IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

JOHN DOE, Plaintiff, v. OBERLIN COLLEGE, Defendant.	)	Case No. 1:17-cv-01335 Judge Solomon Oliver, Jr.

JOHN DOE'S OPPOSITION TO DEFENDANT OBERLIN COLLEGE'S MOTION TO DISMISS PLAINTIFF'S COMPAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authority

STATEMENT OF THE ISSUES

1. Whether Oberlin breached its contract with John Doe when (among other things) it concluded, based *solely* on Jane Roe's statement, "I am not sober right now," that he should have concluded she was "incapacitated"—which Oberlin defines as being so "extremely drunk or extremely high" that she was "unable to control [her] body or no longer understand[] who [she was] with or what [she was] doing."

2. Whether the following facts, among others, support a "minimal plausible inference of gender bias" when all reasonable inferences are drawn in their favor:

   - That the chief architect of Oberlin's Sexual Misconduct Policy (the "Policy"), Meredith Raimondo, has stated that she implements it "as a feminist committed to survivor-centered processes."

   - That Oberlin had come under "systemic investigation" by the Education Department's Office for Civil Rights ("OCR") for its handling of sexual assault just three months before Doe was charged.

   - That Oberlin found every accused student put through its formal resolution proces, all or most of whom were male, responsible for sexual misconduct in that same academic year.

   - That Oberlin assigned Doe an advisor who would later retweet, just two weeks after Doe's hearing: "To survivors everywhere, we believe you."

3. Whether it is foreseeable that private colleges will have to discipline their students and that doing so carries significant consequences to them, such that they owe their students a common law duty of care in doing so.

4. Whether Oberlin adopted an unreasonable interpretation of its Policy in denying Doe's appeal of the severity of his sanction.

SUMMARY OF THE ARGUMENT

John Doe was expelled from Oberlin College ("Oberlin" or the "College") after it said he sexually assaulted Jane Roe, despite overwhelming evidence to the contrary. Like most universities, Oberlin does not bar its students from engaging in drunken sex; rather, its Policy forbids sexual contact only when one's partner reaches an extreme level of intoxication known as "incapacitation," "a state where an individual . . . lack[s] conscious knowledge of the nature of the act . . . and/or is physically helpless.'" Compl. ¶ 20 (quoting Policy at 20-21). Incapacitation "'describes a level of intoxication in which a person is unable to control their body or no longer understands who they are with or what they are doing.'" Compl. ¶ 21 (quoting website of Oberlin's Office of Equity, Diversity and Inclusion). It is a state of being "*extremely* drunk or *extremely* high." *Id.* (emphasis added). To violate the Policy, a student must know, or reasonably ought to have known, that his partner was in that extreme state. Compl. ¶ 22.

Doe has alleged—and amply supported with facts—that Oberlin uncovered almost no evidence that Roe was ever incapacitated on the night she had sex with John Doe, *id.* ¶ 178, and no evidence whatsoever that, if she were, John Doe had any way of knowing that, *id.* ¶ 179. On that latter point there is no credible room for dispute: **Jane Roe herself, at her sexual misconduct hearing, expressly testified that she manifested *no* outward signs of intoxication to Doe during the 45 minutes that she and Doe talked, kissed, and had intercourse**. *Id.* Her testimony—*hers*, not his—was that after those 45 minutes, she told him, "I am not sober right now," and that this was literally the only indication to him of any kind that she was less than completely sober. *Id.* Despite that, and without ever explaining how "I am not sober right now" should have told John Doe that Jane Roe was *incapacitated*, Oberlin said that Roe was incapacitated and Doe should have known it, and imposed upon him the most severe sanction it could impose. *Id.* ¶ 180.

In doing so, Oberlin violated Doe's common law and statutory rights. It violated three protections Oberlin contractually promised Doe in the Policy: to punish him only if his partner were incapacitated and he had reason to know it, *id.* ¶¶ 6, 20-22; to punish him only if a *preponderance* of the evidence showed those things, *id.* ¶¶ 182-86; and to reduce to writing the rationale behind any such findings, *id.* ¶¶ 187-90. It lacked any discretion to violate those provisions. The Motion must therefore be denied as to Doe's breach of contract claim (Count I).

The Complaint alleges a host of facts showing that gender bias played a role in Doe's expulsion, including that the Policy's architect and chief implementer, Meredith Raimondo, openly stated that she approached that work "as a feminist committed to survivor-centered processes" less than a year before Doe's investigation, Compl. ¶ 55, and that Oberlin came under active investigation by OCR just three months before that investigation, *id.* ¶ 48; *Doe v. Cummins*, 662 Fed. Appx. 437, 453 (6th Cir. 2016) (active investigation by OCR supports inference of gender bias). These facts and others amply support the "minimal plausible inference" of gender bias required to proceed under Title IX. *Doe v. Columbia Univ.*, 831 F.3d 46, 56 (2d Cir. 2016); *see Doe v. Case Western Reserve Univ.*, No. 1:17-cv-414, 2017 WL 3840418 at **6-7 (N.D. Ohio Sept. 1, 2017) (denying motion to dismiss Title IX claim based on similar allegations). The Motion should be denied as to Count III as well.

Doe's negligence claim (Count IV) survives because Oberlin has an independent duty, apart from any contractual promises it makes, not to expel students in an arbitrary manner. *Jeffers v. Olexo*, 43 Ohio St. 3d 140, 142 (1989) (discussing elements of duty under Ohio common law); *Doe v. Univ. of the South*, No. 4:09-CV-62, 2011 WL 1258104 at *21 (E.D. Tenn. 2011) (denying school summary judgment on negligence claim brought by student disciplined

for sexual assault). It breached that duty when it instituted a regime that invariably finds respondents guilty and expelled John Doe without basis. Compl. ¶¶ 35, 54, 208, 214, 218-23.

Finally, John Doe states a claim for breach of the covenant of good faith and fair dealing (Count II) because that claim relies on contract provisions separate from the ones that give rise to his breach of contract claim. *Id*. ¶¶ 195-200. As he explained in his Complaint, Oberlin's reasoning in denying his appeal of the severity of his sanction adopted an unreasonable interpretation of the Policy that effectively nullified any right to appeal. *Id.* ¶¶ 196-200.[1]

FACTUAL ALLEGATIONS

A. The Incident

In December 2015, John Doe and Jane Roe met at a party and danced together, then had consensual sex the next morning. *Id*. ¶ 64. They had little interaction after that until the morning of February 28, 2016, *id.* ¶ 65, when Doe texted Roe to see what she was doing, *id.* ¶ 67. They texted back and forth for 30 minutes and Roe asked if she could come to Doe's room. *Id*. Roe's responses were prompt and coherent and she made just a single typo. *Id.*

Minutes before going to Doe's room, Roe was with a friend who knew her well. *Id.* ¶ 84. That friend asked her, "You're good?" when she learned Roe intended to go to Doe's room, and was satisfied with Roe's answer: "Yeah." *Id*. ¶¶ 69, 84, 136. She then watched Roe "mosey" to Doe's room by herself. *Id.* ¶ 84. Roe testified that she exhibited no outward signs of intoxication in Doe's room; she testified to being coherent, in control of her body, and responding in real time to what was taking place. *Id.* ¶¶ 85-98. When asked how Doe might

[1] To the extent that Count II relies on the same contract provisions relied on in Count I, John Doe voluntarily dismisses Count II. John Doe also voluntarily dismisses Count V, his claim for negligent infliction of emotional distress.

have known she was incapacitated, she pointed to just a single thing: her statement, "I am not sober right now." *Id.* ¶ 95.

Before the hearing, Roe consistently testified that, after engaging in intercourse for some time, Doe specifically asked her to perform oral sex on him. She told that to friends after the incident, *id.* ¶ 164, she told it to Oberlin's investigator, Josh Nolan, when he interviewed her, *id.* ¶¶ 95, 163, and she wrote it in her journal on March 1, *id.* ¶ 114. At the hearing, however, when she was directly asked whether Doe had requested that she perform oral sex, she responded, "No." *Id.* ¶ 121. She then claimed, *for the first time*, that Doe had grabbed her neck and forced her mouth onto his penis. *Id.* At the hearing, Mr. Nolan identified this change in her testimony as the sole contradiction made by either party vis-à-vis their investigation testimony. *Id.* ¶ 144.

A friend of Roe's testified that, after the incident, Roe was "'disappointed and upset" that she had chosen to hook up with Doe as she was interested in someone else. *Id.* ¶¶ 111, 135. That friend testified to no obvious outwards signs of Roe's intoxication and described a lengthy, coherent interaction inconsistent with any notion that Roe was incapacitated. *Id.* ¶¶ 112, 133-34.

The evidence collected in the investigation of Roe's claims, and the testimony given at the hearing, thus showed that no one who saw Roe that night thought she was incapacitated before she went to Doe's room, while she was in Doe's room, and immediately after she left Doe's room. And Roe's hearing testimony, which contradicted her consistent testimony before the hearing on a critical fact, showed that she was not a credible witness. Yet the College nevertheless found that Roe was incapacitated and Doe should have known that, and expelled him. It did so because of the unfair and gender-biased regime Oberlin has set up to resolve claims of sexual misconduct.

B. Gender Bias at Oberlin

Oberlin's Title IX enforcement regime, particularly at the time that the charges against Doe were investigated and adjudicated, was rife with gender bias. The Complaint alleges a number of facts showing that Doe's expulsion was the product of gender bias:

- The current Policy was created when a female student publicly complained that her male assailant wasn't punished severely enough and the process took too long. *Id.* ¶ 208.
- Oberlin responded by appointing a task force that spent 18 months revamping its sexual misconduct enforcement regime. *Id.* ¶¶ 37-39.
- The chief architect of the new Policy, Meredith Raimondo, served as Oberlin's first Title IX Coordinator under that policy, a position she held until July of 2016, after which time she supervised the College's interim Title IX Coordinator. *Id.* ¶ 38.
- While she was Title IX Coordinator, Ms. Raimondo publicly stated, "I come to this work as a feminist committed to survivor-centered processes," betraying a gendered view of Title IX enforcement and of the "survivors" the process was meant to benefit. *Id.* ¶ 55.
- Conversely, upon information and belief, during the academic year in which Doe's investigation began, the vast majority of sexual misconduct respondents at Oberlin were male, *id.* ¶¶ 55, 209, a fact that Ms. Raimondo would have expected when she designed and implemented a process meant for survivors.
- Ms. Raimondo has said that one of the primary goals of Oberlin's feminism-inspired enforcement regime is the elimination of "rape culture," *id.* ¶ 39, showing that term has gendered overtones at Oberlin.
- The chief characteristic of the fight against "rape culture" at Oberlin, as evidenced by faculty resource guides, its Counseling Center, and student opinion leaders, is an unwavering belief in the truth of sexual misconduct allegations. *Id.* ¶¶ 40-47.
- Three months before Roe accused Doe of sexual assault, Oberlin came under investigation by OCR based on its handling of a sexual assault allegation on its campus, resulting in "a systemic investigation" of the College's response to claims of sexual misconduct. *Id.* ¶ 48.
- It was widely known at the time that OCR's head, Catherine Lhamon, was enforcing a gendered view of sexual assault, resulting in pressure upon schools to find in favor of women accusing men of sexual assault. *Id.* ¶¶ 49-51. It was also widely known that she was threatening to revoke schools' federal funding if they failed to comply. *Id.* ¶ 50.

- In the academic year in which that investigation was opened (and in which John Doe was accused of sexual assault), **every single respondent put through Oberlin's formal adjudication process was found responsible on at least one charge.** Most of those respondents, if not all of them, were men. *Id.* ¶¶ 55, 209.

- When Doe lamented to Ms. Raimondo that his process had far exceeded Oberlin's timelines for resolution of complaints, and explained the extreme psychological and physical toll it was taking on him, his plea fell on deaf ears, even though a female student's similar complaint had led to a complete revamping of the Policy. *Id.* ¶¶ 76-77.

- When Doe asked for an advisor to assist him at his hearing, he was given someone who shared Ms. Raimondo's views on the need to credit the allegations of sexual assault claimants **and even retweeted the following statement just *two weeks* after Doe's hearing: "To survivors everywhere, we believe you."** *Id.* ¶¶ 56-60, 118-19.

- John Doe was found responsible for assaulting Jane Roe despite overwhelming evidence to the contrary and her contradictory testimony at the hearing. *Id.* ¶¶ 176-86.

ARGUMENT

I. THE COMPLAINT STATES A CLAIM FOR BREACH OF CONTRACT.

John Doe's Complaint states an obvious claim for breach of contract. Under Ohio law, his relationship to the College is contractual in nature, and the Policy and other materials the College publishes for its students supply the terms of the contract. *Savoy v. Univ. of Akron*, 15 N.E.3d 430, 436 (Ohio Ct. App. 2014).[2] As explained above, and more fully in the Complaint, the College violated three provisions of the Policy in expelling Doe: It failed to apply its definition of "incapacitation" to Roe's level of sobriety and Doe's knowledge of her sobriety, *id.* ¶¶ 176-81; it failed to find Doe responsible only if a preponderance of evidence showed it, *id.* ¶¶ 182-86; and it then failed to explain how Roe's lone statement, "I am not sober right now," could have communicated to Doe that she was incapacitated, *id.* ¶¶ 187-90.

[2] Ohio adheres to the "age-old maxim" of contract law that ambiguous contract language is construed against the party who drafted it and in favor of the party who did not. *Central Realty Co. v. Clutter*, 62 Ohio St. 2d 411, 413 (1980); *see Mangla v. Brown Univ.*, 135 F.3d 80, 83 (1st Cir. 1991) (applying similar maxim to interpretation of contracts based on student handbooks). Any ambiguity in the contractual provisions at issue must be construed in favor of John Doe.

Oberlin makes two moves in an effort to sidestep the contract claim. It first argues that courts do not interfere with a school's enforcement of disciplinary measures absent an abuse of discretion. Docket No. 10-1 at 15. Even assuming that applies to contractual promises of the kind at issue here, Doe has pled facts that overwhelmingly show just such abuse. Doe has pled, with ample support, that there was almost no evidence of Roe's incapacitation at all, and certainly no evidence that Doe could have been aware of it. Compl. ¶¶ 176-81.[3] And it is undisputed that the College never explained how Roe's lone statement could lead anyone to conclude she was *incapacitated*—which is far more under Oberlin's policy than just "not sober." *Id.* ¶¶ 187-91. Oberlin cannot simply disregard contract terms at will.

Oberlin's second move is a tacit but damning admission that its finding against Doe is untenable: the Motion actually relies, in two places, on Roe's testimony at the hearing that Doe did not ask her to perform oral sex on him, but instead forced her to do so.[4] *But the panel didn't find him guilty of doing that*. If it had, it would have been required—pursuant to the plain text of the Policy—to have said so in its decision letter. Compl. ¶ 32. That Oberlin feels the need to rely on something that even *the panel itself* chose not to credit shows that its *actual* decision breached its contract with Doe.

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[3] Doe's claim mirrors the contract claim in *King v. DePauw University*, a case that Oberlin itself relies on. The student there was disciplined for having sex with a purportedly incapacitated female student. No. 2:14-cv-70-WTL, 2014 WL 4197507, at *1 (S.D. Ind. 2014). The evidence showed the complainant was intoxicated that night, and—unlike here—possibly even incapacitated. *Id.* at *12. And the plaintiff, unlike Doe, *knew* that the complainant was intoxicated, but it was "essentially uncontroverted" that he didn't know how much she'd had to drink or how she normally behaved. *Id.* The court concluded not only that he had stated a claim for breach of contract but that his case was strong enough to merit a preliminary injunction. *Id.*

[4] *See* Docket No. 10-1 at 16 (arguing that Oberlin properly applied its definition of incapacitation because Roe said she wasn't sober *and* that she "physically resisted Plaintiff's efforts to force her to perform oral sex); *id.* at 18 (using same reasoning to argue that the preponderance of the evidence supported its decision).

II. THE COMPLAINT STATES A CLAIM FOR A TITLE IX VIOLATION.

As Oberlin acknowledges, *see* Docket No. 10-1 at 7, federal courts around the country, including this Court, *see Doe v. Case Western Reserve Univ.*, 2017 WL 3840418, at *4, have recognized the "erroneous outcome" theory of Title IX liability set out by the Second Circuit in *Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994).[5] Under this theory, a student may bring a claim alleging that, as a result of gender bias, "he was innocent and wrongfully found to have committed an offense." *Yusuf*, at 35 F.3d at 715. A student-plaintiff sufficiently states such a claim where he alleges (1) "particular facts sufficient to cast some articulable doubt on the outcome of the disciplinary proceeding," and (2) "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." *Id.* John Doe's Complaint satisfies both prongs and therefore adequately pleads a Title IX claim.

A. John Doe Has Cast Substantial Doubt on the Accuracy of the Outcome.

As the Second Circuit explained in *Yusuf*, "the pleading burden" with respect to this first element of an erroneous outcome claim "is not heavy." 35 F.3d at 716. It may be satisfied by "alleg[ing] particular evidentiary weaknesses behind the finding of an offense such as a motive to lie on the part of a complainant or witnesses, particularized strengths of the defense, or other reason to doubt the veracity of the charge. A [student-plaintiff's] complaint may also allege particular procedural flaws affecting the proof." *Id.*

Doe's Complaint sails over this low bar. He alleges more than just "evidentiary weaknesses" in the case against him: He maintains there was *no actual evidence* that Roe was incapacitated or that he could have known it if she were. Compl. ¶¶ 7-10. He pleads facts

[5] The College also discusses whether Doe's Complaint sufficiently states a "selective enforcement" claim under *Yusuf*. See Docket No. 10-1 at 14-15. Doe's Complaint, however, does not press such a claim.

suggesting "a motive to lie on the part of [the] complainant": her regret at having slept with Doe while being interested in someone else. *Id.* ¶¶ 109-11, 184. And he alleges "procedural flaws affecting the proof" in the form of Oberlin's misapplication of various provisions in its Policy. He has identified convincing evidence of his innocence and Roe's lack of credibility. Such allegations more than suffice to meet the low burden set by the first element. *See, e.g.*, *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 187 (D.R.I. 2016). The College does not argue otherwise.

B. John Doe Has Pled Facts That Amply Support an Inference of Gender Bias.

The College instead turns its attention to the second prong of an erroneous outcome claim: the causal link between gender bias and the adverse outcome. Docket No 10-1 at 8-14. Despite being the lengthiest section in its brief, it studiously avoids discussing the only published circuit court decision on the topic: the Second Circuit's decision in *Doe v. Columbia University*. The omission is glaring, because *Columbia University* essentially brought *Yusuf*—the source of the erroneous outcome theory—into the post-*Iqbal* world. It took earlier courts to task for requiring too high a pleading standard for Title IX claims, and courts since then are increasingly denying motions to dismiss such claims.[6]

John Doe has a unique combination of evidence supporting an inference that his expulsion resulted from gender bias. *See* pp. 5-6, *supra*. He has direct statements from the regime's creator and enforcer about the influence of gender on the process. Compl. ¶ 55. He has evidence that women complaining about the hardships in a sexual misconduct proceeding are

[6] *See, e.g.*, *Doe v. The Trustees of the University of Pennsylvania*, No. 2:16-cv-05088-JP, 2017 WL 4049033 (E.D. Pa. Sept. 13, 2017); *Doe v. Case Western Reserve Univ.*, 2017 WL 3840418 at **6-7 (N.D. Ohio Sept. 1, 2017); *Doe v. Ohio State Univ.*, 239 F. Supp. 3d 1048, 1073 (S.D. Ohio 2017); *Doe v. Lynn Univ., Inc.*, 235 F. Supp. 3d 1336, 1340-41 (S.D. Fla. 2017); *Doe v. Amherst College*, 238 F. Supp. 3d 195, 223 (D. Mass. 2017); *Neal v. Colorado State Univ.-Pueblo*, 2017 WL 633045 at *14 (D. Colo. Feb. 16, 2017); *Collick v. William Patterson Univ.*, 2016 WL 6824374 at **11-12 (D.N.J. Nov. 17, 2016).

treated better than men are. *Id.* ¶¶ 76-77. He has evidence of a campus ethos, consistent with the goals of the Policy, that demands belief in all claims of sexual assault. *Id.* ¶¶ 39-47. He has evidence of a pattern of decisionmaking in academic year 2015-16. *Id.* ¶ 55. He has evidence that at the time of his investigation, Oberlin was under the active watch of OCR. *Id.* ¶ 48. He was appointed an advisor who would retweet, just two weeks after his hearing, "To survivors everywhere, we believe you." *Id.* ¶ 58. And he has an expulsion that is completely contrary to the evidence before his hearing panel. Plaintiffs in most Title IX cases have some of those sticks; John Doe has the whole bundle. *See Doe v. Case Western Reserve Univ.*, 2017 WL 3840418 at **6-7 (denying motion to dismiss Title IX claim where plaintiff had most of the same "sticks").

1. Erroneous Outcome Claims May Proceed Upon a "Minimal Plausible Inference of Discriminatory Intent."

In *Columbia University*, the Second Circuit held that the sufficiency of a student-plaintiff's complaint alleging gender-bias under Title IX is to be analyzed in light of the burden-shifting framework set out by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for employment discrimination cases under Title VII of the Civil Rights Act of 1964. 831 F.3d at 53-56. As the Second Circuit explained, just as that framework creates a "temporary presumption" of discrimination that "reduces the facts a plaintiff would need to *show*" to survive summary judgment, it "also reduces the facts needed to be pleaded under *Iqbal*" to survive a motion to dismiss. *Id.* at 56 (quoting *Littlejohn v. City of New York*, 795 F.3d 297, 310 (2d Cir. 2015)). Thus, a complaint under Title IX, alleging that the plaintiff was subjected to discrimination on account of sex in the imposition of school discipline, is sufficient with respect to the element of discriminatory intent, like a complaint under Title VII, if it pleads specific facts that support "a minimal plausible inference of discriminatory intent." *Id.*; *Littlejohn*, 795 F.3d at

311 ("The facts required by *Iqbal* . . . need only give plausible support to a minimal inference of discriminatory motivation.").[7] Applying this discrimination-specific pleading standard, the Second Circuit in *Columbia University* reversed the district court's dismissal of the student's erroneous outcome claim. *See* 831 F.3d at 57-58; *see also Yusuf*, 35 F.3d at 715 (discriminatory intent need only be "a motivating factor in the decision to discipline").

The Sixth Circuit has yet to consider whether the *McDonnell Douglas* framework should affect the pleading standard in Title IX cases alleging gender discrimination in the imposition of school discipline. But the same reasons that led the Second Circuit to apply that framework obtain equally in the Sixth Circuit. First, "[i]n several prior cases," the Second Circuit had "applied Title VII's framework and principles to Title IX claims." *Doe v. Columbia Univ.*, 831 F.3d at 55. The Sixth Circuit has as well. *See, e.g.*, *Tumminello v. Father Ryan High Sch., Inc.*, 678 Fed. App'x 281, 284 (6th Cir. 2017) ("Title VII jurisprudence . . . is often consulted when interpreting and applying Title IX"); *Bonnell v. Lorenzo*, 241 F.3d 800, 810 n. 6 (6th Cir. 2001) (same). In fact, in both of those cases, the Sixth Circuit relied on decisions from the Second Circuit in concluding that Title VII standards should govern Title IX claims. *See Tumminello*, 678 Fed. App'x at 284 (relying on *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 89 (2d Cir. 2011) for proposition that a "'Title IX sex discrimination claim requires the same kind of proof required in a Title VII sex discrimination claim'")); *Bonnell*, 241 F.3d at 810 (relying on *Murray v. N.Y. Univ.,* 57 F.3d 243, 249 (2d Cir.1995) for same proposition).

[7] As the *Columbia University* court noted, the "minimal evidence" needed to obtain the presumption at summary judgment in the employment context "can be satisfied by as little as a showing that the position sought by the plaintiff remained open after the plaintiff's rejection and that the employer continued to seek applications from persons of plaintiff's qualifications." *Doe v. Columbia University*, 831 F.3d at 54 n. 6 (citing *McDonnell Douglas*, 411 U.S. at 802).

Second, the *Columbia University* court noted that the *Yusuf* decision, the source of the "erroneous outcome" theory, itself "made clear that Title VII cases provide the proper framework for analyzing Title IX discrimination claims" like the one in that case. *Doe v. Columbia Univ.*, 831 F.3d at 55-56. *Yusuf* expressly "adopted Title VII's requirement of proof of discriminatory intent" and stated that "'allegations of a causal connection in the case of university disciplinary cases can be of the kind that are found in the familiar setting of Title VII cases.'" *Id.* (quoting *Yusuf*, 35 F.3d at 714-16). This Court should apply the holding in *Columbia University* when judging the sufficiency of Doe's erroneous outcome claim.

2. Doe's Allegations Amply Support the Required Minimal Inference of Gender Bias.

Doe's Complaint alleges a number of provable, non-conclusory facts from which a reasonable factfinder could draw this "minimal plausible inference" of gender discrimination required to overcome a motion to dismiss. Such facts often fall into one or more of three categories recognized by Title IX decisions as suggesting gender bias: (1) "statements by pertinent university officials," *Yusuf*, 35 F.3d at 715; (2) "patterns of decisionmaking that . . . tend to show the influence of gender," *id.*; and (3) allegations suggesting that the university sought to punish male students to alleviate pressure being exerted on the university by the government, the media, or the public, *see, e.g.*, *Doe v. Cummins*, 662 Fed. Appx. at 453 (existing OCR investigation gives rise to inference of gender bias); *Doe v. Columbia Univ.*, 831 F.3d at 58 (public pressure gave rise to inference of gender bias).

Columbia University illustrates what it means to plead the "minimal plausible inference" necessary to survive a motion to dismiss. The plaintiff there alleged just one source of gender bias: public pressure exerted upon the school, and upon its Title IX investigator, to respond aggressively to claims of sexual assault made by females against males. 831 F.3d at 58. "There

is nothing implausible or unreasonable," the court held, "about the Complaint's suggested inference that the panel adopted a biased stance in favor of the accusing female and against the defending male varsity athlete in order to avoid further fanning the criticisms that Columbia turned a blind eye to such assaults." *Id.* Doe's many allegations of gender bias, *see* pp. 5-6, *supra*, support at least as strong of an inference.

Just three weeks ago, a different court in this District denied a university's motion to dismiss in a case where the allegations of gender bias mirror Doe's in significant respects. In *Doe v. Case Western University*, the plaintiff alleged, as to gender bias:

- that the university was aware that sexual misconduct complaints are disproportionately lodged by women against men;
- that the university recognized general pressure from the federal government to discipline males accused of sexual misconduct;
- that the Deputy Title IX Coordinator who investigated the claims had made gender-biased statements in her doctoral dissertation;
- that after she assumed that role, the university's enforcement practices changed, seeing an increase in the number of reported forcible sex offenses; and
- that the complainant's accusations were accepted at face value despite her inconsistent statements, among a few others.

2017 WL 3840418 at **6-7.

Doe makes those same allegations, but with added force. Doe pleads not just general pressure from the federal government, but the existence of an active OCR investigation against Oberlin, initiated just months before his charges. Compl. ¶ 48. Doe proffered gender-biased statements from the *architect* of the Policy and its *chief* implementer, who additionally interviewed him about the allegations, was in turn interviewed by the investigator, and who did nothing when Doe was in anguish as the process dragged on. *Id.* ¶¶ 55, 76, 79, 212. Doe also maintains that most of Roe's allegations were accepted at face value despite the contradictions in

her testimony. *Id.* ¶¶ 184-85. Doe further alleges facts that the plaintiff in *Case Western Reserve University* does not, such as the differential treatment he received as his process dragged on, *id.* ¶¶ 76-77, the existence of a one-sided campus ethos fostered by Ms. Raimondo, *id.* ¶¶ 39-47, and a clear "pattern of decisionmaking" against male respondents, *id.* ¶¶ 12, 52-54. His complaint supports at least a "minimal plausible inference of discriminatory intent."

3. The College's Efforts to Explain Away Its Gender Bias Fail.

The College argues in vain that Doe's allegations do not show gender bias. Its only response to Ms. Raimondo's statement that she drafted and enforces the Policy "as a feminist committed to survivor-centered processes," Compl. ¶ 55, is that feminism seeks "'*equality* of the sexes.'" Docket No. 10-1 at 9 (quoting *Feminism Definition*, Merriam-Webster.com). True enough, but it does so through gendered means, as that very same dictionary shows. Its second definition of "feminism" is "organized activity on behalf of women's rights and interests."[8] The end may be gender-neutral, but the means decidedly are not. What matters in a Title IX claim is not whether gendered actions are borne from an evil motive, but simply whether "a policy of bias favoring one sex over the other in a disciplinary dispute" has been adopted, "even temporarily," no matter the reason. *Doe v. Columbia Univ.*, 831 F.3d at 58 n. 11.[9]

The College tries to argue that public pressure and pressure from the Education Department's Office for Civil Rights (OCR) are "repeatedly rejected by the courts" as evidence of gender bias. Docket No. 10-1 at 10-12. But in *Doe v. Cummins*, the Sixth Circuit concluded

[8] *See* https://www.merriam-webster.com/dictionary/feminism (last visited Sept. 9, 2017).

[9] The College additionally suggests there's no gender bias because Ms. Raimondo is not alleged to have "engaged in any conduct during Plaintiff's disciplinary process that demonstrates bias against males." Docket No. 10-1 at 9. But courts do not draw inferences only from statements made during a plaintiff's proceeding; gender bias is equally inferred from statements made before the initiation of any charges. *See, e.g.*, *Doe v. Case Western Reserve Univ.*, 2017 WL 384018 at *6; *Doe v. Washington and Lee Univ.*, 2015 WL 4647996 at *10 (W.D. Va. 2015).

otherwise. It distinguished allegations of nationwide pressure from OCR directed generically at all schools from the targeted pressure that comes with an active OCR investigation or public criticism of the school's handling of a prior Title IX proceeding. 662 Fed. App'x at 453. The former, the court said, is the kind of "conclusory allegation" that, "without more, is insufficient to create a plausible claim of gender bias." *Id.* But the latter two are precisely the kind of "supporting facts" that would allow for a plausible inference of gender bias, but which the plaintiffs in *Cummins* simply "d[id] not allege." *Id.* *Cummins* makes clear that targeted public pressure and active OCR investigations support an inference of gender bias.

In the wake of *Columbia University* and *Cummins*, a number of district courts have held that targeted public pressure and active OCR investigations support an inference of gender bias, contrary to Oberlin's memorandum. *See Doe v. The Trustees of the University of Pennsylvania*, No. 2:16-cv-05088-JP, 2017 WL 4049033 at *16 (E.D. Pa. Sept. 13, 2017) (two newspaper articles highlighting school's handling of assault allegations supported inference of gender bias); *Doe v. Miami Univ.*, -- F. Supp. 3d --, 2017 WL 1154086 at *9 and *9 n. 5 (S.D. Ohio March 28, 2017) (distinguishing generic national pressure from OCR, which cannot support inference of bias, from targeted public pressure or existing OCR investigation, which can);[10] *Doe v. Ohio State Univ.*, 239 F. Supp. 3d 1048, 1073 (S.D. Ohio 2017) (pressure and publicity from lawsuit filed two months before investigation supported inference of gender bias).[11]

[10] Oberlin itself relies on this case. *See* Docket No. 10-1 at 11.

[11] *See also Doe v. Lynn Univ., Inc.*, 235 F. Supp. 3d 1336, 1340-41 (S.D. Fla. 2017) (media attention from school security's decision not to charge different student with misconduct in February 2015 supported inference of gender bias against plaintiff seven months later); *Doe v. Amherst College*, 238 F. Supp. 3d 195, 223 (D. Mass. 2017) (allegation that school punished plaintiff to appease student movement pushing "to change the way it handled sexual assault allegations" sufficient to establish inference of gender bias); *Doe v. Columbia Univ.*, 831 F.3d at 58 (local pressure supported inference of gender bias); *see also Wells v. Xavier*, 7 F. Supp. 3d at

Oberlin tries to deflect the fact that, as of February 2016, it had found every student put through its formal resolution process—most, if not all, of whom are believed to be men, Compl. ¶ 55—responsible for at least one charge, by maintaining that Oberlin "is 'not responsible for the gender makeup of those who are accused *by other students* of sexual misconduct[.]'" Docket No. 10-1 at 12 (citing *King v. DePauw Univ.*, 2014 WL 4197507, at *10). That's both true and irrelevant. Oberlin, and Ms. Raimondo in particular, *does* have control over which students are sent through its formal resolution process, Compl. ¶ 27, and it's that process that, in 2015-16, inevitably meant a finding of responsibility. But even if that weren't true, the fact that men were invariably found guilty at the time the charges against Doe were investigated establishes the kind of "pattern[] of decision making" that "tend[s] to show the influence of gender. *Yusuf*, 35 F.3d at 715.[12] The fact that Oberlin came under OCR investigation in the same academic year that this pattern emerged further lends itself to an inference of gender bias.

Doe has pled a number of facts that independently support an inference of gender bias. Those facts additionally allow the Court to find evidence of *gender* bias in other allegations that, standing alone, might only support an inference of *victim* bias, as numerous courts have held. *See, e.g.*, *Doe v. Lynn Univ., Inc.*, 235 F. Supp. 3d at 1341-42 (holding that, while national pressure from OCR "without more" does not support an inference of bias, it "may add plausibility to an otherwise-conclusory allegation of bias"); *Neal v. Colorado State Univ.*-

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747, 751 (fact that school was brought under OCR investigation six months before plaintiff was charged supported inference of gender bias).

[12] Oberlin's rate of sexual misconduct adjudications significantly exceeds the rate in those cases where courts found too small a number of adjudications to draw any conclusions about patterns of decisionmaking. *See Doe v. Cummins*, 662 Fed. App'x at 453 (noting nine case from 2011 through October 2015); *Doe v. Miami Univ.*, -- F. Supp. 3d --, 2017 WL 1154086 at **7-8 (S.D. Ohio March 28, 2017) (noting 12 cases from 2013 through January 2016). As Oberlin acknowledges, it sent approximately 10 individuals through its formal resolution process in a single academic year. Docket No. 10-1 at 12 n. 6.

Pueblo, No. 1:16-cv-873, 2017 WL 633045 at *14 (D. Colo. Feb. 16, 2017) (refraining from deciding whether OCR pressure or procedural deficiencies alone could support inference of gender bias because "all of Plaintiff's allegations together," including "pressure to avoid DOE investigation and . . . procedural shortcomings" sufficed to support plausible inference of gender bias).[13] Here, that allows this Court to infer that the campus newspaper's repeated insistence that the female accuser in the *Rolling Stone* saga be believed, Compl. ¶¶ 46-47; that the Counseling Center's insistence that assault happens when someone *feels* assaulted, no matter the facts, *id.* ¶ 45; that the faculty guides instructing administrators simply to believe reports of assault, *id.* ¶¶ 41-44; that Doe's own advisor also adhering to that philosophy, *id.* ¶¶ 57-62; and that Doe's unsupportable expulsion evince not just *victim* bias but *gender* bias.

III. THE COMPLAINT STATES A CLAIM FOR NEGLIGENCE.

In Count IV, Doe alleges that Oberlin breached a "duty to Doe to exercise reasonable care, with due regard for the truth, an evenhanded application of procedure, and the important and irreversible consequences of its actions." Compl. ¶ 219. To prove negligence in Ohio, "one must show the existence of a duty, a breach of the duty, and an injury resulting proximately therefrom." *Menifee v. Ohio Welding Products, Inc.*, 15 Ohio St. 3d 75, 77 (1984). Ohio has no

[13] *See also Doe v. Brown Univ.*, 166 F. Supp. 3d at 189 (finding that "numerous and significant procedural flaws in Plaintiff's disciplinary hearing" supported plausible inference of gender bias when viewed in conjunction with statements from former employee and professor that Title IX process at Brown was generally gender-biased); *Collick v. William Patterson Univ.*, 2016 WL 6824374 at **11-12 (Nov. 17, 2016) (allegations that female complainant's claims "were accepted as true without any investigation," that the plaintiffs were "not afforded a thorough and impartial investigation," and that OCR exerted national pressure on universities together supported plausible inference of gender bias); *Ritter v. Oklahoma City Univ.*, 2016 WL 3982554, at *2 (W.D. Okla. July 22, 2016) (holding that, even though "allegations of discriminatory intent [we]re sparse," because those allegations, in conjunction with "the asserted facts underlying plaintiff's alleged offense, the alleged manner in which the investigation and disciplinary process were conducted," and allegations that a female would have been treated differently supported a plausible inference of gender bias).

comprehensive list of such duties, but leaves it to the courts to apply certain guidelines to determine whether a duty of care exists. "Whether a duty exists depends largely on the foreseeability of the injury to one in the plaintiff's position." *Jeffers*, 43 Ohio St. 3d at 142. The test for foreseeability "is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act." *Menifee*, 15 Ohio St. 3d at 77; *see also Jeffers*, 43 Ohio St. 3d at 142-43.

Given these guidelines, the Ohio Supreme Court is likely to hold that universities owe a common law duty to their students to exercise reasonable care when disciplining them. *Cf. Rollins v. Cardinal Stritch Univ.*, 626 N.W.2d 464, 470 (Minn. Ct. App. 1981) ("[W]e hold that common law imposes a duty on the part of private universities not to expel students in an arbitrary manner."). It is readily foreseeable that universities will have to discipline their students—that is why codes of conduct are published—and it is just as foreseeable that a wrongful expulsion, particularly for something as "stigmatizing" as sexual assault, *see Starishevsky v. Hofstra Univ.*, 612 N.Y.S.2d 794, 796 (Sup. Ct. 1994), carries serious injury and "important and irreversible consequences" for the accused. *See* Compl. ¶ 219. Courts outside Ohio that have confronted the question—including one in the Sixth Circuit—have thus found such a duty. *See, e.g.*, *Doe v. Univ. of the South*, 2011 WL 1258104 at *21 (relying on *Atria v. Vanderbilt University*, 142 Fed. App'x 246, 251 (6th Cir. 2005)); *Rollins*, 626 N.W.2d at 470.

Oberlin seeks to avoid that fact by baldly asserting that "the 'duties [Plaintiff] identifies all arise from his contractual relationship with [Oberlin.]" Docket No. 10-1 at 19. But that simply isn't true. Doe certainly doesn't allege it; he says just the opposite. *See* Compl. ¶ 219. And it doesn't follow from the fact that Doe also alleges breach of contract based on his expulsion, because Ohio courts have repeatedly recognized that "[a] tort claim based upon the

same actions as those upon which a claim of contract breach is based" will lie "if the breaching party also breaches a duty owed separately from that created by the contract." *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App. 3d 137, 151 (1996) (citing *Battista v. Lebanon Trotting Assn.* 538 F.2d 111, 117 (6th Cir. 1976)); *Bowman v. Goldsmith Bros. Co.*, 109 N.E.2d 556, 557 (Ohio Ct. App. 1952) (same).[14] It would be nonsensical to say that Oberlin could somehow extinguish its common law duties by contractually promising its students a certain set of procedures to resolve sexual assault claims. No promise can give Oberlin license to impose discipline arbitrarily or otherwise excuse it from its common law obligations. A school that promised its students a full-blown criminal trial before unfailingly finding them guilty has simply constructed the world's most elaborate kangaroo court.

Because Ohio courts would likely find that Oberlin owed Doe a duty of care when disciplining him, the only remaining question is whether Oberlin's failure to exercise reasonable care when doing so proximately caused his expulsion. Proximate cause exists when "the injury sustained [is] the natural and probable consequence of the negligence alleged." *Jeffers*, 43 Ohio St. 3d at 143 (quotation marks omitted). The Complaint alleges that the College has established a disciplinary system, and instilled an ethos, demanding that every student alleging sexual assault be believed with little to no regard for the truth or falsity of their assertions. Compl. ¶¶ 39-47,

[14] As a backup, Oberlin argues that Doe's negligence claim is one for "educational malpractice," a claim not recognized in Ohio. Docket No. 10-1 at 19. That doctrine is meant to protect schools' educational decisions, on which they are experts and therefore get considerably more deference from courts than on disciplinary matters. *See Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 473 (Minn. Ct. App. 1999). It does not supplant a common law duty that schools otherwise have to exercise reasonable care as to those they might foreseeably harm. Minnesota and Tennessee both bar claims of "educational malpractice," *see Alsides*, 592 N.W.2d at 473; *McMillin v. Lincoln Memorial Univ.*, 2011 WL 1662544 at *6 (Tenn. Ct. App. May 3, 2011), yet courts applying their law have held that schools have a common law duty not to punish students arbitrarily. *Rollins*, 626 N.W.2d at 470; *Doe v. Univ. of the South*, 2011 WL 1258104 at *21.

52-62, 208, 214, 221. Doe's finding of responsibility wasn't just the "natural and probable" consequence of that system and ethos; from 2015 to 2016, it was their *inevitable* consequence.

IV. THE COMPLAINT STATES A CLAIM FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING.

As explained above, to the extent that Count II relies on the same contract provisions as Count I, *see* Compl. ¶ 194, Doe agrees to voluntarily dismiss it. But Count II is also based on two independent contract provisions: the right to appeal a disproportionately severe sanction coupled with the Policy's statement that students found responsible for sexual assault will be sanctioned within a range that spans "from suspension to expulsion." *Id.* ¶¶ 196-97. Oberlin disingenuously characterizes this part of Count II, saying that Doe "does not explain how Oberlin violated any duty in" rejecting his appeal of the severity of his sanction. Docket No. 10-1 at 18-19 (citing Compl. ¶ 195). But the explanation is right there in the Complaint, in the very paragraphs that follow. *See* Compl. ¶¶ 196-200. If students found responsible for sexual assault must be sanctioned within a range from suspension to expulsion, and if students have a right to appeal the severity of those sanctions, then the right to appeal "would be meaningless if a sanction within the permissible range could never be" too severe to be appealed. *Id.* ¶ 198. Yet the only explanation Oberlin gave Doe for upholding his sanction was that it "fits within" the initial range of punishments for sexual assault, *id.* ¶ 199, which will be true for *every* sanction for sexual assault before an appeal is even filed. Oberlin's interpretation of these provisions "effectively nullifie[d]" Doe's "right to appeal the severity of his [] sanction," *id.* ¶ 200, and therefore violated the covenant of good faith and fair dealing.

CONCLUSION

For the foregoing reasons, John Doe respectfully requests that the College's Motion to Dismiss be denied.

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Respectfully submitted,

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