No. 19-3342

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN DOE

Plaintiff-Appellant,

v.

OBERLIN COLLEGE

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio,
The Honorable Solomon Oliver, Jr., U.S. District Judge

BRIEF OF DEFENDANT-APPELLEE OBERLIN COLLEGE

July 26, 2019

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Oberlin College is not an affiliate or subsidiary of a publicly owned corporation, nor is there a publicly owned corporation not a party to this appeal that has a financial interest in the outcome.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

Other Authorities

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellee Oberlin College states its belief that the allegations, facts, and legal arguments are adequately presented in the record and the District Court's opinion involved proper analysis of the issues. Nonetheless, Oberlin College welcomes the opportunity for oral argument should the Court conclude that oral argument will assist in its review of the issues.

JURISDICTIONAL STATEMENT

Plaintiff-Appellant John Doe has appealed a District Court decision granting Oberlin College's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The first issue presented by this appeal is whether the District Court properly dismissed Plaintiff-Appellant John Doe's erroneous outcome Title IX claim where the Amended Complaint failed to allege any operative facts to support his speculative and conclusory assertions that the outcome of his disciplinary proceedings was caused by a bias against his male gender.

The second issue presented by this appeal is whether the District Court erred by declining to exercise supplemental jurisdiction over Mr. Doe's breach of contract and negligence claims under Ohio law and by dismissing those claims without prejudice when Mr. Doe pled both federal question and diversity jurisdiction.

STATEMENT OF THE CASE

Plaintiff-Appellant John Doe ("Mr. Doe") initiated this litigation on June 23, 2017, by filing a Complaint against Defendant-Appellee Oberlin College that alleged violations of Title IX, 20 U.S.C. § 1681, and four claims under Ohio law. On February 7, 2018, Mr. Doe filed a Motion for Leave to File an Amended Complaint. Mr. Doe explained that his "sole motivation" in seeking to file the Amended Complaint was to add brief excerpts of statements made by Dr. Meredith Raimondo, then Oberlin College's Title IX Coordinator, during an American Constitution Society panel, as captured in a YouTube video posted on June 23,

2015. In addition, Mr. Doe dropped his claims for breach of the covenant of good faith and fair dealing and negligent infliction of emotional distress. On February 26, 2018, the Court granted Mr. Doe leave to file his Amended Complaint.

The Amended Complaint alleges three claims against Oberlin College: an erroneous outcome claim under Title IX, 20 U.S.C. § 1681; a state law claim for breach of contract; and a state law claim for negligence. Oberlin College moved to dismiss the Amended Complaint in its entirety on March 23, 2018. Mr. Doe opposed the motion on April 6, 2018, and Oberlin filed a reply in support of the motion on April 13, 2018.

On March 31, 2019, the District Court filed an order granting Oberlin College's motion to dismiss. The order dismissed Mr. Doe's Title IX claim on its merits with prejudice, holding that Mr. Doe had failed to plead facts supporting a reasonable inference that the outcome of his disciplinary proceedings was caused by a bias against his male gender. The District Court then declined to exercise supplemental jurisdiction over Mr. Doe's state law claims for breach of contract and negligence and dismissed those claims without prejudice. Mr. Doe filed a notice of appeal on April 16, 2019.

FACTUAL ALLEGATIONS

I. OBERLIN COLLEGE'S SEXUAL MISCONDUCT POLICY AND STUDENT DISCIPLINE PROCESS.

Since its founding in 1833, Oberlin College ("Oberlin"), a private college, has established itself as a progressive leader in promoting equity and social justice. This mission includes being at the forefront of combating sex-based discrimination and harassment. RE 21-2, Am. Compl., PageID #478, ¶ 35. At the beginning of Oberlin's Sexual Misconduct Policy (the "Policy"), Oberlin affirms its commitment to ensuring "an equitable and inclusive campus free of violence, harassment, and discrimination," and includes its Statement of Non-Discrimination as a foundational framework for the Policy. RE 28-2, Policy, Page ID #633, 635-636.

The Policy, which was drafted with guidance from outside legal counsel, establishes Oberlin's standards for acceptable student conduct and sets forth the procedures by which Oberlin investigates and adjudicates alleged violations of sexual misconduct. RE 21-2, Am. Compl., PageID #474, ¶ 15; *id.*, Ex. 1 to Am. Compl., "Special Task Force Revises Oberlin's Sexual Offense Policy" (March 1, 2014), PageID #530. The Policy prohibits certain conduct by students, including "Sexual Assault," which the Policy defines as "[h]aving or attempting to have sexual intercourse or sexual contact with another individual without consent." RE 28-2, Policy, PageID #643. The Policy makes clear that "[i]t is the responsibility

of both parties who engage in sexual activity to ensure that effective consent is obtained for each sexual act and over the entire course of each sexual encounter." *Id.*, PageID #645. Effective consent is not possible when a party to the encounter is incapacitated. *Id.*, PageID #646. Nor can effective consent be obtained through the use of force. *Id.*

When a report of sexual misconduct is made, Oberlin's Title IX team conducts an initial assessment of the report. *Id.*, PageID #660-661. The Title IX team includes, at a minimum, the Title IX Coordinator, Title IX Deputy Coordinators, and the Director of Safety and Security. *Id.*, PageID #637. The Title IX team determines the appropriate manner of resolution, and may refer the report for informal resolution or for further investigation and, if the appropriate threshold is met, formal resolution. *Id.*, PageID #661; *see also id.*, PageID #690.

The Title IX Coordinator, in consultation with the Title IX team, oversees any such investigation. *Id.*, PageID #662. A Hearing Coordinator is assigned to review the findings of such an investigation. *Id.*, PageID #663. The Hearing Coordinator is an administrator, other than the Title IX Coordinator, who is trained in campus policy and the dynamics of sexual and/or gender-based harassment, discrimination, and sexual violence. *Id.*, PageID #661.

Upon receipt of an investigator's report, the Hearing Coordinator, in consultation with the Title IX team, makes a "threshold determination as to

whether there is sufficient factual information upon which a [Hearing Panel] *could* find a violation" of the Policy. *Id.*, PageID #663 (emphasis added). If this threshold is met, the matter may be sent to a Hearing Panel for resolution. *Id.*, PageID #663-664.

The Hearing Panel consists of three specially trained administrators who receive annual training on topics that include, among other areas: non-discrimination; factors relevant to a determination of witness credibility; the evaluation of consent and incapacitation; the application of the preponderance of the evidence standard; and the imposition of sanctions in response to a finding of sexual misconduct. *Id.*, PageID #665. The Hearing Panel "will make factual findings, determine whether College policy was violated, and recommend appropriate sanctions and remedies." *Id.*, PageID #670. The Hearing Panel determines a Responding Party's responsibility by a preponderance of the evidence, which means it is "'more likely than not' . . . that the Responding Party is responsible for the alleged violation," as required by guidance issued by the Department of Education's Office of Civil Rights ("OCR") in 2011. *Id.*, PageID #672.

If the Hearing Panel makes a finding of responsibility by majority vote, it recommends sanctions to the Hearing Coordinator who, in consultation with the Title IX Coordinator, reviews them for fairness and consistency, and imposes an

appropriate sanction. *Id.* The outcome of the hearing is provided in writing to both the Reporting Party and Responding Party. *Id.*, PageID #674.

Only a small percentage of sexual misconduct reports that Oberlin receives proceed to a formal resolution. For example, out of "over 100 reports" of all forms of potential sex-based misconduct—not just sexual assault, but also discrimination, exploitation, harassment, retaliation, stalking, and/or intimate partner violence—that Oberlin received during the 2015-16 academic year, about 20 percent were referred to an investigation. RE 28-3, Oberlin's Spring 2016 Campus Climate Report, PageID #697-698; RE 28-2, Policy, Page ID #641-645. Of the 20 percent, the threshold to move to formal resolution was met in around one-half of the investigations where the Responding Party was a student, employee, or was otherwise subject to Oberlin's disciplinary process. *Id.*, PageID #698. Of the reports that met the threshold to move to formal resolution, the Responding Party was ultimately found responsible on at least one charge. *Id.* In total, of the more than 100 reports of all forms of potential sexual misconduct that Oberlin received during the 2015-16 academic year, approximately 10 percent, and potentially less, resulted in a finding of responsibility. *Id.*

A student who is found responsible for sexual misconduct may appeal the Hearing Panel's finding, limited to three bases: (1) the finding was the result of procedural or substantive error that significantly affected the outcome; (2) there is

new evidence that was previously unavailable, despite the reasonable efforts of the party, that could substantially impact the finding; or (3) the sanction imposed was significantly disproportionate to the violation. *Id.*, PageID #674-675. The appeals officer provides a written decision on the appeal, which is final, to both the Reporting Party and Responding Party. *Id.*, PageID #675.

II. MR. DOE'S DISCIPLINARY MATTER.

Mr. Doe was expelled as a student from Oberlin on October 11, 2016, after a Hearing Panel found him responsible for committing sexual assault on another student. RE 21-2, Am. Compl., Page ID #471, 509-511, ¶¶ 6, 153-163. The disciplinary matter at issue resulted from a sexual encounter between Mr. Doe and Jane Roe ("Ms. Roe") in Mr. Doe's residence hall during the early morning hours of February 28, 2016. *Id.*, Page ID #490-493, ¶¶ 71-78.

On March 9, 2016, Ms. Roe reported to Dr. Meredith Raimondo, Oberlin's Title IX Coordinator at the time, that Mr. Doe had sexually assaulted her. *Id.*, PageID #479, 493, ¶¶ 38, 79. On March 16, 2016, Dr. Raimondo emailed Mr. Doe, notifying him that Oberlin was investigating a report that he sexually assaulted Ms. Roe "while she was incapacitated due to alcohol and unable to consent to sexual activity." *Id.*, PageID #493, ¶ 79. On March 18, 2016, Dr. Raimondo appointed Joshua D. Nolan, an outside attorney, to investigate Ms. Roe's allegations. *Id.*, ¶ 80. In addition to Dr. Raimondo, Mr. Nolan interviewed

10 people with knowledge of the events surrounding the sexual encounter between Mr. Doe and Ms. Roe. *Id.*, PageID #494, ¶ 84.

On July 1, 2016, before any decision as to whether the allegations against Mr. Doe met the threshold to proceed to a hearing, Dr. Raimondo left her post as Title IX Coordinator to assume the position of Interim Vice President and Dean of Students. *Id.*, PageID #479, ¶ 38. Mr. Doe does not allege that Dr. Raimondo determined the results of the investigation met the threshold to proceed to a hearing, nor that Dr. Raimondo served on Mr. Doe's hearing panel or as his appeals officer. *Id.*, PageID # 502-515, ¶¶ 122-176.[1]

On July 7, 2016, Mr. Nolan issued a report that summarized the contents of his investigation. *Id.*, PageID #494, ¶ 83.

On October 5, 2016, Oberlin convened a hearing to weigh the charges against Mr. Doe. *Id.*, PageID #502, ¶ 122. At the hearing, Ms. Roe testified about her level of intoxication during the night and morning at issue due to the amount of alcohol and marijuana she consumed. *Id.*, PageID #503-504, ¶ 129. Ms. Roe testified that during the sexual encounter, Mr. Doe grabbed her neck and forced her mouth onto his penis after he stopped having vaginal intercourse with her. *Id.*,

[1] Mr. Doe's opening brief does allege, without a citation to the record, that "Ms. Raimondo oversaw and influenced every part of Oberlin's Title IX regime, including Mr. Doe's proceeding." Appellant Br., Doc. 15 at Page 18. The Amended Complaint does not contain this allegation.

PageID #503, ¶ 126. Ms. Roe went on to testify that she physically resisted Mr. Doe's efforts to force her to perform oral sex. *Id.*, ¶ 127. When asked to explain how Mr. Doe should have known that she was intoxicated during this encounter, Ms. Roe responded: "Um, I made the statement, 'I am not sober right now.' When I was in his room. And I said, 'I don't feel very sober right now.' And that was when I was laying on my back." *Id.*, PageID #503-504, ¶ 129. Mr. Doe had the opportunity to ask and did ask Ms. Roe questions during the hearing. *Id.*, PageID #505, ¶ 136.

Ms. Roe's witnesses corroborated her intoxicated state around the time of the sexual encounter in testimony before the hearing panel. *Id.*, PageID #510, ¶ 158. One friend who sat on a residence hall couch with Ms. Roe just before she went to see Mr. Doe testified that Ms. Roe was "out of it." *Id.*, PageID #506, ¶ 141. Another friend who spoke with Ms. Roe shortly after the encounter with Mr. Doe testified that Ms. Roe was "not making sense with the sentences she was saying" nor was she speaking in "coherent sentences." *Id.*, PageID #505, ¶¶ 138-139.

On October 11, 2016, Oberlin notified Mr. Doe and Ms. Roe in writing that Mr. Doe had been found responsible for misconduct because "the preponderance of the evidence established that effective consent was not maintained for the entire sexual encounter that occurred on February 28, 2016." *Id.*, PageID #509, ¶ 153.

The hearing panel determined that, based on the testimony of Ms. Roe and "the corroborating statements of" her friends about her intoxicated state, Ms. Roe "was incapacitated and not capable of giving effective consent when asked to perform oral sex." *Id.*, PageID #510, ¶¶ 157-158. Oberlin then expelled Mr. Doe from the college. *Id.*, PageID #471, ¶ 6.

Mr. Doe appealed the decision of the hearing panel on October 24, 2016. *Id.*, PageID #511, ¶ 164. In support of his appeal, Mr. Doe included statements from two students, J.B. and H.H., a male and female, respectively, and a letter from a physician who discussed subjective and objective indications of intoxication. *Id.*, PageID #513-514, ¶¶ 168-172. Oberlin denied Mr. Doe's appeal on November 21, 2016, and upheld his expulsion. *Id.*, PageID #514-515, ¶¶ 174-176.

STANDARD OF REVIEW

This Court reviews a district court's grant of a motion to dismiss for failure to state a claim *de novo*. *See Faparusi v. Case W. Reserve Univ.*, 711 Fed.Appx. 269, 272 (6th Cir. 2017), *cert. denied*, 138 S.Ct. 1445 (2018) (citation omitted). To state a claim sufficient to survive a motion to dismiss, the plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level" and must state a claim that is "plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). The plausibility standard requires "more

than a sheer possibility that a defendant has acted unlawfully" and is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In other words, "[a] complaint must do more than paint a plausible factual picture; it must connect those facts to a 'right to relief.'" *Faparusi*, 711 Fed.Appx. at 273 (quoting *Twombly*, 550 U.S. at 555).

SUMMARY OF THE ARGUMENT

After an extensive investigation and a full hearing, Oberlin found that Mr. Doe sexually assaulted Ms. Roe in the early morning hours of February 28, 2016, in violation of Oberlin's Policy. Oberlin expelled Mr. Doe due to his misconduct.

Mr. Doe has sought to improperly litigate the findings against him by alleging that the outcome of his disciplinary proceedings was caused by a bias against his male gender, in violation of Title IX, 20 U.S.C. § 1681. As a general rule, "'courts should refrain from second-guessing the disciplinary decisions made by school administrators.'" *Doe v. College of Wooster*, 243 F.Supp.3d 875, 885 (N.D. Ohio 2017) (quoting *Davis v. Monroe Cnty. BOE*, 526 U.S. 629, 648 (1999)). As this Court well knows, colleges and universities have come under fire for *both* failing to respond to allegations of sexual assault aggressively enough and, as in this lawsuit, for enforcing their own policies consistent with federal mandates. Accordingly, courts, including this one, recognize that "school-

disciplinary committees are entitled to a presumption of impartiality, absent a showing of actual bias." *Doe v. Cummins*, 662 Fed.Appx. 437, 449 (6th Cir. 2016) (citation omitted).

In this case, Mr. Doe claims that his disciplinary process, based in part on the findings of fact by an outside legal expert who served as a neutral investigator, and the decision by the hearing panel to find him responsible for violating Oberlin's Policy, was clearly erroneous. The District Court correctly determined that Mr. Doe's claims of innocence were insufficient to survive Oberlin's motion to dismiss when Mr. Doe failed to allege any facts that plausibly demonstrated Oberlin found him responsible due to gender bias.

Mr. Doe was found responsible for engaging in sexual contact when it should have been clear that the other person was too intoxicated to consent. The issue is not whether Mr. Doe can point to evidence that supports his belief that, under the preponderance of the evidence standard, he did not violate the Policy. The central issue in regard to Mr. Doe's Title IX claim is whether he has plead sufficient allegations to raise a plausible inference that Oberlin's decision to find him responsible for violating its Policy resulted in a flawed outcome due to gender bias.

In an effort to show a particularized causal connection between what he believes to be a flawed disciplinary process and gender bias, Mr. Doe relies on

three categories of allegations. First, Mr. Doe points to public comments made by Dr. Raimondo more than one year before his hearing to argue that Oberlin's entire sexual assault adjudication process was infused with gender bias. Mr. Doe's ire toward Dr. Raimondo is baseless and misdirected. Dr. Raimondo had already left her post as Title IX Coordinator when the decision was made to send Mr. Doe's case to a hearing. Tellingly, Mr. Doe does not allege that Dr. Raimondo was on his hearing panel or involved in his appeal. In addition, Dr. Raimondo's public comments were gender-neutral and did not specifically refer to Oberlin's Policy.

Second, Mr. Doe alleges that Oberlin was under external and internal pressure to find male students responsible for sexual assault. None of this alleged "pressure," however, targeted how Oberlin treats *males* accused of sexual misconduct. The OCR investigation concerned how Oberlin responds to all sexual misconduct complaints, regardless of the gender of the Responding Party. Further, Mr. Doe points to no publicity that arose around the time of his hearing or related in any way to his case.

Finally, Mr. Doe asks this Court to infer that he was held responsible due to gender bias on the basis that Oberlin employs a strict vetting process for sending sexual misconduct complaints to formal resolution so that, at most, up to 10% of all such complaints in one academic year resulted in a finding of responsibility. This small data size does not plausibly suggest gender bias, nor does Mr. Doe's

allegation that more men than women are found responsible for sexual misconduct.

In doing so, Mr. Doe has failed—in his Amended Complaint, in opposing Oberlin's motion to dismiss in the District Court, and in his opening brief before this Court—to point to any authority in which a court has permitted a Title IX claim to proceed on the confluence of such unsupported and conclusory allegations. The District Court considered and rejected each of these allegations of gender bias and held that Mr. Doe failed to state a Title IX claim as a matter of law. This Court should affirm that decision.

ARGUMENT

I. THE DISTRICT COURT'S HOLDING THAT MR. DOE FAILED TO STATE A TITLE IX CLAIM UPON WHICH RELIEF COULD BE GRANTED SHOULD BE AFFIRMED.

Title IX prohibits a college or university from discriminating "on the basis of sex." 20 U.S.C. § 1681(a). Mr. Doe brought his Title IX claim under the erroneous outcome theory. Mr. Doe's Amended Complaint describes *his* version of the events that took place between him and Ms. Roe. However, a court's review of Mr. Doe's claims is "'substantially circumscribed' – namely, 'the law does not allow th[e] Court to retry the [College's] disciplinary proceeding.'" *Z.J. v. Vanderbilt Univ.*, 355 F.Supp.3d 646, 672 (M.D. Tenn. 2018), *appeal dismissed*, 2019 WL 3202209 (Apr. 26, 2019) (quoting *Gomes v. Univ. of Maine Sys.*, 365 F.Supp.2d 6, 14 (D. Me. 2005)).

In short, this Court is not charged with making "an independent determination as to what happened between [Mr. Doe] and [Ms. Roe]" during their sexual encounter. *Doe v. Univ. of the South*, 687 F.Supp.2d 744, 755 (E.D. Tenn. 2009). Instead, the sole question before the Court is whether Mr. Doe has plead allegations that plausibly suggest Oberlin discriminated against him on the basis of his sex when Oberlin expelled him for sexually assaulting another student.

The Sixth Circuit recently affirmed that, in order to state an erroneous-outcome Title IX claim, a plaintiff must allege: "(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." *Doe v. Miami Univ.*, 882 F.3d 579, 592 (6th Cir. 2018) (quoting *Cummins*, 662 Fed.Appx. at 452 (emphasis added)). Allegations that may be sufficient to state a Title IX claim include "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." *Miami Univ.*, 882 F.3d at 593. However, mere "allegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss." *Cummins*, 662 Fed.Appx. at 452.

Mr. Doe's Amended Complaint fails to satisfy this pleading standard.

Instead, Mr. Doe merely describes what he believes to be a flawed disciplinary process, and asks this Court to ***plausibly*** infer that the outcome must have been caused by sex-based discrimination. Mr. Doe has offered nothing that would establish that either the Policy, or the application of the Policy, was motivated by sex-based animus toward male students. Therefore, this Court should affirm the dismissal of Mr. Doe's Title IX claim.

A. Mr. Doe Cannot State a Title IX Claim By Simply Casting "Some Articulable Doubt" on the Accuracy of his Disciplinary Proceeding.

Given that Mr. Doe fails to satisfy the second element of an erroneous outcome Title IX claim—a particularized causal connection between the flawed outcome and gender bias—Oberlin will not address the first element, that he cast "some articulable doubt" on the outcome of his disciplinary proceeding. While Oberlin does not agree with the District Court's conclusion that Mr. Doe pled facts which successfully cast doubt on the outcome of his case, Oberlin acknowledges that the pleading burden in this regard "is not heavy." RE 35, Order, PageID #811-812; *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018) (internal quotation and citation omitted). On its own, Mr. Doe's failure to show a particularized causal connection obliges this Court to affirm the District Court's decision.

B. The Amended Complaint Fails to Plead Facts From Which to Infer a "Particularized Causal Connection" Between the Alleged Flawed Outcome and Gender Bias in Mr. Doe's Case.

Neither Dr. Raimondo's comments, the alleged external and internal "pressure" that Oberlin purportedly faced in regard to its Title IX process, nor the statistical evidence that Mr. Doe relies on to argue that more males than females at Oberlin are held responsible for sexual misconduct, demonstrates a plausible "particularized causal connection" that gender bias resulted in Mr. Doe's discipline. In a contrived effort to save his Title IX claim, Mr. Doe asks this Court to rewrite Title IX jurisprudence and apply factors used in analyzing claims under the Equal Protection Clause of the U.S. Constitution, as announced 42 years ago by the U.S. Supreme Court in *Village of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). *See* Appellant Br., Doc. 15 at Pages 26-27, 29, 44, 48, 51, 55, 58, 60. Mr. Doe cites to no decision—within the Sixth Circuit or otherwise—which has analyzed a Title IX claim centered on a college's adjudication of a sexual misconduct complaint in the same manner as a claim under the Equal Protection Clause.

Mr. Doe's reliance on *Village of Arlington Heights* does not override the pleading standard for an erroneous outcome Title IX claim that this Court has recently and repeatedly adopted. This standard requires Mr. Doe's complaint to allege facts that enable a court to plausibly infer there is "a particularized . . .

causal connection" between the flawed outcome *in his case* and gender bias. *Miami Univ.*, 882 F.3d at 592; *Baum*, 903 F.3d at 585; *Doe v. Univ. of Dayton*, 766 Fed.Appx. 275, 281 (6th Cir. 2019). The District Court correctly determined that Mr. Doe's Amended Complaint did not satisfy this standard. That decision should be affirmed.

1. Oberlin's Policy is Gender-Neutral On Its Face and Applies to All Students, Regardless of Sex.

As an initial matter, the Policy on its face is gender-neutral in that it unambiguously applies to all students regardless of sex. Further, the Policy prohibits sex-based discrimination. RE 28-2, Policy, PageID #635-636. Mr. Doe has not identified any structural deficiencies in the facially neutral Policy that suggests Oberlin's resolution process discriminates against men. Nor has Mr. Doe alleged that the Policy is not gender-neutral or that it fails to comply with OCR requirements, including during the pendency of Mr. Doe's disciplinary hearing.

2. Mr. Doe Overstates Dr. Raimondo's Limited Role in the Adjudication of His Disciplinary Proceeding.

Mr. Doe's opening brief alleges, without a citation to the record, that "Ms. Raimondo oversaw and influenced every part of Oberlin's Title IX regime, including Mr. Doe's proceeding." Appellant Br., Doc. 15 at Page 18. The Amended Complaint does not contain this allegation. Instead, the Amended

Complaint demonstrates that Dr. Raimondo had a very limited role in Mr. Doe's disciplinary proceeding.

Dr. Raimondo was but one of many committee members who helped draft the Policy with guidance from outside legal counsel and therefore could not have tainted the Policy, which is consistent with OCR guidelines then in effect. *Id.*, PageID #479, ¶¶ 37-38; Ex. 1 to Am. Compl, "Special Task Force Revises Oberlin's Sexual Offense Policy" (March 1, 2014), PageID #530. (listing three college deans and three students as members of the task force, which drafted the Policy with the help of outside legal counsel).

Dr. Raimondo had already left her post as Title IX Coordinator when, in accordance with the Policy, it was determined that, based on the investigation conducted by an outside legal expert, the allegations against Mr. Doe should proceed to a hearing panel. RE 21-2, Am. Compl., PageID #479, 494, ¶¶ 38, 83; RE 28-2, Policy, PageID #663. In turn, Dr. Raimondo was not on Mr. Doe's hearing panel, nor did she serve as the officer for Mr. Doe's appeal. RE 21-2, Am. Compl., PageID #502-515, ¶¶ 122-176. Simply put, Mr. Doe has failed to identify *any* action by Dr. Raimondo—let alone an act motivated by gender bias—that resulted in Mr. Doe being held responsible for sexual misconduct.

3. Dr. Raimondo's Public Statements Do Not Reveal *Any* Connection Between Oberlin Finding Mr. Doe Responsible for Sexual Misconduct and Gender Bias.

Even if Dr. Raimondo had been involved in the adjudication of Mr. Doe's disciplinary hearing, her public statements cannot plausibly infer a bias against men. Mr. Doe focuses on two statements made by Dr. Raimondo approximately 16 months before his hearing to allege that gender bias infected his disciplinary proceedings.[2] Appellant Br., Doc. 15 at Pages 28-35. Neither statement suffices to raise a plausible inference of gender bias.

Dr. Raimondo's two statements do not raise a plausible inference that the hearing panel—of which Dr. Raimondo was not a member—held Mr. Doe responsible for violating the Policy due to gender bias. First, Mr. Doe alleges that this Court may conclude his disciplinary process was infused with gender bias because in May 2015, Dr. Raimondo stated during a panel discussion on sexual misconduct on college campuses, "I come to this work as a feminist committed to survivor-centered processes." RE 21-2, Am. Compl., PageID #488, ¶ 59. Contrary

[2] Mr. Doe in his Amended Complaint alleged that statements and conduct by Dean Adrian Bautista also supported his Title IX claim. RE 21-2, Am. Compl., PageID #489, 502, 522-523, ¶¶ 62, 63, 124, 215. Mr. Doe has waived any such allegations due to his failure to include them in his opening brief. *Kuhn v. Washtenaw County*, 709 F.3d 612, 624 (6th Cir. 2013) ("This court has consistently held that arguments not raised in a party's opening brief, as well as arguments adverted to in only a perfunctory manner, are waived.") (citation omitted).

to what Mr. Doe may believe, "feminism" is not anti-male, but rather is "the advocacy of women's rights on the ground of the *equality of the sexes*." Lexico, Definition of Feminism, *available at* https://www.lexico.com/en/definition/feminism (emphasis added). Without qualification, this Court has held that, *even* for individuals on a university's Title IX hearing panel or an appeals board—of which Dr. Raimondo was not a member—"being a feminist . . . does not support a reasonable inference than [*sic*] an individual is biased against men." *Miami Univ.*, 882 F.3d at 593 n.6. This Court has thus already determined that the participation of a feminist in the adjudication of sexual misconduct proceedings—even on a hearing panel, of which Dr. Raimondo was not a member—cannot be used to state a Title IX claim. *Id.*

Further, Dr. Raimondo's use of the term "survivor-centered processes" is gender-neutral and evinces support for the fair and respectful treatment of all persons—regardless of gender, gender identity or gender expression—who bring forth claims of sexualized violence. As with all of Mr. Doe's allegations, a confluence of insufficient conclusory allegations cannot combine to save his Title IX claim.

Second, the excerpted comments of Dr. Raimondo that Mr. Doe plucks from the June 23, 2015 American Constitution Society panel discussion ("ACS Panel") likewise fail to raise an inference of a *particularized casual connection* between

the outcome of his disciplinary proceeding and gender bias.[3] As an initial matter, Dr. Raimondo's remarks do not reference Mr. Doe or his disciplinary proceeding—nor can they. The ACS Panel occurred more than eight months before the February 28, 2016 incident between Mr. Doe and Ms. Roe that led a hearing panel to find him responsible for violating the Policy.

Mr. Doe alleges that Dr. Raimondo's remarks on the ACS Panel purport to reveal that gender bias played a role in Title IX enforcement at Oberlin, especially in "grey areas" or, as another panelist described, "'the middle category' of cases – 'where we're not talking about predators … or sex with someone who is fundamentally unconscious.'" RE 21-2, Am. Compl., PageID #488, ¶ 59. In response to this comment, Dr. Raimondo stated that she was uncomfortable with the term "grey area" because it is "used too often to discredit particularly women's experiences of violence." *Id.* Mr. Doe conveniently ignores that prior to the excerpt of Dr. Raimondo's that he cherry-picked in his Amended Complaint, Dr. Raimondo explained that Title IX procedures should not "assume that women are

[3] The Court may consider all of Dr. Raimondo's comments on the ACS Panel, and not just the fragments Mr. Doe identified in his Amended Complaint. *See Bailey v. City of Ann Arbor*, 860 F.3d 382, 387 (6th Cir. 2017) (the entirety of a video referenced in plaintiff's complaint may be considered in resolving a motion to dismiss).

the only people who report" sexual misconduct claims.[4]

Mr. Doe, in his Amended Complaint, disingenuously claims that Dr. Raimondo depicted a Title IX hearing at Oberlin as focused solely on the reporting student by providing "a safe supportive space for someone to ask, 'What are the harms you experienced and how can we address them so you can continue your education?'" RE 21-2, Am. Compl., PageID #487, ¶ 57. Yet, in the next breath, Dr. Raimondo explained that Oberlin's disciplinary process is designed to assist *all students* involved in the process:

> And for the student who is accused, the question is also important and needs to be met I think equally with respect and dignity, but my question for that student is: What, if anything in your conduct, are you willing to be accountable for and how can you be responsible for the harm you've done to others, if in fact that was the result of your conduct? Hearings are a tool or a technique for answering those big questions.[5]

Dr. Raimondo's remarks demonstrate that, instead of raising an inference that Mr. Doe's particular disciplinary process was instilled with gender bias, Oberlin is committed to using that process to determine what occurred in the context of a given misconduct complaint so that the interests of both the reporting and

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[4] American Constitutional Society, "Sex, Lies and Justice: A Discussion of Campus Sexual Assault, Title IX Compliance, and Due Process," June 23, 2015, *available at* https://www.youtube.com/watch?v=EbmfXvd_6gw&t=2679s (33:38 of 1:36:45) (last visited July 25, 2019).

[5] *Id.* (29:55 of 1:36:45).

responding students can be protected.

By way of comparison to Dr. Raimondo's comments, the Fourth Circuit recently affirmed the grant of a motion to dismiss an erroneous outcome claim where the university's Title IX director formerly worked "as an advocate for female sexual assault victims," which the plaintiff claimed drove "her implementation of gender biased procedures at UMCP [University of Maryland, College Park]." *Doe v. Loh*, No. PX-16-3314, 2018 WL 1535495, at *10 (D. Md. Mar. 29, 2018), *affirmed*, 767 Fed.Appx. 489 (4th Cir. 2019). In *Loh*, the district court held that the fact the Title IX director had previously "taken up the cause of female victims does not render her hopelessly biased against men as UMCP's Title IX Director." *Id.* Dr. Raimondo's comments at academic conferences do not compare to the conduct alleged in *Loh*, which the Fourth Circuit found insufficient to state a claim. Here, the District Court considered Dr. Raimondo's comments on the ACS Panel and concluded that "[a]lthough Oberlin's process maybe [*sic*] designed to be sensitive to victims' needs, this is not the same as gender bias; because, sexual assault victims can be either male or female." RE 35, Order, PageID #813 (citing *Doe v. Univ. of Cincinnati*, 173 F.Supp.3d 586, 606-607 (S.D. Ohio 2016)).

The alleged statements made by university officials in the Title IX cases that Plaintiff relies upon are distinguishable from the comments he attributes to Dr.

Raimondo. Appellant Br., Doc 15 at Pages 34-35. For example, in *Doe v. Marymount Univ.*, 297 F.Supp.3d 573, 586 (E.D. Va. 2018), the plaintiff's lone disciplinary adjudicator expressed in a subsequent proceeding the discriminatory view that "males will always enjoy sexual contact even when that contact is not consensual." In *Doe v. Washington & Lee Univ.*, 14-CV-00052, 2015 WL 4647996, at *10 (W.D. Va. Aug. 5, 2015), the primary Title IX investigator endorsed an article that concluded sexual assault occurs whenever a woman "has consensual sex and regrets it."[6]

Here, in addition to Dr. Raimondo's statements evincing Oberlin's gender-neutral response to sexual assault allegations, the Amended Complaint is devoid of any allegation that Dr. Raimondo engaged in any conduct during Mr. Doe's disciplinary process that demonstrates bias against males. The diversionary attack on Dr. Raimondo fails to alter the undisputed facts that Dr. Raimondo did not investigate Ms. Roe's allegations, serve on the hearing panel that found Mr. Doe responsible for a Policy violation, or serve as the appeals officer that upheld the sanction of expulsion. Nor has Mr. Doe alleged that any of the individuals who participated in his disciplinary process—a male lawyer who investigated the

[6] Mr. Doe does not explain how *Doe v. Lynn Univ., Inc.*, 235 F.Supp.3d 1336, 1341-42 (S.D. Fla. 2017) supports his position. It does not. *Lynn* involved widespread publicity against a university for, among other things, deciding not to charge a male with sexually harassing four female students.

allegations, the three hearing panelists and hearing coordinator, and the appeals officer—demonstrated gender bias against men, much less in his specific proceeding.

4. This Court has Recently and Repeatedly Held that Erroneous Outcome Claims Require Evidence of Bias in a Plaintiffs' Specific Proceeding.

Faced with the fact that none of Dr. Raimondo's comments or his other allegations plausibly infer that Mr. Doe's proceedings were infected with gender bias, Mr. Doe contravenes recent precedent of this Court and incorrectly states that erroneous outcome Title IX claims "do not require evidence of bias in a plaintiff's specific proceeding." Appellant Br., Doc 15 at Pages 35-39. In actuality, this Court has recently and repeatedly required evidence of gender bias in a plaintiff's specific proceeding in order to state a Title IX claim. As an initial matter, the pleading standard that applies to Mr. Doe's Title IX claim contemplates such case-specific evidence by requiring "a particularized . . . causal connection between the *flawed outcome* and gender bias." *Miami Univ.*, 882 F.3d at 592 (emphasis added). Accordingly, the Sixth Circuit in three recent opinions, including *Miami*, has required a complaint to allege facts that raise a plausible inference of bias in the plaintiffs' specific proceeding in order to state a claim.

First, in *Miami*, both parties had consumed alcohol prior to the sexual encounter and were found to have engaged in non-consensual sexual acts, yet only

the male student was investigated and disciplined. *Miami Univ.*, 882 F.3d at 596. Here, Mr. Doe does not allege that he consumed any alcohol prior to the sexual encounter, or that Oberlin should have investigated Ms. Roe for any alleged misconduct.

Second, in *Baum*, this Court reversed the dismissal of a Title IX claim on a motion to dismiss by holding that public attention regarding the University of Michigan's response to allegations of sexual misconduct provided 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 (emphasis added). This case-specific evidence involved the adjudication board in plaintiffs' hearing crediting exclusively female testimony from the reporting student (Roe) and her witnesses and rejecting all of the male testimony from the responding student (Doe) and his witnesses. "In doing so, the [adjudication board] explained that Doe's witnesses lacked credibility because many of them were fraternity brothers of [Doe]. But the [adjudication board] did not similarly note that several of Roe's witnesses were her sorority sisters, nor did it note that they were female." *Id.* (internal quotations omitted). In fact, in *Baum*, the initial investigator who interviewed all of the witnesses found in favor of Doe, leading this Court to conclude that since the plaintiff had alleged a "specific allegation of adjudicator bias" as to his case, he stated a Title IX claim. *Id.* In contrast, Mr. Doe has not

alleged any evidence of gender bias by the investigator, the hearing panelists, or the appeals officer. Dr. Raimondo—the target of much of Mr. Doe's ire—did not serve in any of these roles.

Most recently, in *Univ. of Dayton*, 766 Fed.Appx. at 281, this Court stated the standard that *Baum* and *Miami* enforced, which is to "generally require[] plaintiffs to point to some hint of gender bias in their own disciplinary proceedings" in order to allege a particularized causal connection. As a result, broad allegations of bias that have nothing to do with the plaintiff's specific case are insufficient to state a Title IX claim. In *Univ. of Dayton*, these broad allegations included the university reaching a resolution agreement with OCR as to how it handles Title IX complaints, a hearing board member calling a film concerning sexual assault a "must see," and the plaintiff alleging that in "virtually all cases of campus sexual misconduct" pursued by Dayton, the accused student was male. *Univ. of Dayton*, 766 Fed.Appx. at 282. As in *Univ. of Dayton*, Mr. Doe makes no allegations of bias specific to his case.

Based on this precedent, the District Court correctly held that in the absence of "evidence of gender bias in regard to [Doe's] specific proceeding," Mr. Doe had not pled sufficient facts to establish a particularized causal connection between an alleged flawed outcome and gender bias in his proceeding. RE 35, Order, PageID #819 (citing *Baum*, 903 F.3d at 586).

None of the cases that Mr. Doe relies upon—all of which are from outside of the Sixth Circuit—compel this Court to relieve Mr. Doe of his pleading burden to identify a particularized causal connection between gender bias and *his* disciplinary proceeding in order to state a Title IX claim. In *Doe v. Purdue Univ.*, 928 F.3d 652, 669 (7th Cir. 2019), the Seventh Circuit relied on *Baum* and reversed the dismissal of an erroneous outcome claim on the basis that the plaintiff had alleged "facts raising the inference that Purdue acted at least partly on the basis of sex *in his particular case*." (citing *Baum*, 903 F.3d at 586) (emphasis added). The case-specific allegations of gender bias in *Purdue* included the Title IX coordinator pursuing an investigation of the male plaintiff without a formal complaint and finding the female accuser's account of the sexual encounter more credible than the plaintiff's, even though the coordinator never spoke with the reporting student. *Id.*, 928 F.3d at 657, 669. The hearing panel members also never read the investigative report, refused to let the plaintiff present witnesses, including his roommate who was present during the alleged assault. *Id.* In contrast, the hearing panel in Mr. Doe's case heard testimony from him, Ms. Roe, and several witnesses, and enabled Mr. Doe to ask questions of Ms. Roe and all witnesses so that the hearing panel could weigh their respective credibility before rendering a decision. RE 21-2, Am. Compl., PageID #502-509, ¶¶ 122-152.

In *Doe v. Amherst College*, 238 F.Supp.3d 195, 214, 222 (D. Mass. 2017),

the court relied on allegations of "adjudicator bias" in declining to dismiss an expelled student's Title IX claim, including that the investigator failed to obtain text messages sent by the reporting student that, on their face, show that the accuser initiated the sexual contact at issue. Similarly, in *Lynn Univ.*, 235 F.Supp.3d at 1337-1338, the reporting student was permitted to have an attorney advocate on her behalf, in violation of university policy, including by questioning and "very likely coerc[ing]" potential witnesses. In addition, the hearing officer refused to ask questions prepared by the plaintiff, but instead asked those prepared by the reporting student's lawyer. *Id.*, at 1338. Further, unlike here, the plaintiff in *Lynn* alleged that the university's administrators were instructed to both "take a hard line toward male students accused of sexual battery by female students, while not prosecuting any female students for similar alleged offense." *Id.*, at 1341. Mr. Doe has not alleged that Oberlin refused to discipline female students who allegedly committed sexual assault.

Accordingly, the District Court opinion should be affirmed for the additional, independent reason that Mr. Doe has failed to allege evidence of gender bias in his specific proceeding.

5. None of Mr. Doe's Alleged Sources of External and Internal Pressure Support a Particularized Causal Connection Between Gender Bias and His Case.

Mr. Doe identifies three broad sources of alleged "external and internal

pressure" that he asks this Court to believe should save his Title IX claim from dismissal. These three sources are: (1) generalized pressure from the federal government to combat sexual assault on college campuses; (2) the OCR's investigation into how Oberlin responds to complaints of sexual discrimination; and (3) two articles in Oberlin's student newspaper that dealt solely with an incident of alleged sexual assault at *another university*, as well as statements in Oberlin's faculty guide and published by its Counseling Center. Each of these sources have either been expressly rejected by courts as raising an inference of gender bias or fail to do so when viewed in the context of the Amended Complaint, not as cherry-picked in Mr. Doe's opening brief.

a. Generalized Allegations of Nationwide Pressure from OCR to Combat Sexual Assault on College Campuses Do Not Supply Evidence of Gender Bias.

Mr. Doe alleges—without citing to his Amended Complaint—that Oberlin, like every other college and university in the country, faced generalized nationwide pressure from OCR to "combat vigorously sexual assault on college campuses." Appellant Br., Doc 15 at Page 43. The only portion of his Amended Complaint that Mr. Doe relies on for this accusation concerns a female Oberlin student in a separate disciplinary proceeding in 2012 who, like Mr. Doe, complained about "too long of an investigation and resolution process." *Id.* at Page 44 (citing RE 21-2, Am. Compl., PageID #479-480, ¶¶ 36-40). The purported "nationwide

pressure" that Mr. Doe points to is thus not only not national in scope, but demonstrates that Oberlin treats males and females involved in the Title IX process equally.

Even so, the District Court correctly pointed out that courts routinely reject generalized scrutiny and pressure by OCR as raising an inference of gender bias. RE 35, Order, PageID #816; *see e.g.*, *Doe v. College of Wooster*, 243 F.Supp.3d 875, 887 (N.D. Ohio 2017) ("[A]llegations that Wooster's more stringent stance against campus sexual assault is the result of pressure exerted by the Department of Education . . . fail to support a plausible inference of gender discrimination"); *Univ. of Cincinnati*, 173 F.Supp.3d at 602 (allegations concerning pressure "exerted on universities by the Department of Education to intensify their response to sexual assault complaints fall short of creating a reasonable inference" of gender bias).

Instead, Mr. Doe alleges that the District Court simply ignored *Miami University*, which identified generalized allegations of external pressure *in addition to specific evidence of gender bias*, as sufficient to state a Title IX claim. Appellant Br., Doc 15 at Page 43. Mr. Doe overlooks the fact that the District Court spent a full page analyzing the *Miami* opinion and correctly concluded that Mr. Doe "has not combined his external pressure evidence with other

circumstantial evidence of gender bias found during his specific hearing" so as to save his Title IX claim. RE 35, Order, PageID #817-818.

b. The OCR Investigation of Oberlin Does Not Supply Evidence of Gender Bias.

The District Court properly rejected Mr. Doe's allegation that the OCR's investigation as to how Oberlin handles sexual discrimination complaints, even viewed in conjunction with his other allegations, sufficed to state a Title IX claim. RE Order, PageID #816-819. Mr. Doe pointed to only one news article—published nine months before his hearing—that simply announced Oberlin, along with Cleveland State University and Ohio State University, were among 161 colleges and universities nationwide whose handling of sexual discrimination complaints were under investigation by OCR. RE 21-2, Am. Compl., PageID #483, ¶ 48 n.20. Mr. Doe does not allege what prompted the OCR investigation, including whether it was opened in response to a complaint from a male or female student, or whether the student was an alleged victim or perpetrator of sexual misconduct. *Id.*, ¶ 48.

One certainty is that, given the timing of the OCR investigation, which preceded Mr. Doe's disciplinary process, this is not one of those cases in which courts have found public pressure to support an erroneous outcome Title IX claim because the "public pressure targeted the specific disciplinary action being

challenged." *Doe v. Univ. of Cincinnati*, No. 16cv987, 2018 WL 1521631, at *6 (S.D. Ohio Mar. 28, 2018). Nor does Mr. Doe allege that Oberlin "or the individuals involved in his hearing were facing substantial public pressure or outcry in the weeks leading up to his hearing," which the Second Circuit found persuasive in declining to dismiss a Title IX claim. *Univ. of Dayton*, 766 Fed.Appx. at 282 (citing *Doe v. Columbia Univ.*, 831 F.3d 46, 57-58 (2d Cir. 2016)).

Absent public pressure that targets the specific disciplinary hearing or that occurs just prior to or during the disciplinary hearing in question, courts do not accept that a federal investigation of a university's handling of sexual assault complaints creates an "alleged desire to find men responsible because they are men." *Doe v. Univ. of Colo., Boulder*, 255 F.Supp.3d 1064, 1078 (D. Colo. 2017); *see also Univ. of Cincinnati*, 2018 WL 1521631, at *6 ("In the cases where public pressure was found to support claims of erroneous outcome, that public pressure targeted the specific disciplinary action begin challenged.") (citations omitted). In *Baum*, for example, unlike here, "the negative media reports continued for years, throughout the Board's consideration of [the plaintiff's] case," and "consistently highlighted the university's poor response to female complainants." 903 F.3d at 586.

The District Court properly distinguished *Miami* and *Baum* to demonstrate why the OCR investigation of Oberlin could not serve as a basis for it to conclude that Mr. Doe plausibly alleged gender bias affected the outcome of his case. RE 35, Order, PageID #817-819. In *Miami*, unlike here, the plaintiff alleged that the university found *all* male students accused of sexual misconduct responsible, refused plaintiff's request to investigate the female reporting student even though the plaintiff was too intoxicated to consent to sexual contact during the incident, and provided sworn testimony concerning Miami's refusal to pursue investigations against female students. *Miami Univ.*, 882 F.3d at 593-94. Further, unlike in *Miami*, Oberlin was not a defendant in any lawsuit involving its Title IX disciplinary process during Mr. Doe's proceedings, let alone a matter in which the college is accused of being too lax in disciplining males found responsible for sexual assault. *See id.*, at 594 (female student alleged in a lawsuit that "she would not have been assaulted if [Miami] had expelled her attacker for prior offenses").

Compared to *Baum*, the District Court identified that Mr. Doe does not allege that the hearing panel "credited exclusively female testimony (from Roe and her witnesses) and rejected all of the male testimony (from Doe and his witnesses)." RE 35, Order, PageID #818 (quoting *Baum*, 903 F.3d at 586). In addition, the plaintiff in *Baum* was found to be responsible for sexual misconduct "on a cold record" *without a hearing*. *Baum*, 903 F.3d at 586. In contrast, Mr.

Doe was found responsible following an inquiry by an outside investigator and a hearing before three administrators that included testimony from him, Ms. Roe, and at least three witnesses. RE 21-2, Am. Compl., PageID #493, 502, 505, 507, ¶¶ 80, 125, 137, 145. The pressure, if any, that Oberlin faces was far different from that in *Wells v. Xavier Univ.*, 7 F.Supp.3d 746 (S.D. Ohio 2014), which Mr. Doe relies on. There, Xavier University was subject to multiple ongoing OCR investigations at the time of the disciplinary hearing in question in which Xavier had ignored the direction of the county prosecutor, who advised the university to drop its investigation of the plaintiff. *Id.*, 7 F.Supp.3d at 747, 750.

Absent these types of other factors, which were present in *Baum* and *Miami*, but are lacking here, purported pressure from the federal government is not sufficient to state a Title IX claim.

c. Mr. Doe's Other Sources of Purported Pressure Show Only that Oberlin is Concerned with the Health and Well-Being of Potential Victims of Sexual Assault.

Mr. Doe also alleges that two articles in Oberlin's student newspaper, as well as comments published in Oberlin's faculty guide and by its Counseling Center, support a plausible inference of gender bias. RE 21-2, Am. Compl., PageID #480-483, ¶¶ 41-47. They do not.

The two articles published in Oberlin's student newspaper refer to an incident of alleged sexual assault at the University of Virginia. Neither of these

articles, which were published 22 months and 18 months, respectively, before Mr. Doe's hearing, mention the Policy or Oberlin's Title IX process. RE 21-2, Am. Compl., PageID #482-483, ¶¶ 46-47. These articles do not raise a plausible inference that the adjudication of Mr. Doe's disciplinary proceeding resulted from gender bias.

Mr. Doe's remaining allegations of "targeted pressure" rest on his dangerous suggestion that Oberlin should wait for a finding of responsibility before it provides counseling and other services to alleged sexual assault victims and respondents. Just because Oberlin makes a point to care for the mental and physical health of students who allege they were sexually assaulted—as contained in an online faculty resource guide and a publication from Oberlin's Counseling Center—does not raise an inference of sex-based discrimination. *Id.*, PageID #480-481, ¶¶ 41-45. In his opening brief, Mr. Doe conveniently omits the fact that Oberlin's Counseling Center refers to alleged sexual assault victims as "she or he," acknowledging that such victims can be either men or women. *Id.*, PageID #481, ¶ 45. And Oberlin's concern for alleged victims "does not equate to gender bias because sexual-assault victims can be both male and female." *Cummins*, 662 Fed.Appx. at 453 (citing *Sahm v. Miami Univ.*, 110 F.Supp.3d 774, 778 (S.D. Ohio 2015)). The mission of a counseling center to provide professional treatment services to those seeking assistance without judgment is necessarily different and

distinguishable from the mission of the Office of Equity, Diversity, and Inclusion, that responds to allegations of sexual misconduct.

The cases that Mr. Doe relies upon in which courts decline to dismiss Title IX claims due to publicity surrounding a college's handling of sexual assault claims include unique facts not present here. *See Doe v. Columbia Univ*, 831 F.3d 46, 51 (2d Cir. 2016) (public criticism was contemporaneous with plaintiff's disciplinary hearing and also included *twenty-three* students filing complaints with OCR—not the university—concerning purported Title IX violations); *Lynn Univ.*, 235 F.Supp.3d at 1340 (media attention concerned the university's decision not to charge a male with sexually harassing four female students); *Amherst College*, 238 F.Supp.3d at 223 (at the time of plaintiff's hearing, the complainant was involved in a student-led movement to compel Amherst to expel a male student accused of misconduct); *Doe v. The Trs. of the Univ. of Pennsylvania*, 270 F.Supp.3d 799, 823 (E.D. Pa. 2017) (University's President and Provost stated in an article that Penn was "redoubling [its] efforts" to "tackle [the] problem" of sexual assault in the wake of a "deeply troubling" report that showed one-third of female Penn students had been sexually assaulted).

Here, Oberlin was not under public scrutiny at the time of Mr. Doe's disciplinary hearing. Oberlin was not being pressured to ignore facts and find males responsible for sexual misconduct. Oberlin was not defending a Title IX

lawsuit, nor was Oberlin being accused of failing to investigate a female's sexual assault complaint or being motivated by the results of a "deeply troubling" report.

6. Mr. Doe's Purported Statistical Evidence Does Not Raise a Plausible Inference that the Outcome of His Disciplinary Proceeding was the Result of Gender Bias.

The purported statistical evidence Mr. Doe relies upon does not constitute "patterns of decision-making that also tend to show the influence of gender." *Miami Univ.*, 882 F.3d at 593. Mr. Doe attempts to improperly rewrite his Amended Complaint in his opening brief by claiming that his complaint alleged that, of the individuals convicted of sexual misconduct following a formal resolution, "a vast majority of whom, if not all, were male." Appellant Br., Doc 15 at Page 50 (citing RE 21-2, Am. Compl., PageID #486, ¶ 54). In actuality, his allegations were limited to stating that, as expected, "the vast majority of the Oberlin students who bring sexual misconduct complaints are women, and the vast majority of the Oberlin students accused of sexual misconduct are men." RE 21-2, Am. Compl., PageID #487, ¶ 55. "It is axiomatic that [a] complaint may not be amended by the briefs in opposition to a motion to dismiss." *Frederico v. Home Depot*, 507 F.3d 188, 202 (3d Cir. 2007) (internal quotation and citation omitted); *see also Gen. Elec. Co. v. S & S Sales Co.*, No. 1:11CV00837, 2012 WL 2921566, at *4 (N.D. Ohio July 17, 2012) ("[C]ourts do not consider 'after-the-fact allegations' raised in briefs to determine the sufficiency of a pleading."). Mr.

Doe's allegations regarding the gender of those *found responsible* of sexual misconduct through Oberlin's formal resolution process should be discarded because they are not in his Amended Complaint.

Even so, the data Mr. Doe relies upon shows that of the more than 100 sexual misconduct complaints that Oberlin received during the 2015-2016 academic year, at most, approximately 1 out of 10 respondents were found responsible for some violation of the Policy. RE 28-3, Oberlin's Spring 2016 Campus Climate Report, PageID #697-698. Also, this small group includes individuals found responsible for all forms of sexual misconduct under the Policy—exploitation, harassment, stalking and/or intimate partner violence—and not just sexual assault. *Id.*; RE 28-2, Policy, Page ID #641-645. In turn, Mr. Doe alleged, albeit only based on "information and belief," that the "vast majority" of Oberlin students accused of sexual misconduct are men. RE 21-2, Am. Compl., PageID #487, ¶ 55. Mr. Doe did not claim that *only* men are accused of sexual misconduct, let alone that *only* men were found responsible for misconduct during a given timeframe. *Id.*, PageID #486-487, ¶¶ 52-55. But even if he did, this Court recently held that "it is not enough to allege that in all of one university's sexual assault investigations during the relevant period, 'the accused was male and was ultimately found responsible.'" *Univ. of Dayton*, 766 Fed.Appx. at 281 (quoting *Doe v. Cummins*, 662 Fed.Appx. 437, 453 (6th Cir. 2016)).

Similarly, Mr. Doe does not state a Title IX claim on the basis that more men than women are accused of, or found responsible for, sexual misconduct because Oberlin is "not responsible for the gender makeup of those who are accused *by other students* of sexual misconduct." *Cummins*, 662 Fed.Appx. at 454 (emphasis in original) (internal quotation and citation omitted); *Austin v. Univ. of Oregon*, Nos. 15-cv-02257, 16-cv-00647, 2017 WL 4621802, at *6 (D. Ore. June 7, 2017), *affirmed*, 925 F.3d 1133 (9th Cir. 2019) (the "unremarkable observation" that "males are far more likely to be accused of sexual misconduct than females" does not suffice to state a Title IX claim).[7]

a. Mr. Doe Does Not Plead Statistical Evidence on Par With That Pled in *Miami University*.

Mr. Doe's reliance on the "statistical evidence" alleged in *Miami* to attempt to establish gender bias is misplaced. Appellant Br., Doc 15 at Pages 52-54.

[7] *See also e.g.*, *Doe v. Univ. of St. Thomas*, 240 F.Supp.3d 984, 991 (D. Minn. 2017) ("[A] court cannot plausibly infer . . . a higher rate of sexual assaults committed by men against women, or filed by women against men, indicates discriminatory treatment of males[.]") (internal quotation and citation omitted); *Pierre v. Univ. of Dayton*, No. 15-cv-362, 2017 WL 1134510, at *11 (S.D. Ohio Mar. 27, 2017) ("The University has no control over the gender of a student who accuses another student of sexual misconduct, nor over the gender of the student so accused."); *Doe v. Case W. Reserve Univ.*, No. 1:14CV2044, 2015 WL 5522001, at *6 (N.D. Ohio Sept. 16, 2015) ("That CWRU's policy disproportionately affects males as a result of the higher number of complaints lodged against males does not demonstrate [sex-based discrimination.]").

There, the plaintiff alleged that "every male student [at Miami University] *accused* of sexual misconduct in the Fall 2013 and Spring 2014 semesters was found responsible for the alleged violation[.]" *Miami Univ.*, 882 F.3d at 593 (emphasis added). In contrast, at most, only approximately 10 percent of individuals at Oberlin accused of sexual misconduct during the 2015-2016 academic year were found responsible. RE 28-3, Oberlin's Spring 2016 Campus Climate Report, PageID #697-698. Oberlin's rate of finding about 1 in 10 individuals accused of sexual misconduct responsible is a far cry from the 100 percent rate alleged in *Miami*. In addition, Mr. Doe concedes, as he must, that the facts he alleges differ from those in *Miami*. Appellant Br., Doc 15 at Pages 53-54. In *Miami*, the university refused plaintiff's request to investigate the female reporting student, the plaintiff presented sworn testimony that Miami refused to investigate female students for misconduct, and the university was a defendant in an ongoing lawsuit brought by a female student who alleged "that she would not have been assaulted if the University had expelled her attacker for prior offenses." *Miami Univ.*, 882 F.3d at 594. Mr. Doe makes no such allegations against Oberlin.

Mr. Doe argues that Oberlin and Dr. Raimondo are responsible for the gender makeup of responding students because of their oversight over investigations and the fact that the College decides "whether a student should be charged at the end of it." Appellant Br., Doc. 15 at Page 53. Tellingly, Mr. Doe

does not allege that Oberlin refuses to send female students accused of sexual assault through formal process. In fact, the Amended Complaint contains no allegations to show "that a female was in circumstances sufficiently similar to [plaintiff's] and was treated more favorably by [Oberlin]." *Doe v. Case W. Reserve Univ.*, No. 1:14CV2044, 2015 WL 5522001, at *6 (N.D. Ohio Sept. 16, 2015) (quoting *Mallory v. Ohio Univ.*, 76 Fed.Appx. 634, 641 (6th Cir. 2003)). Nor does Mr. Doe offer any allegations that, if believed, demonstrate Oberlin would have approached the sexual assault report at issue any differently if a female student, rather than Mr. Doe, had been accused of misconduct. *See Sahm v. Miami Univ.*, 110 F.Supp.3d 774, 779 (S.D. Ohio 2015) (dismissing Title IX claim when the plaintiff did not assert any facts showing that the university would have treated a female accused of sexual assault any differently). No inference of sex-based bias exists when a college treats members of both sexes equally.

b. The District Court Properly Considered and Rejected Mr. Doe's Statistical Evidence.

The District Court properly considered and rejected Mr. Doe's statistical evidence as a basis, even when combined with his other allegations, to raise a plausible inference that his finding of responsibility was a result of gender bias.

First, the District Court correctly held that "the analysis of a Title IX violation is similar in many respects to a Title VII, with the exception that, unlike a

Title VII claim, a Title IX claim may not be premised on the 'disparate impact' a policy has with respect to a protected group." RE 35, Order, PageID #815 (quoting *College of Wooster*, 243 F.Supp.3d at 885 (citing *Doe v. Brown Univ.*, 166 F.Supp.3d 177, 184 (D.R.I. 2016))). In other words, "since recovery under Title IX under a disparate impact theory is not permitted, [Mr. Doe] cannot state a claim by alleging that [Oberlin's] otherwise gender-neutral disciplinary procedures disproportionately affect men." *Doe v. Univ. of Cincinnati*, 173 F.Supp.3d 586, 608 (S.D. Ohio 2016) (citation omitted).

Second, the District Court properly recognized that Oberlin vets and investigates sexual misconduct complaints so that when each of the approximately 10 cases that proceeded to formal resolution during a given academic year were found responsible, it "cannot be viewed as supporting gender bias." RE 35, Order, PageID #815. In addition, the District Court made the unremarkable finding that even if "the vast majority of the Oberlin students. . . accused of sexual misconduct are men," that is insufficient to support a claim of gender bias. *Id.* Mr. Doe quibbles with the District Court's citation to *Doe v. Univ. of Dayton*, No. 3:17-cv-134, 2018 WL 1393894 (S.D. Ohio Dec. 19, 2018), which relied on 2006 rather than 2008 Department of Justice statistics, the latter of which show that a smaller, albeit still "vast majority" of males allegedly commit sexual assault. Appellant Br., Doc 15 at Pages 57-58. The well-worn premise, which this Court should

continue to follow, remains unchanged: the allegation that more males than females are accused of sexual misconduct does not raise a plausible inference of gender bias. *E.g.*, *Univ. of Dayton*, 766 Fed.Appx. at 282.

c. Mr. Doe Does Not State a Title IX Claim on the Basis that Oberlin is a Private College.

Notwithstanding Mr. Doe's argument to the contrary, the fact that Oberlin is a private school and is "not subject to public record requests" has no bearing on Mr. Doe's failure to state a Title IX claim. Appellant Br., Doc 15 at Page 57. Courts, including those within the Sixth Circuit, routinely dismiss erroneous outcome Title IX claims brought against private colleges and universities that, like Oberlin, are not subject to public records requests. *See e.g.*, *Doe v. Univ. of Dayton*, 766 Fed.Appx. 275 (6th Cir. 2019); *Z.J. v. Vanderbilt Univ.*, 355 F.Supp.3d 646 (M.D. Tenn. 2018); *Doe v. College of Wooster*, 243 F.Supp.3d 875 (N.D. Ohio 2017); *Doe v. Case W. Reserve Univ.*, No. 14CV2044, 2015 WL 5522001 (N.D. Ohio Sept. 16, 2015); *Doe v. Univ. of the South*, 687 F.Supp.2d 744 (E.D. Tenn. 2009). Mr. Doe appears to suggest that the gender of the reporting students in sexual misconduct complaints that did not proceed to formal resolution will somehow show that his disciplinary proceeding was infused with gender bias. This Court recently rejected this argument because even if "sexual assault proceedings have been brought only against male students is not in and of itself

sufficient to infer gender bias." *Univ. of Dayton*, 766 Fed.Appx. at 282 (citing *Cummins*, 662 Fed.Appx. at 453-54). Oberlin's status as a private school does not absolve Mr. Doe of his pleading burden, which he failed to meet.

7. The Hearing Panel's Decision Does Not Raise a Plausible Inference of Gender Bias.

Mr. Doe also argues that the hearing panel's decision to find him responsible for sexual assault was so "unfounded" and "thoroughly unsupported" that it must have been motivated by gender bias. Appellant Br., Doc 15 at Page 60. Mr. Doe's subjective criticism of the panel's decision goes toward the first element of his pleading burden—to cast "some articulable doubt" on the outcome of his proceeding—and therefore does not save his Title IX claim. *Miami Univ.*, 882 F.3d at 592.

In addition, Mr. Doe ignores that even his hand-picked recitation of the investigation and adjudication of the sexual misconduct allegations against him contains a host of evidence from which the hearing panel could—and *did*—conclude that it is "more likely than not" that Mr. Doe violated the Policy. In particular, Ms. Roe testified at the hearing that she told Plaintiff during their sexual encounter, "I am not sober right now[,]" and that she physically resisted Plaintiff's efforts to force her to perform oral sex on him, including by grabbing her neck. RE 21-2, Am. Compl., PageID #503-504, ¶¶ 126-129. Hearing witnesses

corroborated Ms. Roe's intoxicated state around the time of the sexual encounter. *Id.*, PageID #510, ¶ 158. One friend who sat on a residence hall couch with Ms. Roe just before she went to see Mr. Doe testified that Ms. Roe was "out of it." *Id.*, PageID #506, ¶ 141. Another friend who spoke with Ms. Roe shortly after the encounter with Mr. Doe testified that Ms. Roe was "not making sense with the sentences she was saying" nor was she speaking in "coherent sentences." *Id.*, PageID #505, ¶¶ 138-139. The hearing panel not only heard this evidence, but it also had the opportunity to weigh the credibility of Ms. Roe and Mr. Doe, including Ms. Roe's response to questions from Mr. Doe. Upon doing so, the panel found it "more likely than not," under the preponderance of the evidence standard, that Mr. Doe violated the Policy.

In short, Mr. Doe simply disagrees with the result of the hearing panel. His subjective displeasure with the result of his disciplinary proceeding "cannot constitute a 'pattern of decision-making' that makes plausible an erroneous outcome claim." *Vanderbilt*, 355 F.Supp.3d at 683 (citations omitted). Mr. Doe has not set forth facts that raise a plausible inference that gender bias had anything to do with this result.

II. THIS COURT SHOULD DISMISS MR. DOE'S STATE LAW CLAIMS WITH PREJUDICE.

As a final matter, Mr. Doe contends that the District Court erred when it declined to exercise supplemental jurisdiction over his state-law claims. Appellant Br., Doc 15 at Pages 61-63 (citing RE 35, Order, PageID #819). Mr. Doe's Amended Complaint initially pleaded both federal question and diversity jurisdiction and, therefore, the District Court's stated rationale for dismissal was incomplete.

Still, that fact does not require reversal. "A decision below must be affirmed if correct for any reason, including a reason not considered by the lower court." *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 216 (6th Cir. 1985) (citing *J.E. Riley Inv. Co. v. Comm'r*, 311 U.S. 55, 59 (1940)); *see also La. Sch. Emps.' Ret. Sys. v. Ernst & Young, LLP*, 622 F.3d 471, 477 (6th Cir. 2010) (stating that on *de novo* review, this court "may affirm the judgment of the district court on any ground supported by the record"). Here, the District Court's ultimate result—dismissal—was correct. As Oberlin's briefing before the District Court explained in detail, Mr. Doe's claims for breach of contract and negligence both fail to state a claim upon which relief may be granted. *See* RE 28-1, Oberlin's Memorandum of Law in Support of Motion to Dismiss, PageID #619-624; RE 30, Oberlin's Reply in Support of Motion to Dismiss, PageID #747-752.

When, as here, an issue has been fully briefed and developed at the district court level, this Court is free to consider that briefing and rule on the merits in the first instance. *See, e.g.*, *Twin City Fire Ins. Co. v. Adkins*, 400 F.3d 293, 299-300 (6th Cir. 2005) (declining to "remand this case to the district court" to rule on an issue because "in a case like the present, where we have before us all of the necessary facts and the legal questions have been fully addressed in the parties' briefs, we believe that judicial resources would be better conserved if we proceed to rule on the . . . claim"); *Fair Hous. Advocates Ass'n, Inc. v. City of Richmond Heights*, 209 F.3d 626, 635-36 (6th Cir. 2000) (declining to remand the case when, on *de novo* review, there is "ample evidence presented in the record" for this Court to rectify any alleged error by the district court).

This Court should do so in this case and, for the reasons explained in Oberlin's briefing before the District Court, dismiss Mr. Doe's state-law claims with prejudice.

CONCLUSION

For all of the foregoing reasons, Defendant-Appellant Oberlin College respectfully submits that the District Court's decision should be affirmed with respect to Mr. Doe's Title IX claim, and that Mr. Doe's state-law claims should likewise be dismissed with prejudice.

July 26, 2019

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the word-processing system used to prepare the brief, Microsoft Word, indicates that this brief contains 11,689 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of Defendant-Appellee Oberlin College was filed this 26th day of July, 2019, via the CM/ECF system, which will serve all counsel of record.

/s/ David H. Wallace
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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry No.	Description of Document	Date Filed	Page ID Range
21-2	Amended Complaint	2/07/18	470-531
28	Oberlin's Motion to Dismiss Plaintiff's Amended Complaint	3/23/18	599
28-1	Oberlin's Memorandum of Law in Support of Motion to Dismiss Plaintiff's Amended Complaint	3/23/18	600-625
28-2	Oberlin's Sexual Misconduct Policy	3/23/18	626-691
28-3	Spring 2016 Campus Climate Report	3/23/18	692-701
29	John Doe's Opposition to Oberlin College's Motion to Dismiss Plaintiff's Amended Complaint	4/06/18	703-729
30	Oberlin's Reply in Support of Motion to Dismiss Plaintiff's Amended Complaint	4/13/18	731-754
35	Order Granting Oberlin's Motion to Dismiss	3/31/19	804-819
36	Notice of Appeal	4/16/19	820-821