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

JOHN DOE,	)	Case No.: 1:20-cv-00669
	)	
Plaintiff,	)	JUDGE DAN AARON POLSTER
	)	
vs.	)	**PLAINTIFF'S MOTION FOR**
	)	**RECONSIDERATION OF**
OBERLIN COLLEGE, et al.	)	**COURT'S EXPRESSED**
	)	**INTENTION TO DISMISS**
	)	**PLAINTIFF'S CLAIMS AND TO**
	)	**DENY PLAINTIFF'S MOTION**
	)	**FOR A TEMPORARY**
Defendants.	)	**RESTRAINING ORDER**

Now comes the Plaintiff, by and through undersigned counsel, and respectfully moves this Honorable Court to reconsider its expressed intention to dismiss Plaintiff's Complaint without prejudice and to deny his Motion for a Temporary Restraining Order, based upon the March 23, 2020 decision of the United States District Court for the Eastern District of Michigan, Southern Division, in *Doe v. University of Michigan,* 18-1776, that held in part:

1) a University of Michigan student accused of violating the University's Sexual Misconduct Policy **had standing to sue** the University under 42 U.S.C. § 1983 and Title IX **prior to the University conducting a formal hearing against him and prior to any sanctions and discipline being imposed against him;**

2) the student's causes of action against the University of Michigan **were ripe prior to the University conducting a formal hearing against him and prior to any sanctions and discipline being imposed against him** because his injury involved the deprivation of one of the most basic due process rights – the hearing itself;

3) the student's causes of actions against the University of Michigan **were not moot** because the student was entitled to clarity as to the procedural safeguards that the University would implement and follow in proceeding with its disciplinary proceeding against him; and

4) the student was entitled to judgment as a matter of law on his claims that the portions of the University of Michigan's 2018 and Interim 2019 Sexual Misconduct Policies were unconstitutional **prior to the University conducting a formal hearing against him and prior to any sanctions and discipline being imposed against him**;

Based on the very recent decision in *Doe v. University of Michigan,* supra, and for the additional reasons more fully set forth in the Brief in Support, attached hereto and incorporated herein, Plaintiff respectfully moves this Honorable Court to reconsider its expressed intention to dismiss his Complaint without prejudice and to deny his Motion for a Temporary Restraining Order.

Respectfully Submitted

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BRIEF IN SUPPORT

I. OBERLIN COLLEGE'S SEXUAL MISCONDUCT POLICY CONTAINS PROCEDURES THAT HAVE BEEN REPEATEDLY HELD TO BE UNCONSTITUTIONAL BY THE 6TH CIRCUIT COURT OF APPEALS

Plaintiff respectfully asserts that Oberlin College's Sexual Misconduct Policy contains provisions and procedures that would allow the College to make an adjudication that he violated said policy by engaging in non-consensual sexual conduct with another student without providing him with the constitutionally mandated live hearing requirement and without providing him with the constitutionally mandated opportunity to confront his accuser and any other adverse witnesses against him in the presence of a neutral fact finder.

The Oberlin Policy specifically provides that "the College may substitute an alternate method of adjudication at its discretion" if a full Hearing Panel "cannot reasonably be convened", due to situations such as the adjudication being scheduled during a break, at the end of a semester, and after the end of the academic year.[1] The Oberlin Policy does not define and/or describe what procedures that it would implement if it decides to proceed with an "alternate method of adjudication."

The Oberlin Policy also does not require the participation of the reporting party (Plaintiff's accuser) or any of the witnesses interviewed by the College's Title IX investigator at the adjudicatory hearing.[2] The Policy notes that "the College's ability to present evidence at the full hearing may be limited in the instance that a Reporting Party

[1] Relevant portion of Oberlin College's October 16, 2019 Sexual Misconduct Policy, attached hereto as Exhibit A, at p.51.
[2] Relevant portion of Oberlin College's October 16, 2019 Sexual Misconduct Policy, at p.57.

chooses not to participate in the hearing."[3] The Policy also notes that in the event that a Reporting Party chooses to not participate in the hearing, "Oberlin College will assume the function of the Reporting Party" and in such instances "the Title IX Coordinator will appoint an administrator as the institutional representative to serve as the Reporting Party."[4] The Policy does not describe how the College and/or appointed administrator and/or institutional representative functions as the Reporting Party during the adjudicatory hearing, such as whether said individuals are permitted to read a statement prepared by the Reporting Party and/or whether the Title IX investigator and/or anyone else is permitted to present any alleged evidence or statements provided by the Reporting Party in the Reporting Party's absence.

II. *DOE v. MICHIGAN AND ITS REPEATED HOLDINGS THAT A COURT CANNOT SIMPLY STANDBY AND WAIT FOR A COLLEGE TO COMPLETE ITS TITLE IX INVESTIGATION AND TO RENDER ITS FINDINGS BEFORE INTERVENING TO ENSURE THAT AN ACCUSED STUDENT'S DUE PROECSS RIGHTS ARE PROTECTED*

The plaintiff in *Doe v. Michigan,* case No. 18-1776 (E.D. Michigan), is a male student who was accused of sexual assault by a female student.[5] On March 12, 2018 the female student alleged that the plaintiff had a sexual encounter with her that was not consensual in a complaint she filed with the University's Office of Institutional Equity.[6] The plaintiff maintained that said encounter was consensual.[7] There were no other witnesses to the encounter.[8]

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[3] Relevant portion of Oberlin College's October 16, 2019 Sexual Misconduct Policy, attached hereto as Exhibit A, at p.57.
[4] Relevant portion of Oberlin College's October 16, 2019 Sexual Misconduct Policy, at p.49.
[5] *Doe v. University of Michigan*, 18-1776 (E.D. Michigan, March 23, 2020), attached hereto as Exhibit B.
[6] *Doe v. University of Michigan*, 18-1776 (E.D. Michigan, March 23, 2020).
[7] *Doe v. University of Michigan*, 18-1776 (E.D. Michigan, March 23, 2020).
[8] *Doe v. University of Michigan*, 18-1776 (E.D. Michigan, March 23, 2020).

A. DOE WAS ENTITLED TO INJUNCTIVE RELIEF AS IT RELATED TO THE UNIVERSITY OF MICHIGAN'S 2018 SEXUAL MISCONDUCT POLICY PRIOR TO THE UNIVERSITY COMPLETING ITS INVESTIGATION IN THE ALLEGATIONS AGAINST HIM

The University of Michigan's 2018 sexual misconduct policy did not provide the plaintiff with the right to a live hearing to defend against the allegations that he violated said policy by engaging in non-consensual sex with said female student.[9] Instead, an investigator would conduct an investigation and issue a report in which he/she would make a determination by a preponderance of the evidence as to whether the plaintiff violated the policy.[10]

While the University of Michigan's investigation was proceeding against him, the plaintiff filed his lawsuit on June 4, 2018 against the University and other University officials challenging the constitutionality of the policy and seeking a restraining order and injunctive relief to prevent the University's investigator from rendering her finding as to whether he violated the University's policy.

On June 28, 2018, Senior United States District Court Judge Arthur J. Tarnow held a hearing on the plaintiff's motion for a restraining order and preliminary injunction against the University of Michigan.[11] The University argued that the plaintiff's causes of actions failed because they were not ripe for decision.[12] In support of its argument, the University asserted that in the absence of a finding that the plaintiff violated its policy

[9] *Doe v. University of Michigan*, 18-1776 (E.D. Michigan, March 23, 2020), attached hereto as Exhibit B.
[10] *Doe v. University of Michigan*, 18-1776 (E.D. Michigan, March 23, 2020).
[11] *Doe v. University of Michigan*, 325 F.Supp.3d 821, 826 (E.D. Michigan 2018).
[12] *Doe v. University of Michigan*, 325 F.Supp.3d 821, 826 (E.D. Michigan 2018).

and/or until University imposed a sanction on him, the plaintiff had no due process claim to adjudicate.[13]

Judge Tarnow rejected the University's argument and held that plaintiff had satisfied all three (3) factors of the ripeness inquiry: 1) the likelihood that the harm alleged by the plaintiff will ever come to pass; 2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims; and 3) the hardship to the parties if judicial release is denied at this stage in the proceedings.[14] Judge Tarnow reasoned that the plaintiff, without sufficient due process protections, was at immediate risk of expulsion and had already suffered injury as sexual assault allegations "may impugn his reputation and integrity, thus implicating a protected liberty interest."[15]

Judge Tarnow further held that additional facts were unnecessary to fairly adjudicate the merits of the plaintiff's case because he had examined the University's policy and the relevant case law and was well-equipped to determine whether the policy adequately protected the plaintiff's due process rights.[16] Judge Tarnow then found that if he denied the plaintiff's motion for injunctive relief, but ultimately finds that the policy violates due process, the plaintiff would have been forced to defend himself against serious sexual assault allegations without adequate constitutional safeguards.[17]

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[13] *Doe v. University of Michigan*, 325 F.Supp.3d 821, 826 (E.D. Michigan 2018).
[14] *Doe v. University of Michigan*, 325 F.Supp.3d 821, 826 (E.D. Michigan 2018) (citing *Berry v. Schmitt*, 688 F.3d 290, 298.
[15] *Doe v. University of Michigan*, 325 F.Supp.3d 821, 826 (E.D. Michigan 2018) (citing *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017).
[16] *Doe v. University of Michigan*, 325 F.Supp.3d 821, 826 (E.D. Michigan 2018).
[17] *Doe v. University of Michigan*, 325 F.Supp.3d 821, 826 (E.D. Michigan 2018).

Judge Tarnow then reasoned "Defendants essentially ask this Court to sit back and wait for the investigator to issue findings against Plaintiff before intervening in this action. But at this very moment, the University may be denying Plaintiff due process protections to which he is entitled. ***The Court cannot, and will not, simply standby as the fruit continues to rot on the tree. This case is ripe for adjudication***."[18]

Judge Tarnow subsequently found that the plaintiff was entitled to a preliminary injunction against the University of Michigan because he was entitled a to a hearing and to cross-examination.[19] In support of his decision, Judge Tarnow cited the Sixth Circuit Court of Appeals' decision in *Doe v. University of Cincinnati*, 872 F.3d 393 (6th Cir. 2017) in which the Sixth Circuit held that a male student accused of engaging in non-consensual sex with a female student was entitled to a preliminary injunction prohibiting the University from finding him responsible for sexual assault without having had the opportunity to cross-examine his accuser.[20]

The record on appeal in *Doe v. University of Cincinnati*, supra, reflected that the female student, Jane Roe, did not appear at the respondent John Doe's sexual misconduct hearing, and that the panel Chair read Jane Roe's statement to the panel.[21] Accordingly, neither the respondent nor the panel were able to ask Jane Roe any questions.[22]

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[18] *Doe v. University of Michigan*, 325 F.Supp.3d 821, 826 (E.D. Michigan 2018) (emphasis added).
[19] *Doe v. University of Michigan*, 325 F.Supp.3d 821, 827 (E.D. Michigan 2018)
[20] *Doe v. University of Michigan*, 325 F.Supp.3d 821, 827 (E.D. Michigan 2018)(citing *Doe v. University of Cincinnati,* 872 F.3d 393, 402 (6th Cir. 2017).
[21] *Doe v. University of Michigan*, 325 F.Supp.3d 821, 827 (E.D. Michigan 2018)(citing *Doe v. University of Cincinnati,* 872 F.3d 393, 397 (6th Cir. 2017).
[22] *Doe v. University of Michigan*, 325 F.Supp.3d 821, 827 (E.D. Michigan 2018)(citing *Doe v. University of Cincinnati,* 872 F.3d 393, 397 (6th Cir. 2017).

Nevertheless, the panel still found John Doe responsible for violating the University of Cincinnati's sexual misconduct policy.[23]

In granting the Plaintiff's motion for a preliminary injunction during the University of Michigan's sexual misconduct investigation, Judge Tarnow stated that "[u]nlike the [sexual misconduct] policies which the Sixth Circuit has upheld, [the University of Michigan's] policy deprives Plaintiff of a live hearing and the opportunity to face his accuser."[24] Judge Tarnow further stated "[w]ithout a live proceeding, the risk of an erroneous deprivation of Plaintiff's interest in his reputation, education, and employment is significant" and noted that "[a]dditional procedural safeguards would both assist the truth-seeking process and help ensure the protection of Plaintiff's constitutional rights."[25]

Judge Tarnow further found: 1) requiring the University of Michigan to hold hearings for students accused of sexual assault would not be fiscally or administratively burdensome; 2) the plaintiff was likely to succeed on the merits of his claim that the University of Michigan's Policy, which afforded neither a live hearing nor cross-examination, violated his right to due process; 3) the Court was permitted to presume the Plaintiff would suffer irreparable harm if injunctive relief was not granted because his constitutional right to due process was "threatened or impaired" and money damages could not compensate Plaintiff for the reputational harm he had already suffered and will continue to suffer as a consequence of sexual assault allegations; 4) the potential harm an injunction may pose to the University' strong interest in maintaining campus safety and

[23] *Doe v. University of Michigan*, 325 F.Supp.3d 821, 827 (E.D. Michigan 2018)(citing *Doe v. University of Cincinnati,* 872 F.3d 393, 397 (6th Cir. 2017).
[24] *Doe v. University of Michigan*, 325 F.Supp.3d 821, 828 (E.D. Michigan 2018).
[25] *Doe v. University of Michigan*, 325 F.Supp.3d 821, 828 (E.D. Michigan 2018).

disciplining students who have committed sexual misconduct and the emotional harm and trauma that the complainant may suffer by having to appear at a live hearing with questioning did not outweigh the basic protection for the due process rights of an accused student; and 5) the public interest factor was neutral as the public had both an interest protecting a person's constitutional rights to due process and in ensuring the safety and well-being of students on university campuses.[26]

On April 10, 2019, the Sixth Circuit Court of Appeals vacated Judge Tarnow's order granting injunctive relief to the accused University of Michigan Student and remanded the matter back to him for reconsideration in light of: 1) its September 25, 2018 decision in *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), involving another University of Michigan student accused of violating the University's sexual misconduct policy, in which it held that if a university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact finder; and 2) the University of Michigan's Interim 2019 Sexual Misconduct Policy that the University claimed it would use to adjudicate the sexual misconduct allegations against the plaintiff.

B. DOE WAS ALSO FOUND TO BE ENTITLED TO INJUNCTIVE RELIEF AS IT RELATED TO THE UNIVERSITY OF MICHIGAN'S 2019 SEXUAL MISCONDUCT POLICY PRIOR TO THE UNIVERSITY PROCEEDING TO A HEARING AGAINST HIM

On January 19, 2019, the University of Michigan issued an Interim Sexual Misconduct Policy that it claimed it would use against the plaintiff.[27] Said Policy provided both students with the opportunity to appear before a hearing officer and to

[26] *Doe v. University of Michigan*, 325 F.Supp.3d 821, 828-29 (E.D. Michigan 2018).
[27] *Doe v. University of Michigan*, 18-1776 (E.D. Michigan, March 23, 2020), attached hereto as Exhibit B.

question the opposing party and witnesses after the University completed its investigation into the reporting party's allegations and provided the parties with an opportunity to review the final investigation report.[28] The Policy also provided that attendance at the hearing was voluntary, and if either party or a material witness chose not to attend, the Title IX Coordinator would decide whether the University would proceed with the hearing.[29] Following the hearing, the hearing officer would decide by a preponderance of the evidence whether a respondent violated the University of Michigan's 2019 Sexual Misconduct Policy.[30]

The University of Michigan moved Judge Tarnow to dismiss the plaintiff's causes of action pursuant to Fed.R.Civ.P. 12(b)(1) for mootness, lack of standing, and lack of ripeness.[31] The University of Michigan again argued that the plaintiff lacked standing and that his claims were not ripe because he had yet to suffer any injury since no guilty findings or sanctions had been imposed upon him.[32] Judge Tarnow rejected the University's argument again, holding that "Plaintiff's injury lies in the deprivation of one of the most basic due process rights-the hearing itself."[33]

The University of Michigan also argued that the plaintiff's due process claims were muted by its 2019 Sexual Misconduct Policy which would provide the plaintiff with a hearing.[34] Judge Tarnow rejected the University's argument, reasoning that the "Defendants' voluntary cessation through the Interim Policy does not assure Plaintiff that

[28] *Doe v. University of Michigan*, 18-1776 (E.D. Michigan, March 23, 2020), attached hereto as Exhibit B.
[29] *Doe v. University of Michigan*, 18-1776 (E.D. Michigan, March 23, 2020).
[30] *Doe v. University of Michigan*, 18-1776 (E.D. Michigan, March 23, 2020).
[31] *Doe v. University of Michigan*, 18-1776 (E.D. Michigan, March 23, 2020).
[32] *Doe v. University of Michigan*, 18-1776 (E.D. Michigan, March 23, 2020).
[33] *Doe v. University of Michigan*, 18-1776 (E.D. Michigan, March 23, 2020).
[34] *Doe v. University of Michigan*, 18-1776 (E.D. Michigan, March 23, 2020).

Defendants' will not return to [their] old ways" and that Plaintiff's case could only be mooted "if it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[35] Judge Tarnow also noted that "[t]he heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness" and that as the University of Michigan failed to meet that burden, the Plaintiff's due process claims were not moot.[36]

Judge Tarnow subsequently held that the Plaintiff was entitled to injunctive relief in that while the University of Michigan could proceed with a disciplinary proceeding against him, the University was ordered to provide him with a live hearing and with the opportunity to cross-examine witnesses and the claimant since the outcome of his disciplinary action rested on competing narratives.[37]

Note, the University of Michigan's adjudication hearing on the complainant's allegations that respondent in *Doe v. Michigan*, engaged in non-consensual sex with her will occur more than two (2) years after she made her allegations to the University and the University began conducting its investigation and while a prior respondent's appeal of the University of Michigan's sexual misconduct policy and the sanctions imposed against him was on appeal to the Sixth Circuit Court of Appeals. At no point in time in any of the litigation in *Doe v. Michigan* was there ever a concern expressed that the University of Michigan would somehow be in violation of Title IX and lose its federal funding if its Title IX sexual misconduct adjudicatory process was delayed due to a respondent being entitled to injunctive relief and/or litigating said issues prior to an adjudication as to

[35] *Doe v. University of Michigan*, 18-1776 (E.D. Michigan, March 23, 2020), attached hereto as Exhibit B.
[36] *Doe v. University of Michigan*, 18-1776 (E.D. Michigan, March 23, 2020).
[37] *Doe v. University of Michigan*, 18-1776 (E.D. Michigan, March 23, 2020).

whether he had violated their policy. Thus, Defense Counsel's representations to this Honorable Court, without citing to any legal authority or precedent that supports their position that Oberlin College will somehow lose its federal funding or be in violation of Title IX if this Honorable Court grants Plaintiff's motion for injunctive relief and/or requires Oberlin College to wait until the Sixth Circuit issues its forthcoming opinion in *John Doe v. Oberlin College,* Case No. case number 19-3342, before proceeding to an adjudicatory hearing against the Plaintiff is not well-founded and should not be given any weight.

III. THE OBERLIN COLLEGE SEXUAL MISCONDUCT POLICY, LIKE THE UNCONSTITUTIONAL UNIVERSITY OF MICHIGAN POLICIES, FAILS TO GUARANTEE THE PLAINTIFF THE RIGHT TO A LIVE HEARING AND THE RIGHT TO CROSS-EXAMINE HIS ACCUSER AND OTHER WITNESSES

Just as the district court in *Doe v. University of Michigan*, ultimately held that the University of Michigan's sexual misconduct policies were unconstitutional and that University of Michigan could only proceed with its disciplinary proceedings against the plaintiff if it provided the plaintiff with a live hearing and the opportunity to cross-examine his accuser and other witnesses,[38] so too should this Honorable Court in respect to the Oberlin Sexual Misconduct Policy and the disciplinary proceedings that Oberlin College has initiated against Plaintiff.

A. THE OBERLIN POLICY VIOLATES PLAINTIFF'S CONSTITUTIONAL RIGHTS TO DUE PROCESS BY FAILING TO GUARANTEE THAT HE WILL RECEIVE A LIVE HEARING

The Oberlin Policy specifically provides that "the College may substitute an alternate method of adjudication at its discretion" if a full Hearing Panel "cannot

[38] *Doe v. University of Michigan,* 18-1776 (E.D. Michigan, March 23, 2020), attached hereto as Exhibit B.

reasonably be convened."[39] The Oberlin Policy provides examples of when a full Hearing Panel might not be able to be convened, such as "at or after the end of a semester or academic year or during the Winter Term."[40]

As the Oberlin College's Spring semester and its 2019-2020 academic year is scheduled to end on Sunday, May 17, 2020[41] and due to the current and likely continued social distancing measures implemented by Oberlin College and the State of Ohio, there is a significant likelihood that the College will implement the clause in its Policy that allows for an "alternate method of adjudication." The Oberlin Policy fails to define and/or provide any guidance as to what an "alternative method of adjudication" entails. However, it's very name suggests that said procedure and/or process would not involve a live hearing.

Accordingly, this Honorable Court, like the district court in *Doe v. Michigan*, supra, should issue an Order requiring the Oberlin College Defendants to provide the Plaintiff with a live hearing to defend against the allegations that he violated the Oberlin Policy and with clarity as to the procedural safeguards that the College would implement and follow if it decides to proceed with its "alternative method of adjudication."

B. THE OBERLIN POLICY VIOLATES PLAINTIFF'S CONSTITUTIONAL RIGHTS TO DUE PROCESS BY FAILING TO GUARANTEE THAT HE WILL HAVE AN OPPORTUNITY TO CROSS-EXAMINE HIS ACCUSER AND OTHER WITNESSES AT A LIVE HEARING

The Oberlin Policy does not require the participation of the reporting party

[39] Relevant portion of Oberlin College's October 16, 2019 Sexual Misconduct Policy, attached hereto as Exhibit A, at p.51.
[40] Relevant portion of Oberlin College's October 16, 2019 Sexual Misconduct Policy, at p.51.
[41] Oberlin College calendar for 2019-2020 academic year, attached hereto as Exhibit C.

(Plaintiff's accuser) or any of the witnesses interviewed by the College's Title IX investigator at the live hearing.[42] The Policy notes that "the College's ability to present evidence at the full hearing may be limited in the instance that a Reporting Party chooses not to participate in the hearing."[43] The Policy also notes that in the event that a Reporting Party chooses to not participate in the hearing, "Oberlin College will assume the function of the Reporting Party" and in such instances "the Title IX Coordinator will appoint an administrator as the institutional representative to serve as the Reporting Party."[44]

The Oberlin Policy clearly reflects that the College would intend to proceed with a formal hearing against a Respondent Party, such as the Plaintiff, even if his accuser chose to not participate at the hearing.

Accordingly, this Honorable Court, like the district court in *Doe v. Michigan*, supra, should issue an Order requiring the Oberlin College Defendants to provide the Plaintiff with an opportunity to cross-examine his accuser and any other witnesses against him at a live hearing.

IV. PLAINTIFF SHOULD HAVE AN OPPORTUNITY TO FILE AN AMENDED COMPLAINT FOR THE PURPOSE OF ESTABLISHING THAT THIS HONORABLE COURT HAS DIVERSITY JURISDICTION OVER HIS STATE LAW CLAIMS

Plaintiff respectfully asserts that this Honorable Court should grant him leave to file an Amended Complaint in this matter to assert that this Honorable Court has jurisdiction over his state law claims pursuant to 28 U.S.C. §1332, as the matter in controversy on his

[42] Relevant portion of Oberlin College's October 16, 2019 Sexual Misconduct Policy, attached hereto as Exhibit A, at p.57.
[43] Relevant portion of Oberlin College's October 16, 2019 Sexual Misconduct Policy, at p.57.
[44] Relevant portion of Oberlin College's October 16, 2019 Sexual Misconduct Policy, at p.49.

state law claims exceeds $75,000.00, exclusive of interests and costs, and is between citizens of different States. Plaintiff is a citizen of the State of Georgia and the Defendants are citizens of the State of Ohio. Plaintiff did not aver in his Complaint that he was a citizen of Georgia because he filed his Complaint in the Lorain County Court of Common Pleas and there was no issue as to whether the Lorain County Court of Common Pleas had jurisdiction over his state law claims as the Defendants conduct occurred in Lorain County.

Plaintiff further asserts that his state law causes of action for breach of contract and promissory estoppel accrued on or about February 26, 2020 and are therefore ripe for this Honorable Court's consideration, regardless of whether this Honorable Court denies the Plaintiff's request for a restraining order and/or injunctive relief and/or dismisses his 42 U.S.C § 1983 claims and Title IX claims. If this Honorable Court does not grant Plaintiff permission to file an Amended Complaint in this matter, he would respectfully request that this Honorable Court remand his state law claims back to the Lorain County Court of Common Pleas.

WHEREFORE, the Plaintiff, by and through undersigned counsel, respectfully moves this Honorable Court to reconsider its expressed intention to dismiss Plaintiff's Complaint without prejudice and to deny his Motion for a Temporary Restraining Order based upon the March 23, 2020 decision of the United States District Court for the Eastern District of Michigan, Southern Division, in *Doe v. University of Michigan,* 18-1776.

Respectfully Submitted

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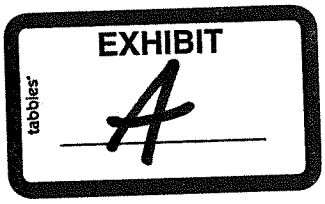
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was electronically served to counsel for the Defendants on this 1st day of April 2020 via the Court's electronic filing system.

/s/ Brian A. Murray
BRIAN A. MURRAY, Esq.

OBERLIN COLLEGE SEXUAL MISCONDUCT POLICY

Approved on October 16, 2019



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the appropriate academic dean or designee if the investigation results in a finding of responsibility.

Time Frame for Resolution

The College seeks to resolve all reports within 60 business days of the initial report. All time frames expressed in this policy are meant to be guidelines rather than rigid requirements. Extenuating circumstances may arise that require the extension of time frames, including extension beyond 60 business days. Extenuating circumstances may include the complexity and scope of the allegations, the number of witnesses involved, the availability of the parties or witnesses, the effect of a concurrent criminal investigation, any intervening school break or vacation, or other unforeseen circumstances.

In the event that the investigation and resolution exceed this time frame, the College will notify all parties of the reason(s) for the delay and the expected adjustment in time frames. Best efforts will be made to complete the process in a timely manner by balancing principles of thoroughness and fundamental fairness with promptness.

The College as Reporting Party

On some occasions, Oberlin College will assume the function of the Reporting Party. This approach may be taken in instances of multiple reports about a single Responding Party, when a Reporting Party chooses not to participate in the hearing process, or other occasions when the College has sufficient evidence to reach a threshold determination that a report should be referred to formal resolution. In these instances, the Title IX Coordinator will appoint an administrator as the institutional representative to serve as the Reporting Party.

Support for Parties after Formal Resolution

The Title IX Coordinator is available to provide support and to identify campus and external resources to assist all parties and witnesses once a resolution has been reached. The goal of such support is to address any personal needs and to facilitate the participation of all individuals in the campus community in whatever ways are appropriate given any sanctions that may have been imposed.

7. Procedures for Formal Resolution of Reports

Overview

Formal resolution of a report under the Sexual Misconduct Policy will occur either through an investigation resulting in a finding about responsibility as described previously. If a violation of the policy is found, sanctioning will be completed as previously described.

If resolution involves a Conduct Conference (for students only), the Hearing Coordinator will meet with the Reporting Party and Responding Party to determine responsibility and render a decision as to what sanctions, if applicable, should be implemented. If resolution involves a Hearing Panel, the Hearing Coordinator will be responsible for facilitating the formal resolution process, including the appointment of the appropriate hearing bodies/administrator to conduct the hearing. These appointments will take into account the need for a timely process and any conflicts of interest. In addition, when hearing panels are utilized, the hearing coordinator will make an attempt to ensure that the panel represents a diverse set of campus and professional expertise.

Any parties who conduct investigations, make sanctioning determinations, or hear appeals must participate in annual training on non-discrimination; the dynamics of sexual and/or gender-based harassment, discrimination and violence, including sexual violence, stalking, and intimate partner violence; the factors relevant to a determination of credibility; the appropriate manner in which to receive and evaluate sensitive information; the manner of deliberation; evaluation of consent and incapacitation; the application of the preponderance of the evidence standard; sanctioning and the College's policies and procedures. The training will be coordinated by the Title IX Coordinator in conjunction with campus and external partners.

The investigators, appeals officers, and sanctioning officers are supported by the Hearing Coordinator and Title IX Coordinator, who are present at Hearing Panel meetings, but are not voting members of the hearing body. The Hearing Coordinator and Title IX Coordinator will meet with all involved parties prior to the hearing, be present during the hearing to serve as a resource for the Hearing Panel and the parties on issues of policy and procedure, and to ensure that policy and procedure are appropriately followed throughout the hearing.

In most cases, it should be possible to convene a Hearing Panel; however if the hearing must be heard at or after the end of the semester or academic year or during Winter Term and/or a full Hearing Panel cannot reasonably be convened, those cases may be heard by the Dean of Students (or designee) or the College may substitute an alternate method of adjudication at its discretion.

Conduct Conference

A Reporting Party or Responding Party may request resolution through an administrative Conduct Conference, in which the Hearing Coordinator will meet with the Reporting Party and Responding Party to determine responsibility and, if applicable, render a decision as to what sanctions should be implemented. Both parties and the Hearing Coordinator must agree that the matter is appropriate for resolution by a Conduct Conference. Depending upon the nature and severity of the allegations, the Hearing Coordinator may decline to handle the matter administratively and refer the case to a Hearing Panel.

A Conduct Conference is appropriate when the Responding Party is a student, has admitted to the misconduct, and there is no discernible dispute in the relevant facts of the investigation report.

All parties must have notice, the opportunity to review the investigative report in advance, and the opportunity to present any additional relevant information to the Hearing Coordinator prior to conducting a Conduct Conference. Based on the outcome of the Conduct Conference, the Hearing Coordinator will issue an appropriate sanction. The Hearing Coordinator may also recommend remedies for the Reporting Party and remedies for the Oberlin community. On the conclusion of the Conduct Conference, the Title IX Coordinator is responsible for reviewing, adjusting, and implementing these remedies in order to eliminate the hostile environment and prevent its recurrence.

Both a Reporting Party and Responding Party may appeal the determination of the Hearing Coordinator as provided in the Appeal section below.

Pre-Hearing Procedures

The pre-hearing process, described below, is crucial to ensuring a fair and equitable process. The Hearing Coordinator is responsible for managing the pre-hearing process. The timelines described below are designed to ensure that the parties have adequate notice to review information and submit related requests to the Hearing Coordinator, as well as to allow the Hearing Coordinator sufficient notice to arrange witnesses or address related concerns. In consultation with the Title IX Coordinator, the Hearing Coordinator may make appropriate adjustments to the timeframes provided to achieve these goals as well as ensure a timely and equitable process. The Hearing Coordinator will have the authority to designate reasonable time frames with respect to the notice provisions regarding witnesses, prior sexual history and/or pattern evidence.

1. Notice of Charges

Following the threshold determination that there is sufficient information to move forward with a hearing, the Hearing Coordinator will send a Notification Letter to both the Reporting Party and the Responding Party. The Notification Letter provides each party with a brief summary of the conduct at issue and the specific policy violation(s) that are alleged to have taken place.

2. Acceptance of Responsibility

If a Responding Party wishes to accept responsibility for the charges, they may request an administrative conference with the Hearing Coordinator. In this instance, the Responding Party will provide a written acceptance of the facts of the allegation. The Hearing Coordinator will then convene a Hearing Panel/Administrator (referred to as the Hearing Body from here forward). The Hearing Body's role will be solely to determine appropriate sanctions. The investigative report will serve as the primary evidence in making this determination. The Reporting Party, the Responding Party, and the Hearing Body retain the right to call witnesses in order to assess sanctions and will follow the time frames and procedures described in this description of pre-hearing procedures.

3. Pre-Hearing Meeting with Reporting Party and Responding Party

Following the Notification Letter, the Hearing Coordinator will contact the Reporting Party and Responding Party to schedule separate meetings with each party. At this pre-hearing meeting, each party will receive an explanation of the hearing process and have the

opportunity to ask any questions. The Advisor is encouraged to accompany the Reporting Party or Responding Party to this initial meeting.

4. Notice of Hearing

Once each party has met with the Hearing Coordinator, a Notice of Hearing is sent to the Reporting Party and the Responding Party. The Notice provides the parties with the date, time, and place of the hearing, as well as the names of the individual panelists on the Hearing Panel or the Hearing Administrator. In general, the hearing will be scheduled within 10 business days of the date of the Notice of Hearing. This time frame may be extended for good cause, with written notice to the parties of the extension and the reason for the extension.

5. Composition of the Hearing Panel

The Reporting Party and the Responding Party may each submit a written request to the Hearing Coordinator that a member of the Hearing Panel be removed. The request must clearly state the grounds to support a claim of bias, conflict of interest or an inability to be fair and impartial. This challenge must be raised within 2 business days of receipt of the Notice of Hearing. Panels for the student process will be chosen based on availability of the panelists and will attempt to include members who embody a diverse set of perspectives and identities. Panels for processes involving the Professional Conduct Review Committee will be selected semi-randomly. In general the Hearing Coordinator will attempt to make a faculty panel that includes at least one faculty member from the Conservatory and one from the College of Arts and Sciences.). If there are insufficient eligible members of the General Faculty Professional Conduct Review Committee available, the Hearing Coordinator and Title IX Coordinator will identify appropriately trained faculty alternates to serve on the review panel. The Hearing Coordinator will attempt to make sure that there is gender diversity on all panels.

6. Pre-Hearing Review of Documents.

Both parties will be afforded similar and timely access to any documents and information used at a hearing. The Reporting Party and the Responding Party will each have the opportunity to review all investigative documents, subject to the privacy limitations imposed by state and federal law, at least 10 business days prior to the hearing. The investigative documents will include the investigation report, any witness statements or interviews, statements from or interviews with both parties, and any other documentary information that will be presented to the Hearing Panel. Review of these documents will

take place at a secure and private location on campus, with access facilitated by the Hearing Coordinator or Safety and Security.

The Hearing Panel must review all pertinent information regarding the incident in question prior to the date of the Hearing Panel.

Information and/or witnesses not provided as part of the investigation may not be introduced at the Hearing Panel without permission of the Hearing Coordinator.

7. Relevance

The Hearing Coordinator will review the investigative report, any witness statements and any other documentary evidence to determine whether the proffered information contained therein is relevant and material to the determination of responsibility given the nature of the allegation. In general, the Hearing Coordinator may redact information that is irrelevant, more prejudicial than probative, or immaterial. The Hearing Coordinator may also redact statements of personal opinion, rather than direct observations or reasonable inferences from the facts, and statements as to general reputation for any character trait, including honesty.

8. Witnesses

The Reporting Party, Responding Party, and the Hearing Panel all have the right to present witnesses. Witnesses must have observed the conduct in question or have information relevant to the incident and cannot be called solely to speak about an individual's character. In general, neither party will be permitted to call as a witness anyone who was not interviewed by the investigator as part of the College's investigation. If either party wishes to call witnesses, whether or not they were previously interviewed as part of the College's investigation, the following must be submitted to the Hearing Coordinator via e-mail or in hardcopy format:

- The names of any witnesses that either party intends to call;
- A written statement and/or description of what each witness observed, if not already provided during investigation;
- A summary of why the witness' presence is relevant to making a decision about responsibility at the hearing; and,
- The reason why the witness was not interviewed by the investigator, if applicable.

The Hearing Coordinator will determine if any proffered witness has relevant information and if there is sufficient justification for permitting a witness who was not interviewed by the investigator. The Hearing Coordinator may also require the investigator to interview the newly proffered witness.

If witnesses are approved to be present, the Reporting Party and the Responding Party are provided with a list of witnesses and any relevant documents related to their appearance at the hearing in advance of the hearing date, with the understanding that the Reporting Party and Responding Party will have the opportunity to submit additional witness information to the Hearing Coordinator in advance of the hearing date after reviewing any additional investigative documents.

9. Prior Sexual History and/or Pattern Evidence

Prior Sexual History of a Reporting Party: In general, a Reporting Party's prior sexual history, character or reputation is not relevant and will not be admitted as evidence at a hearing. Where there is a current or ongoing relationship between the Reporting Party and the Responding Party, and the Responding Party alleges consent, the prior sexual history between the parties may be relevant to assess the manner and nature of communications between the parties. As noted in other sections of this policy, however, the mere fact of a current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Any prior sexual history of the Reporting Party with other individuals is not relevant and will not be permitted. In addition, prior sexual history may be considered under very limited circumstances to explain injury or demonstrate motive or intent.

Pattern Evidence *by a Responding Party:* Where there is evidence of a pattern of conduct similar in nature by the Responding Party, either prior to or subsequent to the conduct in question, regardless of whether there has been a finding of responsibility, this information may be deemed relevant and probative to the panel's determination of responsibility and/or assigning of a sanction in cases where the pattern of behavior itself is what would cause the violation (i.e. in cases where one needs to prove persistent or pervasive behavior). In all other cases, behavior that would create a stand-alone violation of policy may only be used in the sanctioning phase of a hearing if the responding party was previously found responsible for violating college policy. The determination of relevance will be based on an assessment of whether the previous incident was substantially similar to the conduct cited in the report and indicates a pattern of behavior and substantial

conformity with that pattern by the Responding Party. Pattern evidence may also be relevant to prove intent, state of mind, absence of mistake or identity. Where there is a prior finding of responsibility for a similar act of sexual misconduct, the finding may not be considered in making a determination as to responsibility but will be considered in the assigning of a sanction.

The Hearing Coordinator, in consultation with the Title IX Coordinator, may choose to introduce this information, with appropriate notice to the parties. Alternatively, a party may request in writing that information under this section be admitted. A request to admit such information must be submitted to the Hearing Coordinator. The Hearing Coordinator, in consultation with the Title IX Coordinator, will assess the relevance of this information and determine if it is appropriate for inclusion at the hearing.

To aid in an advance determination of relevance of prior sexual history and/or pattern evidence, the following must be submitted before the hearing to the Hearing Coordinator via e-mail or in hardcopy format:

- A written statement and/or description of the proposed information, if not already provided during investigation; and

- A summary of why this information is relevant to making a decision of responsibility at the hearing.

If this information is approved as appropriate for presentation at the hearing, the Reporting Party and Responding Party will be provided with a brief description of the approved information before the hearing.

10. Request to Reschedule Hearing

Either party can request to have a hearing rescheduled. Absent extenuating circumstances, requests to reschedule must be submitted to the Hearing Coordinator with an explanation for the request at least 3 business days prior to the hearing. The Hearing Coordinator in consultation with the Title IX Coordinator will review the request and determine whether a delay in the hearing is warranted, and will notify all parties of their decision.

11. Consolidation of Hearings

At the discretion of the Hearing Coordinator, in consultation with the Title IX Coordinator, multiple reports may be consolidated against a Responding Party in one hearing, if the

evidence related to each incident would be relevant and probative in reaching a determination on the other incident. Matters may be consolidated where they involve multiple Reporting Parties, multiple Responding Parties, or related conduct that would regularly have been heard under the Code of Student Conduct.

Hearing Procedures

The Hearing Coordinator is responsible for the administration of all procedures related to the panel hearing.

1. Attendance at Hearing

If a party does not attend a hearing for any non-emergency or non-compelling reason, the hearing may be held in their absence at the discretion of the Hearing Coordinator. The College will not require a Reporting Party to participate in or attend a hearing, although the College's ability to present evidence may be limited in the instance that a Reporting Party chooses not to participate in the hearing.

If a Responding Party who is a student withdraws from the College prior to the conclusion of an investigation or formal resolution under this policy, the Responding Party's academic transcript will be marked Withdrawal Pending Disciplinary Action. If a Responding Party who is a student chooses not to participate, the College will move forward with the resolution of the report and imposition of sanction, if any, in absentia. If the report is finally resolved while the Responding Party is absent, the Responding Party's academic transcript will be marked with the final outcome in accordance with regular practice under this policy.

A Reporting Party or Responding Party may also request alternative testimony options that would not require physical proximity to the other party. Options include placing a privacy screen in the hearing room or allowing the Reporting Party or Responding Party to speak outside the physical presence of the other by using appropriate technology to facilitate participation. The Hearing Coordinator must review any proposed alternative in advance of the hearing to ensure that it is consistent with the goals of a fair and equitable process. While these options are intended to help make the Reporting Party or Responding Party more comfortable, they are not intended to work to the disadvantage of the other party.

Doe v. University of Michigan, 032320 MIEDC, 18-11776 /**/ div.c1 {text-align: center} /**/

John Doe, Plaintiff,

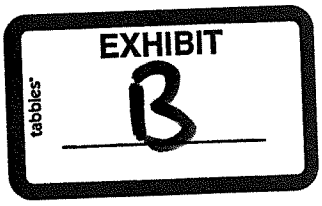
v.

University of Michigan, et al., Defendants.

No. 18-11776

United States District Court, E.D. Michigan, Southern Division

March 23, 2020



Elizabeth A. Stafford Magistrate Judge

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS [49]; GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT [53]; DENYING DEFENDANTS' MOTION FOR PROTECTIVE ORDER AS MOOT [66]; DENYING DEFENDANTS' MOTION TO VACATE ORDER ENJOINING STUDENT CONDUCT HEARING AS MOOT [85]

Arthur J. Tarnow Senior United States District Judge

Plaintiff John Doe, a male student accused of sexual assault at the University of Michigan, commenced this 42 U.S.C. § 1983 action claiming, *inter alia*, that Defendant University of Michigan's Policy and Procedures on Student Sexual and Gender-Based Misconduct and Other Forms of Interpersonal Violence ("2018 Policy") deprives students of due process in violation of the Fourteenth Amendment. He is suing to seek adjudication of the allegations against him through a hearing with an opportunity to cross-examine witnesses. Before the Court are four motions: Defendants' Motion to Dismiss [49], Plaintiff's Motion for Partial Summary Judgment [53], Defendants' Motion for Protective Order [66], and Defendants' Motion to Vacate Order Enjoining Student Conduct Hearing [85].

For the reasons stated below, the Court GRANTS in part and DENIES in part Defendants' Motion to Dismiss [49]; GRANTS Plaintiff's Motion for Partial Summary Judgment [53]; DENIES Defendants' Motion for Protective Order as MOOT [66]; and DENIES Defendants' Motion to Vacate Order Enjoining Student Conduct Hearing as MOOT [85].

Factual Background

On March 12, 2018, a female student ("Claimant") at the University of Michigan filed an Office of Institutional Equity ("OIE") complaint against Plaintiff alleging that he had a sexual encounter with her that was not consensual. Plaintiff alleges that it was consensual. (Dkt. 53, pg. 4). There were no witnesses to the encounter. (*Id.*). The University began investigating the OIE complaint using the February 7, 2018 Policy. (*Id.*).

I. 2018 Sexual Misconduct Policy

At the start of the investigation, the University had a bifurcated system of addressing student misconduct. The Statement of Student Rights & Responsibilities provided a hearing to the accused; while the 2018 Policy, which governed sexual assault claims, did not. When a student reported sexual misconduct to the OIE, the 2018 Policy set forth two resolution processes: 1) formal resolution, involving an investigation, and where necessary, an appeal and sanctions; and 2) alternative resolution. (Dkt. 47-1, pg. 20-21). The formal resolution process is challenged here.

Pursuant to the 2018 Policy, once a claimant files a report of an alleged violation, the

accused is notified in writing of the start of an investigation. (*Id*. at 30). The accused may decline to participate in the process, but the investigation will nevertheless continue. (*Id*. at 31-32). Throughout this process, the accused may have an advisor or an attorney. (*Id*. at 31).

At the onset of the investigation, the OIE investigator meets separately with the claimant and the accused. (*Id*. at 29). After the interviews, the investigator provides the accused with a draft summary of his or her statement so he or she may comment and ensure its accuracy. (*Id*. at 33-34).

The investigator is responsible for reviewing the information provided by the parties and determining its relevance and probative value. (*Id*. at 29-32). The accused may submit suggested questions to the investigator to be asked of the claimant or other witnesses; however, it is within the investigator's discretion to determine which questions are appropriate. (*Id*. at 29).

Once the parties have had the opportunity to comment on their statements, identify witnesses, and submit suggested questions, and the investigator has completed gathering evidence, the investigator prepares a Preliminary Investigation Report. (*Id*. at 34). The Preliminary Investigation Report includes a summary of the witness interviews, but does not contain any findings. (*Id*.). The parties are given a copy of the Report and may comment and offer feedback. (*Id*.).

Thereafter, the investigator makes a determination by a preponderance of the evidence, as to whether the accused has violated the 2018 Policy. (*Id*. at 35). No. live hearing is held. The investigator then drafts a final written report ("Final Report") summarizing his or her findings and supporting rationale. (*Id*. at 34-35). The Final Report is reviewed by the Title IX Coordinator and the Office of General Counsel before it is given to the parties. (*Id*. at 35).

Either party may appeal the investigator's findings. (*Id*. at 39). An external reviewer reviews the Final Report and the parties' written submissions. (*Id*. at 39-40). Typically, within seven days of receipt of the relevant documents, the external reviewer determines whether there are any issues of concern and may affirm, set aside, or modify the investigator's decision. (*Id*.).

II. Doe's Investigation

Defendant Suzanne McFadden, the OIE investigator, commenced an investigation into Claimant's complaint against Doe. (Compl. ¶ 10). She interviewed Claimant on March 29, 2018. (*Id*. at ¶ 62). On April 2, 2018, Doe received an email from the OIE stating that a complaint had been filed against him. (*Id*. at ¶ 32). The complaint alleged Doe engaged in sexual activity without Claimant's consent at a residence hall on November 11, 2017. (*Id*. at ¶ 20). The OIE Senior Director and Title IX Coordinator, Defendant Pamela Heatlie, issued a no contact directive against Doe. (*Id*. at ¶ 31). The directive required Doe to avoid all incidental contact with Claimant. (*Id*. at ¶ 31-32).

On April 3, 2018, McFadden interviewed Doe. (*Id*. at ¶ 60). Doe claims that he was not given any information as to what Claimant told McFadden in their interview. (*Id*. at ¶ 63-65). McFadden also interviewed witnesses on unknown dates. (*Id*. at ¶ 65). Doe claims he was not given a summary of their statements or an opportunity to respond. (*Id*.).

On April 19, 2018, the University informed Doe that an administrative hold had been placed on his student account, rendering him unable to register for classes or receive a copy of his

transcript. (*Id*. at ¶ 44-45).

On May 24, 2018, McFadden issued an Executive Summary. (*Id*. at ¶ 67). Doe was given five days to provide written feedback. (*Id*. at ¶ 68). On May 29, 2018, Doe submitted his feedback. (*Id*. at ¶ 69). McFadden then investigated the new information and issues submitted to her. (*Id*. at ¶ 70). On June 21, 2018, McFadden sent Doe a second Executive Summary, which included additional information provided by the parties. (*Id*. at ¶ 71). The proceedings have been stayed since May 8, 2019 and no findings have been made. (*See* Dkt. 45).

III. *Baum* Decision and the 2019 Interim Sexual Assault Policy

Plaintiff filed this suit on June 4, 2018. On September 25, 2018, *Doe v. Baum* was decided. 903 F.3d 575 (6th Cir. 2018). Similar to here, in *Baum*, a student accused of sexual misconduct challenged the University's 2018 Policy for depriving him of a hearing with cross-examination. *Baum* held that "if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder." *Baum*, 903 F.3d at 578.

On January 9, 2019, Defendants issued an Interim Sexual Misconduct Policy ("2019 Policy" or "Interim Policy") that is still in effect today. (*See* Dkt. 47-3). When a complaint is filed under the 2019 Policy, the Title IX Coordinator does an initial assessment and responds to any immediate health and safety concerns. (*Id*. at 26). Once the Coordinator decides to initiate an investigation, he or she will ensure that the respondent is informed of the nature of the investigations, the parties involved, and a summary of the conduct alleged. (*Id*. at 27). The Coordinator also decides whether or not to impose interim protective measures including, but not limited to: a no contact directive, placing a hold on respondent's transcript and/or degree, imposing an interim suspension. (*Id*. at 13-14).

Once an investigation begins, the Title IX Coordinator choses an investigator, who is usually a OIE staff member, to interview the parties and witnesses, gather relevant evidence, and submit a preliminary investigation report for the parties to review and respond. (*Id*. at 34-35). If a hearing is required, parties will have ten days to review the final investigation report and provide a response to the hearing officer. (*Id*. at 38).

The hearing officer has broad discretion to determine the format of the hearing. (*Id*. at 39). Generally, the hearing provides both parties an opportunity to address the hearing officer in person and question the opposing party and witnesses. (*Id*. at 38). Attendance is voluntary; if either party or a material witness will not attend, the Title IX Coordinator decides whether the University will proceed with the hearing. (*Id*.). Following the hearing, the hearing officer decides, by a preponderance of the evidence, whether the respondent violated the 2019 Policy. (*Id*. at 41). After a finding of a violation, sanctions may be imposed. (*Id*.). Possible sanctions range from disciplinary probation to expulsion. (*Id*. at 43-44).

Either party may appeal the hearing outcome, the sanctions, or both. Appellate review is conducted by an external examiner. (*Id*. at 45). In reviewing the hearing outcome, the external examiner can affirm the hearing officer's finding, remand the matter, or order a new hearing. (*Id*. at 47). In reviewing the sanctions, the external examiner can either affirm the sanctions or alter them,

if they are deemed clearly inappropriate or disproportional. (*Id*.).

Defendants are currently drafting a replacement to the Interim Policy, called the Umbrella Policy, that will apply to students, faculty and staff. (*See* Dkt. 82, pg. 7-8). They have yet to announce when it will be in effect. Defendants claim that they will use the 2019 Policy to adjudicate Plaintiff's case in the meantime. (Dkt. 60-1, pg. 60).

Procedural History

Plaintiff brings this suit against the University of Michigan, its Board of Regents and Individual Defendants Pamela Heatlie, Robert Sellers, Martin Philbert, Erik Wessel, Laura Blake Jones, E. Royster Harper, Suzanne McFadden, and Paul Robinson. (Compl. ¶ 4-14). Plaintiff's Second Amended Complaint [47] alleges the following: (Count I) the 2018 Policy violates his right to due process under the Fourteenth Amendment; (Count II) Title IX disparate treatment and impact based on sex; (Count III) Elliot Larsen Civil Rights Act ("ELCRA") disparate treatment on the basis of gender; (Count IV) ELCRA disparate impact on the basis of gender.

This Court granted Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction on June 14, 2018. (Dkt. 19). That ruling was vacated by the Sixth Circuit on April 10, 2019 and remanded for reconsideration in light of *Baum* and the University's Interim Policy. *Doe v. Bd. of Regents of Univ. of Michigan*, No. 18-1870, 2019 WL 3501814, at *1 (6th Cir. Apr. 10, 2019).

Analysis

I. Motion to Dismiss

Defendants move to dismiss the Complaint pursuant to Fed.R.Civ.P. 12(b)(1) for mootness, lack of standing and lack of ripeness. Where a case is moot, the Court lacks subject-matter jurisdiction. "A case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 473 (6th Cir. 2008) (internal citations omitted) (quotation marks omitted). Voluntary cessation of a challenged conduct moots a case, however, only if it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968).

"Standing is thought of as a 'jurisdictional' matter, and a plaintiff's lack of standing is said to deprive a court of jurisdiction." *Ward v. Alternative Health Delivery Sys., Inc.*, 261 F.3d 624, 626 (6th Cir. 2001) (internal citation omitted). "[P]laintiff has the burden of proving jurisdiction in order to survive the motion." *Mich. S. R.R. Co. v. Branch & St. Joseph Cntys. Rail Users Ass'n., Inc.*, 287 F.3d 568, 573 (6th Cir. 2002). Standing contains three elements. First, a plaintiff has standing when they have suffered an "injury in fact" which is "concrete and particularized" and "actual and imminent." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Second, there must be a causal connection between the injury and the challenged conduct such that the injury is "fairly traceable" to the defendant. *Id*. Third, it must be "likely" that the injury will be "redressed by a favorable decision." *Id.* at 561.

"Ripeness requires that the injury in fact be certainly impending" and "separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for the court's review." *Nat'l Rifle Assoc. of America v. Magaw*, 132 F.3d 272, 280

(6th Cir. 1997). “If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed.” *Bigelow v. Mich. Dep't of Nat. Res.*, 970 F.2d 154, 157 (6th Cir. 1992).

In the alternative, Defendants move to dismiss Plaintiff's entire action for failing to state his claims pursuant to Fed.R.Civ.P. 12(b)(6). “To survive a motion to dismiss, [plaintiff] must allege ‘enough facts to state a claim to relief that is plausible on its face.'” *Traverse Bay Area Intermediate Sch. Dist. v. Mich. Dep't of Educ.*, 615 F.3d 622, 627 (6th Cir. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). On a Rule 12(b)(6) motion to dismiss, the Court must “assume the veracity of [the plaintiff's] well-pleaded factual allegations and determine whether the plaintiff is entitled to legal relief as a matter of law.” *McCormick v. Miami Univ.*, 693 F.3d 654, 658 (6th Cir. 2012) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

a. *Justiciability*

On interlocutory appeal, Defendants questioned this Court's jurisdiction. (Dkt. 84, pg. 4). The Sixth Circuit declined to address jurisdiction and instead mandated the Court to “consider the impact of *Baum* and Michigan's interim policy.” *Doe*, 2019 WL 3501814, at *1. Under the law-of-the-case doctrine, the Court is precluded from reconsidering Defendants' jurisdictional arguments as they were impliedly decided by the appellate court at an earlier stage of the case. *See Caldwell v. City of Louisville*, 200 Fed.Appx. 430, 432-33 (6th Cir. 2006) (citing *United States v. Moored,* 38 F.3d 1419, 1421-22 (6th Cir.1994)); *Westside Mothers v. Olszewski,* 454 F.3d 532, 538 (6th Cir. 2006) (upon remand, the district court is bound to “proceed in accordance with the mandate and law of the case as established by the appellate court.”). In the alternative, the Court will analyze each argument on the merits.

i. *Standing and Ripeness*

Courts may only adjudicate live cases and controversies. *Lujan*, 504 U.S. at 559. A case is live when the plaintiff has suffered an “injury in fact” such that it is concrete and neither hypothetically arising in the future nor resolved in the past. *Lujan*, 504 U.S. at 560-61; *Cleveland Nat. Air Show, Inc. v. U.S. Dep't of Transp*., 430 F.3d 757, 761 (6th Cir. 2005). Defendants argue that Plaintiff has not suffered an injury, because no guilty findings or sanctions have been imposed against him. However, Plaintiff's injury lies in the deprivation of one of the most basic due process rights-the hearing itself. The Supreme Court has stated that “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.” *Carey v. Piphus*, 435 U.S. 247, 266- 67 (1978). There is no dispute between the parties that Defendants' 2018 Policy denied Plaintiff a right to a hearing. Defendants adjudication of the allegations against him “without process…*immediately* collides with the requirements of the Constitution.” *Goss v. Lopez*, 419 U.S. 565, 574-75 (1975) (emphasis added). Accordingly, Plaintiff's injury-being withheld a hearing-is actual and not hypothetical.

ii. *Mootness*

Defendants' 2018 Policy deprived Plaintiff of his due process right to a hearing with an opportunity for cross-examination. In the wake of *Baum* and after this lawsuit was filed, the University changed course and enacted the 2019 Interim Policy. Defendants argue that its Interim Policy, which may provide a hearing to Plaintiff, moots Plaintiff's due process claims. However, the

Interim Policy is just that-interim. It will soon be replaced with an Umbrella Policy with unknown ramifications and procedural safeguards. Although the University assures it will follow the law this time, Plaintiff is entitled to clarity. The University must implement a policy that provides for administrative autonomy and constitutional soundness. *Goss*, 419 U.S. at 574-75 ("The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards.").

As a preliminary matter, the Interim Policy does not moot Plaintiff's claims, because the Sixth Circuit remanded this case for the express purpose of analyzing the Interim Policy in light of recent precedent. Furthermore, Defendants' voluntary cessation through the Interim Policy does not assure Plaintiff that Defendants will not "return to [its] old ways.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. W.T. Grant Co.,* 345 U.S. 629, 632 (1953)).

Plaintiff's case can only be mooted "if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Concentrated Phosphate Export Assn., Inc.*, 393 U.S. at 203. The "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Friends of the Earth, Inc.*, 528 U.S. at 189. This burden "takes into account the totality of the circumstances surrounding the voluntary cessation, including the manner in which the cessation was executed." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767-68 (6th Cir. 2019).

In examining the totality of circumstances, the Sixth Circuit evaluates two factors: (1) whether the process "leading to the change involved legislative-like procedures or were ad hoc, discretionary, and easily reversible actions" and (2) whether the University continues to defend its use of the challenged conduct. *Id.* at 768, 770. The University fails under both prongs.

In *Speech First, Inc*, a non-profit organization challenged the University bias response team initiative for violating students' First Amendment rights to free speech. *Id.* The University claimed that plaintiff's claims were moot, because it changed the challenged definition after the lawsuit was filed. The Sixth Circuit disagreed and found that the circumstances surrounding the University's voluntary cessation were disingenuous and fell short of its burden. *Id*. at 770 (quoting *Friends of the Earth, Inc.*, 528 U.S. at 189). Here, the University's behavior is similar to its actions in *Speech First, Inc.*

Under the first factor, Defendants have not provided evidence showing that the enactment was a legislative like procedure or one that can be easily reversed. Accordingly, the Interim Policy should receive the degree of solicitude that an ad hoc regulation would. *Id.* at 769 (finding the same when the University did not point to evidence suggesting that a formal process would be required to change its policy).

Under the second factor, like in *Speech First, Inc.*, the University has "continue[d] to defend its use of the challenged" policy. *Speech First, Inc.*, 939 F.3d at 770. After the *Baum* decision and subsequent policy change, University President Mark Schlissel publicly declared that "the Sixth Circuit got it wrong" and expressed that he "continue[d] to believe" that their prior method of adjudicating sexual misconduct cases was "the best way to determine the truth" Compl. ¶ 84; *see also Speech First, Inc.*, 939 F.3d at 770 (finding that the University did not satisfy its burden when

it argued that its practices "easily met constitutional standards."). The University, therefore, has failed to meet its burden of proving that the challenged policy will not be re-enacted. Plaintiff's due process claim is not moot.

b. *Qualified Immunity*

The Individual Defendants argue that qualified immunity shields them from personal liability. "Qualified immunity protects government officials performing discretionary functions unless their conduct violates a clearly established statutory or constitutional right of which a reasonable person in the official's position would have known." *Silberstein v. City of Dayton,* 440 F.3d 306, 311 (2006). To overcome this defense, Plaintiff must allege "facts sufficient to indicate that the [government official's] act in question violated clearly established law at the time the act was committed." *Russo v. City of Cincinnati,* 953 F.2d 1036, 1043 (6th Cir.1992).

These facts must satisfy two prongs. First, he must show that "based upon the applicable law, the facts viewed in the light most favorable to the plaintiff show that a constitutional violation has occurred." *Sample v. Bailey,* 409 F.3d 689, 695 (6th Cir.2005); *see also Saucier v. Katz,* 533 U.S. 194, 201 (2001). Plaintiff has satisfied this prong by proving that, in light of *Baum*, he was deprived of due process under the 2018 Policy. Second, Plaintiff must show that "the violation involved a clearly established constitutional right of which a reasonable person would have known." *Sample,* 409 F.3d at 696; *see also Saucier,* 533 U.S. at 201.

A clearly established right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier,* 533 U.S. at 202 (internal quotation marks omitted). "This inquiry . . . must be undertaken in light of the specific context of the case, not as a broad general proposition[.]" *Id.* at 201. Defining the contours of a right requires us to "look first to decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits." *Baker v. City of Hamilton,* 471 F.3d 601, 606 (6th Cir.2006) (internal quotation marks omitted).

Defendants argue that Plaintiff's right to a hearing with cross-examination was not clearly established until after *Baum* and after Defendants' began investigating Plaintiff for sexual assault allegations under the 2018 Policy. Defendants attempt to use *Doe v. Northern Michigan University* for support. However, in *Northern Michigan University*, the court recognized that *Doe v. University of Cincinnati*, which was decided months before the 2018 Policy was enacted, required accused students to "be given an "opportunity to share his version of events . . . at some kind of hearing." *Doe v. N. Michigan Univ.*, 393 F.Supp.3d 683, 696-97 (W.D. Mich. 2019) (quoting *Doe v. University of Cincinnati*, 873 F.3d 393, 400 (2017)) (internal quotations omitted). But since the plaintiff in *Northern Michigan University* affirmed the charges against him, credibility was not an issue in his case. Therefore, the court held that "the right to cross-examine an accuser after the accused affirmed the allegations was not a right that was clearly established at the time Defendants sanctioned Plaintiff" *Id.* at 697.

Northern Michigan University can be easily distinguished from Plaintiff's case, because the contours of the rights in question are fundamentally different. In *Northern Michigan University*, the court considered whether the right to a hearing with cross-examination when credibility *is not* at stake was clearly established. Here, the Court considers whether the right to a hearing with cross-

examination when credibility *is* at stake was clearly established. This latter right was established by *Cincinnati* on September 25, 2017, months before the 2018 Policy came into effect and the investigation against Plaintiff launched. The holding of *Cincinnati* was merely reiterated by *Baum*. For support, the Court need go no further than the first paragraph of *Baum* itself:

Thirteen years ago, this court suggested that cross-examination may be required in school disciplinary proceedings where the case hinged on a question of credibility. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005). Just last year, we encountered the credibility contest that we contemplated in *Flaim* and confirmed that when credibility is at issue, the Due Process Clause mandates that a university provide accused students a hearing with the opportunity to conduct cross-examination. *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401-02 (6th Cir. 2017). Today, we reiterate that holding once again: if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder. Because the University of Michigan failed to comply with this rule, we reverse.

Baum, 903 F.3d at 578. Furthermore, the district court on remand in *Doe v. Baum* stated that "[t]he Sixth Circuit, as well, recognized that the right that it 'reaffirmed' when it remanded the case to this Court was clearly established, at the earliest, only in 2017, by the decision of the court of appeals in *Doe v. University of Cincinnati*, 873 F.3d 393 (2017)." *Doe v. Baum*, No. 16-13174, 2019 WL 4809438, at *14 (E.D. Mich. Sept. 30, 2019).

From its inception to the University's appeal in *Baum*, the 2018 Policy was in violation of Circuit precedent. Five months before publishing its 2018 Policy and likely during its drafting, the Sixth Circuit held that cross-examination was "'essential to due process'" only where the finder of fact must choose "'between believing an accuser and an accused, '" and implored universities to provide a means for decision makers "to evaluate an alleged victim's credibility." *Cincinnati*, 872 F.3d at 405-06. The Court of Appeals further emphasized that deciding the plaintiff's fate without a hearing and cross-examination was a "disturbing . . . denial of due process." *Cincinnati*, 872 F.3d at 402. Because the Individual Defendants violated this ruling and Plaintiff's clearly established constitutional rights, the Court finds that they are not entitled to qualified immunity.

c. *Title IX*

Count II of Plaintiff's Complaint alleges that Defendants University of Michigan and its Board of Regents violated Title IX by discriminating against Plaintiff on the basis of his gender. Because Plaintiff has failed to show a plausible inference of intentional gender discrimination, this claim is dismissed. *See Twombly*, 550 U.S. at 570; *see also Doe v. Miami Univ.*, 882 F.3d 579, 594 (6th Cir. 2018).

Title IX prohibits federally funded educational institutions from discriminating based on gender. It is enforced through an implied private right of action. 20 U.S.C. § 1681(a) (1988); *Klemencic v. Ohio State Univ.*, 263 F.3d 504, 510 (6th Cir. 2001). Our Circuit recognizes at least four theories of liability a student can pursue under Title IX: "(1) 'erroneous outcome,' (2) 'selective enforcement,' (3) 'deliberate indifference,' and (4) 'archaic assumptions.'" *Miami Univ.*, 882 F.3d at 589 (quoting *Cummins*, 662 Fed.Appx. at 451 n.9, 451-52; *Mallory v. Ohio Univ.*, 76 Fed.Appx. 634, 638-39 (6th Cir. 2003)).

Plaintiff is pursuing an erroneous outcome theory of liability. A plausible claim under this theory alleges: (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." *Cummins*, 662 Fed.Appx. at 452 (quoting *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714 (2d Cir. 1994)).

Although Plaintiff has shown that the University did not provide him a hearing with an opportunity for cross-examination when it began adjudicating his case, because Plaintiff's proceedings at the University are still pending, no outcome has occurred. Plaintiff points to a preliminary hold on his transcript as an erroneous outcome, but a preliminary hold is by definition preliminary and before a finding or final sanction has been imposed. *See Peloe v. Univ. of Cincinnati*, No. 1:14-CV-404, 2015 WL 728309, at *14 (S.D. Ohio Feb. 19, 2015) (finding no erroneous outcome when plaintiff sued before his university could make an enforceable decision).

> [A]llegations 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… plaintiff must thus also allege particular circumstances suggesting that gender bias *was* a motivating factor behind the erroneous finding.

Yusuf v. Vassar Coll., 35 F.3d 709, 715 (2d Cir. 1994) (emphasis added).

Even if Plaintiff has shown an erroneous outcome with procedural flaws, he has not alleged "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." *Id*; *Baum*, 903 F.3d at 586. These circumstances could be, *inter alia*, "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." *Yusuf*, 35 F.3d at 715.

Here, Plaintiff makes two allegations to point to gender bias at the University: the University's response to public criticism and imposing an allegedly gendered no contact order on Plaintiff. The University has received criticism from the public, the media, and its own students alike in the wake of the federal government's investigation into the University's response to sexual misconduct complaints. Compl. ¶ 87-97; *see also Baum*, 903 F.3d at 13. In response to outside pressure, the University released a proclamation in support of the "Start by Believing" Public Awareness Campaign and established student resources like Sexual Assault Prevention and Awareness Center ("SAPAC"). Plaintiff claims that this response was laced with gender bias. This is unfounded. Although a hard look at the University's response system may reveal favor towards survivors over the accused, "this does not equate to gender bias because sexual-assault victims can be both male and female" *Cummins*, 662 Fed.Appx. at 453.

Furthermore, Plaintiff's fixation on one phrase ("feminist approach to services") is taken out of context from a broader vision and philosophy of empowering survivors of both genders through professional services and student leadership development. *Our Vision & Philosophy*, Sexual Assault Prevention and Awareness Center, *https://sapac.umich.edu/article/9* (last visited Mar. 23, 2020). It is no secret that the majority of reported sexual assault survivors are female. David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct-The University of Michigan* 29 (2019) ("Among undergraduates, 34.3 percent of women and 7.1 percent of men reported some type of nonconsensual sexual contact."). Universities can and do

serve target populations without disserving others. *Male Survivors of Sexual Assault*, Sexual Assault Prevention and Awareness Center, *https://sapac.umich.edu/article/53* (last visited Mar. 23, 2020) (detailing services for male survivors). Accordingly, the University is well within in its right as an educational institution to enact an approach that best serves its student body.

However, "all of this external pressure alone is not enough to state a claim that the university acted with bias in this particular case. Rather, it provides a backdrop that, when combined with other circumstantial evidence of bias in Doe's specific proceeding, gives rise to a plausible claim." *Baum*, 903 F.3d at 586. Under Title IX, gender bias requires specific allegations of bias against Plaintiff, because he is a man. *Id*. For example, in *Baum* the Sixth Circuit found gender bias when the Board "credited exclusively female testimony (from the claimant and her witnesses) and rejected all of the male testimony (from Doe and his witnesses). In doing so, the Board explained that Doe's witnesses lacked credibility, because 'many of them were fraternity brothers of [Doe].' But the Board did not similarly note that several of [the claimant's] witnesses were her sorority sisters, nor did it note that they were female." *Id*.

Plaintiff's only specific allegation of bias is the University's no contact directive against him. Plaintiff claims that the University exhibited gender bias by only placing a no contact directive on him and not the Claimant. However, there is no evidence that the directive is gender biased. The 2019 Policy places responsibility on the accused to prevent contact with his or her accuser. There is no indication that if the genders were reversed, the responsibility would follow. Short of allegations that indicate that the University treats female and male students differently solely, because of their gender, Plaintiff has not shown enough to prove plausible gender bias.

d. *ELCRA*

Plaintiff claims that the Individual Defendants, in their personal capacities, enacted a policy that disparately treated and impacted him in violation of the ELCRA[1]. Defendants argue that, because Article 4 of the ELCRA only allows claims against educational institutions and its agents, Plaintiff's claims against Individual Defendants in their personal capacities should be dismissed. As defined in the Act, an educational institution also includes its agents. Mich. Comp. Laws § 37.2401 ("As used in this article, 'educational institution'… includes an agent of an educational institution."); *see also Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 26 F.Supp.2d 1001, 1010-11 (W.D. Mich. 1998).

But while individual defendants as employers are liable in their personal capacities under Article 2, it is not clear that individual defendants as agents of educational institutions are similarly liable in their personal capacities under Article 4. *Elezovic v. Ford Motor Co.*, 697 N.W.2d 851, 863 (Mich. 2005); *see also Hall v. State Farm Ins. Co.*, 18 F.Supp.2d 751, 764 (E.D. Mich. 1998), *aff'd,* 1 Fed.Appx. 438 (6th Cir. 2001). Finding that this claim raises a novel issue of State law, the Court declines to exercise supplemental jurisdiction over Plaintiff's ELCRA claims. *See* 28 U.S.C.A. § 1367(c)(1) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . if the claim raises a novel or complex issue of State law.").

II. Plaintiff's Motion for Partial Summary Judgment

Plaintiff argues that he is entitled to summary judgment on his due process claim, because, under the 2018 Policy, Defendants denied him a live hearing with cross-examination when

credibility was at stake in his case. Further, Plaintiff asks this Court to enjoin Defendants from imposing the following disciplinary measures: (1) pre-hearing sanctions and (2) credibility findings and sanction increases on appellate review. (Dkt. 53, pg. 2). Defendants' response mirrors their Motion to Dismiss; they claim Plaintiff is not entitled to summary judgment, because his claims are not justiciable. (*See* Dkt. 60). In accordance with the Sixth Circuit's mandate, the Court will analyze both the 2018 and the 2019 policies in turn. *Doe*, 2019 WL 3501814, at *1.

A party is entitled to summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Additionally, the Court views all of the facts in the light most favorable to the non-moving party and draws all reasonable inferences in the non-moving party's favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Anderson*, 477 U.S. at 255.

On March 12, 2018, Plaintiff was accused of sexual misconduct by a female student. In the wake of this accusation, the University placed a hold on his transcript and his degree, and subject him to an investigation that could have (and still could) lead to his expulsion. In doing so, the University placed Plaintiff's property interest in jeopardy. *Cincinnati*, 872 F.3d at 393. When an individual is at risk of being deprived of a protected property interest, Fourteenth Amendment Procedural Due Process requires that the individual be provided with fair procedural safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), *Cincinnati*, 872 F.3d at 399; *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 636 (6th Cir. 2005). ("[t]he Due Process Clause, however, sets only the floor or lowest level of procedures acceptable"); *Goss*, 419 U.S. at 579 ("[a]t the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.").

Due process safeguards apply to disciplinary proceedings in higher education. *Flaim*, 418 F.3d at 633; *Miami Univ.*, 882 F.3d at 599; *Cincinnati*, 872 F.3d at 399. Those safeguards must comply with two fundamental parameters: notice and an opportunity to be heard. *Flaim*, 418 F.3d at 634; *Cincinnati*, 872 F.3d at 399.

"To state [a] procedural due process claim, [Plaintiff] must establish three elements: (1) that [he has] a property interest protected by the Due Process Clause; (2) that [he was] deprived of this property interest; and (3) that the state did not afford [him] adequate pre-deprivation procedural rights." *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 900 (6th Cir. 2019). The Sixth Circuit's holding in *Doe v. Baum* informs the third element: (1) a hearing is required when a student is facing a serious sanction such as suspension or expulsion, and (2) such a hearing must provide an opportunity for cross-examination when the University's determination turns on the credibility of the accuser, accused or witnesses. *Baum*, 903 F.3d at 582; *Cincinnati*, 872 F.3d at 399-400. This means that a he said/she said tale of events, requires the hearing officer to evaluate the veracity of each witness' story and demeanor live. *Cincinnati*, 872 F.3d at 402.

This truth-seeking process is greatly aided by cross-examination. *Cincinnati*, 872 F.3d at 401 ("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.'… Cross-examination takes aim at credibility like no other procedural device); *Baum*, 903 F.3d at 581-82 (“Due process requires cross-examination in circumstances like these because it is ‘the greatest legal engine ever invented' for uncovering the truth . . . Cross-examination is essential in credibility cases and cannot be substituted with written statements.”) (internal quotation omitted).

The Sixth Circuit is also sensitive to the legitimate concerns that cross-examination could at minimum cause a claimant grave discomfort. Therefore, an accused student's right to a live hearing does not extend to a right to come physically face-to-face with his or her accuser or any other witness. *Cincinnati*, 872 F.3d at 406; *Baum*, 903 F.3d at 583. The University can and should allow questioning to be conducted through a representative and/or live video streaming. *Id*. Cumulatively, these rules set merely “the floor or lowest level of procedures acceptable” to the Fourteenth Amendment. *Flaim*, 418 F.3d at 636.

a. *2018 Policy*

To be entitled to summary judgment on his Due Process claim, Plaintiff has to prove that there is no genuine dispute as to the following material facts: (1) he was accused of misconduct; (2) a finding of guilt would have lead to the deprivation of a protected Due Process interest; (3) the facts of his case placed credibility at stake; (4) he was deprived of a live hearing with an opportunity to cross-examine witnesses.

There is no dispute that (1) on March 20, 2018, a female student accused Plaintiff of sexual assault in violation of the University's sexual misconduct policy; (2) a finding of guilt could have resulted in a serious sanction such as suspension or expulsion (Dkt. 47-1, pg. 38); (3) since there were no witnesses to the incident in question, a finding would have to be based on a credibility determination (Compl. ¶ 48; *see* Dkt. 49 & 50); (4) Defendants subjected Plaintiff to an investigation under the 2018 Policy that did not afford him a live hearing with cross-examination. (*See* Dkt. 47-1). Accordingly, Plaintiff is entitled to judgment as a matter of law on his due process claim.

b. *Interim Policy*

The Sixth Circuit mandated this Court to consider the Interim Policy in light of *Baum*. By providing accused students with an opportunity for a hearing and cross-examination in front of a neutral officer, the University's Interim Policy is closer to complying with the requirements of due process than the 2018 Policy. However, some aspects are still in need of revision for full compliance.

First, the condition under which a hearing is required under the policy is vague. It merely states that a hearing will be provided “where warranted, ” without further explanation. (Dkt. 47-3, pg. 32). The Sixth Circuit is clear that a hearing is warranted when a fact finder “has to choose between competing narratives to resolve a case.” *Baum*, 903 F.3d at 578. The University's Interim Policy should be similarly clear in order to dispel confusion and hold their administration accountable to provide a fair process in every case. An accused student's rights must be guaranteed-not left open for interpretation.

Second, the Interim Policy allows the University to impose serious interim sanctions without a hearing. These sanctions can be imposed after a complaint is filed, but before any determination

of responsibility has been made. (Dkt. 47-3, pg. 12). They range from a no contact directive to a suspension. (Dkt. 47-3, pg. 13-14). Imposing a suspension, prior to a hearing and adjudication is unconstitutional. “[I]f a student is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension.” *Baum*, 903 F.3d at 581. The University may not include suspension as an available interim measure against an accused student.

Plaintiff argues that two other aspects of the Interim Policy's appellate review do not comport with due process. First, Plaintiff urges this Court to prohibit the University from allowing an appellate reviewer to increase sanctions. Such a mandate would have no basis in case law. The Interim Policy allows an external examiner to either remand a case, order a new hearing or alter sanctions. (Dkt. 47-3, pg. 46). It does not allow an external examiner to overturn the findings of a hearing officer and make “credibility findings on a cold record” as prohibited by *Doe v. Baum*. 903 F.3d at 586. The Sixth Circuit's case law does not dictate further restrictions on the external examiner's power-and neither does this Court. The decision to alter sanctions only requires considering whether the original sanctions were disproportionate or inappropriate *based* on the hearing officer's findings, not *in spite of* them. Therefore, the Interim Policy's appellate review currently complies with due process.

Conclusion

Defendants' 2018 Policy is unconstitutional. The possibility of a pre-hearing suspension under Defendants' 2019 Policy is also unconstitutional. The University may proceed with its disciplinary proceedings against Plaintiff. Because the outcome of his disciplinary action rests on competing narratives, Plaintiff is entitled to a live hearing, in person or via video communication, with the opportunity to cross-examine witnesses and the Claimant.

Accordingly, IT IS ORDERED that Defendants' Motion to Dismiss [49] is GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED Plaintiff's Motion for Partial Summary Judgment [53] is GRANTED.

IT IS FURTHER ORDERED Defendants' Motion for Protective Order [66] is DENIED as Moot.

IT IS FURTHER ORDERED Defendants' Motion to Vacate Order Enjoining Student Conduct Hearing [85] is DENIED as Moot.

SO ORDERED.

Notes:

[1] Claims against the University of Michigan Board of Regents and Individual Defendants in their official capacity are barred by sovereign immunity and have been withdrawn by Plaintiff. (*See* Dkt. #49-2.).

2019-2020 Academic Calendar

Fall Semester 2019

New student orientation begins, enrollment packets distributed	Monday, August 26
New student advising, registration	Tuesday, August 27/Thursday, August 29/ Friday, August 30
Residence Halls open for returning students	Saturday, August 31
Labor Day (no classes)	Monday, September 2
Classes begin	Tuesday, September 3
Returning student registration and continuing student add/drop begins	Tuesday, September 3
Continuing & returning student enrollment	Tuesday, September 3 – Friday, September 6
Deadline to request part-time status	Friday, September 6
Add/Drop deadline for first-module, full-semester, and exco courses	Thursday, September 12
Deadline to submit course audit forms for first-module or full-semester courses	Thursday, September 12
Deadline to submit application to graduate in December 2019 via online in Banner Self Service	Thursday, September 12
Yom Kippur – no classes	Wednesday, October 9
Deadline for transfer of credit due before registration appointments are scheduled	Friday, September 27
Last day to declare P/NP option for first-module courses Last day to withdraw from a first-module course	Monday, September 30
First-Module Classes end	Friday, October 18
Deadline for December/January graduating seniors to submit majors/minors/concentration declarations to the Registrar's Office	Friday, October 18
Fall recess	Saturday, October 19 - Sunday, October 27
Second-Module Classes begin 8:00 a.m.	Monday, October 28
Registration information available in Banner Self Service for students (includes reg. appt. and any holds) for Spring 2020 semester	Monday, October 28
Online Schedule of Classes available for Spring 2020	Monday, October 28
Midterm grades due from faculty via Banner Self Service	Tuesday, October 29
Advising for Spring Semester and Winter Term 2020 begins	Wednesday, October 30
Midterm grades available via Banner Self Service to students	Thursday, October 31
Last day to declare P/NP option for full-semester courses Last day to withdraw from a full-semester course Last day to change variable-hour courses	Tuesday, November 5
Add/drop deadline for second-module courses	Wednesday, November 6
Deadline to submit course audit forms for second-module courses	Wednesday, November 6
Registration begins for Spring 2020	Monday, November 11
Last day to declare P/NP option for second-module courses Last day to withdraw from a second-module course	Monday, November 25
Thanksgiving Break	Thursday, November 28- Sunday, December 1
Last day to register for Winter Term 2020	Friday, December 6
Classes end	Thursday, December 12
Reading period	Friday, December 13 – Monday, December 16
Final examination period begins	Tuesday, December 17 – Saturday, December 21
Fall semester ends	Saturday, December 21
Final grades due from faculty to Registrar via Banner Self Service	Thursday, January 2
All incomplete work for the Fall 2019 semester is due to faculty	(no later than) Friday, January 3
Final grades available via Banner Self Service	Monday, January 6
Grades for incompletes due from Faculty	Friday, January 10
Academic Standing Committee meets regarding fall semester academic performance	Week of January 20

Winter Term 2020

Last day to register for Winter Term 2020	Friday, December 6
Winter Term begins	Friday, January 3
Last day to submit changes to Winter Term course information	Friday, January 17
Martin Luther King Jr. Day – no classes	Monday, January 20
Winter Term ends	Tuesday, January 28
Deadline to change credit hours from full to half or change titles of Winter Term projects	Friday, January 31
Deadline to submit individual project reports to faculty	Wednesday, February 5
Grade reports due from faculty to Registrar	Monday, February 10

2019-2020 Academic Calendar

Spring Semester 2020

New student orientation and advising begins	Thursday, January 30
New student registration	Friday, January 31
Residence Halls open for Returning Students	Saturday, February 1
Classes begin	Monday, February 3
Add/drop begins	Monday, February 3
Continuing & returning student enrollment	Monday, February 3 - Friday, February 7
Deadline to request part-time status	Friday, February 7
Add/drop deadline for first-module, full-semester, and exco courses	Wednesday, February 12
Deadline to submit course audit forms for first-module or full-semester courses	Wednesday, February 12
Deadline for graduating seniors to submit majors/minors/concentration declarations to the Registrar's Office	Wednesday, February 12
Deadline for transfer of credit due before registration appointments are scheduled	Friday, February 21
Last day to declare P/NP option for first-module courses Last day to withdraw from a first-module course	Monday, March 2
Last day to apply for an Academic Leave of Absence	Friday, March 13
First-Module Classes end	Friday, March 20
Spring Recess	Friday, March 13 – Sunday, March 29
Registration information available in Banner Self Service for students (include reg. appt. and any holds) for Fall 2020	Monday, April 6
Online Schedule of Classes available for Fall 2020	Monday, April 6
Second-Module Classes begin, 8:00 a.m.	Monday, March 30
Course Catalog for 2020-2021 available online	Week of April 6
Midterm grades due from faculty via Banner Self Service	Tuesday, March 31
Midterm grades available for students via Banner Self Service	Thursday, April 2
Advising for Fall Semester 2020 semester begins	Monday, April 6
Last day to declare P/NP option for full-semester courses Last day to withdraw from a full-semester course Last day to change variable-hour courses	Friday, May 8
Add/Drop deadline for second-module courses	Wednesday, April 15
Deadline to submit course audit forms for second-module courses	Wednesday, April 15
Registration begins for Fall 2020	Monday, April 20
Last day to declare P/NP option for second-module courses Last day to withdraw from a second-module course	Friday, May 8
Classes end	Friday, May 8
Reading period	Saturday, May 9 – Tuesday, May 12
Final examination period begins	Wednesday, May 13
Spring semester ends	Sunday, May 17
Final grades for graduating seniors due from faculty to Registrar, noon via Banner Self Service	Thursday, May 21
Commencement weekend begins	Friday, May 22
Commencement exercises	Monday, May 25
Final grades for all other students due from faculty via Banner Self Service	Wednesday, May 27
Final grades available via Banner Self Service	Friday, May 29
All incomplete work for the Spring 2020 semester is due to faculty	(no later than) Wednesday, June 3
Grades for incompletes due from Faculty	Monday, June 8
Academic Standing Committee meets regarding spring semester academic performance	Week of June 22