. But the evidence wasn't excluded entirely—Doe gave his expert's qualifications and either read or summarized the expert's findings at the [*661] hearing. (Hrg. Trans. at 304-307, Doc. 15). This was more than sufficient to allow Doe to "present his side of the story" and mitigate any risk of erroneously depriving him of his rights. *Goss*, 419 U.S. at 581.

The third *Mathews* factor—"the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail," 424 U.S. 319 at 335—also favors the Administrators. The fiscal and administrative burden on a university would be significant if it had to retain experts, present live expert testimony at student disciplinary hearings, and prepare a cross-examination of the other side's expert witness. In short, the *Mathews* test tilts away from requiring this procedure, even in this case [**31] where there was only one expert witness offered. In any event, the right to present live expert-witness testimony is not a clearly established due process right in the student disciplinary context. Therefore, the Administrators are entitled to qualified immunity on this issue.

7. Defendants' failure to disclose key evidence denied Doe the right to effective cross-examination

Doe argues that the Administrators knew of evidence that he could have used to impeach Jane Roe's credibility, but they did not disclose that evidence to Doe. Then, at the hearing, Jane Roe said, "their decision to keep me in school and to allow me to continue next year in the fall was already decided before my decision to report this assault." (Am. Compl. at ¶ 67). Doe alleges that he would have impeached Roe on this statement if he had the evidence that OSU had. Here are the facts Doe alleges OSU and its Administrators failed to disclose, "[s]pecifically: (a) Jane Roe reported that she was a victim of sexual assault only after she received notice that she was going to be expelled from school; (b) Jane Roe was permitted to remain in school solely because she claimed to be a victim of sexual assault; and (c) Jane Roe misrepresented [**32] to the Hearing Panel her motivation for bringing the allegations and

the timing of her disclosure." (Pl.'s Resp. at 25 (from Am. Compl. at ¶¶ 51-52, 63-64, 67, 69)).

Doe argues that *Brady* requires OSU to disclose this evidence. *See Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The Administrators argue that federal statutes prohibit them from disclosing this evidence. And while *Brady* may not require this disclosure, and its disclosure may conflict with a federal statute, the Due Process Clause may require it.

Brady imposes an affirmative duty on criminal prosecutors to "disclose evidence favorable to a defense." *Kyles v. Whitley*, 514 U.S. 419, 421, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (citing *Brady*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215). Doe argues that courts require government agencies to offer *Brady*-type disclosures in civil matters, citing *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353 (6th Cir. 1993). But in *Demjanjuk*, the Sixth Circuit extended *Brady* to "cover denaturalization and extradition cases where the government seeks denaturalization or extradition based on proof of alleged criminal activities of the party proceeded against." *Id.* There, the court made explicit reference to the fact that *Brady* applied because the government "sought to denaturalize Demjanjuk" in part on the basis that he "was guilty of mass murder." *Id.* There, the government attorneys had a constitutional duty to produce *Brady* material at least [**33] in part because "[t]he consequences of denaturalization and extradition [*662] equal or exceed those of most criminal convictions." *Id.* at 354.

Here, there is no criminal case and certainly no mass murder. The Court is aware of no controlling "case law extending the [*Brady*] rule to civil matters, much less student disciplinary proceedings." *Tanyi v. Appalachian State Univ.*, No. 5:14-CV-170RLV, 2015 U.S. Dist. LEXIS 95577, 2015 WL 4478853, at *5 (W.D.N.C. July 22, 2015) (finding no case law in the Fourth Circuit to support such an extension). The Court will not extend *Brady* to the context of university disciplinary proceedings.

Disclosing this information presents a second problem. If the Due Process Clause requires OSU to disclose the accommodations it makes for alleged victims of sexual misconduct, that requirement may be in conflict with a federal statute.[5] The Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, prohibits the disclosure of "personally identifiable information" in student academic records. Here, the accommodation Jane Roe received is part of her academic record at OSU. Disclosing this accommodation would likely violate FERPA.

Doe argues that OSU can disclose educational records in the context of university disciplinary hearings without violating FERPA. That's true: universities may disclose the "final results" of disciplinary proceedings in a limited way, *see* 20 U.S.C. § 1232g(b)(6), and universities may disclose student records to other school officials who have a "legitimate educational interest[]" in the records, *see* 20 U.S.C. § 1232g(b)(1)(A). Neither of these exceptions apply to Doe. He's not a school official with a legitimate educational interest in Jane Roe's records, nor are the records the "final result" of a disciplinary proceeding.

Doe offers a solution: OSU could have simply redacted the records to eliminate all of Jane Roe's personally identifiable information. Doe argues this would have preserved Jane Roe's anonymity while providing him the information he needed to effectively defend himself in the disciplinary hearing. But if John Doe requested Jane Roe's educational records, and OSU provided him records with the name redacted, [**35] he would have a good reason to believe they were Jane Doe's records. The regulations contemplate this exact situation, defining the term "personally identifiable information" to include "[i]nformation requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates." 34 C.F.R. § 99.3. It appears that releasing Jane Roe's academic records to Doe—even redacted versions—would violate FERPA.

But *Brady* and FERPA aside, Doe alleges that he was denied the opportunity to present his side of the story because the Administrators withheld a critical piece of information. As Magistrate Judge Kemp put it, "No attorney, when cross-examining a witness, can be expected to think of and ask all relevant questions without some ability to identify fruitful areas of cross-examination in advance. That is why discovery is available in civil cases, and the rule of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) has been interpreted to require the disclosure of impeachment evidence in criminal cases." (R&R at 14, doc. 66). The Court has rules [*663] to apply in adversary proceedings. But here, without discovery or mandatory disclosures, Doe is left to rely on the beneficence of the university administrators. [**36] Doe only has what he can unearth and what OSU provides to form the basis of any cross-examination. In this case, Doe alleges that he had no way to know about critical evidence that would impeach his accuser's credibility, and this was a case where the panel's decision hinged on a credibility decision. Specifically, one panel member asked John Doe "Why do you think [Jane Roe] should say — she would say she didn't remember anything from that night? What would be her motivation?" (*See* Am. Compl. at ¶ 68). When

[5] This argument also implicates the constitutional-avoidance canon of statutory construction. That canon "is a tool for choosing between competing plausible [**34] interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005). Neither party raised this argument in their briefs.

asked at the hearing about the timing of her sexual-misconduct complaint, it is at least arguable that Jane Roe made a false or misleading statement. Doe could not impeach her because he didn't have the evidence of the timing of her accommodation.

The right to some form of cross-examination in university expulsion hearings is a clearly established due process right when cross-examination is "essential to due process," as in a case that turns on "a choice between believing an accuser and an accused." *See Flaim*, 418 F.3d at 641 (dicta). Given the facts alleged, it is plausible that Doe's right to cross examination was effectively denied by the Administrators' failure to turn over critical impeachment evidence. [**37] But the right to mandatory disclosures of any impeachment evidence is not a clearly established constitutional right in the student disciplinary context. Given the flexibility of the Due Process Clause, this situation may call for the disclosure of key impeachment evidence. If the Administrators knew that Jane Roe lied about the timing of her accommodation at the hearing and permitted her testimony to stand unrebutted, that plausibly violated John Doe's right to a fundamentally fair hearing, regardless of whether the issue is construed as one of cross-examination or disclosure.

But which Administrators are implicated by Doe's allegations that he did not receive a fundamentally fair hearing?

Javaune Adams-Gaston: Doe alleges that she "has responsibility for the administering and operating aspects of the OSU Student Code of Conduct and Judicial System, and ultimately made the final decision about whether John Doe may remain a student at OSU." (Am. Compl. at ¶ 5). Adams-Gaston, as the one ultimately responsible for the disciplinary process, is implicated by Doe's allegations.

Matthew Page: Page was responsible for administering Doe's disciplinary hearing, and he "was likely aware of Brennan's actions on behalf [**38] of Jane Roe and other victims to obtain accommodations." (Am. Compl. at ¶ 67). Page also knew that "the credibility of Jane Roe was an important issue in this case." (*Id.* at ¶ 74). Page was at the hearing and heard Jane Roe's allegedly false or misleading statement. Page is therefore implicated by Doe's allegations.

Kellie Brennan: "was aware the credibility of Jane Roe was one of the key issues in the case. . . . [and] was likely aware that the Hearing Panel was not told about the significant accommodation received by Jane Roe." (*Id.* at ¶ 74). Brennan was also aware of the accommodation provided to Jane Roe. (*Id.* at ¶ 45). In her capacity as OSU's Title IX Coordinator, she "serves as consultant to any disciplinary hearing panel." (*Id.* at ¶ 32). Doe alleges that Brennan was "aware that Jane Roe made false and misleading statements about the accommodations she had obtained, including that but for her claim that she was a victim of sexual assault she would have been dismissed from the medical [*664] school." (*Id.* at ¶ 68). Doe's allegations implicate Brennan.

Natalie Spiert: Doe alleges she "was aware of the accommodations provided to Jane Roe as a result of her claim that she was a victim of [**39] sexual assault." (*Id.* at ¶ 67). Doe alleges that "Jane Roe, with the assistance of Spiert, made a concerted effort to mislead the Hearing Panel about the timing of her disclosure and her motivations." (*Id.* at ¶ 67). Doe's allegations implicate Spiert.

Jeff Majarian: Doe alleges only that Majarian would have known about the accommodation made for Jane Roe if he had conducted a thorough investigation of Jane Roe's claims. But as this Court has already held, the Due Process Clause does not require a more thorough investigation in the context of university disciplinary proceedings. (*Supra* at § III.B.1.). Doe does not allege that Majarian played a role in the notice or hearing process except to the extent that the results of his investigation were included in the hearing packet. The hearing packet was provided to the hearing panel; it contained summaries of statements from Jane Roe, John Doe, and other witnesses. (Am. Compl. at ¶ 64). Majarian is entitled to qualified immunity because Doe has stated no specific allegations that Majarian violated clearly established law by failing to disclose key impeachment evidence.

The Court will deny the motion to dismiss as to the other four Administrators. Doe suggests [**40] that the Court defer ruling on qualified immunity until the parties have conducted additional discovery. (Pl.'s Resp. at 31).

"Although an officer's 'entitle[ment] to qualified immunity is a threshold question to be resolved at the earliest possible point,' that point is usually summary judgment and not dismissal under Rule 12." *Wesley v. Campbell*, 779 F.3d 421, 433-34 (6th Cir. 2015) (alteration in original) (internal citation omitted) (quoting *Vakilian v. Shaw*, 335 F.3d 509, 516 (6th Cir. 2003)); *see also Summers v. Leis*, 368 F.3d 881, 886 (6th Cir. 2004) (discussing how a district court cannot avoid ruling on the issue of qualified immunity in the context of a motion for summary judgment). The concern at the Rule 12 stage is whether the plaintiff has alleged "facts which, if true, describe a violation of a clearly established statutory or constitutional right of which a reasonable public official, under an objective standard, would have known." *Kennedy v. City of Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986). Even if the plaintiff has done so, the defendant may still be entitled to summary judgment on the basis of qualified immunity "if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

Doe cites a Fifth Circuit case for authority that "a district court "may defer its qualified immunity ruling if further factual development is necessary to ascertain [**41] the availability of that defense." *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012). The Sixth Circuit has not been explicit, like the Fifth Circuit has, about adopting a plan of narrowly tailored discovery to determine the issue of qualified immunity, but such a plan is consistent with the purposes of qualified immunity, namely, that "insubstantial claims against government officials be resolved . . . . at the earliest possible stage in litigation." *Pearson v. Callahan*, 555 U.S. 223, 231-32, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (citations omitted) (internal quotation marks omitted). But whether it's the Court defers its ruling or a simply denies Defendants' motion to dismiss, the Court will not make a final [*665] ruling on the issue of qualified immunity until after limited discovery.

Here, the Court will grant in part and deny in part the motion to dismiss and permit limited discovery. If discovery fails to uncover sufficient evidence that the Administrators violated Doe's due process rights, then the Administrators may be entitled to qualified immunity. The Court will permit limited discovery on two issues pertaining to the Administrators' claim for qualified immunity.

One: the issue of the hearing panel members' training.

Two: the issue of the failure to disclose information about Jane Roe's accommodation.

To answer [**42] the question of whether any of the remaining four Administrators are entitled to qualified immunity, the Court needs to answer the following questions:

(1) In the hearing, did Jane Roe make a false or misleading statement about the timing of her accommodation?

(2) Which of the Administrators knew about her accommodation?

(3) Which of the Administrators knew about her allegedly false or misleading statement in the hearing?

(4) When did Jane Roe first report the alleged sexual misconduct to OSU?

(5) What training did the panel members receive?

IV. Conclusion

The Court therefore **GRANTS IN PART AND DENIES IN PART** Defendants' motion to dismiss. (Doc. 55). Defendant OSU is dismissed. Defendant Administrator Majarian is dismissed. The Court reserves ruling on the issue of qualified immunity as to the remaining Administrators.

IT IS SO ORDERED.

/s/ James L. Graham

JAMES L. GRAHAM

United States District Judge

DATE: November 7, 2016

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Nokes v. Miami Univ.

United States District Court for the Southern District of Ohio, Western Division

August 25, 2017, Decided; August 25, 2017, Filed

Case No. 1:17-cv-482

Reporter
2017 U.S. Dist. LEXIS 136880 *

JOHN NOKES, Plaintiff, v. MIAMI UNIVERSITY, et al., Defendants.

Counsel: [*1] For John Nokes, Plaintiff: Anne L Tamashasky, LEAD ATTORNEY, Joshua A Engel, Engel & Martin, LLC, Mason, OH.

For Miami University, Susan Vaughn, Steven Elliott, Jayne Brownell, Michael Curme, Defendants: Rosemary Doreen Canton, LEAD ATTORNEY, Taft, Stettinius & Hollister - 1, Cincinnati, OH; Evan T Priestle, Taft Stettinius & Hollister, LLP, Cincinnati, OH.

Judges: HON. MICHAEL R. BARRETT, UNITED STATES DISTRICT JUDGE.

Opinion by: MICHAEL R. BARRETT

Opinion

ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION (DOC. 2)

This matter is before the Court on: (1) Plaintiff's July 16, 2017 Motion for Preliminary Injunction (Doc. 2), in which Plaintiff seeks an order "prohibiting [Defendant] Miami [University] from imposing . . . disciplinary sanctions against John [Nokes]"; and (2) Plaintiff's August 21, 2017 Motion to Strike Defendants' Response to Plaintiff's Notice of Supplemental Authority (Doc. 27). Consistent with Plaintiff's August 3, 2017 motion for a temporary restraining order (Doc. 14), Plaintiff also seeks an order preliminarily enjoining Defendants from releasing or otherwise publicly disclosing Plaintiff's name until this matter is resolved on the merits. Matters relating to the requested Rule 65 relief have [*2] been fully briefed, with each party also submitting post-hearing briefs (Doc. 23; Doc. 24) after the August 10, 2017 preliminary injunction hearing.[1]

[1] Defendants filed an additional memorandum (Doc. 26), triggering Plaintiff's pending Motion to Strike (Doc. 27), which is addressed in Section II.A *infra*.

I. BACKGROUND

Plaintiff — known as John Nokes for purposes of this lawsuit — is an undergraduate student at Defendant Miami University who has completed four semesters of coursework. Defendant Miami University has suspended John Nokes for approximately two years for allegedly engaging in sexual misconduct with another student, Jane Roe. Section 103A of Defendant Miami University's "Code of Student Conduct" defines sexual misconduct as "[a]ny sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent." (Doc. 1; PAGEID# 70). Under Section 103A of the Code, consent does not exist, *inter alia*, where sexual contact is initiated by force or while a participant is "severely intoxicated." (*Id.* at 70-71).

Plaintiff alleges that, after a procedurally defective disciplinary hearing, a hearing panel acting on behalf of Defendant Miami University found him responsible for sexual misconduct and informed Plaintiff that he was suspended from Defendant Miami University from April 6, 2017 through May 15, [*3] 2019. (Doc. 1; PAGEID# 28). On July 16, 2017, Plaintiff filed a Complaint for declaratory judgment, violation of 42 U.S.C. §1983, violation of Title IX, and injunctive relief against Defendants Miami University, Susan Vaughn, Steven Elliott, Jayne Brownell, and Michael Curme. (Doc. 1). Specifically, Plaintiff claims that his due process rights were violated because: (1) he was afforded inadequate notice of the nature of the allegations against him; and (2) he was deprived of his alleged right to confront adverse witnesses through cross-examination. The Parties acknowledge that this Court is not a "super appeals" court reviewing the decision of the disciplinary panel; rather, the Court is determining issues relating to Constitutional due process in the context of university disciplinary proceedings. Accordingly, the background set forth below relates to both: (A) the process Plaintiff received from Defendant Miami University; and (B) the procedural posture of the instant lawsuit.

A. Defendant Miami University's Disciplinary Proceeding against Plaintiff

It is undisputed that, in November 2016, Plaintiff and Jane Roe had sexual contact. Five months later, Jane Roe reported that she had been sexually assaulted [*4] by Plaintiff to Defendant Miami University's Office of Ethics and Student Conflict Resolution ("OESCR"). Thereafter, Defendant Miami University initiated a disciplinary proceeding against Plaintiff.

1. April 5, 2017 Notice of Violation

On April 5, 2017, the University provided Plaintiff with a Notice of Violation alleging that Plaintiff committed sexual assault by the use of force or threat of force, in violation of Section 103A (Sexual Assault). (*Id.* at 31) Specifically, the Notice of Violation stated as follows:

> "The [OESCR] is in receipt of a report from [Jane Roe]. Specifically, on November 17, 2016, you allegedly penetrated [Jane Roe] with your fingers and performed unwanted oral sex on her in an alleyway by Bishop Hall. You allegedly continued even when she showed resistance. Furthermore, [Jane Roe] reported that she had to use the restroom, and as she entered the restroom in Bishop Hall, you allegedly entered with her, holding her head down to perform oral sex on you.
>
> This incident is an alleged violation of the Student Conduct Regulation- **Section(s) 103A (Sexual Assault)- 2 Counts**."

(Doc. 17-1; PAGEID# 544) (emphasis in original). The face of the Notice is silent on the issue of intoxication.

2. April [*5] **6, 2017 Summary Hearing**

The next day, Defendant Miami University held a summary suspension hearing. (Doc. 11-1). The foregoing hearing did not address the merits of Jane Roe's accusation, and instead focused on whether Plaintiff would be permitted to remain on campus during the disciplinary process. The Dean of Students presided, determined that Plaintiff presented no threat to the student body, and allowed Plaintiff to remain. (Doc. 11-1).

3. Receipt of Jane Roe's Statements/Hearing Packet

Plaintiff received Jane Roe's first written statement (Doc. 17-1; PAGEID# 546) on April 6, 2017. (Vaughn Decl. at ¶4). The statement reads as follows:

> My name is [Jane Roe] and I am currently a sophomore at Miami University. I had a conference with [Miami employee] this afternoon and she suggested that I write this complaint as soon as possible because it is the end of the year.
>
> I would like to report another student on campus, [John Nokes], for a sexual assault that occurred on Thursday November 17th transitioning to the morning of Friday November 17th, 2016. This event took place just outside of Bishop residence hall and also, inside Bishop as well which is his current residence hall. While we were [*6] both under the influence and I wish I could count this as a "drunken mistake," but his intent for the act was made even more clearly apparent as the months went on.
>
> I have witnesses that can confirm that his intent was to have sex with me by the end of the night which he concluded could be done after at least buying me $28 in alcoholic beverages. He offered to walk me home and sent the other male away so he could walk me home himself. We were friends so I thought nothing of this at the time. We he [sic] asked if we could "hookup," I said no and made it clear that I was not interested in anything, but kissing. He puled [sic] me into the alleyway by Bishop, pulled up my dress and pulled down my panties. His form of making out consisted of him penetrating me with his fingers and him preforming [sic] unwanted oral sex on me. When I showed resistance he said, "come on it will be funny," and proceeded to continue against my hesitation. When I stumbled and almost fell on the sidewalk he decided that it was a good idea to try and have sex with me. I realized that I needed to use the restroom when he was already pulling to into his hall and taking me up to the second floor single restroom. I [*7] remember my confusion because I thought he was trying to enter the women's restroom. Then I remember my head being held down as I preformed [sic] oral sex on him. I tried to pull back and found resistance. After he was done it was about lam on that Friday. He insisted on walking me home to [residence hall] because I was too drunk. It was at that point that he started saying things like, "Was what we did wrong? Wow you're so drunk you need to walk straight. And the ultimate shocker, "You're not gonna sue me right?"
>
> Let me know what other sort of information is needed and I can be contacted by email."

(Doc. 17-1; PAGEID# 546-547).

Plaintiff received Jane Roe's second written statement (Doc. 17-1: PAGEID# 600) on April 21, 2017, seven days before the hearing, along with the rest of the hearing packet. The second statement reads as follows:

> "The night of November 17th, the group when [sic] to pitchers at 45 around 9:30pm. At that time [John Nokes] had bought me a pitcher of alcohol at the bar. I had most

> of the pitcher and was drinking from other pitchers. We went down to the hatch at about 10:00pm and continued drinking. [John] seemed to be drinking some as well. At about 11pn [sic] the group [*8] went to MIA after finishing the pitchers and [John] immediately offered to buy me a drink (Peach Bellini). In a relatively short period afterwards he bought me another one. [John] bought a Makers on the rocks and I drank some of that too. He made sure to get a seat next to me and even asked people to move so he could sit next to me. I drink part of my friend's [] beer. At that point I left the bar with [John Nokes] and [friend] at around 12:15. Walking towards Wells Hall, [John] sends [friend] away and I am left alone with him. [John] asks me if I want to hookup and suggests the single bathroom on his floor. I said, "No, I don't like to sleep around." I kissed him with the intention of not having sex. I was pulled into an alley to the side of Bishop visibly stumbling and slurring. He squatted down in the leaves attempting to preform [sic] oral sex on me even with my hesitation. He removed my underwear and said, "Come on it will be funny." He penetrated me with his fingers and his tongue while I struggled to stand. He kept commenting on how drunk I was. I said I needed to go to the restroom and he said, "Yeah that's where we are going," as he pulled me towards Bishop Hall. I remember [*9] asking to take the elevator because I was so exhausted. He walked in front of me to the bathroom and I remember my confusion when he opened the door. I thought he was trying to enter the women's restroom, but it was the single he previously talked about. I felt uncomfortable using the restroom in front of him and I felt very nervous. He sat on the bathroom bench and motioned me over. We kissed and he undid his pants. I did not say yes or no, but felt pressured to preform [sic] oral sex. When I tried to pull back I felt pressure on the back of my head. Once he was finished I yelled at him for I had not been able to breathe and was obviously shaken. I couldn't believe what had happened. I ran out of the bathroom and he chased after me catching the elevator door before it closed. He asked, "Was that okay? Was that bad what we did?" I was scared and ashamed so I said no. He kept pace with me making sure that I would get home because I was, "So drunk." I'm pretty sure I tried to sit down at one point and he kept me walking. Then he said, "You're not going to sue me right." At that point I was close to tears. He dropped me off at [residence hall] to which my roommate held me while I cried [*10] in our room. Minutes later he texted me at around lam which are attached with this packet of documents."

(Doc. 17-1; PAGEID# 600). Although the term "severely intoxicated" is never used, each statement discusses alcohol consumption.

4. April 28, 2017 Disciplinary Hearing

At the April 28, 2017 hearing, Defendant Susan Vaughn presided. She began with remarks relating to the nature of the accusations against Plaintiff, and asked him to formally "respond" to the accusations as stated in the Notice of Violation. (Doc. 11-2; PAGEID# 188-189). Specifically, the allegedly non-consensual conduct occurring outside Bishop Hall was treated as one charge of sexual misconduct, and the allegedly non-consensual conduct occurring inside Bishop Hall was treated as a separate charge of sexual misconduct. (*Id.*). Plaintiff denied responsibility for both charges. (*Id.*).

Thereafter, Plaintiff was permitted to give an opening statement. In summary, Plaintiff stated that, on the night in question, he and several friends — including Jane Roe — made plans to meet at a bar in Oxford, Ohio. (*Id.*). They were going out, in part, to celebrate a friend's birthday. (*Id.*). According to Plaintiff, he planned to make it a [*11] relatively early night because he had a flight in the morning. (*Id.* at 193). At approximately 9:30 p.m., Plaintiff left his residence hall to walk to friends' dorms, and afterward the bar. (*Id.* at 189). Upon meeting with friends, Jane Roe's friend (who later submitted a written statement on behalf of Jane Roe) allegedly "made a point to say, wow, doesn't [Jane] look great tonight." (*Id.* at 190). Plaintiff said he thought this was "odd" because he thought Jane Roe was dating Plaintiff's best friend (who later wrote a statement on behalf of Plaintiff, then attempted to recant it).[2] Plaintiff testified to drinking with friends at the bar, and buying Jane Roe a drink at her request. (*Id.* at 191). When group photographs were taken, Plaintiff said he was taken "off guard" when Jane Roe grabbed onto his shirt and "leaned over onto [his] shoulder." (*Id.* at 192).

Plaintiff testified that the group later changed locations to a second bar. (*Id.* at 193). Before going up to the bar to buy drinks, Plaintiff asked his friends if they wanted anything, and Jane Roe and others indicated that they did. (*Id.*). Plaintiff admitted to buying Jane Roe and others drinks that night. (*Id.*). Slightly after midnight, a friend in the group decided to leave and "all of [*12] us kind of realized that it was getting late[.]" (*Id.* at 194). Plaintiff allegedly announced that he was going to leave, and another friend stood up to leave with him; thereafter, "[Jane Roe] followed us outside the bar." (*Id.*). Plaintiff's friend split off at one of the intersections, but "[Jane Roe] followed along and continued walking in [Plaintiff's] direction." (*Id.* at 195). Plaintiff testified that Jane Roe grabbed onto his hand. (*Id.*) They allegedly continued to hold hands, and Plaintiff and Jane Roe allegedly started talking about "hooking up" that night. (*Id.*). According to Plaintiff, Jane Roe said that she did not "want

[2] See n. 5, *infra.*

to have sex," but "we can do other things." (*Id.*). Plaintiff testified that he said, "okay, that sounds fine with me," so they "walked into a pair of bushes that were standing directly facing King Library" where they began kissing for three or four minutes. (*Id.*). Plaintiff admitted to performing oral sex on Jane Roe, but only after allegedly telling her he "would like to perform oral sex on her," which he did for about five minutes with "no hesitation" from Jane Roe. (*Id.* at 196). Afterward, they continued to kiss and Jane Roe allegedly "grabbed the general area of [Plaintiff's] pants [*13] and began rubbing that area for about 30 seconds or so." (*Id.* at 197). He started to unzip his pants, but Jane Roe allegedly said "what are you doing" and pointed to a "window a foot above us" at King Library. (*Id.*). King Library was open and students were there studying. (*Id.*). Plaintiff allegedly told Jane Roe that his roommate was sleeping in his dorm room, but made the suggestion that they go to a private bathroom in his residence hall, to which she allegedly agreed. (*Id.*). Plaintiff testified that Plaintiff and Jane Roe walked past King Library to his residence hall. (*Id.*). When they entered the residence hall, they allegedly passed the women's restroom on the first floor in order to take the elevator to the second floor. (*Id.*). Jane Roe allegedly continued to kiss Plaintiff in the elevator. (*Id.* at 198).

According to Plaintiff, when they arrived in the second floor private bathroom, he sat on the handicap seat inside the large shower. (*Id.* at 199). Jane Roe allegedly followed him into the shower, set her things down, and "straddled" Plaintiff. (*Id.*).[3] They allegedly began kissing, she allegedly rubbed "the general area of [his] pants and began doing the exact same thing as she did outside." (*Id.* at 199). According to [*14] Plaintiff, Plaintiff unzipped his pants, and he and Jane Roe discussed "whether [they] were going to have sex or not." (*Id.*). They allegedly agreed not to have sex because "neither of [them] had a condom." (*Id.*). At that point, Jane Roe allegedly "kind of put her hand on [Plaintiff's] shoulder so [he] could sit back down," and "under her own power, 100 percent sat there on her knees and began to perform oral sex on [Plaintiff]." (*Id.*). Plaintiff claims that for five minutes he had his hands behind his head, and he only ever "laid a hand on her . . . [to] push her hair away from her face when we were having that conversation" about where she wanted him to "finish." (*Id.*).

Afterward, Plaintiff walked Jane Roe home. (*Id.* at 200). The next day, Jane Roe — who admittedly was already "involved" with a mutual friend (*Id.* at 389) — sent Plaintiff a series of text messages expressing disgust at the behavior from the night before. (Doc. 17-1; PAGEID# 608). Plaintiff responded to the text messages, agreeing that their behavior was a "horrible decision." (*Id.* at 610).[4]

Several witnesses testified on behalf of Plaintiff.[5] Plaintiff's witnesses, including Plaintiff himself, were questioned extensively by the panel regarding alcohol [*15] consumption on the night in question. At one point, two members of the hearing panel — including Defendant Vaughn —suggested that *any* alcohol consumption eliminated Jane Roe's ability to consent:

> MR. SCOTT: Do you know what the training says about alcohol and consent?
> MR. [JOHN NOKES]: Which training?
> MR. SCOTT: I think it's on this training that you've gone through.
> MR. [JOHN NOKES]: It's on this training?
> MR. SCOTT: What does it say about alcohol?
> MR. [JOHN NOKES]: That an excess of alcohol is not -- an excess of alcohol does not -- you can't give consent if you have a large amount of alcohol.
> MR. SCOTT: It's says large amount?
> MR. [JOHN NOKES]: This is from my understanding, sure.
> MR. SCOTT: It says alcohol. It does not say amount.
> MR. [JOHN NOKES]: So with that definition -- I'm

[3] Even though Jane Roe claimed that the conduct occurring outside the residence hall constituted sexual assault, Jane Roe admitted to later straddling Plaintiff when they arrived inside the private bathroom in the residence hall. (*Id.* at 353).

[4] At the disciplinary hearing and later preliminary injunction hearing, Plaintiff was insistent that everything he and Jane Roe did was consensual, and that his responsive text messages to Jane Roe were not admissions that he had engaged in sexual misconduct. Instead, he testified that his text messages acknowledging his "horrible decision" related to concerns about jeopardizing relationships with mutual friends.

[5] A witness who had previously provided a notarized witness statement to Plaintiff showed up at the hearing in order to urge the panel to *not* consider his notarized statement, because he supposedly did not understand that the statement may be used in a hearing and that he did want to be involved. The panel did not entertain Plaintiff's offer to play the witness' recorded interview (Doc. 11-2; PAGEID# 286), in which the witness supposedly describes a conversation with Jane Roe in which she offers a different version of the night in question to the witness. The panel does not follow any formal rules of evidence, so arguably the members could have used their discretion to listen to recording, but chose not to do so. It is thus not entirely accurate for Defendants to claim (Doc. 16: PAGEID# 520) that Plaintiff attempted to prevent the panel from hearing the reluctant witness' account. Furthermore, one of the issues in this case is the purported right of an *accused* student to confront *adverse* witnesses, so the Court is not persuaded by Defendants' argument that "Mr. Nokes should not be permitted to use provisions of the University's Code of Conduct [allowing use of written/recorded witness statement] where it benefits him, and then argue to this Court that his constitutional due process rights were violated by the same provision."

> honestly just asking, but that definition if everybody on this campus who takes a drink of alcohol and kisses their boyfriend or girlfriend, is that nonconsensual?
> MS. VAUGHN: Potentially, yes.

(Doc. 11-2; PAGEID# 318-319).

Later, Jane Roe testified. Plaintiff was permitted to direct questions of Jane Roe to the hearing panel, which in turn would ask the question to Jane Roe. No live witnesses testified [*16] on behalf of Jane Roe. Instead, she submitted three witness statements from friends who allegedly observed her behavior before or after her encounter with Plaintiff. For example, Jane Roe's roommate stated that Jane Roe came home that night "sobbing uncontrollably and slurring her words" and "unable to walk in a straight line." (Doc. 17-1; PAGEID# 604). Jane Roe allegedly told her roommate that John Nokes "took her to his dorm, took her into the bathroom, and even though she resisted, he held her head down and forced her to give him oral sex." (*Id.*). Plaintiff had no opportunity to confront this witness, as well as two other adverse witnesses, who did not attend the hearing. During the course of the hearing, Defendant Vaughn stated: "when [Jane Roe] had three witness statements, it truly disadvantages everyone if you can't ask questions. So if we can't ask questions, I have to take this as fact. That all is true." (*Id.* at 271).

In his closing remarks, Plaintiff stated that he did not "attack" Jane Roe and that everything she did was of her own free will. (*Id.* at 376). After the hearing, the panel deliberated and found Plaintiff "responsible" for both charges on the basis that Jane Roe was "severely intoxicated" [*17] on the night in question and thus unable to consent. For the sanctioning portion of the hearing, Plaintiff offered character witnesses. He was later informed of his two-year suspension.

5. May 9, 2017 Appeal

On May 9, 2017, John Doe submitted an appeal. After two layers of review, the findings and sanction imposed were affirmed by University officials. (Doc. 17-6). On June 16, 2017, the disciplinary decision became final. This litigation followed.

B. Procedural Posture of the Instant Lawsuit

1. Plaintiff's July 16, 2017 Complaint (Doc. 1)

On July 16, 2017, Plaintiff initiated this lawsuit. Plaintiff asserts that the disciplinary hearing was defective for two reasons.

First, Plaintiff argues that he was afforded inadequate notice of the nature of the allegations against him. Specifically, he argues that the Notice of Violation amounts to "no notice at all," because the April 28, 2017 hearing focused on Jane Roe's alcohol consumption and alleged inability to consent—not use of force as alleged in the Notice of Violation. (Doc. 2; PAGEID # 122, 129).

Second, Plaintiff argues that he was never provided the opportunity to cross-examine three adverse witnesses who supplied written testimony to [*18] the hearing panel, and that he was disadvantaged by the presiding panel member who stated that if "we can't ask questions, I have to take this as fact. That all is true." (Doc. 1; PAGEID# 24).

In addition to compensatory damages and declaratory relief, Plaintiff seeks a permanent injunction "restoring John [Nokes] as a student and prohibiting further disciplinary proceedings in a manner that violates the contract between the parties." *(Id.* at 36).

2. Plaintiff's Motion for Preliminary Injunction (Doc. 3) and Motion for Temporary Restraining Order (Doc. 14)

Contemporaneously with his Complaint, Plaintiff moved for a preliminary injunction prohibiting Defendant Miami University from imposing disciplinary sanctions against him, in order to preserve the *status quo*, until this Court is able to determine the merits of his claims. Later, on August 3, 2017, Plaintiff filed an emergency motion seeking an order temporarily enjoining Defendants from releasing his name, or otherwise disclosing his identity, until the Court is able to rule on Plaintiff's motion for preliminary injunction. On August 9, 2017, the Court granted the temporary restraining order. (Doc. 9).

3. August 10, 2017 Preliminary Injunction [*19] **Hearing**

On August 10, 2017, Plaintiff testified, and the Court received into evidence the hearing transcripts from Defendant Miami University's disciplinary proceedings against Plaintiff. (Doc. 11). In lieu of closing remarks or oral argument on the pending motions, the parties elected to rest on the arguments in their papers. (Docs. 23; 24). The Court instructed the Parties that, if they wished to file post-hearing briefs, they were to confer among themselves and thereafter alert the Court to their decision by end-of-day. Although the Parties initially declined, Defendants contacted the Court on August 11, 2017 requesting leave to submit a short post-hearing brief by end-of-day, stating that they had no objection to Plaintiff filing his post-hearing brief on August 14, 2017. Defendants' request and proposed briefing schedule was acceptable to the Court. Although the Court granted Plaintiff until August 15, 2017 to file a post-hearing brief, Plaintiff filed his post-hearing brief early, on Sunday, August 13, 2017.

4. Post-Hearing Briefing

Post-hearing briefing closed after Plaintiff submitted his August 13, 2017 memorandum. Thereafter, on August 20, 2017, Plaintiff filed a short Notice [*20] of Supplemental Authority (Doc. 25) alerting the Court to a relevant August 18, 2017 opinion from the United States District Court from the Middle District of Pennsylvania. The foregoing Notice contained a case citation and short parenthetical. In response, Defendants filed a five-page memorandum (Doc. 26) attempting to distinguish Plaintiff's supplemental authority, and further arguing points from the Rule 65 briefing that closed on August 13, 2017. Defendants' response triggered Plaintiff's pending Motion to Strike (Doc. 27), which is addressed immediately below.

II. ANALYSIS

A. Plaintiff's August 21, 2017 Motion to Strike Defendants' Response to Plaintiff's Notice of Supplemental Authority (Doc. 27)

Plaintiff argues that Defendants' five-page "response" (Doc. 26) should be stricken because "Defendants have used the filling [sic] of the Notice [of Supplemental Authority] as an opportunity to improperly submit an additional [memorandum]" in violation of S. D. Ohio Local Rule 7.2(a)(2). (Doc. 27). Specifically, Plaintiff argues that Defendants' "response" (Doc. 26) was an improper, transparent attempt to submit additional briefing without leave of Court:

> Not only does the [Defendants'] "Response" improperly contain [*21] argument attempting to distinguish the supplemental authority cited by Plaintiff, but the Defendants then proceed to spend three additional pages essentially replying to the authority cited by Plaintiff on the issue of "prejudice" in Plaintiff's Supplemental Memorandum. Defendants should not be permitted to take advantage of Plaintiff merely bringing an additional authority to the Court's attention to skirt the limitations on briefing established by Local Rule 7.2(a)(2).

(Doc 27; PAGEID# 733) (footnote omitted). However, Defendants argue that Plaintiff was the first to defy Local Rule 7.2, claiming that even though the Notice (Doc. 25) included no "developed" argument, "there is no reason why [Plaintiff] would submit such a notice unless he was trying to argue to the Court that the case he was 'supplementing' was supportive of his arguments." (Doc. 28; PAGEID# 735).

Local Rule 7.2(a)(2) provides that memoranda supporting and in opposition to motions shall be limited to an initial memorandum, an opposition, and a reply. The Rule prohibits further memoranda without leave of Court: "No additional memoranda beyond those enumerated are permitted except upon leave of court for good cause shown." However, the local rules are silent on what constitutes [*22] a memorandum, and whether courts should "strike" non-enumerated memoranda filed without leave. Furthermore, the Court's local rules provide no instruction on the manner in which parties should bring supplemental authority to the attention of the Court. In other words, the local rules do not resolve whether Plaintiff's Notice should be classified as a non-enumerated "memorandum," requiring leave under Local Rule 7.2.

The Court will not attempt to create a bright-line test for when a "notice" crosses the line into memorandum territory. Indeed, the Court needs no bright-line test in order to determine that Plaintiff's citation and short parenthetical did not open the door to Defendants' five-page memorandum, and especially did not open the door to three pages of additional briefing supporting the "prejudice" arguments contained in Defendants' post-hearing brief. Even if Defendants believed that Plaintiff should have requested leave to file his short notice, such a belief does not absolve Defendants of their duty to seek leave before filing a five-page memorandum that includes arguments that relate back to a post-hearing brief. In such a motion seeking leave, Defendants could have raised with the Court [*23] their argument that Plaintiff's Notice violated Local Rule 7.2.[6]

Ultimately, the Court is firmly convinced that Defendants' memorandum violated Local Rule 7.2; however, the Court is less convinced that the proper course of action is to "strike" the document. Again, the local rules are silent on whether courts should "strike" non-enumerated memoranda filed without leave. Furthermore, the Federal Rules of Civil Procedure provide no mechanism for "striking" documents other than pleadings. Fed. R. Civ. P. 12(f). Even though parties (and sometimes even courts) frequently refer to all court filings as "pleadings," such

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[6] Again, the Court is disinclined to create a bright-line test for when a notice of supplemental authority constitutes an additional memorandum requiring leave under Rule 7.2. The Court will note, however, that it is not persuaded by Defendants' arguments that Plaintiff's notice is a form of "argument" because it cites a case in which a district court granted a preliminary injunction. While the Notice mentions the district court's disposition, it otherwise neutrally describes the case as "supplemental authority to aid the Court in its consideration of the Motion for Preliminary Injunction." (Doc. 25). Thereafter, it provides a citation and short parenthetical for a case that had been decided the previous business day. In this instance, the Court does not believe that Plaintiff crossed the line into argument, or that it is a good idea to punish parties for bringing new authority to the attention of the Court, especially where the local rules are silent on the procedure for doing so.

usage is imprecise and incorrect.[7] The only documents that qualify as "pleadings" are enumerated in Fed. R. Civ. P. 7(a) (e.g., complaint, answer, crossclaim, etc.); memoranda are not listed. Thus, orders "striking" non-pleadings such as memoranda are not a proper usage of Rule 12(f). *Johnson v. Wolgemuth*, 257 F. Supp. 2d 1013, 1024 (S.D. Ohio Mar. 10, 2003) (Rice, J.) (declining to "strike" expert report at summary judgment phase; reasoning that Rule 12(f) only allows matters contained within the "pleadings" to be stricken, so "the remedy is not to strike [the] affidavit; it is simply to ignore it"); *Maxum Indem. Co. v. Drive W. Ins. Servces*, No. 1:13-cv-191, 2014 U.S. Dist. LEXIS 196740, at *6 (S.D. Ohio June 13, 2014) (Bowman, M.J.) (denying motion to strike; agreeing with other courts in Sixth [*24] Circuit holding that "motions to strike are inapplicable" where a non-pleading is the subject of the motion to strike); *Dawson v. City of Kent*, 682 F.Supp. 920, 922 (N.D. Ohio 1988)("The federal rules make only one reference to a motion to strike in Rule 12(f). This rule relates only to pleadings and is inapplicable to other filings."); *Johnson v. Manitowoc Boom Trucks, Inc.*, 406 F. Supp. 2d 852, 864 (M.D. Tenn. Dec. 13, 2005) (declining to rule on motion to strike, because "[m]otions to strike relate only to 'pleadings,' a term which is narrowly defined by Rule 7(a) of the Federal Rules of Procedure").

Accordingly, the Court **DENIES** the Motion to Strike (Doc. 27). However, the Court will caution Defendants that: (1) further violations of Local Rule 7.2 will not be tolerated; (2) any such violation will be deemed a violation of an Order of this Court; and (3) even if "striking" non-compliant documents is not the proper remedy under Rule 12(f) or the local rules, the Court will fashion an appropriate remedy for future violations consistent with its inherent power to enforce compliance with its lawful orders. *Bds. of Trs. of Ohio Laborers' Fringe Benefit Programs v. Dixon Masonry, Inc.*, No. 2:09-cv-01013, 2010 U.S. Dist. LEXIS 140501, at *3 (S.D. Ohio Dec. 2, 2010) (citing *S.E.C. v. Dollar Gen. Corp.*, 378 Fed. Appx. 511, 516 (6th Cir. 2010); *Shillitani v. United States*, 384 U.S. 364, 370, 86 S. Ct. 1531, 16 L. Ed. 2d 622 (1966)). This admonition may seem harsh for Defendants' first violation, but the Court deems it appropriate given how strongly the Court expressed its dislike for surprise at the preliminary injunction hearing. The [*25] Court was also clear that it wanted the parties to work together to determine the need for, and timing of, a fair process for post-hearing briefing. Plaintiff's Notice (Doc. 25) containing a single case citation from the previous business day — with no argument — did not open the door for Defendants to file a five-page memorandum without leave.

[7] For example, Defendants misuse the term "pleadings." (Doc. 28; PAGEID# 735) ("Mr. Nokes admits that his Notice was outside of those pleadings[.]")

B. Plaintiff's July 16, 2017 Motion for Preliminary Injunction (Doc. 2)

The purpose of a preliminary injunction is to preserve the *status quo*. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996). In considering a preliminary injunction, the court considers four elements: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *City of Pontiac Retired Emples. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (per curiam). "These four considerations are factors to be balanced, not prerequisites that must be met." *Kessler v. Hrivnak*, No. 3:11-cv-35, 2011 U.S. Dist. LEXIS 57689, at *8-9 (S. D. Ohio May 31, 2011). "Although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal." *Id.*

i. Likelihood of Success

With regard to this [*26] first element, the Court will begin by restating its earlier reservations about "resolving" hotly contested issues of law in any expedited Rule 65 proceeding. (Doc. 21; PAGEID# 692) ("[T]his Court's assessment of Plaintiff's likelihood of success on the merits is not based on an exhaustive analysis of the facts, law, or policy relevant or potentially relevant to the final resolution of this case."). Courts across this Circuit and the country for that matter are being asked to answer the difficult question of how much process was due any particular student, and whether that student's university at least met the minimum threshold required. At the same time, federal circuit courts have generally avoided issuing broad rulings, tacitly recognizing that each university follows different disciplinary procedures and each student's path through the university disciplinary process is likewise different. *See, e.g.*, *Flaim v. Med. College of Ohio*, 418 F.3d 629, 636 (6th Cir. Ohio Aug. 17, 2005) ("*some* circumstances may require the opportunity to cross-examine witnesses"; "*some* circumstances . . . might [warrant disclosure of] the names of witnesses and a list of other evidence the school intends to present," etc.) (emphases added). *Accord*: *Doe v. Ohio State Univ.*, 219 F. Supp. 3d 645, 657 (S.D. Ohio Nov. 7, 2016) ("The Court uses the term 'generally' because [*27] due process is a flexible concept and may require more or less process depending on the situation."). Therefore, given the complexity of the law, and that this matter is still before the Court in an expedited Rule 65 proceeding, the Court continues to assess Plaintiff's likelihood of success based on whether Plaintiff has "raised [factual or legal] questions going to the merits [which are] so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus

for more deliberate investigation." (Doc. 21; PAGEID# 699) (citing *Northeast Ohio Coalition v. Husted*, 696 F.3d 580, 591 (6th Cir. 2012). *Accord*: *PartyLite Gifts, Inc. v. Swiss Colony Occasions*, 246 Fed. Appx. 969, 972, 2007 U.S. App. LEXIS 21589, *7-8 (6th Cir. Aug. 29, 2007) (citing *In re De Lorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1989)); *Ohio Republican Party v. Brunner*, 544 F.3d 711, 720-721, 2008 U.S. App. LEXIS 21573, *26 (6th Cir. Oct. 14, 2008) (*en banc*).

Ultimately, nothing about the preliminary injunction hearing or post-hearing briefing has changed this Court's initial conclusion that Plaintiff has raised sufficiently difficult and serious questions. The Court thus incorporates by reference its likelihood of success analysis included in the earlier temporary restraining order (Doc. 21), and makes the following, additional observations about issues that arose during the preliminary injunction hearing and in the post-hearing briefs:

a. Prejudice

The Court is not persuaded by Defendants' new argument that Plaintiff is required to establish that — absent the [*28] alleged Constitutional violations — Defendant Miami University's hearing panel would have reached a different outcome. (Doc. 23; PAGEID# 708).

Plaintiff chiefly relies on a single Eastern District of Michigan case, which granted the defendants' motion for summary judgment because plaintiff could not show that plaintiff's "suspension occurred because of a failure of procedural due process" — thus, he was not "prejudiced by a lack of process." *Jahn v. Farnsworth*, 33 F. Supp. 3d 866, 874 (E.D. Mich. July 16, 2014) (citing *Graham v. Mukasey*, 519 F.3d 546, 549 (6th Cir. 2008)). In *Jahn*, however, the plaintiff had admitted "guilt" in advance of the hearing. *Id.* In theory, his suspension would have been proper with or without a hearing, weakening his claim that he was entitled to or "deprived of" a hearing. Here, there was no such admission of responsibility. *See* n. 2, *supra*.

Furthermore, *Graham* (which was cited in *Jahn*) is likewise inapposite. Plaintiff argues that — in holding that a plaintiff must show that the relevant tribunal would have reached a different outcome absent the due process violation — *Graham* relied on an "earlier Sixth Circuit decision dealing with immigration law" and that limited its holding to immigration hearings only. (Doc. 24; PAGEID# 719) (observing that *Graham* relied on *Warner v. Ashcroft*, 381 F.3d 534, 95 Fed. Appx. 164 (6th Cir. 2004), which held [*29] that "proof of prejudice is necessary to establish a due process violation *in an immigration hearing*") (emphasis added)). While the Court declines to resolve whether the Sixth Circuit intended to so limit its holding, the Court feels compelled to note that Defendants' "response" (Doc. 26) — which was the subject of Plaintiff's Motion to Strike (Doc. 27) — does not challenge Plaintiff's interpretation of *Graham* or *Warner*. Furthermore, Defendants' response cites additional authority from the Fourth Circuit, Fifth Circuit, Tenth Circuit , and the District of Kansas (Doc. 26; PAGEID# 728)—however, no additional authority from the Sixth Circuit regarding the so-called prejudice requirement is cited.

Accordingly, this Court is not persuaded — based on the authority before the Court — that Sixth Circuit plaintiffs are required to show that the "outcome" of the hearing would have been different absent the alleged Constitutional violations. Just as this Court is unwilling to "second guess" the disciplinary panel's outcome, the Court is also unwilling to accept Defendants' invitation to use *Jahn* or *Graham* as a basis to speculate regarding the panel's outcome had the alleged Constitutional violations [*30] not occurred—especially where the disciplinary hearing turned on the credibility of the witnesses, many of which were absent for cross-examination (the lack of which is the alleged Constitutional violation of which Plaintiff complains). The Court cannot and will not guess at: (1) how those absent witnesses would have fared during questioning; and (2) how the panel would have weighed the absent witnesses' testimony.[8]

b. Notice

In cases where the Sixth Circuit has found that the "school-disciplinary context" implicates due process, it requires that students receive the following: "(1) notice of the charges; (2) an explanation of the evidence against him; and (3) an opportunity to present his side of the story before an unbiased decisionmaker." *Doe v. Cummins*, 662 Fed. Appx. 437, 446 (6th Cir. 2016). *Accord: Doe v. Univ. of Cincinnati*, 223 F. Supp. 3d 704, 709 (S.D. Ohio Nov. 30, 2016). "Notice satisfies due process if the student had sufficient notice of the charges against him and a *meaningful opportunity to prepare for the hearing*." *Flaim*, 418 F.3d at 638 (emphasis added).

It is not lost on the Court that, regardless of the language in the Notice of Violation, Jane Roe's pre-hearing written statements both discuss alcohol consumption. However, the Court is not — at this stage — prepared to find that Plaintiff is unlikely to prevail. On the [*31] issue of notice, the preliminary injunction hearing and the post-hearing briefing raised difficult and serious questions:

First, at the preliminary injunction hearing, Defendants questioned Plaintiff on Section 103A of the "Code of Student Conduct," which defines sexual misconduct as "[a]ny sexual act

[8] As shown below, the Court would still find a sufficient likelihood of success if it were to impose a required prejudice showing on Plaintiff.

directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent." (Doc. 1; PAGEID# 70). Defendants asked Plaintiff to admit that the foregoing section contemplates at least two different "situations" where a party cannot give consent. Plaintiff agreed that the Code contemplates a lack of consent where: (1) the person is "coerced or forced"; and (2) the person is "severely intoxicated." Defendants seem to believe that the Code's broad consent definition is a helpful fact for them (*see also* Doc. 23; PAGEID# 710, n. 2), seemingly based on the theory that Section 103A should have placed Plaintiff on notice that all forms of consent would be at issue, thus giving him an adequate opportunity to prepare for his defense against the accusation(s) that he forced Jane Roe, and/or coerced Jane Roe, and/or took advantage of Jane Roe while she was severely [*32] intoxicated, or some combination of the foregoing. Similar arguments have been rejected by other courts at the Rule 65 stage. *See, e.g., Doe v. Univ. of Notre Dame*, 3:17CV298-PPS/MGG, 2017 U.S. Dist. LEXIS 69645, at *29 (N.D. Ind. May 8, 2017) (granting temporary restraining order and preliminary injunction, where the accused student was provided a "list of the four Standards of Conduct" he may have violated, and "access to the Investigative Summary Report ten days prior to the hearing").

Second, regardless of whether directing a student to broad code section or the investigative report fulfills the notice requirement, Defendants have not adequately addressed this Court's initial concern (Doc. 21; PAGEID# 696) that the April 5, 2017 Notice of Violation used limiting language ("specifically") to narrow the Section 103A violations being investigated and pursued by the university. As the Court previously noted, the Notice of Violation "specifically" focuses on Plaintiff's alleged use of force, and fails to mention Jane Roe's alleged severe intoxication—or any alcohol consumption, for that matter. In other words, once a university directs a student to a broad certain code section, but limits the "specific" conduct that is being investigated, can it credibly argue the student [*33] should still be on notice that it must defend all possible violations of that section?

The closest Defendants come to addressing this issue is its suggestion that, once a plaintiff receives "proper notice regarding the charge of assault and [is] expelled for the assault, [a plaintiff] would not be prejudiced by the [panel] justifying expulsion on additional grounds." (Doc. 23; PAGEID# 710) (citing *Watson ex rel. Watson v. Beckel*, 242 F.3d 1237, 1242 (10th Cir. 2001)). However, *Watson* is inapposite because plaintiff was found responsible for the noticed violation (assault), which alone was grounds for expulsion; the fact that additional violations were addressed at the hearing made little difference. Here, Plaintiff was *not* found responsible for the noticed violation, *i.e.*, sexual misconduct by use of force. Even if the Court were to accept the legal principle embodied in *Watson*, the case is factually distinct.

Third, the Court is troubled by Defendants' attempt to diminish the importance of the specific language in the Notice of Violation, especially when the April 28, 2017 hearing transcript reflects that Plaintiff was required to essentially plead to each "charge" in the Notice of Violation at the beginning of the hearing. (Doc. 11-2; PAGEID# 188-189). [*34]

Fourth, the Court is not yet prepared to accept Defendants' argument that Jane Roe's "second statement" — which more extensively discusses alcohol consumption — should have placed Plaintiff on notice of the university's consent theory. Even if the Court accepts the "second statement" as the notice, "due process is not satisfied unless the noticed party has a meaningful opportunity to prepare for the hearing." *Flaim*, 418 F.3d at 638 (emphasis added). Defendants do not address Plaintiff's argument that, even if the "second statement" qualifies as sufficient notice of the type of allegation, the notice was still legally inadequate because: "(1) the new theory of intoxication was provided to Nokes only one week before the hearing, which was not sufficient time to prepare a defense; and (2) John Nokes received 'notice' of this new theory of intoxication only after he had been required to submit a statement, other witness statements, and evidence of his own for inclusion in the hearing packet in response to the initial version of events." (Doc. 20; PAGEID# 680) (citing *Notre Dame*, 2017 U.S. Dist. LEXIS 69645, at *29). The Court is not holding as a matter of law that seven days constitutes inadequate time to prepare; rather, the Court is expressing that it not [*35] sufficiently satisfied — based on the current record — that Plaintiff had a meaningful opportunity to prepare; thus, a finding that he is unlikely to succeed would be inappropriate at this juncture.

Fifth, Defendants point to the fact that Plaintiff used the term "severely intoxicated" in his opening remarks as conclusive proof that he was on notice of the university's consent theory in advance of the hearing, and thus had a meaningful opportunity to prepare pre-hearing to defend against that particular theory of consent. (Doc. 23; PAGEID# 709) (citing Doc. 11-2; PAGEID# 193). Defendants ignore that Defendant Vaughn was the first person to discuss "severe intoxication" at the hearing. She stated — before Plaintiff's opening statement — that, "[b]y law a person cannot legally give consent no matter what they might say when the person is severely intoxicated due to alcohol or drugs; incapacitated or unconscious." (Doc. 11-2; PAGEID# 186). Plaintiff testified at the preliminary injunction hearing that he tried "his best" to adapt at the disciplinary hearing. Ultimately, the fact that Plaintiff used the term "severe intoxication" in his opening remarks, and otherwise discussed alcohol consumption, [*36] could mean that he was on notice

of this consent theory prior to the hearing; or, it could mean that he was trying to adapt to a potential moving target Defendant Vaughn presented to him at the disciplinary hearing based on her early mention of "severe intoxication."[9]

Finally, even if the Court accepts Defendants' argument that notice is irrelevant unless Plaintiff can show he was prejudiced by the lack of notice, Plaintiff has pointed to additional evidence he would have used at the hearing had he been given adequate notice. Defendants attack the "new" evidence as having already been rejected on Plaintiff's internal appeal; however, Plaintiff persuasively argues that the fact that the fact that a University official "did not accept [Plaintiff's new] evidence on appeal should hardly be conclusive of the issue." Thus, the Court is unable to conclude — at this stage — that "[a]dditional notice would not have allowed [Plaintiff] to better defend the allegations." *Watson v. Beckel*, 242 F.3d 1237, 1242 (10th Cir. 2001) (finding a lack of prejudice because "Mr. Watson candidly admitted his guilt, [so] Mr. Watson was not prejudiced by a lack of notice").

Based on the foregoing, and for the reasons stated in the Court's temporary restraining order (Doc. 21), [*37] Plaintiff has shown a sufficient likelihood of success and "raised questions going to the merits [which are] so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Northeast Ohio Coalition v. Husted*, 696 F.3d 580, 591 (6th Cir. 2012).

c. Cross-Examination

In the university disciplinary context, the Sixth Circuit has observed that "[s]ome circumstances may require the opportunity to cross-examine witnesses, though this right might exist only in the most serious of cases." *Flaim*, 418 F.3d at 636. In *Flaim*, the Sixth Circuit made reference to Second Circuit language stating that — in university disciplinary proceedings hinging on "a choice between believing an accuser and an accused" — "cross-examination is not only beneficial, but essential to due process." *Flaim*, 418 F.3d at 641. *Accord*: *Doe v. Ohio State Univ.*, 219 F. Supp. 3d at 660 (analyzing *Flaim*, but recognizing that the foregoing language was *dictum*); *Doe v. Univ. of Cincinnati*, 223 F. Supp. 3d at 710 (same). Furthermore, in *Doe v. Univ. of Cincinnati*, the undersigned recognized the general principle that the need for cross-examination in the university setting is greater than in other educational settings: "[i]n a university setting, the administrators do not have the same 'particularized knowledge' of a student's trustworthiness that exists in a high school with [*38] a smaller student population." 223 F. Supp. 3d at 711 (noting "total enrollment of UC during the 2016-2017 academic year is 44,338 undergraduate and graduate students").

Although not as large as the University of Cincinnati, Defendant Miami University cannot dispute that it is a large public university, with total enrollment (including regional campuses) exceeding 24,000. *See* http://miamioh.edu/about-miami/quick-facts/ (last visited August 24, 2017). Likewise, it cannot dispute that it allowed Jane Roe to offer the testimony of three witnesses via written statement only. (Doc. 17-1). For example, she offered the written statement of her roommate, who stated that Jane Roe was in tears after her encounter with Plaintiff. (Doc. 17-1; PAGEID# 604). John Nokes was never able to test the roommate's memory or credibility, including any improper motives for testifying as such. What's more, the hearing transcript clearly reflects that Defendant Vaughn stated: "when [Jane Roe] had three witness statements, it truly disadvantages everyone if you can't ask questions. So if we can't ask questions, I have to take this as fact. That all is true." (Doc. 11-2; PAGEID# 271). Based on these facts, the Court stands by its earlier conclusion that, "[u]nder certain interpretations [*39] [of *Flaim*], [Plaintiff may] prevail, especially in light of one panel member's statement that she must accept certain written accounts as true." (Doc. 21).[10]

Based on the foregoing, and for the reasons stated in the Court's temporary restraining order (Doc. 21), Plaintiff has shown a sufficient likelihood of success and "raised questions going to the merits [which are] so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus

[9] Plaintiff claims that no Miami official ever alerted him pre-hearing that "severe intoxication" was at issue. Defendant Vaughn was present at the preliminary injunction hearing, but did not take the stand to contradict Plaintiff's assertion or otherwise provide a contrary account of Plaintiff's pre-hearing notice.

[10] In post-hearing briefing, Defendants argue that Plaintiff failed to establish at the preliminary injunction hearing how cross-examination of Jane Roe's three witnesses would have changed the "outcome." (Doc. 23; PAGEID# 711). As indicated above, this Court is not convinced by Defendants' cited authority that evidence of a "changed outcome" is required to prevail. Regardless, Defendants' argument that cross-examination could not have changed the outcome is unavailing. Specifically, in response to Plaintiff's argument that he would have challenged witness credibility had he been given the opportunity to cross-examine (i.e., lack of personal knowledge, memory, etc.), Defendants argue that Plaintiff "was able to do all of these things himself through his statements to the Hearing Panel." (Doc. 23; PAGEID 711). Defendants miss the point of cross examination, which allows the fact-finder to assess *witness demeanor and responses* in order to "assess the credibility of those who disclaim any improper motivations." *Hart v. Lew*, 973 F.Supp.2d 561, 574 (D. Md. 2013). If anything, Defendants' claim that no amount of cross-examination could have changed the minds of the hearing panel members arguably undercuts the fairness of the hearing Plaintiff received.

for more deliberate investigation." *Northeast Ohio Coalition v. Husted*, 696 F.3d 580, 591 (6th Cir. 2012).

ii. Irreparable Harm

In university discipline cases, this Court has previously found sufficient irreparable harm to warrant a preliminary injunction where suspension and damage to reputation are at issue. *Doe v. Univ. of Cincinnati*, 223 F. Supp. 3d at 712. The Court acknowledges, however, a split in authority. (Doc. 21; PAGEID# 701). That is, some courts deem such harm compensable through monetary damages; others do not. As this Court stated in its temporary restraining order, however, the undersigned is disinclined to embrace a rule that suspension and harm to an individual's reputation cannot constitute irreparable harm as a matter of law. Furthermore, any argument that Plaintiff only claims speculative [*40] harm would be misplaced. At the preliminary injunction hearing, Plaintiff testified to the cyclical nature of job opportunities in his field, and other complications that will prevent him from applying for competitive internships necessary to advance due to his lack of enrollment. Plaintiff has thus made a sufficient showing of irreparable harm. *Doe v. Univ. of Cincinnati*, 223 F. Supp. 3d at 712; *Ritter v. Oklahoma*, 2016 U.S. Dist. LEXIS 60193, at *8 (W.D. Okla. May 6, 2016) ("The court concludes plaintiff has also demonstrated that he will suffer irreparable harm if the injunction is denied. The loss of educational and career opportunities he will encounter if he is not reinstated and allowed to graduate is not readily compensable in money damages."). *Accord*: *Doe v. Univ. of Notre Dame*, 2017 U.S. Dist. LEXIS 69645, *38 (N.D. Ind. May 8, 2017); *Doe v. Middlebury College*, No. 1:15-CV-192-JGM, 2015 U.S. Dist. LEXIS 124540 (D.Vt. Sept. 16, 2015); *King v. Depauw University*, No. 2:14-CV-70-WTL-DKL, 2014 U.S. Dist. LEXIS 117075, at *13 (S.D.Ind. Aug. 22, 2014).[11]

Based on the foregoing, and for the reasons stated in the Court's temporary restraining order (Doc. 21), Plaintiff has made a sufficient showing of irreparable harm.

iii. Injury to Third Parties and Public Interest

Each Party addresses the third and fourth preliminary injunction factors (i.e., injury to third parties and public interest, respectively) together.

Initially, the Court will note that Defendants' post-hearing briefing is [*41] silent on any harm the public or third-parties will suffer if the temporary restraining order enjoining the release of Plaintiff's name is extended. Specifically, this Court temporarily enjoined Defendants from releasing Plaintiff's name in response to public records requests made under Ohio's Public Records Act. In the temporary restraining order, the Court was clear that it would revisit this issue if a longer injunction was sought; however, in the post-hearing briefing, Defendants have not brought to this Court's attention new developments suggesting that third parties or the public will suffer injury as a result of a longer injunction enjoining the release of Plaintiff's name.

Plaintiff's request to enjoin the imposition of discipline requires a somewhat different analysis. While universities have an interest in maintaining their disciplinary system and protecting victims, the public interest is likewise served "by the robust enforcement of constitutional rights." *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, 698 F.3d 885, 896 (6th Cir. 2012). Here, Plaintiff was permitted to remain on campus during the disciplinary process, as Miami found after a summary suspension hearing that Plaintiff did not pose a direct threat to Jane Roe or the student body. Defendants [*42] have not brought to this Court's attention facts suggesting otherwise.

Therefore, on balance, all four preliminary injunction factors favor Plaintiff.

III. CONCLUSION

For the foregoing reasons, the Court:

(1) **DENIES** Plaintiff's Motion to Strike (Doc. 27), but reminds Defendants of the Court's above admonitions; and

(2) **GRANTS** Plaintiff's Motion for Preliminary Injunction

[11] The Court feels compelled to at least note that Ohio's public universities often benefit from a presumption of irreparable harm in their business injunction cases. For example, in trademark cases, universities have benefitted from the rule that, due to a "trademark's unique role in protecting intangible assets, such as *reputation and goodwill*," injuries "that arise as a result of trademark infringement and public confusion are by their very nature irreparable and not susceptible of adequate measurement for remedy at law." *Ohio State Univ. v. Thomas*, 738 F. Supp. 2d 743, at 755-756 (S.D. Ohio Aug. 27, 2010) (emphasis added; internal citations omitted). Yet, when faced with a split in authority, Defendant Miami University would have this Court take the view that a damages such as "embarrassment, humiliation, and damage to an *individual's* reputation fall short of irreparable harm." (Doc. 16; PAGEID# 521) (emphasis added). In other words, damage to an entity's reputation based on a single act of trademark infringement may be irreparable; damage to a person's reputation — connecting that individual to something as universally reviled as sexual assault — is not irreparable. The Court is simply not persuaded.

(Doc. 2). Therefore, pursuant to Fed. R. Civ. P. 65, it is **ORDERED** that:

a. Defendant Miami University, and all those acting in active concert with it, is preliminarily **ENJOINED** from imposing disciplinary sanctions against John Nokes, subject to the requirement that John Nokes have no contact with Jane Roe;

b. Defendants Miami University, Susan Vaughn, Steven Elliott, Jayne Brownell, and Michael Curme, and all those acting in active concert with them, are preliminarily **ENJOINED** from releasing or otherwise publicly disclosing Plaintiff's name;
c. This Order is effective upon its entry; and
d. There is no requirement of a bond.

IT IS SO ORDERED.

/s/ *Michael R. Barrett*

HON. MICHAEL R. BARRETT

UNITED STATES DISTRICT JUDGE

Plummer v. Univ. of Houston

United States Court of Appeals for the Fifth Circuit

June 23, 2017, Filed

No. 15-20350

Reporter
860 F.3d 767 *; 2017 U.S. App. LEXIS 11268 **; 2017 WL 2704014

NATALIE PLUMMER; RYAN MCCONNELL, Plaintiffs - Appellants v. UNIVERSITY OF HOUSTON; RICHARD BAKER; RICHARD WALKER, Defendants - Appellees

Subsequent History: As Revised June 26, 2017.

Prior History: [**1] Appeal from the United States District Court for the Southern District of Texas.

Plummer v. Univ. of Houston, 2015 U.S. Dist. LEXIS 189229 (S.D. Tex., May 28, 2015)

Counsel: For NATALIE PLUMMER, RYAN MCCONNELL, Plaintiffs - Appellants: Joshua Adam Engel, Counsel, Engel & Martin, L.L.C., Mason, OH; Troy Ted Tindal, Tindal Law Firm, Houston, TX.

For UNIVERSITY OF HOUSTON, RICHARD BAKER, RICHARD WALKER, Defendants - Appellees: Sean Patrick Flammer, Esq., Office of the Attorney General, Austin, TX.

Judges: Before JONES, WIENER, and HIGGINSON, Circuit Judges. EDITH H. JONES, Circuit Judge, dissenting.

Opinion by: STEPHEN A. HIGGINSON

Opinion

[*770] STEPHEN A. HIGGINSON, Circuit Judge:

The University of Houston found two former students, Ryan McConnell and Natalie Plummer, to have violated the University's sexual misconduct policy. After two unsuccessful administrative appeals, McConnell and Plummer were ultimately expelled. McConnell and Plummer then sued the University and two University officials, alleging that they were denied constitutional due process and were discriminated against in violation of Title IX. The district court granted summary judgment to the University and the individual defendants, holding that no due process violation occurred and that the individual defendants were entitled to qualified immunity. [**2] The district court dismissed the Title IX claims under Rule 12(b)(6). Finding no reversible error, we affirm.

I

McConnell and Plummer were students at the University of Houston in 2011. On the night of November 19, 2011, McConnell met, for the first time, "Female UH Student" at a bar in Houston. Both McConnell and Female UH Student became intoxicated. They were ejected from the bar for disruptive behavior and walked to McConnell's nearby dorm room. There, they engaged in sexual activity, but neither can remember exactly what occurred.

Later that evening, McConnell's girlfriend (now wife), Plummer, appeared at his dorm room and found McConnell and Female UH Student, both naked and unconscious on the floor. Plummer yelled expletives and took a photo of the two, which she posted on Facebook but removed sometime later. Plummer also made two brief videos. In one, the "Dorm Room Video," a drowsy McConnell appears to fondle the unresponsive Female UH Student as she lies on the dorm room floor and Plummer crudely berates him. After McConnell stands up, Plummer focuses the camera on Female UH Student's vagina and yells several lewd statements, including "Fucking yeah, yeah. Fucking get it, get it. Fucking [**3] get that pussy, bitch!" Simultaneously, slapping sounds can be heard in the background. In the other, the "Elevator Video," Plummer films Female UH Student, who is still fully naked, lying on the dormitory's communal hallway floor. Female UH Student stands up and walks toward Plummer, and Plummer leads the nude Female UH Student into an elevator and sends it to the lobby. Voices can be heard speaking throughout the video, but the precise statements are often unclear. Plummer later showed the videos to her friends and shared the videos and photo electronically.

Other students found Female UH Student lying naked in the elevator, and they contacted University police. A Sexual Assault Nurse examined Female UH Student and found injuries consistent with sexual assault. Police investigated the incident, but did not criminally charge McConnell or Plummer.

On February 12, 2012, Female UH Student submitted a complaint to the University alleging that she was a victim of

sexual assault. Richard Baker, the Vice President of the University's Office of Equal Opportunity Services (EOS), notified McConnell that EOS was investigating the incident. Thereafter, McConnell and Plummer met with Baker to discuss [**4] [*771] the incident and provide their side of the story. At her meeting with Baker, Plummer presented the photo she took of McConnell and Female UH Student, as well as the Elevator Video. Plummer did not disclose the Dorm Room Video. Based on the evidence gathered, the University did not proceed with disciplinary actions at that time. More than a year and a half later, however, the University received a copy of the Dorm Room Video from the Harris County Sherriff's Office and then decided disciplinary proceedings were warranted.

The University provided both McConnell and Plummer with a formal, written declaration of the various allegations against them on September 30, 2013.[1] Each student retained counsel, who formally responded to the charges and accompanied McConnell and Plummer to meetings with Baker. McConnell reported that he remembered nothing after he and Female UH Student arrived at his dorm room but denied sexually assaulting her. Plummer insisted that her actions were motivated by anger at her boyfriend, not an attempt to encourage him to assault Female UH Student. She also asserted that Female UH Student, when awakened, was pressing to "sex" her.[2]

After completing his investigation, [**5] Baker authored a report finding that McConnell "violated the sexual assault and attempted sexual assault provisions . . . when he engaged in sexual activity with [Female UH Student] on November 19, 2011, without her consent."[3] Baker also found that Plummer "facilitated/encouraged the sexual assault of another [UH] student[,]" "electronically recorded the sexual activity of another [UH] student and then shared that video . . . without that student's permission[,]" and "made lewd, lecherous and humiliating comments of a sexual nature against another [UH] student."

Pursuant to the University's procedures, each student appealed Baker's findings to a four-person panel of University personnel. The panels, tasked with upholding or rejecting EOS's findings based on a preponderance of the evidence standard, held separate appeal hearings for McConnell and Plummer. Neither student attended the other's full hearing, although Plummer testified as a witness at McConnell's hearing. Baker, an attorney, presented his findings to the panel, including by testifying about his investigation and providing a packet of investigatory materials. He called two witnesses at McConnell's hearing—two University police [**6] officers who responded to and investigated the incident—and none at Plummer's hearing. An additional University EOS attorney was present at each hearing to advise the panel.

McConnell's and Plummer's attorneys attended and participated in the hearings. Although the University's procedures explicitly allow a student's attorney only a minor role as an "adviser" at the appeal [*772] hearing, in this case, the University allowed McConnell's and Plummer's attorneys to participate more fully, including at times by examining and cross-examining witnesses and making statements to the panel. Additionally, McConnell's and Plummer's attorneys drafted and submitted formal responses to the University's allegations and met with University officials on several occasions to discuss the evidence against the plaintiffs.

McConnell and Plummer each made opening and closing arguments, testified, presented witnesses, cross-examined witnesses, and raised legal and factual objections to the panel. The University's procedures explicitly allow cross-examination of witnesses only through the submission of written questions. Here, however, the panels frequently allowed all parties (or their attorneys) to question witnesses [**7] (including Baker) in person at the hearing. McConnell and Plummer were informed of the investigatory evidence several days before each hearing, although some identities were redacted from materials based on educational privacy concerns. At each hearing, the panel was shown the Dorm Room and Elevator Videos, and all parties offered interpretations of the videos' contents. Female UH Student was not deposed and did not appear or testify at either hearing. Neither Baker nor any other witness testified to the substance of any conversations with Female UH Student about her memory of the night, and Female UH Student's original complaint—which was among the materials supplied to the panels—stated that she did not remember anything that occurred after she arrived at the bar the night of the incident.

Both hearing panels upheld Baker's findings. McConnell and Plummer then appealed to Richard Walker, the University's Vice President and Vice Chancellor for Student Affairs and Enrollment Services, as allowed by the University's procedures. In September 2014, Walker denied these further appeals.

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[1] At some point, Female UH Student decided not to pursue her complaint, and thus the University was the "Complainant" in both proceedings as provided for by the University's procedures.

[2] The dissent observes that Female UH Student "was never investigated for her lascivious advances toward Plummer." Plummer never submitted a formal complaint to EOS, which would have required EOS to intitiate investigative processes.

[3] "Sexual activity" as defined by the University's 2013 Sexual Misconduct Policy includes "any intentional contact with the breasts, buttock, groin, or genitals, or touching another with any of these body parts, or making another touch the Complainant or themselves with or any of these body parts; and any intentional bodily contact in a sexual manner, though not involving contact with/of/by breasts, buttocks, groin, genitals, mouth or other orifice."

McConnell and Plummer were expelled and banned from the University and any activities connected with it. [**8] [4] The disciplinary notations were, however, removed from their official transcripts.

In this lawsuit challenging their discipline, McConnell and Plummer complain that the University retroactively applied its 2013 Misconduct Policy to their 2011 conduct. They also assert that the University's hearing procedures failed to give them adequate notice of the adverse evidence, denied them confrontation rights against Female UH Student, and limited crossexamination to written questions. Finally, they charge that Baker's multiple roles created impermissible conflicts. These deficiencies, they allege, deprived them of constitutional due process.[5]

The district court, in a 36-page opinion relying on Supreme Court and Fifth Circuit law, concluded that the process offered to McConnell and Plummer was constitutionally sufficient. *Plummer v. Univ. of Hous.*, No. 4:14-CV-2959, 2015 U.S. Dist. LEXIS 189229, 2015 WL 12734039 (S.D. Tex. May 28, 2015). McConnell and Plummer appealed. We affirm.

II

"It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking in wisdom or compassion." *Wood v. Strickland*, 420 U.S. 308, 326, 95 S. Ct. 992, [*773] 43 L. Ed. 2d 214 (1975); *see also Davis ex rel LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999) ("[C]ourts should refrain from second-guessing the disciplinary decisions made by school administrators."). "A university is not a court of [**9] law, and it is neither practical nor desirable it be one." *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 n.1 (6th Cir. 2005) (citation omitted). Ultimately, courts must focus on "ensuring the presence of 'fundamentally fair procedures to determine whether the misconduct has occurred.'" *Id.* at 634 (quoting *Goss v. Lopez*, 419 U.S. 565, 574, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975)).

Generally, the amount of process due in university disciplinary proceedings is based on a sliding scale that considers three factors: (a) the student's interests that will be affected; (b) the risk of an erroneous deprivation of such interests through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (c) the university's interests, including the burden that additional procedures would entail. *See Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In *Goss v. Lopez*, the Supreme Court held that an informal give-and-take between a high school student and the administration afforded sufficient process preceding a temporary suspension. 419 U.S. at 584. The Court specified, however, that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." *Id.* This court has held that "due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct." *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961) [**10] . "[T]he interpretation and application of the Due Process Clause are intensely practical matters and . . . 'the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" *Goss*, 419 U.S. at 578 (alteration omitted) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961)). "The nature of the hearing should vary depending upon the circumstances of the particular case." *Dixon*, 294 F.2d at 158.

Here, the first and third *Mathews* factors are easily identified. On the one hand, McConnell and Plummer have a liberty interest in their higher education. *See Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 929-30 (Tex. 1995) (recognizing a liberty interest in graduate higher education under the Texas Constitution); *accord Dixon*, 294 F.2d at 157 ("The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing.").[6] The sanctions imposed by the University could have a "substantial lasting impact on appellants' personal lives, educational and employment opportunities, and reputations in the community." *Doe v. Cummins*, 662 F. App'x 437, 446 (6th Cir. 2016) (unpublished) (citing *Goss*, 419 U.S. at 574-75). On the other hand, the University has a strong interest in the "educational process," including maintaining a safe learning environment for all its students, while preserving its limited administrative resources. *See Goss* 419 U.S. at 580, 583; *see also Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 14-15 (1st Cir. 1998) ("Although the protection of [a student's private interest] would require all possible safeguards, [*774] it must be balanced against the need to promote and protect the primary function of institutions that exist to provide education.").[7]

[4] McConnell graduated from the University before his sanction was imposed.

[5] The dissent criticizes the University's use of a "preponderance of the evidence" standard for the panels' review of Baker's initial findings. McConnell and Plummer, however, do not challenge this aspect of their proceedings on appeal.

[6] Texas has not recognized a property interest in graduate higher education. *Than*, 901 S.W. 2d at 930 n.1.

[7] The dissent narrowly characterizes the University's interest as "impartially adjudicating quasi-criminal sexual misconduct allegations." Although it is true that the University is interested in providing a fair disciplinary process, the Supreme Court has emphasized that "[a]

Applying the second *Mathews* factor—the risk of erroneously depriving [**11] McConnell and Plummer's interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards—the unique facts of this case render it unnecessary that we draw any determinative line regarding sufficient procedures in state university disciplinary cases. McConnell and Plummer received multiple, meaningful opportunities to challenge the University's allegations, evidence, and findings. In light of the graphic conduct depicted in the videos and photo—which the panels viewed for themselves before affirming the University's findings—further procedural safeguards would not have lessened the risk of an erroneous deprivation of McConnell and Plummer's interests or otherwise altered the outcome. *See Mathews*, 424 U.S. at 335; *see also Flaim*, 418 F.3d at 639-43 (holding that additional procedures were not necessary in case without significant factual disputes); *Cummins*, 662 F. App'x at 446-451 (finding students accused of sexual assault received adequate due process in university disciplinary hearings where, "although the procedures employed by [the university] did not rise to the level of those provided to criminal defendants," students received an "opportunity to be heard at a meaningful time and in an meaningful manner" [**12] (quoting *Mathews*, 424 U.S. at 333)); *cf. Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 230 (5th Cir. 1998) ("There may be cases of such gross and outrageous conduct in open court as to justify very summary proceedings for an attorney's suspension or removal from office, but even then he should be heard before he is condemned." (internal quotation omitted)); *Scott v. Harris*, 550 U.S. 372, 380-81, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (recognizing that the existence of undisputed video evidence, which discredited the plaintiff's version of events, justified summary judgment).[8] Thus, we [*775] hold that McConnell and Plummer did not meet their summary judgment burden to demonstrate a genuine factual dispute that the process surrounding their disciplinary cases was constitutionally defective.

McConnell and Plummer argue several potential violations of due process standards. They assert inadequate notice of the standards of conduct because the University's sexual harassment/misconduct policy was changed between 2011, when the incident occurred, and 2013, when they were formally accused. They contend the investigation against them was not full and fair, that Baker's role was suffused with conflicts and bias against them, that there was an "absence of direct evidence," and that they were denied confrontation of the [**13] victim and effective cross-examination. Each of these claims will be briefly discussed.

The claim that a standard of misconduct was retroactively imposed on McConnell and Plummer is unsupportable on the facts of this case. Their conduct, as detailed in the photo and two videos, violated the University's Interim Sexual Assault Policy (effective in November 2011), which prohibited sexual assault as "the touching of an unwilling person's intimate parts . . . through the use of the victim's mental or physical helplessness of which the accused was aware or should have been aware." The policy also prohibited ". . . sexual misconduct which is lewd, exhibitionistic or voyeuristic . . . [and] forbids . . . any act which demeans, degrades, or disgraces any person . . . ." The University's Interim Sexual Harassment policy (effective in November 2011) prohibited "the use of sexually oriented photos . . . unrelated to instruction and/or the pursuit of knowledge."[9] The conduct captured in the videos and photo also violated the more broadly worded 2013 Sexual Misconduct Policy, which encompassed the following violations: (facilitating) sexual assault; taking abusive sexual advantage of another; and [**14] non-consensual electronic recording and transmitting sexual images without the knowledge and consent of the parties involved. As applied to this conduct, the charged violations are neither vague nor outside the legitimate purview

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school is an academic institution, not a courtroom or administrative hearing room." *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 88, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978); *see also Goss*, 419 U.S. at 580, 583 ("[F]urther formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process."); *Gorman*, 837 F.2d at 15 ("[I]t is no exaggeration to state that the undue judicialization of an administrative hearing, particularly in an academic environment, may result in an improper allocation of resources, and prove counter-productive.").

[8] The dissent criticizes our reliance on *Flaim* and *Cummins*. *Flaim* supports our decision not because it involved identical circumstances (it did not), but because it demonstrates that the amount of process constitutionally required in state university disciplinary proceedings will vary in accordance with the particular facts of each case. *See* 418 F.3d at 629 & n.8 ("It is because of the unique facts of this case that we find the procedures used by Medical College of Ohio adequate."). *Cummins*, which we observe for its persuasive analysis, arguably is distinguishable by a feature that would suggest *more* process was due those students than McConnell and Plummer: the sexual assault victims in *Cummins* testified at the accused students' hearings and the students were allowed limited cross-examination only by submitting written questions to the panel. 662 F. App'x at 439-442 (one of the accused students was precluded from cross-examining his accuser entirely). In rejecting the students' challenge to this alleged procedural flaw, the *Cummins* court explained that "[a]ny marginal benefit that would accrue to the fact-finding process by allowing follow-up questions in appellants' . . . hearings is vastly outweighed by the burden on [the university]." *Id.* at 448.

[9] Plummer's posting of the photo to Facebook and sharing the videos with her friends would constitute sexual harassment under the 2011 policy, as would her on-video remarks about Female UH Student.

of the policies.

McConnell and Plummer also assert that they were denied confrontation of Female UH Student and the opportunity to effectively cross-examine adverse witnesses. This case does not require that we determine whether confrontation and cross-examination would ever be constitutionally required in student disciplinary proceedings. The unique facts of this case demonstrate no procedural deficiency in this regard. The University's case did not rely on testimonial evidence from Female UH Student. Indeed, it is undisputed that Female UH Student remembered little about the incident, and no one testified to the substance of any conversations with her about her memory of the night. Rather, the primary evidence Baker presented to the panels were the videos and photo, taken and distributed by Plummer. The conduct depicted in the videos and photo—combined with Plummer's subsequent distribution and publication—was sufficient to sustain the University's findings [**15] and sanctions. *See Mathews*, 424 U.S. at 335 (courts must weigh whether further procedural safeguards would have lessened the risk of an erroneous deprivation [*776] or otherwise altered the outcome). We emphasize that McConnell and Plummer do not argue that Female UH Student's testimony or cross-examination would have suggested that she consented to the degrading and humiliating depictions of her in the videos and photo, nor that such testimony could have otherwise altered the impact of the videos and photo.[10] *See Flaim*, 418 F.3d at 641 (citing *Winnick v. Manning*, 460 F.2d 545, 549 (2d. Cir. 1972)) (concluding that crossexamination of arresting officer was not essential to due process in medical student's disciplinary hearing when the case did not turn on credibility of testimony and plaintiff was unable to identify any significant benefits that cross-examination would have provided). Further, because McConnell and Plummer do not challenge the authenticity of the videos and photo, it does not makes sense to criticize an "absence of direct evidence."

McConnell and Plummer's claims that the University failed to provide adequate notice of adverse evidence and that Baker's multiple roles suffused the proceedings with bias are similarly unpersuasive. Applying the second *Mathews* factor, even if [**16] the University could have provided notice further in advance of the hearings of the identities of relevant witnesses and other evidence, the ultimate disciplinary decisions were conclusively supported by the videos and photo, about which McConnell and Plummer had full knowledge. *See Mathews*, 424 U.S. at 335. McConnell and Plummer do not show how more timely knowledge of the adverse evidence could have aided in their defense. *See id.* Likewise, McConnell and Plummer have not demonstrated that Baker's dual roles amount to a constitutional violation. They argue that Baker's dual role as victim advocate and investigator prevented him from impartially investigating the incident, and that EOS's role in advising the panel created a conflict of interest.[11] But McConnell and Plummer fail to show how any of these alleged impermissible conflicts undermined the integrity of their proceedings. Baker relied primarily on the videos and photo to support his findings before the panel, and there is nothing in the record or offered by McConnell and Plummer to suggest that a different investigator would have uncovered information diminishing the significance of that graphic evidence to the initial findings. *See Mathews*, 424 U.S. at 335; *cf. Baran v. Port of Beaumont Nav. Dist. of Jefferson Cty.*, 57 F.3d 436, 446 (5th Cir. 1995) ("[Where [**17] a]llegations of bias based on the prejudgment of the facts or outcome of a dispute generally stem from the fact that an administrative body or hearing officer has dual roles of investigating and adjudicating disputes and complaints . . . the honesty and integrity of those serving as adjudicators is presumed." (citing *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (5th Cir. 1975))). Notably, the [*777] separate EOS attorney advisor explicitly instructed the panels that they were free to disagree with the interpretations of the evidence offered by the parties, including Baker.

We have carefully reviewed the record, and we hold that the process Appellants received was sufficient. It follows that the question of qualified immunity for the individual defendants becomes moot. Again, we emphasize that we do not suggest a constitutional "floor" for state university disciplinary procedures. Whether a state university has provided an individual student sufficient process is a fact-intensive inquiry and the procedures required to satisfy due process will necessarily vary depending on the particular circumstances of each case. *See Dixon*, 294 F.2d at 158. As we noted at the outset, the Supreme Court has admonished that "[i]t is not the role of the federal courts to set aside decisions of school [**18] administrators which the court may view as lacking in wisdom or compassion." *Wood*, 420 U.S. at 326; *see also Davis*, 526 U.S. at

[10] Plummer contends that Female UH Student sexually harassed her by repeatedly asking to "sex her." This disputed allegation, if true, would at best demonstrate independent misconduct, not a defense to Plummer's own actions.

[11] At the hearings, Baker offered interpretations of the graphic evidence, as well as legal argument about how the University's Sexual Misconduct Policy should be interpreted and applied to that evidence. McConnell and Plummer (on their own and through their attorneys) argued their own interpretations of the video and photo evidence and often vigorously contested the analysis offered by Baker. At both hearings, the separate EOS attorney serving as panel adviser counseled the panel members that they were free to interpret the video and photo evidence themselves and draw their own conclusions about the import of that evidence. This separate EOS attorney adviser also responded to panel questions regarding the meaning and application of the University's Sexual Misconduct Policy.

648 ("[C]ourts should refrain from second-guessing the disciplinary decisions made by school administrators.").

III

We now turn to McConnell and Plummer's argument that the district court erred in dismissing their Title IX claims. The district court carefully articulated the principles governing dismissals under Fed. R. Civ. Pro. 12(b)(6) for failure to state a claim and for McConnell and Plummer's claims that the University and individual defendants should be liable for sex discrimination against them under Title IX. 20 U.S.C. § 1681(a). We find no error in the district court's dismissal.

We review the dismissal and the district court's related conclusions of law de novo. *Dehoyos v. Allstate Corp.*, 345 F.3d 290, 294 (5th Cir. 2003). Briefly, McConnell and Plummer were required to plead facts asserting a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). The University, as a recipient of federal funding, can be held liable for intentional discrimination on the basis of sex or for deliberate indifference to discrimination against or harassment of a student on the basis of sex. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005).[12]

According to the Second Circuit, a university can face Title IX liability for imposing discipline where gender is a motivating factor for the decision under two [**19] general theories. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994). In the first instance, the claim is that the charged student (plaintiff) was innocent and wrongly found to have committed an offense. *Id.* The second instance alleges selective enforcement, i.e., that regardless of the student's culpability, the severity of the penalty and/or the university's decision to initiate proceedings was affected by the charged student's gender. *Id.* More recently, the same court held a student's case sufficient to proceed under Title IX where a male student alleged himself innocent of engaging in nonconsensual sex with a female student. *Doe v. Columbia Univ.*, 831 F.3d 46, 50, 53, 59 (2d Cir. 2016). He further alleged procedural bias and improprieties in the university's discipline process. *Id.* at 56-59. He also alleged that he was singled out because Columbia University was in the midst of a public campaign criticizing its alleged weak response [*778] to female students' complaints of sexual assaults by males. *Id.* at 50-51, 53, 57-58. McConnell and Plummer and the University each rely on the theories adopted in *Yusuf*, so we need not speculate on any other possible theories of Title IX liability.

McConnell and Plummer's allegations here rest on selective enforcement and deliberate indifference to their rights. With regard to selective enforcement, [**20] they urge that the University was motivated by gender bias in favor of Female UH Student. They assert essentially that McConnell and Female UH Student were *in pari delicto*, in that both had passed out and each engaged in sexual conduct with another extremely intoxicated individual. Plummer chides the University for not taking up her charge of misconduct against Female UH Student for pressing to "sex" her. We agree, however, with the district court's assessment of the undisputed facts: the photo and graphic videos, taken and later exhibited by Plummer, show McConnell touching Female UH Student in private areas. Female UH Student is unresponsive and inactive. Female UH Student was found naked in an elevator and taken to the hospital for sexual assault testing. The University's discipline was predicated on what the two charged students did, and during the discipline process they—a male and a female—were treated equally. There is no sound basis for an inference of gender bias.[13]

McConnell and Plummer tersely assert that the University was deliberately indifferent to the constitutional insufficiency of the procedures it employed in sexual misconduct discipline cases. Although the University [**21] may have been better advised in a number of procedural respects, there is a stark contrast between McConnell's and Plummer's culpability and case procedures applied to them and the allegations of student innocence and official refusal to conduct a thorough investigation in *Columbia Univ.*, 831 F.3d at 49-50, 52-53, 56-57. Deliberate indifference to constitutional rights is a very high standard of misconduct. *See Sanches v. Carrollton-Farmers Branch Ind. Sch. Dist.*, 647 F.3d 156, 169-70 (5th Cir. 2011). As the district court held, the pleadings here do not meet that standard.

IV

For the foregoing reasons, the judgment of the district court is AFFIRMED.

Dissent by: EDITH H. JONES

Dissent

[12] Liability under Title IX does not extend to school officials, teachers and other individuals. *Davis*, 526 U.S. at 640-43. Hence, McConnell and Plummer do not appeal the dismissal of the University administrators.

[13] McConnell and Plummer assert that the district court should not have awarded the University "summary judgment" based on the University's list of 39 sexual harassment investigations conducted from 2010 forward, which revealed that nearly all involved male accused students and only 3 involved male accusers. The district court did not address this list, and we need not do so except to note that the same list shows that at least 41% of the investigations resulted in EOS making "no finding" against the accused.

EDITH H. JONES, Circuit Judge, dissenting:

With due respect to my colleagues' refusal to set a "constitutional floor" for the students' procedural due process claims, I dissent. This case is the canary in the coal mine, auguring worse to come if appellate courts do not step in to protect students' procedural due process right where allegations of quasi-criminal sexual misconduct arise. Yes, there is undisputed graphic evidence—videos and a photo of what transpired among McConnell, Plummer and the Female Student on November 19, 2014. The panel's conclusion seems driven by the "unique facts" of graphic evidence to discount all of McConnell's and Plummer's serious arguments. [**22] Put bluntly, the panel implies that because they were guilty, they got enough due process.

[*779] The panel's mode of analysis, in my view, is contrary to *Carey v. Piphus*, 435 U.S. 247, 265, 98 S. Ct. 1042, 1053, 55 L. Ed. 2d 252 (1978). In *Carey*, high school students were suspended for a few weeks without any adjudicative hearing; the authorities did not challenge the lower courts' liability determinations. *Carey* makes clear that the result of a deprivation of liberty or property does not justify the procedural means: "Even if respondents' suspensions were justified, and even if they did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process." 435 U.S. at 265, 98 S. Ct. at 1053. Further, "[b]ecause the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury." 435 U.S. at 266, 98 S. Ct. at 1054 (citations omitted). *See also Zinermon v. Burch*, 494 U.S. 113, 126 n.11, 110 S. Ct. 975, 983, 108 L. Ed. 2d 100 (1990); *Bowlby v. City of Aberdeen, Miss.*, 681 F.3d 215, 219 (5th Cir. 2012); *Caine v. Hardy*, 943 F.2d 1406 (5th Cir. 1991) (en banc).

I would hold that several features of the process to which McConnell and Plummer were subjected, most prominently the intermingled and inherently conflicting [**23] duties of UH Title IX Coordinator Baker, violated their due process rights to defend against quasi criminal charges of sexual assault and facilitating sexual assault. I would reverse and remand for further proceedings, which necessarily include the question of qualified immunity.

The background of this controversy, left unmentioned by the panel although both parties cited and relied on it, is the promulgation by the United States Department of Education, Office of Civil Rights, of a circular that offered "guidance" on how universities must respond to complaints of sexual misconduct on campus. *See* United States Department of Education, Office of the Assistant Secretary for Civil Rights, Dear Colleague Letter, (2011), available at http://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html . The circular was not adopted according to notice-and-comment rulemaking procedures;[1] its extremely broad definition of "sexual harassment" has no counterpart in federal civil rights case law;[2] and the procedures prescribed for adjudication of sexual misconduct are heavily weighted in favor of finding guilt. Institutions of higher learning, like the University of Houston, flocked to embrace the "guidance." From a federal government database, [**24] it is estimated that between 20,000 and 25,000 complaints of sexual misconduct have been filed based on the "guidance" and thousands of students' discipline cases adjudicated using procedural standards far less demanding than those accorded most [*780] defendants. *See* K.C. Johnson & Stuart Taylor, Jr., *The Campus Rape Frenzy* 9-10 (Encounter Books 2017). A number of lawsuits challenging these procedures have survived preliminary motions to dismiss, *see* Johnson & Taylor *passim*, as state and federal courts exhibited concern about deficient procedures.

The University policies used in this case largely tracked the DOE guidance letter. For this reason, it is a hollow claim that the procedures are owed particular deference as products of "institutions of higher learning." These policies were developed by bureaucrats in the U.S. Department of Education and thrust upon educators with a transparent threat of withholding federal funding. Viewed as a whole, without the panel majority's self-imposed blinkers, the procedures raise serious questions about the sufficiency of the University of Houston's procedures to adjudicate fully and fairly charges of sexual misconduct that will affect [**25] the students' future lives as surely as criminal convictions.

In part because the female had no recollection of these events, and she denied anyone had touched or hit her, she declined to file a charge against the students. Because of insufficient evidence, no criminal charges were filed.

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[1] The Dear Colleague Letter is currently being challenged in the U.S. District Court for the District of Columbia on the grounds that it did not go through notice-and-comment rulemaking, is in excess of the Department of Education's statutory authority, and constituted arbitrary and capricious agency action. *See* Complaint at 18-22, *Doe v. Lhamon*, No. 1:16-cv-00158 (D.D.C. June 16, 2016), ECF. No. 1.

[2] *Cf. Davis v. Monroe Cty. Bd. Of Ed.*, 526 U.S. 629, 634, 119 S. Ct. 1661, 1667, 143 L. Ed. 2d 839 (1999) (student-on-student sexual harassment actionable only where it is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit"); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295 (1993) (sexual harassment must be "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive").

Instead, McConnell and Plummer were investigated and charged by Baker, the Vice President of the UH Office of Equal Opportunity Services (EOS), with various violations of the UH sexual misconduct policy (2013 version). Baker's official Title IX position placed him in the multiple, and inherently conflicting, roles of *advocating* for the female student, *investigating* the events, *prosecuting* McConnell and Plummer, *testifying* as a witness at their hearings, and *training* and *advising* the disciplinary hearing panels. By a "more likely than not" standard, his investigative report found that McConnell "violated the sexual assault and attempted sexual assault provisions . . . when he engaged in sexual activity with another [sic] [female UH student] on November 19, 2011, without her consent." Under the same standard, Baker found that Plummer "facilitated/encouraged the sexual assault of another [UH] student." [**26]

During each student's separate hearings, Baker informed the panels that their only job was to determine "by a preponderance of the evidence," which he carefully distinguished from the beyond-a-reasonable doubt standard, whether the results of *his investigation* should be sustained. And lest it be overlooked, Baker ludicrously tried to persuade the panels that the video portrayed Plummer encouraging McConnell to rape the Female Student.[3] Baker, in essence, assumed the roles of prosecutor, jury and judge, whose decision the hearing panels were required to approve only by a preponderance of the evidence.

Other aspects of the procedures are troubling. Although the students' attorneys participated in the proceedings to some extent, they were not permitted formally to represent their clients. Instead, McConnell and Plummer each played lawyer against the real lawyer, University EOS Vice President Baker. Thus, the students made opening and closing arguments, testified, [*781] raised legal and factual objections to the panel, and "cross-examined" witnesses. They were not fully informed of the investigatory evidence [**27] until less than a week before each hearing;[4] even then, witness identities were redacted based on "privacy" concerns. Most important, there was no "confrontation" of the female student, who never appeared, was not deposed, and was never investigated for her lascivious advances toward Plummer.[5]

Based on the graphic video and photo evidence, it is unsurprising that the hearing panels upheld Baker's charges and the students' appeals were rejected. (The meaning of "sexual assault" in this context is open-ended but could have covered the conduct here.) They were expelled and permanently banned from UH and any activities connected with it. The disciplinary notations were removed from their official transcripts, but that matters little for the impact of the "sexual predator" stigma on their careers and reputations.[6]

The panel correctly cites this court's decision in *Dixon* for the proposition that the students have at least liberty interests protected under the due process clause.[7] *Dixon v. Alabama State Bd. of Ed.*, 294 F.3d 150, 151 (5th Cir. 1961).[8] The panel [*782]

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[3] The hearing transcripts demonstrate that Baker pressed his accusations beyond the photo and videos, in the guise of "interpreting" the evidence, to assert that Plummer was encouraging McConnell to attempt rape. When challenged about this during one hearing, Baker responded: "I cannot interpret evidence, that [then?] I cannot be a Title IX coordinator because that's exactly what I've been hired to do. *I've been hired to resolve these complaints by interpreting policy and by interpreting evidence* . . . ." A university discipline panel is no place to adjudicate credible accusations of rape—and there were no such accusations here.

[4] The University's procedures required only five business days' prior notice of evidence against the students.

[5] UH's brief defends its practices, noting that "the Department of Education has stated that it 'strongly discourages a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence.'" The cited DOE guidance goes on to explain that this is because "[a]llowing an alleged perpetrator to question a complainant directly may be traumatic or intimidating, and may perpetuate a hostile environment." *See* United States Department of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf , at p. 31. It then recommends that schools limit cross-examination by pre-submitting questions to a hearing board and that the hearing board screen the questions, which is what happened in this case. Given the nature of charges against these students, limiting cross-examination to written questions seems dubious. *See Doe v. Brandeis Univ.*, 177 F.Supp. 3d 561, 604-05 (D. Mass. 2016) ("While protection of victims of sexual assault from unnecessary harassment is a laudable goal, the elimination of such a basic protection for the rights of the accused raises profound concerns.").

[6] *Accord Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 929-30 (Tex. 1995) ("A medical student charged with academic dishonesty faces not only serious damage to his reputation but also the loss of his chosen profession as a physician. The stigma is likely to follow the student and preclude him from completing his education at other institutions.").

[7] *Univ. of Tex. Med. Sch. at Hous.*, 901 S.W.2d at 929-30 (recognizing liberty interest in graduate education under Texas Constitution). Property interests are creatures of state law, and Texas has not recognized a property interest in graduate higher education. *Id.* at 930 n.1. Other courts have applied *Dixon* to property interests created by state law. *See, e.g., Barnes v. Zaccari*, 669 F.3d 1295, 1303-04 (11th Cir. 2012).

[8] Other federal courts have relied on *Dixon* for the proposition that protected interests are implicated by university suspensions and expulsions. *See, e.g., Barnes*, 669 F.3d at 1305; *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633-36 (6th Cir. 2005); *Pugel v. Bd. of Trs. of Univ. of Ill.*,

concludes as a matter of law that the process offered to McConnell and Ryan was constitutionally sufficient, relying in large part on the "unique facts" and case law that has little in common with quasi criminal [**28] charges of sexual assault that will mar these students indefinitely. Two Sixth Circuit cases, one published and one unpublished, will be shown to be particularly weak reeds. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 639-43 (6th Cir. 2005); *Doe v. Cummins*, 662 F. App'x 437, 446-451 (unpublished) (6th Cir. 2016).

In my contrary view, the process deployed against the students was fundamentally flawed because of (a) the absence of a complaint by and evidence from the Female Student; (b) the conflicting roles played by Baker; (c) the preponderance standard for adjudicating quasi criminal conduct (for which no actual criminal charges were brought), compounded by (d) the deference that Baker insisted was due by the hearing panels to his position.[9] While it seems incontestable that punishment of some kind was due for the students' graphically depicted conduct, these watered-down elements of process conspired to assure that Baker's recommendations to throw the book at McConnell and Plummer would be approved in full.

Put in terms of the *Matthews* balancing test, *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976), the students' interests in preserving their educational status and reputations in the face of serious sexual misconduct charges were compelling.[10] Second, the risk of erroneous deprivation was [**29] exacerbated by (i) the Female Student's failure to participate or provide evidence in the disciplinary proceeding; (ii) Baker's role as her "advocate" while he also served as prosecutor, a witness, and legal adviser to the hearing panel; (iii) the preponderance test used by Baker in his report, along with the deference he claimed from the hearing panel;[11] and (iv) the imbalance between [*783] the level of counsel participation allowed on each side.

Third, additional or substitute safeguards would have enhanced the quality of factfinding and adjudication by providing a confrontation right if material fact issues existed. Eliminating Baker's role in advising and directing the hearing panel would have enabled the panel to make independent findings and receive disinterested advice on issues such as the meaning of "sexual assault" and "facilitating [**30] sexual assault."[12] Elevating the standard of proof to clear and convincing, a rung below the criminal burden, would maximize the accuracy of factfinding. Permitting counsel to represent the students would have resulted in more efficient hearings; the parties and hearing panels spent a lot of time sparring over trivial misunderstandings about procedure. Adopting some or all of the foregoing safeguards would not significantly impede the disciplinary process.

Fourth, the University's interest lies in impartially adjudicating quasi criminal sexual misconduct allegations. The University has no significant expertise in this area; indeed, as noted above, its

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378 F.3d 659, 663-64 (7th Cir. 2004); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 13-14 (1st Cir. 1988); *Nash v. Auburn Univ.*, 812 F.2d 655, 662-63 (11th Cir. 1987); *Harris v. Blake*, 798 F.2d 419, 422-23 (10th Cir. 1986); *Henson v. Honor Comm. of U. Va.*, 719 F.2d 69, 73-74 (4th Cir. 1983); *Sill v. Pa. State Univ.*, 462 F.2d 463, 469-70 (3d Cir. 1972); *Winnick v. Manning*, 460 F.2d 545, 548-49 (2d Cir. 1972); *Esteban v. Cent. Mo. State Coll.*, 415 F.2d 1077, 1089 (8th Cir. 1969); *Doe v. Rector & Visitors of George Mason Univ.*, 149 F. Supp.3d at 615.

This court seems to have overlooked *Dixon* when deciding recent cases that, unlike this one, involved discipline for academic reasons. *See, e.g., Perez v. Texas A&M Univ. at Corpus Christi*, 589 Fed. Appx. 244, 248 (5th Cir. 2014) (per curiam); *Smith v. Davis*, 507 F Appx 359, 362 (5th Cir. 2013) (per curiam).

[9] I do not agree that the students lacked fair notice that their conduct was unauthorized.

[10] *See Doe v. Rector & Visitors of George Mason Univ.*, 149 F. Supp.3d at 622 ("[P]laintiff's lost opportunity to continue with his post-secondary education, coupled with the possibility that he may be unable to pursue meaningful educational opportunities elsewhere while his name remains associated with sexual misconduct, inevitably affects plaintiff's professional prospects. . . . And common sense suffices to understand that an adjudication of responsibility for sexual misconduct carries a . . . powerful stigma," such that robust due process is required.); *Brandeis Univ.*, 177 F. Supp.3d at 602 ("Certainly stigmatization as a sex offender can be a harsh consequence for an individual who has not been convicted of any crime, and who was not afforded the procedural protections of criminal proceedings."); *id.* at 573 ("If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision."); *see also Smyth v. Lubbers*, 398 F. Supp. 777, 797 (W.D. Mich. 1975) ("This case is among the most serious ever likely to arise in a college context. In the interest of order and discipline, the College is claiming the power to shatter career goals, and to make advancement in our highly competitive society much more difficult for an individual than it already is.").

[11] Commentators have noted that applying the civil preponderance standard to quasi criminal charges seriously weakens due process for accused students. *See, e.g.*, Ryan D. Ellis, *Mandating Injustice: The Preponderance of the Evidence Mandate Creates a New Threat to Due Process on Campus*, 32 Rev. Litig. 65 (2013); Barclay Sutton Hendrix, *A Feather on One Side, A Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 Ga. L. Rev. 591, 610-15 (2013); Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. Ky. L. Rev. 49, 62, 62 n.59 (2013).

[12] The panel majority note that Baker's assistant attorney served as adviser to the disciplinary panel. They have no rejoinder, however, to the "graphic facts" I quoted that demonstrate Baker's intent to dominate the proceedings in every way.

policies and procedures derive directly from the Dear Colleague letter, not from inherently educational decisions. Further, to the extent that UH eliminates confrontation and counsel participation; allows one officer, Baker, to direct the investigatory, prosecutorial and adjudicative process; and relies on the lowest standard of proof, the integrity of its decisions may be questioned and discredited.[13]

Even assuming that McConnell and Plummer forfeited a challenge to their inability to confront the Female Student, the problem of Baker's conflict [**31] of interest cannot be overstated. Baker could not conscientiously "advocate" for the Female Student while also conducting an impartial investigation of the accused students. He could not both prepare a report and testify as a principal witness while serving as the prosecutor and then insist that the adjudicatory hearing panel agree with his "preponderance" evaluations of the evidence by their preponderance standard. But he purported to do all these things. Even the Dear Colleague letter admonishes universities that: "The Title IX coordinator should not have other job responsibilities that may create a conflict of interest. For example, serving as the Title IX coordinator and a disciplinary hearing board member or general counsel may create a conflict of interest." Dear Colleague Letter at 7. To the extent Baker's multiple roles substantially lessened the hearing panels' factfinding and adjudicatory autonomy, the integrity of the process was compromised. *See also Brandeis Univ.*, 177 F.Supp. 3d at 606 ("The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, [**32] and may reach premature conclusions.").

As a final note, the Sixth Circuit case law cited by the panel is inapposite. In *Flaim*, the court upheld a medical student's expulsion *after* he had pled guilty to a felony criminal drug offense. While rejecting Flaim's individual procedural complaints, [*784] the court stated *five times* that the fact of a preexisting criminal conviction rendered his case "quite different from the ordinary" student discipline matter, 418 F.3d at 642-43, and "because of the unique facts," the court declined "to address whether these procedures would suffice under other facts." *Id. at* n. 8. *Flaim*, by its own terms, should not be relied on in a case where sexual assault is alleged only by the University's EOS Vice President and no criminal charges, much less convictions, were pursued. The *Flaim* court stated, "We strongly emphasize that a disciplinary hearing involving a record of conviction is wholly different from a case involving disputes of fact, even if the university believes the evidence to be overwhelming." *Id. at* n. 7.

The panel's reliance on the Sixth Circuit's unpublished opinion in *Doe* is also curious. First, that the opinion is "unpublished" means it is not to be cited as precedent. [**33] 6th Cir. R. 32.1; *Crump v. Lafler*, 657 F.3d 393, 405 (6th Cir. 2011) (en banc) ("Unpublished decisions in the Sixth Circuit are, of course, not binding precedent."). Second, the panel cites *Doe* for the uncontroversial proposition that students there, subjected to a different set of procedures, received an "opportunity to be heard in a meaningful time and in a meaningful manner," albeit not the level of protection that would have been offered to criminal defendants. 662 F.App'x. at 446 (quoting *Mathews*, 424 U.S. at 333). Third, the *Doe* court found no due process violation in the denial of active participation by the students' advisors because the university had not itself been represented by counsel in their disciplinary hearings. 662 F.App'x. at 448-49 (citing *Flaim*, 418 F.3d at 640). In this case, however, the students were out-gunned by attorney Baker. Fourth, the *Doe* court rejected the claim of official bias because any defects in the investigator's report were "cured" by the Administrative Review Committee's "subsequent handling of appellants' cases." 662 F.App'x. at 450. Contrary to several critical facts before us, *Doe* contains no indication that the allegedly biased investigator played any role in the committee's activity; the committee was bound by no formal standard of review; and no claim of deference to the investigator's report was made. [**34] Finally, the students in the case received, respectively, a 3-year suspension and a disciplinary suspension plus a research paper requirement, far more lenient treatment than that accorded McConnell and Plummer, even though the *Doe* defendants were found to have engaged in nonconsensual sex with female students.

In sum, I do not take the position that the students must be afforded the same procedural protections as criminal defendants. What drives my concern is the close association between the charges levelled against them and actual criminal charges. Sexual assault is not plagiarism, cheating, or vandalism of university property. Its ramifications are more longlasting and stigmatizing in today's society. The University wants to have it both ways, degrading the integrity of its factfinding procedures, while congratulating itself for vigorously attacking campus sexual misconduct. Overprosecution is nothing to boast about.

Even though these students deserved punishment, they also deserved more protective procedures given the seriousness of the charges. *See Carey, supra.* Accordingly, I would reverse and remand for further proceedings.

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[13] The majority criticize this description of the University's interests as too narrow. Had the University adopted a real, serious concern for its "educational mission," it would not have opened a bar on campus near the dorms that served shots to students. Alcohol abuse is at the root of much student misconduct.

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Doe v. Cummins

United States Court of Appeals for the Sixth Circuit

December 6, 2016, Filed

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Reporter
662 Fed. Appx. 437 *; 2016 U.S. App. LEXIS 21790 **; 2016 FED App. 0656N (6th Cir.); 2016 WL 7093996

JOHN DOE I and JOHN DOE II, Plaintiffs-Appellants, v. DANIEL CUMMINS, DENINE ROCCO, DEBRA MERCHANT, and UNIVERSITY OF CINCINNATI, Defendants-Appellees.

Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Prior History: [**1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

Doe v. Univ. of Cincinnati, 173 F. Supp. 3d 586, 2016 U.S. Dist. LEXIS 37924 (S.D. Ohio, 2016)

Counsel: For JOHN DOE, I, JOHN DOE, II, Plaintiffs - Appellants: Joshua Adam Engel, Engel and Martin, Mason, OH.

For DANIEL CUMMINS, DENINE ROCCO, DEBRA MERCHANT, UNIVERSITY OF CINCINNATI, Defendants - Appellees: R. Doreen Canton, Evan T. Priestle, Taft, Stettinius & Hollister, Cincinnati, OH.

Judges: BEFORE: DAUGHTREY, GIBBONS, and COOK, Circuit Judges.

Opinion by: JULIA SMITH GIBBONS

Opinion

[*438] **JULIA SMITH GIBBONS, Circuit Judge**. John Doe I and John Doe II were both students at the University of Cincinnati ("UC"). In unrelated incidents in March 2014, each was charged with violating UC's Code of Conduct for allegedly sexually assaulting female students. Following an investigation and hearing conducted by UC, both Doe I and Doe II were found "responsible" for the respective allegations against them. Doe I was suspended from UC for three years. Doe II received disciplinary probation and was required to write a research paper. Doe I and Doe II filed suit against UC and various school administrators ("the individual defendants") under 42 U.S.C. § 1983, alleging that UC's disciplinary process did not afford them due process as required by the Fourteenth Amendment. Doe I and [**2] Doe II also claimed that they were subject to gender discrimination in violation of Title IX of the Education Amendments of 1972. The district court granted defendants' motion to dismiss on all counts. For the reasons set forth below, we affirm the judgment of the district court.

I.

A.

The University of Cincinnati is a public university located in Cincinnati, Ohio. On April 11, 2011, the U.S. Department of Education's Office for Civil Rights circulated a "Dear Colleague" letter to colleges and universities around the country in an effort to provide guidance on complying with Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. §§ 1681-88, in the context of sexual-assault investigations. Specifically, the letter encouraged schools to adopt a preponderance [*439] standard of proof, allow appeals for both parties, and "minimize the burden on the complainant" when investigating sexual-assault allegations. DE 1, Compl., Page ID 5.

In response to the "Dear Colleague" letter, UC adopted certain policies and procedures for investigating and adjudicating alleged Title IX violations.[1] Within seven days of receiving a complaint, a Title IX Coordinator meets with the respondent and provides notice of the allegations, a copy of UC's Title IX policies, and information about investigation and

[1] For the purpose of our review, we assume appellants' description of UC's Title IX process is true. *See Logsdon v. Hains*, 492 F.3d 334, 340 (6th Cir. 2007).

disciplinary [**3] procedures. At this meeting, the respondent is provided an opportunity to give his or her account of the facts and discuss the nature of the allegations. Within fourteen days of the complaint being filed, the Coordinator begins interviewing witnesses and gathering relevant evidence. The respondent is also permitted to provide any relevant evidence or witnesses. Following this investigation, the Coordinator prepares an investigatory report summarizing his findings. The report is then provided to both the complainant and respondent for review and comment. The Coordinator incorporates comments from the parties and, if necessary, conducts a follow-up investigation. During the investigation, the complainant may be provided certain accommodations, including changes in homework, deadlines, grades, classes, and schedules. The respondent, however, may be subject to punitive "interim measures," including restrictions on access to certain campus buildings. *Id.* at 10.

After this initial investigation, the respondent is entitled to an Administrative Review Committee ("ARC") hearing prior to the imposition of any discipline. The ARC is a panel made up of UC administrators. Appellants allege that the ARC [**4] panel receives training on UC's Code of Conduct and protecting sexual-misconduct victims but receives no comparable training on protecting the due-process rights of accused students.

At an ARC hearing, panel members function as a board of inquiry and apply a preponderance-of-the-evidence standard in order to resolve the dispute. The respondent is permitted to have an attorney present at the hearing, but the attorney may not actively participate. Cross-examination is allowed, but only by submitting written questions to the panel members, who then determine whether questions are relevant and whether they will be posed to the witness. Neither party may compel witnesses to attend the ARC hearing, but hearsay evidence is allowed. Although parties are not permitted to record the ARC hearings, each party may access the panel's recording of the hearing. Both parties have the right to appeal an adverse decision by the panel.

Between 2010 and the hearings for Doe I and Doe II, the ARC panel presided over nine cases involving sexual-misconduct allegations. The respondent was found "responsible" in each of the eight cases where the panel's decision was disclosed. The punishment imposed in these [**5] cases ranged from disciplinary probation to expulsion.

B.

On March 9, 2014, Doe I—at that time a junior at UC's Blue Ash campus—left a party near campus with Jane Roe I and Jane Roe II to accompany them back to their dorm room. Doe I claimed that both Roe I and Roe II were intoxicated. Roe I claimed that she went to sleep after returning to her dorm room but later awoke to Doe I attempting to have sexual intercourse [*440] with her. She alleged that she told Doe I "no" and left the room. *Id.* at 28. Doe I then allegedly attempted to also have sexual intercourse with Roe II while she was sleeping. Doe I continues to deny both sexual-assault allegations.

To buttress his denial, Doe I claims that Roe I and Roe II gave several inconsistent statements to UC administrators and UC police officers regarding the incident. For example, Doe I alleges that Roe I gave inconsistent statements about whether she had smoked marijuana that night and whether she had, in fact, been asleep when Doe I got into bed with her. Likewise, Roe II allegedly gave inconsistent statements regarding her intoxication level on the night in question and whether she passed out before or after Doe I initiated intercourse with her.

Doe I also [**6] claims that he was fully cooperative with police investigators and that the police obtained significant evidence exonerating him, despite attempts by UC administrators to interfere with the police investigation. For example, Doe I challenges both Roe I's contention that she was unaware how Doe I got into her dorm and Roe II's claim that dormitory staff improperly let Doe I into the building by pointing to surveillance video showing that Roe I waited while Roe II signed Doe I into the dorm. Similarly, Doe I argues that neither Roe I nor Roe II appear intoxicated in the surveillance video despite Roe II's statements to the ARC panel that she was too intoxicated to remember walking home. Doe I also points to forensic cell-phone evidence showing that Roe I and Roe II sent text messages during the time they were allegedly passed out, and later joked about the case. He also argues that another female student, who was allegedly present in the room when the assault occurred, denied witnessing anything illegal. Doe I also believes that the crime lab's assessment of the rape kits was consistent with his theory of events.

Doe I claims that Daniel Cummins, UC's Assistant Dean of Students and Director [**7] of the Office of Judicial Affairs, instituted disciplinary proceedings against him prior to investigating the credibility of the allegations. Doe I alleges that Cummins sent an initial letter explaining the charges on March 12, 2014, and later interviewed him in person on March 28. Doe I alleges that he denied the allegations at this meeting, but otherwise exercised his right to remain silent.

Doe I claims that Cummins scheduled an ARC hearing prior to interviewing any witnesses. Although the hearing was initially scheduled for April 10, 2014, it was later postponed until May 2, 2014. Prior to the hearing, Cummins completed an investigative report, which concluded that Doe I had engaged in sexual activity with Roe I and Roe II without their consent. Doe I claims that Cummins's investigative report had several crucial omissions:

1. It did not include a review of the physical evidence

obtained by UC Police.
2. It failed to include Doe I's statements to UC Police.
3. It excluded a witness's statement that Roe I and Roe II had been "pretty flirtatious" with Doe I and had "basically dragged" him back to their dorm.

4. It did not include any of the physical evidence that tended to exonerate Doe [**8] I, such as the surveillance videos and text messages.

Id. at 33-34.

Doe I also claims that the initial ARC hearing on May 2, 2014, had numerous procedural deficiencies:

[*441] 1. UC did not respond to Doe I's attorney's request that the UC Police investigator be present at the hearing.
2. UC did not permit Doe I to introduce relevant evidence from the UC Police investigation, such as the rape-kit analysis, text messages, surveillance video, or police report.
3. Doe I was not allowed to impeach a witness, Roe I's boyfriend, who lacked firsthand knowledge of the incident.
4. Doe I was not allowed to personally record the hearing.
5. The ARC hearing chair refused to ask witnesses relevant questions that Doe I submitted.
6. The ARC hearing chair refused to compel the attendance of UC police officers who investigated Doe I's case.
7. The ARC panel refused to consider a binder of evidence Doe I submitted that allegedly supported his version of the events.

Doe I claims that these deficiencies led the ARC panel to find that Doe I had violated UC's Code of Conduct with respect to Roe I's claims. Doe I left the ARC hearing before the panel considered Roe II's allegations because he determined he would not be afforded due [**9] process.

Doe I appealed the ARC panel's findings. On appeal, UC determined that substantial procedural errors had occurred and granted Doe I a new hearing. The new hearing took place on May 18-19, 2015. Although Doe I concedes that his second hearing was not the same "kangaroo court[]" as before, he alleges it still lacked significant procedural protections:

1. The panel improperly considered Cummins's allegedly biased investigative report.
2. The panel was not advised that Doe I was presumed innocent or that the complainants bore the burden of proof.
3. The panel refused to ask the complainants a number of written questions that Doe I submitted and that were intended to highlight inconsistencies in the complainants' stories.
4. Doe I was not permitted to make his own recording of the hearing.
5. Doe I was given access to a university advisor at late notice, while the complainants received access to an advisor at an earlier date.
6. The panel heard "impact statements" from the complainants prior to adjudicating Doe I's responsibility.
7. Doe I was not provided advanced notice of the evidentiary rules that would be employed at the hearing.

8. UC failed to provide the panel with information regarding [**10] alleged academic accommodations that were provided to the complainants throughout the investigation, accommodations that Doe I claims may have affected their credibility.

Id. at 38-41.

On rehearing, the ARC panel found Doe I "responsible" for violating UC's Code of Conduct with respect to Roe I, but "not responsible" with respect to Roe II. *Id.* at 41. Doe I claims that no explanation was given for the inconsistent decision. Doe I's appeal—including his claim that the ARC panel erroneously allocated the burden of proof—was rejected by UC's Appeal Administrator, Denine Rocco. In response to Doe I's burden-of-proof argument, Rocco stated that, "Neither party has any burden of proof. Instead, the ARC [panel] uses the hearing to investigate what happened and then makes a finding based on the preponderance of evidence." *Id.* at 41-42. Rocco affirmed the ARC panel's decision on July [*442] 23, 2015. As a result of the responsibility finding, Doe I received a three-year suspension from UC. He has since transferred to another educational institution.

C.

In March 2014, John Doe II was a law student at UC. On March 6, 2014, Cummins received a report from Jane Roe III that she had been sexually assaulted by Doe II. Doe II claims that although [**11] Roe III did not report this matter to police, a police report was created at the behest of Cummins. Following her allegations, Roe III also allegedly received accommodations, including additional time to complete her graduate thesis. Like Doe I, Doe II claims that he was subject to various "interim measures," including restricted access to certain campus buildings. *Id.* at 44.

Doe II claims that Cummins first notified him of the charges on March 17, 2014, and that he had a formal, in-person meeting with Cummins to discuss the allegations on March 26, 2014. Following this meeting, Cummins completed an investigatory report, which allegedly misrepresented Doe II's statements. Doe II claims that he was not given access to this report prior to his ARC hearing.

Doe II's ARC hearing was held on April 22, 2014. Because Doe II's advisor had a conflict, he was able to attend only part of the hearing. Doe II alleges that Cummins refused to accommodate his advisor's request for a different hearing date. Like Doe I, Doe II claims that his initial ARC hearing was procedurally deficient in several ways:

1. The panel heard a victim "impact statement" prior to an adjudication of responsibility.

2. The panel misapplied [**12] the definition of "consent" and other legal terms as set forth in UC's Title IX policy.
3. The panel permitted witnesses to make prejudicial statements and offer their own legal conclusions.
4. A Title IX expert was not permitted to testify about the proper legal definition of terms such as "consent."
5. Doe II was not permitted to effectively cross-examine adverse witnesses because questions were required to be submitted in writing through the panel and no followup was allowed.
6. Unreliable hearsay evidence was admitted at the hearing.
7. The panel did not receive any evidence substantiating Roe III's claim that she was intoxicated.

Id. at 46-47. Doe II was found "responsible" for violating UC's Code of Conduct with respect to Roe III's claims. *Id.* at 48. On appeal, Doe II was granted a new ARC hearing.

The second ARC hearing was held on October 28, 2014. Doe II claims that the second hearing was permeated with many, if not all, of the same procedural defects that plagued the first hearing. He also claims that Roe III told Doe II that he was a "rapist" and was "going to Hell" during her victim-impact statement. *Id.* Following these comments, Roe III allegedly "stormed out of the hearing," which precluded any [**13] opportunity for Doe II to cross-examine her. *Id.* at 49.

The ARC panel again found Doe II "responsible" for a Code-of-Conduct violation. *Id.* Doe II alleges that he was not allowed to appeal this finding but claims that Rocco affirmed this decision on November 10, 2014. As a result, Doe II was placed on disciplinary probation and required to complete and submit a seven-page research paper. Doe II has since graduated from UC's law school, but claims that the negative notation in his academic record may affect future employment opportunities or bar admission in other states.

[*443] D.

In October 2015, Doe I and Doe II filed suit in the District Court for the Southern District of Ohio against UC and several of its administrators for allegedly mishandling their sexual-assault disciplinary proceedings. They sought declaratory and injunctive relief under 42 U.S.C. § 1983 against UC and the individual defendants in their official capacities. They also sought damages from the individual defendants in their personal capacities, alleging violations of their Fourteenth Amendment due-process rights. In addition, Doe I and Doe II sought damages and equitable relief from UC under Title IX, arguing that the adverse outcomes in their UC disciplinary proceedings [**14] were the result of gender discrimination.

UC and the individual defendants filed a motion to dismiss. The district court granted the motion to dismiss on all claims. Specifically, the district court concluded that the procedures provided to Doe I and Doe II in the adjudication of their sexual-assault cases met the minimum requirements of due process as required by the Fourteenth Amendment. The district court also found that, irrespective of any due-process concerns, the individual defendants were entitled to qualified immunity for appellants' § 1983 damages claims. Finally, the district court found that appellants' complaint failed to allege sufficient facts to raise a plausible inference of gender discrimination under Title IX. Doe I and Doe II timely appealed.

II.

We review *de novo* a district court's dismissal of a plaintiff's complaint for failure to state a claim under Rule 12(b)(6). *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006). To survive a Rule 12(b)(6) motion, a plaintiff must provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). This standard is not a "probability [**15] requirement," but "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* We must construe the complaint in a light most favorable to the plaintiff, accepting all factual allegations as true, and drawing all reasonable inferences in the plaintiff's favor. *Logsdon v. Hains*, 492 F.3d 334, 340 (6th Cir. 2007). It is not, however, required that we accept the plaintiff's legal conclusions as true, and thus "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

III.

The district court held that appellants' claims for declaratory relief against the individual defendants in their official capacities were barred by the Eleventh Amendment, but that their claims for declaratory relief against these officials in their personal capacities were not so barred. Appellees argue that the Eleventh Amendment precludes all claims for declaratory relief against the individual defendants, both in their official and personal capacities. Although we believe the district court erred in

limiting the availability of declaratory relief to only those claims made against the individual defendants in their personal capacities, we agree that the Eleventh Amendment does not bar the declaratory relief sought here.

The Eleventh Amendment bars suits for money damages [**16] against the State, arms of [*444] the State, and state officials acting in their official capacities. *See Rodgers v. Banks*, 344 F.3d 587, 594 (6th Cir. 2003). Suits for equitable relief against the State and its departments are also prohibited. *McCormick v. Miami Univ.*, 693 F.3d 654, 661 (6th Cir. 2012). Suits for injunctive and declaratory relief against state officials acting in their official capacities, however, are permitted in limited circumstances. *See Ex Parte Young*, 209 U.S. 123, 155-56, 28 S. Ct. 441, 52 L. Ed. 714 (1908); *Edelman v. Jordan*, 415 U.S. 651, 666-69, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). Whether the Eleventh Amendment bars such suits turns on the nature of the relief sought. *See Edelman*, 415 U.S. 651, 666-69, 94 S. Ct. 1347, 39 L. Ed. 2d 662. The Eleventh Amendment does not bar relief that is prospective in nature and designed to ensure future compliance with federal law. *Id.* Retroactive equitable relief against state officials—often involving compensatory payments from the state treasury—however, is precluded by the Eleventh Amendment because it is effectively a suit against the state itself. *Nelson v. Miller*, 170 F.3d 641, 646 (6th Cir. 1999).

Because Doe I and Doe II are seeking prospective equitable relief, their claims are not barred by the Eleventh Amendment. Appellants are requesting an injunction against the individual defendants in their official capacity "prohibiting the imposition of, or reporting of, any disciplinary actions under the UC Code of Student Conduct." DE 1, Compl., Page ID 63. If successful, this claim would not require the court to grant any retroactive or compensatory remedy. Rather, [**17] the individual defendants would merely be compelled to remove the negative notation from appellants' disciplinary records that resulted from the allegedly unconstitutional disciplinary process. This is nothing more than prospective remedial action. *See Thomson v. Harmony*, 65 F.3d 1314, 1321 (6th Cir. 1995) (holding that an injunction requesting the removal of negative entries from a personnel record resulting from an alleged due-process violation was not barred by the Eleventh Amendment); *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007) (finding negative entries in a student's university records stemming from an allegedly unconstitutional action presented a continuing violation sufficient to trigger the *Ex Parte Young* exception). Importantly, this relief imposes no monetary burden on the state itself, a factor often dispositive when examining the availability of injunctive relief under the Eleventh Amendment. *See Edelman*, 415 U.S. at 663-66. Accordingly, the Eleventh Amendment does not bar the injunctive relief at issue here. *See Thomson*, 65 F.3d at 1321.

Appellees nevertheless argue that appellants' request for a declaratory judgment that the individual defendants violated the Due Process Clause is barred under the Eleventh Amendment because it targets past conduct. Such relief, however, is permissible under the Eleventh Amendment. Standing alone, this type of declaratory relief would likely be barred given its retroactive nature. *See Brown v. Strickland*, No. 2:10-cv-166, 2010 U.S. Dist. LEXIS 63878, 2010 WL 2629878, at *4 (S.D. Ohio June 28, 2010) [**18] ("[A] declaratory judgment against state officials declaring that they violated federal law in the past constitutes retrospective relief. . . ."). Such relief, however, is permitted when it is ancillary to a prospective injunction designed to remedy a continuing violation of federal law. *See Green v. Mansour*, 474 U.S. 64, 67-73, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985); *Banas v. Dempsey*, 742 F.2d 277, 286-88 (6th Cir. 1984). Accordingly, we find such declaratory relief against the individual defendants is also allowed under the Eleventh Amendment.

IV.

The district court dismissed appellants' due-process claims, holding that the alleged [*445] deficiencies in UC's disciplinary procedures did not constitute a violation of their due-process rights. Appellants appealed, arguing that numerous procedural deficiencies resulted in a disciplinary process that deprived them of property and liberty interests without due process.

Doe I and Doe II claim that the procedural deficiencies pervading UC's disciplinary process deprived them of a fundamentally fair hearing and a meaningful opportunity to be heard. In their complaint, appellants allege that UC engaged in numerous procedures that violated their due-process rights, including: (1) conducting biased investigations; (2) improperly admitting hearsay evidence without [**19] providing appellants the opportunity to effectively cross-examine hearsay witnesses; (3) permitting the ARC panel to hear impact statements prior to adjudicating responsibility; (4) improperly applying UC's policies and Code of Conduct at the hearing;[2] (5) not allowing effective cross-examination of adverse witnesses; (6) denying effective assistance of counsel due to the inability of counsel to participate in the hearing; (7) improperly allocating the burden of proof at the hearing; and (8) utilizing an inherently biased

[2] Given that the Constitution—and the case law interpreting it—mandates what procedures are constitutionally required following the deprivation of a property or liberty interest, and not internal school rules or policies, this argument clearly lacks merit. *See Heyne v. Metro. Nashville Pub. Schs*, 655 F.3d 556, 570 (6th Cir. 2011) (holding that the violation of school policies or state law does not create a cognizable due-process claim in federal court); *Hall v. Med. Coll. of Ohio*, 742 F.2d 299, 309 (6th Cir. 1984) (holding that a school's violation of its own internal rules is of no constitutional moment).

panel that routinely finds in favor of victims.[3] Appellees contend that appellants received constitutionally sufficient procedures, namely, notice of the charges, an explanation of the evidence against them, and a meaningful opportunity to present their side of the story. For the reasons set out below, we affirm the district court because appellants received sufficient due process under the Fourteenth Amendment.

A.

The Constitution requires certain minimum procedures before an individual is deprived of a "liberty" or "property" interest within the meaning of the Due Process Clause of the Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). We have recognized that these protections apply to higher education disciplinary decisions. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633 (6th Cir. 2005). Doe I's suspension clearly [**20] implicates a property interest. *See Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1247-48 (E.D. Mich. 1984). And although Doe II was not deprived of a property interest under the Due Process Clause because he was not suspended, the adverse disciplinary decision did, and continues to, impugn his reputation and integrity, thus implicating a protected liberty interest. *See Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971) (holding that where "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," the minimal requirements of due process must be satisfied).

[*446] Once we conclude that due process applies, "the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). We answer this question by applying the framework articulated by the Supreme Court in *Mathews*, 424 U.S. at 335. *See Flaim*, 418 F.3d at 634.

Under *Mathews*, the level of process the Fourteenth Amendment requires is determined by balancing three factors: (1) the nature of the private interest affected by the deprivation; (2) the risk of an erroneous deprivation in the current procedures used, and the probable value, if any, of additional or alternative procedures; and (3) the governmental interest involved, including the burden that additional procedures would entail. *Mathews*, 424 U.S. at 335. Although the inquiry should be flexible, due process requires, at a minimum, "the opportunity to be heard 'at a meaningful time [**21] and in a meaningful manner.'" *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965)). In the school-disciplinary context, an accused student must at least receive the following pre-expulsion: (1) notice of the charges; (2) an explanation of the evidence against him; and (3) an opportunity to present his side of the story before an unbiased decisionmaker. *Heyne*, 655 F.3d at 565-66 (citing *Goss v. Lopez*, 419 U.S. 565, 581, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975)). We have recognized, however, that "disciplinary hearings against students . . . are not criminal trials, and therefore need not take on many of those formalities." *Flaim*, 418 F.3d at 635. Although a university student must be afforded a meaningful opportunity to present his side, a full-scale adversarial proceeding is not required. *See id.* at 640. The focus, rather, should be on whether the student had an opportunity to "respond, explain, and defend," and not on whether the hearing mirrored a criminal trial. *Id.* at 635 (quoting *Gorman v. Univ. of R.I.*, 837 F.2d 7, 13 (1st Cir. 1988)). With these principles in mind, we turn to the *Mathews* framework.

B.

The first factor to be weighed under *Mathews* is the nature of the private interest at stake. *Mathews*, 424 U.S. at 335. Here, both Doe I and Doe II were accused of serious sexual offenses. A finding of responsibility will thus have a substantial lasting impact on appellants' personal lives, educational and employment opportunities, and reputations [**22] in the community. *See Goss*, 419 U.S. at 574-75. Accordingly, appellants' private interests are compelling. This is especially true for Doe I, who received a three-year suspension. Doe II's interest, however, while still significant, is slightly diminished given that he was placed only on "university disciplinary probation," and not suspended or expelled. DE 1, Compl., Page ID 49.

C.

The strength of appellants' private interests, however, is not the end of the inquiry. We must also consider the other two factors in the *Mathews* framework. To do so, we balance appellants' private interests against the "additional procedures requested, any error-reducing benefit those procedures might have, and the burden on [the University] of adding those additional procedures." *Flaim*, 418 F.3d at 638. In analyzing the sufficiency of UC's procedures, we review each alleged deficiency in isolation for purposes of analytical clarity. The focus of our analysis, however, is not whether each procedural protection is required, but rather what protections, as a whole, were required in this case.

[*447] In reviewing appellants' due-process claims, we agree with the district court that, "to the extent that [Doe I and Doe II] base their due process claims on alleged [**23] defects in their first hearings, those alleged errors were harmless because

[3] Appellants claim that "[a]n ARC Hearing Panel has never failed to recommend that a student be found responsible and significant discipline be imposed." DE 1, Compl., Page ID 58. Like the district court, we take this to mean that appellants are alleging they faced a disciplinary panel that was inherently biased against them.

their appeals were sustained and they both received new hearings." *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 601 (S.D. Ohio 2016). Thus, although both Doe I and Doe II allege that numerous procedural deficiencies existed in their first ARC hearings, those defects were cured by UC's decision to grant their appeals, vacate the finding of responsibility, and provide each a second hearing. *See Harper v. Lee*, 938 F.2d 104, 105-06 (8th Cir. 1991) (finding that administrative reversal and grant of new disciplinary hearing rectified any procedural deficiencies in an inmate's initial hearing); *see also Young v. Hoffman*, 970 F.2d 1154, 1156 (2d Cir. 1992). Accordingly, the relevant procedures for purposes of our *Mathews* analysis are those employed by UC in appellants' most recent hearings.

1.

There is no question that both Doe I and Doe II received adequate notice of the charges against them. Doe I concedes that he received written notice of the charges against him on March 12, and had a follow-up meeting with Cummins on March 28 to discuss the allegations. This was a full month before his first ARC hearing on May 2. Similarly, Doe II states that Cummins notified him in writing of the allegations against him on March 17, and that he had a follow-up meeting with Cummins to discuss [**24] the charges on March 26. This was also a full month before Doe II's initial ARC hearing on April 22. This dual form of notice was sufficiently formal and timely to satisfy due-process requirements and provide appellants with a meaningful opportunity to prepare a defense. *See Flaim*, 418 F.3d at 638 ("Notice satisfies due process if the student had sufficient notice of the charges against him and a meaningful opportunity to prepare for the hearing." (quoting *Jaksa*, 597 F. Supp. at 1250)).

2.

Appellants make several arguments regarding the procedures actually employed at their ARC hearings, all of which ultimately fail to state a due-process violation. First, appellants challenge the use of hearsay evidence without adequate safeguards. Appellants' complaint, however, fails to indicate what hearsay was actually allowed against them in their hearings. The only reference to the use of hearsay involves appellants' initial hearings. As discussed above, any procedural deficiencies in appellants' initial hearings were cured when they received new hearings. Because there is no claim that hearsay evidence was introduced in the second hearings, this allegation is irrelevant to our analysis.

Second, appellants claim that the ARC panel erred by allowing [**25] the introduction of victim-impact statements prior to adjudicating responsibility. While due process does not necessarily require that formal "rules of evidence, [or] rules of civil or criminal procedure" be applied in a school-disciplinary setting, *Flaim*, 418 F.3d at 635, this allegation is potentially problematic under *Mathews*. Exposure to victim-impact statements prior to an adjudication on the merits may prejudice the accused and lead to an erroneous outcome based on emotion, as opposed to reason. This is especially true in Doe II's case given that the victim testified that Doe II was "a rapist" and was "going to Hell." DE 1, Compl., Page ID 48. But UC has a strong interest in avoiding the bifurcation of proceedings into multiple phases—i.e., a guilt phase and a punishment phase—that would add time, expense, and complexity [*448] to every disciplinary hearing. Additionally, there were procedural protections in place to counteract any potential for error from allowing the victims' statements, including the panel's ability to make credibility determinations of the victims' statements and appellants' own opportunity to refute the victims' accounts. Moreover, the limited prejudicial impact of allowing the ARC [**26] panels to consider the victim-impact statements prior to determining appellants' responsibility is illustrated in this case. Although the victim's statements in Doe II's hearing were more prejudicial than those in Doe I's, Doe II ultimately received a more lenient punishment. On balance, therefore, we find that the introduction of victim-impact statements prior to determining appellants' responsibility did not impact appellants' due-process rights under *Mathews*.

Third, appellants claim that they were denied effective cross-examination of witnesses because they were allowed to submit only written questions to the ARC panel, the panel did not ask all of the questions they submitted, and they were not allowed to submit follow-up questions. Although due process may require a limited ability to cross-examine witnesses in school disciplinary hearings where, like here, credibility is at issue, *see Flaim*, 418 F.3d at 641 (citing *Winnick v. Manning*, 460 F.2d 545, 549-50 (2d Cir. 1972)), that requirement was satisfied in this case. Any marginal benefit that would accrue to the fact-finding process by allowing follow-up questions in appellants' ARC hearings is vastly outweighed by the burden on UC. *See Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 926 (6th Cir. 1988) ("To saddle [school officials] with the burden of overseeing the process [**27] of cross-examination (and the innumerable objections that are raised to the form and content of cross-examination) is to require of them that which they are ill-equipped to perform."). Moreover, the circumscribed form of cross-examination utilized in appellants' hearings has been found constitutionally sufficient under *Mathews* in one of our sister circuits. *See Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) (holding that there "was no denial of appellants' constitutional rights to due process by their inability to question the adverse witnesses in the usual, adversarial manner").

Doe II's argument on this point, however, is stronger given he was not permitted to cross-examine Roe III, in any form, during his second hearing. But his claim that cross-examination was

required still fails for two reasons. First, as mentioned above, Doe II's private interest under *Mathews*'s first prong is diminished because he was not facing expulsion, only disciplinary probation. Thus, the requisite level of procedural formalities for Doe II was not as high as was required for Doe I, who was facing a serious suspension.[4] *See Goss*, 419 U.S. at 584 ("Longer suspensions or expulsions . . . may require more formal procedures."). Second, it appears that Doe II did have the chance [**28] to cross-examine Roe III in his initial hearing in the presence of several panel members who then presided over his second hearing. Although it is unclear to what extent these panel members relied on this initial cross-examination in reaching their conclusions in the subsequent hearing, taken together, these two facts preclude a due-process violation in Doe II's case.

Fourth, appellants contend that they were denied due process because their advisors were not allowed to actively participate in their hearings despite being able to attend them. We have recognized that a [*449] student may have a constitutional right to counsel in academic disciplinary proceedings where the hearing is unusually complex or when the university itself utilizes an attorney. *See Flaim*, 418 F.3d at 640 (citing *Jaksa*, 597 F. Supp. at 1252). Neither scenario is present here. And appellants fare no better under *Mathews* balancing. Although appellants' advisors were not allowed to actively participate in the hearing, they were still permitted to be present and advise appellants in presenting their cases. The added benefit of allowing active participation by an advisor here is minimal given the limited cross-examination of witnesses, the lack of complexity, and the fact [**29] that knowledge of evidentiary rules was not required. Moreover, the burden on UC of allowing this level of participation by counsel in every disciplinary hearing would be significant due to the added time, expense, and increased procedural complexity. *See Flaim*, 418 F.3d at 640-41 ("Full-scale adversarial hearings in school disciplinary proceedings have never been required by the Due Process Clause and conducting these types of hearings with professional counsel would entail significant expense and additional procedural complexity."). The inability of appellants' advisors to actively participate in their hearings, therefore, does not present a due-process violation under *Mathews*.

Finally, appellants allege that it was constitutional error to fail to place the burden of proof on their accusers, effectively requiring appellants to prove their innocence. Although the locus of the burden of proof can frequently be dispositive to the outcome of a case, the Supreme Court has concluded that "[o]utside the criminal law area," which party bears the burden of proof "is normally not an issue of federal constitutional moment." *Lavine v. Milne*, 424 U.S. 577, 585, 96 S. Ct. 1010, 47 L. Ed. 2d 249 (1976).

Under *Mathews*, however, placing the burden of proof on the appellants may have proven constitutionally suspect due to the [**30] potentially detrimental effect on the accuracy of the hearing and the minimal burden of an alternate procedure. But, as the district court recognized, the facts alleged in appellants' complaint tend to show that the ARC panel did not place the burden of proof on either party. Rather, the panel functioned as a board of inquiry, reaching its conclusion based on a preponderance of the evidence. Allocating the burden of proof in this manner—in addition to having other procedural mechanisms in place that counterbalance the lower standard used (e.g., an adequate appeals process)—is constitutionally sound and does not give rise to a due-process violation.

3.

Appellants' most ubiquitous argument is that the entire UC disciplinary process was inherently biased against them, resulting in a fundamentally unfair process. It is unquestioned that a fundamental due-process requirement is an impartial and unbiased adjudicator. *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975); *Heyne*, 655 F.3d at 566.[5] It is also well established that school-disciplinary committees are entitled to a presumption of impartiality, absent a showing of actual bias. *Atria v. Vanderbilt Univ.*, 142 F. App'x 246, 256 [*450] (6th Cir. 2005) ("[I]n a 'university setting, a disciplinary committee is entitled to a presumption of honesty and integrity, absent a showing of actual [**31] bias.'" (quoting *McMillan v. Hunt*, No. 91-3843, 1992 U.S. App. LEXIS 17475, 1992 WL 168827, at *2 (6th Cir. July 21, 1992))); *cf. Withrow*, 421 U.S. at 47. Thus, "[a]ny alleged prejudice on the part of the [decisionmaker] must be evident from the record and cannot be based in speculation or inference." *Nash*, 812 F.2d at 665.

Appellants make several allegations regarding UC's disciplinary process that they claim evince a bias against those accused of sexual misconduct. First, appellants claim that, due to pressure from the Department of Education, UC employs a biased investigatory process in order to "look good" for the Department and preserve federal funding. CA6 R.16, Appellants' Br., at 28-29. As the district court correctly

[4] In fact, the negative entry in Doe II's disciplinary record has not prevented him from graduating law school or passing the Ohio Bar Exam.

[5] Given that the constitutional requirement of an unbiased decisionmaker is absolute and does not vary based on the facts of the case, *Mathews* is inapplicable to this alleged procedural defect. Accordingly, a finding of partiality and bias would automatically trigger a due-process violation, irrespective of any balancing of interests. *See Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) (noting that a "biased decisionmaker" in the administrative context is "constitutionally unacceptable").

observed, this is nothing more than a conclusory allegation devoid of any facts or evidence that UC, itself, has been subjected to any direct investigation or pressure by the Department of Education.[6] *See Iqbal*, 556 U.S. at 678 (noting that courts are not required to accept conclusory statements as true); *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 377 (6th Cir. 2011) (finding that "vague and conclusory allegations of nefarious intent and motivation by officials at the highest levels of the federal government" are insufficient to state a claim under *Iqbal*).

Next, appellants assert that Cummins displayed biased behavior against them, including: (1) seeking accommodations for the alleged victims [**32] while simultaneously investigating their allegations; and (2) preparing a biased investigatory report that excluded exculpatory evidence. With respect to the allegedly improper accommodations, these are required by federal regulations. *See* 34 C.F.R. § 668.46(b)(11)(v). Complying with these regulations, therefore, is not evidence of Cummins's bias. Moreover, any claim regarding the allegedly biased investigative report is weakened by the fact that Cummins did not ultimately serve on the ARC panels that adjudicated appellants' culpability. Instead, appellants' responsibility was adjudicated by an independent panel that considered all of the evidence allegedly left out of Cummins's investigative report. Accordingly, even if Cummins's initial investigations of the incidents were biased, those defects were cured by the ARC panel's subsequent handling of appellants' cases.

Finally, appellants allege a general bias by ARC panel members against students accused of sexual misconduct. They claim that the panel members received biased training that emphasized the rights of the complaining party over the due-process rights of the accused, and that the panel members had a history of finding in favor of victims in sexual-misconduct [**33] cases. These allegations are belied by the process appellants received. In both cases, the initial responsibility determination was reversed on appeal for inadequate hearing procedures. This demonstrates a system that places much importance on the due-process rights of the accused at the expense of losing a finding in favor of the accuser. Furthermore, Doe I was ultimately found "not responsible" for the allegations made by Roe II. It is difficult to explain how the ARC panel was biased against Doe I in finding him "responsible" for Roe I's allegations but not biased against him in finding him "not responsible" [*451] for Roe II's allegations. Overall, this argument is untenable. Accordingly, we find that appellants' claims of bias in UC's disciplinary process lack constitutional merit.[7]

4.

Although not perfect, the process afforded to Doe I and Doe II comports with the Due Process Clause of the Fourteenth Amendment. *See Flaim*, 418 F.3d at 637 ("[T]he requirements mandated by the Due Process Clause afford, 'if anything, less than a fair minded school administrator would impose upon himself in order to avoid unfair decisions.'" (quoting *Goss*, 419 U.S. at 568)). Appellants received adequate notice of the charges against them and a sufficient opportunity to prepare a defense. Regardless of whether appellants' [**34] initial hearings were permeated with procedural deficiencies, following an appeal, they each received new hearings without many of the same alleged deficiencies. At these new hearings, appellants were able to offer pertinent evidence and explain their version of the events. Appellants were also allowed to conduct modified cross-examination and have an advisor present at the hearing. Although the procedures employed by UC did not rise to the level of those provided to criminal defendants, that level of process is not required in school-disciplinary proceedings. *See Flaim*, 418 F.3d at 635. At bottom, all that is required under the Due Process Clause is an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965)). Appellants received that here. Accordingly, we affirm the district court's dismissal of appellants' due-process claims.[8]

V.

Appellants also allege that the adverse outcomes in their respective disciplinary hearings resulted from gender discrimination in violation of Title IX. The district court found that appellants' complaint failed to state a viable Title IX claim because it failed to create a plausible inference of gender discrimination on the part of UC. We agree.

Title IX prohibits educational [**35] institutions receiving federal funds from discriminating on the basis of gender. 20 U.S.C. § 1681(a)(1). Although we are not subject to a binding framework in evaluating a student's Title IX discrimination claim, we have previously looked to the Second Circuit's decision in *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994), which identified two categories of Title IX claims related to student-disciplinary hearings: "erroneous outcome" claims

[6] The complaint states that the federal government is investigating at least 129 schools for possible Title IX violations related to sexual assaults and then lists several schools that are the subject of those investigations. Notably absent is the University of Cincinnati.

[7] Appellants also cite statistics that allegedly suggest a bias against men in UC's enforcement of Title IX. This argument also fails for reasons discussed *infra* Part V.

[8] Because we find that there is no due-process violation, we need not reach the question of qualified immunity.

and "selective enforcement" claims.[9] *See Mallory v. Ohio [*452] Univ.*, 76 F. App'x 634, 638-39 (6th Cir. 2003). A successful "erroneous outcome" claim requires the plaintiff to show that the "outcome of [the] University's disciplinary proceeding was erroneous because of sex bias." *Id.* at 639; *see also Marshall v. Ohio Univ.*, No. 2:15-cv-775, 2015 U.S. Dist. LEXIS 155291, 2015 WL 7254213, at *5 (S.D. Ohio Nov. 17, 2015) ("The gravamen of an erroneous outcome claim is that an 'innocent' person was wrongly found to have committed an offense because of his or her gender."). To prevail on a "selective enforcement" claim, the plaintiff must show that a similarly-situated member of the opposite sex was treated more favorably than the plaintiff due to his or her gender. *Mallory*, 76 F. App'x at 641; *Marshall*, 2015 U.S. Dist. LEXIS 155291, 2015 WL 7254213, at *6.

Appellants' claims are most appropriately analyzed under the "erroneous outcome" standard. [10] Under this standard, "allegations of a procedurally or otherwise [**36] flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss." *Yusuf*, 35 F.3d at 715. Instead, to state an erroneous-outcome claim, a plaintiff must plead: (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 gender bias." *Id.* Causation sufficient to state a Title IX discrimination claim can be shown via "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." *Id.* Because appellants have failed to show any causal connection between the adverse outcomes in their hearings and gender bias, they have not met their burden here. Accordingly, their Title IX claims fail.

Appellants first contend that, in order to appease the Department of Education, UC adopted a practice of investigation and enforcement under Title IX that is inherently biased against male students accused of sexual assault. This claim is unfounded. First, to the extent [**37] appellants claim that the accommodations offered to the complainants during the investigatory process are evidence of gender bias, these claims fail because such accommodations were required by federal regulations. *See supra* Part IV.C.3. Second, unlike the allegations in the cases relied on by appellants, the allegations in appellants' complaint are mere conclusory statements, unsupported by sufficient factual allegations to make their claims plausible.

For example, *Doe v. Columbia University*, 831 F.3d 46, 2016 WL 4056034 (2d Cir. 2016), involved additional facts substantiating the plaintiff's claim that federal-government influence had led to gender bias in the university's enforcement proceeding. In that case, Columbia University, in the weeks leading up to the plaintiff's hearing, had faced substantial criticism from both the student body and the public media regarding its handling of sexual-assault investigations. 831 F.3d 46, *Id.* at *8. The effect of this criticism was evident from the university president's decision to call a campus-wide town hall for students to discuss the issue with the dean of the university. *Id.* The plaintiff's complaint in *Columbia University* also alleged that the Title IX investigator—the [*453] position occupied by Cummins at UC—was herself subject to [**38] public criticism in the weeks prior to the hearing. 831 F.3d 46, *Id.* at *9. The Second Circuit concluded that these additional facts were sufficient to support an inference that pressure to avoid Title IX liability and further public criticism had led to a disciplinary system that was biased against males. 831 F.3d 46, *Id.* at *8-9.

Appellants fail to allege similar supporting facts here. They do not allege that UC or any of its officials had faced public criticism for their handling of Title IX investigations prior to appellants' hearings. Nor do appellants allege that UC—unlike Columbia University—was being investigated by the federal government for potential Title IX violations. Instead, appellants allege more generally that the Department of Education's "Dear Colleague Letter" induced UC to discriminate against males in sexual-assault investigations in order to preserve federal funding. This conclusory allegation, without more, is insufficient to create a plausible claim of gender bias under Title IX.

Appellants next claim that UC's alleged due-process violations—e.g., the limited right to cross-examination, the limited access to an advisor, and the improper allocation of the burden of proof—evidence gender discrimination in [**39] UC's disciplinary process. Appellants, however, fail to show how these alleged procedural deficiencies are connected to gender bias. As noted by the district court, these deficiencies at

[9] As was the case with the appellant in *Mallory*, Doe I and Doe II ask us to adopt two additional categories of Title IX claims: (1) "deliberate indifference" claims and (2) "archaic assumptions" claims. Noting that the *Mallory* court assumed only, *arguendo*, that such categories apply, we decline to adopt them because neither is applicable here. *Mallory v. Ohio Univ.*, 76 F. App'x 634, 639 (6th Cir. 2003). The "archaic assumptions" standard appears limited to unequal athletic opportunities. *Id.* at 638-39; *see also Marshall v. Ohio Univ.*, No. 2:15-cv-775, 2015 U.S. Dist. LEXIS 155291, 2015 WL 7254213, at *8 (S.D. Ohio Nov. 17, 2015) (noting that the archaic assumptions doctrine appears limited to unequal athletic opportunities). Additionally, appellants make no arguments with respect to the "deliberate indifference" standard. As such, any "deliberate indifference" claim is waived. *Kuhn v. Washtenaw Cty.*, 709 F.3d 612, 624 (6th Cir. 2013) ("[A]rguments adverted to in only a perfunctory manner[] are waived.").

[10] Because appellants do not allege that a similarly accused female was treated differently under UC's disciplinary process, the "selective enforcement" standard is inapplicable.

most show a disciplinary system that is biased in favor of alleged victims and against those accused of misconduct. [11] But this does not equate to gender bias because sexual-assault victims can be both male and female. *See Sahm v. Miami Univ.*, 110 F. Supp. 3d 774, 778 (S.D. Ohio 2015) ("Demonstrating that a university official is biased in favor of the alleged victims of sexual assault claims, and against the alleged perpetrators, is not the equivalent of demonstrating bias against male students."). Accordingly, without additional facts linking these alleged procedural deficiencies to gender bias, these procedural defects do not create a plausible inference of gender discrimination under Title IX. *See Yusuf*, 35 F.3d at 715 ("Allegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss.").

Finally, appellants cite statistics that they allege evince a pattern of discrimination against males in UC's investigation and adjudication [**40] of sexual-misconduct claims. Specifically, appellants claim that since 2011 there have been nine sexual-assault investigations at UC, and in all nine cases, the accused was male and was ultimately found responsible. Like appellants' other claims, this allegation fails to create a plausible inference of gender bias.

First, as the district court aptly observed, appellants fail to eliminate the most obvious reasons for the disparity between male and female respondents in UC sexual-misconduct cases: "(1) UC has only received complaints of male-on-female sexual assault, and (2) males are less likely than females to report sexual assaults." *Univ. of Cincinnati*, 173 F. Supp. 3d at 607-08. It would be unreasonable, therefore, for us to infer that the gender disparity in UC's sexual-misconduct cases is the result of gender bias, as opposed to these other, [*454] more innocent causes. *See Girgis v. Countrywide Home Loans, Inc.*, 733 F. Supp. 2d 835, 843 (N.D. Ohio 2010) ("While it is true that, in considering a motion to dismiss, all well-pleaded factual allegations must be taken as true, a court need not indulge in unreasonable inferences." (citations and internal quotations omitted)); *cf. King v. DePauw Univ.*, No. 2:14-cv-70-WTL—DKL, 2014 U.S. Dist. LEXIS 117075, 2014 WL 4197507, at *11 (S.D. Ind. Aug. 22, 2014) (noting that a university "is not responsible [**41] for the gender makeup of those who are accused *by other students* of sexual misconduct" (emphasis in original)).

Second, nine cases is hardly a sufficient sample size for this court to draw any reasonable inferences of gender bias from these statistics. *See Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 943 (6th Cir. 1987) (finding sample size of seventeen cases insufficient to support an inference of discrimination in the employment context). Finally, appellants' own treatment belies their argument that men are invariably found responsible in UC sexual-assault investigations: Doe I was found "not responsible" for Roe II's allegations. These statistics, therefore, are insufficient to show a pattern of decisionmaking suggesting the influence of gender in the UC disciplinary process. *See Yusuf*, 35 F.3d at 715.

Because appellants have failed to create a reasonable inference that gender bias affected the outcome of their respective proceedings, we affirm the district court's finding that appellants have failed to state a plausible Title IX gender-discrimination claim.

VI.

For the reasons stated above, we affirm.

End of Document

[11] Although appellants attack this portion of the district court's opinion as evidence of a due-process violation, we concluded that UC's disciplinary process was not inherently biased, and thus complied with the minimum requirements of due process. *See supra* Part IV.C.3.

Doe v. Univ. of Cincinnati

United States Court of Appeals for the Sixth Circuit

August 1, 2017, Argued; September 25, 2017, Decided; September 25, 2017, Filed

File Name: 17a0224p.06

No. 16-4693

Reporter
2017 U.S. App. LEXIS 18458 *; 2017 FED App. 0224P (6th Cir.) **; 872 F.3d 393; 2017 WL 4228791

JOHN DOE, Plaintiff-Appellee, v. UNIVERSITY OF CINCINNATI; ANIESHA MITCHELL; JUAN GUARDIA, Defendants-Appellants.

Prior History: [*1] Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. No. 1:16-cv-00987—Michael R. Barrett, District Judge.

Doe v. Univ. of Cincinnati, 223 F. Supp. 3d 704, 2016 U.S. Dist. LEXIS 165163 (S.D. Ohio, Nov. 30, 2016)

Counsel: ARGUED: Evan T. Priestle, TAFT, STETTINIUS & HOLLISTER LLP, Cincinnati, Ohio, for Appellants.

Joshua Adam Engel, ENGEL & MARTIN, LLC, Mason, Ohio, for Appellee. ON BRIEF: Evan T. Priestle, Doreen Canton, TAFT, STETTINIUS & HOLLISTER LLP, Cincinnati, Ohio, for Appellants.

Joshua Adam Engel, ENGEL & MARTIN, LLC, Mason, Ohio, for Appellee.

Judges: Before: CLAY, GRIFFIN, and THAPAR, Circuit Judges.

Opinion by: GRIFFIN

Opinion

[**1] GRIFFIN, Circuit Judge.

On September 6, 2015, University of Cincinnati students John Doe and Jane Roe[1] engaged in sex at John Doe's apartment. John contends that the sex was consensual; Jane claims it was not. No physical evidence supports either student's version.

After considerable delay, defendant University of Cincinnati ("UC") held a disciplinary hearing on Jane Roe's sexual assault charges against graduate student John Doe. Despite Jane Roe's failure to appear at the hearing, the University found John Doe "responsible" for sexually assaulting Roe based upon her previous hearsay statements to investigators. Thereafter, UC suspended John Doe [*2] for two years—reduced to one year after an administrative appeal.

Plaintiff Doe appealed his suspension to the district court, arguing that the complete denial of his right to confront his accuser violated his due process right to a fair hearing. In granting a preliminary injunction against Doe's suspension, the district court found a strong likelihood that John Doe would prevail on his constitutional claim. So do we, and for the reasons stated herein, affirm the order of the district court.

The Due Process Clause guarantees fundamental fairness to state university students facing long-term exclusion from the educational process. Here, the University's disciplinary committee necessarily made a credibility determination in finding John Doe responsible for sexually assaulting Jane Roe given the exclusively "he said/she said" nature of the case. Defendants' failure to provide any form of confrontation of the accuser made the proceeding against John Doe fundamentally unfair.

[**2] I.

John Doe met Jane Roe on Tinder, and after communicating for two or three weeks, met in person. Thereafter, Doe invited Roe back to his apartment, where the two engaged in sex. Three weeks later, Jane Roe reported to the University's [*3] Title IX Office that John Doe had sexually assaulted her that evening in his apartment. Five months later, UC cited Doe for violating the Student Code of Conduct, "most specifically," the University's policies against sex offenses, harassment, and discrimination.

UC resolves charges of non-academic misconduct through an Administrative Review Committee (ARC) hearing process. The process begins when "[a]ny person, department, organization or entity" files a complaint against a student, and the University informs the student of the allegations against him. If the claim involves a potential sexual offense, UC's Title IX Office

[1] We use aliases to protect the parties' privacy.

investigates the matter, interviewing both parties and gathering the evidence. Defendant Aniesha Mitchell, the Director of UC's Office of Student Conduct and Community Standards, discloses the evidence to the accused student before the hearing.

During the hearing, the ARC panelists (a mix of faculty and students) hear the allegations, review the evidence, and question the participating witnesses. Accused students are entitled to present favorable evidence and explain their side of the story in their own words. They may also question witnesses through a "circumscribed form [*4] of cross-examination"—one that involves "submitting written questions" to the ARC panelists, "who then determine whether [the] questions are relevant and whether they will be posed to the witness." *Doe v. Cummins*, 662 F. App'x 437, 439, 448 (6th Cir. 2016).

However, there is no guarantee that a witness will appear for questioning. "Witnesses are strongly encouraged to be present for hearings," but UC's Code of Conduct does not require them to be present, regardless of whether they are the accused, the accuser, or a bystander with relevant information. If a witness is "unable to attend," the Code permits him to submit a "notarized statement" to the Committee in lieu of an appearance. At the close of the hearing, the ARC deliberates and determines whether the accused student should be found "responsible" for violating the Code of Conduct.

[**3] Defendants planned to follow these procedures at Doe's June 27, 2016, hearing, but modified the process when Jane Roe failed to appear. The Committee Chair explained how the hearing would proceed in her absence:

> So, during the hearing, the Administrative Review Committee and both the respondent and complainant shall have the right to submit evidence and written questions to be asked of all adverse witnesses [*5] who testify in the matter. The hearing chair, in consultation with the ARC, has the right to review and determine which written questions will be asked. Questions will be asked in the order presented by the Chair. And all questions from the complainant and respondent must be submitted in writing for review by the ARC [C]hair.
>
> Again, there is no complainant here and we have no witnesses. So we likely won't have to do any of this.

John Doe claims, and defendants do not dispute, that he was not informed in advance that Jane Roe would not be attending the hearing.

The Chair recited the Code of Conduct violations leveled against Doe and invited him to enter an "understanding"—accepting or denying responsibility for the allegations. Doe entered an understanding of not responsible.

The Chair then read a summary of the Title IX Office's report, which began with Jane Roe's account of the night in question, followed by Doe's account. Each party's account was based on his or her interview statements to the Title IX investigators and included remarks that would be hearsay if introduced in court. The Chair also read a summary of witness statements from four of Jane Roe's friends who were told of the alleged [*6] sexual assault through Roe. Once the Chair finished, he gave the Committee members the chance to ask questions regarding the report. They had none.

The Chair then asked whether John Doe had any questions:

> [The Chair]: Okay, so the complainant is not here. At this time I would have given Roe time to ask questions of the Title IX report. But again, they [sic] are not here. So we'll move on.
>
> So now, do you, as the respondent Mr. Doe, have any questions of the Title IX report?
>
> [Doe]: Well, since she's not here, I can't really ask anything of the report.
>
> [**4] Is this the time where I would enter in like a situation where like she said this and that never could have happened? Because that's just—
>
> [The Chair]: You'll have time here in just a little bit to direct those questions. Just—
>
> [Doe]: Then no, I don't have any questions for the report.

With that, the Chair concluded the "Title IX presentation" portion of the hearing.

"And so now," the Chair explained that if Jane Roe had been present, he would have asked her to "read into the record what happened and [provide] any additional information." "The ARC would then have time to ask clarifying questions" of Roe, followed by Doe's opportunity to ask her [*7] questions. "Again," however, the Chair noted Roe was not present and "move[d] onto the next step"—asking Doe to "summarize what happened." Doe challenged a number of Roe's statements, and responded to the Committee's questions. Following this exchange, the Chair read Jane Roe's written closing statement into the record and invited Doe to give a responsive closing statement.

After its deliberations, the Committee submitted its recommended findings to Daniel Cummins, UC's Assistant Dean of Students. It recommended that Cummins find Doe responsible for violating the Student Code of Conduct and issue a two-year suspension. On July 7, Cummins notified John Doe that he had accepted the recommendation.

Doe appealed the decision the next day. The University's Appeals Administrator rejected Doe's appeal of the finding of responsibility, but recommended that his sentence be reduced to a one-year suspension to begin at the end of the fall 2016 semester, and conclude at the end of the fall 2017 semester—

meaning Doe could not attempt to re-enroll in his graduate program until January 2018. Defendant Juan Guardia, the Assistant Vice President and Dean of Students, accepted the Administrator's recommendation [*8] and informed plaintiff on September 23, 2016, that this was the University's final decision.

II.

Doe then filed this action against UC Administrators Guardia and Mitchell and the University in the district court. Plaintiff Doe claimed that defendants violated his due process [**5] rights under the United States and Ohio Constitutions and discriminated against him in violation of Title IX.

On the same day he filed his complaint, Doe moved for preliminary relief enjoining UC from enforcing his suspension. Plaintiff's motion focused solely on defendants' failure "to permit John Doe to confront his accuser." Doe maintained that UC could not constitutionally find him responsible for sexually assaulting Roe without "any opportunity to confront and question" her. The district court agreed.

"In this case," the court reasoned, "the ARC Hearing Committee was given the choice of believing either Jane Roe or Plaintiff, and therefore, cross-examination was essential to due process." *Doe v. Univ. of Cincinnati*, 223 F. Supp. 3d 704, 711 (S.D. Ohio 2016). The fact that Doe could have submitted written questions to the Committee Chair, which the Chair could have put to Roe, had she appeared at the hearing, did not convince the district court otherwise. *Id.* at 712. And although UC's Code [*9] of Conduct permits absent witnesses who are "unable" to attend the hearing to provide notarized statements, the district court noted that Roe's closing statement was not notarized. Such a "significant and unfair departure[] from an institution's own procedures can," the court explained, "amount to a violation of due process." *Id.* (quoting *Furey v. Temple Univ.*, 730 F. Supp. 2d 380, 396-97 (E.D. Pa. 2010) (brackets omitted)).

The district court ruled that plaintiff demonstrated a strong likelihood of success on the merits of his due process claim, and that the remaining preliminary injunction factors weighed in favor of granting preliminary relief. *Id.* at 712. Accordingly, the court entered an order enjoining UC from suspending plaintiff. *Id.* Defendants timely appealed.

III.

In reviewing a district court's decision to grant a preliminary injunction, "we evaluate the same four factors that the district court does": (1) whether the movant has demonstrated a strong likelihood of success on the merits; (2) whether he would suffer irreparable injury without the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether issuing the injunction would serve the public interest. *Planet Aid v. City of St. Johns*, 782 F.3d 318, 323 (6th Cir. 2015) (internal quotation marks omitted). "We have often cautioned [*10] that these [**6] are factors to be balanced, not prerequisites to be met." *S. Glazer's Distributors of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir. 2017). "At the same time, however, we have also held that 'a preliminary injunction issued where there is simply no likelihood of success on the merits must be reversed.'" *Id.* (brackets and citation omitted). And in the case of a potential constitutional violation, "the likelihood of success on the merits often will be the determinative factor." *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc, per curiam) (citation omitted).

We review a district court's legal conclusions de novo, its factual findings for clear error, and its ultimate decision to grant preliminary relief for abuse of discretion. *S. Glazer's*, 860 F.3d at 849. Practically speaking, this means "when we look at likelihood of success on the merits, we independently apply the Constitution, but we still defer to the district court's overall balancing of the four preliminary-injunction factors." *Planet Aid*, 782 F.3d at 323 (citation omitted).

IV.

State universities must afford students minimum due process protections before issuing significant disciplinary decisions. *See Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633 (6th Cir. 2005); *see also Jaksa v. Regents of the Univ. of Michigan*, 597 F. Supp. 1245, 1248 (E.D. Mich. 1984), *aff'd* 787 F.2d 590 (6th Cir. 1986) (per curiam, unpublished) ("Whether plaintiff's interest is a 'liberty' interest, 'property' interest, or both, it is clear that he is entitled to the protection of the [*11] due process clause."). Suspension "clearly implicates" a protected property interest, and allegations of sexual assault may "impugn [a student's] reputation and integrity, thus implicating a protected liberty interest." *Cummins*, 662 F. App'x at 445 (citations omitted).

Because the Due Process Clause applies, "the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). "[T]he specific dictates of due process generally require[] consideration of three distinct factors": (1) the nature of the private interest subject to official action; (2) the risk of erroneous deprivation under the current procedures used, and the value of any additional or substitute procedural safeguards; and (3) the governmental interest, [**7] including the burden any additional or substitute procedures might entail. *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

At a minimum, a student facing suspension is entitled to "the opportunity to be 'heard at a meaningful time and in a meaningful manner.'" *Cummins*, 662 F. App'x at 446 (quoting *Mathews*, 424 U.S. at 333). While the exact outlines of process may vary, universities must "at least" provide notice of the

charges, an explanation of the evidence against the student, and an opportunity to present his side of the story before an unbiased decision maker. *Id.* (citing *Heyne v. Metro. Nashville Pub. Sch.*, 655 F.3d 556, 565-66 (6th Cir. 2011)).

A student's opportunity to share his version of events must occur at "some kind of [*12] hearing," *Goss v. Lopez*, 419 U.S. 565, 579, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975), though that hearing need not "take on . . . [the] formalities" of a criminal trial. *Flaim*, 418 F.3d at 635. Education is a university's first priority; adjudication of student disputes is, at best, a distant second. *See Bd. of Curators of the Univ. of Missouri v. Horowitz*, 435 U.S. 78, 88, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978). "Formalizing hearing requirements would divert both resources and attention from the educational process." *Jaksa*, 597 F. Supp. at 1250. Thus, UC is not required to "transform its classrooms into courtrooms" in pursuit of a more reliable disciplinary outcome. *Id.*; *see also Flaim*, 418 F.3d at 635 ("Courts have generally been unanimous . . . in concluding that hearings need not be open to the public, that neither rules of evidence nor rules of civil or criminal procedure need be applied, and witnesses need not be placed under oath." (citations omitted)). Even in the case of a sexual assault accusation—where "[a] finding of responsibility will . . . have a substantial and lasting impact" on the student, *see Cummins*, 662 F. App'x at 446—the protection afforded to him "need not reach the same level . . . that would be present in a criminal prosecution." *Doe v. Univ. of Kentucky*, 860 F.3d 365, 370 (6th Cir. 2017). Review under *Mathews* asks only whether John Doe "had an opportunity to 'respond, explain, and defend,'" not whether a jury could constitutionally convict him using the same procedures. *Cummins*, 662 F. App'x at 446 (quoting *Flaim*, 418 F.3d at 635).

[**8] A.

First, [*13] Doe contends, and UC does not dispute, that the private interest at stake in this case is significant. A finding of responsibility for a sexual offense can have a "lasting impact" on a student's personal life, in addition to his "educational and employment opportunities," especially when the disciplinary action involves a long-term suspension. *Id.* The "private interest that will be affected by the official action" is therefore compelling. *Mathews*, 424 U.S. at 335.

B.

Next, we consider the risk of erroneous deprivation of this interest under the University's current procedures and the value of any additional procedural safeguards plaintiff requests. *Id.* at 334-35. The only additional procedure Doe requests is one that UC, in theory, already provides: the opportunity to confront and cross-examine Roe by posing questions to her through the Committee Chair.

"The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings." *Winnick*, 460 F.2d at 549. However, general rules have exceptions, and "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Goss*, 419 U.S. at 578 (citation and parenthetical omitted). The more [*14] serious the deprivation, the more demanding the process. And where the deprivation is based on disciplinary misconduct, rather than academic performance, "we conduct a more searching inquiry." *Flaim*, 418 F.3d at 634. "Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed." *Goss*, 419 U.S. at 580. For the student, "[t]he risk of error is not at all trivial, and it should be guarded against . . . without prohibitive cost or interference with the educational process." *Id.*

Accused students must have the right to cross-examine adverse witnesses "in the most serious of cases." *Flaim*, 418 F.3d at 636. We alluded to what "the most serious of cases" might entail in *Flaim*: If a case "resolve[s] itself into a problem of credibility, cross-examination of witnesses might . . . be[] essential to a fair hearing." *Id.* at 641 (quoting *Winnick*, 460 F.2d at 549). [**9] We ultimately did not reach that answer, however. It was not essential to Sean Michael Flaim's hearing, because Flaim admitted to the misconduct that prompted the Medical College of Ohio to expel him—his felony drug conviction. *Id.* That "rather unique" fact justified the College's decision [*15] to deny his request to cross-examine his arresting officer during Flaim's expulsion hearing. *Id.* at 641, 643.

But the circumstances of the present case pose the credibility contest we contemplated in *Flaim*: John Doe maintains that their sex was consensual; Jane Roe claims that it was not. Importantly, the Committee's finding of responsibility necessarily credits Roe's version of events and her credibility. The Title IX Office proffered no other evidence "to sustain the University's findings and sanctions" apart from Roe's hearsay statements. *Cf. Plummer v. Univ. of Houston*, 860 F.3d 767, 775-76 (5th Cir. 2017) (cross-examination not required where the plaintiffs distributed videos and a photograph of the victim's "degrading and humiliating" assault online, and "[t]he University's case did not rely on testimonial evidence" from the victim).

Defendants insist that Roe's nonappearance did not impact the fairness of the proceedings because Doe still had an opportunity be heard. The ARC panel invited him to "summarize what happened" in his own words, and Doe took advantage of that opportunity. He disputed Roe's overall interpretation of events and a number of her specific claims. Because plaintiff was able to draw attention to alleged inconsistencies in Roe's

statements, [*16] defendants argue that cross-examination would have been futile. We disagree.

UC assumes cross-examination is of benefit only to Doe. In truth, the opportunity to question a witness and observe her demeanor while being questioned can be just as important to the trier of fact as it is to the accused. "A decision relating to the misconduct of a student requires a factual determination as to whether the conduct took place or not." *Horowitz*, 435 U.S. at 95 n.5 (Powell, J. concurring). "The accuracy of that determination can be safeguarded by the sorts of procedural protections traditionally imposed under the Due Process Clause." *Id.* Few procedures safeguard accuracy better than adversarial questioning. In the case of competing narratives, "cross-examination has always been considered a most effective way to ascertain truth." *Watkins v. Sowders*, 449 U.S. 341, 349, 101 S. Ct. 654, 66 L. Ed. 2d 549 (1981) (footnote omitted); *see also Maryland v. Craig*, 497 U.S. 836, 846, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) (cross-examination "ensur[es] that evidence [**10] admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings").

"The ability to cross-examine is most critical when the issue is the credibility of the accuser." *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 605 (D. Mass. 2016). Cross-examination takes aim at credibility like no other procedural device. *Craig*, 497 U.S. at 846; *Watkins*, 449 U.S. at 349. A cross-examiner may "delve [*17] into the witness' story to test the witness' perceptions and memory." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). He may "expose testimonial infirmities such as forgetfulness, confusion, or evasion . . . thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." *Craig*, 497 U.S. at 847 (citation and brackets omitted). He may "reveal[] possible biases, prejudices, or ulterior motives" that color the witness's testimony. *Davis*, 415 U.S. at 316. His strategy may also backfire, provoking the kind of confident response that makes the witness appear more believable to the fact finder than he intended. *Watkins*, 449 U.S. at 345, 348-49; *cf. Davis*, 415 U.S. at 318 ("On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness."). Whatever the outcome, "the greatest legal engine ever invented for the discovery of truth" will do what it is meant to: "permit[] the [fact finder] that is to decide the [litigant]'s fate to observe the demeanor of the witness in making his statement, thus aiding the [fact finder] in assessing his credibility." *Craig*, 497 U.S. at 846 (quoting in part *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)).

Given the parties' competing claims, and the lack of [*18] corroborative evidence to support or refute Roe's allegations, the present case left the ARC panel with "a choice between believing an accuser and an accused." *Flaim*, 418 F.3d at 641. Yet, the panel resolved this "problem of credibility" without assessing Roe's credibility. *Id.* (citation omitted). In fact, it decided plaintiff's fate without seeing or hearing from Roe at all. That is disturbing and, in this case, a denial of due process.

Even in *Flaim*—where "cross-examination would have been a fruitless exercise" because the plaintiff student admitted the "critical fact[s]" against him—the trier of fact was still able to question the plaintiff's arresting officer, and the plaintiff was still "able to listen to and observe" [**11] the officer's testimony. *See id.* at 633, 641 (quoting in part *Winnick*, 460 F.2d at 549). More critically, *the trier of fact* was "able to listen to and observe" the officer's testimony. *Id.* at 633. Evaluation of a witness's credibility cannot be had without some form of presence, some method of compelling a witness "to stand face to face with the [fact finder] in order that it may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43, 15 S. Ct. 337, 39 L. Ed. 409 (1895). Cross-examination is "not [*19] only beneficial, but essential to due process" in a case that turns on credibility because it guarantees that the trier of fact makes this evaluation on both sides. *Flaim*, 418 F.3d at 641. When it does, the hearing's result is most reliable.

Reaching the truth through fair procedures is an interest Doe and UC have in common. "The Due Process Clause will not shield [a student] from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension is in fact unwarranted." *Goss*, 419 U.S. at 579. UC, of course, also has a "well recognized" interest in maintaining a learning environment free of sex-based harassment and discrimination. *Bonnell v. Lorenzo*, 241 F.3d 800, 822 (6th Cir. 2001). To that end, "ensuring allegations of sexual assault on college campuses are taken seriously is of critical importance, and there is no doubt that universities have an exceedingly difficult task in handling these issues." *Brandeis*, 177 F. Supp. 3d at 602 (citation omitted).

But if a university's procedures are insufficient to make "issues of credibility and truthfulness . . . clear to the decision makers," that institution risks removing the wrong students, while overlooking those it should be removing. *See Furey v. Temple Univ.*, 884 F. Supp. 2d 223, 252 (E.D. Pa. 2012). "The concern would be mostly academic if the disciplinary process were a totally accurate, unerring [*20] process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is." *Goss*, 419 U.S. at 579-80. Cross-examination, "the principal means by which the believability of a witness and the truth of his testimony are tested," can reduce the likelihood

of a mistaken exclusion and help defendants better identify those who pose a risk of harm to their fellow students. *See Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 924 (6th Cir. 1988) (citation omitted).

[**12] We are equally mindful of Jane Roe's interest, and the extent to which it conflicts with John Doe's. Roe and other alleged victims have a right, and are entitled to expect, that they may attend UC without fear of sexual assault or harassment. *See* 20 U.S.C. § 1681(a). If they are assaulted, and report the assault consistent with the University's procedures, they can also expect that UC will promptly respond to their complaints. *Cf. Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000) (citing *Wills v. Brown Univ.*, 184 F.3d 20, 25 (1st Cir. 1999)). Setting aside the troubling fact that UC's Title IX Office waited a month to interview Roe, another four months to notify Doe of her allegations, and *yet another four* months to convene the ARC hearing, the concern at this point is that UC's inadequate procedures left the ARC's decision vulnerable to a constitutional challenge.[2]

Strengthening those procedures is not [*21] without consequence for victims. "Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating" the same hostile environment Title IX charges universities with eliminating. *Doe v. Regents of the Univ. of Cal.*, 5 Cal. App. 5th 1055, 210 Cal. Rptr. 3d 479, 505 (Cal. Ct. App. 2016) (citation omitted). However, John Doe is not requesting an opportunity to question Jane Roe "directly." In this appeal, he does not challenge our determination in an unpublished decision that UC's "circumscribed form of cross-examination" is constitutional. *Cummins*, 662 F. App'x at 448. Rather, plaintiff asks only to question Roe through the ARC panel—a procedure the Department of Education's Office for Civil Rights previously recommended for the victim's wellbeing. Catherine E. Lhamon, Assistant Secretary for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, at 31, April 29, 2014, https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (last visited Aug. 31, 2017). (The Department subsequently withdrew its April 29, 2014, letter, and replaced it with an interim letter. *See* Dep't of Educ., Office for Civil Rights, *Q&A on Campus Sexual Misconduct*, Sept. 22, 2017, https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf (last visited Sept. 22, 2017)).

[2] UC encourages victims to report alleged assaults "as soon as reasonably possible" "to ensure that the passage of time does not limit the University's ability to conduct an investigation or locate witnesses, as memory lapses and other time-sensitive factors may impair an investigation." *See* https://www.uc.edu/titleix/procedures.html (last visited Aug. 31, 2017)."[T]ime-sensitive factors" evidently did not motivate the University in the instant case.

[**13] We acknowledge this procedure may not relieve Roe's potential emotional trauma. Still, a case [*22] that "resolve[s] itself into a problem of credibility" cannot itself be resolved without a mutual test of credibility, at least not where the stakes are this high. *Flaim*, 418 F.3d at 641 (quoting *Winnick*, 460 F.2d at 550); *but see Cummins*, 662 F. App'x at 448 (a plaintiff subject to disciplinary probation may be entitled to less process than one subject to suspension). "While protection of victims of sexual assault from unnecessary harassment is a laudable goal, the elimination of such a basic protection for the rights of the accused raises profound concerns." *Brandeis*, 177 F. Supp. 3d at 604-05. One-sided determinations are not known for their accuracy. Jane Roe deserves a reliable, accurate outcome as much as John Doe.

Ultimately, the ARC must decide whether Doe is responsible for violating UC's Code of Conduct: whether Roe's allegations against him are true. And in reaching this decision "[t]he value of cross-examination to the discovery of truth cannot be overemphasized." *Newsome*, 842 F.2d at 924. Allowing John Doe to confront and question Jane Roe through the panel would have undoubtedly aided the truth-seeking process and reduced the likelihood of an erroneous deprivation.

C.

UC has a strong interest both "in eliminating sexual assault on its campus and establishing a fair and constitutionally permissible disciplinary system." [*23] *Doe*, 860 F.3d at 370. And in defendants' favor, we have recognized that a constitutionally permissible disciplinary system need not follow the rules of evidence. *See Flaim*, 418 F.3d at 635. Cross-examination can "unnecessarily formalize school expulsion proceedings" precisely because it "impos[es] the additional burden on school administrators of applying, to some extent, the rules of evidence." *Newsome*, 842 F.2d at 925 n.4. UC's administrators are "in the business of education, not judicial administration." *Flaim*, 418 F.3d at 640. "To saddle them with the burden of overseeing the process of cross-examination (and the innumerable objections that are raised to the form and content of cross-examination) is to require of them that which they are ill-equipped to perform." *Newsome*, 842 F.2d at 926.

[**14] These concerns informed our decision to approve UC's procedure in *Doe v. Cummins*, issued a week after the district court enjoined UC from suspending plaintiff. *See* 662 F. App'x at 448. *Cummins* held that UC's practice of limiting cross-examination to preapproved written questions comported with due process even if the ARC panel "did not ask all of the questions [the accused students] submitted," and did not permit follow-up questions. *Id.* at 448. But that holding gets defendants only so far. Fear of "saddl[ing] school officials with the burden of overseeing [*24] . . . cross-examination" convinced the *Cummins* court that this "circumscribed form of cross-

examination" is sufficient when a student's accuser appears for the hearing. *See id.* (quoting *Newsome*, 842 F.2d at 926, brackets omitted). The court left open the possibility that UC's procedures may nonetheless violate due process as applied to a student whose accuser *fails to appear* for the hearing.[3] Sparing the ARC panel from having to navigate traditional cross-examination justifies the requirement for written preapproved questions, but it does not justify denying the opportunity to question an adverse witness altogether.

Defendants' better argument is that they cannot compel a witness (adverse or not) to attend the ARC hearing. UC's Student Code of Conduct does not require witnesses to attend the hearing, and even if it did, there is no guarantee the witness would show. Universities do not have subpoena power. What is more, UC refers to cross-examination as an alternative to hearsay evidence, suggesting that the latter cannot be introduced at a disciplinary hearing unless the accused student has an opportunity to conduct the former. While UC's concerns are not unfounded, both arguments lose sight [*25] of our limited holding in this case.

For one, defendants are not required to facilitate witness questioning at every nonacademic misconduct hearing. *Flaim*'s dictate is narrow: cross-examination is "essential to due process" only where the finder of fact must choose "between believing an accuser and an [**15] accused." 418 F.3d at 641. The ARC panel need not make this choice if the accused student admits the "critical fact[s]" against him. *Id.* Another relevant factor is that UC's allegations against Doe rested solely on Roe's statements to investigators. Cross-examination may be unnecessary where the University's case "d[oes] not rely on testimonial evidence" from the complainant. *See, e.g., Plummer*, 860 F.3d at 775-76.

For another, nothing in our decision jeopardizes UC's ability to rely on hearsay statements. *See Crook v. Baker*, 813 F.2d 88, 99 (6th Cir. 1987) ("It is clear that admission of hearsay evidence [at a school disciplinary proceeding] is not a denial of procedural due process."). Hearsay and its exceptions are delineated in the Federal Rules of Evidence, *see* Fed. R. Evid. 801(c), but a university student has "no right to [the] use of formal rules of evidence" at his disciplinary hearing. *Flaim*, 418 F.3d at 635 (citing *Nash v. Auburn Univ.*, 812 F.2d 655, 665 (11th Cir. 1987)). UC may still open the hearing with a Title IX report summary that includes the parties' "out-of-court" [*26] statements, and the ARC panel may still rely on those statements in deciding whether Doe is responsible for violating the Code of Conduct—it need not demand that Roe and Doe recite the evening's events from memory. We do not require schools to "transform [their] classrooms into courtrooms" to provide constitutionally adequate due process. *Jaksa*, 597 F. Supp. at 1250.

Plaintiff is likely to succeed on the merits of his due process claim not because defendants introduced hearsay evidence against him, but because the nature of that evidence posed a problem of credibility.[4] *See Flaim*, 418 F.3d at 641. Jane Roe claimed that John Doe engaged in specific acts without her consent, and John Doe replied that he did not. Although hearsay and credibility disputes often go hand in hand, use of hearsay does not itself trigger the right to question an adverse witness. Were it otherwise, the Medical College of Ohio would have violated Flaim's rights by expelling him on the basis of his "certified record of a recent felony conviction" (i.e., a hearsay record) without permitting him to cross-examine his arresting officer. *See id.* at 643; *see also* Fed. R. Evid. 803(22) (excluding evidence of a judgment of conviction [**16] from the general prohibition against the admission of hearsay). [*27] That is not *Flaim*'s holding, and it is not our holding here.

That said, we acknowledge that witness questioning may be particularly relevant to disciplinary cases involving claims of alleged sexual assault or harassment. Perpetrators often act in private, leaving the decision maker little choice but to weigh the alleged victim's word against that of the accused. Credibility disputes might therefore be more common in this context than in others. Arranging for witness questioning might also pose unique challenges given a victim's potential reluctance to interact with the accused student. *See Regents of the Univ. of Cal.*, 210 Cal. Rptr. 3d at 505. However, we emphasize that UC's obligations here are narrow: it must provide a means for the ARC panel to evaluate an alleged victim's credibility, not for the accused to physically confront his accuser.

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[3] The two *Cummins* plaintiffs also faced charges of sexual assault, but successfully appealed the results of their first ARC hearings to UC's Appeals Administrator. After a second round of hearings, UC found each student "responsible" for violating the Student Code of Conduct. It suspended one for a three-year period and placed the other on disciplinary probation. *Cummins*, 662 F. App'x at 438-43. The latter plaintiff argued UC violated his due process rights because his alleged victim did not attend his second ARC hearing, denying him the opportunity to question her through the panel. *Id.* at 448. We found no violation, however, because the accused student had an opportunity to conduct cross-examination at his first hearing, and because UC gave him a lesser punishment—disciplinary probation rather than suspension. *Id. Cummins* did not address whether a student facing suspension who is denied even this modified form of cross-examination suffers a violation of due process.

[4] In arguing against UC's use of Roe's hearsay statements, plaintiff assumes this evidence is necessarily harmful to his defense. Yet Doe's intended strategy is "to question Jane Roe about inconsistencies in her [prior] statements" in order to demonstrate her claimed lack of credibility. He cannot do that if her previous statements are not presented at the hearing.

The University has procedures in place to accommodate this requirement. A month before the ARC hearing, Mitchell informed Doe and Roe that they could "participate via Skype . . . if they could not attend the hearing."[5] Doe did not object to Roe's participation by Skype, and he does not object to this practice on appeal. To the contrary, the record suggests that he or one or more of the ARC panelists [*28] in fact appeared at the hearing via Skype. What matters for credibility purposes is the ARC panel's ability to assess the demeanor of both the accused and his accuser. Indisputably, demeanor can be assessed by the trier of fact without physical presence, especially when facilitated by modern technology. *See Craig*, 497 U.S. at 849-50, 857. That fact mitigates UC's administrative burden.

D.

We are sensitive to the competing concerns of this case. "The goal of reducing sexual assault[] and providing appropriate discipline for offenders" is more than "laudable"; it is necessary. *Brandeis*, 177 F. Supp. 3d at 572. But "[w]hether the elimination of basic procedural [**17] protections—and the substantially increased risk that innocent students will be punished—is a fair price to achieve that goal is another question altogether." *Id.*

Here, John Doe's private interest is substantial, and the risk of erroneous deprivation under the procedures UC followed at his ARC hearing is unacceptably high. Allowing defendants to pose questions to witnesses at certain disciplinary hearings may impose an administrative burden on UC. Yet on the facts here, that burden does not justify imposition of severe discipline without any credibility assessment of the accusing student. [*29] Accordingly, Doe has demonstrated a strong likelihood of success on the merits of his due process claim. *Planet Aid*, 782 F.3d at 323. This "often . . . determinative" factor weighs in favor of preliminary relief. *Schimmel*, 751 F.3d at 430.

V.

The second factor in our preliminary-injunction inquiry asks whether the movant is likely to suffer irreparable harm in the absence of the injunction. *S. Glazer's*, 860 F.3d at 852. In Doe's case, the district court found that he would.

"When constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002). Defendants' characterization of Doe's injury as "speculative or unsubstantiated" does not rebut that presumption. *Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006) (citation omitted). Were we to vacate the injunction, Doe would be suspended for a year and suffer reputational harm both on and off campus based on a finding rendered after an unfair hearing. Accordingly, this factor weighs in favor of preliminary relief.

Defendants do not challenge the district court's findings regarding the third factor—that the preliminary injunction will not harm others.

But they do contest the fourth: the district court's finding that the preliminary injunction serves the "public good." *Doe*, 223 F. Supp. 3d at 712. In rejecting UC's claim that it has an interest in regulating and maintaining the [*30] integrity of its disciplinary system, the district court [**18] merely reiterated that "part of Plaintiff's claim is that UC failed to follow the procedures outlined in its own disciplinary system"—namely, the requirement that Roe's statement to the ARC panel be notarized. *See id.* That UC did so is irrelevant.

A school's departure from its own hearing rules amounts to a due process violation only when the departure "results in a procedure which itself impinges on due process rights." *Flaim*, 418 F.3d at 640 (quoting *Bates v. Sponberg*, 547 F.2d 325, 329-30 (6th Cir. 1976)). The Committee's review of Roe's non-notarized statement did not "result in a procedure which itself impinge[d]" upon plaintiff's right to a fair hearing. Plaintiff's rights are dictated by the Constitution, "not internal school rules or policies." *Cummins*, 662 F. App'x at 445 n.2 (citing *Heyne*, 655 F.3d at 570, and *Hall v. Med. Coll. of Ohio*, 742 F.2d 299, 309 (6th Cir. 1984)).

The district court may have been nodding to the principle that it is always in the public's interest to prevent a violation of an individual's constitutional rights, which, it is. *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016). At the same time, while the public has a competing interest in the enforcement of Title IX, that interest can never override individual constitutional rights. U.S. Const. art. VI, cl.2. This factor is, at most, neutral.

VI.

On balance, the preliminary injunction factors favor the grant of preliminary [*31] relief. Accordingly, we conclude that the district court did not abuse its discretion in enjoining John Doe's suspension. For these reasons, we affirm the order of the district court.

[5] UC's Code of Conduct does not define the conditions under which a student might be "unable to attend" an ARC hearing. In any event, this is an individual determination best left to defendants. *See Horowitz*, 435 U.S. at 91 (the niceties of "public education . . . [are] committed to the control of state and local authorities" (citation omitted)); *see also Goss*, 419 U.S. at 578. In the present case, there was no finding that Jane was unable to attend the hearing.