

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

JOHN DOE,	)	Case No.: 20-3482
	)	
Plaintiff-Appellant,	)	On Appeal from the United States
	)	District Court for the Northern
vs.	)	District of Ohio, Eastern Division,
	)	Case No.: 1:20 CV 669
	)	
OBERLIN COLLEGE, et al.,	)	
	)	
Defendants-Appellees.	)	

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**BRIEF OF PLAINTIFF/APPELLANT JOHN DOE**

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## **CORPORATE DISCLOSURE STATEMENT**

Appellant John Doe is not an affiliate or subsidiary of a publicly owned corporation, nor is there a publicly owned corporation not a party to this appeal with a financial interest in the outcome.

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**STATEMENT IN SUPPORT OF ORAL ARGUMENT**

Appellant John Doe respectfully requests oral argument. This case involves a rapidly developing area of the law concerning a college student's rights to due process of law and to basic fairness during a Title IX sexual misconduct investigation and hearing process implemented by a private university. Oral Argument will aid this Honorable Court by allowing the parties to explore the issues presented in this appeal and respond to any inquiries raised by the Court.



## STATEMENT OF JURISDICTON

### ***A. Basis of the District Court's Subject Matter Jurisdiction***

The District Court had jurisdiction over Mr. Doe's claims pursuant to 28 U.S.C. §§ 1331, 1367, 1441, and 1446. Mr. Doe filed a Verified Complaint against the Defendants in the Lorain County, Ohio Court of Common Pleas, setting forth federal and state law causes of action against the Defendants. The Defendants removed Mr. Doe's State Court action to the United States District Court for the Northern District of Ohio.

### ***B. Basis of the Court of Appeals' Jurisdiction***

This Honorable Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 as Mr. Doe is appealing from a final judgment of a United States District Court.

### ***C. The Timeliness of John Doe's Appeal***

Mr. Doe's appeal is timely filed as he filed his Notice of Appeal on May 5, 2020, within thirty (30) days of the District Court's April 7, 2020 Judgment Entry from which he is appealing.

### ***D. The Estate's Appeal is from a Final Judgment that Disposes of All Parties and All Claims***

The District Court's April 7, 2020 Judgment Entry Ordered, Adjudged and Decreed that Mr. Doe's case was terminated and dismissed as final.

## STATEMENT OF THE ISSUES

1. Did the District Court error in sua sponte dismissing Mr. Doe's federal due process claim against the Defendants on the merits and without providing him reasonable notice that the adequacy of his claim was in question;
2. Whether a student who attends a private college is entitled to any level of due process during a Title IX sexual misconduct investigation and disciplinary process;
3. What due process is a private college obligated to provide to a student who is accused of violating its Title IX sexual misconduct policy;
4. Did the District Court error in sua sponte dismissing Mr. Doe's remaining state and federal claims against the Defendants without prejudice and on the ground that his claims were premature; and
5. Whether a student who attends a private college is required to wait until after the college makes a finding that he or she violated the college's sexual misconduct policy before he or she is able to seek injunctive relief regarding the procedures that the college intends to use and/or has used against him or her during the disciplinary process.

## STATEMENT OF THE CASE

This case involves yet another male student at Oberlin College suing the College for sex discrimination, in violation of Title IX of the Higher Education Act of 1965. Mr. Doe's claims against the Defendants are based on Oberlin College's well-documented, gender-based discriminatory policies and procedures that it has implemented against male students accused of violating its sexual misconduct policy and its biased handling of its investigation and adjudicatory process into whether he violated the College's sexual misconduct policy.

The District Court sua sponte dismissed Mr. Doe's federal and state law claims against Oberlin College and the other named Oberlin College Defendants and denied his Motion for a Temporary Restraining Order and a Preliminary Injunction based on its mistaken beliefs that: 1) he could not plead a viable due process claim against the Defendants for violating his constitutional rights to due process because Oberlin College is a private college; and 2) his other federal and state law claims were premature (lacked ripeness) since the Defendants had not completed their investigation and adjudication of whether he violated the College's sexual misconduct policy.

Notably, within three (3) months of the District Court's judgment entering dismissing Mr. Doe's claims, this Honorable Court issued an Opinion in a separate case finding that a male student at Oberlin College had "amply stated a claim for

sex discrimination in violation of Title IX” against the College as it related to the College’s investigation and adjudication that he had violated its sexual misconduct policy.<sup>1</sup> In that case, this Honorable Court vacated the district court’s judgment entry of dismissal and remanded the matter back to the district court for further proceedings consistent with its Opinion.<sup>2</sup>

Similarly, in the present matter, Mr. Doe respectfully moves this Honorable Court to vacate the District Court’s judgment entry of dismissal and to remand this matter back to the District Court for further proceedings on his claims against Oberlin College and the other Defendants.

## **STATEMENT OF FACTS**

### **A. MR. DOE’S CLAIMS AGAINST THE OBERLINE COLLEGE DEFENDANTS**

On March 20, 2020 Mr. Doe, a college student at Oberlin College, filed a Verified Complaint seeking Preliminary and Permanent Injunctive Relief and Money Damages against Oberlin College, Oberlin College Board of Trustees, Oberlin College’s Title IX Coordinator (Rebecca Mosely), and other Oberlin College Defendants.<sup>3</sup> Mr. Doe filed his Complaint in the Court of Common Pleas, Lorain County, Ohio (State Court action).<sup>4</sup>

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<sup>1</sup> *Doe v. Oberlin College*, 6<sup>th</sup> Cir. No. 19-3342 (June 29, 2020).

<sup>2</sup> *Doe v. Oberlin College*, 6<sup>th</sup> Cir. No. 19-3342 (June 29, 2020).

<sup>3</sup> Verified Complaint, R.1-1, PageID #: 7-258.

<sup>4</sup> Verified Complaint, R.1-1, PageID #: 7-258.

Mr. Doe's Complaint set forth the following causes of action against the Oberlin College Defendants: 1) Violation of Title IX of the Education Amendments of 1972 – erroneous outcome and selective enforcement; 2) Violation of 42 U.S.C. § 1983; 3) Breach of Contract; 4) Breach of the Covenant of Good Faith and Fair Dealing; 5) Negligence; and 6) Promissory Estoppel.<sup>5</sup>

Mr. Doe's Title IX erroneous outcome claim is based on the College erroneously determining that its Title IX investigation should proceed past the "Initial Title IX Assessment" and/or that it should not be handled through the "informal resolution process."<sup>6</sup>

Mr. Doe's Title IX selective enforcement claim is based on the College's decision to only open an investigation into whether he violated its sexual misconduct policy by allegedly engaging in sexual contact and/or conduct with Jane Roe while she was "drunk", but not opening an investigation into Jane Roe as to whether she violated the sexual misconduct policy by engaging in sexual contact and/or conduct with him based on her alleged disclosure to Oberlin College officials that she and Mr. Doe were both drunk when they began "hooking up" during one of the reported incidents.<sup>7</sup>

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<sup>5</sup> Verified Complaint, R.1-1, PageID #: 7-258.

<sup>6</sup> Verified Complaint, R.1-1, PageID #: 66-70.

<sup>7</sup> Verified Complaint, R.1-1, PageID #: 70-71.

Mr. Doe's selective enforcement claim is also based on the Defendants' refusal to investigate his complaint that Jane Roe violated the College's sexual misconduct policy by informing other students that he was being investigated for violating the policy due to her allegations and by demanding the Defendants reverse their decision to handle her allegations through the informal resolution process and to proceed formally against Mr. Doe upon learning that Mr. Doe accused her of violating the policy.<sup>8</sup>

In Mr. Doe's 42 U.S.C. § 1983 Fourteenth Amendment procedural due process claim against the Oberlin College Defendants, he asserted that the Defendants were state actors during their investigation into Jane Roe's allegations and were therefore required to honor the rights and guarantees set forth in the United States Constitution during their investigation and adjudication.<sup>9</sup>

Mr. Doe's breach of contract claim against the Defendants is based on the Defendants' failure to act in accordance with Oberlin College's sexual misconduct policy and in failing to comply with the policy in investigating and resolving Jane Roe's allegations against him.<sup>10</sup>

Mr. Doe's breach of the covenant of good faith and fair dealing is based on the Defendants' decision to reverse its decision to proceed informally against him

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<sup>8</sup> Verified Complaint, R.1-1, PageID #: 70-71.

<sup>9</sup> Verified Complaint, R.1-1, PageID #: 71-75.

<sup>10</sup> Verified Complaint, R.1-1, PageID #: 75-77.

in response to Jane Roe's allegations and to proceed with a formal investigation and hearing process.<sup>11</sup>

As it relates to his negligence cause of action against the Defendants, Mr. Doe alleged that the Defendants owed him a duty of care, arising from the obligations delineated in Oberlin College's policies and directives issued by the U.S. Department of Education's Office for Civil Rights, including a duty of reasonable care to allow him an equal opportunity to present information and witnesses in support of his defense and a duty to conduct an impartial and thorough investigation into the allegations of sexual misconduct against him.<sup>12</sup>

Mr. Doe's promissory estoppel claim was based on his reliance on express and implied promises and representations made by Oberlin College, including the representations and promise that Oberlin College would ensure his right to a fair process if a sexual misconduct allegation was made against him.<sup>13</sup>

In addition to injunctive relief and monetary damages, Mr. Doe also sought a declaratory judgment that Oberlin College's rules, regulations, and guidelines in the policy were unconstitutional.<sup>14</sup>

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<sup>11</sup> Verified Complaint, R.1-1, PageID #: 77-78.

<sup>12</sup> Verified Complaint, R.1-1, PageID #: 78-79.

<sup>13</sup> Verified Complaint, R.1-1, PageID #: 79-80.

<sup>14</sup> Verified Complaint, R.1-1, PageID #: 80.

## **B. RELEVANT PORTIONS OF OBERLIN COLLEGE'S 2019 SEXUAL MISCONDUCT POLICY**

In general, Oberlin College's 2019 sexual misconduct policy provides two types of avenues for the resolution of Title IX Complaints: Informal Resolution and Formal Resolution.<sup>15</sup> Once a Title IX Complaint is received by the College, the College's Title IX Team conducts an "Initial Assessment" to determine whether, "depending on a variety of factors, such as the Reporting Party's wish to pursue formal or informal resolution, the risk posed to any individual or the campus community, and the nature of the allegation" that the Complaint should be referred for Formal or Informal resolution.<sup>16</sup> Specifically, the policy provides that, "At the conclusion of the Title IX Assessment, the Title IX Team will determine the appropriate manner of resolution and, if appropriate, refer the report either for informal resolution or for further investigation and, if the appropriate threshold is met, formal resolution."<sup>17</sup>

With respect to Formal Resolution, once the College has determined that a Title IX Complaint will be submitted to Formal Resolution, "an Investigator will be assigned to facilitate the formal resolution process."<sup>18</sup> The Policy provides that "At the conclusion of the investigation, the investigator will prepare a written

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<sup>15</sup> Oberlin College 2019 Sexual Misconduct Policy R.1-1, PageID #: 88-157.

<sup>16</sup> Oberlin College 2019 Sexual Misconduct Policy R.1-1, PageID #: 130-132.

<sup>17</sup> Oberlin College 2019 Sexual Misconduct Policy R.1-1, PageID #: 130-132.

<sup>18</sup> Oberlin College 2019 Sexual Misconduct Policy R.1-1, PageID #: 130-132.



report synthesizing the facts for review for review by the Title IX Coordinator and a Hearing Coordinator.”<sup>19</sup> The investigator is not charged with reaching a determination as to responsibility, which is a function reserved for the Conduct Conference or the Hearing Panel/Administrator.<sup>20</sup>

Upon receipt of the investigative report, the Hearing Coordinator, in consultation with the Title IX Coordinator, and as appropriate, the Title IX Team, will review the report and make a threshold determination as to whether there is sufficient factual information upon which a Hearing Administrator or Body could find a violation of this policy.<sup>21</sup> This threshold determination does not involve making a determination of responsibility, nor does it involve assessing the credibility of the parties.<sup>22</sup> If the threshold has been established, the Hearing Coordinator will issue a notification letter to the Responding Party and the Reporting Party and refer the report for the appropriate resolution procedures.<sup>23</sup> If the Hearing Coordinator, in consultation with the Title IX Coordinator, determines that the threshold has not been reached (that is, that there is not sufficient evidence

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<sup>19</sup> Oberlin College 2019 Sexual Misconduct Policy R.1-1, PageID #: 134.

<sup>20</sup> Oberlin College 2019 Sexual Misconduct Policy R.1-1, PageID #: 134.

<sup>21</sup> Oberlin College 2019 Sexual Misconduct Policy R.1-1, PageID #: 134.

<sup>22</sup> Oberlin College 2019 Sexual Misconduct Policy R.1-1, PageID #: 134.

<sup>23</sup> Oberlin College 2019 Sexual Misconduct Policy R.1-1, PageID #: 134.

which could support a policy violation), the Reporting Party and Responding Party will be notified in writing.<sup>24</sup>

The Policy is clear that disciplinary action against a Respondent may only be taken through Formal Resolution procedures.<sup>25</sup> For Formal resolution against a student, disciplinary action may be taken by the Dean of Students or designee if the student accepts responsibility for the conduct, or after a Formal Investigation when a hearing panel comprised of three trained staff members reaches a finding of responsibility and recommends appropriate sanctions.<sup>26</sup>

With respect to cross-examination at the hearing, the Policy permits limited cross-examination of the Reporting Party by the Responding Party, specifically, “[t]he Hearing Body may pose questions to the Reporting Party, including questions submitted in writing to the Hearing Body by the Responding Party ... [t]he Responding Party will not be permitted to question the Reporting Party directly.”<sup>27</sup> However, notwithstanding the “cross-examination by proxy” provision in the Policy, pursuant to Oberlin’s policy, “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 direction of the Hearing Coordinator. The College will not require a

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<sup>24</sup> Oberlin College 2019 Sexual Misconduct Policy R.1-1, PageID #: 134.

<sup>25</sup> Oberlin College 2019 Sexual Misconduct Policy R.1-1, PageID #: 135.

<sup>26</sup> Oberlin College 2019 Sexual Misconduct Policy R.1-1, PageID #: 135.

<sup>27</sup> Oberlin College 2019 Sexual Misconduct Policy R.1-1, PageID #: 146.

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."<sup>28</sup>

**C. THE CLEAR PROCEDURAL IRREGULARITIES IN OBERLIN COLLEGE'S RESPONSE TO JANE ROE'S ALLEGATIONS PERMIT A PLAUSIBLE INFERENCE THAT THE DEFENDANTS DISCRIMINATED AGAINST MR. DOE BASED ON HIS GENDER**

In his Complaint, Mr. Doe asserted that Jane Roe's allegations were false, wildly inconsistent, and failed to rise to the level of any threshold that would justify a formal investigation into whether he violated the College's sexual misconduct policy.<sup>29</sup> The Oberlin College Defendants' original assessment of Jane Roe's allegations led them to conclude that her allegations should be resolved informally, without an investigation, and without any disciplinary action being taken against Mr. Doe.<sup>30</sup>

Jane Roe reported her allegations to the Oberlin College Defendants on or about December 12, 2019.<sup>31</sup> Jane Roe and the Oberlin College Defendants unilaterally agreed to an informal resolution of her complaint against Mr. Roe.<sup>32</sup>

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<sup>28</sup> Oberlin College 2019 Sexual Misconduct Policy R.1-1, PageID #: 144.

<sup>29</sup> Verified Complaint, R.1-1, PageID #: 8-9.

<sup>30</sup> Verified Complaint, R.1-1, PageID #: 9.

<sup>31</sup> Verified Complaint, R.1-1, PageID #: 9.

<sup>32</sup> Verified Complaint, R.1-1, PageID #: 9.

Jane Roe and the Oberlin College Defendants conspired to not notify Mr. Doe about her allegations and the commencement of and/or the pendency of a Title IX process until after the College's winter break ended in early February of 2020.<sup>33</sup> At the time that Jane Roe disclosed her allegations to the Oberlin College Defendants, physical evidence crucial to Mr. Doe's defense of her allegations existed in the form of electronically stored security video.<sup>34</sup> The Oberlin College Defendants took no action to investigate the veracity of Jane Roe's allegations and failed to take any steps to preserve any physical evidence that was, at that time, known, or should have been known, to exist.<sup>35</sup>

The Oberlin College Defendants did not notify Mr. Doe about the existence of Jane Roe's allegations and/or the commencement and pendency of the Title IX investigation and process that they were initiating against him until February 4, 2020.<sup>36</sup> By the time that Mr. Doe was notified of the existence of Jane Roe's allegations and/or the commencement and pendency of the Title IX investigation and process against him, the electronically stored campus surveillance videos that would have contained exculpatory and/or favorable and/or highly relevant evidence, had been destroyed.<sup>37</sup>

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<sup>33</sup> Verified Complaint, R.1-1, PageID #: 9.

<sup>34</sup> Verified Complaint, R.1-1, PageID #: 9.

<sup>35</sup> Verified Complaint, R.1-1, PageID #: 9.

<sup>36</sup> Verified Complaint, R.1-1, PageID #: 9.

<sup>37</sup> Verified Complaint, R.1-1, PageID #: 9.

Shortly prior to February 25, 2020, the Oberlin College's Title IX Coordinator notified Mr. Doe's counsel that Jane Roe's allegations would be handled by way of informal resolution, meaning no adverse action would be taken against him as a result of her allegations.<sup>38</sup> On February 25, 2020, Mr. Roe met with the College's Title IX Coordinator in response to Jane Roe's allegations.<sup>39</sup> Oberlin College's Title IX Coordinator confirmed again that she, Oberlin College, and Jane Roe agreed to resolve the matter informally, meaning that no adverse action would be taken against him.<sup>40</sup>

During the February 25, 2020 meeting, Mr. Doe's counsel voiced a concern and complaint to the Title IX Coordinator that Jane Roe had told other Oberlin College students that Mr. Doe was a rapist and that she lodged a Title IX Complaint against him.<sup>41</sup> Oberlin College's Title IX Coordinator subsequently met with Jane Roe and disclosed to her Mr. Doe's complaint that she violated the College's sexual misconduct policy by disclosing that Title IX proceedings had been initiated against him.<sup>42</sup> On information and belief, after being informed of Mr. Doe's complaint, Jane Roe retaliated by requesting that the Oberlin College Defendants commence a formal resolution process against Mr. Doe, subjecting him

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<sup>38</sup> Verified Complaint, R.1-1, PageID #: 10.

<sup>39</sup> Verified Complaint, R.1-1, PageID #: 10.

<sup>40</sup> Verified Complaint, R.1-1, PageID #: 10.

<sup>41</sup> Verified Complaint, R.1-1, PageID #: 11.

<sup>42</sup> Verified Complaint, R.1-1, PageID #: 11.

to potential expulsion from the College and a permanent record on his academic transcript.<sup>43</sup>

On February 26, 2020, Oberlin College's Title IX Coordinator informed Mr. Doe that Jane Roe was no longer interested in informal resolution, that she had requested a formal resolution process, and that the College would commence an investigation into whether he violated the College's sexual misconduct policy.<sup>44</sup>

Upon learning that the College intended to proceed with a formal resolution process against him, Mr. Doe filed a Complaint and a Motion for a Temporary Restraining Order and Preliminary injunction seeking for a Court to intervene and prevent the Oberlin College Defendants from proceeding with a fundamentally unfair sexual misconduct investigation and hearing process that historically had been rife with unconstitutional, gender-based discriminatory practices and procedures.<sup>45</sup> Mr. Doe noted that Oberlin College had boasted about its 100% conviction rate for students accused of violating its sexual misconduct policy when cases proceeded to a formal hearing.<sup>46</sup>

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<sup>43</sup> Verified Complaint, R.1-1, PageID #: 11.

<sup>44</sup> Verified Complaint, R.1-1, PageID #: 11.

<sup>45</sup> Verified Complaint, R.1-1, PageID #: 12.

<sup>46</sup> Verified Complaint, R.1-1, PageID #: 12.

**D. OBERLIN COLLEGE’S PATTERNS OF DECISION MAKING  
SHOW THE REQUISITE CONNECTION BETWEEN OUTCOME  
AND SEX**

In his Complaint, Mr. Doe also set forth facts establishing that Oberlin College had a well-documented, recent history of gender-based discrimination regarding allegations of sexual misconduct.<sup>47</sup> Around October 2012, a female student’s very public complaint that Oberlin College had traumatized her by the way it handled her sexual misconduct complaint gathered widespread attention.<sup>48</sup> The female student complained that the punishment that Oberlin College imposed (a suspension) on a male student who accepted responsibility for touching her vagina without her consent was not adequate and that the length of time the College’s disciplinary process had taken had harmed her.<sup>49</sup>

Less than a month after said female student publicly complained about Oberlin College’s sexual misconduct process, Oberlin College’s then president, Marvin Krislov, announced that a task force would be appointed to overhaul its sexual misconduct policy and procedures.<sup>50</sup> That task force would spend a year and a half developing a new sexual misconduct policy as well as the training by which the Oberlin College administrators who implement it would be educated.<sup>51</sup>

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<sup>47</sup> Verified Complaint, R.1-1, PageID #: 15.

<sup>48</sup> Verified Complaint, R.1-1, PageID #: 15.

<sup>49</sup> Verified Complaint, R.1-1, PageID #: 15.

<sup>50</sup> Verified Complaint, R.1-1, PageID #: 15.

<sup>51</sup> Verified Complaint, R.1-1, PageID #: 15.

In 2013, while a new Oberlin College sexual misconduct policy was being drafted, one of the members of the task force, Professor Meredith Raimondo, was named Oberlin College's Title IX Coordinator, the administrator who "oversees the College's central review, investigation and resolution of reports of sexual harassment, misconduct, stalking and intimate partner violence ... and coordinates the College's compliance with Title IX."<sup>52</sup>

In March of 2014, the task force issued a draft of its new sexual misconduct policy and discussed it with the campus community.<sup>53</sup> Ms. Raimondo made clear, at an open forum that day, that "[o]ne large emphasis of the policy ... is to ensure that the needs of survivors are met and their psychological and physical safety is guaranteed."<sup>54</sup> Ms. Raimondo further explained that the sexual misconduct policy, and its implementation, would have a much broader goal, to steer the conversation away from preventative measures that can be taken and instead provide a clear understanding of rape culture, and the actions that can be taken to eradicate this culture.<sup>55</sup>

Neither the draft of Oberlin College's sexual misconduct policy circulated in March 2014, nor the final version adopted on May 1, 2014, defined "rape culture"

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<sup>52</sup> Verified Complaint, R.1-1, PageID #: 15-16.

<sup>53</sup> Verified Complaint, R.1-1, PageID #: 16.

<sup>54</sup> Verified Complaint, R.1-1, PageID #: 16.

<sup>55</sup> Verified Complaint, R.1-1, PageID #: 16.



or otherwise explained what it meant.<sup>56</sup> But a wide array of materials- from faculty resource guides, to The Counseling Center, to editorials in The Oberlin Review, to tweets from the College’s Assistant Dean of Students (an appellate officer in its sexual misconduct adjudications) made clear its primary characteristic: An unwavering belief in the truth of sexual misconduct allegations.<sup>57</sup>

On information and belief, from at least December 22, 2013 through at least March 12, 2015, Oberlin College faculty were instructed to believe a student who reports sexual misconduct to them, because a very small minority of reported sexual assaults prove to be false reports.<sup>58</sup> Oberlin College’s efforts to overhaul its sexual misconduct policy and procedures, by creating a complainant-centered process designed to combat “rape culture,” did not save it from continued public scrutiny over its handling of sexual misconduct claims.<sup>59</sup>

On May 26, 2015, Ms. Raimondo stated, as to her implementation of Oberlin College’s 2014 sexual misconduct policy and its ethos, “I come to this work as a feminist committed to survivor-centered processes.”<sup>60</sup> In a panel discussion the following month, Ms. Raimondo made her gender bias against males very clear: She said she doesn’t like the term “gray areas” as a description

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<sup>56</sup> Verified Complaint, R.1-1, PageID #: 16.

<sup>57</sup> Verified Complaint, R.1-1, PageID #: 16.

<sup>58</sup> Verified Complaint, R.1-1, PageID #: 17.

<sup>59</sup> Verified Complaint, R.1-1, PageID #: 17.

<sup>60</sup> Verified Complaint, R.1-1, PageID #: 21.

for sexual-assault allegations that don't involve "predators" or "sex with someone who is fundamentally unconscious" because such terminology can "discredit particularly women's experiences of violence."<sup>61</sup>

With respect to a student accused of sexual misconduct, Ms. Raimondo stated that they needed to be asked the following questions: "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?"<sup>62</sup>

On November 24, 2015, Oberlin College was notified that it was being investigated by the Education Department's Office for Civil Rights (OCR) to determine whether it had violated title IX in a recent sexual assault disciplinary proceeding.<sup>63</sup>

That investigation, OCR explained, was not limited to the particular complaint that occasioned it but was "a systematic investigation of the College's policies, procedures, and practices with respect to its sexual harassment and sexual assault complaint process."<sup>64</sup> Oberlin College's status as a target of investigation was made freely available by OCR and was the focus of local media attention and it brought the College under intense scrutiny by OCR.<sup>65</sup>

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<sup>61</sup> Verified Complaint, R.1-1, PageID #: 21.

<sup>62</sup> Verified Complaint, R.1-1, PageID #: 21.

<sup>63</sup> Verified Complaint, R.1-1, PageID #: 17.

<sup>64</sup> Verified Complaint, R.1-1, PageID #: 17.

<sup>65</sup> Verified Complaint, R.1-1, PageID #: 17.

It was no secret that the view of sexual violence that OCR was enforcing was a gendered view that saw men as the paradigmatic perpetrators of that violence and heterosexual women as its paradigmatic targets.<sup>66</sup> The OCR's then-head, Catherine Lhamon, left no doubt about the consequences colleges and universities faced if they failed to adequately heed to OCR's mandates: They would lose all their federal funding. "Do not think it's an empty threat," she told a group of university administrators in July 2014.<sup>67</sup> "It's nice when you carry the big stick of the federal government," she would say again in October 2016, leaving no doubt that the threat of having one's federal funding yanked remained very real.<sup>68</sup>

The OCR investigation initiated at Oberlin College in November 2015 brought Oberlin College under the intense scrutiny of an Education Department that the College knew was primarily concerned with eradicating the perpetuation of sexual violence by men against women.<sup>69</sup> Oberlin College knew that failing to appear to OCR during this investigation as being tough on sexual assault alleged by women against men risked substantial negative publicity and a potential loss of hundreds of millions of dollars in federal funding.<sup>70</sup>

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<sup>66</sup> Verified Complaint, R.1-1, PageID #: 18.

<sup>67</sup> Verified Complaint, R.1-1, PageID #: 18-19.

<sup>68</sup> Verified Complaint, R.1-1, PageID #: 19.

<sup>69</sup> Verified Complaint, R.1-1, PageID #: 19.

<sup>70</sup> Verified Complaint, R.1-1, PageID #: 19.

Consistent with that scrutiny and the campus ethos fostered by Ms. Raimondo's 2014 overhaul of Oberlin College's sexual misconduct policy, Oberlin College's Spring 2016 Campus Climate Report painted a striking picture of what Title IX enforcement looked like at Oberlin during the 2015-2016 academic year.<sup>71</sup> At the date of its publication (which was not included in the document), Oberlin's Title IX team had "received and reviewed over 100 reports of potential sex-based discrimination and harassment."<sup>72</sup> "Most" of those 100 reports involved reporting parties who "request[ed] that the College take no disciplinary action nor inform the responding party about the report."<sup>73</sup> But of those reports that were investigated, about half were deemed eligible for resolution via Oberlin College's formal process.<sup>74</sup> And in every single case sent through the formal process, the respondent was found responsible for at least one charge.<sup>75</sup>

Oberlin College's 2014 sexual misconduct policy and its gender-based discriminatory practices and procedures were recently the subject of the litigation in the federal court system and were addressed in a June 29, 2020 issued by a panel of the Sixth Circuit Court of Appeals.<sup>76</sup> On June 23, 2017, a former male student

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<sup>71</sup> Verified Complaint, R.1-1, PageID #: 19-20.

<sup>72</sup> Verified Complaint, R.1-1, PageID #: 20.

<sup>73</sup> Verified Complaint, R.1-1, PageID #: 20.

<sup>74</sup> Verified Complaint, R.1-1, PageID #: 20.

<sup>75</sup> Verified Complaint, R.1-1, PageID #: 20.

<sup>76</sup> Verified Complaint, R.1-1, PageID #: 23.

at Oberlin College who was expelled from the College after being found responsible for alleged sexual misconduct sued Oberlin College<sup>77</sup> alleging causes of action or breach of contract, gender-based discrimination, and negligence.<sup>78</sup>

In his lawsuit, the expelled student alleged that Oberlin College breached its contract with him by: 1) failing to apply the policy's definition of "incapacitation" in finding him responsible for sexual assault when there was no evidence presented at the hearing to show that the female complainant was incapacitated; and 2) failing to apply the preponderance of the evidence standard in concluding that the evidence tending to show that the female complainant could not consent to oral sex outweighed the evidence that she could, and did consent.<sup>79</sup>

Said student further alleged that the egregious misapplication of the policy's definition of "incapacitation"; the complete lack of evidence that his accuser exhibited any signs of incapacitation to him; and the serious credibility issues that emerged with respect to the female complainant's testimony, caused serious doubts on Oberlin College's finding of responsibility and showed that their decision against him was based on his gender and the gender of his accuser.<sup>80</sup>

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<sup>77</sup> See *John Doe v. Oberlin College*, 1:17-cv-01335.

<sup>78</sup> Verified Complaint, R.1-1, PageID #: 23.

<sup>79</sup> Verified Complaint, R.1-1, PageID #: 23.

<sup>80</sup> Verified Complaint, R.1-1, PageID #: 24.

While the district court dismissed the student's claims against Oberlin College, the student appealed that decision to the Sixth Circuit Court of Appeals, and in a June 29, 2020 opinion, a panel judges from the Sixth Circuit Court of Appeals reversed the District Court's decision, finding that the student amply stated a claim for sex discrimination against Oberlin College in violation of Title IX.<sup>81</sup> In said opinion, the Sixth Circuit Court of Appeals openly questioned Oberlin College's willingness to ever acquit a male student accused of violating its sexual misconduct policy, at least during the 2015-2016 academic year.<sup>82</sup>

Oberlin College replaced its 2014 sexual misconduct policy with an updated policy that was approved on October 16, 2019.<sup>83</sup> Defendant Rebecca Mosely, the Title IX Coordinator at Oberlin College, oversaw the drafting and editing of the College's 2019 policy.<sup>84</sup> In an interview with The Oberlin Review in November of 2019, Defendant Mosely stated "[w]e originally started editing the policy in the 2017-2018 academic year," [w]e had an idea of how we wanted to edit it, and then the stuff that was coming out from the federal government was leaked and we knew that what we were pushing forward wasn't going to meet the requirements of the federal government or the Sixth Circuit ruling."<sup>85</sup>

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<sup>81</sup> *Doe v. Oberlin College*, 6<sup>th</sup> Cir. No. 19-3342 (June 29, 2020).

<sup>82</sup> *Doe v. Oberlin College*, 6<sup>th</sup> Cir. No. 19-3342 (June 29, 2020).

<sup>83</sup> Verified Complaint, R.1-1, PageID #: 27.

<sup>84</sup> Verified Complaint, R.1-1, PageID #: 27.

<sup>85</sup> Verified Complaint, R.1-1, PageID #: 27.

Other members of Oberlin College’s 2019 Title IX Policy Committee were quoted in interviews as stating “[u]nfortunately or fortunately, we have to be in compliance with federal law on things like Title IX” and “personally, I’m not a fan of the live hearing and panel-style of investigation as mandated by the government, since it requires parties who have experienced trauma to participate heavily in the process regardless of whether they feel comfortable doing so.”<sup>86</sup>

Oberlin College has continued to perpetuate the OCR’s gendered view that sees men as the paradigmatic perpetrators of sexual violence and heterosexual women as its paradigmatic targets.<sup>87</sup> In addition to the mandatory training that all first-year and transfer students are required to attend related to sexual consent, Oberlin College also offers workshops for male students to attend called “Consent for Men” and emphasizes that men should obtain “enthusiastic consent” before engaging in sex, whereas there is no similar program designed specifically for female students.<sup>88</sup>

**E. MR. DOE’S MOTION FOR A TEMPORARY RESTAINING ORDER AND PRELIMINARY INJUNCTION**

In addition to filing his Complaint, Mr. Doe also filed an *Ex Parte* Motion

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<sup>86</sup> Verified Complaint, R.1-1, PageID #: 28.

<sup>87</sup> Verified Complaint, R.1-1, PageID #: 30.

<sup>88</sup> Verified Complaint, R.1-1, PageID #: 31.

for a Temporary Restraining Order and Preliminary Injunction, seeking a Court Order enjoining the Oberlin College Defendants from continuing with their unconstitutional investigation and disciplinary process into whether he violated the College's sexual misconduct policy.<sup>89</sup>

**F. DEFENSE COUNSEL'S NOTICE OF APPEARANCE AND THE SUBSEQUENT STATE COURT FILINGS AND PROCEEDINGS**

On March 24, 2020 counsel for the Oberlin College Defendants filed their notice of appearance in the State Court action.<sup>90</sup> On March 25, 2020 Mr. Doe filed a Supplement Brief in Support of his Motion for a Temporary Restraining Order and Preliminary Injunction that incorporated a transcript of the December 12, 2019 oral arguments before the Sixth Circuit Court of Appeals in *Doe v. Oberlin College*, case No. 19-3342.<sup>91</sup> As set forth in his Supplemental Brief, Mr. Doe asserted that the transcript from said oral arguments, clearly reflected that a panel of judges from this Honorable Court expressed significant concerns regarding Oberlin College's sexual misconduct policy and whether the College's decision to find the male student in that case to have violated their policy was due to gender bias against male students.<sup>92</sup>

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<sup>89</sup> Motion for Temporary Restraining Order, R.1-2, PageID #: 260-292.

<sup>90</sup> March 27, 2020 Journal Entry, R.1-4, PageID #: 386.

<sup>91</sup> Supplemental Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction, R.1-3, PageID #: 365-384.

<sup>92</sup> Supplemental Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction, R.1-3, PageID #: 365-370.



On March 27, 2020 the State Court held a telephone conference with counsel for the parties regarding Mr. Doe's Motion for a Temporary Restraining Order and Preliminary Injunction.<sup>93</sup> The State Court ordered counsel for the Oberlin College Defendants to respond to Mr. Doe's Motion for a Temporary Restraining Order and Preliminary Injunction by April 3, 2020.<sup>94</sup>

### **G. THE DEFENDANTS' NOTICE OF REMOVAL**

On March 30, 2020 the Oberlin College Defendants filed a Notice of Removal of Mr. Doe's State Court Action with the District Court.<sup>95</sup> In their Notice of Removal, the Defendants asserted that the District Court had original or supplemental jurisdiction over all of Mr. Doe's claims under 28 U.S.C. §§ 1331 or 1367(a) because his Complaint seeks relief under the U.S. Constitution, federal and Ohio law, and all claims form part of the same case or controversy.<sup>96</sup> The Defendants further asserted that District Court had supplemental jurisdiction over Mr. Doe's state law claims pursuant to 28 U.S.C. § 1441(c)(1)-(2) and that upon removal, the District Court would have original jurisdiction over Mr. Doe's state law claims given that Mr. Doe and the Defendants are citizens of different states and there is more than \$75,000.00 in controversy.<sup>97</sup> The Civil Cover sheet that the

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<sup>93</sup> March 27, 2020 Journal Entry, R.1-4, PageID #: 386-387.

<sup>94</sup> March 27, 2020 Journal Entry, R.1-4, PageID #: 386-387.

<sup>95</sup> Notice of Removal, R.1, PageID #: 1-5.

<sup>96</sup> Notice of Removal, R.1, PageID #: 1.

<sup>97</sup> Notice of Removal, R.1, PageID #: 3.

Defendants filed with their Notice of Removal reflected that Mr. Doe's county of residence was Glynn County, Georgia.<sup>98</sup>

**H. THE MARCH 30 TELEPHONE CONFERENCE WITH THE DISTRICT COURT AND MR. DOE'S MOTION FOR RECONSIDERATION OF THE DISTRICT COURT'S EXPRESSED INTENTION TO DENY HIS MOTION FOR INJUNCTIVE RELIEF AND TO DISMISS HIS CLAIMS AS PREMATURE**

The District Court conducted a telephone conference call with counsel for the parties on March 30, 2020, the same day that the Defendants filed their notice of removal. During the telephone conference, the District Court advised that it was denying Mr. Doe's Motion for a Temporary Restraining Order and dismissing Mr. Doe's Complaint without prejudice because it believed his claims were premature since the College had not completed its investigation and adjudicated the issue of whether Mr. Doe had violated its sexual misconduct policy.<sup>99</sup>

On April 1, 2020, and before the District Court issued a formal ruling denying his Motion for a Temporary Restraining Order and/or Preliminary Injunction and dismissing all of his claims without prejudice, Mr. Doe filed a Motion for Reconsideration in which he cited to a district court decision from *Doe v. University of Michigan*, 18-1776 (E.D. Michigan 2020) that held:

- 1) a college student accused of violating a college's sexual misconduct policy had standing to sue the college under 42 U.S.C. § 1983 and Title IX prior to

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<sup>98</sup> Civil Cover Sheet, R.1-5, PageID #: 388.

<sup>99</sup> Motion for Reconsideration, R.4, PageID #: 393-394.

the college conducting a formal hearing against him and prior to any sanctions and discipline being imposed against him;

- 2) a college student's causes of action against a college are ripe prior to the college 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) a college student's causes of actions against a college are not moot unless it is absolutely clear that the college's alleged prior wrongful behavior could not reasonably be expected to recur and because a student is entitled to clarity as to the procedural safeguards that the college would implement and follow in proceeding with its disciplinary proceeding against him; and
- 4) if portions of a college's sexual misconduct policies are unconstitutional, a college student is entitled to judgment as a matter of law on his claims prior to the college conducting a formal hearing against him and prior to any sanctions and discipline being imposed against him.<sup>100</sup>

(emphasis added).

In his Motion for Reconsideration, Mr. Doe continued to assert that Oberlin College's 2019 sexual misconduct policy contained procedures that had been repeatedly held to be unconstitutional by the United States Sixth Circuit Court of Appeals.<sup>101</sup> Mr. Doe specifically expressed his concerns that: 1) Oberlin's policies would allow the College to make an adjudication that he violated the 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

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<sup>100</sup> Motion for Reconsideration, R.4, PageID #: 393-435.

<sup>101</sup> Motion for Reconsideration, R.4, PageID #: 395-396.

accuser and any other adverse witnesses against him in the presence of a neutral fact finder.<sup>102</sup>

### **I. THE DISTRICT COURT’S APRIL 2, 2020 TELECONFERENCE REGARDING MR. DOE’S MOTION FOR RECONSIDERATION**

In response to Mr. Doe’s Motion for Reconsideration, the District Court scheduled a telephone conference with counsel for the parties on April 2, 2020.<sup>103</sup> Mr. Doe also filed a Motion for Leave to file a First Amended Complaint on April 1, 2020 in an effort to set forth additional facts establishing that the District Court would have diversity jurisdiction over his state law claims against the Oberlin Defendants.<sup>104</sup> On April 2, 2020, and prior to the telephone conference that was scheduled that morning, the District Court granted Mr. Doe’s Motion to file his First Amended Complaint.<sup>105</sup>

The April 2, 2020 telephone conference was recorded by stenographic means.<sup>106</sup> During the telephone conference, counsel for the Defendants asserted “I think it’s important that we get it straight of the chute that Oberlin as a private college is not a state actor, and it is not subject to due process requirements.”<sup>107</sup> Defense counsel further asserted “there is not claim for due process that can be

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<sup>102</sup> Motion for Reconsideration, R.4, PageID #: 395-396.

<sup>103</sup> Docket, April 1, 2020 Notice Telephone Conference [non-document].

<sup>104</sup> Motion for Leave to File First Amended Complaint, R.5, PageID: 436-689.

<sup>105</sup> Docket, April 2, 2020 Order.

<sup>106</sup> Transcript of April 2, 2020 teleconference, R.12, PageID #: 704-716.

<sup>107</sup> Transcript of April 2, 2020 teleconference, R.12, PageID #: 707.

made against Oberlin . . . [t]he Sixth Circuit has recognized that and the Northern District has recognized that and courts all over the country have recognized that you cannot bring a due process claim against a private college or university.”<sup>108</sup>

Mr. Doe’s counsel responded to Defense counsel’s argument by requesting an opportunity to brief the issue of whether a college student could maintain a viable 42 U.S.C. § 1983 claim against a private college or university that was based on alleged due process violations.<sup>109</sup> The District Court denied counsel request, stating that due process doesn’t apply to a private actor.<sup>110</sup>

The District Court further held that Mr. Doe’s federal Title IX claims and state law claims were premature since the Oberlin Defendants had not concluded their investigation and adjudication into the sexual misconduct allegations against him.<sup>111</sup> The District Court reasoned I am not going to jump into the middle of a mandated Title IX investigation ....”<sup>112</sup> “I’m going to let this play. Whatever happens, happens.”<sup>113</sup> “I will let it play out how it plays out.”<sup>114</sup>

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<sup>108</sup> Transcript of April 2, 2020 teleconference, R.12, PageID #: 707-708.

<sup>109</sup> Transcript of April 2, 2020 teleconference, R.12, PageID #: 708.

<sup>110</sup> Transcript of April 2, 2020 teleconference, R.12, PageID #: 707-711.

<sup>111</sup> Transcript of April 2, 2020 teleconference, R.12, PageID #: 712-716.

<sup>112</sup> Transcript of April 2, 2020 teleconference, R.12, PageID #: 716.

<sup>113</sup> Transcript of April 2, 2020 teleconference, R.12, PageID #: 715-716.

<sup>114</sup> Transcript of April 2, 2020 teleconference, R.12, PageID #: 716.

**J. THE DISTRICT COURT’S APRIL 7, 2020 OPINION, ORDER, AND JUDGMENT ENTRY DISMISSING MR. DOE’S CLAIMS.**

On April 7, 2020 the District Court issued an Opinion and Order denying Mr. Doe’s Motion for a Temporary Restraining Order and Motion for Reconsideration, dismissing Mr. Doe’s federal due process claim on the merits, and dismissing without prejudice Mr. Doe’s remaining state and federal claims as premature.<sup>115</sup> The District Court also issued a Judgment Entry on April 7, 2020 ordering Mr. Doe’s case terminated and dismissed as final.<sup>116</sup>

On May 5, 2020 Mr. Doe timely filed his Notice of Appeal from the District Court’s April 7, 2020 Opinion and Order and Judgment Entry.<sup>117</sup>

**STANDARD OF REVIEW**

“This Court reviews a district court’s sua sponte order of dismissal for an abuse of discretion.” *Hargate v. Gaines*, 182 F.3d 917 (6<sup>th</sup> Cir. 1999)(citing *Jourdan v. Jabe*, 951 F.2d 108, 109 (6<sup>th</sup> Cir. 1991)).

“An abuse of discretion ‘exists when the district court applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact.’” *Hargate v. Gaines*, 182 F.3d 917 (6<sup>th</sup> Cir. 1999)(citing *First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641, 647 (6<sup>th</sup> Cir. 1993)).

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<sup>115</sup> April 7, 2020 Opinion and Order, R.6, PageID #: 690-693.

<sup>116</sup> April 7, 2020 Judgment Entry, R.7, PageID #: 694.

<sup>117</sup> Notice of Appeal, R.8, PageID #: 695-696.

## SUMMARY OF THE ARGUMENT

The District Court abused its discretion by: 1) sua sponte dismissing Mr. Doe's due process claim against the Defendants and in denying his request for an opportunity to brief the issue of whether he could maintain a viable 42 U.S.C. § 1983 claim against Oberlin College, a private college; and 2) in dismissing his remaining federal and state law claims as being premature.

## ARGUMENT

### **I. THE DISTRICT COURT ERRED IN SUA SPONTE DISMISSING MR. DOE'S 42 U.S.C. § 1983 CLAIM ON THE MERITS**

The District Court erred when it dismissed Mr. Doe's 42 U.S.C. § 1983 claim sua sponte and on the merits as it failed to provide him with an adequate opportunity to respond to the Oberlin College Defendants' assertion during a teleconference that he could not maintain a due process claim against a private college. "Whether a complaint is dismissed sua sponte on the merits or for failure to state a claim, plaintiffs must be afforded the chance to amend their complaint or to respond to the notice of intended dismissal." *Hargate v. Gaines*, 182 F.3d 917 (6<sup>th</sup> Cir. 1999)(citing *Morrison v. Tomano*, 755 F.2d 515, 517 (6<sup>th</sup> Cir. 1985); *Tingler v. Marshall*, 716 F.2d 1109, 1111 (6<sup>th</sup> Cir. 1983); *Yashon v. Gregory*, 737 F.2d 547, 552 (6<sup>th</sup> Cir. 1984)(stating the "clearly established rule in this circuit is that a district court must afford the party against whom sua sponte summary judgment is to be entered ten-day's notice and an adequate opportunity to

respond”); *Berkovitz v. Home Box Office, Inc.*, 89 F.3d 24, 29 (1<sup>st</sup> Cir. 1996)(holding that “a district court may enter summary judgment sua sponte at, or in consequence of, a pretrial conference ... only if it first gives the targeted party appropriate notice and a chance to present its evidence at the essential elements of the claim or defense”).

In *Hargate*, the Sixth Circuit Court of Appeals vacated a district court’s sua sponte dismissal of the plaintiffs’ complaint upon finding that the district court erred in failing to allow the plaintiffs an opportunity to remedy the perceived deficiencies in their complaint before dismissing it. In support of its decision to vacate the district court’s order, the Sixth Circuit Court of Appeals in *Hargate* reasoned that by filing the order the same day as the pretrial conference, the district court did not give the plaintiffs adequate time to amend their complaint.

Similarly, in the present, matter, the District Court erred in failing to provide Mr. Doe with an adequate opportunity to respond to the Oberlin College Defendants’ argument during the April 2, 2020 teleconference that Mr. Doe could not maintain a viable 42 U.S.C. § 1983 against them. The transcript from the April 2, 2020 teleconference confirms that Mr. Doe disputed the Defendants’ argument that he could not maintain a viable due process claim against them and requested



the opportunity to brief the issue.<sup>118</sup> The District Court denied Mr. Doe’s request and stated that it did not recognize his due process claim as a viable claim.<sup>119</sup>

On April 7, 2020 the District Court issued its Opinion and Order and Judgment Entry, dismissing Mr. Doe’s 42 U.S.C. § 1983 on the merits and dismissing without prejudice his remaining federal and state claims as premature.<sup>120</sup> As the District Court failed to give Mr. Doe appropriate notice and a chance to formally respond to the issue of whether he could assert a viable 42 U.S.C. § 1983 claim against the Oberlin College Defendants, this Honorable Court must vacate the District Court’s judgment entry of dismissal and remand this matter for further proceedings consistent with said decision.

**A. PRIVATE COLLEGES AND UNIVERSITIES SHOULD BE REQUIRED TO PROVIDE SOME LEVEL OF DUE PROCESS TO STUDENTS ACCUSED OF SEXUAL MISCONDUCT IN TITLE IX PROCEEDINGS**

In *Doe v. Case Western Reserve University*, 19-3520 (6<sup>th</sup> Cir. April 6, 2020), an opinion that was released a mere four (4) days after the April 2, 2020 teleconference, a panel of judges from the Sixth Circuit Court of Appeals noted that “we have yet to decide expressly how those [due process] considerations apply in the context of Title IX proceedings conducted by a private university.” The

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<sup>118</sup> Transcript of April 2, 2020 teleconference, R.12, PageID #: 708.

<sup>119</sup> Transcript of April 2, 2020 teleconference, R.12, PageID #: 712-716.

<sup>120</sup> April 7, 2020 Opinion and Order, R.6, PageID #: 690-693 and April 7, 2020 Judgment Entry, R.7, PageID #: 694.

Sixth Circuit Court of Appeals further noted in its opinion that it did not have decide that issue “today” because even if the appellant was entitled manner of due process, he waived those rights by selecting an informal adjudicatory process rather than a formal adjudicatory process for resolving the sexual misconduct complaint against him. *Id.*

While the Sixth Circuit Court of Appeals has yet to address how due process considerations apply in the context of student disciplinary proceedings at private colleges, some federal courts, including the Tenth Circuit Court of Appeals, have recognized that a private college is required to provide its students with due process in connection with its disciplinary proceedings against them.

In *Li v. University of Tulsa*, 12-CV-641-TCK-FHM (U.S. Dist. N.D. Oklahoma Jan. 29, 2013), the district court denied a student’s motion for injunctive relief against a private college, including her request that the college remove a notation from her transcript reflecting that she was dismissed, upon concluding that she failed to succeed on the merits of her claim as the evidence adduced at trial reflected that she was afforded adequate due process and fundamental fairness. The district court in *Li* noted that “[b]ased upon the unique student/university relationship, the Tenth Circuit requires private universities to afford certain due process protections during disciplinary proceedings.” *Id.* (citing *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 626 (10<sup>th</sup> Cir. 1975)(analyzing claim of

wrongful dismissal by private university in terms of due process although the complaint was based on a contract theory).

The district court in *Li* further noted that “[s]pecifically, the Tenth Circuit has held that a private university must provide notice, thereby making the student aware of the subject to be considered ... [and] must also conduct an adequate hearing on the charge with a meaningful opportunity given to plaintiff to participate, to present his position, and to hear the witnesses presenting the facts they had knowledge of....” *Id.* (citing *Slaughter*, 514 F.2d at 624)(declining to draw distinction between public and private universities).

Thus, this Honorable Court should follow the Tenth Circuit Court of Appeals and recognize that private colleges and universities are required to provide due process to students accused of misconduct during disciplinary proceedings.

#### **B. PRIVATE COLLEGES AND PRIVATE UNIVERSITIES CAN BE CONSIDERED STATE ACTORS**

The district court erred in finding that Oberlin College could not be considered a state actor because it is a private university. “A private university may, under certain circumstances, be deemed a state actor by virtue of significant entwinement with government policies.” *Udeme Edoho-Eket v. Northwestern University, et al.*, No. 3:18-cv-01022 (M.D. Tennessee Oct. 26, 2018). “State action may be found only if there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be treated as that of the

State itself.” *Brentwood Academy v. Tennessee Secondary School Athletic Association et al.*, 531 U.S. 288 (2001)(citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)).

“No one fact is a necessary condition for finding state action, nor is any set of circumstances sufficient, for there may be some countervailing reason against attributing activity to the government. *Id.* “The facts that can bear on an attribution’s fairness, e.g., a nominally private entity may be a state actor when it is entwined with governmental policies or when government is entwined in its management or control, unequivocally show that a legal entity’s character is determined neither by its expressly private characterization in statutory law, nor by the law’s failure to acknowledge its inseparability from recognized government officials or agencies.” *Id.*

In *Brentwood Academy*, the United States Supreme Court reversed a decision from the Sixth Circuit Court of Appeals that held that a private athletic association that regulated interscholastic sports among Tennessee public and private high schools was not a state actor and therefore could not be sued under 42 U.S.C. § 1983 for penalizing the plaintiff for violating a recruiting rule. *Id.* In reversing the Sixth Circuit Court of Appeals, the United States Supreme Court in *Brentwood Academy* held that the athletic association’s regulatory activity over interscholastic athletic competition among public and private secondary schools

should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association. *Id.* at 291.

In support of its decision, the United States Supreme Court in *Brentwood Academy* noted that “[t]o complete the entwinement of public school officials with the Association from the bottom up, the State of Tennessee has provided for entwinement from the top down.” *Id.* at 300. “State Board members are assigned ex officio to serve as members of the board of control and legislative council, and the Association’s ministerial employees are treated as state employees to the extent of being eligible for membership in the state retirement system. *Id.*”

The Supreme Court in *Brentwood* further noted that “[i]t is, of course true that the time is long past when the close relationship between the surrogate association and its public officials acting as such was attested frankly” as the terms of the State Board’s Rule expressly designating the Association as a regulator of interscholastic athletics in public schools were deleted in 1996, the year after a Federal District Court held that the Association was a state actor because its rules were “caused, directed and controlled by the Tennessee Board of Education.” *Id.* (citing *Graham v. TSSAA*, No. 1:95-CV-044, 1995 WL 115890, \*5 (ED Tenn., Feb. 20, 1995)).

The United States Supreme Court further noted in *Brentwood* that the removal of the designated language from the State Board’s Rule affected nothing

but words as the State Board's member-designees continue to sit on the Association's committees as nonvoting members, and the State continues to welcome Association employees in its retirement scheme. *Id.* at 301. The Supreme Court further reasoned that "[t]he most one can say on evidence is that the State Board once freely acknowledged the Association's official character but now does it by winks and nods." *Id.* The Supreme Court stated "[t]he entwinement down from the State Board is therefore unmistakable and that entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards. *Id.* at p.302.

Similarly, in the present matter, this Honorable Court should find that there is a close nexus between Oberlin College and the State of Ohio as the Oberlin College has the ability to investigate and impose discipline and sanctions on students who its finds to have committed sexual assaults, without any requirement that the College contact State or local enforcement officials. The investigation and the adjudication of alleged sexual assaults is a procedure that is normally reserved for State actors. State and federal officials are not only aware of Oberlin's handling of such procedures, but encourage Oberlin to investigate and adjudicate said cases with the threat of having significant sums of federal funding taken away

if they fail to investigate and adjudicate allegations of sexual misconduct my its students quickly and harshly.

## **II. THE DISTRICT COURT ERRED IN DISMISSING MR. DOE’S REMAINING FEDERAL AND STATE LAW CLAIMS WITHOUT PREJUDICE UPON FINDING THEM TO BE PREMATURE**

The trial court erred when it dismissed Mr. Doe’s remaining federal and state law claims as being premature because his claims were ripe at the time he filed at his Complaint and Motion for a Temporary Restraining Order and Preliminary Injunction. “[T]he ripeness requirement prevents courts from hearing premature or abstract disagreements.” *Doe v. University of Michigan*, 325 F.Supp.3d 821, 826 (E.D. Mich. 2018)(citing *Platt v. Bd. of Commrs on Grievances & Discipline of Ohio Sup.Ct.*, 769 F.3d 447, 451 (6<sup>th</sup> Cir. 2014)). “Three factors guide the ripeness inquiry: (1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication on the merits of the parties respective claims; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings.” *Id.* (citing *Berry v. Schmitt*, 688 F.3d 290, 298 (6<sup>th</sup> Cir. 2012)).

In *Doe*, supra, a college student who was accused of sexual assault, commenced a 42 U.S.C. § 1983 action in the midst of the public university’s investigation into his alleged conduct, claiming that the university’s policies and procedures on student sexual misconduct deprived him of due process in violation

of the Fourteenth Amendment. *Id.* at 823. The university in *Doe*, argued that the student's claims failed because they were not ripe for decision in the absence of a finding that he violated the policy or the university imposing sanctions on him. *Id.* at 826.

The district court in *Doe* rejected the university's arguments and held that student's case satisfied the ripeness requirement. *Id.* In support of its holding, the district court reasoned: 1) the student, who may presently be without sufficient due process protections, is at immediate risk of expulsion; 2) the student had already suffered an injury as sexual assault allegations may impugn his reputation and integrity, thus implicating a protected liberty interest; 3) additional facts were unnecessary to fairly adjudicate the merits of the student's claims as, it, having examined the university's sexual misconduct policy and the relevant case law, was well-equipped to determine whether the policy adequately protected the student's due process rights; and 4) if it denied the student's motion for a preliminary injunction, but ultimately finds that the policy violated due process, the student will have been forced to defend himself against serious sexual assault allegations without adequate constitutional safeguards. *Id.*

The district court in *Doe*, further noted that the university was essentially asking it to sit back and wait for the investigator to issue findings against the student before intervening in this action. *Id.* The district court explained that it



was rejecting the university's request because "at this very moment, the [u]niversity may be denying [the student] due process protections to which he is entitled." *Id.* The district court further explained that it "cannot, and will not, simply standby as the fruit continues to rot on the tree." *Id.* Thus, the district court held that the student's case was ripe for adjudication. *Id.*

Similarly, in the present matter, the District Court should have found that Mr. Doe's claims against the Defendants were ripe for adjudication despite the fact that the College's investigation of the sexual misconduct allegations against him was ongoing. Mr. Doe was at immediate risk at expulsion through a process and procedure at Oberlin College that had previously resulted in 100% of the male students who were accused of sexual misconduct by a female student being found responsible for some form of misconduct at the conclusion of the College's formal adjudicatory process during a recent academic year.<sup>121</sup>

Moreover, additional facts were unnecessary to fairly adjudicate the merits of the Mr. Doe's claims as the Oberlin College sexual misconduct policy failed to guarantee Mr. Doe a fundamentally fair investigation and adjudicatory process as it failed guarantee that he would have the rights to a live hearing, to cross-examine his accuser and other witnesses' against him.<sup>122</sup> Further, by dismissing Mr. Doe's

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<sup>121</sup> Verified Complaint, R.1-1, PageID #: 12.

<sup>122</sup> Motion for Reconsideration, R.4, PageID #: 404-406.

claims as premature, the District Court forced Mr. Doe to defend himself against serious sexual assault allegations in an investigation and adjudicatory process that he had already set forth evidence was fundamentally unfair and/or in violation of due process.

Thus, the District Court clearly abused its discretion in dismissing in Mr. Doe's remaining federal and state law claims on the basis that they were premature. As Mr. Doe's claims were ripe, this Honorable Court should vacate the District Court's judgment entry as it relates to said claims.

### **CONCLUSION**

For the forgoing reasons, Mr. Doe respectfully requests that the judgment of the District Court be reversed.

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the word count of the Brief of Plaintiff-Appellant, John Doe, is 9,047 pursuant to the Word Count feature using proportionally spaced Times New Roman, 14-point font, in Microsoft Word for Mac 2018 format.

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## CERTIFICATE OF SERVICE

I certify that on August 3, 2020 the forgoing Appellant's Opening Brief was served on all parties or their counsel of record through the CM/EDC system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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**ADDENDUM**

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT  
DESIGNATION OF APPENDIX CONTENTS

The following filings from the district court's record are designated to be included in the appendix:

DESCRIPTION OF ENTRY	DATE	RECORD ENTRY NO.	PAGE ID # RANGE
Defendants' Notice of Removal	3/30/2020	R.1	1-5
Plaintiff's Verified Complaint	3/30/2020	R.1-1	7-87
Oberlin College 2019 Sexual Misconduct Policy	3/30/20	R.1-1	88-157
Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction	3/30/2020	R.1-2	259-363
Plaintiff's Supplemental Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction	3/30/2020	R.1-3	364-384
State Court's March 27, 2020 Journal Entry regarding telephone status conference and initial orders	3/30/2020	R.1-4	385-387
Civil Cover Sheet	3/30/2020	R.1-5	388-389

Plaintiff's Motion for Reconsideration of Court's Expressed Intention to Dismiss Plaintiff's Claims and to Deny Plaintiff's Motion for a Temporary Restraining Order	4/01/2020	R.4	393-435
Plaintiff's Motion for Leave to file a First Amended Complaint Instanter	4/01/2020	R.5	
Plaintiff's First Amended Complaint	4/01/2020	R.5-1	
April 7, 2020 Opinion and Order Denying Plaintiff's Motion for a Temporary Restraining Order, Denying Plaintiff's Motion for Reconsideration, and Dismissing Plaintiff's claims	4/07/2020	R.6	690-693
April 7, 2020 Judgment Entry terminating and dismissing Plaintiff's case as final	4/07/2020	R.7	694
Notice of Appeal	05/05/2020	R.8	695-696
Transcript from April 2, 2020 teleconference	05/27/2020	R.12	704-716