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

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

DEFENDANT OBERLIN COLLEGE'S REPLY IN SUPPORT
OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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INTRODUCTION

Colleges and universities have come under fire for *both* failing to respond to allegations of sexual assault aggressively enough and, as in this lawsuit, for impartially enforcing their own policies consistent with federal mandates. Noting that colleges and universities are caught between the proverbial rock and a hard place, courts, including those within the Sixth Circuit, presume that colleges and universities act with honesty and impartiality in adjudicating sexual assault claims. In this case, Plaintiff John Doe ("Plaintiff") claims that the decision by the Hearing Panel, based in part on the findings of fact by an outside legal expert who served as the neutral investigator, to find him responsible for violating Oberlin College's Sexual Misconduct Policy (the "Policy") was clearly erroneous. Plaintiff's claims of innocence, however, are insufficient to survive Oberlin's motion to dismiss when Plaintiff has failed to allege any facts upon which a reasonable fact finder could conclude that he was treated differently because of his gender. Simply put, "a single case by an individual who was displeased by the result of a disciplinary proceeding cannot constitute a pattern of decision-making." *Doe v. Case Western Reserve Univ.*, No. 1:14CV2044, 2015 WL 5522001, at *6 (N.D. Ohio Sept. 16, 2015). Plaintiff is that single case.

Plaintiff was found responsible for engaging in sexual contact when it should have been clear that the other person was too intoxicated to consent. The central issue in regard to Plaintiff's Title IX claim is whether Oberlin's decision to find him responsible for violating its Policy resulted in a flawed outcome because of gender bias. The issue is not whether Plaintiff can point to evidence that supports his belief that he did not violate the Policy. In an effort to save his Title IX claim, Plaintiff's Opposition to Oberlin's Motion to Dismiss his Complaint ("Opposition") (DE 12) ignores and misstates the standard under which his claim is judged, and

also rewrites allegations in his Complaint. In perhaps the most egregious example, Plaintiff pleaded that the "only outward indicator to Mr. Doe of Ms. Roe's level of intoxication was her statement, 'I am not sober.'" Compl. ¶ 179. Yet in his Opposition, Plaintiff claims, for the first time and in bold type no less, that Jane Roe **"expressly testified that she manifested *no* outward signs of intoxication to Doe[.]"** Opp. at 1 (emphasis in original). Aside from the fact that a verbal statement *is* an "outward sign" and the Complaint contains no reference to any such testimony, Plaintiff has failed to plead facts that overcome the presumption of integrity afforded to Oberlin's disciplinary proceedings, and that the record as alleged in the Complaint supports the disciplinary outcome. *E.g., Doe v. Cummins*, 662 Fed.Appx. 437, 449 (6th Cir. 2016); Compl. ¶¶ 120-131. As such, Plaintiff has failed to state a Title IX claim.

Plaintiff's breach of contract claim (Count I) fails because he has not pleaded facts to infer that Oberlin clearly abused its discretion in investigating and adjudicating Ms. Roe's sexual assault claim, or otherwise breached a duty owed to him, the governing legal standard that Plaintiff ignores wholesale. Opp. at 6-7. Ohio law does not recognize Plaintiff's claims for negligence (Count IV) and breach of the covenant of good faith and fair dealing (Count II). For all of the reasons set forth in Oberlin's Brief in Support of its Motion to Dismiss (DE 10-1), as well as those below, the Court should grant Oberlin's motion (DE 10) and dismiss Plaintiff's Complaint.

ARGUMENT

I. Plaintiff's Complaint Does Not State a Claim for a Title IX Violation (Count III).

A. Plaintiff Misstates His Burden to State a Title IX Claim Under the Erroneous Outcome Standard.

To state an erroneous outcome Title IX claim in the Sixth Circuit, a plaintiff must plead "(1) facts sufficient to cast some articulable doubt on the accuracy of the outcome of the

disciplinary proceedings and (2) a "*particularized . . . causal connection* between the flawed outcome and gender bias." *Cummins*, 662 Fed.Appx. at 452 (emphasis added).[1] In evaluating whether a complaint meets this standard, courts within the Sixth Circuit start with the "well established" premise that, in investigating and disciplining student conduct, colleges and universities are "entitled to a presumption of impartiality, absent a showing of *actual* bias." *Id.* at 449 (emphasis added); *see also e.g.*, *Doe v. College of Wooster*, 243 F.Supp.3d 875, 885 (N.D. Ohio 2017); *Doe v. Univ. of Cincinnati*, 173 F.Supp.3d 586, 601 (S.D. Ohio 2016); *Doe v. Miami Univ.*, -- F.Supp.3d --, No. 1:15cv605, 2017 WL 1154086, at *13 (S.D. Ohio Mar. 28, 2017) (same). Accordingly, to state a Title IX claim, a "plaintiff must allege facts sufficient to overcome this presumption" and demonstrate that the "challenged misconduct was motivated by sex-based discrimination." *College of Wooster*, 243 F.Supp.3d at 885 (quoting *Univ. of Cincinnati*, 173 F.Supp.3d at 601); *CWRU*, 2015 WL 5522001, at *4.[2]

Given the presumption that colleges and universities act impartially, courts hold that a Tile IX claim does not survive a motion to dismiss based on general allegations that a disciplinary system is "biased in favor of alleged victims and against those accused of misconduct" because "sexual-assault victims can be both male and female." *Cummins*, 662 Fed.Appx. at 453 (citing *Sahm v. Miami Univ.*, 110 F.Supp.3d 774, 778 (S.D. Ohio 2015)). As demonstrated in Oberlin's Brief (DE 10-1 at 6-14), and below, Plaintiff's Complaint does not

[1] Plaintiff concedes that he has only brought a Title IX claim under the erroneous outcome standard, and not under the selective enforcement, deliberate indifference, or archaic assumptions standards applied by other courts. Opp. at 8 n.5.

[2] In his Opposition, Plaintiff did not even attempt to distinguish a host of recent cases within the Sixth Circuit, including this District, in which courts dismissed erroneous outcome Title IX claims. *See* Opp. at 8-17; *College of Wooster*, 243 F.Supp.3d at 887 (denying motion to amend complaint to add Title IX claim); *Univ. of Cincinnati*, 173 F.Supp.3d at 608; *Sahm v. Miami Univ.*, 110 F.Supp.3d 774, 780 (S.D. Ohio 2015); *Pierre v. Univ. of Dayton*, No. 3:15-cv-362, 2017 WL 1134510, at *11 (S.D. Ohio Mar. 27, 2017); *CWRU*, 2015 WL 5522001, at *6.

contain more than conclusory allegations and therefore fails to state a Title IX claim.

Plaintiff theorizes that he only has to show a "minimal plausible inference of discriminatory intent" by Oberlin to save his Title IX claim. Opp. at 10. He is wrong. A court in this District has already expressly *rejected* the "minimal plausible inference" standard set forth in *Doe v. Columbia University*, 831 F.3d 46 (2d Cir. 1996), because it would "put universities in a double bind. Either they come under public fire for not responding to allegations of sexual assault aggressively enough or they open themselves to Title IX claims simply by enforcing rules against alleged perpetrators." *College of Wooster*, 243 F.Supp.3d at 886 n.4 (quoting *Austin v. Univ. of Oregon*, 205 F.Supp.3d 1214, 1226-27 (D. Ore. 2016)).[3] Furthermore, despite a host of Title IX cases that post-date the Second Circuit's decision in *Columbia University*, no court within the Sixth Circuit, including in this District, has adopted the "minimal plausible inference" pleading standard. In a glaring omission that goes beyond ducking the guidance of *College of Wooster*, Plaintiff failed to acknowledge how courts within the Sixth Circuit evaluate erroneous outcome Title IX claims. *See e.g.*, *Cummins*, 662 Fed.Appx. at 454 (plaintiffs "failed to create a reasonable inference that gender bias affected the outcome of their respective proceedings"); *Miami Univ.*, -- F.Supp.3d --, 2017 WL 1154086, at *10 (plaintiff "failed to show how the alleged procedural deficiencies are connected to gender bias"); *Univ. of Dayton*, No. 15-cv-362, 2017 WL 1134510, at *11 (not even mentioning *Columbia University*). Even outside of the Sixth Circuit, courts throughout the nation have continued to grant motions to dismiss erroneous outcome Title IX claims at a steady clip after *Columbia University*.[4] The pleading standard for

[3] Of course, Plaintiff never addressed *College of Wooster* in his Opposition even though Oberlin cited it throughout its Brief, including in its introduction. *See* Oberlin Br. at 1, 8, 11, and 19.
[4] *See Doe v. Baum*, 227 F.Supp.3d 784, 820 (E.D. Mich. 2017); *Doe v. Univ. of St. Thomas*, 240 F.Supp.3d 984, 993 (D. Minn. 2017); *Doe v. Western New England Univ.*, 228 F.Supp.3d 154, 191 (D. Mass. 2017); *Doe v. Univ. of Colo., Boulder*, No. 16-cv-1789, -- F.Supp.3d --, 2017 WL

erroneous outcome claims has not changed within the Sixth Circuit or this District.

In fact, in addition to *College of Wooster*, another court in this District did not follow *Columbia University* when it recently denied a motion to dismiss a Title IX claim. *See Doe v. Case Western Reserve Univ.*, No. 1:17CV414, 2017 WL 3840418 (N.D. Ohio Sept. 1, 2017). Instead, the court followed the guidance of the Sixth Circuit and held that, in order to state an erroneous outcome claim, a plaintiff must show "a particularized … causal connection between the flawed outcome and gender bias." *Id.* at *5 (quoting *Cummins*, 662 Fed.Appx. at 452). While the court in *CWRU* applied the correct standard for evaluating a Title IX claim of gender discrimination, its holding does not apply because the facts of *CWRU* are easily distinguishable from those alleged here. In *CWRU*, the plaintiff alleged numerous facts which, if true, would demonstrate that the university treated him less favorably than the female complainant in its handling of the complainant's sexual assault allegation against him. In *CWRU*, for example, the plaintiff alleged that he and the female complainant were both intoxicated during the sexual encounter, but only he was punished for the sex acts initiated by the complainant. *See CWRU*, 2017 WL 3840418, at *7 ("If only the male participant is disciplined for participating in the same acts—the implication of gender bias is clear."). Here, Plaintiff does not make similar allegations. *See* Compl. ¶¶ 66-73. Also, the complainant in *CWRU* was provided accommodations to get out of a class she was failing, while the respondent was not offered any such concessions despite his admission of physical and mental health issues. 2017 WL 3840418, at *6. Here, Plaintiff does not allege that Ms. Roe was treated any differently in regard to any academic or medical accommodations Oberlin provided. In addition, the allegations in *CWRU*

2311209, at *12 (D. Colo. May 26, 2017); *Univ. of Oregon*, 205 F.Supp.3d at 1226 (declining to adopt the Second Circuit's "minimal plausible inference of discrimination" standard because there is "no plausible inference that a university's aggressive response to allegations of sexual misconduct is evidence of gender discrimination").

also included procedural defects absent here. For example, the respondent in that case was not permitted to review the investigative report prior to his hearing, and was only allowed to review the report for 20 minutes on the day after his hearing to prepare his appeal. *Id.* at *5. Here, Plaintiff reviewed his investigative report on July 7, 2016, approximately three months before his hearing. Compl. ¶¶ 78, 117. In summary, the *CWRU* court concluded that the plaintiff satisfied the requirement to plead a particularized causal connection between the outcome and gender bias with numerous examples of how he was treated differently and less favorably compared to the complainant in his disciplinary hearing process. In this case, Plaintiff does not make that argument at all and, as pointed out, his Complaint undermines such an argument.

The allegations in *Doe v. Ohio State Univ.*, 239 F.Supp.3d 1048 (S.D. Ohio 2017), the only other post-*Columbia University* decision within Ohio in which an erroneous outcome claim survived a motion to dismiss, are likewise distinguishable. There, the plaintiff cited to, among nearly 20 other similar allegations of gender bias, two ongoing Title IX lawsuits against Ohio State, the attendant publicity that accompanied those lawsuits, and an affirmative statement by Ohio State in which it promised to continue aggressively disciplining male students accused of sexual misconduct, with no reassurance of ensuring fairness in the disciplinary process, to support a claim of institutional gender bias. *Id.* at 1072-73. Plaintiff has no similar facts to point to here. Plaintiff's Complaint fails to state a Title IX claim and should be dismissed.

B. Plaintiff Has Not Alleged Facts to Show a Particularized Causal Connection Between the Outcome of His Disciplinary Proceeding and Gender-Based Bias.

Plaintiff in his Opposition seeks to avoid dismissal of his Title IX claim by rewriting his Complaint in the form of *even more* conclusory statements of gender bias, which, even if they did appear in his Complaint, are insufficient to state a claim. *See e.g.*, *Cummins*, 662 Fed.Appx.

at 450. Of course, "[i]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." *Frederico v. Home Depot*, 507 F.3d 188, 202 (3d Cir. 2007) (internal quotation and citation omitted); *Gen. Elec. Co. v. S&S Sales Co.*, No. 1:11CV00837, 2012 WL 2921566, at *4 (N.D. Ohio July 17, 2012) (same). Upon examination, the "whole bundle" of sticks that Plaintiff claims to possess amounts to a few splintered toothpicks that fail to state a claim. Opp. at 9-10. Just as the court concluded in *College of Wooster*, Plaintiff has not shown that Oberlin "would have approached the complaint differently if the accused had been a female." 243 F.Supp.3d at 886. *See Univ. of Cincinnati*, 173 F.Supp.3d at 607 (an allegation pointing to bias in favor of sexual assault victims "is not the same as gender bias because sexual assault victims can be either male or female").

First, the "direct statements" attributed to Dr. Meredith Raimondo consist of the *lone* statement that she was motivated "by her views on feminism" in helping to draft Oberlin's Policy (attached as Ex. 1 to Oberlin's Brief). Opp. at 5, 9, 14 (citing Compl. ¶ 55). Dr. Raimondo was one of many who drafted the Policy, which is facially neutral and includes procedural safeguards to protect the interests of both the complainant and respondent. Most importantly, Dr. Raimondo did not investigate Ms. Roe's allegations. Joshua D. Nolan, the outside investigator, did. Compl. ¶ 75.

Second, the Complaint refers to *both* Plaintiff and a female student complaining about the length of the investigatory process. Comp. ¶¶ 76-77. But the Complaint contains no facts to show "that a female was in circumstances sufficiently similar to [plaintiff's] and was treated more favorably by the University." *CWRU*, 2015 WL 5522001, at *6 (quoting *Mallory v. Ohio Univ.*, 76 Fed.Appx. 634, 641 (6th Cir. 2003)). No inference of sex-based bias exists when a college treats members of both sexes equally.

Third, Oberlin's Policy mandates that both the reporting and responding parties to sexual assault claims "have equal access to support and counseling services through the College." Policy, at 21. Plaintiff does not allege that Oberlin denied him any physical or mental health treatment that was afforded to Ms. Roe. Just because Oberlin makes a point to care for the mental and physical health of students who allege they were sexually assaulted—irrespective of any finding of wrongdoing by another student—does not establish sex-based discrimination. *See* Opp. at 17; Compl. ¶ 45. Similarly, the college's concern for alleged victims "does not equate to gender bias because sexual-assault victims can be both male and female." *Cummins*, 662 Fed.Appx. at 453. Plaintiff does not state a Title IX claim on the basis of his dangerous suggestion that Oberlin should decline to wait for a finding of responsibility before it provides counseling and other services to alleged sexual assault victims.

Fourth, courts have consistently held that a plaintiff does not state a Title IX claim on the basis that more men than women are accused of, and found responsible for, sexual misconduct. An Ohio federal court recently dismissed an erroneous outcome Title IX claim that alleged the same "pattern of decisionmaking" as Plaintiff. Opp. at 6, 10, 14. In *Miami Univ.*, the court held that it would be "unreasonable to infer" that Miami was motivated by gender bias when it "found every male student who was accused by a female of violating Miami's sexual misconduct policy [during the 2013-14 academic year] to be 'responsible' for that alleged violation." 2017 WL 1154086, at *8 (citing *Cummins*, 662 Fed.Appx. at 453-54). The court "observed that there are more obvious reasons for the disparity, include [*sic*] that the school has only received complaints of male-on-female sexual assaults or males are less likely than females to report sexual assaults." *Id.*; *see also e.g.*, *CWRU*, 2015 WL 5522001, at *6 ("That CWRU's policy disproportionately affects males as a result of the higher number of complaints lodged against males does not

demonstrate [sex-based discrimination.]"); *Doe v. Regents of the Univ. of California*, No. 15-cv-02478, 2016 WL 5515711, at *5 (C.D. Cal. July 25, 2016). Plaintiff admits that this precedent is "true," but makes no showing as to why the Court should ignore this case law. Opp. at 16.

Instead, Plaintiff argues that Oberlin and Dr. Raimondo "have control over which students are sent through its formal resolution process," but tellingly, he does not allege that Oberlin refuses to send female students accused of sexual assault to formal process. *Id.*; *see e.g.*, *Doe v. Baum*, 227 F.Supp.3d 784, 819 (E.D. Mich. 2017) (discarding allegation that the "overwhelming majority" of students accused of sexual misconduct are male because plaintiff "has not identified any decisions in other cases that would tend to suggest any gender-biased 'pattern of decision making'"); *Salau v. Denton*, 129 F.Supp.3d 989, 999 (W.D. Mo. 2015) (allegation that a university discriminated against the male respondents "based solely on their sex does not establish a pattern of decisionmaking that tends to show gender bias, because Plaintiff only points to one case—his own") (internal quotation omitted).

In addition, Oberlin found only a very small minority of students responsible for sexual misconduct among all misconduct complaints that it received during the 2015-16 academic year. *See* Oberlin's Spring 2016 Campus Climate Report, at 6 (Ex. 2 to Oberlin's Brief); Oberlin Br. at 12 n.6. Also, this very small minority is not made up solely of individuals found responsible for sexual assault, but includes those found responsible for other forms of misconduct, including harassment. *Id.* The statistics Plaintiff relies on to allege that Oberlin's rate of sexual misconduct adjudications "significantly exceeds" those at other colleges and universities subject to a Title IX lawsuit are not an accurate comparison because those statistics are limited to sexual assault investigations, and, unlike Oberlin's data, do not include other forms of misconduct. *See* Opp. at 16 n.12; *Cummins*, 662 Fed.Appx. at 453 (noting nine *sexual assault* investigations from

2011 through October 2015); *Miami Univ.*, -- F.Supp.3d --, 2017 WL 1154086, at *8 (identifying 12 cases from 2013 through January 2016 involving disciplinary procedures against male students accused of sexual misconduct toward female students).

Fifth, Plaintiff points to a Department of Education Office of Civil Rights ("OCR") investigation of Oberlin's "sexual harassment and sexual assault complaint process" to support his claim that Oberlin was coerced to engage in gender bias against male respondents. Opp. at 5, 10, 13, 16 (citing ¶ 48). But Plaintiff does not allege what prompted the OCR investigation more than 18 months after Oberlin implemented its Policy, including whether it was opened based on a complaint from a respondent or complainant in a disciplinary proceeding. *Id*. Furthermore, courts do not accept that a federal investigation of a university's handling of sexual assault complaints bears on the university's "alleged desire to find men responsible because they are men." *Univ. of Colo., Boulder*, -- F.Supp.3d --, 2017 WL 2311209, at *11; *Baum*, 227 F. Supp.3d at 818 (dismissing erroneous outcome Title IX claim even though the University of Michigan was the subject of an ongoing federal inquiry related to its handling of sexual assault complaints). Also, the allegation that a student editorial supported the accuser in another sexual assault matter at a *different school* does not state a claim against Oberlin. Opp. at 17 (citing Compl. ¶¶ 46-47). Similar criticism levied at a *defendant college* has been considered and rejected. *College of Wooster*, 243 F.Supp.3d at 886; Oberlin Br. at 10-11 (citing authorities).

The other cases that Plaintiff relies upon in which courts declined to dismiss Title IX claims at the pleading stage due, in part, to publicity surrounding a college's handling of sexual assault claims, created a climate of gender bias against male respondents and include unique facts not present here. Opp. at 15; *see Ohio State Univ.*, 239 F.Supp.3d at 1073 (two ongoing Title IX lawsuits were pending against Ohio State at the time of plaintiff's case); *Doe v. Lynn*

Univ., 235 F.Supp.3d 1336, 1340 (S.D. Fla. 2017) (media attention concerned Lynn's previous decision not to charge a male with sexually harassing four female students); *Doe v. Amherst College*, 238 F.Supp.3d 195, 223 (D. Mass. 2017) (at the time of plaintiff's hearing, the complainant was involved in a student-led movement to compel Amherst to expel a male student accused of misconduct); *Doe v. The Trs. of the Univ. of Pennsylvania*, No. 16-5088, -- F.Supp.3d --, 2017 WL 4049033, at *16 (E.D. Pa. Sept. 13, 2017) (University's President and Provost stated in an article that Penn was "redoubling [its] efforts" to "tackle [the] problem" of sexual assault in the wake of a "deeply troubling" report that showed one-third of female Penn students had been sexually assaulted). Here, Oberlin was not under public scrutiny at the time of Plaintiff's disciplinary hearing. Oberlin was not being pressured to ignore the facts and find every male respondent responsible of all allegations of sexual misconduct. Oberlin was not defending a Title IX lawsuit, let alone two, nor was Oberlin being accused of failing to pursue a sexual assault complaint or being motivated by the results of a "deeply troubling" report such as that at issue in *Univ. of Pennsylvania*.[5]

Sixth, Plaintiff's criticism of his hearing advisor does not raise an inference of gender bias, as Oberlin addressed in its initial brief. Mr. Doe selected Mr. Bautista as his advisor. Oberlin Br. at 13-14. Importantly, Plaintiff has not cited to any comments from Mr. Bautista that "targeted him based on his gender." *Doe v. Univ. of Massachusetts-Amherst*, No. 14-30143,

[5] The two remaining post-*Columbia University* Title IX cases that Plaintiff relies on likewise contain allegations not present here. Opp. at 16-17; *see Neal v. Colorado State University-Pueblo*, No. 16-cv-873, 2017 WL 633045, at *11, 13 (D. Colo. Feb. 16, 2017) (alleging that university's Title IX coordinator was pressured by OCR to meet a quota of male students to discipline for sexual misconduct and that a female counselor identified plaintiff in front of his football teammates as having engaged in non-consensual sex before he was disciplined); (*Collick v. William Paterson Univ.*, No. 16-471, 2016 WL 6824374, at *11 (D. N.J. Nov. 17, 2016) (alleging, among other things, that the university performed *no* investigation of the sexual assault claims and did not permit plaintiffs an opportunity to respond to the charges).

2015 WL 4306521, at *8 (D. Mass. July 14, 2015). Also, Mr. Bautista was neither an investigator nor a decision maker.

Of course, Plaintiff's Complaint contradicts his hyperbolic stance that his expulsion was "completely contrary to the evidence before his hearing panel." Opp. at 10; *see also supra* Sec. II. Among other things, the evidence presented to the Hearing Panel included Ms. Roe's testimony that she told Plaintiff she was "not sober right now" and that her friends observed Ms. Roe was "not making sense with the sentences she was saying" shortly after her sexual encounter with Plaintiff. E.g., Compl. ¶¶ 124, 134, 151, 153. In perhaps Plaintiff's most blatant mischaracterization of his Complaint, he alleges, for the first time in his Opposition, that Ms. 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." Opp. at 3. The Complaint cites to no such affirmative statements from Ms. Roe, either during the hearing or otherwise. Compl. ¶¶ 85-98, 120-131. Plaintiff has failed to plead facts that show a "particularized . . . causal connection" that the outcome of his disciplinary proceeding was motivated by gender bias so as to state a Title IX claim.

II. Plaintiff's Complaint Fails to State a Claim for Breach of Contract (Count I).

Plaintiff does not dispute that courts do not interfere with a private college's disciplinary measures "absent *a clear abuse of discretion.*" *Pierre v. Univ. of Dayton*, 143 F.Supp.3d 703, 712 (S.D. Ohio 2015) (quoting *Valente v. Univ. of Dayton*, 438 Fed.Appx. 381, 384 (6th Cir. 2011)); Oberlin Br. at 15-16. Nor does Plaintiff demonstrate how Oberlin engaged in "just such abuse." Opp. at 7. As set forth in Oberlin's Brief, the Complaint contains a host of allegations from which the Hearing Panel could and did conclude that it is "more likely than not," under the

preponderance of the evidence standard mandated by the DOE, that Plaintiff violated the Policy. *See* Oberlin Br. at 16-18 (citing Complaint, at ¶¶ 121-124, 176); *id.* at 17 n.12.

Yet rather than address these allegations, Plaintiff argues that the Hearing Panel failed to abide by the Policy because "*the panel didn't find him guilty*" of forcing Ms. Roe to perform oral sex on him. Opp. at 7. In doing so, Plaintiff ignores his own allegations as to why the Hearing Panel concluded that Ms. Roe's "effective consent was not maintained for the entire sexual encounter that occurred on February 28, 2016." Compl. ¶ 148. In reaching that conclusion, *according to Plaintiff*, the Hearing Panel relied on Ms. Roe's statement that she was "not sober" *and* "the corroborating statements" of her friends." *Id.* ¶¶ 151, 153.[6] These "corroborating statements" include a friend who saw Ms. Roe shortly after the early-morning encounter with Plaintiff and observed that she "wasn't necessarily making coherent sentences" and that she was "not making sense with the sentences she was saying." *Id.* ¶¶ 133, 134. Plaintiff has not plead facts to show why, when faced with this testimony, the Hearing Panel *clearly abused its discretion* in concluding, by a preponderance of the evidence, that Plaintiff was "not capable of giving effective consent when asked to perform oral sex." *Id.* ¶ 152; *see also Univ. of Dayton*, 143 F.Supp.3d at 713 (holding that, in evaluating a similar breach of contract claim, the issue "is not whether the [Hearing Panel] should have believed a certain party's version of the events[,]" but "whether the University abused its discretion[.]").[7]

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[6] In his Statement of Issues, Plaintiff likewise ignores the Hearing Panel's citation to "the corroborating statements" of Ms. Roe's friends as a basis for finding Plaintiff responsible for committing sexual assault. Opp. at iv; Compl. at ¶ 153.

[7] Plaintiff's reliance on *King v. DePauw Univ.*, No. 2:14-cv-70, 2014 WL 4197507 (S.D. Ind. Aug. 22, 2014) is misplaced. Opp. at 7 n.3. There, the court applied Indiana law to the plaintiff's breach of contract claim and, unlike here, in which Plaintiff knew that Ms. Roe had at least smoked marijuana, the plaintiff in *DePauw Univ.* did not know that the complainant had consumed any intoxicating drug prior to their sexual encounter. 2014 WL 4197507, at *11-12; Compl. ¶¶ 67-68.

The Hearing Panel found that Ms. Roe could not effectively consent to performing oral sex after she told Plaintiff that she was "not sober." Compl. ¶ 151. According to the Complaint, Ms. Roe's testimony that she resisted performing oral sex on Plaintiff prior to him "ejaculate[ing] in [her] mouth," *id.* ¶ 122, is consistent with the Hearing Panel's finding that she was incapable of giving effective consent. Oberlin did not act "unreasonably, arbitrarily, or unconscionably" in applying the Policy's definition of incapacitation, finding Plaintiff responsible for committing sexual assault, and explaining its rationale in writing. *Ray v. Wilmington Coll.*, 667 N.E.2d 39, 42 (Ohio App. 1995). To the contrary, Oberlin "adhered to its misconduct procedure." *Univ. of Dayton*, 143 F.Supp.3d at 713. Plaintiff has failed to state a claim for breach of contract.

III. Ohio Does Not Recognize a Claim for Breach of the Covenant of Good Faith and Fair Dealing (Count II).

Plaintiff committed to dismissing Count II, his claim for breach of the covenant of good faith and fair dealing, to the extent it relies on contract provisions at issue in Count I, his breach of contract claim. Opp. at 3 n.1. This commitment to narrow Count II, which Plaintiff has not otherwise acted on, does not save Count II from dismissal. Both Count I and Count II are based on the Policy, and Ohio law does not recognize a claim for breach of the covenant of good faith and fair dealing separate and apart from a breach of contract claim. *See* Compl. ¶¶ 196-197 (quoting the Policy in regard to Count II); *e.g.*, *Alshaibani v. Litton Loan Serv., LP*, 528 Fed.Appx. 462, 465 (6th Cir. 2013) ("[U]nder Ohio law, a breach-of-contract claim subsumes any claim for breach of the duty of good faith and fair dealing.") (citing *Lakota Local Sch. Dist. BOE v. Brickner*, 671 N.E.2d 578, 583-84 (Ohio Ct. App. 1996)); *Nachar v. PNC Bank, Nat. Ass'n*, 901 F.Supp.2d 1012, 1019 (N.D. Ohio 2012) ("The covenant of good faith is part of a contract claim, and does not stand alone as a separate cause of action."). Given that Ohio law

does not recognize a separate claim for breach of the covenant of good faith and fair dealing, Plaintiff understandably did not set forth *any* legal authority to defend or evaluate Count II. Opp. at 20. If Plaintiff wants to allege that Oberlin breached the Policy in regard to the affirmation of his expulsion, he must bring a separate breach of contract claim, which he did not do.

Yet even if Ohio recognized a claim for breach of the covenant of good faith and fair dealing—which it does not—Plaintiff does not explain how Oberlin *clearly abused its discretion* by upholding his expulsion, as would be required to plead a breach of contract claim. *See infra* Sec. II; Opp. at 20; Compl. ¶¶ 168, 195-202. Instead, Plaintiff complains that Oberlin upheld his expulsion on the basis that the punishment "fit[] within the range specified in the Policy" and argues that, as long as an original sanction falls within that range, an appeal would be meaningless. Compl. ¶¶ 198-99; Opp. at 20. Plaintiff ignores that he had the burden of proof on appeal "as the original determination and sanction are presumed to have been decided reasonably and appropriately." Policy at 49. To the extent Plaintiff believes he was owed a more detailed written explanation than he was provided on appeal, Compl. ¶¶ 169-171, Plaintiff points to no provision of the Policy that required Oberlin to provide detailed findings. *See* Policy at 49 (requiring the Appeals Officer to issue a written decision in what is "not intended to be full rehearing"). Nor does Plaintiff plead facts to show that Oberlin acted "unreasonably, arbitrarily, or unconscionably" in upholding his expulsion. *Wilmington Coll.*, 667 N.E.2d at 42. Count II of Plaintiff's Complaint must be dismissed for failure to state a claim.

IV. Plaintiff's Complaint Fails to State a Claim for Negligence (Count IV).

Ohio law also does not recognize a negligence claim in the context of a college student's disciplinary proceeding when the student alleges his relationship with the college is governed by contract. *See College of Wooster*, 243 F.Supp.3d at 895 (dismissing negligence claim because

"the existence of a valid contract governs the relationship between the parties"); *Valente*, 438 Fed.Appx. at 387 ("Because the duties Valente identifies all arise from his contractual relationship with [the University of] Dayton, he proffers no grounds upon which to base a negligence action."); *see also Wolfe v. Cont'l Cas. Co.*, 647 F.2d 705, 710 (6th Cir. 1981). Plaintiff's *entire* Complaint, not just his negligence claim, is centered on Oberlin's conduct in adjudicating the sexual assault claim against him, conduct that Plaintiff claims is governed by contract. Compl. ¶ 174 (alleging in Count I that Oberlin was contractually required to "act in accordance with these publications in resolving complaints of misconduct, in the investigation of those complaints, in the process of adjudicating those complaints, and in resolving appeals"). Given that Ohio courts do not recognize Plaintiff's negligence claim because it is based on the same duties that form the basis of his breach of contract claim, it fails as a matter of law.[8]

In addition, courts bar negligence claims such as Plaintiff's on the basis that they constitute "educational malpractice," including in matters involving student discipline stemming from sexual assault allegations. *See Univ. of Dayton*, 2017 WL 1134510, at *10; Oberlin Br. at 19 (citing Ohio authorities). In an effort to avoid the categorization of his claim as one of "educational malpractice," Plaintiff did not discuss Ohio law, but instead relied on non-binding authorities from Minnesota and Tennessee. Opp. at 19 n.14.

Rather than address cases that have been decided under Ohio law, Oberlin Br. at 19-20, Plaintiff relies on case law from a Minnesota state appellate court to somehow predict that the Ohio Supreme Court would not dismiss his claim. Moreover, Plaintiff hypothesizes that Oberlin could avoid a negligence claim by "promis[ing] its students a full-blown criminal trial before unfailingly finding them guilty." Opp. at 19. Oberlin has done no such thing, nor does Plaintiff

[8] Plaintiff agreed to voluntarily dismiss Count V, his claim of negligent infliction of emotional distress, so Oberlin will not address it here. Opp. at 3 n.1; *see also* Oberlin Br. at 20.

allege that it has. Having failed to identify an independent legal duty to establish a prima facie negligence claim, this Court should grant Oberlin's motion and dismiss Count IV.

CONCLUSION

For the reasons set forth herein, as well as in Oberlin's Brief in Support of its Motion to Dismiss, Oberlin requests that this Court dismiss Plaintiff's Complaint with prejudice.

Dated: October 4, 2017

Respectfully submitted,

/s/ David H. Wallace

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CERTIFICATE OF COMPLIANCE

I hereby certify that this case has not been assigned to a specific track, and that this memorandum adheres to the 20-page limit set forth in Local Rule 7.1.

/s/ David H. Wallace
David H. Wallace
Attorney for Defendant Oberlin College

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2017, the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ David H. Wallace
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