VIOLENCE AGAINST WOMEN ON COLLEGE CAMPUSES – A 2018 UPDATE

2018 Seminar Material

S0169.18

New Jersey Institute for Continuing Legal Education

A Division of the State Bar Association
NJICLE.com

VIOLENCE AGAINST WOMEN ON COLLEGE CAMPUSES – A 2018 UPDATE

Moderator/Speaker

Raymond M. Brown, Esq.
Greenbaum, Rowe, Smith & Davis, LLP
(Iselin, Roseland)

Introductory Remarks/Welcome

Lynn Fontaine Newsome, Esq.
Certified by the Supreme Court of New Jersey as a Matrimonial Law Attorney
Newsome O'Donnell, LLC
(Florham Park)

Speakers

Honorable Sohail Mohammed, JSC
(Paterson)

Maria C. Anderson, Esq.
Associate University Counsel, Montclair State University (Montclair)

Helen Archontou, MSW, LSW
YWCA Bergen County
(Hackensack, Ridgewood)

Tamara J. Britt, Esq.
General Counsel, Manhattan College
(New York City)

Philip A. Byler, Esq.
Nesenoff & Miltenberg LLP
(New York City)

Patricia Teffenhart, MPA
NJ Coalition Against Sexual Assault
(New Brunswick)

In cooperation with the **New Jersey State Bar Foundation** **S0169.18**

Table of Contents

Violence Against Women on College Campuses – a 2018 Update

Presented by:

Maria C. Anderson, Associate University Counsel, Montclair State University

And

Tamara J. Britt, General Counsel, Manhattan College

RECENT HEADLINES

- Is There a Smarter Way to Think About Sexual Assault on Campus
  https://www.newyorker.com/magazine/2018/02/12/is-there-a-smarter-way-to-think-about-sexual-assault-on-campus
- I'm a Campus Sexual Assault Activist. It's Time to Reimagine How We Punish Sex Crimes
  https://www.nytimes.com/2018/02/22/opinion/campus-sexual-assault-punitive-justive.html
- West Virginia University Takes Action Against 16 Fraternities on Campus
  http://www.theintelligencer.net/news/top-headlines/2018/02/west-virginia-university%E2%80%88takes-action-against-16-fraternities-on-campus/
- In light of recent sexual assaults on campus, #MeToo, #TimesUp more important than ever
  https://badgerherald.com/opinion/2018/02/13/in-light-of-recent-sexual-assaults-on-campus-metoo-timesup-more-important-than-ever/
- Author cancels graduation speech amid harassment allegations
  http://www.wacotrib.com/news/ap_nation/headlines/author-cancels-graduation-speech-amid-harassment-allegations/article_5ca32ad0-cb83-5213-a30b-959f14c89e32.html
- #MeToo founder Tarana Burke in East Bay: It's not about 'taking down' powerful men
  https://www.mercurynews.com/2018/02/28/me-too-founder-tarana-burke-speaks-to-bay-area-crowd-at-saint-marys-college/
- Combating 'toxic' masculinity: Students of all genders need to join the conversation
  http://www.thedp.com/article/2018/02/jessica-li-combating-toxic-masculinity-summit-penn-philadelphia
- Senate to MSU: Prevent sexual assaults or risk aid
  https://www.detroitnews.com/story/news/politics/2018/02/14/michigan-senate-msu-budget/110410118/

  A College's List of Alleged Rapists
  https://www.insidehighered.com/news/2018/01/30/metoo-movement-inspires-similar-campaigns-among-colleges
- Campus Assault Survivors Are Feeling Left Behind By #MeToo
  https://www.refinery29.com/2018/02/190725/campus-sexual-assault-me-too-betsy-devos

Federal Laws Protecting Women

- College/University responses to sexual assault and violence are governed by a multifaceted federal and state regulatory framework. The federal framework is based on three primary statutes: Title IX; the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act2 (Clery Act/Clery); and Section 304 of the Violence Against Women Reauthorization Act of 2013 (VAWA).
- Title IX of the Education Amendment of 1972
  - 20 USC 1681, et. seq.
- Title IX Implementation Regulations
  - 28 CFR 42.201-42.215; 42.601-42.613 (Employment)
  - 34 CFR 106 (Education Programs and Activities)
  - 29 CFR 1604 (Sexual Harassment)
  - 45 CFR 86 (Athletics)
  - 28 CFR 42.101-42.112 (Federally assisted programs)
- Prohibits discrimination by institutions receiving federal funding on the basis of sex in admissions, education programs, athletic activities and employment

Federal Laws Protecting Women

- Title VI of the Civil Rights Act
  - 42 USC 2000d, et. seq.
- Implementation Regulations
  - 28 CFR 50.3 (Guidelines for Enforcement)
  - 34 CFR 100 (Programs Receiving Federal Assistance)
  - 45 CFR 80 (Other Programs Receiving Federal Assistance)
- Prohibits institutions receiving federal financial assistance from discrimination based on race, color or national origin in admission, educational and/or academic programs or activities

New Jersey Law Protecting Women

- While college/university responses necessitate a coordinated and integrated approach to Title IX, Clery and VAWA, these institutions must also consider obligations under state and local laws.
- NJ Law Against Discrimination - N.J.S.A. 10:5-12
- Prohibits unlawful discrimination in employment, housing, places of public accommodation, credit and business contracts.
- Protected categories are greater than federal law
  - Race, creed, color, national origin, nationality, ancestry, age, sex (including pregnancy), familial status, marital status, domestic partnership or civil union status, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for military service, and mental or physical disability, perceived disability, and AIDS and HIV status.

Penalties for Non-Compliance with Federal Law

- A lawsuit may be filed in State or Federal Court. Prevailing party may recover damages/punitive damages, and is entitled to attorney's fees.
- Complaint may be filed with the Office of Civil Rights.
  - OCR will first seek voluntary compliance through negotiation of a corrective action agreement.
  - If OCR is unable to achieve voluntary compliance, OCR will initiate enforcement action.
  - OCR may file administrative proceeding to terminate federal financial assistance to institution.
  - OCR may refer complaint to DOJ for judicial proceedings to recover monetary damages, punitive damages, and civil penalties ($50k for 1st offense, $100k for subsequent violations).

Penalties for Non-Compliance with State Law

- A complaint can be filed with NJ Division of Civil Rights. Director of Division may issue cease and desist order, award attorney's fees, and assess penalties ($10k for 1st offense, $25k for 2nd offense, $50k for 3rd offense).
- A complaint can be filed with the Superior Court of NJ, and seek punitive damages. A successful plaintiff is entitled to reasonable attorney's fees.

Federal Laws Protecting Student Safety

- Campus Sex Crimes Prevention Act
  - Public Law 106-386, 34 CFR 668
  - Registered sex offenders must provide notice of enrollment at higher education institution to law enforcement in the institution's jurisdiction.
- Clery Act - 20 USC 1092(f); 34 CFR 668.41; 34 CFR 668.46
  - Requires institutions receiving federal financial assistance to keep information about crime on and near its campus and provide annual report of crime statistics, security measures and policies to all students employees and USDOE

Federal Laws Protecting Student Safety

- Violence Against Women Reauthorization Act
  - Pub. Law 113–4
  - 34 CFR 668
  - Requires annual reporting of statistics on domestic violence, dating violence, stalking, and hate crimes based upon gender identity;
  - Requires adoption of procedures for reporting, investigating and adjudicating reports
  - Requires institutions to provide victims the option to, or not to, seek assistance by law enforcement and campus authorities
  - Requires institutions to provide victims notice of its obligations and victims rights regarding no-contact, restraining and protective orders

Federal Laws Protecting Student Safety

- Violence and Women Act (continued)
  - Requires adoption of standard of evidence used to adjudicate complaints
  - Requires employees who conduct adjudication proceedings to be trained on how to investigate and conduct hearings in a manner that protects the safety of the victim and promotes accountability
  - Requires adoption of policies that identify sanctions and protective measures to be imposed following a final determination of rape, acquaintance rape, domestic violence, dating violence, sexual assault or stalking
  - Requires victim and accused to be provided the same opportunity to present evidence and witnesses during an adjudicative proceeding
  - Requires victim and accused to be notified simultaneously of the outcome of a proceeding
  - Requires adoption of procedures to maintain the confidentiality of the victim and recordkeeping

Federal Laws Protecting Student Safety

- Violence and Women Act (continued)
  - Requires new students and employees to be offered training that promotes awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking
  - Requires training to include:
    - Definition of offenses and statement that they are prohibited by the institution
    - Definition of consent
    - Safe and positive options for bystander intervention and individual may take to prevent harm or intervene in risky situations
    - Recognition of signs of abusive behavior and how to avoid potential attacks
  - Requires ongoing prevention and awareness campaigns to students and faculty

Guidance to Higher Education Institutions

- Dear Colleague Letter (DCL) dated April 4, 2011 issued by OCR within the U.S. Department of Education
  - Provides guidance an actions that must be taken by schools under Title IX in response to sexual violence
- Q/A provided by OCR dated April 29, 2014
- DCL dated April 24, 2015 issued by OCR
  - Provides guidance on Title IX Coordinator responsibilities
- Title IX Coordinator Resource Guide dated April 2015 issued by OCR
- White House Task Force to Protect Students from Sexual Assualt
  - Sample language for development of policies and procedures
- Q/A issued by OCR dated September 2017

Guidance to Higher Education Institutions

- Changes imposed by 2017 Q/A:
  - Makes clear that both victim and accused are entitled to interim measures to provide full access to their education while the investigation is pending;
  - Must provide sufficient details of the allegations within a sufficient time period prior to the accused's interview and the proceedings so that the accused will have sufficient time to prepare a response;
  - The institution is provided the option to grant a right to appeal to both parties after the outcome, or limit appeals to being filed only by the accused
  - Schools may now decide whether to use the preponderance of evidence standard or the clear and convincing standard when adjudicating sexual assault cases **
  - There is no fixed time frame under which a school must complete a Title IX investigation.

HIGHER EDUCATION INSTITUTION'S DUTY UNDER LAW

Following trigger a response from the institution:

- Faculty or other employee explicitly or implicitly condition an educational decision or benefit on the student's submission to unwelcome sexual conduct.
- The conduct is sufficiently serious to deny or limit a student's ability to participate in or benefit from the school's program(s)
- The harassment occurred or was reasonably perceived as occurring in the context of the employee's provision of aid, benefits or services to students.
- Student is the victim of sexual violence

HIGHER EDUCATION INSTUTION'S DUTIES

Action that must be taken by institution:

- Responsible employees must forward reports to Title IX Coordinator
  - Does not include mental health or pastoral counselors, social workers, health center employees
- Title IX Coordinator must investigate to determine what occurred and take interim measures to protect the alleged victim;
  - Not obligated to wait for criminal investigation or court proceedings to be resolved

HIGHER EDUCATION INSTITUTION'S DUTY UNDER LAW

- Take reasonable, timely, appropriate and corrective action, e.g.
  - Impose escalating consequences
  - Minimize the burden on the alleged victim
  - Provide other services like counseling or tutoring to alleged victim
  - Require the harasser to undergo special training or issue an apology
- Provide a hearing
  - Both parties are permitted to attend

HIGHER EDUCATION INSTUTION'S DUTY UNDER LAW

- Honor alleged victim's request for confidentiality
  - Note that this may be disregarded if there is a greater threat to student welfare
  - Limit sharing of info to those who need to know
- Be proactive in preventing any further harassment and retaliation against the complainant or witnesses
- Provide notice of the outcome to both parties
- Provide training to its employees and students on how to report and how to respond to complaints
- Maintain confidential record keeping of compliance activities
- Provide an avenue to appeal the findings, remedy or both

PREVENTATIVE STRATEGIES

- Education programs on consent, alcohol and drugs;
- Educate staff on millennials and generation z (i-generation) (i.e., terminology of relationship status);
- Widely disseminate notice of institutional policies and procedures likely to be consulted by students
- Complaint handling should be consistent with those procedures and done in a reasonably prompt time frame (ROLE OF TITLE IX TEAM)
- Perform adequate, reliable, and impartial investigation of complaints which permit the presentation of witnesses and other evidence (ROLE OF TITLE IX TEAM)

College & University Programs

- ***Green Dot Bystander Intervention***

  The Green Dot Program is a bystander intervention program that was developed at the University of Kentucky and is currently being implemented in colleges and high schools in New Jersey and throughout the United States. Green Dot addresses the issues of power-based personal violence: harassment, stalking – on-line or in person, domestic violence, sexual assault, and bullying. Green Dot recognizes the great impact that informed bystanders can have in reducing this violence within their communities. The program strives to connect students to the issue of violence prevention and helps them to believe that they play a necessary part in addressing it. Awareness education and skills practice will empower students to use their influence with their peers. Together they will move their community toward increased intolerance for this violence in all of its forms.
  https://www.spfk12.org/cms/lib/NJ01001501/Centricity/Domain/1061/9th%20grade%20parent%20letter%20GreenDot.pdf

- ***New York University - S.P.A.C.E. (Sexual misconduct Prevention, Assistance, Counseling, & Education)***

  Provide confidential assistance to complainants about sexual misconduct, relationship violence, and stalking. Support includes providing information about resources and options, accompanying a complainant to rape treatment centers, medical services and campus meetings or proceedings. S.P.A.C.E. also coordinates NYU educational outreach, prevention efforts and training initiatives, and serves as a liaison to all student groups active in the area of sexual misconduct prevention and awareness. Staff at S.P.A.C.E. — which includes Crisis Response Counselors at the Wellness Exchange — are licensed health professionals who can act as your personal liaison throughout the process of accessing care and services following a sexual assault.
  https://www.nyu.edu/students/health-and-wellness/wellness-exchange/sexual-assault-prevention-and-response.html

- ***University of Richmond - Center for Sexual Assault Prevention and Response***

  The University of Richmond values a learning community in which all members feel secure physically and intellectually. The prevention of sexual misconduct, particularly sexual violence, is an institutional priority. The University is unwavering in its commitment to support survivors of sexual assault, to respond promptly to reports of any type of sexual misconduct, and to investigate and adjudicate reports in a manner that is fair and equitable to all parties involved.
  https://prevent.richmond.edu/

Resources

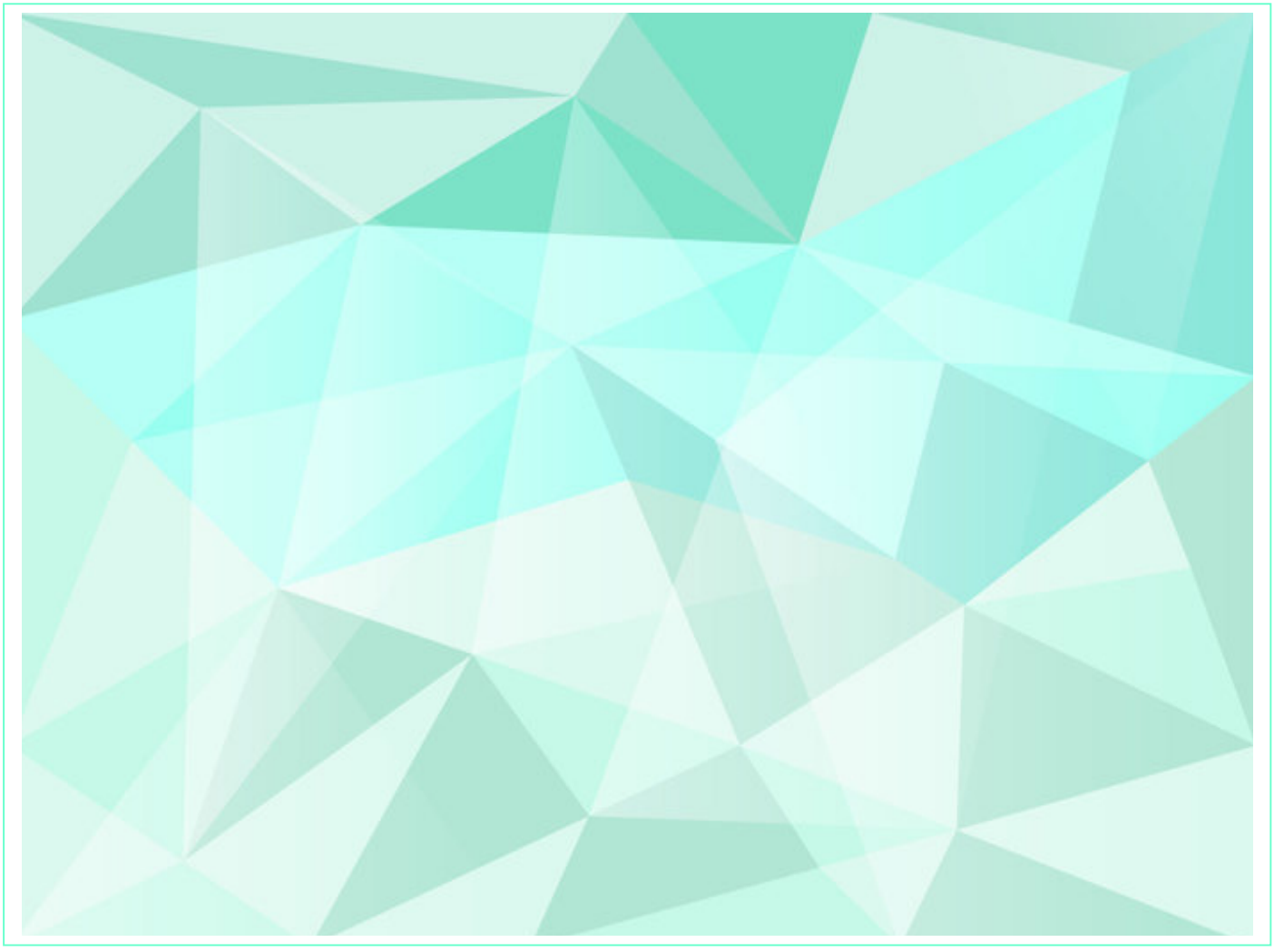
- U.S. Department of Education website: https://www2.ed.gov/about/offices/list/ocr/lgbt.html
  - Dear Colleague Letters
  - Examples of Policies and Emerging Practices
  - Resolution Agreements
  - Recent decisions
- Other Resources
  - LGBTQ: https://www.samhsa.gov/behavioral-health-equity/lgbt
  - Department of Health for LGBTQ: https://www.hhs.gov/programs/topic-sites/lgbt/index.html
  - Equal Employment Opportunity Commission: https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

ADDRESSING CAMPUS SEXUAL VIOLENCE

Creating Safer Higher Education Communities

New Jersey Task Force on Campus Sexual Assault
Report and Recommendations

June 2017



The New Jersey Task Force on Campus Sexual Assault

Co-Chairs

Donna M. Barry
Director, University Health Center
Montclair State University

Patricia Teffenhart, MPA
Executive Director
New Jersey Coalition Against
Sexual Assault (NJCASA)

Helen Archontou, MSW, LSW
Chief Executive Officer
YWCA Bergen County

Anne Marie Bramnick, Esq.
Bramnick, Rodriguez, Grabas, Arnold
& Mangan, LLC

Rochelle Hendricks
Secretary of Higher Education
The State of New Jersey

Virginia M. Lyttle
Past State President
American Association of University
Women-New Jersey
(AAUW-NJ)

Sarah McMahon, Ph.D., MSW, LSW
Associate Professor and Associate Director
Center on Violence Against Women and
Children at the School of Social Work
Rutgers, The State University of New Jersey

Frank Merckx, DMH
Dean of Students
Drew University

Bette M. Simmons, Ed.D.
Vice President of Student Development
and Enrollment Management
County College of Morris

Jennifer Stonerod, Esq.
Deputy Attorney General
Deputy Chief of Staff
Division of Criminal Justice
State of New Jersey

Charmaine Thomas
Assistant Commissioner
Department of Children and Families
Division on Women
Division of Family Community Partnerships

Corlisse Thomas, Ed.D.
Vice Chancellor for Student Affairs
Rutgers-Newark, The State University of
New Jersey

Staff

Alan Guenther, Christina Quin
Office of the Secretary of Higher Education

Acknowledgements

We are grateful to the dozens of experts who met with us, and shared their insights about how to make college campuses safer from sexual violence in New Jersey. Without their cooperation and ideas, our work would not have been possible. We also thank Julia Cusano, MSW and Brittany DiBella, MSW at the Center on Violence Against Women and Children at the School of Social Work, Rutgers.

Robert Baran
Assistant Director
New Jersey Coalition Against Sexual Assault

Sarah Bear
Training and Outreach Coordinator
New Jersey Coalition Against Sexual Assault

Christie L. Bevacqua
Deputy First Assistant Prosecutor
Middlesex County Prosecutor's Office

Katherine Buck
Vice President for Student Life
and Dean of Students
College of Saint Elizabeth

Deni Carise, Ph.D.
Chief Clinical Officer
Recovery Centers of America

Gabriela C. Celeiro
Co-Founder and Chief Clinician
Sanar Wellness Institute

Paul M. Cell
Chief of Police
Montclair State University

Jennifer Downing
Deputy First Assistant Prosecutor
Mercer County Prosecutor's Office

Pam Drager
Senior Manager of Community Engagment
Domestic Abuse and Sexual Assault
Crisis Center of Warren County

Jason Fredericks
Assistant Dean of Student Services
at Raritan Community College

Shannon Gary
Associate Vice Provost and Dean of Students
University of San Francisco

Michelle Gasparian
Supervising Assistant Prosecutor
Mercer County Prosecutor's Office

Sergeant Patricia Gusmano
Union County Prosecutor's Office

Alison Kiss
Executive Director
Clery Center

Leidy Londono
Prevention Coordinator
healingSPACE: A Sexual Violence
Resource Center

Najma Q. Rana
Assistant Prosecutor
Hudson County

Joseph P. Rem, Jr., Esq.
Rem Law Group
Hackensack, NJ

Remi Spencer, Esq.
Spencer & Associates
Counselors at Law, L.L.C

Laura Valente
Associate Vice President for Student
Engagement, Dean of Students
and Title IX Coordinator
New Jersey Institute of Technology

Liz Zadnik
Statewide Capacity Manager
New Jersey Coalition Against Sexual Assault

Glossary and Resources

Campus Climate Survey

Mentioned in the first *Not Alone* report, campus climate surveys have been conceptualized as a way to gather information from students and members of the campus community. Surveys are intended to capture meaningful and actionable data regarding school climate, victimization experiences, and community norms. Sections of the survey can include campus climate, perceptions of campus response processes, experiences of sexual violence victimization, bystander efficacy, and self-reflection regarding other pro-social behaviors.

The development of survey measures and guidance is an ongoing team effort. Rutgers University's Center on Violence Against Women & Children was charged with piloting and evaluating the survey. The Justice Department's Office on Violence Against Women supported implementation by working with campus grantees to disseminate the survey and glean practical insights. The Bureau of Justice Statistics engaged in a validation study in order to further refine the process and offer guidance on next steps.

To learn more:

Bureau of Justice Statistics - Campus Climate Survey Validation Study Final Technical Report: https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5540
Rutgers University – Center on Violence Against Women & Children - Understanding and Responding to Campus Sexual Assault: Comprehensive Campus Climate Assessment: https://socialwork.rutgers.edu/centers/center-violence-against-women-and-children/research-and-evaluation/understanding-and
Department of Justice Campus Climate Survey resources: https://www.justice.gov/ovw/protecting-students-sexual-assault#campusclimate
Progress report on campus climate surveys: http://changingourcampus.org/wp-content/uploads/2017/01/Progress-on-Campus-Climate-Surveys.pdf

---

Clery Act

The Jeanne Clery Disclosure of Campus Security Policy and Crime Statistics Act ("Clery Act") was signed into law in 1990 and is named after Jeanne Clery, a young woman who was assaulted and murdered while at college in Pennsylvania. The Clery Act is a consumer protection law that requires institutions of higher learning to record and disclose campus crime statistics and safety policies. The Clery Act also requires schools to have a procedure for offering timely warnings and emergency notifications to campus community members, as well as protect the rights of victims by offering resources and options when violence is reported.

To learn more:

The Clery Center: https://clerycenter.org/

Complainant

The individual making an accusation of sexual assault.

Confidential Sexual Violence Advocates (CSVA)

Provides services to victims of sexual violence.

'Dear Colleague' Letter

The Office for Civil Rights (OCR) of the U.S. Department of Education periodically releases policy guidance to notify schools and federal grantees of their obligations and outlines ways OCR enforces federal civil rights laws, as a tool for helping them comply with the law. When precedent-setting cases highlight or operationalize specific applications of the law, OCR sends around "Dear Colleague" letters and supplementary materials to help stakeholders and the public understand how decisions apply to schools, districts, and educational institutions of higher learning.

'Dear Colleague' Letters of note:

- February 22, 2017: Office for Civil Rights Withdraws Title IX Guidance on Transgender Students
- April 24, 2015: Guidance on Obligation of Schools to Designate a Title IX Coordinator
- April 29, 2014: Questions and Answers about Title IX and Sexual Violence
- April 4, 2011: Guidance on Addressing Sexual Harassment/Sexual Violence

To learn more:

Department of Education, Office for Civil Rights – Dear Colleague Letters: Sex Discrimination Policy Guidance:
https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html
National Sexual Violence Resource Center – Dear Colleague Letter: Sexual Violence:
http://www.nsvrc.org/publications/dear-colleague-letter-sexual-violence

---

Forensic Medical Exam

Within five days of an assault, a victim has the option to undergo a forensic medical exam at a local emergency room. This procedure is conducted by a forensic nurse examiner (FNE) to collect physical evidence of an assault. The FNE documents the findings and assembles the evidence into a sexual assault forensic exam (SAFE) kit (often referred to as a "rape kit"). The completed and sealed kit is then transported and stored according to the appropriate chain of custody, often in collaboration with the county prosecutor's office. After the examination, the FNE can make recommendations for medical treatment, sexually transmitted infection (STI) prophylaxis, and pregnancy options.

To learn more:

U.S. Department of Justice Office on Violence Against Women – A National Protocol for Sexual Assault Medical Forensic Exams:
https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf
Sexual Assault Forensic Examiner Technical Assistance:
http://www.safeta.org/

Not Alone Report

Released April of 2014 by the White House Task Force to Protect Students from Sexual Assault, this document outlines the Task Force's plan to address campus-based sexual violence by offering guidance and resources for schools. *Not Alone* highlighted the role of campus climate surveys in

supporting accountability and school responsiveness, described promising prevention strategies designed to address root causes of sexual violence perpetration, gave research-based examples for developing trauma-informed services to students who report sexual assault, and outlined next steps for federal transparency and coordinated oversight. The second report, released in January of 2017, served as a "progress report" of Task Force efforts and included new resources for schools.

To learn more:

The Center for Changing Our Campus Culture – Not Alone page:
http://changingourcampus.org/about-us/not-alone/2014
Not Alone report: https://www.justice.gov/ovw/page/file/905942/download
2017 Not Alone report: http://www.changingourcampus.org/resources/not-alone/Second-Report-VAW-Event-TF-Report.PDF

Prevention

The Centers for Disease Control and Prevention (CDC) have identified sexual violence as a public health issue that can be prevented. The CDC has defined and categorized violence prevention into three categories: primary, secondary, and tertiary.
Primary prevention includes efforts that seek to prevent violence before it occurs. Primary prevention strategies focus on addressing and reducing factors that put people at risk for perpetrating violence.

Secondary prevention focuses on minimizing the impact immediately after violence has occurred. Secondary prevention efforts concentrate on the needs of the victim, significant others, and the community, such as crisis intervention and medical care.

Tertiary prevention is a response after violence has already occurred. Tertiary prevention focuses on the long-term impact of the violence, such as managing the ongoing effects of victimization and/or treatment and management of the perpetrator.

To learn more:

Centers for Disease Control – Principles of Prevention Guide:
http://vetoviolence.cdc.gov/apps/pop/assets/pop_notebook.pdf
Centers for Disease Control – Sexual Violence on Campus: Strategies for Prevention:
https://www.cdc.gov/violenceprevention/pdf/campussvprevention.pdf
National Sexual Violence Resource Center – Primary Prevention Primer:
http://campus.nsvrc.org/course/index.php?categoryid=15

Resource Advisor

Resource advisor, members of the college or university community who serve [as volunteers] to assist the victim/survivor and the accused students in understating the university policies, procedures and resources. These individuals are trained members of the college or university faculty or staff, and are separate and apart from the higher education institution's Title IX Coordinator, investigator and adjudicator. Their prime role is to serve as an additional resource throughout the process.

Respondent
The person accused of perpetrating a sexual assault.

SART

The Sexual Assault Response Team (SART) is a collaborative, victim-centered team committed to responding to immediate or near-immediate sexual violence victimization. In New Jersey, core members often include a confidential sexual violence advocate (CSVA), law enforcement, and a forensic nurse examiner (FNE). These individuals work together to support the victim during the forensic medical exam and/or criminal justice investigation (should the victim choose), as well as providing the victim with community referrals and resources to assist with healing and safety.

To learn more:

Office of Justice Programs – SART Toolkit:
https://ovc.ncjrs.gov/sartkit/

Title IX

Title IX of the Education Amendments of 1972 ("Title IX") prohibits gender discrimination in educational institutions that receive federal funding. The intent of the law is to promote equity and protect the civil rights of students of all genders. It states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." The U.S. Department of Education regards Title IX as broad protections against sexual harassment and sexual violence within school communities. Schools that receive federal funding are legally required to respond and address "hostile environments" when they receive reports of sexual misconduct.

Under Title IX, schools are required to:

- Post notices and policies of nondiscrimination
- Have someone on staff who functions as Title IX Coordinator
- Publish clear and understandable grievance policies
- Offer training to the campus community on misconduct policies and procedures
- Protect students against retaliation
- Offer accommodations to students

To learn more:

Know Your IX: Empowering Students to Stop Sexual Violence: https://www.knowyourix.org/ and https://www.knowyourix.org/college-resources/title-ix/

Table of Contents

Executive Summary

Higher education is an opportunity to enjoy a time of self-exploration with the goal of enlightenment. Students, full of hope and promise, enter college anxious to discover their true potential. It is a fragile time. Some students are just out of high school, inexperienced in relationships but eager to experiment. Others, perhaps, are more experienced but no less eager to explore their new collegiate environment. Too often they encounter a brutal reality for which they are ill-prepared to cope.

Approximately 20 percent of undergraduate women experience sexual violence while on college campuses around the nation, most often in their first year of school. This statistic has been replicated numerous times over the years through scientific research and it is clear that a larger number of undergraduate students, particularly women, are impacted by sexual violence while on campus.[1-5] These forms of sexual violence range from sexual harassment to unwanted sexual touching to rape. It is the position of the Task Force that all forms of sexual violence have detrimental effects on victims and the larger campus community.

In nearly 85 percent of sexual violence cases, the victims know their attackers. Frequently, they fail to report the crime to any campus or law enforcement authority. They are uncertain of their rights and know little about the services or treatment that should be readily available to any student in need of help. In one national survey of nine higher education institutions, students reported 770 completed rapes on campus during the 2014-15 academic year, but only 40 of those were reported to campus authorities under Clery Act guidelines. The Clery Act was signed into law in 1990 after Jeanne Clery was assaulted and murdered while at college in Pennsylvania. The Clery Act requires institutions of higher learning to record and disclose campus crime statistics and safety policies, but research has shown that most acts of sexual violence are not being counted under Clery guidelines.

The FBI recognizes sexual assault as the second most violent crime, the first of which is murder, and the impact on victims can be devastating. Ninety-one percent of the victims of rape and sexual assault are female, and 9 percent are male, according to the National Sexual Violence Resource Center.

Sexual assault survivors have an attempted suicide rate 13 percent higher than the general population. Members of the Lesbian, Gay, Bisexual, Transgender and Queer (LGBTQ) community experience victimization rates much higher than others. One in two transgender individuals are sexually abused or assaulted at some point in their lives. Some reports estimate that transgender survivors may experience rates of sexual assault up to 66 percent, often coupled with physical assaults or abuse, according to the federal Office for Victims of Crime.[9]

Defense attorneys point out that those who are accused of sexual assault struggle to find fair treatment and justice through the campus adjudication process. Even when they have not been charged formally with any crime, the accused can find their academic careers suspended for a year or more while investigations are conducted. In most cases, when an incident has first occurred, defense attorneys are barred from campus and are not permitted to interview witnesses. Often, they must rely on interviews conducted by university officials. On the other hand, activists who work for the complainants say that too often the defense puts the victims on trial, forcing them to relive a traumatic experience. Law enforcement officials encourage victims to testify and bring a perpetrator to justice, but understand that a trial can be a challenging ordeal.

The federal Department of Justice defines sexual assault as any type of sexual contact or behavior that occurs without the explicit consent of the recipient. It includes such activities as forced

sexual intercourse, forcible sodomy, and attempted rape. To confront this violent crime on our college campuses, the New Jersey State Legislature and Governor Christie formed the Task Force on Campus Sexual Assault. During the past year, the Task Force interviewed dozens of experts, including defense attorneys and prosecutors, advocates for survivors' rights, community groups, college administrators, faculty, and most importantly, students.

A wide range of issues was discussed. The Task Force reviewed dozens of reports and studies, including two recent White House reports on campus sexual assault. A representative from Rutgers University, who partnered with the White House and the Office of Violence Against Women to develop information on best practices for campus climate surveys, also served as a member of New Jersey's Task Force.

Findings and Recommendations

After much discussion, debate and study, the Task Force on Campus Sexual Assault unanimously recommends the following:

- Every higher education institution in New Jersey should conduct a sexual violence campus climate survey, using a validated research tool and methods that can scientifically glean information from students, faculty members and staff. National surveys have shown that students are more than willing to discuss the issue confidentially. Free information about campus climate surveys can be found here: https://www.justice.gov/ovw/protecting-students-sexual-assault
- Campus climate surveys should be conducted every three to four years and should be specifically tailored to each campus. Results should be shared with the college or university community. Data from the climate surveys should be used to develop an action plan to collect missing information or provide necessary services.
- Sexual violence education needs to begin sooner than college. A Sexual Violence Primary Prevention Task Force for New Jersey should be created to research best practices in teaching curriculum content for the middle and high school years.
- Higher education institutions should ensure that students' rights are protected and that equal representation is provided to survivors and the accused.
- Each college and university should develop an investigation and adjudication model that honors the survivor, the respondent, and the particular needs, character and philosophy of the college or university.
- Investigations should be separate from adjudications in campus sexual assault cases. Investigators who are trained in collecting evidence should not also sit in judgment as adjudicators.
- Students should know where they can confidentially report an incident of sexual violence, and they should know that if they report an assault, they will be able to obtain counseling and services without being required to report the incident to authorities, except in cases where reporting is mandated by state or federal guidelines.

- Students should be accurately educated on the role of law enforcement so they can make informed decisions regarding reporting, including being apprised of the availability of county victim witness advocates who can assist the student in navigating the legal process.

- Based on the expertise and research reviewed by the Task Force, there is no evidence to support that banning alcohol on campus will end sexual assault. The Task Force believes that sexual assault is a result of ingrained behaviors and unacceptable cultural norms. Better education and awareness, sharing of information and the promotion of safe behavior are all more important than an ineffective prohibition that students will easily circumvent.

- Although not every campus has the capacity to provide appropriately in-depth prevention and intervention services outlined in federal guidelines, community partnerships can help increase the availability of services. A formal Memorandum of Understanding (MOU) should exist between campuses and county-based rape crisis centers so that help and expertise is available whenever necessary. A collaborative strategy for addressing funding for the MOU must be developed.

- Colleges and universities should be invited to attend meetings for the county Sexual Assault Response Teams (SART), which provide coordinated community responses to sexual violence.

- In addition to conducting campus climate surveys every three to four years, action plans should be developed. Those action plans should evaluate the implementation of any policies, programs, or procedures in an ongoing manner to ensure quality control and effectiveness. This particular Task Force should be reauthorized with its current membership to meet, at most, quarterly to continue to address emergent issues and responses to these recommendations and supplement our findings as needed.

It is the hope of the Task Force that, at long last, through the research, information and recommendations presented in this report, we can begin to address the prevalence of sexual assault, and through increased knowledge and awareness, students can better know their rights if such an incident occurs. The Task Force hopes that this report will help instituitons of higher education enhance the safety of students on campus, assist students affected by sexual violence, and create healthier campus communities built on respect.

June 22, 2017

Introduction

Since the release of the *Dear Colleague Letter* from the federal Office of Civil Rights in 2011, and the subsequent *Not Alone* reports in 2014 and 2017 issued by the White House Task Force, discussions relating to the prevalence and impact of sexual violence within campus communities have been elevated.

In response, state policy makers introduced legislation to help address the issue. In New Jersey, the Legislature and Governor Christie authorized the creation of the Task Force on Campus Sexual Assault on Dec. 2, 2015. A diverse selection of expert stakeholders was appointed to the Task Force with the charge of creating a comprehensive report to help guide the legislative process in New Jersey.

The 12-member Task Force consisted of the Secretary of Higher Education, the Attorney General, and the Director of the Division on Women in the Department of Children and Families. Five members appointed by the Governor included representatives of the State colleges and universities, the public research universities, the county colleges, the independent colleges and universities, and the New Jersey Coalition Against Sexual Assault. Four members of the public were appointed, including one person who is a campus sexual assault survivor. The President of the Senate, the Speaker of the General Assembly, the Minority Leader of the Senate, and the Minority Leader of the General Assembly each appointed one of the public members.

The Task Force first convened on June 22, 2016, and met at least once a month for its one year duration. The agenda for each meeting addressed at least one policy priority identified by the legislation which created the Task Force. Guest speakers, research articles, and interviews with experts and students informed the discussion.

This report is the result of the intentional and thorough process followed by the Task Force on Campus Sexual Assault. Following are a list of key recommendations developed by members of the Task Force spanning a number of critical areas for consideration, including early education, campus climate surveys, services for victims, services for the accused, investigation and adjudication, prevention, coordinating with community agencies, and education and training.

Recommendations: Early Education

The Task Force recommends the creation of a separate Task Force to research best practices in teaching and content against sexual violence in middle school, high school and the community. College is too late to begin such education. Sexual violence education, including what constitutes consent, needs to begin in the home and be reinforced throughout the middle and high school years.

According to RAINN (Rape, Abuse & Incest National Network), the nation's largest anti-sexual violence organization, the need for earlier intervention is illustrated by these statistics:

- One in nine girls and one in 53 boys under the age of 18 experience sexual abuse or assault at the hands of an adult.[6]
- 82% of all victims under 18 are female.
- Females ages 16 to 19 are four times more likely than the general population to be victims of rape, attempted rape, or sexual assault.

Nationally, there is increasing awareness that sexual violence is not just a problem for college campuses but also for younger children. In 2016, as a follow-up to their work on the issue of campus sexual assault, The White House released guidance for K-12 schools to address sexual trauma (https://www.justice.gov/ovw/file/900716/download). In addition, the Department of Education has recognized the importance of addressing sexual violence within K-12 schools and developed a resource package for educators: (https://safesupportivelearning.ed.gov/safe-place-to-learn-k12.)

This evidence shows that sexual assault is an issue in the K-12 school system. The Task Force's own independent research concurred with these findings. That is why the Task Force recommends the Legislature create a separate Task Force to address this issue; specifically a Sexual Violence Primary Prevention Task Force.

Recommendations: Campus Climate Surveys

The *White House Task Force to Protect Students from Sexual Violence* identifies the administration of campus climate surveys as "the first step" in working towards solutions to campus sexual violence. Campus climate surveys are typically used to assess prevalence of sexual assault on campus. They may also include measurement of sexual harassment, stalking and dating violence and student perceptions of the university response to sexual assault. Campus climate surveys should be used to help institutions identify their strengths and address areas in need of improvement.

Recommendation: Each campus should conduct a sexual violence campus climate survey using validated research tools and methods.[7]

- The survey should be conducted every three to four years to assess the college or university's climate related to campus sexual violence.[8]
- The survey should include but is not limited to the following: students' victimization experiences; perceptions of reporting an incident and accessing victim services; knowledge of campus and community resources; awareness of policies related to Title IX, reporting and adjudication; perceptions of an institution's response to sexual violence.[9]
- Validated tools are available to institutions such as the survey from the Bureau of Justice Statistics (https://www.bjs.gov/content/pub/pdf/ccsvsftr.pdf).
- Institutions are encouraged to add questions tailored to their own campus (such as assessing awareness of resources unique to the campus).[10]
- Surveys should result in a written action plan describing how the school will address gaps and build upon strengths.[11,12]
- The three- to four-year cycle should include obtaining support from campus administrators and leadership[13,14]; developing a survey administration plan to maximize the response rate[15]; administering the survey; analyzing results; sharing the results of the survey; developing and implementing an action plan based on the results; and reassessing to determine if the action was effective.[16]
- The results of the survey should be made available to the campus community in writing and/or online.[17]

Resources for conducting campus climate surveys:

Bureau of Justice Statistics Campus Climate Survey Validation Study:
https://www.bjs.gov/content/pub/pdf/ccsvsftr.pdf

Center for changing our campus culture:
http://changingourcampus.org/

Center on Violence Against Women and Children:
https://socialwork.rutgers.edu/centers/center-violence-against-women-and-children

Recommendations: Services for the Survivor

Higher education institutions must strive to create an atmosphere in which survivors feel safe to (1) seek services and resources available to him or her, both on and off campus, after an alleged assault and (2) to participate in the adjudication processes available to him or her, both on- and off-campus, if they choose to do so.

Several higher education experts appeared before the Task Force, sharing their opinions regarding necessary services and response that should be available to survivors, both on and off campuses in New Jersey. In addition to the mandates and guidelines already in place, the Task Force offers the following recommendations:

- Higher education institutions should ensure that there are adequate services available to assist students who are victims of alleged sexual assaults. These comprehensive services should include medical care, mental health support, and general counseling services, and can be provided directly from on-campus resources or off-campus services.[18]

- Campuses are encouraged to develop written policies and procedures that are easily accessible to students and widely publicized. In regard to the survivor, it is suggested that these written policies include:

    - A comprehensive list of both on-campus services and off-campus community resources available to students. This list should be inclusive of all student populations (i.e. international students, LGBTQ students, commuter students, etc.) and include medical services (including forensic exam locations), mental health services, counseling services, law enforcement contact information and advocacy support services information;

    - Information on how a survivor may be able to contact a Confidential Sexual Violence Advocate off-campus or an on-campus confidential advocate equivalent;

    - A list of reporting sites and/or college and university personnel that clearly defines who are the mandatory reporters and who are confidential resources, as defined by federal law;

    - Guidelines for reporting a sexual assault to the college or university, and the college's or university's adjudication process that follows;

    - Amnesty or "responsible action" policies for survivors who may fear being subjected to alcohol or drug violations under campus conduct codes.

- Substantive partnerships between higher education institutions and local community agencies is essential to insuring survivors receive informed services and responses. To achieve this goal, the Task Force would suggest both the higher education institutions and county-based Rape Crisis Centers consider taking the following steps:

    - Appropriate college and university representatives (ideally the Clery Act and Title IX coordinator(s)) should be invited to attend all county Sexual Assault Response Team (SART) meetings.

  - Campuses should be prepared to advise survivors of the availability of the county-based Sexual Assault Response Team, which can provide access to a Confidential Sexual Violence Advocate, a Forensic Nurse Examiner, and local law enforcement.

  - Funded memoranda of understanding should be negotiated between the county-based Rape Crisis Centers and higher education institutions to implement and expand the capacity of campuses to provide sexual assault prevention and intervention services, programs, and support, and cross-training of personnel.[19] The scope of the partnership will vary according to the needs and capacity of the higher education institutions and Rape Crisis centers, but such collaborations can include provision of training to students, faculty, and staff; creation and facilitation of campus-based prevention programs; and increasing access to external support services.

- The availability of county SART services be explained to the campus survivor. [20]

- Keeping in mind that no student should be forced to seek services (either within or external to the campus community) or take legal action in response to an alleged assault, higher education institutions should have a working understanding of, and partnership with, local and county law enforcement agencies to be able to offer the survivor all services available after an alleged sexual assault. In order to achieve such partnerships, memoranda of understanding between the colleges and universities and local and county law enforcement should be created. The specific role of law enforcement in responding to reports from campuses should be outlined in detail and so should the role of the Title IX Coordinator.[21] Moreover, the Title IX Coordinator should receive training on the details of the local and county law enforcement response services and law enforcement should be trained on the higher education institution's Title IX requirements, options, and procedures as well as Clery Act reporting requirements.[22]

- Recognizing that colleges and universities are limited by resources and personnel, efforts should be made to ensure that support services and resources are available to a survivor after reporting a sexual assault. It is recommended that a trained resource advisor, separate and apart from the higher education institution's Title IX Coordinator, investigator and adjudicator, should be identified to assist and support survivors once they have reported a sexual assault to a college or university. The resource advisor should be informed about the availability of all campus services and community resources available to the survivor.[23,24] The advisor should support survivors as they exercise their options. Following federal guidance, the survivor should be provided with interim measures such as academic and housing accommodations.

- In 1994, New Jersey passed the "Campus Sexual Assault Victim's Bill of Rights," which was revised in 2013. The Task Force recommends having this bill available in the student handbook and published on the institutions' web sites.

Recommendations: Services for the Accused

While higher education institutions must strive to create an atmosphere in which the individual making an accusation of sexual assault ("the complainant") feels safe to access services and resources and participate in adjudication processes if he or she chooses to do so, higher education institutions also have the challenge of attending to the person accused of perpetrating the assault ("the respondent") if that person is a member of the campus community.

The Task Force members recognize that this is a delicate and difficult balance for any institution to undertake, not just higher education institutions. Therefore the Task Force members dedicated an entire research session to hearing the perspective of respondents through attorneys who have represented such students in legal proceedings both on campus (Title IX investigations) and off campus (criminal justice system). Based upon this research, the Task Force makes the following recommendations:

- Campuses should develop written policies and procedures outlining the potential sanctions the institution may impose following a final determination. These policies and procedures should be available online and easily accessible to students and members of the campus community.[25] In regards to the respondent, it is suggested that these written policies include resources that are available to provide mental health support, general counseling services, and legal support services both on-campus and off-campus.

- Once a sexual assault complaint is filed, it is recommended that a resource advisor who serves the respondent be identified by the college or university as a point person for learning and accessing services available to him or her.

    - The purpose of this resource advisor is to provide a support person to the respondent with whom the respondent can speak face-to-face. This resource advisor should be (a) informed as to the campus and community services, and the legal resources available to the respondent, on and off-campus, (b) familiar with the Title IX investigation and adjudication process, and (c) aware of potential legal proceedings that may occur at the request of the complainant.

    - The resource advisor for the respondent must be separate and apart from the Title IX Coordinator, the investigator and/or adjudicator, and should be a different advisor from the advisor recommended to assist the complainant.

Recommendations: Investigation and Adjudication

Federal law dictates that all higher education institutions respond to allegations of sexual assault involving a college or university student with an on-campus investigation and adjudication process.[27] To date, there is no "model process" for New Jersey to look to as federal guidance on Title IX implementation continues to expand and develop.[28] Therefore, as part of its research, the Task Force invited several speakers from various areas of expertise to speak not only to their particular expertise but also to their experience with Title IX investigations and adjudications on New Jersey college and university campuses.

Such speakers included college and university administrators, currently enrolled college and university students, sworn law enforcement officers from campus departments and from municipality or county departments, assistant prosecutors, criminal and Title IX defense attorneys, and advocates from sexual assault community resource agencies. From this research, the Task Force recommends the following:

- Each college and university should develop an investigation and adjudication model that incorporates each of the following recommendations in a way that honors the survivor, the respondent and the particular needs, character and philosophy of the college or university.

Investigations

Investigations should be led by experienced, trained investigators.[29] It is encouraged that these investigators be trained in trauma-informed response and, particularly in how trauma can affect both the complainant and the respondent. Once the investigation is concluded, these investigators should memorialize their factual findings in a report that is given to the Title IX adjudicator.

Adjudication

- Adjudicators should receive appropriate and on-going training on Title IX requirements, developments in Title IX implementation nationwide, best practices of Title IX nationwide, and sexual assault prevention and intervention training that enrolled students are required to receive.[30]
- It is encouraged that students, faculty, staff and administrators collaborate on the development of the campus's adjudication model, processes and procedures.[31]
- Once the adjudication process has concluded with either a "Responsible" or "Not Responsible" adjudication, the findings should be released to the complainant and the respondent at the same time.[32]

- There are two parts to Title IX: (1) investigation and (2) adjudication. These two processes should be independent and conducted by two or more individuals with specific delineated roles – an investigator and an adjudicator. These roles should not be merged into one process or into one person serving as both investigator and adjudicator.[33]
- As mandated in the Violence Against Women Act of 2013, it is important for institutions to ensure that both the complainant and the respondent should have the option to have an advisor, or support person, of their choice present during both the investigation and the adjudication hearing.[34] While it is recommended that this advisor or support person be physically present during these times, he or she should also be without a voice in either proceeding.

Recommendations: Prevention

Sexual assault prevention programming is essential, both on campus and in our communities. In order, however, for that programming to be effective, it must saturate a community. One-shot-deals during first-year orientation, or spotlight sessions for specialty groups are ineffective and do not meet the Public Health definition of "prevention programming," but rather serve as awareness opportunities.[36]

Colleges and universities must think of the ways in which they promote multiple forms of prevention on different levels including primary, secondary or tertiary. [38] Examples of these different types of prevention efforts include promoting gender equity and respect (primary prevention), encouraging bystander intervention (primary or secondary prevention), and facilitating the campus adjudication process (tertiary prevention) as a way to deter perpetration.[39, 40] Best practices indicate that prevention should not only address individual attitudes and behaviors but also take into account the role of peers and the larger campus community.[41]

In addition, sexual violence prevention education is best facilitated by experts in the field. Many times, well-intentioned, and low-resourced institutions expand the roles of existing faculty members and/or staff to include this work. But that often means that messages are not expertly informed, or grounded in strong prevention principles.

- Appropriate resources must be dedicated to insure the hiring, or through funded Memoranda of Understanding (MOU), the contracting of qualified professionals to conduct sexual violence prevention programming on campus.

- Sexual violence prevention programming should be evidence-informed and participation should be available for all students – not just incoming students.[42,43]

- Sexual violence prevention programming should take into account the unique circumstances, cultural contexts, and experiences of each campus community.[44,45]

- Sexual violence prevention efforts should be ongoing, use different modalities, and address various subgroups – individuals, peers and campus communities.[46,47]

- Campuses should assess the ways in which their structure promotes gender equity and respect, and insures that leadership is as diverse as its student population.[48, 49]

- Sexual violence policies that promote equity and respect among diverse student populations should be created and upheld.

Recommendations: Coordinating with Community Agencies

Not all campuses have the professional or financial capacity to appropriately address the breadth of sexual violence prevention and intervention needs of their campus community. It is essential that campuses engage in substantive partnerships with the local community to expand their capacity.[50] At the same time, no student should be forced to seek services within or external to the campus.

County Sexual Assault Response Team (SART)

• Campus representation should be added to the state SART Coordinating Council.

• Colleges and universities should be invited to attend County Sexual Assault Response Team (SART) meetings.

County-based Rape Crisis Centers

• Funded MOUs between campuses and their county-based rape crisis center can ensure that sexual violence prevention and intervention programming is grounded in best practice.

• MOUs may include that the county-based agency:

- Provide sexual violence prevention training to students, faculty, administrators and staff;
- Provide information about off-campus resources including hotline, counseling, SART, etc.;
- Offer on-campus "office hours" to serve student survivors.

Confidential Sexual Violence Advocates (CSVA)

CSVAs training should include information about Clery Act and Title IX options and reporting requirements.

Law Enforcement

• MOUs between campuses and local law enforcement should clearly outline the role law enforcement plays in responding to reports from campus.

• Law enforcement training should include information about Clery Act and Title IX options and reporting requirements.

Recommendations: Education and Training

The Task Force recommends that education and training should be divided into a variety of sub areas. These areas are informed by the federal guidance and best practices learned from research both inside higher education and from professional organizations.

Education and training must be collaborative, working with those within the college or university and those agencies within the county and state. Education and training should be mutual between all parties and programs presented should be evidence-based.

The Task Force recommends that education be provided for:

- New, incoming students and university employees.[51]
- University officials responsible for responding to sexual violence.
- In addition, on-going educational opportunities should be offered to the college and university community.[52]

Currently, it is federally required all new, incoming students and employees should be educated on sexual assault.[53,54] This should include:

- On- and off-campus resources for preventing and responding to sexual assault, including the right to any aspect of the Sexual Assault Response Team, whether this is the Confidential Sexual Violence Advocate, Forensic Nurse Examiner or law enforcement.

- Information on whom to report incidents of sexual violence, including those who are able to receive a report confidentially, and those who are able to address their concerns through a form of investigation.

- Education should focus on the state and national trends and available, verified information, but should also include information from each campus's own climate assessment. It is imperative that students learn what is happening on their campus.

- Education and training should encompass all groups within the college community, yet programs should be offered appropriately to each audience. For example, international students, commuters and others may need to be educated in a different way than domestic or residential students.

- New and incoming students and employees should be provided with educational opportunities using a variety of learning modalities that should also be made available to all students.

University Officials Responsible for Responding to Sexual Violence

- Employees of colleges and universities must know their rights and their responsibilities under federal and state law and regulations. It is recommended that training be provided to all including their roles in preventing and responding to sexual violence.

- Training for those who will respond to sexual violence, from initial report through adjudication and appeal, should be annual and based upon current best practices.

Ongoing Education

- Education and training should be developed so that it is presented throughout the year and available for all students, faculty and staff to attend. A simple way in which this is accomplished is following national "of the month" schedules, including Sexual Assault Awareness Month in April.[55]

Recommendations: Relationship between Substance Abuse and Sexual Assault

How alcohol consumption and substance abuse relate to sexual assault was a consistent theme throughout the Task Force's research. Most invited experts commented on alcohol's relationship to sexual violence in one way or another. Because of this, the Task Force convened a separate research session to examine the issue.

While the Task Force believes that alcohol does not cause sexual assault or violence, research shows that alcohol is frequently a complicating factor and consumption of alcohol can be used to excuse violent or criminal behavior. The question remains: What to do about it?

Based on the expertise and research reviewed by the Task Force, there is no evidence to support that banning alcohol on campus will end sexual assault. The Task Force believes that sexual assault is a result of ingrained behaviors and unacceptable cultural norms. Better education and awareness, sharing of information and the promotion of safe behavior are all more important than an ineffective prohibition that students will easily circumvent.

Education should include information on stages of intoxication and incapacitation, including that incapacitated people are unable to give consent.[56,57]

The Task Force's finding is supported by its own members' extensive experience in adjudicating cases; by the experts who presented evidence to the Task Force and by research and national studies on this subject. In one research paper published by the National Institute on Alcohol Abuse and Alcoholism, renowned researcher Dr. Antonia Abbey, Ph.D. stated that "[a]lthough alcohol consumption and sexual assault frequently co-occur, this phenomenon does not prove that alcohol use causes sexual assault."[58] This is true whether the accused is intoxicated, the survivor is intoxicated, or both.

Statistics show that there is little to no difference in the frequency of sexual violence on college campuses whether such campuses are "dry" or "wet." The Task Force does not recommend that colleges and universities become "dry" as a prevention technique for sexual assault. We recognize that sexual assault takes place on all campuses within the state, whether they are "wet" or "dry."

Data on assault is collected under the "Clery Act," the consumer protection law requiring institutions of higher learning to record and disclose campus crime statistics and safety policies. In New Jersey, the Clery data from 2014 and 2015 shows an insignificant difference in the reported acts of sexual violence on campuses that are not exclusively dry. In 2014, .03 percent of students on a "dry" campus reported sexual violence, while .05 percent of students at "wet" campuses reported violence. In 2015, the rate was 0 percent for "dry" campuses and .07 percent for "wet" campuses.

Experts acknowledge that the Clery data shows the significant underreporting of acts of sexual violence on all campuses. Campus climate surveys, based on interviews with students, are a much more accurate way to gauge the extent of the problem.

The Office of Civil Rights states that colleges and universities should educate students on the role alcohol and drugs often play in sexual violence incidents, including the deliberate use of alcohol

and/or other drugs to perpetrate sexual violence.[59] Alcohol is often involved in sexual violence cases, but sexual violence is not caused by alcohol. Sexual violence is caused by learned behaviors and unacceptable societal attitudes toward violence.

The Task Force recommends that immunity for using alcohol and other drugs should be granted to the complainant and the respondent, unless the alcohol or other drug was used knowingly as a strategy to perpetrate the violence.[60] No one should be fearful of obtaining resources or remedies from a violent crime solely because they were intoxicated.

Other Considerations

The recommendations put forth in this report should be considered within a number of important contexts, outlined below.

Campus Culture and Norms

Institutions should be aware of shifting problematic norms on campus and build environments that foster healthy, respectful relationships. Shifting norms are challenging work, and will need to be collaborative and long-term. Programs such as bystander intervention and social norms marketing have demonstrated success in challenging social norms and should be considered as options for this type of work.[61]

Connecting Campus Sexual Assault with Other Issues

Since various forms of violence such as sexual violence, dating violence, and harassment often co-occur, as well as other pressing issues for college students such as mental health concerns, suicide and substance use, it may be useful to consider the impact of integrated approaches to prevention.[62,63] In addition, students may experience multiple forms of oppression such as harassment, homophobia, and racism. The Task Force encourages campuses to facilitate collaborative approaches among service providers to address these issues in an integrated manner.[64,65]

Diverse Student Backgrounds

Colleges and universities host students from diverse backgrounds including various racial/ethnic groups, sexual identities, ages, religions and more. In addition, students may be commuters, residential or online and may be attending classes full-time or part-time. Membership in various communities on campus such as athletics, Greek organizations, LGBTQ groups, military groups, student government, cultural groups and others may also impact an individual's experience with sexual violence, their access to resources, or norms related to sexual violence. The diversity of students should be considered when designing and implementing programs and policies to address campus sexual assault, and input from individuals from the various groups is encouraged.[65]

Varying Levels of Capacity and Resources

It is important to recognize that institutions of higher education across the state have various levels of capacity related to addressing the recommendations put forth in this report. Capacity refers to the ability to effectively develop, organize, and use resources to engage in the implementation of the recommendations (Chavis, 1995). Some institutions already have robust means for addressing campus sexual violence, while others may just be starting. Many of the recommendations in this report require not only financial resources, but also expertise in the area of campus sexual violence. The Task Force encourages institutions to allocate time to build capacity to implement the recommendations successfully, and to consider collaborating with other institutions and community partners to share resources.

Evaluation of Recommendations and Action Plans

In addition to conducting campus climate surveys every three to four years, action plans should be developed. Those action plans should evaluate the implementation of any policies, programs, or procedures in an ongoing manner to ensure quality control and effectiveness. This particular Task Force should be reauthorized with its current membership to meet, at most, quarterly to continue to address emergent issues and responses to these recommendations and supplement our findings as needed.

Involving Students in Drafting Legislation

As evidenced by the student voices in the addendum of this report, students have important contributions to make in understanding the sexual violence climate on campus. Students should be consulted when campus policies and legislation are drafted and invited to testify when legislation is debated.

Addendum

A: Citations

Executive Summary

[1] Krebs, C., Lindquist, C., Berzofsky, M., Shook-Sa, B.E., M.A.S., Peterson, K., RTI International, Planty, M.G., Langton, L., Stroop, J., Bureau of Justice Statistics. January 20, 2016: NCJ 249545.
[2] Krebs, C. P., Lindquist, C. H., Warner, T. D., Fisher, B. S., & Martin, S. L. (2007). The campus sexual assault (CSA) study (Document No. 221153). Retrieved from: https://www.ncjrs.gov/pdffiles1/nij/ grants/221153.pdf
[3] Krebs, C., Lindquist, C., Berzofsky, M., Shook-Sa, B., Peterson, K., Planty, M., & Stroop, J. (2016). Campus climate survey validation study final technical report. Retrieved from: http://www.bjs.gov/content/pub/pdf/ccsvsftr.pdf
[4] Rothman, E., Exner, D., & Baughman, A. (2011). The Prevalence of Sexual Assault Against People Who Identify as Gay, Lesbian, or Bisexual in the United States: A Systematic Review. Trauma Violence & Abuse, *12*(2), 55-66.
[5] The "Injustice at Every Turn: A Report of the National Transgender Discrimination Survey" report, conducted by the National Center for Transgender Equality and the National Gay and Lesbian Task Force. The full report, break-out population reports, and videos are available at http://endtransdiscrimination.org/

Recommendations: Early Education

[6] Frieden, T. R., Jaffe, H. W., Cono, J. Richards, C. L., & Iademacro, M. F. Youth Risk Behavior Surveillance. MMWR 2014; *63*(4):1-168.

Recommendations: Campus Climate Surveys

[7] White House Task Force to Protect Students from Sexual Assault. (2014a). Campus climate surveys: Useful tools to help colleges and universities in their efforts to reduce and prevent sexual assault. Retrieved from https://www.notalone.gov/assets/ovw-climate-survey.pdf
[8] White House Task Force to Protect Students from Sexual Assault, 2014a
[9] White House Task Force to Protect Students from Sexual Assault, 2014a; Krebs, Lindquist, Berzofsky, Shook-Sa, Peterson, Planty & Stroop, 2016
[10] McMahon, S., Stepleton, K., Cusano, J., O'Connor, J., Gandhi, K., & McGinty, F. (2017; accepted for publication). Beyond sexual assault surveys: A model for conducting a comprehensive campus climate assessment. Journal of Student Affairs Research and Practice.
[11] Ryder A.J. & Mitchell J.J. (2013). Measuring campus climate for personal and social responsibility. *New Directions for Higher Education*.164:31-48; McMahon, Stepleton, Cusano, O'Connor, Gandhi, & McGinty, 2017.
[12] Cantalupo, N. C. (2014). Institution-specific victimization surveys addressing legal and practical disincentives to gender-based violence reporting on college campuses. Trauma, Violence, & Abuse, *15*(3), 227–241. doi:10.1177/152483801452132
[13] Banyard, V. (2014). Improving college campus-based prevention of violence against women: A strategic plan for research built on multipronged practices and policies. Trauma Violence & Abuse, *15*(4), 339-351.
[14] Lichty, L. F., Campbell, R., Schuiteman, J. (2008). Developing a university-wide institutional response to sexual assault and relationship violence. Journal of Prevention & Intervention in the Community, 36, 5-22.
[15] McMahon, Stepleton, Cusano, O'Connor, Gandhi, & McGinty, 2017
[16] White House Task Force to Protect Students from Sexual Assault, 2014a
[17] Prevention Innovations Research Center. (2015). Communicating and Using Climate Survey Results. Retrieved from http://cola.unh.edu/sites/cola.unh.edu/files/departments/Prevention%20Innovations/Climate_Survey_Guideance_FINAL_10_24_14_.pdf Accessed June 3, 2015.

Recommendations: Services for the Survivor

[18] White House Task Force to Protect Students from Sexual Assault (2014b). Building Partnerships with Local Rape Crisis Centers: Developing a Memorandum of Understanding. Retrieved from: https://www.justice.gov/ovw/page/file/910381/download
[19] White House Task Force to Protect Students from Sexual Assault, 2014b
[20] White House Task Force to Protect Students from Sexual Assault, 2014b
[21] White House Task Force to Protect Students from Sexual Assault, 2014b
[22] White House Task Force to Protect Students from Sexual Assault, 2014b

[23] Section 304, Violence Against Women Reauthorization Act (VAWA) of 2013.
[24] White House Task Force to Protect Students from Sexual Assault (2014). Key components of sexual assault crisis intervention/victim service resources. Retrieved from: https://www.justice.gov/ovw/page/file/910266/download

Recommendations: Services for the Accused
[25] White House Task Force to Protect Students from Sexual Assault (WHTFPSSA) (2014). Checklist for Campus Sexual Misconduct Policies. Retrieved from: https://www.justice.gov/ovw/page/file/910271/download

Recommendations: Investigation and Adjudication
[27] The Dear Colleague letters of 2001 https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf and again in 2011 https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf are not the only regulations shared on the college's and university's responsibilities of responding to incidents of sexual and relationship violence, yet are often the most recognized.
[28] Questions and Answers on Title IX and Sexual Violence, pg 30, footnote 30: http://www.nccpsafety.org/assets/files/library/QA_On_Title_IX_and_Sexual_Violence.pdf
[29] The Task Force recognizes that there are a variety of ways to accomplish these types of investigations depending on the institutions resources (for example: hiring part-time retired law enforcement, using sworn or non-sworn public safety officers, retaining law firms or insurance investigators) but one avenue that is not recommended is requiring college/university staff or faculty to wear the hat of 'investigator' as an "add-on" to their full-time college/university role. This is not effective and it is not best practice.
[30] White House Task Force to Protect Students from Sexual Assault (WHTFPSSA) (2014). Checklist for Campus Sexual Misconduct Policies. Retrieved from: https://www.justice.gov/ovw/page/file/910271/download.
[31] White House Task Force to Protect Students from Sexual Assault (WHTFPSSA) (2014). Checklist for Campus Sexual Misconduct Policies. Retrieved from: https://www.justice.gov/ovw/page/file/910271/download.
[32] White House Task Force to Protect Students from Sexual Assault (WHTFPSSA) (2014). Checklist for Campus Sexual Misconduct Policies. Retrieved from: https://www.justice.gov/ovw/page/file/910271/download.
[34] Section 304, Violence Against Women Reauthorization Act (VAWA) of 2013.

Recommendations: Prevention
[38] Office on Violence Against Women, US Dept. of Justice, 2017
[39] Banyard & Potter, n.d.
[40] Dills, J., Fowler, D., Payne, G. (2016). *Sexual Violence on Campus: Strategies for Prevention.* Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention.
[41] Gidycz, C. A., Orchowski, L.M., & Berkowitz, A.D. (2011). Preventing sexual aggression among college men: An evaluation of a social norms and bystander intervention program. Violence against women, *17*(6), 720-742.
[42] Gidycz, Orchowski, & Berkowitz, 2011
[43] Office on Violence Against Women, US Dpt. of Justice, 2017
[44] Banyard & Potter, n.d
[45] Office on Violence Against Women, US Dpt. of Justice, 2017
[46] Perez, Z. J. and Hussey, H. (2014). A hidden crisis: Including the LGBT community when addressing sexual violence on college campuses. Issue brief: Center for American Progress. Retrieved from https://www.americanprogress.org/issues/lgbt/ report/2014/09/19/97504/a-hidden-crisis/
[47] Office on Violence Against Women, US Dpt. of Justice, 2017
[48] Banyard & Potter, n.d.
[49] Dills, Fowler, & Payne, 2016

Recommendations: Coordinating with Community Agencies
[50] White House Task Force to Protect Students from Sexual Assault (2014). Building Partnerships with Local Rape Crisis Centers: Developing a Memorandum of Understanding. Retrieved from: https://www.justice.gov/ovw/page/file/910381/download

Recommendations: Education and Training
[51] Section 304, Violence Against Women Reauthorization Act (VAWA) of 2013
[52] Section 304, Violence Against Women Reauthorization Act (VAWA) of 2013
[53] The education requirements of the Campus SaVE Act required that all Institutions of Higher Education must provide programs on prevention and awareness. A statement that the college or university prohibits sexual and relationship violence; Provide to all the college's or university's definition of domestic violence, dating violence, sexual assault and stalking. These definitions should be based on the definition within their state or jurisdiction, yet colleges and universities must collect and report statistics based upon the federal definitions; Colleges and Universities were instructed to provide the definition for consent within their jurisdiction, which in New Jersey is

a challenge as there is no state definition of consent; There should be education and teaching on how to be a bystander, whether through reporting what one sees occur, or by standing in to prevent or end a potential violent episode; Ways to prevent the risk of sexual or relationship violence to occur; Information on disciplinary proceedings on the individual campus and the victims' rights.

[54] The Clery handbook states that education should be comprehensive, intentional and integrated programming, initiatives, strategies and campaigns intended to end dating violence, domestic violence, sexual assault and stalking that are: culturally relevant; inclusive of diverse communities and identities; sustainable; responsive to community needs; informed by research or assessed for value, effectiveness or outcome; and consider environmental risk and protective factors as they occur on the individual, relationship, institutional, community, and societal levels.

[55] Other theme months and days are: January is National Stalking Awareness Month; February is National Teen Dating Violence & Awareness Month; March is National Women's Month; April is both Sexual Assault Awareness Month and Alcohol Awareness Month, as well as incorporating National Student Athlete day on April 6th; June is traditionally gay pride month; October is National Domestic Violence Awareness Month, as well as National Coming Out day on October 11th; and November brings International Student Education Week.

Recommendations: Relationship between Substance Abuse and Sexual Assault

[56] U.S. Department of Education, Office for Civil Rights. (2011, April 4). *Dear colleague letter*. Retrieved from: http://www2.ed.gov/about/offices/list/ocr/letters/ colleague-201104.pdf

[57] Banyard, V. L. (2013). Go big or go home: Reaching for a more integrated view of violence prevention. *Psychology of violence, 3*(2), 115.

[58] Antonia Abbey, Ph.D., Tina Zawacki, M.A., Philip O. Buck, M.A., A. Monique Clinton, M.A., and Pam McAuslan, Ph.D. (2001). Alcohol and Sexual Assault. Retrieved from https://pubs.niaaa.nih.gov/publications/arh25-1/43-51.pdf

[59] Hamby, S. & Grych, J. (2013). Evidence-based interventions need to be more systematic, not more disruptive. *American Psychologist, 68*(6), 476-477.

[60] White House Task Force to Protect Students from Sexual Assault (WHTFPSSA) (2014). Key components of sexual assault crisis intervention/victim service resources. Retrieved from: https://www.justice.gov/ovw/page/file/910266/download; U.S. Department of Education, Office for Civil Rights. (2011, April 4). *Dear colleague letter*. Retrieved from: http://www2.ed.gov/about/offices/list/ocr/letters/ colleague-201104.pdf

Other Considerations

[60] Banyard, V. L. (2014). Improving college campus–based prevention of violence against women: A strategic plan for research built on multipronged practices and policies. Trauma, Violence, & Abuse, *15*(4), 339-351.

[61] Banyard, 2014

[62] Hamby, S. & Grych, J. (2013). Evidence-based interventions need to be more systematic, not more disruptive. American Psychologist, 68(6), 476-477.

[63] Banyard, 2014

[64] Hamby & Grych, 2013

[65] Banyard, 2014

B: Student Voices

Students from various New Jersey higher education institutions met at Drew University in October 2016 and responded to questions prepared by the Task Force on Campus Sexual Assault. They were representatives of: Caldwell University, Centenary University, College of Saint Elizabeth, Drew University, Fairleigh Dickinson University, Georgian Court University, Kean University, Monmouth University, Princeton University, Ramapo College of NJ, Rider University, Rutgers University – Newark, Rutgers University - New Brunswick, Stevens Institute of Technology, William Paterson University. Note, in some cases the college/university name has been redacted.

The following are the student responses:

GROUP 1

- **What does your college or university do for education for sexual violence education for new and returning students?**
    - Orientation- briefly mentioned. So much information crammed in to one day. They try to make it informative and fun.
    - Hard to remember any information from that time because there is so much information.
    - Great model at NYU where there is an orientation and then it goes throughout the year through a one credit course.
    - Orientation is not enough- this is only one time and only for new students and then you never hear about it again.
    - Orientation can be a jumping off point but it needs to be continued.
    - Orientation at another school is a two-year experience. SCREAM is a powerful tool.
    - Georgian Court, Drew and Ramapo use SCREAM Theater as well
    - Rutgers Newark uses Unity Theater
    - Rutgers New Brunswick uses Not Anymore online training for all incoming students, fraternities and sororities, and athletes. It is well done but it is long.
    - Ramapo- uses alcohol.edu and Haven. Haven is comprehensive. They also have follow up meetings with community-based organizations in first year seminar classes.
    - One hour at orientation. Not taken seriously. More is needed
    - Sexual assault/dating violence focused on at orientation but outside of that, not really discussed. Issue of sexual assault may be over emphasized during orientation. Sometimes it is "overdone" and students are turned off and they end up mocking it. It is off putting.
    - Evaluation follow up done for these programs? Some yes, some no.
    - Important for college campuses to be transparent with surveys (e.g. campus climate) and to provide information back to students and the larger campus community
    - At Rutgers NB, students took the inforgraphic from the campus climate study and talked with other student groups about the findings

- Important to bring information to student groups- not only about campus climate studies, but also information about Title IX and how to report
- Important to engage "Public Opinion Leaders" on campus to help spread the message to help them change norms
- Students liked the idea of having some sort of training for student leaders on these issues- statistics, resources, etc. Also important to put a face on it by knowing that this can happen to people around you, and make safe spaces to share your story as a survivor
- There needs to be structure for places for survivors to share their stories- peer support groups, survivor support groups. It's a tough task to have survivors who are the "Face" of sexual assault survivors on campus
- Something that has been successful on the Drew campus is a series of student-led forums on different topics (religion, smoking, and other topics). Creates open and encompassing environment for open dialogue. Facilitates student-to-student interaction and helps promote an environment of understanding. This might be a good idea for continued education

- **What are ways that your college or university responds to reports of sexual assault? What can colleges and universities do better to support students involved? As students, what can you do better to support the students involved?**
  - Who is confidential reporters has changed. As residence life assistants, students now have to report.
  - Students do not like the mandated reporting process. If you don't know that someone like an RA has to report, it is really uncomfortable
  - One student RA explained situations where a student comes to disclose sexual assault and then he has to call the police. That is the policy.
  - Mandated reporting deters most if not all students from using resources- for sexual assault as well as other issues like mental health
  - There are some situations where students are reporting against their wishes
  - Problematic issue of alcohol and afraid of reporting
  - Strong feelings against mandated reporting
  - Most staff are instructed to pass the disclosure "up the ladder" of supervisors and that is problematic because the person reporting does not necessarily want it to be reported
  - What are best practices for immediate response to disclosures?
  - Instead of mandated reporting, we should make sure that faculty and staff have enough information to respond properly. Educating faculty and staff. Everyone should be made aware of the resources and how to best respond.
  - It's unclear to students who the confidential and mandated reporters are on campus.
  - Peer educators are not mandated reporters and can provide information
  - Guidebook/how-to brochure on how to report would be helpful
  - Shouldn't be mandatory for RAs to report to police; shouldn't be mandatory for RAs to report at all. They should be informed of resources.

- Not in favor of mandated reporters but would rather the faculty member directs student to title IX coordinator

- **Do you think that the students involved in incidents on your campus are aware of the resources available for them both on and off-campus**?
  - People are aware of different pieces of the process but not the whole thing. If you are not involved in a student organization, there is less awareness of information
  - How would you want to receive this information? Not through an email, not on our website. Links don't work, not consolidated.
  - The "circle of 6" app is interesting
  - School specific apps – in addition to transportation, dining services, etc.
  - Centralized website would be helpful

- **Other ideas**
  - Students want to be talking about this. Finding ways to facilitate conversation is important. At Rutgers, we consider ourselves "conversation catalysts" to try to get dialogue moving. Universities need to help students have these conversations. They need to plant these conversations among student groups and then encourage conversations.
  - Goal of these conversations are to encourage bystander intervention, as well as to share stories
  - Students have many solutions in their minds but need a place to discuss
  - Need for these to occur in safe spaces
  - Open forum, or student governments, or just informal conversations
  - Ramapo has an app for resources. Campus also has a 24hr service.
  - Ramapo- trying to reinstitute a pledge
  - While sexual assault has taken the stage- it's great that it's being well studied- but we also need to be careful about taking natural student movements and merging them into larger movements (like No More). Student-led movements are genuine
  - Information on consent is needed on college campuses/policies

- **How much information was given to you prior to campus?**
  - Only two students in the group had received information on SV prior to coming to campus
  - There are some good programs in middle school/high school that use peer educators/mentors
  - Doesn't make sense that people are learning about sexually transmitted diseases but have not learned about consent.

GROUP 2

- **What does your college or university do for education for sexual violence education for new and returning students?**
  - Not Anymore Program (RU)
  - Mandatory for all new students at RU-NB and Drew
    SCREAM Theatre at NSO - RU-NB and Drew
    SCREAM rant from CDC to research bystander education and impact on the community
    UNITY Theater at RU-Newark
    Not Anymore - students are not taking the program seriously, "Workplace" unsure of name
  - No consequence if you do not complete the program
  - First year and junior year administered program
    Drew University - Yellow Card program for athletes
    FDU Madison - Greek Life and Athletes receive programming
    Relatability is key for students to take this seriously
  - Student/peer
    No More @ RU - NB; STOP @ Centenary - peer education organizations
  - RUSA sexual assault prevention chair - RUSA committee on sexual assault receives title IX training from Title IX Coordinator
  - Host a town hall to ask students about Not Anymore; panel of Title IX Coord, director of VPVA
    Sexual assault education more about subconscious versus direct education about behavior
    Not Anymore forced one student to work through videos and modules and learn
- **Is the timing of the educational programs right? Should it be at the start of the spring semester?**
  - First six weeks = danger zone
    Colleges are failing our students because we are not continuously programming after the start of the fall semester
    Consider programming around the topic throughout the year
    Bystander Intervention Program - should continue after first dose (SCREAM theatre)
  - Brings student attention to the matter. SG Pres. - feels a bit uneducated on the topic
  - No additional programs throughout the year
  - Residential focused training and programming; commuters are not receiving the same training program - orientation program that was approaching the matter from a comedic perspective, not super effective, left student feeling disappointed
  - Education is based in niche communities: athletes, RAs, etc.
  - To keep the education going, there needs to be information and education on this topic worked into the curriculum - must be supported throughout the university; not just student organizations, not just Victim Advocate Office

- **Stevens - Orientation Program is full of information; how do other campuses highlight this issue as a priority?**
  - Set the stage - make people know and understand this is a priority
  - Strategetic plan essential
  - Initially a whole day focused on the topic seems like super heavy, but it demonstrates the importance.
  - FDU - first year seminar class highlights the topic over two class sessions
  - SG students know more than other students; feel like students try to cover up real information - creating a "nice" feel to the campus community. Don't think enough is shared with the community - not receiving timely notifications
  - Being a small campus, people know who is involved; see people transfer after incident
  - Another small campus - reports go to TIX Coord and handled, but not a lot of public information being shared on campus
  - Receive crime alerts, but not about alleged sexual assaults; unsure - but maybe RAs are informed of situation?
- **Are there barriers to reporting?**
  - If a student reports an alleged assault, the RA is mandated to call campus police. Once police arrive, RA is supposed to call Victims Advocacy Office - feels like a lot of miscommunication on campus.
  - This mandated call to campus police has resulted in a decrease in reporting
  - Feels like the response of calling campus police is to cover the university versus supporting the students.
  - Needs to be education on all levels from all students to administrators
  - Student experience - "record the interaction"
- **How would you like your university to respond to these issues?**
  - Giving a victim options, giving them time to let them take control; options presented by RA (student life/residence life)
  - We don't feel like our institutions are being completely honest with us (students)
  - Think univ administrators think they are protecting us, we are here to help you, but you need to have a voice and a say in this matter.
- **Can victims have completely control over the process? Request from student**
  - Responsibility to ensure the community is safe in addition to letting the victim drive the process
- **What can you tell us, what words can you give us to take back to the policy-makers that say that the swing in processes is not helpful?**
  - In situation, students may not want the situation to "blow up" and include everyone to report on the matter. Can we have a student victim advocate program report to the issue

- Awareness and preventative measures must be created. Sexual assault awareness month - to help students feel comfortable coming forward
- Institutional funding is essential - what works at RU may not work at Drew; broad policies and requirements is not the answers. More support for individual institutions would be most helpful. Continue student conversations to ensure we can come other to discuss and support one another.

- **How accessible are the county agencies or NP agencies to you? Would you like them to be more accessible?**
  - Keeping resources within campus works; like having students respond
  - More outside options for students to keep the situation confidential; depending on the severity of the issue
  - 75% commuter; unsure of who to go to; commuters unaware of the process
  - Unsure if general student population really understand what outside resources are available.
- **Additional Topics to Explore**
  - Stalking needs to be a part of the conversation
  - Ratios - fraternity/sorority parties and other locations
  - Task Force Members - students want to be talked with not talked to or at; allows for two-way conversations
  - Interpartner violence and intragender violence
  - Abusive friendships and abusive partnerships; expanding from sexual assault to sexual violence
  - Legal processes and policies: victim rights, various burdens of proof, etc.
  - The one-size fits all legislative solution does not work; passing one bill and going home does not work. We need to get out of that mindset
  - Continue this conversation every year or every other year; this will continue to impact students across our country. More forums like this are important.
  - Focus on education being more open in terms of our conversations that regardless of sexual orientation sexual assault is an issue.
  - Create more of a network among SG/SGA students - would be amazing to continue this network across topics.
  - Are policies in different languages or inclusive of all abilities? We need to be inclusive in our descriptions of policies and resources provided to our communities.
  - A lot of college party culture involves hook-ups and often, drunk hook-ups; that experience needs to be acknowledged and addressed that this is a serious matter.
  - Disclosing information to mandated reporters is a challenging situation. Include students as peer to peer advocates to help guide victims/survivors through the process.
  - Important to keep students at the center of this conversation; keeping students at the center is going to help this conversation.
  - Administration and faculty also must be educated on this process and resources as non-counseling staff must also be included and educated about how we can move forward.

GROUP 3

- **What does your college or university do for education for sexual violence education for new and returning students?**
  - Orientation is heavily focused on sexual assault, but we miss out on educating and training returning students
  - Scream Theater is effective, schools are training their own theater students to model Rutgers
  - Green Dot/Red Dot programs don't work – potentially encourage victim blaming
  - Participation in first year seminars is effective, but again there is a need to find avenues to reach returning students
  - Crisis intervention includes an advocate program that consists of students, faculty, and staff that are available to advocate for and support a victim with 24/7 on-all coverage
  - Idea shared to partner with clubs and organization to reach retuning students
  - Not Any More Module – some scenarios do not fit for certain colleges, what works for Rutgers may not work for Drew, personalization is important
  - Take Back the Night is effective
- **What are ways that your college or university responds to reports of sexual assault? What can colleges and universities do better to support students involved? As students, what can you do better to support the students involved?**
  - Investigation and handling of complaint needs to be private and confidential, but there needs to be a loud voice on campus from students and administration from the prevention/education standpoint when an assault occurs on campus
  - There was a perception at one school that allegations were being swept under the rug and that the university sought to quell and silence student protests about an assault that occurred because the university did not want any accountability
  - Students need several different reporting options and the survivor needs to have a voice and control regarding their options
  - Trial/Panel to resolve a case is too scary, not private enough, victims and accused should not have to be in the room together
  - It is seen as a negative to have RAs be mandatory reports, having confidential reporting options and confidential resources is so important and students need to know where they are on campus
  - When the police arrive to a scene there is a noticeable change in the demeanor of the reporter
  - Amnesty policies are seen as a positive to encourage reporting
  - An active student government can be helpful in supporting policy/procedure changes on campus

- **Do you think that the students involved in incidents on your campus are aware of the resources available for them both on and off-campus**?
    - One school could only identify the local police department as an off-campus resource, highlights the need to educate about off-campus resources like Healing Space, it was relayed that every county has a Healing Space
    - Important to train student leaders and club presidents about resources so they can appropriately refer other students
    - More training and information is needed about resources and what are the functions of those resources
    - Idea – faculty at one school are required to have information about sexual misconduct resources and counseling in their course syllabus
    - Campuses need to utilize resources like Healing Space more and build relationships with these community resources
    - Important that on-campus resource locations are discreet and private, but students still know where to go
- **What resources do you think are needed on your campus for better education, prevention efforts, response to incidents or other areas?**
    - Combination of multiple resources is most effective – student groups, different offices on campus, advocacy
    - It is important that we are connecting the dots between everything that is being done on campus from a prevention and education standpoint, not working in silos, should all efforts and initiatives funnel from one entity?
    - Some schools use one website to post all events
    - Student government is a go to place where students can voice concerns
    - Better education is needed on dating violence – it seems like it is the least talked about in all the training efforts but it is the most common form of violence on campus, it is also sometimes harder to decipher and more difficult to become aware of
    - Reiterated that more training was needed on available resources
    - Holding forums on these topics are seen as a positive to get campus feedback
- **There is a large focus on sexual assault on college campuses, yet the data shows that many students are coming to our campuses having already experience sexual violence. What do you think we should do to address this?**
    - Education needs to start way earlier, pressure needs to be put on the state to institute mandatory education in high school on Title IX, and perhaps even earlier than high school
    - One student shared that they didn't know anything about sexual assault or Title IX until they were sexually assaulted during the first semester of their freshman year at college
    - Colleges and universities need to understand that the education in K-12 is not occurring at all, therefore the information cannot be sugar coated or glossed over

Two students - Rahimah Faiq, Student Government President of Rutgers-Newark, and Jared Sutton, Student Government President of Drew University – testified at a Senate Hearing with the recommendations provided by the various students who addressed the Task Force on Campus Sexual Assault questions at Drew University.

The following are their recommendations:

- **One-size-fits-all won't work**
  - Size and culture difference between Drew University (1600 undergraduates) and Rutgers-New Brunswick (35000 undergraduates)
- **Building a relationship between schools and law enforcement. Immediate mandatory reporting to law enforcement discourages survivors to report and seek treatment**
  - Adversarial and violates resetting survivors claims on their own lives and decisions
  - Training needs to improve for both on and off campus responding agencies
  - Schools, law enforcement, prosecutors and advocates need to go beyond basic memorandums of understanding and build relationships of mutual respect
- **International Students/Students with other needs**
  - Drew→ international student population
  - Centenary→ commuter populations
  - Having materials in multiple languages
  - Education
- **Providing increased state funding for education programs→ do so much with so little**
  - Our county non-profit agencies are often on-campus performing education and other trainings or response, yet few have resources to keep this sustainable
- **Coming to college should not be the first time students discuss sexual/dating violence**
  - Many students reported at the forum that the first time they had discussions or education on sexual and dating violence was during college orientation
  - Data shows that women and men are victims of sexual assault in earlier grades with little support like that of a college community
  - Likewise, many are victimized who are not in a college or university setting
- **Dating violence is also an area where dangerous behavior can occur, which often goes unreported**

C: Legislation

AN ACT establishing a Task Force on Campus Sexual Assault.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. a. There is established a Task Force on Campus Sexual Assault. The purpose of the task force is to study and make recommendations concerning sexual assault occurring on the campuses of institutions of higher education in the State.

b. The task force shall consist of the following 12 members:

(1) the Secretary of Higher Education, the Attorney General, and the Director of the Division on Women in the Department of Children and Families, or their designees;

(2) five members appointed by the Governor, including a representative of the State colleges and universities established pursuant to chapter 64 of Title 18A of the New Jersey Statutes, a representative of the public research universities, a representative of the county colleges, a representative of the independent colleges and universities, and a representative of the New Jersey Coalition Against Sexual Assault; and

(3) four members of the public with demonstrated expertise or interest in issues related to the work of the task force, including at least one individual who is a campus sexual assault survivor. The President of the Senate, the Speaker of the General Assembly, the Minority Leader of the Senate, and the Minority Leader of the General Assembly shall each appoint one of the public members.

c. Appointments to the task force shall be made within 30 days of the effective date of this act. Vacancies in the membership of the task force shall be filled in the same manner as the original appointments were made. Members of the task force shall serve without compensation, but shall be reimbursed for necessary expenditures incurred in the performance of their duties as members of the task force within the limits of funds appropriated or otherwise made available to the task force for its purposes.

2. The task force shall organize as soon as practicable following the appointment of its members, but no later than 60 days after the effective date of this act. The task force shall choose a chairperson from among its members and shall appoint a secretary who need not be a member of the task force.

3. The Office of the Secretary of Higher Education shall provide such stenographic, clerical, and other administrative assistants, and such professional staff as the task force requires to carry out its work. The task force also shall be entitled to call to its assistance and avail itself of the services of the employees of any State, county, or municipal department, board, bureau, commission, or agency as it may require and as may be available for its purposes.

4. It shall be the duty of the task force to study and evaluate current policies and practices concerning campus sexual assault, to identify problems and areas for improvement, and to make recommendations concerning campus sexual assault prevention, response, and awareness. The task force shall:

a. gather information from the public institutions of higher education and from a sample of independent institutions of higher education in the State regarding their policies and procedures for addressing campus sexual assault, and review and evaluate those policies and procedures;

b. review current New Jersey and federal laws regarding campus sexual assault;

c. review and evaluate existing research and literature, including any national best practices, professional standards, or guidelines, regarding the prevention of, and response to, incidents of campus sexual assault;

d. consult with, and evaluate testimony from, campus sexual assault survivors and advocates who provide support services to campus sexual assault survivors; and

e. develop and issue recommendations and guidelines concerning campus sexual assault in New Jersey, including recommendations regarding sexual assault prevention and awareness, and recommendations regarding protocols for responding to reports of campus sexual assault and providing victim support services.

5. The task force shall issue a final report to the Governor, and to the Legislature pursuant to section 2 of P.L.1991, c.164 (C.52:14-19.1), no later than one year after the task force organizes. The report shall contain the task force's findings and recommendations concerning campus sexual assault.

6. This act shall take effect immediately, and the task force shall expire 30 days after the issuance of its final report.

Approved December 2, 2015.

John DOE, Plaintiff-Appellant-Cross-Appellee,

v.

COLUMBIA UNIVERSITY, The Trustees of Columbia University, Defendants-Appellees-Cross-Appellants.

Docket Nos. 15-1536 (Lead), 15-1661 (XAP)
August Term, 2015

United States Court of Appeals, Second Circuit.

Argued: April 12, 2016

Decided: July 29, 2016

Background: Male student brought action against university, alleging that university acted with sex bias in violation of Title IX in investigating him and suspending him for alleged sexual assault. The United States District Court for the Southern District of New York, Furman, J., 101 F.Supp.3d 356, granted university's motion to dismiss for failure to state claim. Student appealed.

Holding: The Court of Appeals, Leval, Circuit Judge, held that student adequately pleaded facts that plausibly supported at least minimal inference of sex bias on part of university.

Vacated and remanded.

1. Federal Civil Procedure ⚿1829, 1832

On a motion to dismiss a complaint for failure to state a claim, the only facts to be considered are those alleged in the complaint, and the court must accept them, drawing all reasonable inferences in the plaintiff's favor, in deciding whether the complaint alleges sufficient facts to survive. Fed. R. Civ. P. 12(b)(6).

2. Federal Civil Procedure ⚿1829

The court, in judging the sufficiency of the complaint on a motion to dismiss for failure to state a claim, must accept the facts alleged and construe ambiguities in the light most favorable to upholding the plaintiff's claim; if the complaint is found to be sufficient to state a legal claim, the opposing party will then have ample opportunity to contest the truth of the plaintiff's allegations and to offer its own version. Fed. R. Civ. P. 12(b)(6).

3. Civil Rights ⚿1067(1)

Because Title IX prohibits, under covered circumstances, subjecting a person to discrimination on account of sex, it is understood to bar the imposition of university discipline where gender is a motivating factor in the decision to discipline. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a).

4. Federal Courts ⚿3587(1)

A court of appeals reviews de novo a district court's grant of a motion to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

5. Civil Rights ⚿1535

The minimal evidence suggesting an inference that the employer acted with discriminatory motivation, as required for a Title VII discrimination claim to survive a motion to dismiss, can be satisfied by as little as a showing that the position sought by the plaintiff remained open after plaintiff's rejection and that the employer continued to seek applicants from persons of plaintiff's qualifications. Civil Rights Act of 1964 § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6. Federal Civil Procedure ⚿1772

While the plausibility standard for the sufficiency of federal complaints is not akin to a probability requirement, it asks for

more than a sheer possibility that a defendant has acted unlawfully.

7. Civil Rights ⚿1532

To the same extent that the *McDonnell Douglas* temporary presumption reduces the facts a plaintiff would need to show to defeat a motion for summary judgment on a Title VII discrimination claim prior to the defendant's furnishing of a non-discriminatory motivation, that presumption also reduces the facts needed to be pleaded; because the discrimination complaint, by definition, occurs in the first stage of the litigation, the complaint also benefits from the temporary presumption and must be viewed in light of the plaintiff's minimal burden to show discriminatory intent. Civil Rights Act of 1964 § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. Civil Rights ⚿1532

At the motion to dismiss stage of a Title VII suit, allegation of facts supporting a minimal plausible inference of discriminatory intent suffices as to this element of the claim because this entitles the plaintiff to the temporary presumption of discrimination under *McDonnell Douglas* until the defendant furnishes its asserted reasons for its action against the plaintiff. Civil Rights Act of 1964 § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fed. R. Civ. P. 12(b)(6).

9. Civil Rights ⚿1395(2)

The temporary presumption of discrimination afforded to plaintiffs at the pleadings stage in employment discrimination cases under Title VII applies to sex discrimination plaintiffs under Title IX as well. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a); Civil Rights Act of 1964 § 701 et seq., 42 U.S.C.A. § 2000e et seq.

10. Civil Rights ⚿1395(2)

A complaint under Title IX, alleging that the plaintiff was subjected to discrimination on account of sex in the imposition of university discipline, is sufficient with respect to the element of discriminatory intent, like a complaint under Title VII, if it pleads specific facts that support a minimal plausible inference of such discrimination. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a); Civil Rights Act of 1964 § 701 et seq., 42 U.S.C.A. § 2000e et seq.

11. Civil Rights ⚿1067(4)

Male student, who was suspended from university following investigation into sexual assault allegations, adequately pleaded facts that plausibly supported at least minimal inference of sex bias on part of university, as required for his Title IX discrimination claim to survive university's motion to dismiss; university's investigator and disciplinary panel allegedly declined to seek out potential witnesses that student had identified as source of information favorable to him, panel allegedly reached incorrect conclusion that student committed sexual misconduct, and university was allegedly motivated to favor accusing female student over accused male student due to criticism from student body and public media that university, and investigator personally, did not take complaints of sexual assault seriously. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a).

12. Civil Rights ⚿1137

Under Title VII, a defendant institution is not shielded from liability for discrimination practiced by an employee endowed by the institution with supervisory authority or institutional influence in recommending and thus influencing the adverse action by a non-biased decision-mak-

er. Civil Rights Act of 1964 § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Philip A. Byler, Nesenoff & Miltenberg, LLP, New York, NY, (Andrew T. Miltenberg, on the brief), for Plaintiff-Appellant-Cross-Appellee.

Paul R.Q. Wolfson, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC, (Bruce M. Berman, Saurabh Sanghvi, Alan E. Schoenfeld, on the brief), for Defendants-Appellees-Cross-Appellants.

Before: LEVAL, DRONEY, Circuit Judges; KOELTL, District Judge.[1]

LEVAL, Circuit Judge:

Plaintiff, a Columbia University student who is identified by the pseudonym John Doe, appeals from the judgment of the United States District Court for the Southern District of New York (Furman, *J.*), dismissing his amended complaint ("the Complaint") under Fed. R. Civ. P. 12(b)(6) "for failure to state a claim on which relief can be granted." The Complaint alleges that Defendant Columbia University[2] violated Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"), and state law, by acting with sex bias in investigating him and suspending him for an alleged sexual assault. We conclude that the Complaint meets the low standard described in *Littlejohn v. City of New York*, 795 F.3d 297 (2d Cir. 2015), of alleging facts giving rise to a plausible minimal inference of bias sufficient to survive a motion to dismiss, which we hold applies in Title IX cases. We therefore VACATE the judgment and REMAND.

1. The Honorable John G. Koeltl of the United States District Court for the Southern District of New York, sitting by designation.

I. Factual Background

[1, 2] On a motion under Rule 12(b)(6) to dismiss a complaint for failure to state a claim, the only facts to be considered are those alleged in the complaint, and the court must accept them, drawing all reasonable inferences in the plaintiff's favor, in deciding whether the complaint alleges sufficient facts to survive. *See DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 110–11 (2d Cir. 2010). Furthermore, the plaintiff is at liberty to plead different theories, even if they are inconsistent with one another, and the court must accept each sufficiently pleaded theory at face value, without regard to its inconsistency with other parts of the complaint. *See* Fed. R. Civ. P. 8(d)(3) ("A party may state as many separate claims ... as it has, regardless of consistency."); *Gregory v. Daly*, 243 F.3d 687, 701 n. 12 (2d Cir. 2001). Needless to say, the facts a plaintiff alleges in the complaint may turn out to be self-serving and untrue. But a court at this stage of our proceeding is not engaged in an effort to determine the true facts. The issue is simply whether the facts the plaintiff alleges, if true, are plausibly sufficient to state a legal claim. For that reason, the court, in judging the sufficiency of the complaint, must accept the facts alleged and construe ambiguities in the light most favorable to upholding the plaintiff's claim. If the complaint is found to be sufficient to state a legal claim, the opposing party will then have ample opportunity to contest the truth of the plaintiff's allegations and to offer its own version. In light of those rules, we set forth below facts alleged in Plaintiff's Complaint in the light most fa-

2. Although the Trustees of Columbia University are also Defendants in this action, we generally use "Defendant" hereinafter to refer to Columbia University.

vorable to him, drawing reasonable inferences in his favor.

a. The Sexual Encounter between Plaintiff and Jane Doe

On the night of May 12, 2013, Plaintiff, a male Columbia freshman who upon completing his freshman year became a varsity athlete, was studying for a final exam in his residence hall. At approximately 1:00 a.m. a female classmate and member of the same circle of friends, identified in this litigation by the pseudonym Jane Doe, approached him and initiated a conversation. They took an hour-long walk together, and eventually began discussing the topic of "hooking up." The Complaint alleges that, in the interest of privacy for a sexual encounter, Jane suggested using the bathroom of her dormitory's suite. She insisted on using her suite rather than his because her ex-boyfriend was Plaintiff's roommate. She told Plaintiff to wait in the bathroom while she went to her bedroom to retrieve a condom. She then undressed herself in the bathroom, and they proceeded to have sex. Over the next two weeks, Jane contacted Plaintiff twice to express doubts about how their friends would react.

b. Jane Doe's Complaint and Defendant's Investigation

After the start of the next school year, on September 24, 2013, Rosalie Siler, Defendant's Assistant Director for Gender-Based and Sexual Misconduct, contacted Plaintiff to inform him that a fellow student had made allegations of sexual assault against him, and advised him to come in for a meeting. The next day, Plaintiff met with Siler, who gave him a formal written notice that he was charged with "Non-Consensual Sexual Intercourse" in violation of the school's Gender-Based Misconduct Policies for Students ("GBMPS"), which established procedures for responding to allegations of sexual assault on campus. He was told that, as a consequence of Jane Doe's accusation, the University had issued an order barring him from contact with her and restricting his access to residence halls on campus. Although Plaintiff was advised that he was entitled to access the on-campus Counseling & Psychological Services, he was not advised of other sources of support during the disciplinary process.

Plaintiff was summoned to meet on September 25, 2013, with the Columbia Title IX investigator, Jilleian Sessions-Stackhouse, who Plaintiff alleges, referring to her prior experience, was not gender neutral. In her role as Title IX investigator, Sessions-Stackhouse was "charged with creating the narrative account that is eventually adopted by the [disciplinary] panel." A 90. Plaintiff told Sessions-Stackhouse that the encounter had been consensual and that there had been witnesses at the residence hall lounge that night who could be helpful. The Complaint alleges that Sessions-Stackhouse's response was hostile. She did not ask him about the witnesses, interview them, or follow up with them in any way.[3] According to Plaintiff, "[a]t all times, [he] was under the impression that Ms. Sessions-Stackhouse would investigate and follow up on [his] account of the evening once he conveyed his side of the story; [but] as it turns out, that never happened." A 89.

According to the Complaint, Sessions-Stackhouse's questioning of Plaintiff was akin to cross-examination calculated to elicit a confession. She failed to tell him he could submit his own written statement to

3. The Complaint later acknowledged that Sessions-Stackhouse interviewed at least one witness identified by Doe.

her or to the disciplinary panel, and failed also to advise him that he was entitled to seek the support of a student advocate. Nor did she advise him of resources available to him to aid him in the process.

Plaintiff alleges in contrast, upon information and belief, that, in meeting with Jane Doe, Sessions-Stackhouse took a narrative account without leading questions and without hostility, giving Jane thorough advice as to the resources available to her. The interviews conducted by Sessions-Stackhouse were not recorded. She took handwritten notes.

On October 21, 2013, Plaintiff reported to Siler that Jane Doe's friends had harassed and assaulted him on campus. Siler "did not take [his] complaint . . . seriously." A 91-92.

On October 22, 2013, Plaintiff met with Sessions-Stackhouse to review her notes from their previous meeting. He "observed that [her] notes inaccurately and inadequately paraphrased [Plaintiff's] verbal account of the events." A 92. On January 25, 2014, Plaintiff met with Interim Assistant Director, Deputy Title IX Coordinator Virginia Ryan (Siler's replacement) to review Sessions-Stackhouse's report.

According to the Complaint, the report falsely depicted Plaintiff as having inflicted nonconsensual sex on Jane Doe, by virtue of having coercively pressured her over a period of weeks to have sex with him.[4] The report showed that Sessions-Stackhouse had disregarded Plaintiff's account of Jane Doe's clearly expressed consent, and failed to reconcile Jane's account with conflicting information provided to Sessions-Stackhouse by India Knight, who was a friend of Jane's, about Jane's motivation on May 12. The report also allegedly failed to include statements of persons, including Jane's roommate, "who had occasion to witness Jane Doe in the weeks before" the encounter as well as on that night. A 104-05, 95. Plaintiff attempted to correct Sessions-Stackhouse's mistakes. Ryan gave Plaintiff a form to state his response, which he completed and returned on January 29, 2014.

Soon thereafter, Ryan provided Plaintiff with a hearing date of February 12 and gave him a list of the panelists. According to Plaintiff, at no point during the investigative process did Sessions-Stackhouse, or any administrator, advise him that he was entitled to seek advice and counsel from his Dean of Students.

c. Criticisms of Columbia Among Students and in the Press for its Previous Lenient Handling of Sexual Assault Complaints

In the period preceding Plaintiff's disciplinary hearing, Columbia students had expressed concern that the University did not take seriously the complaints of female students about sexual assaults by male students. Various student organizations had "alleged that the school [was] not being firm enough in the disciplinary process" in cases involving accusations by female students of sexual misconduct by male students. A 97. This controversy reached the press. On December 11, 2013, a New York Post article declared, "Columbia drops ball on jock 'rapist' probe: students." *Id.* The article quoted several female students asserting that Columbia had mishandled their sexual assault complaints, failing to act with expediency in investigating, giving lenient sanctions, and

4. While the Complaint does not explicitly allege what Sessions-Stackhouse wrote in her report, it can be fairly inferred that the report took the position that Plaintiff coerced Jane into sex by weeks of pressure, and that her participation was deemed to be without consent by reason of the prior pressure.

conveying an overall tenor of "dismissal" with regard to the serious nature of the complaints. The article stated that the University's Presidential Advisory Committee on Sexual Assault intended to schedule a meeting with the Columbia University Student Democrats to learn more directly about student concerns and explore possible next steps.

On campus, the Columbia University Democrats had criticized the University's handling of sexual assault complaints and called for reforms. Sarah Weinstein, the Membership Director of that student organization, had written opinion articles calling for increased transparency at the school, and had spearheaded a petition to request statistics on sanctions issued by Defendant in sexual assault cases. Referring to reports that Yale University had given light punishments to male students found to have raped or assaulted female students, Weinstein was quoted in articles as saying, "[W]e want to make sure that what's happening at Yale isn't happening here at Columbia." A 98.

On January 23, 2014, an independent, student-run newspaper criticized Columbia's handling of sexual assault complaints, discussing the experiences of three alleged sexual assault victims "in an effort to highlight how the university's internal investigation allowed [an] accused student athlete to escape punishment." The articles particularly criticized Sessions-Stackhouse for "inadequate investigation[s]." A 99. In February 2014 (close to the time of Plaintiff's hearing) Columbia University President Lee Bollinger promised to hold a Town Hall meeting on the school's handling of sexual misconduct. Columbia Dean James Valentini was scheduled to attend the meeting.

On April 24, 2014, twenty-three students filed complaints with the United States Department of Education for violations of Title IX and other laws, alleging that Defendant mishandled incidents of sexual assault and misconduct on campus.

d. Columbia's Policies for Addressing Sexual Assault

Columbia's policy on gender-based misconduct (the GBMPS) provided that a student accused of sexual assault would be given notice of the complaint and written notice of the allegations, as well as an opportunity to meet with the Assistant Director for Student Services for Gender-Based and Sexual Misconduct to review the GBMPS policy and procedures. A specially trained Title IX investigator (Sessions-Stackhouse) would then interview "the complainant, respondent, and any witnesses," "gather any pertinent documentation," and "prepare a report detailing the relevant [findings]." A 178. If the investigator found "reasonable suspicion," then the respondent and complainant would "each have the opportunity to review the investigative report and . . . documentation." A 179. If the respondent denied responsibility or did not respond, a hearing panel would be convened.

Hearings were to be closed proceedings. The hearing panels, when practicable, would consist of two deans and/or senior-level administrators and one student drawn from a specially trained pool. A party could challenge a panelist's participation in writing. During the hearing, only the panel would call and question parties and witnesses, but parties could submit questions, which the panel would have discretion to decline to ask if it found them irrelevant or duplicative. Panels were to base their decisions on a "preponderance of [the] evidence" standard of proof. A 181. Decisions were to be made within five business days, and the Dean of Students would render a decision five business days later. Sanctions could range from a warn-

ing to suspension to full dismissal. Respondents had the right to an appeal.

e. The Disciplinary Hearing and Plaintiff's Suspension

Plaintiff's disciplinary hearing took place on February 12, 2014, before three panelists—the Director of the Office of Disability Services at Barnard College, the Associate Director for Residential Life and Housing at Barnard College, and a graduate student at the Columbia School of Public Health. Ryan and her assistant were also present. Plaintiff brought his roommate. Jane Doe was accompanied by Weinstein, who had been among the most vocal critics of the University's prior handling of rape complaints. Weinstein was not Jane's friend, and had no prior relationship with her. Columbia's rules did not allow the accused student legal representation.

There were three rooms set up for the hearing—one for the panelists, one for Plaintiff, and one for Jane Doe. In each room, a television was set up with a live video feed of the hearing so that each participant had the opportunity to watch at all times.

At the start of the hearing, the panelists asked Plaintiff to make a statement. Because Sessions-Stackhouse allegedly had not told Plaintiff he would be called on to make a statement, he had nothing prepared and merely stated that he "did nothing wrong." A 101-02.

At the hearing, the panel considered Sessions-Stackhouse's report, which did not include reference to witnesses who could have supported Plaintiff's defense, allegedly because Sessions-Stackhouse had declined to follow the leads Plaintiff had given her. The panel did not call witnesses who could have supported Plaintiff's defense. Plaintiff submitted questions to the panelists to be put to Jane Doe, but they did not allow him to exhaust his list, asserting that the questions were "irrelevant." A 103.

The hearing lasted less than two hours. The panelists found Plaintiff "Responsible" for the charge of "sexual assault: nonconsensual sexual intercourse." A 104. Although Plaintiff denied having coerced Jane Doe and alleged that no evidence was presented in support of such coercion, the panel found that Plaintiff had "directed unreasonable pressure for sexual activity toward the Complainant over a period of weeks" and that "this pressure constituted coercion [so that] the sexual intercourse was without consent." A 104.

On February 26, 2014, Plaintiff was informed that Columbia was issuing an order of suspension until Fall 2015. Because the University refused to give Plaintiff credit for his Spring 2014 classes, the suspension was functionally equivalent to one and one half years. Plaintiff stated that on the same day, he saw Jane Doe, who called out to him that she was "sorry" and that she was going to get his punishment lessened. A 105.

Plaintiff was advised of his right to appeal within five business days. On March 3, 2014, Plaintiff appealed, citing, among other things, Sessions-Stackhouse's failure to interview key student witnesses. Jane Doe also submitted an appeal to reduce the severity of Plaintiff's punishment.

On March 10, 2014, Dean Valentini denied Plaintiff's appeal, explaining in part that Sessions-Stackhouse's failure to interview "key witnesses" identified by Plaintiff was within her discretion, that such witnesses were "not raised with Ms. Sessions-Stackhouse and were 'raised for the first time on appeal,' " and that Plaintiff's coercive behavior "was committed outside the purview of other witnesses, and, thus, such witnesses' testimonies were insufficient." A 107. The Dean concluded that the sanction

was appropriate because sexual assault is an egregious offense. Dean Valentini's denial of Plaintiff's appeal occurred four days prior to the University-wide meeting for discussion of the school's handling of such complaints, which the Dean was scheduled to attend.

f. Proceedings Below

Plaintiff filed his suit on June 9, 2014, alleging that Columbia subjected him to sex discrimination in violation of Title IX and state law. The Complaint seeks both damages and expungement of his disciplinary record. It alleges that Sessions-Stackhouse, in the role of the University's supposedly neutral Title IX investigator, was motivated by pro-female sex bias, attributable in part to a desire to refute criticisms of herself and of the University for their past handling of similar complaints, to perform her duties in a manner that discriminated against the accused male. The Complaint alleges that she conducted a sex-biased and deficient investigation that was hostile to his claim, failed to carry out her duty to interview his witnesses and explore channels that could be helpful to him, failed to advise him of his rights, and drew unfair and incorrect conclusions against him in her report to the adjudicatory panel. The Complaint alleges also that the University's decision-makers (the panel and the Dean), seeking to protect the University from criticism both among students and the public to the effect that it was not taking women's sexual assault complaints seriously, took a pro-female, sex-biased stance on Jane Doe's allegations, leading them to decide against him, incorrectly and contrary to the weight of the evidence.

The district court granted Columbia's motion to dismiss the federal law claims. The court also "declin[ed] to exercise supplemental jurisdiction" over Plaintiff's state-law claims. A 223. Plaintiff then brought this appeal.

DISCUSSION

I. Title IX

[3] Title IX's relevant portion provides, "No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or *be subjected to discrimination* under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphases added). This provision, which is enforceable through an implied private right of action, was enacted to supplement the Civil Rights Act of 1964's bans on racial discrimination in the workplace and in universities. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714 (2d Cir. 1994). Because Title IX prohibits (under covered circumstances) subjecting a person to discrimination on account of sex, it is understood to "bar[ ] the imposition of university discipline where gender is a motivating factor in the decision to discipline." *Id.* at 715.

II. Standard of Review

[4] A court of appeals reviews *de novo* a district court's grant of a motion under Rule 12(b)(6) to dismiss a complaint for "failure to state a claim upon which relief can be granted." *Littlejohn*, 795 F.3d at 306.

a. Standard for Judging the Sufficiency of a Complaint Alleging Discrimination under Title IX

In a series of cases beginning with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973),[5] the Supreme Court ruled that, in

5. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147

suits alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e *et seq.*, and related statutes, until the defendant furnishes a nondiscriminatory reason for the adverse action it took against the plaintiff, the plaintiff needs to present only minimal evidence supporting an inference of discrimination in order to prevail. *See McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817.

[5] As set forth in our recent explanation of *McDonnell Douglas*'s standard,

> [I]n the initial phase of the case, the plaintiff can establish a prima facie case without evidence sufficient to show discriminatory motivation.... If the plaintiff can show (1) that she is a member of a protected class; (2) that she was qualified for employment in the position; (3) that she suffered an adverse employment action; and, in addition, has (4) some minimal evidence suggesting an inference that the employer acted with discriminatory motivation,[6] such a showing will raise a temporary "presumption" of discriminatory motivation, shifting the burden of production to the employer and requiring the employer to come forward with its justification for the adverse employment action against the plaintiff. However, once the employer presents evidence of its justification for the adverse action, joining issue on plaintiff's claim of discriminatory motivation, the presumption "drops out of the picture" and the *McDonnell Douglas* framework "is no longer relevant." At this point, in the second phase of the case, the plaintiff must demonstrate that the proffered reason was not the true reason (or in any event not the sole reason) for the employment decision, which merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against her.

Littlejohn, 795 F.3d at 307-08 (internal citations omitted).

[6] With respect to the sufficiency of federal complaints generally, the Supreme Court ruled in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868,(2009),[7] that a complaint must plead specific facts sufficient to support a plausible inference that the defendant is liable for the misconduct alleged. *Id.* at 678, 129 S.Ct. 1937. While "[t]he plausibility standard is not akin to a 'probability requirement,' ... it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

[7] In *Littlejohn*, we clarified that *Iqbal* applies to employment-discrimination complaints brought under Title VII. "To the same extent that the *McDonnell Douglas* temporary presumption reduces the facts a plaintiff would need to *show* to defeat a motion for summary judgment prior to the defendant's furnishing of a non-discriminatory motivation, that presumption also reduces the facts needed to be *pleaded* under *Iqbal*." *Littlejohn*, 795

L.Ed.2d 105 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

6. The "minimal evidence suggesting an inference that the employer acted with discriminatory motivation" can be satisfied by as little as a showing that the position sought by the plaintiff remained open after plaintiff's rejection and that the employer continued to seek applicants from persons of plaintiff's qualifications. *See McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817.

7. *See also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

F.3d at 310. Because "[t]he discrimination complaint, by definition, occurs in the first stage of the litigation ... the complaint also benefits from the temporary presumption and must be viewed in light of the plaintiff's minimal burden to show discriminatory intent." *Id.* at 311.

[8] In other words, at the 12(b)(6) stage of a Title VII suit, allegation of facts supporting a minimal plausible inference of discriminatory intent suffices as to this element of the claim because this entitles the plaintiff to the temporary presumption of *McDonnell Douglas* until the defendant furnishes its asserted reasons for its action against the plaintiff.[8]

A further question we now face is whether the burden-shifting framework established by the *McDonnell Douglas* line of cases for claims of discrimination on account of race, religion, or national origin under Title VII, and the associated pleading burden we articulated in *Littlejohn*, apply also to Title IX claims alleging discrimination on account of sex in education programs or activities that receive federal support. These claims have so much in common that, at least on certain sorts of facts, rules the Supreme Court established for Title VII litigation appear to apply also to such similar claims of sex discrimination under Title IX. *See Yusuf*, 35 F.3d at 714 ("[C]ourts have interpreted Title IX by looking to ... the caselaw interpreting Title VII."). In several prior cases, we have applied Title VII's framework and principles to Title IX claims. *See Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 n. 1 (2d Cir. 2000) (explaining that the Title VII framework applies to employment discrimination claims brought under Title IX); *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 248–49 (2d Cir. 1995) (stating that Title VII standards should be applied in determining a university's liability for a student's claim of sexual harassment under Title IX); *see also Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 89 (2d Cir. 2011) (stating that "[i]n [certain] respects, a Title IX sex discrimination claim requires the same kind of proof required in a Title VII sex discrimination claim," and applying Title VII standards to two sexual harassment claims).

[9] While we did not explicitly state in *Yusuf* that we were incorporating *McDonnell Douglas*'s burden-shifting framework into Title IX jurisprudence, we did state, after discussing the plaintiff's allegations, that "[s]imilar allegations, if based on race in employment decisions, would more than suffice in a Title VII case, and we believe they easily meet the requirements of Title IX." *Yusuf*, 35 F.3d at 716. We also adopted Title VII's requirement of proof of discriminatory intent, and stated that "[a]llegations of a causal connection in the case of university disciplinary cases can be of the kind that are found in the familiar setting of Title VII cases." *Id.* at 714–15. *Yusuf* made clear that Title VII cases pro-

8. For this reason, we have often vacated 12(b)(6) and 12(c) dismissals of complaints alleging discrimination. *See Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 84 (2d Cir. 2015) (vacating 12(c) dismissal of Title VII claim because the district court held Plaintiff to overly stringent pleading standards); *Dawson v. N.Y.C. Transit Auth.*, 624 Fed.Appx. 763, 770 (2d Cir. 2015) (summary order) (vacating 12(b)(6) dismissal of Plaintiff's complaint); *Azkour v. Bowery Residents' Comm., Inc.*, 646 Fed.Appx. 40, 41–42, 2016 WL 1552367, *2 (2d Cir. 2016) (summary order); *Osby v. City of New York*, 633 Fed. Appx. 12, 13 (2d Cir. 2016) (summary order). We have also cautioned district courts against imposing too high a burden on plaintiffs alleging discrimination at the 12(b)(6) stage. *See Dawson*, 624 Fed.Appx. at 770 ("At the pleading stage, district courts would do well to remember this exceedingly low burden that discrimination plaintiffs face....").

vide the proper framework for analyzing Title IX discrimination claims.[9] We therefore hold that the temporary presumption afforded to plaintiffs in employment discrimination cases under Title VII applies to sex discrimination plaintiffs under Title IX as well.

[10] Thus, a complaint under Title IX, alleging that the plaintiff was subjected to discrimination on account of sex in the imposition of university discipline, is sufficient with respect to the element of discriminatory intent, like a complaint under Title VII, if it pleads specific facts that support a minimal plausible inference of such discrimination. Because *Littlejohn* was not decided until after the district court made its decision in this case, and it had not yet been decided that the Title VII *McDonnell–Douglas* framework applies to Title IX complaints, the district court might not have anticipated that *McDonnell–Douglas*'s temporary presumption in a plaintiff's favor reduces the plaintiff's pleading burden, so that the alleged facts need support only a minimal inference of bias.

b. Plaintiff's Title IX Claims

[11] Plaintiff's Complaint pleads sufficient specific facts giving at least the necessary minimal support to a plausible inference of sex discrimination to survive a Rule 12(b)(6) motion to dismiss, if Title IX's other requirements are met. It alleges that Columbia's hearing panel (which erroneously imposed discipline on the Plaintiff), its Dean (who rejected his appeal), and its Title IX investigator (who influenced the panel and the Dean by her report and recommendation), were all motivated in those actions by pro-female, anti-male bias. Those alleged biased attitudes were, at least in part, adopted to refute criticisms circulating in the student body and in the public press that Columbia was turning a blind eye to female students' charges of sexual assaults by male students.

Among the Complaint's allegations that support the inference of sex discrimination are the following. Both the investigator and the panel declined to seek out potential witnesses Plaintiff had identified as sources of information favorable to him.[10] The investigator and the panel failed to act

9. Our court has extended the *McDonnell Douglas* burden-shifting framework to several other statutory schemes. *See, e.g., Gant ex rel. Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 146 (2d Cir. 1999) (applying the framework to racial discrimination claims brought under 42 U.S.C. §§ 1981 and 1983); *Leibowitz v. Cornell Univ.*, 584 F.3d 487, 498 & n. 2 (2d Cir. 2009) (applying the framework to the Age Discrimination in Employment Act of 1967 (ADEA), with the distinction that an ADEA plaintiff must demonstrate that age was a but-for, and not merely a motivating, factor), *superseded by statute on other grounds*; *Boykin v. KeyCorp*, 521 F.3d 202, 213 (2d Cir. 2008) (applying the framework to Fair Housing Act disparate treatment claims).

10. Columbia's proffered explanation that those witnesses were not sought out because they had no relevance to whether Plaintiff had coerced Jane Doe by unreasonable pressure during the preceding weeks does not justify the dismissal of the Complaint. This is so for two reasons. First, while a factfinder might ultimately determine that this was the true reason for not seeking out and interviewing these witnesses, it is also plausible that the failure to seek them out was attributable to discrimination, as the Complaint alleges. It is not the court's function in ruling on a motion to dismiss for insufficiency of the complaint to decide which was the defendant's true motivation. Second, it is not correct that the potential witnesses suggested by Plaintiff related exclusively to the events of the night of the sexual encounter and not to the preceding weeks. At least one was allegedly identified as a friend and potential confidante of Jane Doe's and not as a person who observed the interaction between John and Jane on the night of the encounter.

in accordance with University procedures designed to protect accused students. The investigator, the panel, and the reviewing Dean, furthermore, reached conclusions that were incorrect and contrary to the weight of the evidence.

When the evidence substantially favors one party's version of a disputed matter, but an evaluator forms a conclusion in favor of the other side (without an apparent reason based in the evidence), it is plausible to infer (although by no means necessarily correct) that the evaluator has been influenced by bias. Here, the facts pleaded in the Complaint (which we must accept in the light most favorable to Plaintiff) support John Doe's version (not surprisingly as they represent his contentions). The Complaint's narrative depicts Jane Doe as an altogether willing participant. It denies that Plaintiff coerced Jane and asserts that "no evidence was presented" in support of the claim of coercion. A 114. The alleged fact that Sessions-Stackhouse, and the panel and the Dean, chose to accept an unsupported accusatory version over Plaintiff's, and declined even to explore the testimony of Plaintiff's witnesses, if true, gives plausible support to the proposition that they were motivated by bias in discharging their responsibilities to fairly investigate and adjudicate the dispute.

While those allegations support the inference of bias, they do not necessarily relate to bias on account of sex. Additional allegations of the Complaint, however, give ample plausible support to a bias with respect to sex. As outlined above, the Complaint alleges that during the period preceding the disciplinary hearing, there was substantial criticism of the University, both in the student body and in the public media, accusing the University of not taking seriously complaints of female students alleging sexual assault by male students. It alleges further that the University's administration was cognizant of, and sensitive to, these criticisms, to the point that the President called a University-wide open meeting with the Dean to discuss the issue. Against this factual background, it is entirely plausible that the University's decision-makers and its investigator were motivated to favor the accusing female over the accused male, so as to protect themselves and the University from accusations that they had failed to protect female students from sexual assault.

Columbia argues that the pleaded facts do not support an inference of intentional sex discrimination. It argues that the criticism of the University was for not taking student complaints of sexual assault seriously, and that any motivation on the part of the panel to demonstrate that it takes such complaints seriously is not the same thing as a motivation to discriminate against an accused male student. The district court stated that any bias in favor of Jane Doe "could equally have been—*and more plausibly was*—prompted by lawful, independent goals, such as a desire (enhanced, perhaps, by the fear of negative publicity or Title IX liability to the victims of sexual assault) to take allegations of rape on campus seriously and to treat complainants with a high degree of sensitivity." *Doe v. Columbia Univ.*, 101 F.Supp.3d 356, 371 (S.D.N.Y. 2015). This reasoning fails to recognize the court's obligation to draw reasonable inferences *in favor of* the sufficiency of the complaint. *Iqbal* does not require that the inference of discriminatory intent supported by the pleaded facts be *the most plausible* explanation of the defendant's conduct. It is sufficient if the inference of discriminatory intent is plausible.

The Complaint alleges that, having been severely criticized in the student body and in the public press for toleration of sexual

assault of female students, Columbia was motivated in this instance to accept the female's accusation of sexual assault and reject the male's claim of consent, so as to show the student body and the public that the University is serious about protecting female students from sexual assault by male students—especially varsity athletes. There is nothing implausible or unreasonable about the Complaint's suggested inference that the panel adopted a biased stance in favor of the accusing female and against the defending male varsity athlete in order to avoid further fanning the criticisms that Columbia turned a blind eye to such assaults.[11]

The Complaint sufficiently alleges circumstances plausibly supporting a similar motivation on the part of Sessions-Stackhouse. It alleges that she had suffered personal criticism in the student body for her role in prior cases in which the University was seen as not taking seriously the complaints of female students. At the time Sessions-Stackhouse investigated Jane Doe's accusation of Plaintiff, she knew that the University had been criticized for its conduct of investigations of sexual abuse, and specifically accused of conducting the investigations in a manner that favored male athletes and that was insufficiently protective of sexually assaulted females. It is plausible that she was motivated to refute those criticisms by siding with the accusing female and against the accused male.

Columbia further contends that bias on the part of Sessions-Stackhouse cannot be actionable because she "was merely the investigator [and] did not sit on the panel that found [Plaintiff] responsible for sexual misconduct." Defendant's Br. at 33. It argues, "Because the purported procedural errors were made by someone who did not participate in determining [Plaintiff's] responsibility, those errors are insufficient to state [a claim]." *Id.*

The argument is not persuasive. Although Sessions-Stackhouse was not the decision-maker, she allegedly had significant influence, perhaps even determinative influence, over the University's decision. According to Plaintiff's allegations, Sessions-Stackhouse was appointed by Columbia to the role of Title IX investigator with the expectation that her investigations and reports would inform the University's decisions. The Complaint plausibly alleges that her report advocating discipline influenced the University's decision to sanction John Doe. The fact that Sessions-Stackhouse was not the decision-maker does not render sex bias in her performance of her duties irrelevant to liability of the University.[12]

[12] According to precedent under Title VII, a defendant institution is not

11. It is worth noting furthermore that the possible motivations mentioned by the district court as more plausible than sex discrimination, including a fear of negative publicity or of Title IX liability, are not necessarily, as the district court characterized them, lawful motivations distinct from sex bias. A defendant is not excused from liability for discrimination because the discriminatory motivation does not result from a discriminatory heart, but rather from a desire to avoid practical disadvantages that might result from unbiased action. A covered university that adopts, even temporarily, a policy of bias favoring one sex over the other in a disciplinary dispute, doing so in order to avoid liability or bad publicity, has practiced sex discrimination, notwithstanding that the motive for the discrimination did not come from ingrained or permanent bias against that particular sex.

12. We recognize that depending on the answers to questions regarding the status of the Title IX investigator in the Columbia hierarchy, the theory of bias on the part of Sessions-Stackhouse may be precluded by the standards enunciated in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-91, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998).

shielded from liability for discrimination practiced by an employee endowed by the institution with supervisory authority or institutional influence in recommending and thus influencing the adverse action by a non-biased decision-maker. *See Holcomb v. Iona Coll.*, 521 F.3d 130, 143 (2d Cir. 2008) (holding that a plaintiff is "entitled to succeed, even absent evidence of illegitimate bias on the part of the ultimate decision maker," so long as a biased person endowed with institutional influence "played a meaningful role in the process" (internal quotations and alteration removed)); *see also Staub v. Proctor Hosp.*, 562 U.S. 411, 422, 131 S.Ct. 1186, 179 L.Ed.2d 144 (2011) (holding, in the context of the Uniformed Services Employment and Reemployment Rights Act, that when a supervisor performs an act motivated by antimilitary animus intended to cause an adverse employment action, and the act proximately causes that adverse action, the employer is liable notwithstanding that the biased supervisor did not make the ultimate employment decision).

We conclude that the Complaint adequately pleads facts that plausibly support at least the needed minimal inference of sex bias. *See Littlejohn*, 795 F.3d at 311. Accordingly, we vacate the district court's dismissal of the Title IX claim, and remand for further consideration. Our decision to reinstate the Complaint in no way suggests that our court has any view, one way or the other, on the likely accuracy of what Plaintiff has alleged. We recognize that the facts may appear in a very different light once Defendant Columbia has had the opportunity to contest the Plaintiff's allegations and present its own version. The role of the court at this stage of the proceedings is not in any way to evaluate the truth as to what really happened, but merely to determine whether the plaintiff's factual allegations are sufficient to allow the case to proceed. At this stage, the court is compelled to assume the truth of the plaintiff's factual allegations and draw all reasonable inferences in his favor. Following those rules, we conclude that the Complaint sufficiently alleges that Columbia was motivated by sex bias.[13]

CONCLUSION

For the foregoing reasons, we **VACATE** the district court's judgment dismissing the Complaint and **REMAND** for further proceedings.

Deyli Noe GUERRA, AKA Deyli Noe Guerra Cantorial, Petitioner-Appellee,

v.

Christopher SHANAHAN, Field Office Director, New York Office, U.S. Immigrations and Customs Enforcement, DHS, Jeh Johnson, Secretary of Department of Homeland Security, Kenneth Decker, Orange County Correctional Facility, United States Department of Homeland Security, Respondents-Appellants.

13. We also vacate the dismissal of the state-law claims asserted in the Complaint. The district court dismissed these claims without prejudice to their renewal in state court, on the theory that these claims were supplemental to the federal-law claims from which the court's jurisdiction derived. The Complaint, however, asserted diversity jurisdiction as well as federal question jurisdiction. The court will need to address the state-law claims on remand.

Secretary DeVos Prepared Remarks on Title IX Enforcement

September 7, 2017
Contact: Press Office, (202) 401-1576, press@ed.gov

Thank you Dean Henry Butler for the kind introduction and for the opportunity to be here. Thank you President Angel Cabrera for your leadership of George Mason University.

And to the students and faculty with us today, thank you for making time to be here during this busy day of classes.

It is a great honor for me to be here today to address a very important topic.

Earlier this year marked the 45th anniversary of Title IX, the landmark legislation passed by Congress that seeks to ensure: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

The amendment to the Higher Education Act was initially proposed by Democrat Senator Birch Bayh, signed into law by Republican President Richard Nixon, and was later renamed for Congresswoman Patsy Mink, herself a victim of both sex-based and race-based discrimination as a third-generation Japanese-American.

Mink's law has served an important role in shaping our Nation's educational environment.

Title IX has helped to make clear that educational institutions have a responsibility to protect every student's right to learn in a safe environment and to prevent unjust deprivations of that right.

It is a responsibility I take seriously, and it is a responsibility that the Department of Education's Office for Civil Rights takes seriously.

We will continue to enforce it and vigorously address all instances where people fall short.

Sadly, too many fall short when it comes to their responsibility under Title IX to protect students from sexual misconduct, acts of which are perpetrated on campuses across our nation.

The individual impacts of sexual misconduct are lasting, profound, and lamentable. And the emotions around this topic run high for good reason.

We need look no further than just outside these walls to see evidence of this. Yet I hope every person—even those who feel they disagree—will lend an ear to what I outline today.

I'm glad we live in a country where an open debate of ideas is welcomed and encouraged. Debate, of course, comes with responsibilities. Violence is never the answer when viewpoints diverge.

I appreciate that you have the opportunity to attend a university that promotes a higher level of discourse.

So let me be clear at the outset: acts of sexual misconduct are reprehensible, disgusting, and unacceptable. They are acts of cowardice and personal weakness, often thinly disguised as strength and power.

Such acts are atrocious, and I wish this subject didn't need to be discussed at all.

Every person on every campus across our nation should conduct themselves with self-respect and respect for others.

But the current reality is a different story.

Since becoming Secretary, I've heard from many students whose lives were impacted by sexual misconduct: students who came to campus to gain knowledge, and who instead lost something sacred.

We know this much to be true: one rape is one too many.

One assault is one too many.

One aggressive act of harassment is one too many.

One person denied due process is one too many.

This conversation may be uncomfortable, but we must have it. It is our moral obligation to get this right.

Campus sexual misconduct must continue to be confronted head-on. Never again will these acts only be whispered about in closed-off counseling rooms or swept under the rug.

Not one more survivor will be silenced.

We will not abandon anyone. We will amplify the voices of survivors who too often feel voiceless.

While I listened to the stories of many survivors and their families over these past several months, I couldn't help but think of my own family.

I thought about my two daughters.

And I thought about my two sons.

Every mother dreads getting that phone call: a despondent child calling with unthinkable news.

I cannot imagine receiving that call.

Too many mothers and fathers are left on the other end of the line completely helpless. I have looked parents in their tear-filled eyes as they recounted their own stories, and each time their pain was palpable.

I'm haunted by the story one brave young woman told me. She was targeted and victimized by her college boyfriend—someone she thought cared about her.

He looked on as his roommate attempted to rape her. She escaped her harrowing encounter, but too many do not.

For too many, an incident like this means something even worse.

There is no way to avoid the devastating reality of campus sexual misconduct: lives have been lost. Lives of victims. And lives of the accused.

Some of you hearing my voice know someone who took his or her own life because they thought their future was lost; because they saw no way out; because they lost hope.

One mother told me her son has attempted to take his life multiple times. Each time she opens the door to his bedroom, she doesn't know whether she will find him alive or dead.

No mother, no parent, no student should be living that reality.

We are here today for those families. We need to remember that we're not just talking about faceless "cases."

We are talking about people's lives. Everything we do must recognize this before anything else.

And we're here today because the previous administration helped elevate this issue in American public life. They listened to survivors, who have brought this issue out from the backrooms of student life offices and into the light of day.

I am grateful to those who endeavored to end sexual misconduct on campuses.

But good intentions alone are not enough. Justice demands humility, wisdom and prudence.

It requires a serious pursuit of truth. And so, this is why I recently hosted a summit to better understand all perspectives: survivors, falsely accused students and educational institutions, both K-12 and higher ed. I wanted to learn from as many as I could because a conversation that excludes some becomes a conversation for none. We are having this conversation with and for all students.

Here is what I've learned: the truth is that the system established by the prior administration has failed too many students.

Survivors, victims of a lack of due process, and campus administrators have all told me that the current approach does a disservice to everyone involved.

That's why we must do better, because the current approach isn't working.

Washington has burdened schools with increasingly elaborate and confusing guidelines that even lawyers find difficult to understand and navigate.

Where does that leave institutions, which are forced to be judge and jury?

Where does that leave parents?

Where does that leave students?

This failed system has generated hundreds upon hundreds of cases in the Department's Office for Civil Rights, mostly filed by students who reported sexual misconduct and believe their schools let them down.

It has also generated dozens upon dozens of lawsuits filed in courts across the land by students punished for sexual misconduct who also believe their schools let them down.

The current failed system left one student to fend for herself at a university disciplinary hearing.

She told her university that another student sexually assaulted her in her dorm room. In turn, her university told her she would have to prosecute the case herself.

Without any legal training whatsoever, she had to prepare an opening statement, fix exhibits and find witnesses.

"I don't think it's the rape that makes the person a victim," the student told a reporter. She said it is the failure of the system that turns a survivor into a victim.

This is the current reality.

You may have recently read about a disturbing case in California. It's the story of an athlete, his girlfriend and the failed system.

The couple was described as "playfully roughhousing," but a witness thought otherwise and the incident was reported to the university's Title IX coordinator.

The young woman repeatedly assured campus officials she had not been abused nor had any misconduct occurred. But because of the failed system, university administrators told her they knew better.

They dismissed the young man, her boyfriend, from the football team and expelled him from school.

"When I told the truth," the young woman said, "I was stereotyped and was told I must be a 'battered' woman, and that made me feel demeaned and absurdly profiled."

This is the current reality.

Another student at a different school saw her rapist go free. He was found responsible by the school, but in doing so, the failed system denied him due process. He sued the school, and after several appeals in civil court, he walked free.

This is the current reality.

A student on another campus is under a Title IX investigation for a wrong answer on a quiz.

The question asked the name of the class Lab instructor. The student didn't know the instructor's name, so he made one up—Sarah Jackson—which unbeknownst to him turned out to be the name of a model.

He was given a zero and told that his answer was "inappropriate" because it allegedly objectified the female instructor.

He was informed that his answer "meets the Title IX definition of sexual harassment." His university opened an investigation without any complainants.

This is the current reality.

I also think of a student I met who honorably served our country in the Navy and wanted to continue his education after his service. But he didn't know the first thing about higher education.

He Googled "how to apply to college" and applied to one nearby, an HBCU. He was accepted and became the first in his family to attend college.

The student told me that as graduation approached, his grandmother beamed with pride. She had already purchased a flight and picked out her Sunday best for the occasion.

But three weeks before graduation, he saw his future dashed.

This young man was suspended via a campus-wide email which declared him a "threat to the campus community." When he tried to learn the reason for his suspension, he was barred from campus.

He was not afforded counsel by the college and couldn't afford counsel himself. Eventually, he found a lawyer who submitted a Freedom of Information Act request pro bono—but would do no more.

Only through the FOIA was he able to discover he had been accused of sexual harassment, but he was still denied notice of the specific allegations, and he remained suspended.

This young man was denied due process. Despondent and without options or hope, after five years of sobriety, he relapsed and attempted to take his own life.

He felt he had let down everyone who mattered to him—including, most of all, his grandmother who was so much looking forward to seeing the first member of her family don a cap and gown.

"Whatever your accusers say you are," he told me, "is what people believe you are."

That is the current reality.

Here is what it looks like: a student says he or she was sexually assaulted by another student on campus. If he or she isn't urged to keep quiet or discouraged from reporting it to local law enforcement, the case goes to a school administrator who will act as the judge and jury.

The accused may or may not be told of the allegations before a decision is rendered. If there is a hearing, both the survivor and the accused may or may not be allowed legal representation.

Whatever evidence is presented may or may not be shown to all parties. Whatever witnesses—if allowed to be called—may or may not be cross-examined. And Washington dictated that schools must use the lowest standard of proof.

And now this campus official—who may or may not have any legal training in adjudicating sexual misconduct—is expected to render a judgement. A judgement that changes the direction of both students' lives.

The right to appeal may or may not be available to either party. And no one is permitted to talk about what went on behind closed doors.

It's no wonder so many call these proceedings "kangaroo courts."

Washington's push to require schools to establish these quasi-legal structures to address sexual misconduct comes up short for far too many students.

The current system hasn't won widespread support, nor has it inspired confidence in its so-called judgments.

The results of the current approach? Everyone loses.

Some suggest that this current system, while imperfect, at least protects survivors and thus must remain untouched. But the reality is it doesn't even do that.

Survivors aren't well-served when they are re-traumatized with appeal after appeal because the failed system failed the accused. And no student should be forced to sue their way to due process.

A system is not fair when the only students who can navigate it are those whose families can afford to buy good lawyers—or any lawyer at all.

No school or university should deprive any student of his or her ability to pursue their education because the school fears shaming by—or loss of funding from—Washington.

For too long, rather than engage the public on controversial issues, the Department's Office for Civil Rights has issued letters from the desks of un-elected and un-accountable political appointees.

In doing so, these appointees failed to comply with basic legal requirements that ensure our so-called "fourth branch of government" does not run amok.

Unfortunately, school administrators tell me it has run amok. The Office for Civil Rights has "terrified" schools, one said.

Another said that no school feels comfortable calling the Department for simple advice, for fear of putting themselves on the radar and inviting an investigation.

One university leader was rightly appalled when he was asked by an Office for Civil Rights official: "Why do you care about the rights of the accused?"

Instead of working with schools on behalf of students, the prior administration weaponized the Office for Civil Rights to work against schools and against students.

One administrator summed this up clearly when he told me his staff should be "forward looking advocates for how to stop sexual misconduct."

Instead, he said, "they've been forced to be backward looking data collectors" to meet the Department's demands.

Faculty from the University of Pennsylvania's law school also voiced grave concerns about the current approach. They wrote, and I quote, "it exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness."

Too often, they wrote, "outrage at heinous crimes becomes a justification for shortcuts" in processes.

Ultimately, they concluded, "there is nothing inconsistent with a policy that both strongly condemns and punishes sexual misconduct and ensures a fair adjudicatory process."

These professors are right. The failed system imposed policy by political letter, without even the most basic safeguards to test new ideas with those who know this issue all too well.

Rather than inviting everyone to the table, the Department insisted it knew better than those who walk side-by-side with students every day. That will no longer be the case.

The era of "rule by letter" is over.

Through intimidation and coercion, the failed system has clearly pushed schools to overreach. With the heavy hand of Washington tipping the balance of her scale, the sad reality is that Lady Justice is not blind on campuses today.

This unraveling of justice is shameful, it is wholly un-American, and it is anathema to the system of self-governance to which our Founders pledged their lives over 240 years ago.

There must be a better way forward.

Every survivor of sexual misconduct must be taken seriously. Every student accused of sexual misconduct must know that guilt is not predetermined.

These are non-negotiable principles.

Any failure to address sexual misconduct on campus fails all students.

Any school that refuses to take seriously a student who reports sexual misconduct is one that discriminates.

And any school that uses a system biased toward finding a student responsible for sexual misconduct also commits discrimination.

A better way begins with a re-framing.

This conversation has too often been framed as a contest between men and women or the rights of sexual misconduct survivors and the due process rights of accused students.

The reality is, however, a different picture.

There are men and women, boys and girls, who are survivors, and there are men and women, boys and girls who are wrongfully accused.

I've met them personally. I've heard their stories. And the rights of one person can never be paramount to the rights of another.

A better way means that due process is not an abstract legal principle only discussed in lecture halls.

Due process is the foundation of any system of justice that seeks a fair outcome. Due process either protects everyone, or it protects no one.

The notion that a school must diminish due process rights to better serve the "victim" only creates more victims.

A better way also means we shouldn't demand anyone become something they are not.

Students, families, and school administrators are generally not lawyers and they're not judges. We shouldn't force them to be so for justice to be served.

A better way is also being more precise in the definition of sexual misconduct.

Schools have been compelled by Washington to enforce ambiguous and incredibly broad definitions of assault and harassment.

Too many cases involve students and faculty who have faced investigation and punishment simply for speaking their minds or teaching their classes.

Any perceived offense can become a full-blown Title IX investigation.

But if everything is harassment, then nothing is.

Punishing speech protected by the First Amendment trivializes actual harassment. It teaches students the wrong lesson about the importance of free speech in our democracy.

Harassment codes which trample speech rights derail the primary mission of a school to pursue truth.

A better way is ultimately about recognizing that schools exist—first and foremost—to educate. Their core obligation under Title IX is to ensure all students can pursue their education free of discrimination.

Schools tend to do a good job, as they should, of making appropriate accommodations that don't infringe on the rights of others.

While a Title IX complaint is pending, schools usually make academic accommodations such as adjusting schedules, changing dorm assignments, and postponing papers or exams.

But there is a fundamental difference between making these sorts of accommodations for accusers—and schools which seek to punish the accused before a fair decision has been rendered.

There is a competency gap here.

Washington has insisted that schools step into roles that go beyond the mission of these institutions.

This doesn't mean schools don't have a role. They do. But we should also draw on medical professionals, counselors, clergy, and law enforcement for their expertise.

And so, a better way includes pursuing alternatives that assist schools in achieving justice for all students.

In order to ensure that America's schools employ clear, equitable, just, and fair procedures that inspire trust and confidence, we will launch a transparent notice-and-comment process to incorporate the insights of all parties in developing a better way.

We will seek public feedback and combine institutional knowledge, professional expertise, and the experiences of students to replace the current approach with a workable, effective, and fair system.

To implement sustainable solutions, institutions must be mindful of the rights of every student. No one benefits from a system that does not have the public's trust—not survivors, not accused students, not institutions and not the public.

Other groups have already made progress on these difficult issues.

The American Bar Association established a task force comprised of lawyers and advocates from diverse backgrounds and varying perspectives.

They found consensus and offered substantive ideas on how we can do better. Schools should find their recommendations useful.

The American College of Trial Lawyers also gathered experts from across the country to produce reasonable responses to the current failed system.

An open letter from Harvard's law school faculty provides important perspectives and insights that will be helpful as we pursue a better way.

Another promising idea comes from two former prosecutors, Gina Smith and Leslie Gomez.

Both of them have spent their careers specializing in sexual misconduct cases. They propose a "Regional Center" model; and it is being explored by a number of states today.

The model sets up a voluntary, opt-in Center where professionally-trained experts handle Title IX investigations and adjudications.

It looks something like this: in partnership among states and their Attorneys General, participating schools refer to the Center any Title IX incident which rises to a criminal level.

The Center cooperates with local law enforcement and has access to resources to collect and preserve forensic evidence, facilitate—but never require—criminal prosecutions, and apply fair investigative techniques to gather and evaluate all relevant evidence to determine whether sexual misconduct occurred.

This insures that students are not charged by school-based tribunals on the basis of hearsay or incomplete evidence.

This model allows educators to focus on what they do best: educate.

These are only a few examples that allow for a more effective and equitable enforcement of Title IX.

Our interest is in exploring all alternatives that would help schools meet their Title IX obligations and protect all students. We welcome input and look forward to hearing more ideas.

Schools have an opportunity to help shape and improve the system for all their students. But they also have a responsibility to do better by their students.

This is not about letting institutions off the hook. They still have important work to do.

A survivor told me that she is tired of feeling like the burden of ensuring her school addresses Title IX falls on her shoulders.

She is right. The burden is not hers, nor is it any student's burden.

We need to act as if any of these students were one of our own loved ones.

One young woman made this clear to me when she told me her story of the failed system. Both as a falsely accused student, and as a survivor.

She had recently gone through a bad break-up with her boyfriend.

Another female student, one of her close friends, sought to console her—except in all the wrong ways. The friend showed up and made an unwanted sexual advance. Upset about being rejected by the heartbroken student, the young woman who was supposed to be there as a friend, instead turned a lighthearted gesture into a full-scale Title IX incident.

Shockingly, the school punished the student who only needed a friend after a break-up. This student then revealed to me that she had been sexually assaulted earlier in life.

"I've been on both sides of this issue," she told me, "and on neither side did they get it right."

We can and must get it right for her, and for all students.

We must continue to condemn the scourge of sexual misconduct on our campuses.

We can do a better job of making sure the handling of complaints is fair and accurate.

We can do a better job of preventing misconduct through education rather than reacting after lives have already been ruined.

We can do a better job of helping institutions get it right.

And we can do a better job for each other.

The truth is: we must do better for each other and with each other.

May God bless all of you, and may He continue to bless our great Nation.

www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0029p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN DOE,

Plaintiff-Appellant,

v.

MIAMI UNIVERSITY; STEVEN ELLIOT; ROSE MARIE WARD; ALANA VAN GRUNDY-YODER; JAYNE BROWNELL; SUSAN VAUGHN,

Defendants-Appellees.

No. 17-3396

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 1:15-cv-00605—Michael R. Barrett, District Judge.

Argued: November 29, 2017

Decided and Filed: February 9, 2018

Before: GUY, MOORE, and ROGERS, Circuit Judges.

COUNSEL

ARGUED: Eric John Rosenberg, ROSENBERG & BALL CO. LPA, Granville, Ohio, for Appellant. Evan T. Priestle, TAFT STETTINIUS & HOLLISTER LLP, Cincinnati, Ohio, for Appellees. **ON BRIEF:** Eric John Rosenberg, ROSENBERG & BALL CO. LPA, Granville, Ohio, for Appellant. Evan T. Priestle, Doreen Canton, TAFT STETTINIUS & HOLLISTER LLP, Cincinnati, Ohio, for Appellees.

OPINION

KAREN NELSON MOORE, Circuit Judge. In the fall of 2014, John Doe and Jane Doe[1] were students at Miami University, a public university located in Oxford, Ohio. The two students knew each other and had engaged in several consensual "physical encounters." This case arises from an incident between John and Jane on September 14, 2014. Both parties had consumed alcohol, and John states that he was so intoxicated that he cannot remember what occurred. According to Jane's statement, the two engaged in some consensual sexual acts, but at some point Jane stopped consenting and John continued to engage in then non-consensual sexual acts for some period of time before he stopped. This accusation of sexual misconduct was evaluated by Miami University, and John was found responsible for violating the school's sexual-assault policy. He was initially suspended for approximately eight months, but this suspension was reduced by the University on appeal to four months. After the University's appeals process affirmed the original finding of responsibility, John brought suit against Jane, Miami University, and individual University employees who had been part of the disciplinary process. John voluntarily dismissed his claims against Jane after the two parties reached a settlement. The other defendants moved to dismiss John's six remaining claims under Title IX and § 1983 pursuant to Federal Rule of Civil Procedure 12(b)(6), and the district court granted their motion.

On appeal, John argues that the district court erred in granting the defendants' motion to dismiss. We **AFFIRM** the district court's dismissal of John's Title IX hostile-environment claim, Title IX deliberate-indifference claim, and § 1983 substantive-due-process claim. Furthermore, we **AFFIRM** in part and **REVERSE** in part the district court's dismissal of John's § 1983 procedural-due-process and equal-protection claims and related finding of qualified immunity. We **REVERSE** the district court's holding that John did not sufficiently plead his

---

[1]The district court granted John's motion to allow the parties to use pseudonyms. R. 49 (Dist. Ct. Order re Pseudonyms) (Page ID #3270).

Title IX erroneous-outcome claim. We **REMAND** for further proceedings consistent with this opinion.

I. BACKGROUND

On the evening of September 13, 2014, John and his roommate attended "a party where John Doe consumed approximately six beers."[2] R. 39 (Am. Compl. ¶ 22) (Page ID #1977). John then proceeded to "a bar and drank at least two more beers and four shots of alcohol before leaving the bar in the early morning hours of September 14, 2014." *Id.* At this point, John was sufficiently intoxicated that he cannot clearly remember what happened for the remainder of the night. *Id.* ¶¶ 22, 24 (Page ID #1977, 1978). Based on text messages he later found on his cellphone, John knows that he called Jane and "exchanged text messages with" her after he left the bar. *Id.* ¶ 23 (Page ID #1978).

John recalls Jane getting into his bed some time before dawn on September 14. *Id.* ¶ 24 (Page ID #1978). His next memory is when he awoke the morning of September 14. *Id.* Jane was upset that her cellphone was "ruined." *Id.* ¶ 25 (Page ID #1978). "Because John Doe believed that he had been the last person to handle Jane Doe's phone, John Doe offered to buy her a new one." *Id.* During their trip to the store, Jane told John that "she was uncomfortable that he began to perform oral sex on" her. *Id.* ¶ 26 (Page ID #1978). John apologized for whatever he may have done, but informed Jane that he could not remember anything about his interactions with her the prior night. *Id.* "After John Doe purchased a new phone for Jane Doe, she told him that she forgave him and still wanted to be friends." *Id.*

John attached to his complaint Jane's written statement about what occurred that night and stated that this is the only information he has about what happened besides his own incomplete recollection. *Id.* ¶ 6 (Page ID #1975); R. 39-2 (Pl. Ex. 1: Jane Doe Statement) (Page ID #2036–37). In her statement, Jane recalled that on the evening of September 13 she was out with a group of friends. R. 39-2 (Pl. Ex. 1: Jane Doe Statement at 1) (Page ID #2036). As she

[2]These facts are drawn from John Doe's amended complaint and attached exhibits. R. 39 (Am. Compl.) (Page ID #1973–2028). As this case is in front of us on an appeal from the district court's grant of the defendants' motion to dismiss, we presume all factual allegations in the complaint to be true at this stage of the proceedings.

and her friends walked back home, she ran into John and his roommate, whom Jane had previously dated. *Id.* Jane described herself as a "little drunk." *Id.* Jane and one of her friends returned to John and his roommate's dorm room. *Id.* Once there, Jane's friend told her that she was going to sleep in Jane's room that evening. *Id.* John and his roommate then offered to let Jane stay in their room, and she accepted. *Id.* In her statement, Jane then describes a sexual encounter with John that transitioned between consensual and non-consensual acts:

> I had made out with [John] a couple of times before then, so I decided to stay with them, I had just kind of assumed we might make out again. I did not know [his roommate] was going to stay there. At the time I thought I gave [my friend] my ID to get into my dorm to stay there. And she left. At this point I was kinda sobered up and thought [John] and [his roommate] were too. So they gave me a change of clothes and told me to pick a bed. I picked [John's] bed, because I thought that would be less weird. We got in bed and turned of [sic] the lights and we thought [the roommate] was asleep, [John] started kissing me and that was okay and what I expected and fine. He had asked me to do things before, and I had said no, and he had kept pressuring me to do things and I kept saying no, no, no. And he asked me again, if he could finger me and I said fine, because I was tired of him asking me. I am a virgin and Christian, and I don't do that. So he started doing that, and it was hurting. I said "[John] stop it is hurting." He said "Oh it will hurt at first, you will be fine in a couple of minutes." I said "Okay fine, whatever." It kept hurting and never got better. I kept saying stop and it hurts. [John] kept telling me to be quite [sic] because I would wake up [his roommate]. I finally got him to stop doing it, after telling him I pushed him away. We went back to kissing. He asked to eat me out. And I said no you are not doing that. We were kissing and then he just did it. I never said no. I pushed him away. He rolled over and went to sleep.

Id.

Jane discussed the incident with several of her friends. *Id.* at 2 (Page ID #2037); R. 39 (Am. Compl. ¶ 28) (Page ID #1979). One of her friends informed a Resident Advisor ("RA") that John had sexually assaulted Jane. R. 39 (Am. Compl. ¶ 28) (Page ID #1979). The RA informed her superiors at Miami about the alleged sexual assault and also expressed concern that John might harm himself because of the accusation. *Id.* ¶ 29 (Page ID #1979).

On September 16, 2014, Miami University's Associate Vice President and Dean of Students Michael Curme emailed John and informed him that the University had received a report that he had sexually assaulted another student two days before. R. 39-2 (Pl. Ex. 3: Summ.

Hr'g Notification at 4) (Page ID #2042). Curme told John that he was required to attend a summary suspension hearing the following day. *Id.* Following that hearing, the University imposed several restrictions on John, including one that prohibited him from contacting Jane. R. 39 (Am. Compl. ¶ 31) (Page ID #1980); R. 39-2 (Pl. Ex. 4: Summ. Hr'g Dec. at 5) (Page ID #2047).

On or about September 19, 2014, Miami University's Emergency Case Manager Tim Parsons met with John to explain the disciplinary process at Miami. R. 39 (Am. Compl. ¶ 34) (Page ID #1980). John applied for, and received, a Medical Leave of Absence from the University, effective September 23, 2014, because of his psychological distress resulting from the accusations. *Id.* ¶¶ 37–38 (Page ID #1981).

Also on September 23, 2014, defendant Susan Vaughn, the Director of the University's Office of Ethics and Student Conflict Resolution, provided John a Notice of Alleged Violation. *Id.* ¶ 39 (Page ID #1981); R. 39-2 (Pl. Ex. 6: Notice of Alleged Violation) (Page ID #2052). The notice informed John that there was an allegation that he had "sexually assaulted a female resident while both she and you were intoxicated." R. 39-2 (Pl. Ex. 6: Notice of Alleged Violation) (Page ID #2052). According to the notice, this was an alleged violation of Section 103 of Miami University's Student Conduct Regulations. *Id.*; R. 39-2 (Pl. Ex. 8: Miami Univ. Student Handbook at 39–40) (Page ID #2095–96). The notice informed John that he must attend a Procedural Review meeting the following day. R. 39 (Am. Compl. ¶ 39) (Page ID #1981). The purpose of the meeting was to review with John the alleged violation and potential consequences. R. 39-2 (Pl. Ex. 6: Notice of Alleged Violation) (Page ID #2052). At that meeting, John denied that he had committed a violation and requested that the violation be adjudicated by an Administrative Hearing Panel. R. 39 (Am. Compl. ¶ 43) (Page ID #1982).

On October 1, 2014, Procedural Hearing Officer Kelly Ramsey informed John and Jane that the hearing panel would convene on October 7. *Id.* ¶ 50 (Page ID #1984); R. 39-3 (Pl. Ex. 11: John Doe Notice of Hr'g at 1) (Page ID #2193); R. 39-3 (Pl. Ex. 12: Jane Doe Notice of Hr'g at 1) (Page ID #2196). Ramsey further informed John and Jane of the identity of the panel members and that objections to their inclusion based on bias could be filed by October 3. R. 39-3 (Pl. Ex. 11: John Doe Notice of Hr'g at 1) (Page ID #2193); R. 39-3 (Pl. Ex. 12: Jane Doe

Notice of Hr'g at 1) (Page ID #2196). The panel members were defendants Vaughn, Professor Alana Van Gundy-Yoder, and Professor Steve Elliott. *Id.* John alleges that he had insufficient time to investigate the proposed panel members and contest their inclusion before the deadline. R. 39 (Am. Compl. ¶ 52) (Page ID #1985). Ramsey also told John he had to submit a witness list, supporting documents, and any written statements by noon on October 3. R. 39-3 (Pl. Ex. 11: John Doe Notice of Hr'g at 1–2) (Page ID #2193–94). Jane received the same instructions. R. 39-3 (Pl. Ex. 12: Jane Doe Notice of Hr'g at 1) (Page ID #2196). The University did not, however, hold Jane to the October 3 deadline and allowed her to submit a written statement on October 6. R. 39 (Am. Compl. ¶ 51) (Page ID #1984–85).

Miami University held the Administrative Hearing Panel on October 7. *Id.* ¶ 55 (Page ID #1985). John alleges that he was not provided the names of the witnesses who testified against him prior to the hearing or a summary of their proposed testimony. *Id.* ¶ 57 (Page ID #1986). He also alleges that he was not given access to the disciplinary report compiling the evidence against him. *Id.* ¶ 102 (Page ID #2001). John describes Vaughn—who had been the person responsible for initially reviewing the evidence against him and choosing to pursue disciplinary action—as dominating the hearing and trying "to deflate John Doe's credibility while inflating Jane Doe's credibility." *Id.* ¶ 58 (Page ID #1986). John also describes Vaughn's body language during the hearing as "suggesting she believed John was lying" and alleges that she told him "I'll bet you do this [i.e., sexually assault women] all the time." *Id.* ¶ 66 (Page ID #1988–89).

The hearing panel found John responsible for violating Section 103 of the Student Conduct Regulations. *Id.* ¶ 61 (Page ID #1987); R. 39-3 (Pl. Ex. 15: Admin. Panel Hr'g Dec.) (Page ID #2233). The totality of the panel's fact-finding is reproduced below:

> You stated that you and [Jane] were friends and have spent time together in the past. Both of you agreed to go to your residence hall room, where you engaged in consensual kissing and some consensual sexual contact. However, at some point, [Jane] indicated she did not want to have oral sex and asked you to stop but the act continued.

R. 39-3 (Pl. Ex. 15: Admin. Panel Hr'g Dec.) (Page ID #2233). The panel sanctioned John by suspending him for three terms—fall, winter, and spring—until May 2015. R. 39 (Am. Compl. ¶ 61) (Page ID #1987); R. 39-3 (Pl. Ex. 15: Admin. Panel Hr'g Dec.) (Page ID #2233). Upon

John's re-enrollment, he was to be placed on disciplinary probation for one year. R. 39-3 (Pl. Ex. 15: Admin. Panel Hr'g Dec.) (Page ID #2233).

On October 13, John appealed the hearing panel's decision to the Chair of the University Appeals Board, defendant Rose Marie Ward. R. 39 (Am. Compl. ¶ 69) (Page ID #1989–90); R. 39-4 (Pl. Ex. 18: Oct. 13, 2014 Appeal Ltr.) (Page ID #2237–38). On November 11, 2014, Ward informed John via letter that the University Appeals Board had denied his appeal. R. 39 (Am. Compl. ¶ 73) (Page ID #1991); R. 39-4 (Pl. Ex. 20: Appeals Bd. Dec.) (Page ID #2242). John then appealed this decision to Vice President of Student Affairs, defendant Jayne Brownell. R. 39 (Am. Compl. ¶ 75) (Page ID #1991–92); R. 39-4 (Pl. Ex. 21: Nov. 14, 2014 Appeal Ltr.) (Page ID #2243–44). Brownell affirmed the University Appeals Board's decision to uphold the hearing panel's finding of responsibility, but reduced his suspension period such that it ended on January 23, 2015. R. 39 (Am. Compl. ¶ 77) (Page ID #1993); R. 39-4 (Pl. Ex. 23: Brownell Dec. at 1) (Page ID #2249).

John filed suit against the University and several individual defendants in the United States District Court for the Southern District of Ohio on September 17, 2015. R. 1 (Complaint) (Page ID #1–55). John voluntarily dismissed the two state-tort claims that he brought against Jane after the two parties reached a settlement. R. 32 (Voluntary Dismissal) (Page ID #1873). The remaining defendants moved to dismiss all claims under Federal Rule of Civil Procedure 12(b)(6). R. 42 (Mot. to Dismiss at 6) (Page ID #3139). The district court granted the defendants' motion. *Doe v. Miami Univ.*, 247 F. Supp. 3d 875, 896–97 (S.D. Ohio 2017). John now appeals the district court's judgment with respect to Counts 3 through 7.

II. STANDARD OF REVIEW

We review de novo a district court's grant of a motion to dismiss for failure to state a claim. *Jackson v. Ford Motor Co.*, 842 F.3d 902, 906 (6th Cir. 2016). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged." *Id.* On a motion to dismiss, "[w]e must construe the complaint in the light most favorable to the plaintiff and accept all allegations as true." *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012).

We have previously applied the *Twombly*/*Iqbal* standard of pleading without modification in Title IX cases. *See, e.g.*, *Tumminello v. Father Ryan High Sch., Inc.*, 678 F. App'x 281, 283–84 (6th Cir. 2017); *Doe v. Cummins*, 662 F. App'x 437, 443 (6th Cir. 2016). In other words, a complaint alleging Title IX violations must plead sufficient factual allegations to satisfy *Twombly* and *Iqbal*. *See Keys*, 684 F.3d at 609–10.

Nevertheless, John argues that we should adopt the Second Circuit's recent decision in *Doe v. Columbia University*, 831 F.3d 46 (2d Cir. 2016), which modified the pleading standard for Title IX claims. Appellant Br. at 28–34. In *Columbia University*, our sister circuit considered what a plaintiff asserting a Title IX claim must allege in order to plead sufficiently the required element of discriminatory intent. *Columbia Univ.*, 831 F.3d at 56. The Second Circuit analogized between what it required of plaintiffs in Title VII employment-discrimination cases and what it should require of plaintiffs alleging Title IX claims. *Id.* It concluded that a complaint under Title IX "is sufficient with respect to the element of discriminatory intent . . . if it pleads specific facts that support a minimal plausible inference of such discrimination." *Id.* This modified pleading standard "reduces the facts needed to be pleaded under *Iqbal*." *Id.* at 54 (quoting *Littlejohn v. City of New York*, 795 F.3d 297, 310 (2d Cir. 2015)).

Whatever the merits of the Second Circuit's decision in *Columbia University*, to the extent that the decision reduces the pleading standard in Title IX claims, it is contrary to our binding precedent. *Columbia University* is partially premised on the Second Circuit's decision in *Littlejohn*, 795 F.3d 297. In that case, the Second Circuit reconciled *Twombly* and *Iqbal* with the Supreme Court's holding in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), by holding that "[t]o the same extent that the *McDonnell Douglas* temporary presumption reduces the facts a plaintiff would need to show to defeat a motion for summary judgment prior to the defendant's furnishing of a non-discriminatory motivation, that presumption also reduces the facts needed to be pleaded under *Iqbal*." *Littlejohn*, 795 F.3d at 310. In contrast, we reconciled these cases differently in *Keys*, 684 F.3d at 609–10, and held that a plaintiff asserting a Title VII claim must

plead sufficient factual allegations to satisfy *Twombly* and *Iqbal* in alleging the required element of discriminatory intent. Thus, the foundational analogy in *Columbia University* lacks support from our precedent. Accordingly, in this Circuit, John must meet the requirements of *Twombly* and *Iqbal* for each of his claims in order to survive a Rule 12(b)(6) motion to dismiss.

III. TITLE IX CLAIMS

Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a). "Title IX is enforceable through a judicially implied private right of action, through which monetary damages are available." *Klemencic v. Ohio State Univ.*, 263 F.3d 504, 510 (6th Cir. 2001).

We have recognized, although never explicitly adopted in a published opinion, at least four theories of liability that a student who is "attacking a university disciplinary proceeding on grounds of gender bias," *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994), can potentially assert under Title IX. These theories are: (1) "erroneous outcome," (2) "selective enforcement," (3) "deliberate indifference," and (4) "archaic assumptions." *Cummins*, 662 F. App'x at 451–52 & n.9; *Mallory v. Ohio Univ.*, 76 F. App'x 634, 638–39 (6th Cir. 2003). Here, John argues that the defendants are liable under Title IX under the first three of these theories, as well as under a hostile-environment theory. The hostile-environment theory of liability has been recognized in other Title IX cases, *see, e.g.*, *Doe v. Claiborne Cty.*, 103 F.3d 495, 515 (6th Cir. 1996), although not one in which a student who was disciplined for sexual misconduct has brought suit against a university.

A. Count 3: Hostile Environment

In Counts 3 and 4 of his complaint, John alleges a violation of Title IX under a hostile-environment theory and a deliberate-indifference theory. R. 39 (Am. Compl. ¶¶ 138–62) (Page ID #2012–19). The district court analyzed both as asserting claims under the deliberate-indifference theory. *Miami Univ.*, 247 F. Supp. 3d at 885 n.3. While the district court was correct that John's allegations overlap substantially between Counts 3 and 4, a hostile-

environment claim and deliberate-indifference claim require the plaintiff to allege different elements.

A Title IX hostile-environment claim is analogous to a Title VII hostile-environment claim. *Claiborne Cty.*, 103 F.3d at 515; *see also Tumminello*, 678 F. App'x at 284. Under this theory of liability, the plaintiff must allege that his educational experience was "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive [so as] to alter the conditions of the victim's" educational environment. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (internal citations and quotation marks omitted).

John argues that his allegations of gender bias in the University's sexual-assault disciplinary process suffice to constitute a viable hostile-environment claim. Appellant Br. at 35. John does not allege facts that support a reasonable inference that his educational experience was "permeated with discriminatory intimidation, ridicule, and insult." *Harris*, 510 U.S. at 21 (citation and internal quotation marks omitted). Thus, we affirm the district court's grant of the defendants' motion to dismiss as to Count 3. *Cf. La. Sch. Emps.' Ret. Sys. v. Ernst & Young, LLP*, 622 F.3d 471, 477 (6th Cir. 2010) (stating that on de novo review of a district court's grant of a motion to dismiss, this court "may affirm the judgment of the district court on any ground supported by the record").

B. Count 4: Deliberate Indifference

John's second theory of Title IX liability is deliberate indifference: He argues that the University was deliberately indifferent to the gender discrimination that he faced during the disciplinary process and the sexual misconduct perpetrated against him by Jane. Appellant Br. at 35–36. Under the deliberate-indifference theory, a plaintiff must "demonstrate that an official of the institution who had authority to institute corrective measures had actual notice of, and was deliberately indifferent to, the misconduct." *Mallory*, 76 F. App'x at 638. Furthermore, a deliberate-indifference claim premised on student-on-student misconduct must allege "harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis v. Monroe Cty. Bd. of Educ.*,

526 U.S. 629, 633 (1999); *see also Patterson v. Hudson Area Schs.*, 551 F.3d 438, 444–45 (6th Cir. 2009).

In *Mallory*, we did not explicitly state whether a deliberate-indifference claim in this context requires the plaintiff to plead that the misconduct alleged is sexual harassment, because we only assumed arguendo that this theory applied. *Mallory*, 76 F. App'x at 638–39; *see also Cummins*, 662 F. App'x at 451 n.9 (declining to decide whether the deliberate-indifference theory was applicable to this kind of case because the plaintiff did not argue that it was).[3] John asserts no rationale why deliberate-indifference claims in this kind of case do not require allegations of sexual harassment when such an allegation is a required element of a prima facie case of deliberate indifference in other Title IX cases. *See Horner v. Ky. High Sch. Athletic Ass'n*, 206 F.3d 685, 691–93 (6th Cir. 2000) (summarizing the three Supreme Court cases that articulate the deliberate-indifference theory of liability in Title IX cases and noting that "all address deliberate indifference to sexual harassment"); *Doe v. Univ. of the South*, 687 F. Supp. 2d 744, 758 (E.D. Tenn. 2009) (dismissing a plaintiff's Title IX deliberate-indifference claim because he "fail[ed] to allege any facts to support a finding that the University's actions were at all motivated by [his] gender or sex or constituted gender harassment or sexual harassment"). *But see Plummer v. Univ. of Houston*, 860 F.3d 767, 778 (5th Cir. 2017) (dismissing plaintiffs' deliberate-indifference claim, but implying that the misconduct need not be sexual harassment, but rather could be constitutional deficiencies in the disciplinary process). Thus, to plead sufficiently a Title IX deliberate-indifference claim the misconduct alleged must be sexual harassment.

John's argument, therefore, that he has sufficiently alleged a deliberate-indifference claim based solely on the gender discrimination he asserts occurred throughout the disciplinary process, Appellant Br. at 35–36, fails because the alleged gender discrimination is not tethered to a claim of sexual harassment. John, however, also argues that the defendants were deliberately

[3]The Fifth Circuit has recognized deliberate indifference as a theory of liability, as have lower courts in this Circuit. *Plummer v. Univ. of Houston*, 860 F.3d 767, 777 (5th Cir. 2017) (implicitly recognizing that plaintiffs could allege a deliberate-indifference claim by holding that their pleading of this claim was insufficient); *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 752 (S.D. Ohio 2014); *Doe v. Univ. of the South*, 687 F. Supp. 2d 744, 757–58 (E.D. Tenn. 2009).

indifferent to the sexual misconduct that Jane perpetrated against him. Appellant Br. at 36. The district court rejected this argument because John did not allege that he had initiated his own sexual-misconduct complaint against Jane and only one incident of sexual misconduct does not rise to the level of being "severe, pervasive, and objectively offensive." *Miami Univ.*, 247 F. Supp. 3d at 886.

The district court was incorrect to suggest that John needed to have made a formal complaint about Jane in order to plead a deliberate-indifference claim. We require only that "the funding recipient had actual knowledge of the sexual harassment," and not that the plaintiff followed a formal procedure to put the funding recipient on notice. *Patterson*, 551 F.3d at 445. The University did have actual knowledge that Jane had kissed John while John was so intoxicated that he could not remember the events of the night the next morning—indicating that John was inebriated to the extent that he could not consent under Miami University's policies.[4] R. 39-2 (Pl. Ex. 1: Jane Doe Statement at 1) (Page ID #2036); R. 39-2 (Pl. Ex. 6: Notice of Alleged Violation) (Page ID #2052). Thus, John's failure to initiate his own complaint against Jane for her sexual misconduct has no impact on the actual knowledge of the defendants.[5]

However, one incident of allegedly non-consensual kissing—while unacceptable—does not rise to the level of "sexual harassment [that is] so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school." *Patterson*, 551 F.3d at 444–45. Rather, we have required a plaintiff alleging deliberate indifference to establish an extensive pattern of sexually offensive behavior, and this one incident of kissing is insufficient. *Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 360, 363 (6th Cir. 2012) (holding that three separate occasions of sexual harassment—a male student shoving a female student into a locker, demanding that she perform oral sex on him, and making obscene sexual gestures at her—did not constitute sexual harassment that rose to the

[4]Miami University's Student Handbook states that "[a]n individual cannot consent who is substantially impaired by any drug or intoxicant . . . ." R. 39-2 (Pl. Ex. 8: Miami Univ. Student Handbook at 39–40) (Page ID #2095–96).

[5]It also appears that Jane did not initiate a formal complaint herself, but rather Jane's friend reported the alleged sexual misconduct. R. 39-2 (Pl. Ex. 1: Jane Doe Statement at 2) (Page ID #2037).

level of "severe, pervasive, and objectively offensive"). Thus, we affirm the district court's judgment with respect to John's Title IX deliberate-indifference claim.

C. Count 5: Erroneous Outcome

Count 5 of John's complaint alleges that Miami University violated Title IX under an erroneous-outcome theory of liability. R. 39 (Am. Compl. ¶¶ 169–76) (Page ID #2019–21). To plead an erroneous-outcome 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.'" *Cummins*, 662 F. App'x at 452 (quoting *Yusuf*, 35 F.3d at 715). The district court held that John had alleged sufficient facts to "cast doubt on the accuracy of the outcome of the Administrative Hearing." *Miami Univ.*, 247 F. Supp. 3d at 886. The district court, however, held that John had not sufficiently pleaded the second part of an erroneous-outcome claim: causation between the disciplinary proceeding's outcome and gender bias. *Id.* at 889–90. Thus, the district court held that John had failed to state a claim under Title IX based on an erroneous-outcome theory. *Id.* at 890.

We agree with the district court that John has pleaded sufficient facts to cast "some articulable doubt on the accuracy" on the outcome of his disciplinary hearing. He alleges that he was so intoxicated that he cannot recall the critical events in question. R. 39 (Am. Compl. ¶¶ 6, 22) (Page ID #1975, 1977). Thus, John's only knowledge of what occurred is drawn from Jane's description. *Id.* ¶ 6 (Page ID #1975). In her written statement, Jane describes a series of sexual acts between herself and John, some of which were consensual and some of which were not. R. 39-2 (Pl. Ex. 1: Jane Doe Statement at 1) (Page ID #2036). She states that she initially agreed to digital penetration, but at some point told John to stop. *Id.* John did stop, but only after some period of time had passed. *Id.* Then John asked Jane if he could engage in oral sex. *Id.* According to Jane, she said no, but John proceeded anyway and Jane responded by pushing him away, rather than re-verbalizing her denial of consent. *Id.* John then stopped. *Id.* Jane also states, however, that "I never said no." *Id.*

The Administrative Hearing Panel found John responsible for sexual misconduct on the basis of the following finding of fact: "However, at some point, [Jane] indicated she did not want to have oral sex and asked you to stop but the act continued." R. 39-3 (Pl. Ex. 15: Admin. Panel Hr'g Dec.) (Page ID #2233). This one-sentence finding of misconduct holds John responsible for non-consensual oral sex only, and not non-consensual digital penetration. But Jane's statement is internally inconsistent with regard to her description of the oral sex: she states both that "I said no" and "I never said no." R. 39-2 (Pl. Ex. 1: Jane Doe Statement at 1) (Page ID #2036). The Administrative Hearing Panel does not explain how it resolved this inconsistency. Additionally, the panel's terse statement does not elucidate why it found the oral sex to be non-consensual when it appears to have found that the digital penetration was consensual. Furthermore, John alleges that Vaughn, a hearing-panel member, was mistaken about the applicable standard of consent, and that she erroneously believed Miami University required affirmative consent, as evidenced by a quote attributed to Vaughn explaining the University's policy in a local newspaper article. R. 39 (Am. Compl. ¶ 108) (Page ID #2004); R. 41 (Pl. Ex. 59: Dayton Daily News Article) (Page ID #2804). Affirmative consent is a more stringent requirement than what is actually articulated in the University's Title IX policy and student handbook. R. 39-2 (Pl. Ex. 8: Miami Univ. Student Handbook at 39) (Page ID #2095); R. 39-2 (Pl. Ex. 9: Miami Univ. Title IX Policy at 3–4) (Page ID #2170–71). At the motion-to-dismiss stage, where all reasonable inferences must be drawn in favor of the plaintiff, the unresolved inconsistency in Jane's statement, the unexplained discrepancy in the hearing panel's finding of fact, and the alleged use of an erroneous definition of consent creates "some articulable doubt" as to the accuracy of the decision.

In order to survive a motion to dismiss on this claim, John must also allege facts showing "a 'particularized . . . causal connection between the flawed outcome and gender bias.'" *Cummins*, 662 F. App'x at 452 (quoting *Yusuf*, 35 F.3d at 715). "Such allegations might include, inter alia, statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." *Yusuf*, 35 F.3d at 715. The district court concluded that John had not sufficiently pleaded this second part of his claim. *Miami Univ.*, 247 F. Supp. 3d at 890. We disagree.

Taken together, the statistical evidence that ostensibly shows a pattern of gender-based decision-making and the external pressure on Miami University supports at the motion-to-dismiss stage a reasonable inference of gender discrimination.[6] John alleges facts showing a potential pattern of gender-based decision-making that "raise a reasonable expectation that discovery will reveal" circumstantial evidence of gender discrimination. *See Twombly*, 550 U.S at 556. He asserts that every male student accused of sexual misconduct in the Fall 2013 and Spring 2014 semesters was found responsible for the alleged violation, R. 39 (Am. Compl. ¶ 151) (Page ID #2016), and that nearly ninety percent of students found responsible for sexual misconduct between 2011 and 2014 have male first-names, *Id.*; R. 40-4 (Pl. Ex. 42: Public Record Request of Sexual Misconduct Violations) (Page ID #2613) (listing twenty students' first-names, only two of which are traditionally female names). Additionally, John incorporated an affidavit from an attorney who represents many students in Miami University's disciplinary proceedings, which describes a pattern of the University pursuing investigations concerning male students, but not female students. R. 39 (Am. Compl. ¶ 85) (Page ID #1996); R. 41–5 (Pl. Ex. B: Meloy Affidavit at 1–2) (Page ID #3132–33). Lastly, John points to his own situation, in which the University initiated an investigation into him but not Jane, as evidence that Miami University impermissibly makes decisions on the basis of a student's gender. R. 39 (Am. Compl. ¶¶ 80–83) (Page ID #1994–95). Discovery may reveal that the alleged patterns of gender-based decision-making do not, in fact, exist. That information, however, is currently controlled by the defendants, and John has sufficiently pleaded circumstantial evidence of gender discrimination. *See Brown Univ.*, 166 F. Supp. at 189; *Marshall v. Ind. Univ.*, 170 F. Supp. 3d 1201, 1210 (S.D. Ind. 2016).

[6]We do not rely on John's allegation that Van Gundy-Yoder, one of the members of the Administrative Hearing Panel, is biased against men because she researches "feminist criminological theory" and is affiliated with the Women's, Sexuality, and Gender Studies program at Miami University, R. 39 (Am. Compl. ¶ 54) (Page ID #1985), or that Ward, the chair of the University Appeals Board, was motivated by gender bias because her "research focuses on student alcohol consumption and sexual assault from the perspective of protecting females from males," *id.* ¶ 74 (Page ID #1991). Merely being a feminist, being affiliated with a gender-studies program, or researching sexual assault does not support a reasonable inference than an individual is biased against men. Nor do we rely on Vaughn's statements and body language at the hearing, *id.* ¶ 66 (Page ID #1988–89), which do not support an inference that she was motivated by biases against men as a group.

John also asserts that Miami University faced external pressure from the federal government and lawsuits brought by private parties that caused it to discriminate against men. Specifically, he argues that pressure from the government to combat vigorously sexual assault on college campuses and the severe potential punishment—loss of all federal funds—if it failed to comply, led Miami University to discriminate against men in its sexual-assault adjudication process. R. 39 (Am. Compl. ¶¶ 76, 86–92) (Page ID #1992–93, 1996–98); R. 40 (Pl. Ex. 30: White House "Not Alone" Report at 17) (Page ID #2315); R. 40–2 (Pl. Ex. 32: Miami Univ. Training at 49–54) (Page ID #2504–09); R. 39-4 (Pl. Ex. 22: ATIXA Tip of the Week Apr. 24, 2014 at 1–2) (Page ID #2245–46); *see also* "Dear Colleague" Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; Emma Ellman-Golan, Note, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 MICH. L. REV. 155, 162–66, 173–74 (2017). Additionally, John contends that Miami University was facing pressure to increase the zealousness of its "prosecution" of sexual assault and the harshness of the sanctions it imposed because it was a defendant in a lawsuit brought by a student who alleged that she would not have been assaulted if the University had expelled her attacker for prior offenses. R. 39 (Am. Compl. ¶100) (Page ID #2000–01); R. 40-4 (Pl. Ex. 43: Media Reports of Lawsuit at 5–7) (Page ID #2618–2620); R. 40-4 (Pl. Ex. 44: 2013 Lawsuit against Miami Univ.) (Page ID #2621–61).

Considering all of these factual allegations relating to Miami University's pattern of activity respecting sexual-assault matters and the asserted pressures placed on the University, John has pleaded sufficient specific facts to support a reasonable inference of gender discrimination. At the pleading stage, John's allegations need only create the plausible inference of intentional gender discrimination; although alternative non-discriminatory explanations for the defendants' behavior may exist, that possibility does not bar John's access to discovery. *See 16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 505 (6th Cir. 2013) ("[T]he mere existence of more likely alternative explanations does not automatically entitle a defendant to dismissal); *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011) ("Often, defendants' conduct has several plausible explanations. Ferreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage.").

Consequently, we reverse the district court's grant of the defendants' motion to dismiss Count 5 of John's complaint and remand for further proceedings.

D. Selective Enforcement

In his appellate brief, John argues in passing that he sufficiently alleged a Title IX claim premised on the theory of selective enforcement. Appellant Br. at 18–19. John did not assert this as a theory of liability in his complaint or in his opposition to the defendants' motion to dismiss. To the extent that John is now trying to assert a Title IX selective-enforcement claim, he has forfeited this argument. *Guyan Int'l, Inc. v. Prof'l Benefits Adm'rs, Inc.*, 689 F.3d 793, 799 (6th Cir. 2012) ("If a party fails to raise an issue to the district court, then that party 'forfeits the right to have the argument addressed on appeal.'" (quoting *Armstrong v. City of Melvindale*, 432 F.3d 695, 699–700 (6th Cir. 2006))).

IV. SECTION 1983 CLAIMS

John brought claims pursuant to 42 U.S.C. § 1983 against the individual defendants in their official capacities for injunctive relief and in their personal capacities for monetary damages. R. 39 (Am. Compl. ¶¶ 177–207) (Page ID #2021–26). He alleges that the individual defendants violated the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. *Id.* The district court held that John had failed to state a claim under either of these clauses and granted the defendants' motion to dismiss. *Miami Univ.*, 247 F. Supp. 3d at 891, 895, 896. The district court also held that the individual defendants were entitled to qualified immunity. *Id.* at 896.

"To state a claim under 42 U.S.C. § 1983, a plaintiff must set forth facts that, when construed favorably, establish (1) the deprivation of a right secured by the Constitution or laws of the United States (2) caused by a person acting under the color of state law." *Heyne v. Metro. Nashville Pub. Sch.*, 655 F.3d 556, 562 (6th Cir. 2011) (quoting *Marvin v. City of Taylor*, 509 F.3d 234, 243 (6th Cir. 2007)). Here, the defendants do not dispute that they were acting under the color of state law; thus, the issue is whether John has sufficiently alleged that he has been deprived of a constitutional right. Because part of John's due-process claim is premised on

his equal-protection claim, we will address the two counts in the opposite order from how they are presented in his complaint.

A. Count 7: Equal Protection

To establish an equal-protection violation, a plaintiff must allege that the state made a distinction which "burden[ed] a fundamental right, target[ed] a suspect class, or intentionally treat[ed] one differently from others similarly situated without any rational basis for the difference." *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312 (6th Cir. 2005). John alleges three instances when the defendants treated him differently from those similarly situated without any rational basis for the treatment. Only the last of the three asserted occasions of differential treatment sustains a viable-equal protection claim.

First, John argues that he faced unequal treatment because Jane was given "limited amnesty" for underage drinking. Appellant Br. at 39–40. Although the district court considered this an allegation of unequal treatment, *Miami Univ.*, 247 F. Supp. 3d at 895–96, John's complaint does not support his argument that he faced an unequal application of Miami University's policy against underage drinking. John asserts that Jane received "limited amnesty" for her violation of the prohibition on underage drinking, R. 39 (Am. Compl. ¶ 49) (Page ID #1983–84), but he does not allege that the University proceeded against him for violating the underage drinking policy. John was found responsible by the University for sexual misconduct, not underage drinking. R. 39-3 (Pl. Ex. 15: Admin. Panel Hr'g Dec.) (Page ID #2233). The grant of "limited amnesty" to one student who admitted underage drinking and the non-prosecution of another student who also admitted underage drinking does not give rise to a claim of unequal treatment in violation of the Equal Protection Clause.

Second, John alleges that Jane was allowed to submit her written statement on October 6, 2014, three days after the deadline that the University had stated. R. 39 (Am. Compl. ¶ 51) (Page ID #1984–85). John does not, however, allege that he attempted to submit materials after the deadline, much less that the University refused to accept such materials or would not have provided an extension to him as well. Thus, John's allegations do not give rise to a reasonable inference that he faced unequal treatment.

Lastly, John argues that the defendants' failure to discipline Jane for sexual misconduct, when he faced discipline, was unequal treatment. Appellant Br. at 40; R. 39 (Am. Compl. ¶ 65) (Page ID #1988). The gravamen of John's argument is that Miami University, acting through Vaughn, pursued disciplinary action against him because he was a man, whereas it did not do so with respect to Jane because she was a woman.[7] Appellant Reply Br. at 4. In order to plead this claim sufficiently, John must allege that Vaughn was operating under "the same set of operative facts" when she decided not to initiate the disciplinary process against Jane. *Doe v. Ohio State Univ.*, 239 F. Supp. 3d 1048, 1083 (S.D. Ohio 2017); *see also Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir. 2000) (holding that for individuals to be similarly situated there must be "relevant similarity," but there need not be "exact correlation").

Vaughn, the individual allegedly responsible for deciding whether or not to charge students with sexual-misconduct violations, R. 39 (Am. Compl. ¶ 58) (Page ID #1986), had received a report that John had engaged in non-consensual sexual acts against Jane. R. 39-2 (Pl. Ex. 6: Notice of Alleged Violation) (Page ID #2052). Vaughn also allegedly knew that Jane had engaged in non-consensual sexual acts against John, when John was so intoxicated he was unable to provide consent—as defined by Miami University's consent policy—and Jane had "kinda sobered up." R. 39 (Am. Compl. ¶¶ 24, 63) (Page ID #1978, 1988); R. 39-2 (Pl. Ex. 6: Notice of Alleged Violation) (Page ID #2052); R. 39-2 (Pl. Ex. 8: Miami Univ. Student Handbook at 39–40) (Page ID #2095–96); R. 39-2 (Pl. Ex. 1: Jane Doe Statement at 1) (Page ID #2036). The non-consensual acts Jane allegedly perpetrated—kissing John—are a type of prohibited sexual misconduct under the University's policies. R. 39-2 (Pl. Ex. 1: Jane Doe Statement at 1) (Page ID #2036); R. 39-2 (Pl. Ex. 9: Miami Univ. Title IX Policy at 3) (Page ID #2170). Thus, Vaughn knew that Jane had potentially violated the University's sexual misconduct provisions at the same time she reviewed the allegations against John. Neither Jane nor John initiated a formal complaint themselves regarding the other's conduct, R. 39-2 (Pl. Ex. 1: Jane Doe Statement at 2) (Page ID #2037), but Vaughn chose to pursue disciplinary action against John, but not Jane.

[7]John does not allege that the other individual defendants—Van Gundy-Yoder, Elliott, Ward, and Brownell—had any role in deciding whether to pursue disciplinary action against Jane. We focus, therefore, on Vaughn's alleged conduct.

These alleged facts sufficiently show at the motion-to-dismiss stage that John and Jane were similarly situated. Vaughn had credible information that both students had potentially violated the University's sexual misconduct policy. Vaughn, however, chose not to pursue disciplinary action against the female student, but only against the male student. We note that the exact alleged sexual misconduct of each student is not the same. John, while extraordinarily inebriated, apparently engaged in non-consensual digital penetration and oral sex. Jane, apparently mostly sober, purportedly kissed John when he was incapacitated and unable to consent. But we have not previously required a plaintiff to allege that the misconduct giving rise to an allegedly discriminatory disciplinary outcome be of the same type and degree. *See Heyne*, 655 F.3d at 571 (holding that the plaintiff sufficiently pleaded an equal-protection claim when he alleged that he was punished more harshly for running over another student's foot with his vehicle than the other student was for threatening the plaintiff's life because of the different races of the two students).

The instance of unequal treatment that John sufficiently pleads arises out of Vaughn's failure to initiate the University's disciplinary process with respect to Jane after receiving credible information that Jane may have violated the sexual-misconduct policy. *Cf. Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000) (affirming the grant of summary judgment for the defendants on plaintiffs' § 1983 equal-protection claim when the asserted disparate treatment was that the female plaintiffs were suspended after being caught violating the school rules, whereas the male students were not punished because the school had no notice of misconduct on their part). But equal protection does not require John and Jane to have received the same sanctions when the underlying alleged misconduct of the two was different; if Miami University had initiated disciplinary proceedings against Jane, this process may have led to a finding of not responsible or the imposition of a lesser sanction. None of these hypotheticals, unless impermissibly motivated by gender, would establish an equal-protection violation.

John must also allege that the different treatment he received was based on "purposeful or intentional" gender discrimination. *Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004). John asserts the same facts that undergirded his Title IX claims of gender discrimination to buttress his § 1983 claim. Appellant Br. at 40. For the same reasons that we held that John had

sufficiently pleaded facts demonstrating discriminatory intent under his Title IX erroneous-outcome claim, John has alleged sufficient facts to show circumstantial evidence of gender discrimination with respect to his equal-protection claim. *See* Section III.C *supra*.

"[C]onstru[ing] the complaint in the light most favorable to the plaintiff," *Keys*, 684 F.3d at 608, John has sufficiently pleaded an equal-protection claim. Of course this case is before us at the motion-to-dismiss stage, and discovery may disprove John's allegation that the reason he was treated differently than Jane was because of his gender and not because of other, legitimate reasons. But given the procedural posture in which the case currently stands, however, we must presume John's allegations to be true.

Thus, we reverse the district court's grant of the defendants' motion to dismiss Count 7 with respect to Vaughn and remand for further proceedings. As the remaining individual defendants—Van Gundy-Yoder, Elliott, Ward, and Brownell—played no role in the decision to initiate disciplinary proceedings against John, but not Jane, we affirm the district court's grant of the defendants' motion to dismiss Count 7 with respect to them.

B. Count 6: Substantive Due Process

Substantive-due-process claims are "loosely divided into two categories: (1) deprivations of a particular constitutional guarantee; and (2) actions that shock the conscience." *Valot v. Southeast Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220, 1228 (6th Cir. 1997) (internal quotation marks omitted). Here, John has pleaded both types of substantive-due-process claims.

1. Deprivation of Constitutional Guarantee

In his complaint, John alleges that his substantive-due-process rights were violated because he was deprived of two constitutionally protected property interests: a property interest in continuing his education and a property interest in a transcript "unmarred" by the finding of responsibility for sexual misconduct. R. 39 (Am. Compl. ¶¶ 182, 197) (Page ID #2021, 2024). In his response to the defendants' motion to dismiss before the district court and in front of this court, John has asserted only his property interest in continuing his education. R. 25 (Dist. Ct. Op. at 22) (Page ID #3592); Appellant Br. at 41.

"As an initial matter, we note that the Supreme Court never has held that the interest in continued education at a public university constitutes a fundamental property or liberty interest that finds refuge in the substantive protections of the Due Process Clause." *Martinson v. Regents of Univ. of Mich.*, 562 F. App'x 365, 375 (6th Cir. 2014). "[O]ur own precedent suggests that the opposite is true," although this court has not definitively decided the issue. *Id.* A consensus on this issue does not appear to have emerged among our sister circuits either. *See, e.g., Williams v. Wendler*, 530 F.3d 584, 589 (7th Cir. 2008) (holding that a suspension from a public university is not a deprivation of constitutional property); *Butler v. Rector & Bd. of Visitors of Coll. of William & Mary*, 121 F. App'x 515, 518–19 (4th Cir. 2005) (assuming, without deciding, that a student had "a property interest in continued enrollment" in a master's program "that is protected by the Due Process Clause").

In *Bell v. Ohio State University*, 351 F.3d 240, 251 (6th Cir. 2003), we held that, because a medical student had not established that her expulsion from medical school was an equal-protection violation, "we c[ould] see no basis for finding that [her] interest in continuing her medical school education is protected by substantive due process." *See also Rogers v. Tenn. Bd. of Regents*, 273 F. App'x 458, 463 (6th Cir. 2008). The holding in *Bell* relied on our earlier decision in *Gutzwiller v. Fenik*, 860 F.2d 1317, 1329 (6th Cir. 1988), where we noted that in "certain situations . . . a violation of one [clause] will constitute a violation of the other."

John relies on *Bell* to argue that because he has asserted an equal-protection violation, he has sufficiently pleaded a substantive-due-process violation. Appellant Br. at 42; Appellant Reply Br. at 23. But "[t]he spheres of protection offered by the two concepts [equal protection and substantive due process] are not, to be sure, coterminous." *Gutzwiller*, 860 F.2d at 1328. For a substantive-due-process claim to lie, the interest that John allegedly was deprived of must fall within the ambit of substantive due process. *Id.* at 1329. Here, John offers no argument for why we should recognize an independent property interest in pursuing a post-secondary education continuously, free from a suspension of less than four months. *Cf. Bell*, 351 F.3d at 249–50 ("The interests protected by substantive due process are of course much narrower than those protected by procedural due process. . . . [Substantive due process] protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and

tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."). On the alleged facts and arguments presented to us in this case, John has not sufficiently pleaded a substantive-due-process claim premised on a deprivation of a constitutionally protected guarantee.

2. Actions that "Shock the Conscience"

John also alleges that the defendants violated the substantive component of the Due Process Clause because they engaged in an "arbitrary abuse of executive power so egregious that it shocks the conscience of the public." R. 39 (Am. Compl. ¶ 190) (Page ID #2023). The district court held that John had forfeited this argument because he did not raise it in his opposition to the defendants' motion to dismiss. R. 25 (Dist. Ct. Op. at 22) (Page ID #3592). John vigorously contests the district court's conclusion that he has abandoned this part of his substantive-due-process claim. Appellant Br. at 41 & n.11. But even if John has not forfeited this claim, he cannot survive a motion to dismiss on this claim.

Executive action shocks the conscience when it is "arbitrary, or conscience shocking, in a constitutional sense." *Handy-Clay v. City of Memphis*, 695 F.3d 531, 547 (6th Cir. 2012) (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998)). "Moreover, this characterization applies to only the most egregious official conduct, conduct that is so brutal and offensive that it [does] not comport with traditional ideas of fair play and decency." *Id.* at 547–48 (alteration in original) (internal citations and quotation marks omitted). Even viewing John's complaint in the most favorable light, the defendants' alleged actions do not constitute constitutionally arbitrary or conscience-shocking conduct. *See, e.g.*, *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 643 (6th Cir. 2005) (describing an example of conscience-shocking conduct drawn from a case in which two African-American students were expelled from Alabama State College, without notice or a hearing, "for seeking to purchase lunch at a publicly owned grill in the basement of the Montgomery, Alabama, county courthouse" (citing *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961))).

"Where government action does not deprive a plaintiff of a particular constitutional guarantee or shock the conscience, that action survives the scythe of substantive due process so

long as it is rationally related to a legitimate state interest." *Valot*, 107 F.3d at 1228. Here, the defendants' imposition of sanctions on John is rationally related to Miami University's legitimate interest in investigating alleged violations of its student code of conduct and disciplining those found responsible. Consequently, we affirm the district court's grant of the defendants' motion to dismiss with respect to John's § 1983 substantive-due-process claim.

C. Count 6: Procedural Due Process

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Procedural due process is "implicated by higher education disciplinary decisions." *Flaim*, 418 F.3d at 633; *see also Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017). "Suspension 'clearly implicates' a protected property interest, and allegations of sexual assault may 'impugn [a student's] reputation and integrity, thus implicating a protected liberty interest.'" *Univ. of Cincinnati*, 872 F.3d at 399 (quoting *Cummins*, 662 F. App'x at 445).

Because John's suspension implicates a constitutionally protected interest, "the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see also Univ. of Cincinnati*, 872 F.3d at 399. We evaluate the nature of the procedure that is due under the three-factor framework articulated by the Supreme Court in *Mathews*, 424 U.S. at 334–35; *see also Flaim*, 418 F.3d at 634. These "three distinct factors" are: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

The private interest at stake in this case is substantial. "A finding of responsibility for a sexual offense can have a 'lasting impact' on a student's personal life, in addition to his 'educational and employment opportunities,' especially when the disciplinary action involves a long-term suspension." *Univ. of Cincinnati*, 872 F.3d at 400 (quoting *Cummins*, 662 F. App'x at

446); *see also* Ellman-Golan, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, *supra*, at 175 (An individual accused of sexual misconduct "will see his own rights curtailed. He may be forced, even as an interim measure, to move out of university housing or to withdraw from certain classes or to avoid a certain dining hall during certain periods of time. He may be suspended or expelled from school. . . . And as some states . . . begin to pass legislation requiring schools to note on a student's transcript whether the student was suspended or expelled for sexual misconduct, he may face severe restrictions, similar to being put on a sex offender list, that curtail his ability to gain a higher education degree." (internal citations omitted)). Thus, the effect of a finding of responsibility for sexual misconduct on "a person's good name, reputation, honor, or integrity" is profound. *See Goss v. Lopez*, 419 U.S. 565, 574 (1975).

When a student faces the possibility of suspension, we have held that the minimum process a university must provide is "notice of the charges, an explanation of the evidence against the student, and an opportunity to present his side of the story before an unbiased decision maker." *Univ. of Cincinnati*, 872 F.3d at 399–400. "In some circumstances [such as] where factual issues are disputed [and the student is not permitted to attend the adjudication proceeding], notice might also be required to include the names of witnesses and a list of other evidence the school intends to present." *Flaim*, 418 F.3d at 635. Furthermore, if the credibility of an alleged victim is at issue, the university must provide a way for the adjudicative body to evaluate the victim's credibility and "to assess the demeanor of both the accused and his accuser." *Univ. of Cincinnati*, 872 F.3d at 406. But the protections afforded to an accused, even in the face of a sexual-assault accusation, "need not reach the same level . . . that would be present in a criminal prosecution." *Id.* at 400 (quoting *Doe v. Univ. of Ky.*, 860 F.3d 365, 370 (6th Cir. 2017)); *see also Flaim*, 418 F.3d at 635 n.1 ("A university is not a court of law, and it is neither practical nor desirable it be one." (quoting *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 16 (D. Me. 2005))).

On appeal, John does not ask for additional procedures beyond what we have already held to be required. Rather, John suggests that these procedures should be strengthened considering the significance of the private interest at stake. Appellant Br. at 44–46.

1. Unbiased Decision-Maker

John's main argument is that his procedural-due-process rights were violated because he was not given the opportunity to present his side of the story to an unbiased decision-maker. Appellant Br. at 45. "[S]chool officials responsible for deciding whether to exclude a student from school must be impartial." *Heyne*, 655 F.3d at 567. However, "[i]t is also well established that school-disciplinary committees are entitled to a presumption of impartiality, absent a showing of actual bias." *Cummins*, 662 F. App'x at 449.

John alleges that Vaughn, one of three members of his Administrative Hearing Panel, was biased against him because: (1) she was his investigator, prosecutor, and judge; and (2) she had pre-determined his guilt. Appellant Br. at 46. "[D]ue process is not necessarily violated when the school official who initiates, investigates, or prosecutes charges against a student plays a role in the decision to suspend the student." *Heyne*, 655 F.3d at 567 (first citing *Lamb v. Panhandle Cmty. Unit Sch. Dist. No. 2*, 826 F.2d 526, 529–30 (7th Cir. 1987); and then citing *Brewer ex rel. Dreyfus v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 264 (5th Cir. 1985)). Due process may, however, be violated when "a school official's involvement in an incident created a bias such as to preclude his affording the student an impartial hearing." *Brewer*, 779 F.2d at 264 (internal quotation marks omitted).

Here, John argues that Vaughn's dual roles undermined her neutrality enough to overcome the presumption of impartiality afforded school officials. Appellant Br. at 46. For support, John alleges that Vaughn dominated the hearing and that her remarks were designed to reduce John's credibility while bolstering Jane's credibility. R. 39 (Am. Compl. ¶ 58) (Page ID #1986). Vaughn's alleged dominance on the three-person panel raises legitimate concerns, as she was the only one of the three with conflicting roles. Furthermore, John alleges that Vaughn announced during the hearing that "I'll bet you do this [i.e., sexually assault women] all the time." *Id.* ¶ 66 (Page ID #1988). This statement implies that Vaughn had determined prior to the hearing that John was responsible for the misconduct alleged in this incident and had a propensity for engaging in sexual misconduct. Thus, although an individual's dual roles do not per se disqualify him or her from being an impartial arbiter, here John has alleged sufficient facts

plausibly indicating that Vaughn's ability to be impartial "had been manifestly compromised." *Heyne*, 655 F.3d at 568.

John also alleges that the two other members of his Administrative Hearing Panel (Van Gundy-Yoder and Elliott) and the two individuals who decided his appeals (Ward and Brownell) were not neutral decision-makers. Appellant Br. at 47. He argues that Van Gundy-Yoder and Ward were biased due to their research interests. R. 39 (Am. Compl. ¶¶ 54, 74) (Page ID #1985, 1991). But merely being a feminist or researching topics that affect women does not support a reasonable inference that a person is biased. John also alleges that all of these individual defendants faced institutional pressures to find him responsible due to external influence from the federal government and lawsuits brought by private parties. R. 39 (Am. Compl. ¶¶ 86–100) (Page ID #1996–2001); R. 40 (Pl. Ex. 30: White House "Not Alone" Report at 22) (Page ID #2315); R.40–2 (Pl. Ex. 32: Miami Univ. Training at 49–54) (Page ID #2504–09).

These generalized allegations of institutional pressure, however, do not suffice to show that Van Gundy-Yoder, Elliott, Ward, and Brownell were actually biased, thus overcoming the presumption of impartiality afforded to them. *See Cummins*, 662 F. App'x at 449. John's complaint is silent as to how the public pressure to combat sexual misconduct on college campuses and the governmental pressure to comply with Title IX affected these individual defendants' decisions. This is not, for example, a case in which individual decision-makers were instructed by a superior to alter their disciplinary decisions based on the identity of the student. *See, e.g.*, *Heyne*, 655 F.3d at 569 (holding that a plaintiff had alleged sufficient facts to support the inference that two arbiters were, although not personally biased against the plaintiff, partial because they had been instructed by the school principal "to enhance both the charges against and the discipline imposed on" the plaintiff because of his race). One could imagine a case in which the pressure placed on a university caused employees to feel that they must reach certain outcomes in the institution's adjudicative process in order to protect their own career prospects.

But that is not what is alleged in this case. Consequently, John has not alleged sufficient facts to overcome the presumption of impartiality afforded to these four defendants.[8]

2. Notice of the Charges and Explanation of the Evidence

John's second-due process argument is that Miami University did not provide sufficient notice or an explanation of the evidence against him. Appellant Br. at 44–45. John's argument that the University provided him insufficient notice is unavailing. The timeline of the multiple communications Miami University had with John prior to his hearing, detailed in Section I *supra*, demonstrates that John had notice of the charges against him two days after the incident occurred and that the University explained the allegations against him in an in-person meeting eight days later. As the district court noted, *Miami Univ.*, 247 F. Supp. 3d at 893, the type and timing of the notice John received is very similar to the notice in *Cummins*, which we held "was

[8]The defendants also argue that the partiality or impartiality of Ward and Brownell is not dispositive, because a student has no due-process right to appeal a school's disciplinary decision. Appellees Br. at 41. In support of this proposition, the defendants cite *C.Y. ex rel. Antone v. Lakeview Pub. Sch.*, 557 F. App'x 426, 434 (6th Cir. 2014), and *Flaim*, 418 F.3d at 642. In *Flaim*, we said that "[c]ourts have consistently held that there is no right to an appeal from an academic disciplinary hearing that satisfies due process." *Flaim*, 418 F.3d at 642. However, we then considered whether an appeal was part of the due-process rights to which Flaim was entitled under the *Mathews* framework. *Id.* We concluded that given the "rather unique" circumstances of the case—Flaim was expelled on the basis of a felony conviction—Flaim was not entitled to an appeal. *Id.* at 643. In doing so, "we strongly emphasize[d] that a disciplinary hearing involving a record of conviction is wholly different from a case involving disputes of fact, even if the university believes the evidence to be overwhelming." *Id.* at 643 n.7. *C.Y.*, meanwhile, involved the expulsion of a high school freshman for bringing a knife to school and threatening to stab another student. *C.Y.*, 418 F. App'x at 427. In this unpublished decision, we relied on *Flaim* to reject C.Y.'s claim that she had the right to an appeal. *Id.* at 433.

Neither of these cases forecloses the possibility that in a school discipline case in which the private interest is so significant—a potential lifetime of stigma and preclusion from further educational and employment opportunities—and there is a dispute about the facts of the events in question, due process entitles a student to some type of appeals process. *Cf. Flaim*, 418 F.3d at 642 n.6 ("An appeal is valuable for many reasons, among them being the gravity of the decision to expel a student from medical school, the personal and professional consequences an expelled student will face, the institution's role as an educator and teacher of young people, and more. An appeal also provides additional assurance to the institution that a just result has been reached and provides the student with, irrespective of the outcome, significant participation value."); *Heyne*, 655 F.3d at 569 ("Students have no constitutional right to appeal the decision of school officials *to suspend them for ten days or fewer*." (emphasis added)). We do not need to reach that question here, because, even assuming due process provides a right to appeal, John has failed to allege a violation of his due-process rights at the appeals level of Miami University's discipline system. As explained above, John's claim that the individual defendants who heard his appeals were not neutral arbiters because of institutional pressures is not viable. Furthermore, although his allegation that he was denied access to a recording of his panel hearing when preparing his appeal might raise a due-process violation, Appellant Br. at 45, John does not allege that any of the individuals he has sued under § 1983 had control of this recording and denied a request to access it. *See* R. 39 (Am. Compl. ¶ 56) (Page ID #1985) (alleging that John requested "Miami provide him a copy of the recording" and that "Miami failed to provide" him the copy).

sufficiently formal and timely to satisfy due-process requirements and provide appellants with a meaningful opportunity to prepare a defense," 662 F. App'x at 447.

John also argues that Miami University did not sufficiently explain the evidence against him because it withheld his disciplinary file from him. Appellant Br. at 45; R.39 (Am. Compl. ¶ 102) (Page ID #2001). John asserts that it is the University's policy for its Title IX investigator to interview individuals connected to the incident in question, compile written statements, police reports, and any other relevant documentation into a report. R. 39 (Am. Compl. ¶ 101) (Page ID #2001); R. 40-4 (Pl. Ex. 45: Minutes of Title IX Training at 3) (Page ID #2664). This report is then sent to the Office of Ethics and Student Conflict Resolution "for appropriate disciplinary action." R. 39 (Am. Compl. ¶ 101) (Page ID #2001); R. 40-4 (Pl. Ex. 45: Minutes of Title IX Training at 3) (Page ID #2664). John alleges that Miami University refused to provide this report, or the evidence against him contained within the report, even though the University's policies state that he was allowed access to this evidence. R. 39 (Am. Compl. ¶ 102) (Page ID #2001–02); R. 39-2 (Pl. Ex. 9: Miami Univ. Title IX Policy at 15) (Page ID #2182). The district court was correct to note that a mere failure by the University to follow its own internal guidelines does not give rise to a procedural-due-process violation. *Miami Univ.*, 247 F. Supp. 3d at 893; *see, e.g.*, *Cummins*, 662 F. App'x at 445 n.2. The Constitution does require, however, that the student be provided the evidence against him. *Univ. of Cincinnati*, 872 F.3d at 399–400. Thus, to the extent any of the evidence contained within this report was used by the Administrative Hearing Panel to adjudicate John's claim, and John was not provided this evidence, he has alleged a cognizable due-process violation. Because John has alleged that this report was held by the Office of Ethics and Student Conflict Resolution, it is plausible to infer that Vaughn, as director of that office, had control of this report and could have provided him access. John does not allege, however, that any of the other individual defendants he has sued had control over the report. Thus, John has sufficiently pleaded allegations with respect to this aspect of his procedural-due process claim as to Vaughn, but not as to the other individual defendants.

* * *

To summarize, John has sufficiently pleaded a procedural-due-process claim against Vaughn based on the claims that she was not an impartial adjudicator and that she did not fully provide him the evidence used against him. Thus, we reverse the district court with respect to these claims against Vaughn. We affirm, however, the district court's dismissal of John's procedural-due-process claims against Van Gundy-Yoder, Elliott, Ward, and Brownell.

D. Qualified Immunity

The district court also found that the individual defendants were entitled to qualified immunity from all of John's § 1983 claims on the basis that he had failed to state a claim that his constitutional rights were violated. *Miami Univ.*, 247 F. Supp. 3d at 896. There is "a two-part test [that] determines whether qualified immunity applies: '(1) whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated, and (2) whether that right was clearly established.'" *Heyne*, 655 F.3d at 562 (quoting *Colvin v. Caruso*, 605 F.3d 282, 290 (6th Cir. 2010)). These two prongs may be addressed in any order. *Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016). If either prong is not met, then the government officer is entitled to qualified immunity. *Id.*

As John has failed to state a claim that his substantive-due-process rights have been violated, qualified immunity shields all of the individual defendants from this claim against them. We therefore affirm the district court's holding that the individual defendants are entitled to qualified immunity from John's substantive-due-process claim. Furthermore, because John has failed to state a claim that Van Gundy-Yoder, Elliott, Ward, or Brownell violated his procedural-due-process or equal-protection rights, we affirm the district court's holding that these four defendants are entitled to qualified immunity with respect to Count 6 and 7 of John's complaint.

John has, however, sufficiently alleged a claim under § 1983 that Vaughn violated his equal-protection and procedural-due process rights. *See* Section IV.A and C *supra*. All of these rights were clearly established in the fall of 2014. John's "right to freedom from invidious [gender] discrimination under the Equal Protection Clause was certainly clearly established at all

times pertinent to this action . . . ." *Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 681 (6th Cir. 2011). John's procedural-due-process right to an impartial adjudicator and access to the evidence used against him was also clearly established. First, viewing the allegations in the light most favorable to John, we conclude that a reasonable person in Vaughn's position should have known that she was partial and that she could not, therefore, sit on John's Administrative Hearing Panel. "The impropriety of [Vaughn's] alleged conduct in failing to disqualify [her]self should have been apparent based on *Goss*[, 419 U.S. at 579–84], *Newsome*[*v. Batavia Local Sch. Dist.*, 842 F.2d 920, 927 (6th Cir. 1988)], and other precedent directly on point." *Heyne*, 655 F.3d at 568. Second, John's right to view all of the evidence against him is clearly established. *Id.* at 565 (citing *Goss*, 419 U.S. at 582). Thus, we reverse the district court's holding that Vaughn is entitled to qualified immunity from John's equal-protection and procedural-due-process claims.

V. CONCLUSION

We **AFFIRM** the district court's dismissal of John's Title IX hostile-environment claim, Title IX deliberate-indifference claim, and § 1983 substantive-due-process claim. We also **AFFIRM** the district court's dismissal of John's § 1983 procedural-due-process and equal-protection claims and related finding of qualified immunity with respect to Van Gundy-Yoder, Elliott, Ward, and Brownell. We **REVERSE** the district court's holding that John did not sufficiently plead his Title IX erroneous-outcome claim. Furthermore, we **REVERSE** the district court's dismissal of John's § 1983 procedural-due-process and equal-protection claims against Vaughn, as well as its holding that Vaughn was entitled to qualified immunity. We **REMAND** for further proceedings consistent with this opinion.

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

SPECIAL REPORT

DECEMBER 2014

NCJ 248471

Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013

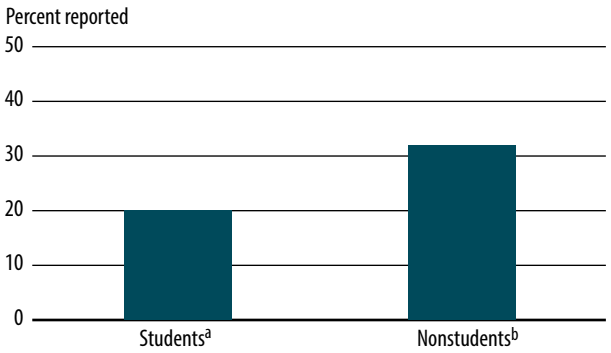
Sofi Sinozich, *BJS Intern*
Lynn Langton, Ph.D., *BJS Statistician*

For the period 1995–2013, females ages 18 to 24 had the highest rate of rape and sexual assault victimizations compared to females in all other age groups. Within the 18 to 24 age group, victims could be identified as students enrolled in a college, university, trade school or vocational school or as nonstudents. Among student victims, 20% of rape and sexual assault victimizations were reported to police, compared to 32% reported among nonstudent victims ages 18 to 24 **(figure 1)**.

This report describes and compares the characteristics of student and nonstudent female victims of rape and sexual assault, the attributes of the victimization, and the characteristics of the offender. The findings are from the Bureau of Justice Statistics' (BJS) National Crime Victimization Survey (NCVS), which collects information on nonfatal crimes reported and not reported to police against persons age 12 or older. Rape and sexual assault are defined by the NCVS to include completed and attempted rape, completed and attempted sexual assault, and threats of rape

FIGURE 1

Rape or sexual assault victimizations against females ages 18 to 24 reported to police, by post-secondary enrollment status, 1995–2013



Note: Includes only reports to the police, not to other officials or administrators. See table 8 for estimates and appendix table 9 for standard errors.

[a]Includes female victims ages 18 to 24 enrolled part time or full time in a post-secondary institution (i.e., college or university, trade school, or vocational school).

[b]Includes female victims ages 18 to 24 not enrolled in a post-secondary institution.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

HIGHLIGHTS

This report uses the National Crime Victimization Survey (NCVS) to compare the rape and sexual assault victimization of female college students and nonstudents. For the period 1995–2013—

- The rate of rape and sexual assault was 1.2 times higher for nonstudents (7.6 per 1,000) than for students (6.1 per 1,000).
- For both college students and nonstudents, the offender was known to the victim in about 80% of rape and sexual assault victimizations.
- Most (51%) student rape and sexual assault victimizations occurred while the victim was pursuing leisure activities away from home, compared to nonstudents who were engaged in other activities at home (50%) when the victimization occurred.
- The offender had a weapon in about 1 in 10 rape and sexual assault victimizations against both students and nonstudents.
- Rape and sexual assault victimizations of students (80%) were more likely than nonstudent victimizations (67%) to go unreported to police.
- About a quarter of student (26%) and nonstudent (23%) victims who did not report to police believed the incident was a personal matter, and 1 in 5 (20% each) stated a fear of reprisal.
- Student victims (12%) were more likely than nonstudent victims (5%) to state that the incident was not important enough to report.
- Fewer than 1 in 5 female student (16%) and nonstudent (18%) victims of rape and sexual assault received assistance from a victim services agency.

Comparing the NCVS and other surveys that measure rape and sexual assault in a college-age population

The NCVS is one of several surveys used to study rape and sexual assault in the general and college-age population. In addition to the NCVS, the National Intimate Partner and Sexual Violence Survey (NISVS) and the Campus Sexual Assault Study (CSA) are two recent survey efforts used in research on rape and sexual assault. The three surveys differ in important ways in how rape and sexual assault questions are asked and victimization is measured. Across the three surveys, the measurement differences contribute, in part, to varying estimates of the prevalence (the number of unique persons in the population who experienced one or more victimizations in a given period) and incidence (the number of victimizations experienced by persons in the population during a given period) of rape and sexual assault victimization.

Although conducted at different times, with different samples and reference periods, both NISVS and CSA produced prevalence rates that were substantially higher than the NCVS victimization and prevalence rates. Based on 2011 NISVS data, 2% of all females experienced unwanted sexual contact during the prior 12 months.[1] The 2007 CSA findings suggested that 14% of females ages 18 to 25 who were enrolled in two colleges and surveyed in the United States had experienced a completed sexual assault since entering college.[2] In comparison, in 2010 the NCVS showed that 1% of females age 12 or older experienced one or more rape or sexual assaults in the prior year.[3] For the period 2007–13, the NCVS victimization rate was 4.7 per 1,000 for females ages 18 to 24 who were enrolled in post-secondary schools (not shown).

Several of the key measurement differences that contribute to the different estimates include (see *Appendix 1*)—

- **Survey context and scope.** The NCVS is presented as a survey about crime, while the NISVS and CSA are presented as surveys about public health. The NISVS and CSA collect data on incidents of unwanted sexual contact that may not rise to a level of criminal behavior, and respondents may not report incidents to the NCVS that they do not consider to be criminal.
- **Definitions of rape and sexual assault.** The NCVS, NISVS, and CSA target different types of events. The NCVS definition is shaped from a criminal justice perspective and includes threatened, attempted, and completed rape and sexual assault against males and females (see *Methodology*). The NISVS uses a broader definition of sexual violence, which specifically mentions incidents in which the victim was unable to provide consent due to drug or alcohol use; forced to penetrate another person; or coerced to engage in sexual contact (including nonphysical pressure to engage in sex) unwanted sexual contact (including forcible kissing, fondling, or grabbing); and noncontact unwanted sexual experiences that do not involve physical contact.[4] The CSA definition of rape and sexual assault includes unwanted sexual contact due to force and due to incapacitation, but excludes unwanted sexual contact due to verbal or emotional coercion.[5]
- **Question wording.** The three surveys use different approaches to asking about experiences with rape and sexual assault. The NCVS uses a two-phased approach to identifying incidents of rape and sexual assault. Initially, a screener is administered, with cues designed to trigger the respondent's recollection of events and ascertain whether the respondent experienced victimization during the reference period. The screener questions are short and worded specifically about experiences with rape and sexual assault. For instance, "Incidents involving forced or unwanted sexual acts are often difficult to talk about. Have you been forced or coerced to engage in unwanted sexual activity by (a) someone you didn't know before, (b) a casual acquaintance? OR (c) someone you know well?"

  The screener is then followed by an incident form that captures detailed information about the incident, including the type of injury, presence of a weapon, offender characteristics, and reporting to police.

  Even if the respondent does not respond affirmatively to the specific screeners on rape and unwanted sexual contact, the respondent could still be classified as a rape or sexual assault victim if a rape or unwanted sexual contact is reported during the stage-two incident report.

(Continued on next page)

[1]Breiding, M.J., Smith, S.G., Basile, K.C., Walters, M.L., Chen, J., & Merrick, M.T. (2014). Prevalence and characteristics of sexual violence, stalking, and intimate partner violence victimization — National Intimate Partner and Sexual Violence Survey, United States, 2011. *Morbidity and Mortality Weekly Report, Surveillance Summaries*, 63(8), 1–18. Retrieved from http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm?s_cid=ss6308a1_e#Table1

[2]Krebs, C.P., Lindquist, C.H., Warner, T.D., Fisher, B.S., & Martin, S.L. (2007). The Campus Sexual Assault (CSA) study. Final report to the National Institute of Justice, grant number 2004-WG-BX-0010, document number 221153. Retrieved from https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf

[3]*Measuring the Prevalence of Crime with the National Crime Victimization Survey*, NCJ 241656, BJS web, September 2013.

[4]National Research Council. (2014). *Estimating the incidence of rape and sexual assault*. Panel on Measuring Rape and Sexual Assault in Bureau of Justice Statistics Household Surveys, C. Kruttschnitt, W.D. Kalsbeek, and C.C. House, Editors. Committee on National Statistics, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press. Retrieved from http://www.nap.edu/openbook.php?record_id=18605&page=R1, p. 86.

[5]Krebs, C.P., Lindquist, C.H., Warner, T.D., Fisher, B.S., & Martin, S.L. (2007). The Campus Sexual Assault (CSA) study. Retrieved from https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf, p. 1–3.

Comparing the NCVS and other surveys that measure rape and sexual assault in a college-age population (continued)

Unlike the NCVS, which uses terms like rape and unwanted sexual activity to identify victims of rape and sexual assault, the NISVS and CSA use behaviorally specific questions to ascertain whether the respondent experienced rape or sexual assault. These surveys ask about an exhaustive list of explicit types of unwanted sexual contact a victim may have experienced, such as being made to perform or receive anal or oral sex.

- **Mode and response rates.** Collection mode and response rates can impact data quality. The NCVS uses in-person and telephone interviews to collect data and has an 88% person and 74% overall response rate. The 2011 NISVS uses random-digit dialing with a 33% response rate. The 2007 CSA is a self-administered survey with 33% to 43% response rates.

Despite the differences that exist between the surveys, a strength of the NCVS is its ability to be used to make comparisons over time and between population subgroups. The differences observed between students and nonstudents are reliable to the extent that both groups responded in a similar manner to the NCVS context and questions. Methodological differences that lead to higher estimates of rape and sexual assault in the NISVS and CSA should not affect the NCVS comparisons between groups.

As a result, the differences in the NCVS between student and nonstudent rates and variations in the characteristics of student and nonstudent victimizations should not be affected by the methodological differences impacting the overall level of rape and sexual assault victimization in the NCVS. Because the CSA only collects data from a student population, and student status cannot be identified in the NISVS, the magnitude of difference between these subgroups cannot be ascertained.

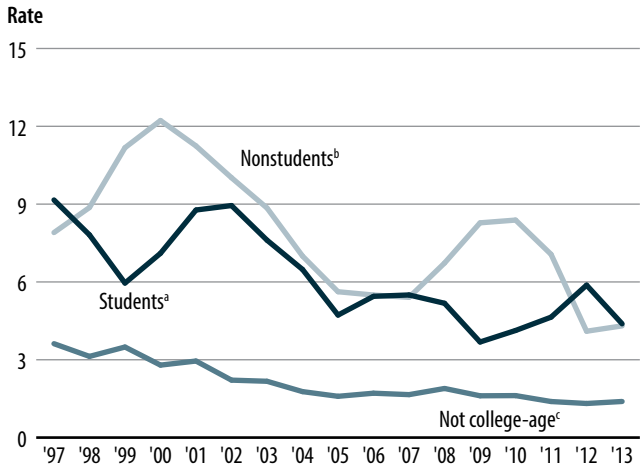
or sexual assault (see *Methodology*). Unless otherwise noted, this report presents aggregate estimates of rape and sexual assault victimization for the period 1995 through 2013. Aggregating data across the period increases the reliability and precision of estimates and facilitates comparisons of detailed victimization characteristics.

Females ages 18 to 24 had higher rates of rape and sexual assault than females in other age groups

From 1997 to 2013, females ages 18 to 24 consistently experienced higher rates of rape and sexual assault than females in other age brackets **(figure 2)**. In 2013, college-age females had a similar rate of rape and sexual assault regardless of enrollment status (about 4.3 victimizations per 1,000), while the victimization rate for not college-age (ages 12 to 17 and 25 or older) females was 1.4 victimizations per 1,000. For both students and nonstudents ages 18 to 24, the 2013 rates of rape and sexual assault were not significantly different from their respective rates in 1997. During the period, the rates for students did not differ significantly from one year to the next, though rates in the high years of 2001 and 2002 were slightly higher than in the low year of 2009. For nonstudents, there was more fluctuation. The rates of rape and sexual assault victimization for nonstudents were significantly higher for the period 1999–2001 than for the periods 2005–07 and 2012–13.

FIGURE 2

Rate of rape or sexual assault for females, by age and post-secondary enrollment status, 1997–2013



Note: Estimates based on 3-year rolling averages centered on the most recent year. See appendix table 1 for estimates and standard errors.

[a]Per 1,000 females ages 18 to 24 enrolled part time or full time in a post-secondary institution (i.e., college or university, trade school, or vocational school).

[b]Per 1,000 females ages 18 to 24 not enrolled in a post-secondary institution.

[c]Per 1,000 females ages 12 to 17 and age 25 or older.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

Rate of rape and sexual assault victimization was 1.2 times higher for nonstudents than students

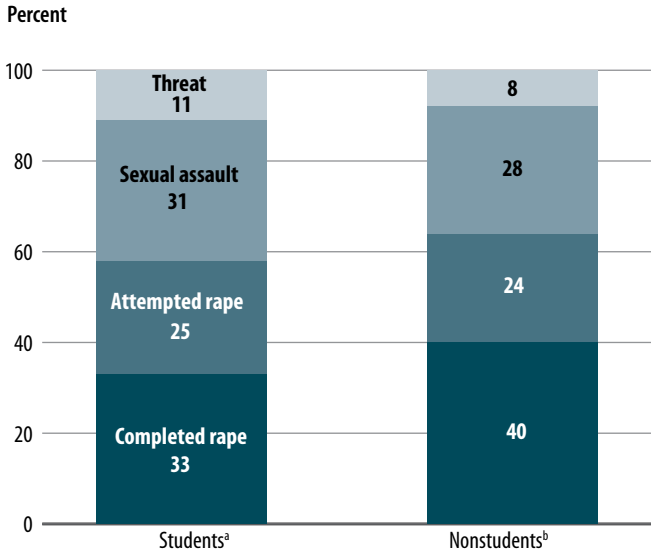
For the period 1995–2013, females ages 18 to 24 not enrolled in a post-secondary school were 1.2 times more likely to experience rape and sexual assault victimization (7.6 per 1,000), compared to students in the same age range (6.1 per 1,000) (table 1). Nonstudents (65,700) also accounted for more than double the number of rape and sexual assault victimizations as students (31,300).

The rate of completed rape for nonstudents (3.1 per 1,000) was 1.5 times higher than for students (2.0 per 1,000). However, there was no significant difference in the rates of female students and nonstudents who experienced attempted rape or other sexual assault. This suggests that differences in the rates of completed rape largely accounted for differences in the overall rates of rape and sexual assault between students and nonstudents.

Among female student victims ages 18 to 24, a third (33%) of the rape and sexual assault victimizations involved completed rape, while 2 in 5 nonstudent (40%) female victims experienced completed rape (figure 3). The majority of student (56%) and nonstudent (52%) victims experienced attempted rape or other sexual assault.

FIGURE 3

Type of rape or sexual assault experienced by female victims ages 18 to 24, by post-secondary enrollment status, 1995–2013



Note: Excludes a small number of female victims ages 18 to 24 with unknown enrollment status (less than 1%). The average annual population was 5,130,004 for students and 8,614,853 for nonstudents. See appendix table 2 for standard errors. See *Methodology* for definitions.

[a]Includes female victims ages 18 to 24 enrolled part time or full time in a post-secondary institution (i.e., college or university, trade school, or vocational school).

[b]Includes female victims ages 18 to 24 not enrolled in a post-secondary institution.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

TABLE 1

Rape or sexual assault victimization against females ages 18 to 24, by post-secondary enrollment status, 1995–2013

	Students[a]		Nonstudents[b]		Ratio of nonstudent to student rate
	Average annual number	Rate[c]	Average annual number	Rate[d]	
Total	31,302	6.1	65,668 ‡	7.6 †	1.2
Completed rape	10,237	2.0	26,369	3.1 †	1.5
Attempted rape	7,864	1.5	15,792	1.8	1.2
Sexual assault	9,714	1.9	18,260	2.1	1.1
Threat of rape or sexual assault	3,488	0.7	5,247	0.6	0.9

Note: Detail may not sum to total due to rounding. Excludes a small number of female victims ages 18 to 24 with unknown enrollment status (less than1%). The average annual population was 5,130,004 for students and 8,614,853 for nonstudents. See appendix table 2 for standard errors. See *Methodology* for definitions.

† Nonstudent estimates are significantly different from student estimates at the 95% confidence level.

‡ Nonstudent estimates are significantly different from student estimates at the 90% confidence level.

[a]Includes females ages 18 to 24 enrolled part time or full time in a post-secondary institution (college or university, trade school, or vocational school).

[b]Includes females ages 18 to 24 not enrolled in a post-secondary institution.

[c]Per 1,000 female students ages 18 to 24.

[d]Per 1,000 females ages 18 to 24 not enrolled in a post-secondary institution.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

Rates of other violence among college-age females

Across all types of violent crime, female students had a lower victimization rate than nonstudents **(table 2)**. For the period 1995–2013, the rate of violent victimization was 1.6 times higher for nonstudents (73.1 per 1,000) than students (46.3 per 1,000). For both students and nonstudents, the rate of rape and sexual assault was lower than the rate of aggravated and simple assault, but higher than the rate of robbery.

TABLE 2

Rate of violent victimization among females ages 18 to 24, by post-secondary enrollment status, 1995–2013

	Students[a]	Nonstudents[b]	Ratio of nonstudent to student rates
Violent crime	46.3	73.1 †	1.6
Serious crime	17.8	25.8 †	1.5
Rape and sexual assault	6.1	7.6 †	1.2
Robbery	3.3	5.6 †	1.7
Aggravated assault	8.3	12.5 †	1.5
Simple assault	28.5	47.3 †	1.7

Note: Excludes a small percentage of females ages 18 to 24 with unknown enrollment status (less than 1%). See appendix table 3 for standard errors.

† Nonstudent estimates are significantly different from student estimates at the 95% confidence level.

[a]Per 1,000 females ages 18 to 24 enrolled part time or full time in a post-secondary institution (i.e., college or university, trade school, or vocational school).

[b]Per 1,000 females ages 18 to 24 not enrolled in a post-secondary institution.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

Rape and sexual assault victimization among male students

For the period 1995–2013, the rate of rape and sexual assault victimization was lower for males ages 18 to 24 than for females, regardless of enrollment status **(table 3)**. College-age male victims accounted for 17% of rape and sexual assault victimizations against students and 4% against nonstudents. However, the rate of rape and sexual assault victimization for nonstudents (0.3 per 1,000) was a fifth of the rate for students (1.4 per 1,000). Due to the relatively small number of sample cases of male victims, this report focuses exclusively on females. Estimates of male rape and sexual assault victimization from the NCVS cannot be further disaggregated by victim and incident characteristics.

TABLE 3

Rape and sexual assault victimization, by sex of victim and post-secondary enrollment status, 1995–2013

	Students[a]			Nonstudents[b]			Ratio of nonstudent to student rate
Sex of victim	Average annual number	Percent of victimizations	Rate[c]	Average annual number	Percent of victimizations	Rate[c]	
Male	6,544	17%	1.4	2,866	4% †	0.3 †	0.2
Female	31,302	83	6.1	65,668	96 †	7.6 †	1.2

Note: Excludes a small percentage of victims with unknown enrollment status (less than 1%). See appendix table 4 for standard errors.

† Nonstudent estimates are significantly different from student estimates at the 95% confidence level.

[a]Includes victims ages 18 to 24 enrolled part time or full time in a post-secondary institution (i.e., college or university, trade school, or vocational school).

[b]Includes victims ages 18 to 24 not enrolled in a post-secondary institution.

[c]Per 1,000 persons ages 18 to 24.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

Female students were more likely to experience rape or sexual assault victimization away from home, while nonstudents were more likely to be at home

For both students and nonstudents, about 70% of rape and sexual assault victimizations occurred either at the victim's home or the home of another known person (table 4).[6] A greater percentage of the victimizations against students (29%) than nonstudents (17%) occurred at the home of a known person, such as a friend, relative, or acquaintance. In comparison, nonstudents (50%) experienced a greater proportion of rape and sexual assaults at their homes than students (38%). There were no significant differences between the percentages of students and nonstudents victimized in other places, including commercial areas, at school, or on public transportation.

The majority (51%) of student rape and sexual assault victimizations occurred while the victim was away from home pursuing leisure activities or traveling from place to place. Nonstudents (50%) were more likely than students (31%) to be sleeping or pursuing other activities at home when the victimization occurred. Nearly two-thirds of both student (65%) and nonstudent (64%) victims experienced the victimization at night (from 6 p.m. to 6 a.m.).

[6]In the NCVS, the victim's home is defined as the location of residence at the time of the interview.

TABLE 4

Location, victim activity, and time of day of the rape/sexual assault victimization among females ages 18 to 24, by post-secondary enrollment status, 1995–2013

	Students[a]	Nonstudents[b]
Location where crime occurred	100%	100%
At or near victim's home[c]	38	50 †
At or near home of friend/relative/ acquaintance	29	17 †
Commercial place/parking lot or garage	16	15
School[d]	4 !	2 !
Open areas/public transportation/other[e]	13	16
Activity when crime occurred	100%	100%
Traveling to or from other place/shopping or errands/leisure activity away from home	51	29 †
Sleeping/other activities at home[c]	31	50 †
Working or traveling to work	10 !	16 ‡
Attending school or traveling to school[d]	5 !	2 !‡
Other/unknown	3 !	4
Time of day	100%	100%
Daytime (6 a.m. – 6 p.m.)	33	35
Night (6 p.m. – 6 a.m.)	65	64
Unknown	3 !	1 !

Note: Detail may not sum to total due to rounding. Excludes a small percentage of female victims ages 18 to 24 with unknown enrollment status (less than 1%). See appendix 5 for standard errors.

! Interpret with caution; estimate based on 10 or fewer sample cases, or coefficient of variation is greater than 50%.

† Nonstudent estimates are significantly different from student estimates at the 95% confidence level.

‡ Nonstudent estimates are significantly different from student estimates at the 90% confidence level.

[a]Includes female victims ages 18 to 24 enrolled part time or full time in a post-secondary institution (i.e., college or university, trade school, or vocational school).

[b]Includes female victims ages 18 to 24 not enrolled in a post-secondary institution.

[c]In the NCVS, the victim's home is defined as the location of residence at the time of the interview.

[d]Includes schools at any educational level regardless of whether the victim was a student at the location.

[e]Includes locations such as an apartment yard; a park, field, or playground not on school property; a location on the street other than that immediately adjacent to home of the victim, a relative, or friend; in a station or depot for bus or train; on a plane; or in an airport.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

About 1 in 10 rape and sexual assault victimizations against college-age females involved a weapon

For the period 1995–2013, the offender had a weapon in about 1 in 10 rape and sexual assault victimizations against female students (11%) and nonstudents (12%) (table 5). There were no significant differences between students and nonstudents in the percentage of rape and sexual assault victimizations in which a weapon was present.

There was also no significant difference in the percentage of student and nonstudent victims who sustained a physical injury during the rape and sexual assault victimization. The majority of student (57%) and nonstudent (63%) victims suffered an injury (e.g, cuts, bruises, internal injuries, broken bones, gunshot wounds, or rape-related injuries) during the victimization. About 4 in 10 students (40%) and nonstudents (37%) who were injured during the victimization received medical treatment for their injuries.

More than 3 in 4 student victims of rape and sexual assault knew the offender

College-age female victims knew their offender in about 80% of rape and sexual assault victimizations, regardless of their enrollment status (table 6). Nonstudents (34%) were more likely than students (24%) to experience rape or sexual assault committed by an intimate partner (i.e., a former or current spouse, boyfriend, or girlfriend). For student victims, offenders were more likely to be friends or acquaintances (50%) than intimate partners (24%). Among nonstudent victims, there was no significant difference in the percentage of rape and sexual assault committed by friends or acquaintances (37%) or intimates (34%). About 1 in 5 rape and sexual assault victimizations among students (22%) and nonstudents (20%) were committed by a stranger.

TABLE 5

Presence of weapon and injury to victim in rape or sexual assault victimizations against females ages 18 to 24, by post-secondary enrollment status, 1995–2013

	Students[a]	Nonstudents[b]
Involving weapons	100%	100%
No weapon	82%	84%
Weapon	11 !	12
Don't know	7	4
Involving injuries	100%	100%
No injury	43%	37
Injury	57	63
Treatment for injuries[c]	100%	100%
No treatment	60	63
Any treatment	40	37

Note: Detail may not sum to total due to rounding. Excludes a small percentage of female victims ages 18 to 24 with unknown enrollment status (less than 1%). See appendix table 6 for standard errors.

! Interpret with caution; estimate based on 10 or fewer sample cases, or coefficient of variation is greater than 50%.

[a]Includes females ages 18 to 24 enrolled part time or full time in a post-secondary institution (i.e., college or university, trade school, or vocational school).

[b]Includes female victims ages 18 to 24 not enrolled in a post-secondary institution.

[c]Includes female victims ages 18 to 24 who were injured during the victimization.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

TABLE 6

Victim–offender relationship in rape or sexual assault victimizations against females ages 18 to 24, by post-secondary enrollment status of victim, 1995–2013

Victim–offender relationship	Students[a]	Nonstudents[b]
Stranger	22%	20%
Nonstranger	78%	80%
Intimate partner[c]	24	34 †
Relative	2 !	1 !
Well-known/casual acquaintance	50	37 †

Note: Detail may not sum to total due to rounding. Excludes a small percentage of victimizations in which the victim-offender relationship, number of offenders, or victim enrollment status was unknown. See appendix table 7 for standard errors.

! Interpret with caution; estimate based on 10 or fewer sample cases, or coefficient of variation is greater than 50%.

† Nonstudent estimates are significantly different from student estimates at the 95% confidence level.

[a]Includes female victims ages 18 to 24 enrolled part time or full time in a post-secondary institution (i.e., college or university, trade school, or vocational school).

[b]Includes female victims ages 18 to 24 not enrolled in a post-secondary institution.

[c]Includes former or current spouse, boyfriend, or girlfriend.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

Similar percentages of student (47%) and nonstudent (40%) victims perceived that the offender was drinking or using drugs

In the NCVS, victims of rape and sexual assault are asked to provide information about the perceived characteristics of their offenders. For the period 1995–2013, more than 90% of rape and sexual victimizations of female students (95%) and nonstudents (92%) were committed by a single offender, rather than a group of offenders (table 7). Regardless of the victim's enrollment status, more than half of female victims perceived that the offender was white. However, because the NCVS did not collect information on the Hispanic origin of the offender prior to 2012, Hispanic offenders make up an unknown portion of the white, black, and other race of offender categories. There were no significant differences between students and nonstudents in the race of the offender.

For both students and nonstudents, the vast majority of offenders were male. However, a male was the offender in a greater percentage of female student victimizations (97%) than nonstudent victimizations (91%).

There was no difference in the distribution of offender age among female student and nonstudent victims. More than half of all offenders were perceived to be between the ages of 21 and 29 in victimizations involving both students (51%) and nonstudents (53%). Student victims (25%) were less likely than nonstudent victims (36%) to believe that the offender was not under the influence of drugs or alcohol at the time of the rape or sexual assault. However, about a quarter of student (28%) and nonstudent (24%) victims did not know whether the offender was using drugs or alcohol.

TABLE 7

Perceived offender characteristics in rape and sexual assault victimizations against females ages 18 to 24, by post-secondary enrollment status of victim, 1995–2013

Offender characteristic	Students[a]	Nonstudents[b]
Number of offenders		
One	95%	92%
Two or more	5 !	5
Unknown	-- !	3 !
Age[c]		
18–20	17%	13%
21–29	51	53
30 or older	23	23
Mixed group	2 !	3
Unknown	7	7
Sex		
Male	97%	91% †
Female	1 !	3 ! †
Mixed group/unknown	2 !	5 ! †
Race[d]		
White	63%	60%
Black	19	22
Other/mixed group[e]	10	12
Unknown	8	7
Alcohol/drug use		
Yes	47%	40%
No	25	36 †
Don't know/unknown	28	24

Note: See appendix table 8 for standard errors.

--Less than 0.5%.

! Interpret with caution; estimate based on 10 or fewer sample cases, or coefficient of variation is greater than 50%.

†Nonstudent estimates are significantly different from student estimates at the 95% confidence level.

[a]Includes female victims ages 18 to 24 enrolled part time or full time in a post-secondary institution (i.e., college or university, trade school, or vocational school).

[b]Includes female victims ages 18 to 24 not enrolled in a post-secondary institution.

[c]Detail may not sum to total due to small portion of offenders age 17 or younger.

[d]Prior to 2012, victims were not asked about perceived Hispanic origin of offenders, so Hispanic offenders make up an unknown portion of the white, black, and other race of offender categories.

[e]American Indian, Alaska Native, Asian, Native Hawaiian, and other Pacific Islander, persons of two or more races, and mixed groups that may include persons of any race.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

A greater percentage of student (80%) than nonstudent (67%) rape and sexual assault victimizations were not reported to police

For the period 1995–2013, rape and sexual assault victimizations against female students (80%) were more likely to go unreported to police, compared to victimizations against nonstudents (67%) (table 8). Regardless of enrollment status, rape and sexual assault victimizations were more likely to go unreported than other types of violent crime (not shown). The NCVS does not directly collect information about whether victims reported to other officials or administrators.

The reasons for not reporting a rape or sexual assault victimization to police varied somewhat between students and nonstudents. A greater percentage of nonstudent (19%) than student (9%) victims stated that they did not report to police because the police would not or could not do anything to help. Nonstudent victims were also more likely to state that they had reported to a different official.[7] Student victims (12%) were more likely to state that the victimization was not important enough to report, compared to nonstudent victims (5%). About a quarter of student (26%) and nonstudent (23%) victims who did not report to police believed the incident was a personal matter, and 1 in 5 (20% each) stated a fear of reprisal.

No significant difference in the proportion of student and nonstudent victims who received assistance from a victim service agency

Fewer than 1 in 5 female student (16%) and nonstudent (18%) victims of rape and sexual assault received assistance from a victim services agency for the period 1995–2013 (table 9). Victim service agencies include public or privately funded organizations that provide victims with support and services to aid their recovery, offer protection, guide them through the criminal justice system process, and assist with obtaining restitution. There was no significant difference in the proportion of victims who received assistance based on enrollment status.

[7]The NCVS does not ask victims for information about the types of other officials to which they may have reported.

TABLE 8

Rape or sexual assault victimizations against females ages 18 to 24 reported and not reported to police and reasons for not reporting, by post-secondary enrollment status, 1995–2013

	Students[a]	Nonstudents[b]
Reported[c]	20%	32% †
Not reported	80%	67% †
Reason for not reporting		
Reported to different official	4% !	14% †
Personal matter	26	23
Not important enough to respondent	12	5 †
Police would not or could not do anything to help	9	19 †
Did not want to get offender in trouble with law	10	10
Advised not to report	-- !	1 !
Fear of reprisal	20	20
Other reason	31	35

Note: Detail may not sum to total due to multiple reasons for not reporting. About 0.4% of student and 0.6% of nonstudent victims did not know or did not report whether the victimization was reported to police. See appendix table 9 for standard errors.

--Less than 0.5%.

! Interpret with caution; estimate based on 10 or fewer sample cases, or coefficient of variation is greater than 50%.

†Nonstudent estimates are significantly different from student estimates at the 95% confidence level.

[a]Includes female victims ages 18 to 24 enrolled part time or full time in a post-secondary institution (i.e., college or university, trade school, or vocational school).

[b]Includes female victims ages 18 to 24 not enrolled in a post-secondary institution.

[c]Includes only reports to the police, not to other officials or administrators. The NCVS does not collect information on victim reporting to parties other than law enforcement.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

TABLE 9

Receipt of assistance from a victim service agency among female rape or sexual assault victims ages 18 to 24, by post-secondary enrollment status, 1995–2013

	Students[a]	Nonstudents[b]
Received assistance	16%	18%
Did not receive assistance	83	82

Note: Detail does not sum to total due to a small percentage of victims who did not know whether assistance was received. Excludes a small percentage of female victims ages 18 to 24 with unknown enrollment status (less than 1%). See appendix table 10 for standard errors.

[a]Includes female victims ages 18 to 24 enrolled part time or full time in a post-secondary institution (i.e., college or university, trade school, or vocational school).

[b]Includes female victims ages 18 to 24 not enrolled in a post-secondary institution.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

Among females living in rural areas, the rate of rape and sexual assault victimization was almost 2 times higher for nonstudents (8.8 per 1,000) than students (4.6 per 1,000)

For the period 1995–2013, there were no significant differences in the student and nonstudent rates of rape and sexual assault for black non-Hispanics, Hispanics, or persons of other races (table 10). However, among white non-Hispanic females, the rate of victimization was 1.4 times higher for nonstudents (9.2 per 1,000) than for students (6.7 per 1,000). Among female students, the rate of rape and sexual assault was slightly higher for whites (6.7 per 1,000) than for Hispanics (4.5 per 1,000), but did not differ significantly from the rate for blacks (6.4 per 1,000).

The rate of rape and sexual assault was 1.6 times higher for females ages 18 to 19 not enrolled in college (10.4 per 1,000) than for female students in the same age group (6.6 per 1,000). Among females ages 20 to 21, the rate of victimization was 1.5 times higher for nonstudents (8.9 per 1,000) than students (5.8 per 1,000). There was no significant difference in the rate of rape and sexual assault for students and nonstudents ages 22 to 24.

Among female college students there were no significant differences in the rate of victimization by age. However, among nonstudents, the rate of victimization was lower for females ages 22 to 24 (5.4 per 1,000) than for females ages 18 to 21.

Nonstudents in the South were slightly more likely (1.4 times) to experience rape and sexual assault, compared to female students in the South. Across other regions of the country, there were no significant differences in the student and nonstudent victimization rates.

Female students in the Midwest (8.3 per 1,000) had a higher rate of rape and sexual assault, compared to students in the Northeast (5.2 per 1,000) and South (4.7 per 1,000). Similarly, among nonstudents, females in the Midwest had a higher rate of victimization than in any other region of the country.

In rural areas, the rate of rape and sexual assault was 1.9 times higher for college-age nonstudents (8.8 per 1,000) than students (4.6 per 1,000). Nonstudents in urban areas (8.7 per 1,000) also had a slightly higher rate of victimization (1.3 times), compared to students in urban areas (6.6 per 1,000). In suburban areas, there was no significant difference in the rate of rape and sexual assault between female students (6.0 per 1,000) and nonstudents (6.3 per 1,000). Among female students, there was no significant variation in rape and sexual assault rates across urban, suburban, and rural areas. Among nonstudents, females living in suburban areas had the lowest victimization rates.

TABLE 10

Rate of rape and sexual assault against female victims ages 18 to 24, by demographic characteristics and post-secondary enrollment status, 1995–2013

Victim characteristic	Students[a]	Nonstudents[b]	Ratio of nonstudent to student rate
Age			
18–19	6.6	10.4 †	1.6
20–21	5.8	8.9 †	1.5
22–24	6.0	5.4	0.9
Race/Hispanic origin			
White[c]	6.7	9.2 †	1.4
Black[c]	6.4	6.2	1.0
Hispanic	4.5	4.5	1.0
Other[c,d]	3.7 !	5.9	1.6
Region[e]			
Northeast	5.2	4.1	0.8
Midwest	8.3	11.0	1.3
South	4.7	6.5 ‡	1.4
West	5.9	8.0	1.4
Location of residence			
Urban	6.6	8.7 ‡	1.3
Suburban	6.0	6.3	1.0
Rural	4.6	8.8 †	1.9

Note: Detail may not sum to total due to rounding. See appendix table 11 for standard errors.

! Interpret with caution; estimate based on 10 or fewer sample cases, or coefficient of variation is greater than 50%.

† Nonstudent estimates are significantly different from student estimates at the 95% confidence level.

‡ Nonstudent estimates are significantly different from student estimates at the 90% confidence level.

[a]Per 1,000 females ages 18 to 24 enrolled part time or full time in a post-secondary institution (i.e., college or university, trade school, or vocational school).

[b]Per 1,000 females ages 18 to 24 not enrolled in a post-secondary institution.

[c]Excludes persons of Hispanic or Latino origin.

[d]Includes American Indian, Alaska Native, Asian, Native Hawaiian, and other Pacific Islander, and persons of two or more races.

[e]Includes data from 1996 through 2013 because information about region was not collected prior to 1996.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

Methodology

Survey coverage

The National Crime Victimization Survey (NCVS) is an annual data collection conducted by the U.S. Census Bureau for the Bureau of Justice Statistics (BJS). The NCVS is a self-report survey in which interviewed persons are asked about the number and characteristics of victimizations experienced during the prior 6 months. The NCVS collects information on nonfatal personal crimes (rape or sexual assault, robbery, aggravated and simple assault, and personal larceny) and household property crimes (burglary, motor vehicle theft, and other theft) both reported and not reported to police. In addition to providing annual level and change estimates on criminal victimization, the NCVS is the primary source of information on the nature of criminal victimization incidents.

Survey respondents provide information about themselves (e.g., age, sex, race and Hispanic origin, marital status, education level, and income) and whether they experienced a victimization. The NCVS collects information for each victimization incident about the offender (e.g., age, sex, race and Hispanic origin, and victim–offender relationship), characteristics of the crime (including time and place of occurrence, use of weapons, nature of injury, and economic consequences), whether the crime was reported to police, reasons the crime was or was not reported, and victim experiences with the criminal justice system.

The NCVS is administered to persons age 12 or older from a nationally representative sample of households in the United States. The NCVS defines a household as a group of persons who all reside at a sampled address. Persons are considered household members when the sampled address is their usual place of residence at the time of the interview and when they have no usual place of residence elsewhere. Once selected, households remain in the sample for 3 years, and eligible persons in these households are interviewed every 6 months either in person or over the phone for a total of seven interviews.

All first interviews are conducted in person with subsequent interviews conducted either in person or by phone. New households rotate into the sample on an ongoing basis to replace outgoing households that have been in the sample for the 3-year period. The sample includes persons living in group quarters, such as dormitories, rooming houses, and religious group dwellings, and excludes persons living in military barracks and institutional settings such as correctional or hospital facilities, and persons who are homeless.

NCVS measurement of rape and sexual assault

This report focuses on rape and sexual assault victimizations, including completed, attempted, and threatened rape or sexual assault. Because of the sensitive nature of the topic, measuring the extent of these victimizations is often difficult, and best practices are still being determined. For the NCVS, survey respondents are asked to respond to a series of questions about the nature and characteristics of their victimization. The NCVS classifies victimizations as rape or sexual assault, even if other crimes, such as robbery or assault, occur at the same time. The NCVS then uses the following rape and sexual assault definitions:

- **Rape** is the unlawful penetration of a person against the will of the victim, with use or threatened use of force, or attempting such an act. Rape includes psychological coercion and physical force, and forced sexual intercourse means vaginal, anal, or oral penetration by the offender. Rape also includes incidents where penetration is from a foreign object (e.g., a bottle), victimizations against males and females, and both heterosexual and homosexual rape. Attempted rape includes verbal threats of rape.
- **Sexual assault** is defined across a wide range of victimizations separate from rape or attempted rape. These crimes include attacks or attempted attacks usually involving unwanted sexual contact between a victim and offender. Sexual assault may or may not involve force and includes grabbing or fondling.

The measurement of rape and sexual assault presents many challenges. Victims may not be willing to reveal or share their experiences with an interviewer. The level and type of sexual violence reported by victims is sensitive to how items are worded, which definitions are used, the data collection mode, and a variety of other factors related to the interview process. In addition, the legal definitions of rape and sexual assault vary across jurisdictions. The NCVS presents one approach to measuring and enumerating these incidents as well as other forms of violence and property crime.

Comparison of NCVS and National Center for Education Statistics student population statistics

This report focused on females ages 18 to 24, which account for about 32% of the total population enrolled in post-secondary institutions.[8] To assess whether the NCVS estimates of the college student population accurately reflect the actual population of students, NCVS weighted counts of enrolled students were compared to data collected through the National Center for Education Statistics' (NCES) Integrated Post-Secondary Education Data System (IPEDS).

[8]National Center for Education Statistics.

From 1997 to 2011, the years of available NCES data, the NCVS estimates of the female population of college students were significantly lower than the NCES estimates in 9 of the 15 years **(table 11)**. In the years in which the NCVS estimate differed from the IPEDS population count, the NCVS female student population was about 10% lower.

TABLE 11
Number of female students ages 18 to 24 enrolled in post-secondary institutions according to the NCVS and NCES, 1997–2011

	National Crime Victimization Survey			
Year	Estimate	Lower confidence level	Upper confidence level	Integrated Post-Secondary Education Data System
1997	4,090,000	3,687,000	4,494,000	4,409,000
1998	4,122,000	3,755,000	4,489,000	4,571,000
1999	4,498,000	4,028,000	4,967,000	4,769,000
2000	4,441,000	4,035,000	4,847,000	4,959,000
2001	4,513,000	4,028,000	4,997,000	5,186,000
2002	4,874,000	4,292,000	5,456,000	5,467,000
2003	5,074,000	4,610,000	5,538,000	5,602,000
2004	5,139,000	4,606,000	5,671,000	5,713,000
2005	5,217,000	4,680,000	5,755,000	5,683,000
2006	5,297,000	4,783,000	5,810,000	5,864,000
2007	5,611,000	5,136,000	6,087,000	5,994,000
2008	5,658,000	5,195,000	6,121,000	6,208,000
2009	5,781,000	5,320,000	6,241,000	6,580,000
2010	6,262,000	5,781,000	6,743,000	6,685,000
2011	6,222,000	5,710,000	6,735,000	6,723,000

Note: See appendix table 12 for standard errors.

Sources: Bureau of Justice Statistics, National Crime Victimization Survey, 1997–2011; and National Center for Education Statistics, Integrated Post-Secondary Education Data System, 1997–2011.

Nonresponse and weighting adjustments

In 2013, 90,630 households and 160,040 persons age 12 or older were interviewed for the NCVS. Each household was interviewed twice during the year. The response rate was 84% for households and 88% for eligible persons. Victimizations that occurred outside of the United States were excluded from this report. In 2013, less than 1% of the unweighted victimizations occurred outside of the United States and were excluded from the analyses.

Estimates in this report use data from the 1995 to 2013 NCVS data files, weighted to produce annual estimates of victimization for persons age 12 or older living in U.S. households. Because the NCVS relies on a sample rather than a census of the entire U.S. population, weights are designed to inflate sample point estimates to known population totals and to compensate for survey nonresponse and other aspects of the sample design.

The NCVS data files include both person and household weights. Person weights provide an estimate of the population represented by each person in the sample. Household weights provide an estimate of the U.S. household population represented by each household in the sample. After proper adjustment, both household and person weights are also typically used to form the denominator in calculations of crime rates.

Victimization weights used in this analysis account for the number of persons present during an incident and for high-frequency repeat victimizations (i.e., series victimizations). Series victimizations are similar in type but occur with such frequency that a victim is unable to recall each individual event or describe each event in detail. Survey procedures allow NCVS interviewers to identify and classify these similar victimizations as series victimizations and to collect detailed information on only the most recent incident in the series.

The weight counts series incidents as the actual number of incidents reported by the victim, up to a maximum of 10 incidents. Including series victimizations in national rates results in large increases in the level of violent victimization; however, trends in violence are generally similar, regardless of whether series victimizations are included. In 2013, series incidents accounted for about 1% of all victimizations and 4% of all violent victimizations. Weighting series incidents as the number of incidents up to a maximum of 10 incidents produces more reliable estimates of crime levels, while the cap at 10 minimizes the effect of extreme outliers on rates. Additional information on the series enumeration is detailed in the report *Methods for Counting High-Frequency Repeat Victimizations in the National Crime Victimization Survey* (NCJ 237308, BJS web, April 2012).

Standard error computations

When national estimates are derived from a sample, as with the NCVS, it is important to use caution when comparing one estimate to another estimate or when comparing estimates over time. Although one estimate may be larger than another, estimates based on a sample have some degree of sampling error. The sampling error of an estimate depends on several factors, including the amount of variation in the responses and the size of the sample. When the sampling error around an estimate is taken into account, the estimates that appear different may not be statistically different.

One measure of the sampling error associated with an estimate is the standard error. The standard error can vary from one estimate to the next. Generally, an estimate with a small standard error provides a more reliable approximation of the true value than an estimate with a large standard error. Estimates with relatively large standard errors are associated with less precision and reliability and should be interpreted with caution.

To generate standard errors around numbers and estimates from the NCVS, the Census Bureau produced generalized variance function (GVF) parameters for BJS. The GVFs take into account aspects of the NCVS complex sample design and represent the curve fitted to a selection of individual standard errors based on the Jackknife Repeated Replication technique. The GVF parameters were used to generate standard errors for each point estimate (e.g., counts, percentages, and rates) in this report.

BJS conducted tests to determine whether differences in estimated numbers, percentages, and rates in this report were statistically significant once the sampling error was taken into account. Using statistical programs developed specifically for the NCVS, all comparisons in the text were tested for significance. The primary test procedure was the Student's t-statistic, which tests the difference between two sample estimates. Differences described as higher, lower, or different passed a test at the 0.05 level of statistical significance (95% confidence level). Differences described as somewhat, slightly, or marginally different, or with some indication of difference, passed a test at the 0.10 level of statistical significance (90% confidence level). Caution must be taken when comparing estimates not explicitly discussed in this report.

Data users can use the estimates and the standard errors of the estimates provided in this report to generate a confidence interval around the estimate as a measure of the margin of error. The following example illustrates how standard errors can be used to generate confidence intervals:

> According to the NCVS, for the period 1995–2013, the rate of rape and sexual assault for female students ages 18 to 24 was 6.1 per 1,000 persons (see table 1). Using the GVFs, it was determined that the estimated victimization rate has a standard error of 0.56 (see appendix table 2). A confidence interval around the estimate was generated by multiplying the standard errors by ±1.96 (the t-score of a normal, two-tailed distribution that excludes 2.5% at either end of the distribution). Therefore, the 95% confidence interval around the 6.1 estimate is 6.1 ± (0.56 X 1.96) or (5.0 to 7.2). In others words, if different samples using the same procedures were taken from the U.S. female student population, 95% of the time the rape and sexual assault rate would fall between 5.0 and 7.2 per 1,000 persons.

In this report, BJS also calculated a coefficient of variation (CV) for all estimates, representing the ratio of the standard error to the estimate. CVs provide a measure of reliability and a means to compare the precision of estimates across measures with differing levels or metrics. In cases in which the CV was greater than 50%, or the unweighted sample had 10 or fewer cases, the estimate was noted with a "!" symbol. (Interpret data with caution. Estimate based on 10 or fewer sample cases, or the coefficient of variation is greater than 50%.)

Methodological changes to the NCVS in 2006

Methodological changes implemented in 2006 may have affected the crime estimates for that year to such an extent that they are not comparable to estimates from other years. Evaluation of 2007 and later data from the NCVS conducted by BJS and the Census Bureau found a high degree of confidence that estimates for 2007 through 2013 are consistent with and comparable to estimates for 2005 and previous years. The reports, *Criminal Victimization, 2006*, NCJ 219413, December 2007; *Criminal Victimization, 2007*, NCJ 224390, December 2008; *Criminal Victimization, 2008*, NCJ 227777, September 2009; *Criminal Victimization, 2009*, NCJ 231327, October 2010; *Criminal Victimization, 2010*, NCJ 235508, September 2011; *Criminal Victimization, 2011*, NCJ 239437, October 2012; *Criminal Victimization, 2012*, NCJ 243389, October 2013; and *Criminal Victimization, 2013*, NCJ 247648, September 2014, are available on the BJS website.

Appendix 1

Differences between the NCVS and other surveys measuring rape and sexual assault in a college-age population

The NCVS is one of several surveys used to study rape and sexual assault in the college-age population. In addition to the NCVS, two recent survey efforts used in research on rape and sexual assault of college students are the National Intimate Partner and Sexual Violence Survey (NISVS) and the Campus Sexual Assault Study (CSA). Each of these surveys has a different purpose and methodological approach than the NCVS. Depending on which of the three data sources are used, researchers will generate different estimates of the prevalence and frequency of rape and sexual assault victimization. Some of these differences include—

- **Survey context and scope.** In a 2014 report on the measurement of rape and sexual assault in the NCVS and other federal surveys, the National Research Council (NRC) of the National Academies of Sciences described survey context as "a major contributor of differences in the estimates of rape and sexual assault" across different data collections.[9] Survey context refers to how the survey is described to respondents through notification letters, survey questions, or the interviewer. The NCVS is an omnibus survey designed to collect information on experiences with a broad range of crimes. It is likewise presented to respondents as a survey about criminal victimization. Because victims of rape or sexual assault may not consider their victimization a crime, this context could discourage or suppress recall and reporting of those incidents.[10] Additionally, because the NCVS covers a wide range of criminal victimization, the number of screening questions related to rape and sexual assault are limited. In comparison, the NISVS focused on sexual violence, stalking, and intimate partner violence and was presented as a survey collecting data on a range of behaviors that impact public health. This public health perspective may encourage respondents to recall and report on experiences that they may not typically think of as criminal victimization. It also may result in the collection of incidents that may not be considered criminal behavior. Similarly, the CSA study focused specifically on rape and sexual assault, also from a public health and safety perspective.
- **Definitions of rape and sexual assault.** The NCVS, NISVS, and CSA define rape and sexual assault slightly differently. The NCVS definition is shaped from a criminal justice perspective and includes threatened, attempted, and completed rape and sexual assault against males and females (see *Methodology*). Penetration due to coercion is included in the definition of rape, but the survey does not specifically ask about incidents in which the victim was unable to provide consent because of drug or alcohol consumption. Because the NISVS is focused on rape and sexual assault from a public health perspective, the scope of sexual violence included in NISVS is broader than the definitions used in the NCVS. In NISVS, sexual violence includes threatened, attempted, or completed rape, including incidents in which the victim was unable to provide consent due to drug or alcohol use; forced penetration of another person; sexual coercion, which includes nonphysical pressure to engage in sex; unwanted sexual contact, including forcible kissing, fondling, or grabbing; and noncontact unwanted sexual experiences, which do not involve physical contact.[11] The CSA definition of rape and sexual assault included unwanted sexual contact due to force and due to incapacitation, but excluded unwanted sexual contact due to verbal or emotional coercion.[12]

[9]National Research Council. (2014). *Estimating the incidence of rape and sexual assault,* p. 96.

[10]Krebs, C.P., Lindquist, C.H., Warner, T.D., Fisher, B.S., & Martin, S.L. (2007). The Campus Sexual Assault (CSA) study. Retrieved from https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf, p. 15.

[11]National Research Council. (2014). *Estimating the incidence of rape and sexual assault,* p. 86.

[12]Krebs, C.P., Lindquist, C.H., Warner, T.D., Fisher, B.S., & Martin, S.L. (2007). The Campus Sexual Assault (CSA) study. Retrieved from https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf, p. 1–3.

TABLE 12
Summary of major methodological differences among the NCVS, NISVS, and CSA

	NCVS (2013)	NISVS (2011)	CSA (2007)
Purpose	To gather information on victims of crime both reported and not reported to police in the United States	To gather information related to the public health consequences of intimate partner violence; sexual violence; and related behaviors, such as stalking	To gather data on the prevalence and consequences of rape and sexual assault against college students
Population surveyed	Representative sample of persons age 12 or older residing in households in the United States	Representative sample of adults in the United States	Stratified random sample of students at two large public universities
Survey scope	A range of violent and property crimes	Sexual violence, stalking, and intimate partner violence	Rape and sexual assault
Data collection mode	In-person and telephone interviews	Random digit dialing	Self-administered, web-based
Response rate	88% person; 74% combined	33%	33% to 43% for males and females at each of the two schools
Bounded estimates to control for telescoping	Yes	No	No

- **Longitudinal versus cross-sectional design.** Both the CSA and NISVS were cross-section data collections administered to the sample a single point in time that asked about events that occurred during a specified reference period. The NCVS is a longitudinal survey administered seven times to the same sampled household, with questions asked about events occurring since the last interview. Longitudinal surveys like the NCVS have the advantage of bounding the reference period and ensuring that events occurring outside of that reference period are not included in estimates. Since research has suggested that traumatic events, such as rape and sexual assault, may be particularly prone to telescoping (i.e., the reporting of events occurring outside of a reference period as though they occurred within the specified period), unbounded surveys may have artificially high incident rates due to events occurring outside of the reference period being telescoped in.
- **Question wording.** The language and ordering of questions in a survey may affect whether a respondent indicated that an incident occurred. The three surveys used different approaches to asking about experiences with rape and sexual assault. The NCVS used a two-phased approach to identifying incidents of rape and sexual assault. Initially, a screener was administered, with cues designed to trigger the respondent's recollection of event and ascertain whether the respondent experienced victimization during the reference period. The screener questions directly focused on rape and sexual assault were—
  - (Other than any incidents already mentioned), has anyone attacked or threatened you in any of these ways:… (e) any rape, attempted rape, or other type of sexual attack;
  - Incidents involving forced or unwanted sexual acts are often difficult to talk about. (Other than any incidents already mentioned), have you been forced or coerced to engage in unwanted sexual activity by (a) someone you didn't know before, (b) a casual acquaintance? OR (c) someone you know well?

Even if the respondent did not respond affirmatively to these specific screeners on rape and unwanted sexual contact, the respondent could still be classified as a rape or sexual assault victim if a rape or unwanted sexual contact was reported during the stage-two incident report.

Unlike the NCVS which used terms like rape and unwanted sexual activity to identify victims of rape and sexual assault, the NISVS and CSA used behaviorally specific questions to ascertain whether the respondent experienced rape or sexual assault. For example, one question on the NISVS survey read:

- When you were drunk, high, drugged, or passed out and unable to consent, how many people ever…
  - had vaginal sex with you? By vaginal sex, we mean that {if female: a man or boy put his penis in your vagina} {if male: a women or girl made you put your penis in her vagina}.
  - {if male} made you perform anal sex, meaning that they made you put your penis into their anus? made you receive anal sex, meaning they put their penis into your anus?
  - made you perform oral sex, meaning that they put their penis in your mouth or made you penetrate their vagina or anus with your mouth?
  - made you receive oral sex, meaning that they put their mouth on your {if male: penis} {if female: vagina} or anus?[13]

Questions on the CSA used similar behaviorally specific cues to identify victims of rape and sexual assault.

- **Survey mode.** The NCVS, NISVS, and CSA used different modes of administration. The CSA study was a self-administered web survey sent via email to students at the participating colleges. Self-administered surveys are not subject to interviewer effects, but may result in lower response rates or confusion over question wording that could otherwise be clarified by an interviewer. The NISVS was a random digit dialing telephone survey. Telephone surveys exclude respondents without a phone, may be subject to sampling bias because of multiple phones associated with particular households or individuals, and may be subject to nonresponse bias due to low response rates.[14] The NCVS used a multimode design that begins with an initial in-person interview, followed by telephone follow-ups every 6 months for the 3.5 years the household is in the sample. While respondents can develop rapport with the interviewer and familiarity with the survey questions, the NCVS may be more subject to interviewer effects than the CSA or NISVS.
- **Population surveyed.** The NCVS and NISVS were administered to a national sample of noninstitutionalized persons, meaning that findings are generalizable to the noninstitutionalized U.S. population of persons ages 18 to 24 with some exceptions. The NCVS uses a household-based sample, so persons who are homeless are excluded from the scope. The NISVS was administered using random digit dialing, which excludes persons without a telephone. In comparison, the CSA was administered to a stratified random sample of students at two large public universities.[15] Because of the limited population included

[13]National Research Council. (2014). *Estimating the incidence of rape and sexual assault*, p. 89.

[14]National Research Council. (2014). *Estimating the incidence of rape and sexual assault*, p. 102.

[15]Krebs, C.P., Lindquist, C.H., Warner, T.D., Fisher, B.S., & Martin, S.L. (2007). The Campus Sexual Assault (CSA) study. Retrieved from https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf, p. 3–11.

in the CSA, it should not be assumed that findings from the survey are representative of the population of persons ages 18 to 24 or even to college students specifically.

- **Survey response rates and bias.** Surveys with low response rates have an increased potential for nonresponse bias compared to surveys with higher response rates.[16] Nonresponse bias means that those who participated in the survey may differ in important ways from those who did not participate, which could in turn impact the survey findings. In 2013, the NCVS had an 88% response rate for eligible persons and a combined persons and household response rate of 74%, while the 2011 NISVS had an overall response rate of 33.1%, and the CSA response rate was between 33% and 43% for males and females at the two schools.[17,18]

Measuring rape and sexual assault victimization is an evolving field. BJS is currently engaged in a variety of projects exploring ways to improve the measurement of rape and sexual assault through the NCVS and related surveys.

[16]National Research Council. (2014). *Estimating the incidence of rape and sexual assault*, p. 127.

[17]Breiding, M.J., Smith, S.G., Basile, K.C., Walters, M.L., Chen, J., & Merrick, M.T. (2014). Prevalence and characteristics of sexual violence, stalking, and intimate partner violence victimization — National Intimate Partner and Sexual Violence Survey, United States, 2011. *Morbidity and Mortality Weekly Report, Surveillance Summaries*, 63(8). Retrieved from http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm?s_cid=ss6308a1_e.

[18]Krebs, C.P., Lindquist, C.H., Warner, T.D., Fisher, B.S., & Martin, S.L. (2007). The Campus Sexual Assault (CSA) study. Retrieved from https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf, p. 3-3.

APPENDIX TABLE 1

Estimates and standard errors for figure 2: Rate of rape or sexual assault for females, by age and post-secondary enrollment status, 1997–2013

	Estimates			Standard errors		
	Students ages 18–24[a]	Nonstudents ages 18–24[b]	Non-college-age females[c]	Students ages 18–24[a]	Nonstudents ages 18–24[b]	Non-college-age females[c]
1997	9.2	7.9	3.6	2.9	2.0	0.5
1998	7.8	8.9	3.1	2.9	2.3	0.5
1999	6.0	11.2	3.5	2.1	2.3	0.4
2000	7.1	12.2	2.8	2.3	2.5	0.4
2001	8.8	11.2	3.0	2.7	2.3	0.4
2002	8.9	10.0	2.2	2.7	2.2	0.3
2003	7.6	8.8	2.2	2.4	2.1	0.3
2004	6.5	7.0	1.8	2.4	2.0	0.3
2005	4.7	5.6	1.6	1.9	1.6	0.3
2006	5.4	5.5	1.7	2.1	1.7	0.3
2007	5.5	5.4	1.7	1.8	1.5	0.3
2008	5.2	6.7	1.9	2.1	2.0	0.3
2009	3.7	8.3	1.6	1.5	2.1	0.3
2010	4.1 !	8.4	1.6	1.8	2.3	0.3
2011	4.6	7.1	1.4	1.7	1.9	0.3
2012	5.9	4.1	1.3	2.0	1.4	0.3
2013	4.4	4.3	1.4	1.4	1.2	0.2

Note: Estimates based on 3-year rolling averages centered on the most recent year.

! Interpret with caution; estimate based on 10 or fewer sample cases, or coefficient of variation is greater than 50%.

[a]Includes female victims ages 18 to 24 enrolled part time or full time in a post-secondary institution (i.e., college or university, trade school, or vocational school).

[b]Includes female victims ages 18 to 24 not enrolled in a post-secondary institution.

[c]Includes females ages 12 to 17 and age 25 or older.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

APPENDIX TABLE 2

Standard errors for table 1 and figure 3: Rape or sexual assault victimization against females ages 18 to 24, by type of victimization and post-secondary enrollment status, 1995–2013

	Students		Nonstudents	
	Average annual number	Rate	Average annual number	Rate
Total	10,416	0.6	15,603	0.5
Completed rape	5,755	0.3	9,499	0.3
Attempted rape	5,014	0.3	7,230	0.2
Sexual assault	5,599	0.3	7,808	0.2
Threat of rape or sexual assault	3,292	0.2	4,064	0.1

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

APPENDIX TABLE 3

Standard errors for table 2: Rate of violent victimization among females ages 18 to 24, by type of violence and post-secondary enrollment status, 1995–2013

	Students	Nonstudents
Violent crime	2.5	2.8
Serious violence	1.0	1.1
Rape and sexual assault	0.6	0.5
Robbery	0.5	0.5
Aggravated assault	0.6	0.7
Simple assault	1.8	2.0

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

APPENDIX TABLE 4

Standard errors for table 3: Rape and sexual assault victimization, by sex of victim and post-secondary enrollment status, 1995–2013

	Students			Nonstudents		
	Average annual number	Percent of victimizations	Rate	Average annual number	Percent of victimizations	Rate
Male	4,557	2.7%	0.3	2,976	1.0%	0.1
Female	10,416	2.9	2.9	15,603	1.2	0.5

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

APPENDIX TABLE 5

Standard errors for table 4: Location, victim activity, and time of day of the rape/sexual assault victimization among females ages 18 to 24, by post-secondary enrollment status, 1995–2013

	Students	Nonstudents
Location where crime occurred		
At or near victim's home	3.9%	3.0%
At or near home of friend/relative/acquaintance	3.6	2.1
Commercial place/parking lot or garage	2.8	2.0
School	1.5 !	0.7 !
Open areas/public transportation/other	2.6	2.0
Activity when crime occurred		
Traveling to or from other place/shopping or errands/leisure activity away from home	4.1%	2.6%
Sleeping/other activities at home	3.7	2.9
Working or traveling to work	2.2 !	2.0
Attending school or traveling to school	1.7 !	0.8 !
Other/unknown	1.3 !	1.0
Time of day		
Daytime (6 a.m. – 6 p.m.)	3.7%	2.8%
Night (6 a.m. – 6 p.m.)	3.9	2.9
Unknown	1.2 !	0.6 !

! Interpret with caution; estimate based on 10 or fewer sample cases, or coefficient of variation is greater than 50%.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

APPENDIX TABLE 6

Standard errors for table 5: Presence of weapon and injury to victim in rape or sexual assault victimizations against females ages 18 to 24, by enrollment status, 1995–2013

	Students	Nonstudents
Involving weapons		
No weapon	3.2%	2.2%
Weapon	2.4 !	1.8
Don't know	2.0	1.1
Involving injuries		
No injury	4.0%	2.9%
Injury	4.0	2.8
Treatment for injuries		
No treatment	4.0%	2.9%
Any treatment	3.9	2.8

! Interpret with caution; estimate based on 10 or fewer sample cases, or coefficient of variation is greater than 50%.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

APPENDIX TABLE 7

Standard errors for table 6: Victim–offender relationship in rape or sexual assault victimizations against females ages 18 to 24, by post-secondary enrollment status of victim, 1995–2013

Victim–offender relationship	Students	Nonstudents
Stranger	3.2%	2.3%
Nonstranger	3.4%	2.4%
Intimate partner	3.4	2.7
Relative	0.9 !	0.5 !
Well-known/casual acquaintance	4.1	2.8

! Interpret with caution; estimate based on 10 or fewer sample cases, or coefficient of variation is greater than 50%.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

APPENDIX TABLE 8

Standard errors for table 7: Perceived offender characteristics in rape and sexual assault victimizations against females ages 18 to 24, by post-secondary enrollment status, 1995–2013

	Students	Nonstudents
Number of offenders		
One	1.9%	1.7%
Two or more	1.6 !	1.1
Unknown	~	1.0 !
Age		
18–20	2.9%	1.9%
21–29	4.1	3.0
30 or older	3.3	2.4
Other mixed group	1.0 !	0.8
Unknown	1.9	1.3
Sex		
Male	1.4%	1.7%
Female	0.6 !	0.9 !
Mixed group/unknown	0.9 !	1.2 !
Race		
White	3.9%	2.9%
Black	3.1	2.4
Other/mixed group	2.3	1.8
Unknown	2.0	1.3
Alcohol/drug use		
Yes	4.0%	2.9%
No	3.4	2.8
Don't know/unknown	3.6	2.4

~Not applicable.

! Interpret with caution; estimate based on 10 or fewer sample cases, or coefficient of variation is greater than 50%.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013

APPENDIX TABLE 9

Standard errors for figure 1 and 8: Rape or sexual assault victimizations against females ages 18 to 24 reported and not reported to police and reasons for not reporting, by post-secondary enrollment status, 1995–2013

	Students	Nonstudents
Reported	3.1%	3.7%
Not reported	2.4%	2.8%
Reason for not reporting		
Reported to different official	1.5 !	2.3
Personal matter	3.8	2.9
Not important enough to respondent	2.7	1.4
Police would or could not do anything to help	2.4	2.6
Did not want to get offender in trouble with law	2.6	1.9
Advised not to report	~ !	0.6 !
Fear of reprisal	3.5	2.7
Other reason	4.1	3.3

~Not applicable.

! Interpret with caution; estimate based on 10 or fewer sample cases, or coefficient of variation is greater than 50%.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

APPENDIX TABLE 10

Standard errors for table 9: Receipt of assistance from a victim service agency among female rape or sexual assault victims ages 18 to 24, by post-secondary enrollment status, 1995–2013

	Students	Nonstudents
Received assistance	2.8%	2.2%
Did not receive assistance	3.1	2.3

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

APPENDIX TABLE 11

Standard errors for table 10: Rate of rape and sexual assault against female victims ages 18 to 24, by demographic characteristics and post-secondary enrollment status, 1995–2013

	Students	Nonstudents
Age		
18–19	1.0	1.0
20–21	0.8	1.0
22–24	0.9	0.6
Race/Hispanic origin		
White	0.7	0.7
Black	1.4	1.0
Hispanic	1.1	0.7
Other	1.2	1.6
Region		
Northeast	1.1	0.8
Midwest	1.2	1.2
South	0.8	0.7
West	1.0	1.0
Location of residence		
Urban	0.8	0.8
Suburban	0.8	0.6
Rural	1.2	1.1

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1995–2013.

APPENDIX TABLE 12

Standard errors for table 11: Number of female students ages 18 to 24 enrolled in post-secondary institutions according to the NCVS and NCES, 1997–2011

Year	National Crime Victimization Survey
1997	204,417
1998	185,721
1999	237,939
2000	205,519
2001	245,489
2002	294,786
2003	235,086
2004	269,608
2005	272,300
2006	260,057
2007	240,618
2008	234,551
2009	233,346
2010	243,656
2011	259,479

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1997–2011.

The Bureau of Justice Statistics of the U.S. Department of Justice is the principal federal agency responsible for measuring crime, criminal victimization, criminal offenders, victims of crime, correlates of crime, and the operation of criminal and civil justice systems at the federal, state, tribal, and local levels. BJS collects, analyzes, and disseminates reliable and valid statistics on crime and justice systems in the United States, supports improvements to state and local criminal justice information systems, and participates with national and international organizations to develop and recommend national standards for justice statistics. William J. Sabol is acting director.

This report was written by Sofi Sinozich, BJS intern, and Lynn Langton, Ph.D. Jennifer L. Truman verified the report.

Jill Thomas and Lynne McConnell edited the report. Barbara Quinn produced the report.

December 2014, NCJ 248471

Office of Justice Programs
Innovation • Partnerships • Safer Neighborhoods
www.ojp.usdoj.gov

17-3594-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOHN DOE,

Plaintiff-Appellant,

v.

COLGATE UNIVERSITY,

Defendant-Appellee,

and

COLGATE UNIVERSITY BOARD OF TRUSTEES, JEFFREY HERBST, individually and as agent for Colgate University, SUZY M. NELSON, individually and as agent for Colgate University, KIMBERLY TAYLOR, individually and as agent for Colgate University, MARILYN RUGG, individually and as agent for Colgate University, VALERIE BROGAN, individually and as agent for Colgate University, TAMALA FLACK, individually and as agent for Colgate University,

Defendants.

On Appeal from the United States District Court
for the Northern District of New York (Syracuse)

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT

NESENOFF & MILTENBERG, LLP
Attorneys for Plaintiff-Appellant
363 Seventh Avenue, 5th Floor
New York, New York 10001
212-736-4500

RULE 26.1 DISCLOSURE STATEMENT

Plaintiff-Appellant John Doe is an individual to whom Rule 26.1 of the Federal Rules of Appellate Procedure does not apply.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitution, Statutes and Rules

Other Authorities

Schow, "No, 1 in 5 Women Have Not Been Raped on College Campuses," *Washington Examiner*, August 13, 2014, http://www.washingtonexaminer.com/no-1-5-women-have-not-been-raped-on-college-campuses/articles/2551980….....8-9

United Educators, "Confronting Campus Sexual Assault: An Examination of Higher Education Claims," https://web.archive.org/web/20170128225139/https://www.ue.org.uploadedFiles/ Confronting%20Campus%20Sexual%20Assault.pdf……...…27

PRELIMINARY STATEMENT

Plaintiff-Appellant John Doe ("Plaintiff"), a distinguished male senior at Defendant-Appellee Colgate University ("Colgate") thirty-nine days away from graduation when he was expelled based on alleged sexual misconduct when he was a freshman, brings this appeal to reverse the Opinion and Order of the District Court (SPA 1-59) and associated Judgment (SPA 60) that granted Colgate's motions for summary judgment dismissing the Complaint and to preclude Plaintiff's expert testimony.

STATEMENT OF APPELLATE JURISCTION

The appeal is from an Opinion and Order of the District Court and Judgment granting summary judgment dismissing the Complaint and is an appeal as of right to this Court pursuant to 28 U.S.C. § 1291 and Rule 4(a) of the Federal Rules of Appellate Procedure.

ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in granting Colgate's motion for summary judgment against Plaintiff's Title IX claim?

2. Did the District Court err in granting Colgate's motion to preclude Plaintiff's expert testimony on gender bias?

3. Did the District Court err in granting Colgate's motion for summary judgment against Plaintiff's state law breach of contract claims?

STATEMENT OF THE CASE

The District Court, in granting summary judgment and excluding the Gruber expert testimony on gender bias, provides a one-sided and incomplete statement of facts. (SPA 2-12.) A more complete statement points to reversal.

A. Parties.

Plaintiff was a male student for nearly four years at Colgate. He maintained a 3.28 G.P.A. until his expulsion thirty-nine days short of graduation. Colgate is a private university in Hamilton, New York. (CA 564; A 283.)

Missing from the District Court opinion is anything about Plaintiff. He had an unblemished disciplinary record at Colgate until accusations were made in his senior year about alleged incidents in his freshman year. Plaintiff had, since high school aspired to be a doctor; he thought he would get into medical school given his overall record. At Colgate, Plaintiff was the sports medicine assistant for the football team all four years, a member of the Beta Beta Biological Honor Society and active in campus activities. (CA 561, 562, 564-567.) After expulsion, despite career hopes being dashed, Plaintiff became a paramedic and instructor of paramedics. (CA 559.)

B. Plaintiff's Freshman 2011-2012 Year: Plaintiff's Version of Three Alleged Incidents.

Jane Does 1, 2 and 3 filed complaints during their and Plaintiff's senior 2014-2015 year involving separate incidents that allegedly occurred during complainants' and Plaintiff's freshman 2011-2012 year. The District Court's opinion omits

Plaintiff's account of the incidents submitted by Plaintiff in written statements during the investigation:

1. <u>Fall 2011 (Alleged Incident 1).</u>

In the Fall 2011, Plaintiff joined other friends from Curtis Hall, his dormitory, to go to a party. One of the friends was fellow freshman Jane Doe 1. At the party, Jane Doe 1 was ill and became intoxicated, so the group of friends decided she should go back to her dorm room. They chose Plaintiff, the "fairly sober" person among the group, to walk Jane Doe 1 back to her dorm room. (CA 140.)

During the walk back to Curtis Hall, passing Taylor Lake, Jane Doe 1 acted "goofy" and "kept trying to run into the lake." Plaintiff stopped her, but Jane Doe 1 caught him off guard at one point and got her foot in the water. During the walk home, Plaintiff gave Jane Doe 1 his sweatshirt when she indicated she was cold. Once they arrived at Jane Doe 1's dorm room, Plaintiff made sure that Jane Doe 1 took her shoes off because they were soaked. (CA 140.)

"All of a sudden," Jane Doe 1 began undressing, presumably to get ready for bed. Plaintiff did not leave at that time because Jane Doe 1 was still talking to him and he wanted to ensure that she made it safely to bed. Jane Doe 1 thanked Plaintiff for making sure that she got home safely. Jane Doe 1 undressed herself down to her underwear and then hugged Plaintiff. Although this confused Plaintiff because nothing similar had happened during the course of their friendship, Plaintiff hugged

her back and started touching her. Jane Doe did not object or otherwise express that she wanted him to stop, but Plaintiff realized that he should stop, and returned to his own dorm room. Plaintiff and Jane Doe 1 never spoke of the evening thereafter, and they continued to be good friends and spent time with the same group of people throughout their freshman year. (CA 140.)

2. Valentine's Weekend 2012 (Alleged Incident 2).

On an evening during Valentine's Weekend in February 2012, Plaintiff attended a fraternity party and became the most inebriated he ever has been in his life from beer and marijuana, which led to vomiting and stumbling. Plaintiff's memory of the evening is limited. (CA 141.)

Plaintiff's first recollection of the evening is walking back towards his dorm, with one of his arms around Jane Doe 1 and the other arm around Jane Doe 2. Because they were all friends, Plaintiff recalls thinking that Jane Doe 1 and Jane Doe 2 must have found him and decided to help him back to his dorm room. (CA 141.)

Plaintiff's next memory is of being in a dorm room, kissing Jane Doe 2. Being passed around the room was marijuana that he does not recall smoking. (CA 141.)

Plaintiff's next memory is of being in Jane Doe 1's room. He believes Jane Doe 1 and Jane Doe 2 brought him there, but he does not know why they took him there instead of his own room. Plaintiff vaguely recalls that Jane Doe 1 was wearing a shirt and no bra, and Jane Doe 2 was wearing a bra and no shirt. (CA 141-142.)

Plaintiff's next recollection is of being on Jane Doe 1's bed, with Jane Doe 2 on top of him, shirtless and kissing him. Jane Doe 1 was no longer in the room; he later learned that she had gone downstairs with his friends. (CA 142.) Plaintiff believes he fell asleep, and in his next snapshot of the evening, he was awakened by Jane Doe 2 opening the door to leave and the light from the hallway shining in his face. Jane Doe 2 said something to the effect of "I'm going to bed," and Plaintiff fell back asleep. (CA 142.)

Plaintiff woke up at 8:00 a.m., alone in Jane Doe 1's room. He went downstairs to his room, texting Jane Doe 2 on the way, saying "Hey, I don't remember much of last night, but I know I was with you, so I am sorry if I made a fool of myself and I hope we are okay." She later responded, "Don't worry, we're fine!" (CA 142.)

Plaintiff then ran into his best friend, S.M., who asked if Plaintiff recalled the prior evening. Plaintiff responded that he got drunk and ended up kissing Jane Doe 2. Plaintiff further indicated that he was not happy because he had a crush on Jane Doe 2's ex-roommate M.E. and had asked M.E. to a Formal set to take place two days later. S.M. told Plaintiff that the people on his floor were upset because he and Jane Doe 2 had kicked Jane Doe 1 and her roommate M.W. out of their room. Plaintiff was embarrassed when he found out that his date for the upcoming Formal

had walked in on him and Jane Doe 2 kissing and upset when M.E. told him to find a new date to the Formal. (CA 142.)

Plaintiff and Jane Doe 2 remained friendly, despite some awkwardness. They were in the same class their junior year and were friendly in small group discussions. (CA 143.)

3. <u>Spring 2012: Jane Doe 3's Birthday (Alleged Incident 3).</u>

During the spring semester of Plaintiff's freshman year, Plaintiff attended a party at an interest house on Broad Street with his friends. It was Jane Doe 3's birthday, and the group of friends all became intoxicated. (CA 144.)

As the party was winding down, Plaintiff's best friend texted him that Jane Doe 3 said she wanted to go home with Plaintiff. Right after receiving the text, Jane Doe 3 came over to Plaintiff and started flirting, asking if he was walking back up the hill. When he responded that he was, the two decided to walk back to their dorms together. (CA 144.) As Plaintiff and Jane Doe 3 walked up the hill, they stopped multiple times to kiss. They agreed they wanted to take things further, however both their roommates had stayed in that night, so they had nowhere private to go. (CA 144.)

Plaintiff thought they might be able to find some privacy at the Science Center, so they began to walk in that direction. When they were unable to gain access to the building, Plaintiff and Jane Doe 3 sat down on a bench nearby and

continued to kiss. Jane Doe 3 actively engaged in kissing Plaintiff for fifteen to twenty minutes. (CA 144.)

As they kissed, Plaintiff and Jane Doe 3 simultaneously touched each other over their clothing. At one point, Plaintiff began to move his hand up the bottom of Jane Doe 3's shirt and Jane Doe 3 stopped him; she expressed that she wanted to take things further with Plaintiff but was uncomfortable engaging in sexual activity outside. When Plaintiff discussed with Jane Doe 3 continuing, Jane Doe 3 became upset and decided she did not want to proceed. As soon as Jane Doe 3 indicated that she did not want to continue, the two began walking back to the dorms together. (CA 144.) When they arrived at the dorms, Jane Doe 3 said good night to Plaintiff in a manner that indicated she was angry. During his walk home, Plaintiff texted Jane Doe 3 an apology. (CA 144.)

Plaintiff and Jane Doe 3 subsequently met to discuss the evening. Plaintiff apologized; Jane Doe 3 said she forgave him. They remained friendly thereafter; Plaintiff spoke with Jane Doe 3 and her parents after she had shoulder surgery the following summer. (CA 144-145.)

C. Plaintiff's Senior 2014-2015 Year: Sexual Climate Forum and Filing of Jane Does 1-3 Anonymous Complaints.

When Plaintiff and Jane Does 1, 2 and 3 were seniors at Colgate in the 2014-2015 school year, "Breaking The Silence," a Colgate student group of which Jane Doe 2 was a member, held a Sexual Climate Forum on October 27, 2014. The Sexual

Climate Forum was attended by approximately 300 students (mostly female, including Jane Doe 1), the ostensible purpose of which was to provide an opportunity for discussion about sexual assault on college campuses. Valerie Brogan, a Title IX Investigator, and Marilyn Rugg, the Associate Provost for Equity and Diversity and Title IX Coordinator, were members of the Sexual Climate Advisory Committee and panelists for the Sexual Climate Forum. Following the Sexual Climate Forum, announcements were made about the "Carry That Weight" Campaign, to take place nationally and on Colgate's campus on October 29, 2014. (A 267-268, 348-355, CA 149, 232, 274-282, 411, 418.)

Omitted from the District Court opinion were the facts that within 48 hours of the Sexual Climate Forum, Jane Does 1-3 anonymously filed their complaints against Plaintiff and that Jane Doe 1 later told investigators she and Jane Doe 2, after learning about serial rapists at the Forum, decided to file anonymous reports. (CA 95, 149, 153, 274-282; A 267.)

Instead, the District Court quotes an article by Colgate's President stating that 20 percent of college-age women are subject to sexual assault. (SPA 4.) The Court neglects to mention that this "statistic" comes from a disputed 2007 study, is based on a broad definition of sexual assault, and, according to the study authors, is not derived from a nationally representative sample. Schow, "No, 1 in 5 Women Have Not Been Raped on College Campuses," *Washington Examiner*, August 13, 2014,

http://www.washingtonexaminer.com/no-1-5-women-have-not-been-raped-on-college-campuses/articles/2551980. A Bureau of Justice Statistics (DOJ) study, 1995-2013, published in December 2014 found that college-age female students on campus less likely to be victims of sexual assault than non-students and the real number of college women assault victims is .03 in 5; these statistics do not support the notion of a "crisis" of violence against *women*. *Rape and Sexual Assault Victimization among College Age Females, 1995-2013* (Special Report), U.S. Department of Justice, December 2014, http://www.bjs.gov.content/pub/pdf/ravcaf9513.pdf.

D. Jane Does 1-3 Anonymous Complaints.

1. Fall 2011 (Alleged Incident 1).

On October 28, 2014, 36 months after Alleged Incident 1, Jane Doe 1 submitted an anonymous university complaint that described being "quite drunk" at a Halloween party on October 28, 2011, being walked home by Plaintiff who put his hands in her underwear while outside and tried to finger her while in her room until her roommate came back. The complaint stated that Jane Doe 1 had not told anyone about this incident since it occurred and only decided to report it when hearing about serial rapists at the Sexual Climate Forum. Five weeks later, on December 2, 2014, Brogan had Jane Doe 1 revise her statement to assert that Plaintiff had inserted his finger into her vagina. (CA 146-151.)

2. Valentine's Weekend 2012 (Alleged Incident 2).

On October 28, 2014, 32½ months after Alleged Incident 2, Jane Doe 2 submitted an anonymous university complaint that began "I'm a senior now, so it is hard to remember" referring to an incident on February 11, 2012. The anonymous complaint described being "incredibly intoxicated" from hard liquor at a party and stated that after she flirted with Plaintiff, he put his hands down her pants pressing her butt without asking. Thereafter, according to Jane Doe 2, she went behind Frank Dining Hall, where she, Jane Doe 1, Plaintiff and some others smoked marijuana and Jane Doe 2 became "incredibly messed up" under the influence of "both alcohol and weed." There, Plaintiff kissed Jane Doe 2 and put his hands on her butt; according to the complainant, she was "more comfortable" with the kissing. Jane Does 1 and 2 then went to Curtis Hall where their dorm rooms were, followed by Plaintiff. Jane Does 1 and 2 and Plaintiff ended up in bed together in what she thought would be a platonic sleepover, but Plaintiff kept touching her breasts; she could not recall whether it was above or under clothing. After Jane Doe 1 left, Plaintiff allegedly pulled his pants down and tried to get Jane Doe 2 to touch his penis. Then, Jane Doe 1 and her roommate yelled at Jane Doe 2 and Plaintiff not to hook up there, after which Jane Doe 2 left Plaintiff in the room. The next day, when Jane Doe 2 ran into Plaintiff at the library, Plaintiff apologized saying he did not remember anything, and she told him not to worry about it. (CA 101-103.)

3. Spring 2012: Jane Doe 3's Birthday (Alleged Incident 3).

On October 29, 2014, 30 months after Alleged Incident 3, Jane Doe 3 submitted an anonymous university complaint that on her birthday, she left a party with Plaintiff, one of her best guy friends, and consensually made out with him in several places as they returned to their dorms. According to the complainant, Plaintiff kept asking Jane Doe 3 for sex, to which she said no. At the Science Center, the complaint alleged that Plaintiff fingered her, which she stopped. Once at her dorm, the anonymous complaint described Plaintiff taking her into the bathroom where he pushed her against a sink, unhooked her bra, tried to put his hands down her pants and tried to get her to touch his penis. According to Jane Doe 3, she ended the evening, tearing off her birthday crown that had "magically" stayed on her head. The next day, according to the anonymous complaint, she received a text from Plaintiff asking still to be friends, and she responded that she felt violated. (CA 150-155.) Nevertheless, the two did meet and talk. (CA 154.)

4. Time Lapse; Delayed Notice of Specifics to Plaintiff.

The District Court dismisses the significance of the time lapse by relying on the fact that Colgate's Equity Grievance Process (EGP) provides "no formal limitation on the bringing of a complaint." (SPA 2.) The District Court fails, however, to quote the remainder of the section which states "but prompt reporting is very strongly encouraged. The associate provost for equity and diversity may

exercise discretion in handling complaints when substantial time has passed since an alleged incident." (A 325.) Defendant Rugg was that associate provost. (A 261.)

Although the complaints were filed on October 28 and 29, 2014, Colgate would not inform Plaintiff of the specifics of the allegations against him until March 24, 2015, five months after the investigation had commenced and two weeks prior to the hearing. (A 299; CA 86-94, 105, 149, 153, 579-580, 585-586.)

E. Equity Grievance Process ("EGP") and Training.

Colgate's EGP, drafted by the Association of Title IX Administrators ("ATIXA"), provides procedural rules to adjudicate alleged violations of the Sexual Misconduct Policy. (A 290-291, 324-325; CA 197-198, 383-385.)

Rugg, as the Title IX Coordinator, was charged with training on sexual misconduct and consent. Rugg attended a training session in 2014 hosted by ATIXA that advised administrators: to refer to sexual assault complainants as "victims" when speaking to complainants but as "complainants" when speaking to respondents; to discourage respondents from seeking legal representation; and to generally consolidate separate cases involving the same respondent. (CA 226, 383-385.) Rugg decided to use gendered language in her training sessions (i.e. referring to victims as "she" or "her") "because [in] the majority of sexual assaults that occur, the reporting party is a woman and a responding party is a man." (CA 228.) As Rugg recognizes, in Colgate's case, "sexual assault complainant" is virtually synonymous

with "woman," as Colgate had never received an EGP complaint from a male student accusing a female student of sexual misconduct in violation of the EGP Policy. (A 175, 274, 305-306, 407.)

F. November 4 and 7, 2014: Rugg-Jane Doe 2 Meetings.

Jane Doe 2 and Title IX Coordinator Rugg knew each other from the Sexual Climate Advisory Committee; Jane Doe 2, who knew Rugg as "Lynn," sought Rugg's assistance with the electronic system for filing anonymous complaints. On November 4, 2014, Jane Doe 2 met with Rugg to ask questions about Colgate's Equity Grievance Policy. On November 7, 2012, Jane Doe 2 approached Rugg about filing a formal complaint. Rugg put her in touch with Brogan, with whom Jane Doe 2 had previously corresponded about the Sexual Climate Forum. (A 267, 399; CA 97-98, 650-651.)

G. Brogan's Meetings With Complainants.

Brogan interviewed Jane Doe 2 on November 7, 2014. Acting on information from Jane Doe 2 and her own suspicions, Brogan interviewed Jane Doe 1 and Jane Doe 3 on December 2, 2014. According to Brogan, the three Jane Does identified themselves as authors of the anonymous complaints and agreed to proceed with the complaints; Brogan's file memos indicated additions were made to Jane Doe 1's account and Jane Doe 3 had doubts about being a complainant. (A 201-202; CA 100, 110-111, 155, 150, 151.)

H. Plaintiff's December 4, 2014 Meeting With Associate Dean Taylor.

On December 4, 2014, Plaintiff was called to the Office of Associate Dean Taylor, where he was told there were EGP investigations concerning him, given a No Contact Order for each complainant and told Brogan would be in contact with him. While Taylor's declaration said complainants had requested the no contact orders, Taylor testified at her deposition that she did not know if Jane Does 1-3 had requested them. (A 286, 400-401; CA 294-295, 575.) Plaintiff testified that upon receiving the no contact orders, he had "no idea what the allegations were" and, although he might have suspicions, did not know they involved sexual misconduct. (CA 575.)

I. Brogan's Investigation.

On December 12, 2014, Brogan, along with EO Director Tamala Flack, met with Plaintiff and informed him three misconduct allegations had been made against him. (A 165, 203, 401.) When Plaintiff inquired as to what the specific allegations were, Brogan stated she could not yet share that information. (A 167, 402; CA 126, 579.) Brogan asked general questions about the alleged incidents. (CA 416-417.) Plaintiff testified that this kind of questioning was unfair and that it seemed it was the investigators' "job to find the male accused responsible. . . . I think if it was their intention to have a fair, unbiased investigation, it would have been responsible for them to tell me what I was being accused of before asking me to defend myself."

(CA 579-580.) Brogan wrote up her recollection of the meeting. (CA 124-126.) What Plaintiff said to Brogan was consistent with Plaintiff's later written statements that merely added a few details. (*Compare* CA 124-126 *with* CA 140-145.)

Plaintiff returned from winter break, and on January 28, 2015, he met for a second time with Brogan and Flack. During this meeting, Plaintiff was told "the charges but [the investigators] would not go into detail specifically so, still, [Plaintiff] did not know what [he] was accused of." (CA 581.) Brogan asked Plaintiff to write a statement, and on February 16, 2015, Plaintiff submitted three written statements. (CA 140-145; CA 581-582.)

On February 27, 2015, Plaintiff met again with Brogan and Flack to answer some questions relating to Alleged Incident 1, that the touching -- brief according to Plaintiff's account -- was to Jane Doe 1's breasts. It was implied to Plaintiff that getting a lawyer was a bad idea. (A 170, 404; CA 140-141, 585.)

Brogan and Flack interviewed sixteen other witnesses. Plaintiff, after finally being able to see the investigation file before the hearing, testified that while witness statements written by Brogan were helpful to him, it was through "a layer of bias," and he (Plaintiff) "was unhappy with how lightly they were questioned" and with a focus more on Plaintiff's character than actual events. (A 170, 404; CA 586-587.)

J. March 24, 2015 "Charges" and Setting of April 7, 2015 Hearing Date.

On March 24, 2015, Plaintiff received three letters containing "charges" identifying violations under Colgate's Sexual Misconduct Policy with supporting allegations and setting the hearing for April 7, 2015 for all three complaints (CA 86-94) -- 14 days away.

The "charges" for Alleged Incident 1 were for Sexual Misconduct I and Sexual Misconduct II based on the allegations that Plaintiff had "digitally penetrated [Jane Doe 1]'s vagina without her consent" and that he "put [his] hands down [Jane Doe 1]'s underwear and touched her in a sexual manner without her consent." (CA 86-88.)

The "charges" for Alleged Incident 2 were for Sexual Misconduct II and Sexual Exploitation based on the allegations that Plaintiff "put [his] hands down [Jane Doe 2]'s underwear and touched her buttocks without her consent," "touched [Jane Doe 2]'s breasts without her consent," "forced [Jane Doe 2] to touch [his] penis with her hand, without her consent" and "exposed [his] penis to [Jane Doe 2] without her consent." (CA 89-91.)

The "charges" for Alleged Incident 3 were for Sexual Misconduct I, Sexual Misconduct II and Sexual Exploitation based on the allegations that Plaintiff "digitally penetrated [Jane Doe 3]'s vagina without her consent," "forced [Jane Doe 3] to touch [his] penis with her hand, without her consent," "unhooked [Jane Doe

3]'s bra and touched her breasts without her consent," "pushed [his] penis against [Jane Doe 3]'s thigh without her consent; and "exposed [his] penis to [Jane Doe 3] without her consent." (CA 92-94.)

K. Consolidation Decision.

The Jane Does informed Associate Dean Taylor that they wanted their allegations to be heard as a single case. (A 173, 406.) Plaintiff did not consent, and Plaintiff's attorney made a request that the three sets of charges be heard by separate panels. (A 173, 296-297, 406.) Taylor denied the request for separate panels, asserting she had the authority to determine pattern evidence and a common hearing panel may avoid the need for repeat questioning, and set up that the hearings would be separate and consecutive. Effectively, however, one joint hearing took place: the same Equity Grievance panel heard all three sets of charges on the same day with the same investigation file and with Brogan addressing all three sets of charges. (A 288-289, 296-297, 327-328, 406-407, SAP 9; CA 663-664.) Plaintiff testified the combination was prejudicial and he objected to it. (CA 590.)

L. Pre-Hearing Availability of Investigation File.

Taylor also reviewed the investigation file, removing some material deemed irrelevant or unfairly prejudicial. (A 292-293.) The investigation file was then made available in the Dean's Office to Plaintiff and his advisor for review starting March 27, 2015 (A 295) -- 11 days before the hearing. The first time that Plaintiff and his

advisor could get together to review the file was April 3, 2015 (CA 583) -- 4 days before the hearing. On April 5, 2015, Plaintiff made a request for postponing the hearing so that he and his advisor could have more time to prepare for the hearing. Taylor denied the request ostensibly on the ground that Plaintiff was given twice the one-week notice of hearing provided under Colgate's Policy -- never mind that three charges were involved. (A 175, 292, 407-408; CA 86-94.) Plaintiff and his advisor again reviewed the investigation file on the day of the hearing. (A 298; CA 587.) Plaintiff testified there was "no way to get through that [investigation file] in any meaningful way before the hearing." (CA 587.)

M. <u>April 7, 2015 Hearing.</u>

Title IX Coordinator Rugg selected the panelists for the hearing: Professor Mary Moran, Professor Jeff Bary (married to a Woman's Studies Professor) and Lab Techician Nikki Doroshenko. The chair of the panel was Associate Dean Taylor. Moran, Doroshenko and Taylor attended Rugg's training programs. (A 184, 234-235, 269-270; CA 588-589.) Nearly everyone knew Jane Doe 2, a Woman's Studies major. (A 114; CA 217-218, 222, 232, 293.)

The Hearing was held on April 7, 2015 before the Equity Grievance Panel. (A 346-349.) Plaintiff was asked if he took responsibility for each "charge," and he denied the allegations. (CA 481-482: Colgate 001943 at 5:36-6:58.) Plaintiff testified Moran went into the hearing biased against him and asked questions "harsh"

in tone and content. (CA 589-590.) Brogan "testified," excusing Jane Doe 2 for not reporting Alleged Incident 2 earlier, calling Jane Doe 1 a victim of trauma, assessing Jane Doe 2's credibility based on her being a victim, rationalizing away Jane Doe 1's thought that what happened between Jane Doe 2 and Plaintiff was consensual, discussing Jane Doe 3's credibility in terms of her victimhood (saying it was perfectly understandable not to come forward given the devastating experience) and attacking Plaintiff for changing his story as to Jane Doe 1 from nothing happened to the account he gave (Brogan did not mention how she obtained a revision in Jane Doe 1's story to add digital penetration). (CA 151; CA 481-482: Colgate001943 at 8:34-8:43, 11:57-12:44, 16:02-16:46, 22:07-23:50; CA 481-482: Colgate001943 at 12:44-13:41; CA 481-482: Colgate001948 at 13:01-13:57, 13:57:14:06; A 486.) Plaintiff testified that Brogan "greatly influenced the panel members" with her credibility assessments. (CA 601.)

The District Court gave a short statement about the hearing, stating that Plaintiff could offer additional information and noting that Plaintiff asked questions of Brogan. (A 329; CA 481-482: Colgate001943 at 22:07-23:50; SPA 9-10.)

N. <u>Disciplinary Decision.</u>

On April 8, 2015, Taylor issued three Decision Letters finding Plaintiff "responsible" for each of the violations alleged. Despite Colgate's provision requiring that the findings letter include a "rationale for the outcome," the three

Letters were identical, simply stating, "[a]fter a careful review of the information presented during the hearing, the Hearing Panel found [Jane Doe 1/2/3]'s account to be more credible than yours." The Letters then proceeded to state the sanction: expulsion for the "charges" as to Jane Does 1 and 3, suspension for the "charges" as to Jane Doe 2. (CA 180-188.) The District Court's discussion of the disciplinary decision is based almost entirely on the after-the-fact declarations of the panelists, who for the purpose of defending in litigation provided rationales that the Decision Letters did not. (SPA 11-12.)

O. <u>Appeal.</u>

On April 25, 2015, Plaintiff timely submitted his appeal of the three decisions. Plaintiff cited, among other things, the complainants' delay in reporting their claims, inadequate time to prepare for the hearing, refusal to provide separate hearings for the three complaints, investigator bias, failure to use a preponderance of the evidence standard, gender discrimination, the panel's lack of specific findings, and the imposition of a disproportionately severe sanction (noting an otherwise unblemished disciplinary record at Colgate and a continuation of interaction of Plaintiff and the Jane Does throughout their years on a small campus). (A 252; CA 6-17.)

The appeal went to Dean Suzy Nelson, who regularly attended sexual assault awareness events around campus, Women's Studies Brown Bag Lunches, and was known as someone who "worked tirelessly on the issue of…survivor support" and

was "good friends" with Taylor. (CA 494, 496, 506.) Nelson denied Plaintiff's request for a stay of the sanction pending appeal because that would have allowed Plaintiff to graduate. (A 251-252; CA 3-5.) Approximately one month *after* John Doe's graduation date passed, Nelson denied Plaintiff's appeal. (CA 18-44.)

P. District Court.

Plaintiff brought this case, and after the parties conducted fact and expert discovery, Colgate moved to exclude Plaintiff's expert testimony on gender bias and for summary judgment dismissing the Complaint, and Plaintiff opposed those motions. (SPA 1-59.) The District Court granted the motions.

SUMMARY OF THE ARGUMENT

The District Court erroneously granted summary judgment dismissing Plaintiff's Title IX and breach of contract claims by failing to apply basic summary judgment rules in ruling that the evidence was "insufficient" to show gender bias. The totality of the circumstances showed abundant evidence of gender bias that created genuine issues of material fact. The "erroneous outcome" as to three-year old alleged incidents lacked supporting contemporaneous evidence and was the product of a gender biased process.

The District Court erroneously precluded Plaintiff's expert testimony on gender bias by circumventing this Court's presumption of admissibility of expert

testimony, wrongly calling it speculative and unreliable, by mischaracterizing the expert opinion in order to attack it and by overlooking the supporting evidence.

ARGUMENT

I.

THE DISTRICT COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT DISMISSING THE TITLE IX CLAIM

A. Applicable Summary Judgment Rules.

In *Gallo v. Prudential Residential Services*, 22 F.3d 1219, 1223 (2d Cir. 1994), this Court began its legal analysis by stating: "Considering how often we must reverse a grant of summary judgment, the rules for when this provisional remedy may be used apparently need to be repeated." The same can be said here.

The grant of summary judgment is reviewed *de novo*. *Wright v. New York State Dep't of Correction*, 831 F.3d 64, 71-72 (2d Cir. 2015); *Garcia v. Hartford Police Dep't*, 706 F.3d 120, 127 (2d Cir. 2013); *Gallo*, 22 F.3d at 1224.

"Summary judgment is only proper when, construing the evidence in light most favorable to non-moving party, 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Doniger v. Niehoff*, 642 F.3d 334, 344 (2d Cir. 2011); *Walsh v. New York City Housing Authority*, 828 F.3d 70, 74 (2d Cir. 2016); *Gallo*, 22 F.3d at 1224.

"[T]he burden is upon the moving party to demonstrate that no genuine issue respecting any material fact exists." *Gallo v. Prudential Residential Services*, 22

F.3d at 1223; *Chertkova v. Connecticut General Life*, 92 F.3d 81, 86 (2d Cir. 1996). "A genuine dispute exists 'where the evidence is such that a reasonable jury could decide in the nonmovant's favor.'" *Walsh*, 828 F.3d at 74.

All ambiguities are resolved and all permissible inferences are drawn in favor of the non-moving party. *Wright*, 831 F.3d at 71-72; *Garcia*, 706 F.3d at 127; *Walsh*, 828 F.3d at 74; *Whidbee v. Gazarelli Food Specialties*, 200 F.3d 62, 68 (2d Cir. 2000); *Gallo*, 22 F.3d at 1223.

"In reviewing the evidence and the inferences that may reasonably be drawn, the court "*may not make credibility determinations or weigh the evidence . . . . 'Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge.'" Rogoz v. City of Hartford*, 796 F.3d 236, 245 (2d Cir. 2015) (emphasis in the original).

Summary judgment is inappropriate when it is sought on the basis of questions of motive and intent. *Walsh*, 828 F.3d at 74; *Gallo*, 22 F.3d at 1224; *Freidman v. Meyers*, 482 F.2d 435, 439 (2d Cir. 1973).

As *Doe v. Columbia*, 831 F.3d 46, 53-54 (2016), ruled that Title IX cases are subject to the analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the evidence "must be viewed as a whole rather than in a piecemeal fashion." *Walsh*, 828 F.3d at 76; *Byrnie v. Town of Cromwell*, 243 F.2d 93, 102 (2d Cir. 2001). The Court should be wary of summary judgment in discrimination cases because the

"totality of the circumstances" must be considered. *Whidbee*, 200 F.3d at 69; *Gallo*, 22 F.3d at 1224.

B. Title IX Discrimination Law in College Disciplinary Cases.

Title IX provides, in relevant part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX may be violated by a school's failure to prevent or remedy sexual harassment or sexual assault, *Davis v. Monroe Bd. Of Education*, 526 U.S. 629 (1999), or by "the imposition of university discipline where gender is a motivating factor in the decision to discipline," *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994). In either case, the statute is enforceable through an implied private right of action. *Yusuf*, 35 F.3d at 714.

Yusuf classified challenges to university disciplinary proceedings for sex discrimination in two categories: (1) "erroneous outcome" cases, in which "the claim is that plaintiff was innocent and wrongly found to have committed an offense"; and (2) "selective enforcement" cases, in which "the claim asserts that, regardless of the student's guilt or innocence, the severity of the penalty and/or decision to initiate the proceeding was affected by the student's gender." 35 F.3d at 715.

According to *Yusuf*, for either kind of claim, the plaintiff must plead and prove that conduct was discriminatory; for an "erroneous outcome" case, the plaintiff must

allege "particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding" and must "also allege particular circumstances suggesting gender bias was a motivating factor behind the erroneous findings," including but not limited to statements by disciplinary tribunal members and university officials and patterns of decision-making. 35 F.3d at 715.

Proscribed gender bias is reflected in how the sexual misconduct process is structured and how decisions are made. The ideology of many Title IX administrators is at odds with the text of Title IX passed by Congress. Title IX by text and legislative history is a non-discrimination statute, for requiring fairness for men and women, and does not justify procedurally defective and biased tribunals staffed by individuals who treat females as "victims" presumptively telling the truth and males as rapists engaged in victim blaming and unlikely to be telling the truth. This is one reason why Professor Aya Gruber's expert testimony, discussed below, is relevant. Such views as she critiques are found neither in the text or legislative history of Title IX. For the importance of text in statutory interpretation, *see* A. Scalia, *Reading Law: The Interpretation of Legal Texts* (West Pub. 2012); and for the argument for examining legislative history, *see* R. Katzman, *Judging Statutes* (Oxford Univ. Press 2014). Title IX does not countenance institutions, like Colgate, that choose to address sexual assault through favoring female complainants and discriminating against male respondents.

C. A Reasonable Jury Could Find Gender Bias Was A Motivating Factor Behind The Erroneous Expulsion.

The District Court granted summary judgment against Plaintiff's Title IX claim solely on the basis that "Plaintiff presents insufficient evidence to permit a reasonable jury to conclude that Colgate's decision to expel him was motivated by gender bias." (SPA 41.) The District Court was incorrect: Plaintiff presents ample evidence for a reasonable jury to find gender bias was a motivating factor in the expulsion decision. The District Court bases its analysis on two flawed premises and then plays jury as to the specifics showing gender bias. (SPA 25-41.)

1. Flawed Premises.

The District Court's first false premise is that "evidence of bias against the accused in sexual misconduct hearings does not equate to bias against men." The District Court misreads the modest statement in *Doe v. Columbia*, 831 F.3d at 57, and cites two district court opinions that make a very different, erroneous point.

This Court in *Doe v. Columbia* ruled that the Complaint there stated a Title IX claim and did so by identifying pleaded facts that showed a complainant-favoring bias at work in the way that administrators handled evidence of consensual sex and pointing to the allegations supporting the inference that this bias was gender-based. This Court acknowledged that decision-making which is biased toward one party in a dispute involving parties of different sexes does "not *necessarily* relate to bias on the account of sex"; however, this Court then discussed why the particular

allegations in the case were sufficient to raise an inference that the biases in that Title IX sexual assault dispute were on account of sex. 831 F.3d at 57.

The District Court also cites *Doe v. Trustees of Boston College*, 2016 WL 5799297 (D. Mass. Oct. 4, 2016), for the proposition that pro-complainant bias is unrelated to gender bias, when, in fact, that court merely stated that pro-complainant bias is not the "equivalent" of gender bias. 2016 WL at *25. More troubling is the District Court's quoting *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 579 (E.D. Va. 1996), that bias against people accused of sexual misconduct and in favor of the victim indicates nothing about gender discrimination. That assertion is wrong. If the system is victim centered, it is not neutral and impartial; and the reality is that males are the "accused" respondents and females are the "victim" complainants. There have been no male complainants at Colgate, and the school's training materials refer to the victim as female and the respondent as male (pp. 12-13 above). The 2011 Dear Colleague Letter premised the need for colleges to discipline sexual misconduct, using a preponderance of the evidence standard, with the false statistic that 1 in 5 *women* were victims of sexual assault. A United Educators study shows that 99% of the accused students are male. "Confronting Campus Sexual Assault: An Examination of Higher Education Claims,"https://web.archive.org/web/20170122225139/https://www.ue.org.uploadedFiles/Confronting%20Campus%20Sexual%20Assault.pdf. A court that says "victim

centered, but not gender biased" trumps reality with a theoretical but non-existent possibility of females being both victims and accused and males being both victims and accused.

The District Court's second false premise is that specifics showing gender bias can be rejected *seriatim* without consideration of whether the "totality of the circumstances" shows gender bias, an inquiry this Court has stated is necessary in this kind of case, see cases cited at pp. 23-24 above, and is correct Title IX law. *Doe v. Washington & Lee U.*, 2015 WL 4647996, at *10 (W.D. Va. Aug. 5, 2015).

2. <u>Gender Biased Sexual Climate.</u>

The District Court rejected that Colgate's sexual climate during the 2014-2015 academic year reflected evidence of pressures causing Plaintiff's proceeding to be tainted by gender bias, starting with purporting to distinguish *Doe v. Columbia*, 831 F.3d 46, on the ground that it was decided on a motion to dismiss and presented in this case is a motion for summary judgment. But *Doe v. Columbia* is still relevant to summary judgment because of two points made by this Court that are applicable regardless of procedural context: (1) the existence of student activism on sexual assault and rape victimhood can create pressure that motivates administrators to be biased toward female complainants and against male respondents; and (2) administrators' employment of processes that unfairly favors a female complainant over a male respondent provides the basis for an inference that the administrators

were in fact so motivated by gender bias. 831 F.3d at 57-58. The District Court's treatment of the record cannot be squared with either *Doe v. Columbia* or summary judgment rules.

a. <u>Student Activism.</u>

The District Court dismisses that the Sexual Climate Forum exerted a gender biased pressure at Colgate as "unavailing," disparages (unfairly) Plaintiff's counsel and dismisses the significance of the Sexual Climate Forum as simply raising awareness of sexual assault. (SPA 27-28.) The District Court relies on *Doe v. College of Wooster*, 243 F.Supp.3d 875 (N.D. Ohio 2017), which purports to distinguish *Doe v. Columbia* on the ground that raising sexual assault awareness at Wooster was entirely gender neutral. *Doe v. Columbia* makes clear, however, that it is reasonable to infer gender bias from administrators who adopt a biased stance to avoid criticisms that they are not taking sexual assaults seriously, without evidence that such criticism *explicitly* referred to sexual assault of women's only. 831 F.3d at 50-51, 58 n. 11. Further, more was involved than raising, in gender neutral terms, awareness of sexual assault in *Doe v. Columbia* and in this case.

The District Court acknowledges that Jane Doe 1's complaint states she heard disturbing statistics at the Forum about "serial rapists" and the record shows "serial rapists" were discussed at the Forum. (A 445, 447, 485.) Yet, contrary to reality and contrary summary judgment rules, the District Court draws inferences in favor of

Colgate and asserts that nothing was said about males being rapists. The notion women were included in "serial rapists" is fatuous.

Further, the District Court does not deal with much relevant evidence. Advertised at the Forum was "Carry That Weight," a reference to the carrying of mattresses upon which women have been raped. (CA 139-140, 270-273.) During the 2014-2015 academic year, Colgate saw a "huge amount of student activism" concerning "survivor support." (CA 211.) A spike occurred in the number of sexual misconduct complaints that directly correlated with the national dialogue on sexual assault, Breaking the Silence and the Forum. (CA 210-211, 274-282.) Jane Does 1-3 filed anonymous complaints immediately after the Forum. (CA 95, 149, 153.) Jane Doe 1 told investigators that she and Jane Doe 2 decided to file reports only after learning about serial rapists at the Forum (CA 110, 112, 149), which according to the excluded Gruber report, raised the possibility that the Forum caused Jane Does 1-3 to misremember what had occurred with Plaintiff as sexual misconduct (CA 570-571-601).

b. <u>2011 Dear Colleague Letter.</u>

The District Court asserts that the 2011 Dear Colleague Letter is no evidence of gender bias and that the 2017 Dear Colleague Letter revoking the 2011 one means only that the interpretation of Title IX will change over time. (SPA 28-29.) The 2017 Dear Colleague Letter, however, was critical of the 2011 one for directing --

the threat of federal funding cutoff made it a direction -- that schools use sexual misconduct procedures with reduced protections for the accused (A 986-996, *see* OCR Letter to Harvard Law School, https://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf), which has meant that males respondents such as Plaintiff are sanctioned. *Doe v. Miami Univ.*, 2018 WL 797457 *10 (6th Cir. Feb. 9, 2018) (Title IX claim upheld, gender bias from federal government pressure).

c. President's Winter 2015 Message.

The District Court dismisses as "insufficient evidence" the Colgate President's Winter 2015 message to the Colgate community, which contained the false statistic of 1 of 5 college women being sexually assaulted and also touted the "Yes Means Yes" seminar that focused on "female sexual power" and a "world without rape." (CA 149-152.) The District Court relies upon the inapposite case of *Doe v. Salsbury Univ.*, 123 F.Supp.3d 748 (D. Md. 2015), which involved campus notices mostly directed to campus safety. Here, the President's Message is part of the totality of circumstances evidencing gender bias.

3. Gender Biased Training.

The District Court rejected that Title IX Coordinator Rugg's training showed gender bias. The District Court notes the use of a slide with the complainant as a female and the respondent a male, but cites *Hardy v. New DN Co.*, 1997 WL 666212 (S.D.N.Y. Oct. 24, 1997), for the proposition that use of "him" in this one slide does

not evidence discriminatory bias. (SPA 31.) *Hardy*, however, is off point. It was a racial discrimination case arising out of a corporate downsizing; the passage cited by the District Court concerned whether an e-mail could be read to reference one of the plaintiffs as a target for firing.

Further, the District Court does not address the record showing gender bias in the Rugg training. For one training session, Rugg presented a slide referring to the complainant's failure to communicate "her expectations to her partner." (CA 359; emphasis in original.) When asked about this language, Rugg testified that she used gendered language in her trainings "because the majority of sexual assaults that occur, the reporting party is a woman and a responding party is a man." (CA 222.) A second slide stated:

> ALCOHOL & INCAPACITY…Did the sexual aggressor know of the incapacity of his partner (fact)? Or should he reasonably have known from all the circumstances (reasonable sober person)?

(CA 354.) When asked why the sexual aggressor was male, Rugg answered "[b]ecause it is the *normal* -- the *ordinary* -- because in the majority of cases that are brought forward, the male is the responding party." (CA 39; emphasis supplied.) Rugg's training also assumed that *males* are always required to seek and obtain consent (while women are passive), as evidenced by a slide in which "John" asks "Kate" if she wants to have sex. (CA 355.)

In April 2014, Rug attended an ATIXA training at which attendees were advised to refer to complainants as "victims" or "survivors" when speaking with complainants and to refer to them solely as "complainants" when speaking to respondents. (CA 229, 383.) ATIXA further advised that respondents, assumed to be male, should be intimidated -- if "he lawyers up" then "he" is denied review of the "her" (the complainant's) statement. (CA 384.) EGP panel members were warned not to question complainants at the hearing because it would be too uncomfortable for them to reveal intimate details to strangers. (CA 385.) Like Rugg's trainings, the case study assumed the complainant was female and respondent male. (CA 384.) It was also suggested that a "pattern of behavior" could be used to group complaints so that reluctant complainants would be encouraged to move forward. (CA 384.) While the District Court rejected that ATIXA training showed gender bias because such practices were not implemented (SPA 5), such practices were implemented (pp. 15, 17 above; CA 585.)

4. <u>Gender Biased EGP.</u>

The District Court acknowledges that ATIXA drafted the EGP and that Plaintiff argues the EGP is gender biased because of the different treatment accorded complainants (females) and respondents (males). But the District Court rejects that the EGP should be considered gender biased because it is facially neutral and does not create an inference of gender bias. (SPA 32-33.) This reliance on "facial

neutrality" repeats the mistake of using a theoretical possibility to trump the reality that females are complainants and males are respondents.

The District Court miscites *Yu v. Vassar*, 97 F. Supp.3d 448 (S.D.N.Y. 2015), for the proposition that university policies do not "reflect[] gender bias where policies were 'entirely gender neutral.'" (SPA 33.) The *Vassar* court cited to the gender neutral nature of Vassar's policies in response to Yu's contention that there was a different intoxication standard for men and women, not as an argument that facially neutral but pro-complainant policies are irrelevant to a claim of gender bias. Further, according to the court, it was not solely the facial neutrality of the policies that undermined Yu's claim, but that there was "simply no indication anywhere in the record that this policy was understood to apply on a gendered basis" and "no evidence that Vassar's policy was . . . motivated by gender bias." 97 F. Supp.3d at 479. Here, there was evidence the policies were understood in a gendered way; and in any event, reliance on *Yu v. Vassar*, 97 F. Supp.3d 448 (S.D.N.Y. 2015), is ill advised. "The Railroading Of Peter Yu," *Minding The Campus*, http://mindingthecampus.org/2015/04/the-railroading-of-peter-yu/.

5. <u>Gender Biased Investigation.</u>

The District Court rejects the five points of evidence showing gender bias, but does so by playing jury resolving factual disputes and ignoring record evidence.

a. Sex Crimes Approach To Investigation.

Brogan, the primary investigator in nearly all of Colgate's Title IX cases since 2012, is a former police officer who spent 16 years of her career investigating sex crimes. (A 197; CA 205-206, 392, 398.) Brogan conducts investigations at Colgate in the same manner as when she was a police officer. (CA 419-420.) She thinks of sexual misconduct offenses in the language she was "trained in" meaning in her "law enforcement career" (CA 401-402.)

The District Court dismisses that Brogan had an adversarial relationship to males as perpetrators (SPA 34), but the District Court can only do so by ignoring Plaintiff's testimony -- and summary judgment rules -- that Brogan was adversarial with and biased against him and favorable to female complainants (CA 580, 586).

The District Court cites *Sahm v. Miami Univ.*, 110 F.Supp.3d 774 (S.D. Ohio 2015), for the proposition that a Title IX investigator who serves dual roles as a part-time police officer and member of the university task force on preventing sexual assault does not raise an inference of gender bias (SPA 34); however, *Sahm* is inapposite, as it did not hold that the administrator's dual role was irrelevant, but that there had to be further proof that the role predisposed the administrator against male respondents. Here, there is ample evidence that Brogan took her approach to sex crimes into her Title IX investigation work and treated male respondents as

perps. There was good reason for Plaintiff's testimony about having nightmares in which Brogan was chasing him. (CA 600.)

b. Presumption of Truthful Complainants.

Brogan testified: "Do I believe most victims tell the truth? I believe that has been my experience. I can't say all the time. But has mostly been my experience? Yes." (CA 422.) The District Court says that this does not mean Brogan assumes that complainants tell the truth (SPA 34) – an assertion contrary to the record. Despite the timing and the campus activism underlying the complaints, Brogan challenges Plaintiff and his witnesses to come up with an explanation as to why the complainants would be untruthful. (CA 116, 121, 418.) When asked about lapses in memory and whether any particular issues arise when investigating an incident that occurred three years earlier, Brogan stated "it isn't a question of if something had happened or didn't happen. But could someone maybe have a time wrong." Brogan never entertained the possibility that the lapse of time could affect the complainants' memories. (CA 412.) *Doe v. Brandeis Univ.*, 177 F. Supp.3d 561, 573 (D. Mass. 2016) ("whether someone is a victim is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning").

The District Court also says the assumption complainants tell the truth is not gender biased because males may be complainants. (SPA 34-35.) This ignores the record evidence that no male at Colgate has been a complainant (p. 13 above) and

reflects the errors of: (i) ignoring the focus in the 2011 Dear Colleague Letter of women being subject to sexual assault and (ii) using a theoretical possibility to trump the reality of females being complainants and males being respondents (pp. 27-28, 30-31 above).

c. <u>Male Guilt Assumption.</u>

Brogan's questioning of witnesses in Plaintiff's case reflected bias in assuming male guilt. Plaintiff testified that the questioning during the investigation that left him in the dark as to the specific allegations against him was unfair and that it seemed it was investigators' "job to find the male accused responsible." (CA 579-580.) When questioning Plaintiff's friend M.K., who was surprised at both the allegations against Plaintiff as well as the timing, Brogan responded "it is not uncommon for folks not to report…everyone has a different timeline for dealing with emotions" and contested M.K.'s recollection that "everything was consensual." (CA 121.) Brogan also asked M.K. "Can you think of any reason these women would say this happened if it didn't?" (CA 121, 418.) When Brogan was asked if she expected the witness to speculate, she responded "I don't think that's a speculating question. That's a very common question that is asked in -- I think, in this line of work, and I've used it before." (CA 418.) But Brogan did not ask complainants' witnesses this question. (CA 97-100, 108-111, 123-130.) Brogan also asked M.K. if Plaintiff ever bragged about sexual conquests or engaged in hookups.

(CA 121-122.) In contrast, Brogan did not ask any witnesses about the complainants' sexual histories or conquests with men. When questioning, K.A., one of *Plaintiff's female* witnesses, Brogan told her that sometimes good people do bad things (CA 417) -- which reflects Brogan's assumption that Plaintiff was guilty before she even concluded the investigation.

The District Court dismisses this evidence of bias by pointing to purportedly exculpatory lines of inquiry pursued by Brogan. (SPA 35.) The neutral and potentially inculpatory request for names of people Plaintiff spoke to is not exculpatory; the District Court's rationalization does not justify summary judgment. The District Court also asserted that Brogan's being a panelist at the Sexual Climate Forum did not mean she was gender biased. (SPA 35-36.) But Brogan's assumptions of female complainant truthfulness and male guilt evidenced she was.

d. <u>Male To Obtain Consent Assumption.</u>

Brogan investigated Plaintiff's case assuming that he was responsible in every instance for obtaining consent, even though there was evidence that he was incapacitated and vomiting on the night of the alleged incident with Jane Doe 2 and no question was asked of Jane Doe 2 if she obtained Plaintiff's consent. (CA 410.) The District Court's response is that Plaintiff did not file a complaint against Jane Doe 2 and therefore his consent was not an issue. (SPA 35.) That response does not

answer the point that Brogan is dealing with consent in a one-sided way and does not justify summary judgment.

6. Gender Biased Consolidation.

The District Court dismisses that the consolidation decision to treat the complaints against Plaintiff as a "pattern" of behavior further evidenced gender bias that influenced the outcome of Plaintiff's case. The District Court calls Colgate's decision "well-reasoned." (SPA 38.) The District Court is wrong.

Holding the hearing before the same panel on the same day with the same investigation report effectively joined the cases in violation of the EGP which permitted a joint hearing *only* in cases where "individuals bring charges against each other arising out of the same incident or set of circumstances." (A 328.) That was not the case here.

The purported "pattern" that Plaintiff followed was to accompany his intoxicated female friends back to their dorms and use their friendship to take advantage of them. (A 191, 241, CA 234, 304, 407-408.) The evidence does not support this conclusion. Jane Doe 2 met up with Plaintiff at a pizza place, where he was already in a state of heavy intoxication. (CA 95-96, 141-142, 410.) Plaintiff and Jane Doe 2 then went with a group of friends to smoke marijuana, where they made out. At the end of the night, Jane Does 1 and 2 and Plaintiff ended up in Jane Doe 1's room, where all three got into bed together. (CA 95-96, 141-142.) In Jane Doe

3's case, she left the party with Plaintiff to make out, which she admitted was consensual. She was not coerced into leaving with him and consented to making out on a willow path and in front of a building on campus. (CA 153.)

Rugg and Taylor also focused on digital penetration as part of the "pattern." Digital penetration was not alleged in Jane Doe 2's case. (CA 95-96.) Jane Doe 1's initial report did not state that penetration occurred. (CA 148-150.) Searching for facts to fit the predetermined pattern, Brogan suggested to Jane Doe 1 that penetration occurred and she changed her story to match that suggestion. (CA 146, 150.)

It was because of the false "pattern" that one hearing was effectively held before the same panel members and provided them with evidence for all three complaints, causing the EGP panel to view Plaintiff as a serial offender from the beginning, rather than weigh the evidence in each case independently. This is evidenced by EGP panel member Bary's statement that Jane Doe 1's case "was the closest of three cases" but her "credibility was bolstered by the fact that the scenario was very similar to the other two cases" and evidence of Plaintiff's "modus operandi." (A 191.) In a court of law, this very kind of prejudice disallows consolidation. *Bender v. Underwood*, 93 A.D.2d 747, 461 N.Y.S.2d 301 (1st Dep't 1983) (reversed erroneous consolidation); *Bradford v. John A. Coleman High School*, 11 A.D.2d 965, 488 N.Y.S.2d 105 (2d Dep't 1985) (error to consolidate);

Alder v. Oppenheimer & Co., 8 Misc.3d 1008(A), 801 N.Y.S.2d 775 (Sup.Ct. N.Y. Co. 2005) (motion to consolidate separate sexual harassment cases denied).

Given that the Alleged Incidents are entirely distinguishable from one another, the totality of the circumstances raises a question whether gender bias led to combining the complaints in order to pursue a pattern where none existed. On these points, the improperly excluded Gruber Report is helpful. (CA 671-672, 677.)

7. Gender Biased Treatment of Complainants Versus Plaintiff.

The District Court rejects that gender bias was involved in the email correspondence between Jane Doe 3 and Taylor and the accommodations to complainants at the hearing (SPA 37); however, that treatment was in stark contrast to how Plaintiff was treated, receiving two weeks' notice for three complainants and being denied a postponement in order to prepare with the investigation file just having been made available (see p. 18 above).

8. Gender Biased Hearing.

The District Court dismisses Plaintiff's arguments about the hearing, noting Plaintiff's bullet point list (A 337-339) and Plaintiff's "subjective impressions" and giving it all the back of the hand. (SPA 39-40.) Plaintiff, however, was not giving "subjective impressions."

As noted above (p. 18), Plaintiff was asked to and did enter a plea as to each charge -- as if he were a criminal; this was not EGP mandated procedure (A 393).

As also noted above (p. 18), the hearing panel consisted of a woman (Moran) viewed by Plaintiff as biased, the husband (Bary) of a Women's Studies professor, a woman (Doroshenko) who attended Rugg's Title IX training programs with Moran and Taylor and the Associate Dean (Taylor) who had effectively consolidated the three charges against Plaintiff and denied him a postponement; meanwhile, Jane Doe 2 was a prominent Women's Studies major.

As further noted above (p. 19), former sex crimes policewoman Brogan was the major "witness" who was greatly influential with the panel with her credibility assessments for the Jane Does against Plaintiff and who gave an excuse for Jane Doe 2 not reporting Alleged Incident 2 earlier, called Jane Doe 1 a victim of trauma, rationalized away Jane Doe 1's thought that what happened between Jane Doe 2 and Plaintiff was consensual, gave an assessment of Jane Doe 2's credibility based on her being a victim, discussed Jane Doe 3's credibility in terms of her victimhood and attacked Plaintiff for changing his story from nothing happened to the accounts he gave (Brogan did not mention how she obtained a revision in Jane Doe 1's story to add digital penetration). In analyzing the assumptions of Brogan's testimony in female complainant truth telling, male respondent guilt and consent, the excluded testimony of Gruber is helpful. (CA 667-673.) Brogan was not a percipient witness, but she "testified" for the "prosecution." (CA 601.) *See Doe v. Columbia*, 831 F.3d at 58 (effect of investigator bias).

So when Plaintiff testified that Moran went into the hearing biased against him and asked questions "harsh" in tone and content (CA 589-590) and that the consolidation made it impossible for the panel to be impartial (CA 590), Plaintiff was describing objective reality.

9. <u>Gender Biased Evaluation of Evidence.</u>

The District Court gives short shrift to Plaintiff's arguments about the gender biased evaluation of evidence and resulting erroneous outcome (SPA 39), but that is only because the defects to the Jane Does 1-3 complaints are not addressed. Those complaints related to events from 3 years to 2½ years prior, did not have supporting contemporaneous documentation and supporting medical evidence, were filed anonymously in the two days after the Sexual Climate Forum and had additional individual problems pointed out by Plaintiff. (A 375-379.) In finding Plaintiff responsible, the panel misapplied the preponderance of the evidence standard as one that compares the credibility of the parties, rather than to require each claim of sexual misconduct to be more likely than not; and in coming to their conclusion that the complainants were "more credible," the panelists relied on gendered assumptions about truthful complainants and guilty male perpetrators.

a. <u>Jane Doe 1.</u>

The panelists, in their after the-fact declarations, said they found Jane Doe 1 more credible because Plaintiff's story had supposed discrepancies (to which Brogan had "testified"). (A 191, 226, 240-241.) That "explanation" does not work.

First, there were not discrepancies, as investigator Flack testified. At the investigators' first meeting with Plaintiff, only general questions were asked; saying nothing happened is a fair statement of Plaintiff's response that no complaints were justified. (CA 481-482: Colgate001948 at 14:16-15:30, 21:49-25:03.) Plaintiff subsequently had time over semester break to recall more details for a written statement (CA 481-482: Colgate001948 at 14:16-15:30, 21:49-25:03.)

Second, Jane Doe 1 significantly changed her story over a month after she submitted her initial report to add digital penetration at the suggestion of Brogan. (CA 149-150.) Ignoring discrepancies of female complainants while saying discrepancies from male respondents undermine credibility shows gender bias.

Third, Jane Doe 1's report showed her consent to what occurred prior to arriving at her dorm room. She stated she covered up her feelings of discomfort. (CA 149.) Plaintiff was not responsible for knowing her internal feelings. (CA 673.)

Fourth, what Jane Doe 1 alleged occurred in her dorm room was not feasible: Jane Doe 1 stated that Plaintiff was in her room for one minute in total. (CA 481-482: Colgate001950 at 4:35-4:44.)

b. Jane Doe 2.

The panelists, in their after the-fact declarations, said they favored Jane Doe 2's account because Plaintiff was intoxicated on the night in question. (A 187-188, 222.) That "explanation" does not work.

First, Jane Doe 2 was completely "messed up," having mixed alcohol and marijuana for the first time that night. (CA 95-96.) The panel took Jane Doe 2's account as true despite her admitted level of intoxication and passage of three years.

Second, Jane Doe 2, by her own account, consented to sexual activity with Plaintiff. At the pizza place, she did not tell Plaintiff to stop putting his hand down her pants or give any indication that she wanted him to stop. (CA 95.) Jane Doe 2 admitted that she took no action, and said nothing, when she was kissing Plaintiff on the hill. (CA 95.)

Third, Jane Doe 2's story about not feeling safe (A 430) does not add up. She, though with Jane Doe 1, did not tell Plaintiff to go home. There is no evidence that Plaintiff knew that Jane Doe 2 did not feel safe. She had previously made out with him on the hill. Once they reached Jane Doe 1's room, the three got into bed together (CA 95) -- which indicated consent.

Fourth, three eyewitnesses -- including one in bed with Plaintiff and Jane Doe 2 -- assessed the situation as a consensual hookup. Jane Doe 1 told Brogan that she felt like a "third wheel" because Plaintiff and Jane Doe 2 were engaged in "heavy

petting" and "making out." (CA 162.) Per Brogan, Jane Doe 1 only changed her opinion about consent with "20/20 hindsight." (CA 481-482: Colgate001943 at 11:57-12:44.) Jane Doe 1's roommate yelled at Jane Doe 2 and Plaintiff to stop hooking up. (CA 96.) A third eyewitness also thought the activity was consensual. (CA 122-123.)

c. Jane Doe 3.

The panelists, in their after the-fact declarations, favored Jane Doe 3's account due to Jane Doe 3's four witnesses. (A 239.) That "explanation" does not work.

First, there were no eyewitnesses identified to corroborate Jane Doe 3's account or what allegedly occurred in her dorm bathroom. Two of Jane Doe 3's witnesses had no information at all concerning the alleged dorm bathroom incident. (CA 125-127, 131-134, 144-145, 153.) The third "witness," E.K., gave a hearsay account that Plaintiff "forced his way into a room" and that Jane Doe 3 repeatedly said "no," which conflicted with Jane Doe 3's account that, in the bathroom, she said nothing. (CA 126, 153.) A fourth "witness," I.E., is Jane Doe 3's childhood friend who gave an overly precise hearsay recollection of Jane Doe 3's account, which she purportedly heard three years prior. (CA 133-134.)

Second, indisputably, Jane Doe 3 left a party with John Doe to "make out" with him and that she "even told his friends [she] was okay with that." (CA 153.) This is consistent with Plaintiff's account. (A 144.) Indisputably, the two "made out"

outside the Science Center, and Plaintiff persisted in asking Jane Doe for sex, which he agreed upset her. (CA 144, 153.)

Third, Jane Doe 3's account does not make sense in saying that after the two disagreed about Plaintiff's asking for sex, she allowed Plaintiff into her dorm (which required entering the building security code) and then allowed him to "shepherd" her into the bathroom. (CA 153.)

10. <u>Appeal Allowing Gender Biased Result.</u>

The District Court rejected Plaintiff's argument that the appeal was meaningless and supported finding gender bias, calling Plaintiff's arguments against the hearing "unpersuasive." (SPA 40-41.) But the arguments were not unpersuasive but rather raised important errors that allowed a gender biased outcome -- receipt of hearsay, bias of the panel, inability to cross-examine, inadequate notice, use of a common panel, the lapse of time in the complaints being brought, gender discrimination, Brogan's gender bias and failure to meet the proof burden (CA 6-17). Nelson, a woman's "survivor" supporter, denied the appeal by confining the decision to (i) finding no procedural error at the hearing, and (ii) summarily upholding the sanction with the comment that she knew the resources that had been expended on Plaintiff's college education (CA 18-44).

11. Totality of the Circumstances.

The "totality of circumstances" discussed above establishes that a reasonable jury could find that gender bias was a motivating factor in the decision to expel Plaintiff on the eve of his graduation.

II.

THE DISTRICT COURT ERRONEOUSLY PRECLUDED PLAINTIFF'S EXPERT TESTIMONY ON GENDER BIAS

A. Expert Testimony Is Presumed to Be Admissible.

In the Second Circuit, there is a presumption in favor of admitting expert testimony. *Borawick v. Shay*, 68 F.3d 597, 610 (2d Cir. 1995) ("[B]y loosening the strictures on scientific evidence set by *Frye* [*v. U.S.*, 293 F. 1013 (D.C. Cir. 1923)], *Daubert* [*v. Merrell Dow Pharm.*, 509 U.S. 579 (1993),] reinforces the idea that there should be a presumption of admissibility of evidence."); *Utica Mutual Ins. Co. v. Fireman's Fund Ins. Co.*, 239 F. Supp.3d 314, 341 (N.D.N.Y. 2017) ("rejection of expert testimony is the exception rather than the rule.") The only circumstances under which a district court should preclude expert testimony is where it is "speculative or conjectural or based on assumptions that are 'so unrealistic and contradictory as to suggest bad faith' or to be in essence 'an apples and oranges comparison.'" *Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC*, 571 F.3d 206, 213-14 (2d Cir. 2009) (reversal of district court for abusing discretion in

excluding expert testimony). The exceptions to the presumption of admissibility do not apply here.

Professor Aya Gruber ("Gruber") is a tenured full professor of law who has been a full-time legal academic since 2002. She most recently served as a visiting Professor of Law at Harvard Law School in Fall 2017. Gruber is the author of a book on criminal procedure and dozens of articles on feminism and gender crime. Her scholarship relies on cases, statutes, regulations, law reviews, books, sociological studies, and news articles, among other sources. Gruber is a member of the American Law Institute, serves as an adviser to the Model Penal Code Sexual Assault Project and is a member consultant to the Campus Sexual Assault Project. Gruber has incorporated Title IX and campus sexual assault into her teaching and writing. (A 995-1005; CA 665-666.)

Gruber's testimony met the admissibility requirements of Rule 702 of the Federal Rules of Evidence ("FRE 702"). At bottom, the District Court rationalized the preclusion of Gruber's testimony by engaging in an adversarial analysis of the correctness of Gruber's opinions. The District Court's disagreement with Gruber's opinions is not a basis for preclusion and was an abuse of discretion. *Zerega Ave. Realty Corp.*, 571 F.3d at 213-14 ("'contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony,'" citing *Boucher v. U.S.*

Suzuki Motor Corp., 73 F.3d 18, 21 (2d Cir. 1996)); *In re Pfizer Securities Litig.*, 819 F.3d 642, 660-661 (2d Cir. 2016).

B. Gruber's Opinions Concerning Trauma Should Not Have Been Precluded.

The District Court abused its discretion in relying on mischaracterizations of Gruber's opinions about trauma and the evidence supporting them in order to preclude those opinions. (SPA 16-20.)

1. Factual Support for Conclusions.

The District Court abused its discretion in finding that "Gruber provides an inadequate factual basis to support her sweeping assertion that administrators presume that all complainants are traumatized." (SPA 16.) Gruber's declaration differently states:

> the concept of "rape trauma syndrome" has widely influenced Title IX administrators, *many of whom* presuppose that any given college student complainant must be suffering from serious traumatic stress that can easily be re-triggered through participation in the disciplinary process or interaction with the accused.

(A 1007; emphasis supplied.) The District Court later acknowledged Gruber's research shows that "some administrators in some Title IX offices believe that complainants are traumatized." (SPA 18.)

Gruber provides ample basis for her opinion on how the "trauma trope" operates in Title IX disciplinary proceedings on college campuses (CA 669-677), citing: (i) the record evidence that she relied upon in forming her opinions; (ii)

seminal studies concerning rape trauma syndrome; and (iii) specific documents that she reviewed when drawing conclusions about the potential for bias in Colgate's investigation of Plaintiff's case. (CA 665-669, 673-692.)

Gruber refers to the "three-year gap" in Jane Does 1-3 reporting their allegations against Plaintiff, "memory lapses" and "inconsistent testimony" as indicators of complainant credibility issues (CA 670, 684-690) and then states that "the crucial question on which the University should have focused is what prompted the simultaneous reports after three years of silence" (A 670).

Contrary to the District Court's assertion that Gruber's opinions about the influence of trauma on Colgate administrators was "unsupported by any citation to the record," "conclusory," "speculative and unreliable," Gruber specifically *quotes* the portions of the record where a presumption of trauma appears to play a role in Brogan's investigation that was predisposed to credit complainants and consider the three-year lapse of time in reporting not to be meaningful. (A 1014; CA 688.) Gruber also examined how Brogan directed her investigative efforts to confirm Plaintiff's guilt, noting "Defendant Brogan at several times declined to explore material facts about what was said and done during the alleged assaults. Instead, she concentrated the bulk of her inquiry on whether *complainants were or appeared to be psychologically damaged* after the incidents and how witnesses felt about Plaintiff." (CA 684-688; emphasis supplied.)

Gruber's opinions were based not only on the record, but also on her knowledge, education and experience. *See* FRE 702; *Rondout Valley Central School Dist. v. The Coneco Corp.*, 321 F. Supp.2d 469, 475 (N.D.N.Y. 2004) ("As long as the expert has experience to support his opinion, explains how such experience leads to the expert's conclusion and demonstrates how the experience is reliably applied to the facts at hand, he should not be required to satisfy an overly narrow and rigid test in order to be considered an expert."). Gruber explained in deposition that she has researched trauma extensively, and that her research involves the review and study of numerous materials including sociological studies, Title IX training materials, law review articles, newspaper articles, statements made by Title IX activists serving on Title IX panels, various documents from the federal government and climate surveys. (A 634, 653-654, 712-717, 1014-1021.) Gruber was not required to conduct her own empirical studies to be recognized as an expert. *In re Mirena IUD Prods. Liability Litig.*, 169 F. Supp.3d 396, 412 (S.D.N.Y. 2016) ("Experts need not conduct studies of their own in order to opine on a topic.")

2. Reliability of Conclusions.

The District Court abused its discretion by dismissing Gruber's opinions concerning presumptions about complainant trauma as unreliable and to be precluded because "her declaration cites only her Report and four law journal articles that she authored." (SPA 16-20.) *Cruz v. Kumho Tire Co.*, 2015 WL 2193796 at **4-

5 (N.D.N.Y. May 11, 2015) (disputes regarding the existence or number of supporting authorities for an expert's opinion go to weight rather than admissibility); *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995) ("Disputes as to the strength of (expert's) credentials, faults in his use of differential etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony.")

The District Court focused on two paragraphs of Gruber's Declaration -- out of forty-six -- to conclude that her opinions about the influence of the "trauma trope" on Title IX administrators are unreliable. (SPA 17, citing ¶¶ 9-10, A 1013-1014.) Paragraph 9 of Gruber's Declaration does not address trauma, but discusses how feminist efforts to change rape law have influenced college and university sexual misconduct processes. Contrary to the District Court's claim that *Consent Confusion* and *Not Affirmative Consent* provide "no supporting information" (SPA 17), both of these articles discuss the impact of feminist ideology on the definition of consent, including the definitions adopted on college campuses, and is informative about how college administrators have been influenced by activist concerns.

In *Consent Confusion*, 38 Cardozo L. Rev. 415 (2016), Gruber analyzes: (i) social science literature concerning sexual consent and corresponding gender differentials in young adults in the United States, including on college campuses; (ii) the meaning of consent through her examination of sociological and psychological

studies, statutory and policy documents, and surveys and articles concerning the definition of consent on college campuses; and (iii) the impact of recent political rhetoric about sexual assault on college campuses on the portrayal of young men as serial rapists. (A 1039-1072.) *Not Affirmative Consent*, 47 McGeorge L. Rev. 683 (2016), while addressing efforts to define consent in the draft Model Penal Code, includes a discussion of how college regulations define consent. (A 798.)

The District Court reduces Gruber's article *Anti-Rape Culture*, 64 U. Kansas L. Rev. 1027 (2016), to a single, abbreviated quote. (SPA 17.) The article contains thirteen pages which specifically address the "trauma trope," and the statements made in the article are supported by over sixty footnotes. (A 857-870.) Likewise, the District Court attacks one, abbreviated sentence in *Rape Law Revisited*, 13:2 Ohio St. J. Crim. L. 279, 287 (2016) (A 817-836), as demonstrating that the article as a whole "relies on sparse anecdotal evidence and conjecture." One need only review the well-supported article to see that this is a mischaracterization of Gruber's work. The District Court's erroneous statements about Gruber's articles are not proper grounds for precluding Gruber's testimony. *McCullock*, 61 F.3d at 1044.

3. <u>Disagreement With Gruber.</u>

The District Court abused its discretion by going far beyond the bounds of reasonable analysis in disagreeing with Gruber's citation to the 2011 Dear Colleague Letter in *Anti-Rape Culture* and concluding that "analyzing the 2011 DCL does not

provide insight into the beliefs of administrators incorporating its requirements into their Title IX programs." (SPA 17-18.) The District Court apparently believes (erroneously) that Colgate's administrators were impervious to pressure, but the District Court's "belief as to the correctness" of Gruber's conclusions is irrelevant to whether her opinions are admissible. *In re Pfizer Securities Litig.*, 819 F.3d 642, 665. Gruber's analysis of the 2011 Dear Colleague Letter's history, substance, and implementation can aid the jury in understanding Plaintiff's claim that the 2011 Dear Colleague Letter and its enforcement created pressure on Colgate administrators to adopt policies and practices favorable to female complainants.

C. The District Court Set a Narrow Standard for Expert Qualification That Contravenes the Law of This Circuit.

1. Gruber Is Qualified to Opine on the "Trauma Trope."

The District Court abused its discretion in determining that Gruber's experience is not "extensive" enough for her to opine on the existence of gender bias among Title IX administrators because "she has never attended a Title IX training, served on a Title IX panel, conducted a Title IX investigation, or interviewed a Title IX coordinator, investigator, or decision-maker to learn about whether they presumed that all complainants are traumatized." (SPA 19.) There is no requirement that an expert have "extensive" experience in order to be qualified. On the contrary, "a proffered expert who has the *minimum* level of education and relevant experience in the field should not be precluded from testifying." *Rondout Valley*, 321 F. Supp.2d

at 475 (emphasis supplied). Nor is there a requirement that an expert have *practical* experience in order to be qualified. *Valentin v. City of N.Y.*, 1997 WL 33323099 at * 15 (E.D.N.Y. Sept. 9, 1997) ("formal education may also suffice to qualify a witness as an expert in a particular field, and the lack of extensive practical experience directly on point does not necessarily preclude an expert from testifying.")

Notwithstanding this, Gruber has extensive experience as a legal academic who studies feminist theory and violence against women using the orthodox methods of legal scholarship. The District Court's comparison of Gruber to the excluded experts in *Charter Practices International, LLC v. Robb*, 2015 WL 13000251, at *5 (D. Conn. Mar. 31, 2015), and *Playtex Prods., Inc. v. Procter & Gamble*, 2003 WL 21242769, at *10 (S.D.N.Y. May 28, 2003), is misplaced because Gruber's opinions were not based on a few conversations with students or Title IX administrators, but systematic academic study of the issues using accepted methodologies of her field.

The District Court's requirement that a qualified expert in this case needs direct experience with Title IX disciplinary proceedings ignored that the courts of this Circuit have admitted expert testimony concerning gender bias in cases where the expert has *no* direct experience with the policies and procedures at issue other than his or her review of the record evidence. *E.E.O.C. v. Morgan Stanley & Co.*, 324 F. Supp. 2d 451, 462 (S.D.N.Y. 2004) (admitting testimony regarding impact of

gender stereotypes on personnel decisions, and organizational policies and practices, including types of policies that would minimize gender bias); *Int'l Healthcare Exch. v. Global Healthcare Exch.*, 470 F. Supp.2d 345, 355 (S.D.N.Y. 2007) (testimony concerning theories on state of research concerning gender stereotyping and opinions about impact of such stereotyping on Plaintiff's employment were admissible); *E.E.O.C. v. Beauty Enters.*, 361 F. Supp. 2d 11, 18-19 (D. Conn. 2005) (testimony regarding stigmatization of minorities using subjective feelings of parties to show that those feelings were similar to those reported in sociological studies would assist trier of fact in determining Title VII claim). Experience with Title IX investigations at specific colleges or universities does not make one better equipped to globally understand those investigations or implicit gender bias.

In discounting Gruber's qualifications, the District Court overlooked her decades of experience researching and writing about the relationship between feminist theory and criminal law reform addressing violence against women, including rape and sexual assault, and, more recently, Title IX enforcement and the impact of the Dear Colleague Letter. (A 1018-1019.) Gruber co-authored a textbook on comparative criminal procedure which examines and analyzes the investigation and interrogation techniques used by police. (A 1019.) She teaches courses which address rape, force and consent standards, intoxication, rape shield laws, victim credibility, and rape trial procedure. For the past four years, her courses have

included lectures on Title IX. (A 1015.) As a member of CU Boulder's faculty assembly, Gruber met several times with Title IX personnel to discuss University policies and procedures in sexual misconduct cases. (A 1017.) Gruber has given numerous lectures on Title IX and affirmative consent. (A 1020-1021.) The totality of Gruber's experience more than qualifies her to render the opinions in her expert report. *Argonaut Ins. Co. v. Samsung Heavy Indus. Co.*, 929 F. Supp.2d 159, 168 (N.D.N.Y. 2013) ("'A court should look at the totality of the witness' qualifications in making this assessment…This Circuit has adopted a liberal standard for qualifying an expert'").

Gruber's lack of experience as a Title IX officer or panel member does not render her unqualified to opine on the presence of gender bias in Colgate's EGP. *Engler v. MTD Prods., Inc.*, 2015 WL 900126 at * 8 (N.D.N.Y. Mar. 2, 2015) ("When an expert's background is in a 'general field closely related to the subject matter in question, the court will not exclude the testimony solely on the ground that the witness lacks expertise in the specialized areas that are directly pertinent."); *Valentin*, 1997 WL 33323099 at * 15 ("The fact that a proposed expert may not have the exact qualifications to fit the case does not mean the expert's testimony is automatically inadmissible.") This Court in *Stagl v. Delta Airlines, Inc.*, 117 F.3d 76, 81 (1997), warned against requiring experts to be specifically qualified because it limits the availability of experts; but here, the District Court imposed precisely the

degree of specificity cautioned against by this Court and thus abused its discretion in setting a far more stringent standard for expert qualification than is permissible in this Circuit.

2. Gruber Is Qualified to Opine On The Presence Of Investigator Bias In Plaintiff's Case.

The District Court abused its discretion in imposing an overly narrow standard in concluding that Gruber is not qualified to opine on Brogan's potential for bias in investigating the allegations against Plaintiff because Gruber never conducted an investigation of an alleged sexual assault, attended a Title IX training, or served as a Title IX investigator. (SPA 23-24.) This is meritless for reasons stated above.

The District Court further concluded that "Gruber's knowledge of bias in *criminal* investigations is not a sufficient experiential foundation for her exacting scrutiny of Brogan's conduct during a qualitatively distinct *Title IX* investigation." (SPA 24; emphasis in the original.) Yet no one is more qualified to opine on this issue than Gruber, who has spent her career examining prosecutorial processes and the minimization of due process protections for those accused of rape, sexual assault and other crimes concerning violence against women. (A 1013-1021.) Gruber co-authored a textbook on comparative criminal procedure, including the investigation and interrogation techniques used by the police, rendering her well equipped to assess whether a career law enforcement officer handled a Title IX investigation in an adversarial rather than (the required) inquisitorial manner. (A 1013-1014, 1019.)

Valentin, 1997 WL 33323099 at **25-26 (expert with experience in police investigations permitted to offer opinions on Housing Police and E.E.O. investigations).

The District Court's distinction between criminal and Title IX investigations has no bearing on the validity of Gruber's opinions. Gruber acknowledges the differences between the two forms of investigation and then provides specific examples as to how Brogan operated under the presumption that Plaintiff was guilty rather than serving as an impartial fact finder. (A 1013-1014; CA 684-689.) Contrary to the District Court's conclusory assertion, Gruber did not offer these opinions "in service of an improper legal conclusion." Nowhere in her report or declaration does Gruber conclude that Colgate discriminated against Plaintiff on the basis of his gender or that he was denied a fair process in violation of Title IX.

D. The District Court Abused Its Discretion In Precluding Gruber's Testimony Concerning the "Serial Rapist Trope."

In precluding Gruber's testimony concerning the "serial rapist trope," the District Court abused its discretion by (1) mischaracterizing Gruber's opinions, (2) erroneously claiming they were unsupported by the record, (3) wrongly saying Gruber was taking the role of jury and (4) improperly contradicting her opinions with a declaration submitted on summary judgment that Gruber did not have in her possession at the time of her report. (SPA 16-21.)

1. The District Court inaccurately summarized Gruber's opinion as "Colgate's administrators and the complainants treated Plaintiff's alleged behavior as sexual assault instead of 'unpleasant' but consensual sexual activity because they bought into the 'serial rapist trope.'" (SPA 16.) Gruber actually opines that each complainant "seemed to have relied on the fact that the other had an experience with Plaintiff to conclude that Plaintiff was a 'serial' rapist, and therefore what happened to them was rape." (CA 672.) The basis for this was a "series of campus-rape awareness events sponsored by the University and other groups." (CA 670.) Here, the only commonality between the complainants' cases is that they all involve sexual interactions with Plaintiff. (CA 670.)

2. The District Court asserted, erroneously, that Gruber points to "'no facts' to support her opinion that the 'myth of the serial rapist appears to have had a profound effect in [Plaintiff's] case.'" (SPA 16.) On the contrary, Gruber's report cites record evidence showing that: (i) Brogan wrote off the fact that all three complainants came forward at the same time after attending a rally that discussed serial rapists (CA 688); (ii) "[b]y December 3, 2014…Brogan came to believe that Plaintiff was a serial rapist" (CA 687); (iii) Brogan asked witnesses about *any* women who may have had sexual contact with Plaintiff (CA 687-688); (iv) Taylor, the EGP Chair, improperly joined the cases because she erroneously believed that all three cases reflected a pattern of behavior (CA 677); and (v) "Taylor apparently

believe[d] that the fact that multiple rather than one complaint exists demonstrates that Plaintiff engaged in a 'pattern' of sexual activity" (CA 678). An attack on the sufficiency of this evidence goes to the weight, rather than admissibility, of Gruber's testimony. *Zerega Ave. Realty Corp.*, 571 F.3d at 213-14.

3. The District Court was incorrect when asserting that Gruber was attempting to usurp the role of the jury in assessing a witness's motivations. (SPA 20.) The "serial rapist trope" aids understanding the actions of complainants and panel members.

4. The District Court abused its discretion by relying on the Taylor Declaration to contradict Gruber's opinion that Taylor's joinder of the three cases was evidence of the influence of the serial rapist assumption. The District Court's assertion that the Taylor Declaration is "undisputed" is false, as Plaintiff disputed the propriety of the purported "pattern" in his opposition to Colgate's summary judgment motion. (A 366, 371.) The District's Court's view of Taylor's joinder of the cases is not relevant to the admissibility of Gruber's expert testimony. *In re Pfizer Securities Litig.*, 819 F.3d 665. The credibility of Taylor's *post hoc* account should not have been determined by the District Court, either on summary judgment or as part of the motion to preclude. *Azrielli v. Cohen Law Offices*, 21 F.3d 512, 517 (2d Cir. 1994) (court "may not properly grant summary judgment where the issue turns on the credibility of witnesses.") Gruber was not in possession of the Taylor

Declaration when she issued her expert report, but there is no evidence that Taylor's purported reasons for finding a pattern of behavior would change Gruber's analysis of how the serial rapist trope may have impacted Plaintiff's case. (*Compare* Gruber Report, CA 665-688, to Taylor Declaration, A 283-309.)

E. The District Court Mischaracterized Gruber's Statements About the EGP Panel.

The District Court abused its discretion in mischaracterizing Gruber's basis for opining that there was a risk that that the EGP Panel misunderstood consent. At the time that Gruber issued her report, she had before her the investigative record and the hearing panel's Decision Letters that did not contain detailed findings. (CA 666.) Per Gruber's Report, "[i]t is impossible to know for sure whether the hearing panel mistakenly interpreted non-consensual sex to mean internally unwanted sex, given that *the panel never recorded their findings*." (CA 673; emphasis supplied). Absent from the District Court's opinion is the following from Gruber's report: "the fact that there was so little evidence relating to the actual communication between the parties and so much relating to the internal feelings of the complainants creates a strong impression that the panel misapplied the nonconsent standard in the policy." (CA 673.) Gruber's report later outlines how Brogan failed to ask questions about the communications between Plaintiff and Jane Does 1-3 and to elicit details about the sexual interactions, thereby resulting in an inadequate record in regard to consent. (A 684-687.)

F. The District Court Erroneously Asserted That Gruber's Report Draws Legal Conclusions About Plaintiff's Claims.

The District Court abused its discretion in dismissing nearly the entirety of Gruber's report as drawing improper legal conclusions. (SPA 22.) A review of pages 9-28 of Gruber's report reveals no such conclusions. (CA 673-692.) Gruber has not opined that that Colgate discriminated against Plaintiff on the basis of his sex, or that there was an erroneous outcome in his case or that Colgate breached any contract with Plaintiff. As the District Court concedes, an expert may opine on "an issue of fact within the jury's province." (SPA 22.) Moreover, pursuant to FRE 704, an expert opinion "is not objectionable because it embraces an ultimate issue in the case." Gruber's report, in analyzing the Title IX procedures employed by Colgate and how they were applied in Plaintiff's case, assists the jury with a framework for the jury to decide whether gender bias was a motivating factor in expelling Plaintiff.

III.

THE DISTRICT COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT DISMISSING THE BREACH OF CONTRACT CLAIM

The District Court erroneously granted summary judgment dismissing the breach of contract claim. The District Court correctly ruled that Colgate's EGP contained the terms of an agreement between Colgate and Plaintiff, which means, as the District Court recognized (SPA 54-55), that as a matter of law, the contract had an implied duty of good faith, *Payday Advance Plus v. Findwhat.com*, 478 F.

Supp.2d 496 (S.D.N.Y. 2007). But the District Court rejected that any terms of the contract were breached and that Colgate deprived Plaintiff of the benefit of the bargain (SPA 42-56).

Plaintiff was deprived of the benefit of the bargain: after almost four years of college but thirty-nine days before graduation, Plaintiff was expelled based on a gender biased erroneous outcome of a sexual misconduct proceeding relating to alleged events his freshman year (pp. 26-48 above). The Court rationalizes away the breach of contract issues involving compliance with the EGP, finding: discretion to institute investigation of complaints despite the passage of time; no prohibition on joint investigation of differing complaints; the same panel considering the three complaints consecutively on the same day was not as a contract matter the same hearing; Taylor's decision allowing pattern evidence was discretionary; the required notice under the EGP was given; the denial of postponing the hearing was discretionary; no prohibition on requiring a "plea" at the hearing; summary statement in the decision is sufficient under EGP; the Court cannot second guess hearing panel under EGP. (SPA 43-44.) Some of these rulings are more than questionable; wrongly prejudicial were the same panel hearing the three complaints (which gave the District Court "pause") and the failure to apply the preponderance standard; the issues about EGP compliance add up to establish a breach of the implied contract duty of good faith.

CONCLUSION

For the reasons discussed above, this Court should: (i) reverse the grant of Colgate's motion for summary judgment dismissing the action, (ii) reverse the grant of Colgate's motion to preclude the Gruber expert testimony; (iii) remand the case to the District Court for jury trial and (iv) grant such other and further relief as this Court deems just and proper.

Dated: New York, New York
February 23, 2018

NESENOFF & MILTENBERG, LLP

By: *Philip A. Byler, Esq.*
Philip A. Byler, Esq.
Andrew T. Miltenberg, Esq.
Kara Gorycki, Esq.
Tara Davis, Esq.
Attorneys for Plaintiff-Appellant
John Doe
363 Seventh Avenue - Fifth Floor
New York, New York 10001
212.736.4500

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this Appellant's Brief was produced in Times New Roman (a proportionally-spaced typeface), 14-point type and contains 15,499 words (based on Microsoft Word processing system word count function).

Dated: New York, New York
February 23, 2018

NESENOFF & MILTENBERG, LLP

By: *Philip A. Byler, Esq.*
Philip A. Byler, Esq. (PB 1234)

Attorneys for Plaintiff-Appellant
John Doe
363 Seventh Avenue - Fifth Floor
New York, New York 10001
212.736.4500

SPECIAL APPENDIX

Table of Contents

Page

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOHN DOE,

Plaintiff,

-against- 5:15-CV-1069 (LEK/DEP)

COLGATE UNIVERSITY, *et al.*,

Defendants.

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff John Doe, a former Colgate University student proceeding pseudonymously, brings this action to challenge Defendant Colgate University's decision to expel him because of sexual assault allegations by former Colgate students Jane Does 1, 2, and 3. Dkt. No. 1 ("Complaint") ¶¶ 1, 186. Plaintiff alleges (1) violations of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*; (2) violation of New York State Human Rights Law ("HRL") § 296(4); (3) other state statutory and common law claims. Id. ¶¶ 189–298. In addition to Colgate, Plaintiff names as Defendants current and former Colgate administrators Jeffrey Herbst, Suzy Nelson, Kimberly Taylor, Marilyn Rugg, Valerie Brogan, and Tamala Flack, individually and as Colgate's agents. Id. ¶ 1.

Defendants moved for summary judgment on each of Plaintiff's claims, Dkt. No. 67 ("Summary Judgment Motion"), and to preclude the testimony of Plaintiff's proffered expert, Dkt. No. 85 ("Preclusion Motion"). For the reasons that follow, both of Defendants' motions are granted.

II. BACKGROUND

A. Factual History

Plaintiff is a male who attended Colgate from 2011 until he was expelled in April 2015, his senior year, after being found responsible for three instances of sexual misconduct that occurred during the 2011–12 academic year. Compl. ¶¶ 1–4, 133.

1. Relevant Colgate Policies

a. Sexual Misconduct

During the 2011–12 academic year, Colgate's Policy on Sexual Misconduct and Sexual Harassment ("Sexual Misconduct Policy") defined the violation "Sexual Misconduct I" as including "any sexual penetration . . . by a man or a woman upon a man or a woman without effective consent." Dkt. No. 67-17 ("Taylor Exhibit G") at 5. The Policy defined "Sexual Misconduct II" as "any intentional sexual touching . . . with any object by a man or woman upon a man or woman without effective consent." Id. The Policy defined the violation "Sexual Exploitation" as sexual misconduct that does not constitute either of the above violations, but can include, in relevant part, "exposing one's genitals in non-consensual circumstances." Id.

b. Colgate's Equity Grievance Policy ("EGP")

Colgate's EGP imposes procedural rules to adjudicate alleged violations of the Sexual Misconduct Policy.[1] Dkt. No. 67-13 ("Taylor Declaration") ¶ 32. The EGP prescribes "no formal time limitation on the bringing of a complaint." Taylor Ex. G at 13. "During the investigation [of a complaint], the complainant and the respondent will have an equal opportunity to share

[1] Plaintiff's hearing was governed by the EGP for the 2014–15 academic year. Taylor Decl. ¶ 32.

information and request that witnesses be interviewed." Id. at 14. "Once an investigation is completed, the investigator(s) will meet with the associate provost for equity and diversity and the appropriate EGP co-chair," and the associate provost then decides whether, "[b]ased on that meeting," enough evidence exists to "proceed[] with the complaint process." Id. at 15. In cases where it is determined that a hearing is required, "the associate provost for equity and diversity will appoint a non-voting panel chair . . . and three members of the EGP to the hearing panel." Id. at 16. The panel chair is required to send a letter to the hearing participants "[a]t least one week prior to the hearing," describing the allegations involved, the date of the hearing, and "a description of the applicable procedures." Id. During the hearing, "the complainant and the respondent will have a reasonable opportunity to present facts and arguments and to present questions through the chair." Id. at 17. After the hearing, the hearing panel decides the respondent's responsibility for the alleged EGP violations based on a preponderance of the evidence standard and what sanctions, if any, to impose. Id. at 18. Following the panel's decision, each party receives notice of the hearing's outcome, "which will include a rationale for the outcome." Id. at 20. Parties can appeal the decision. Id. at 20–21.

2. Anti-Sexual Assault Advocacy at Colgate

In April 2014, members of a Colgate student group called "Breaking the Silence" gathered "to raise awareness of sexual assault on Colgate's campus." Dkt. No. 73-2 ("Plaintiff's Exhibit 2"). Breaking the Silence released a statement in connection with the event that declared, "For too long, sexual assault and sexual abuse on this campus have been kept quiet." Id. In July 2014, defendant Rugg, Colgate's Title IX Coordinator and Associate Provost for Equity and Diversity, gave a presentation to campus tour guides, which stated that Colgate had "expelled

students found responsible for violating [its] EGP process." Dkt. No. 73-1 ("Rugg Deposition") at 158–59.

Breaking the Silence organized a Sexual Climate Forum held on October 27, 2014. Rugg Dep. at 162. The Forum featured a speaker who blamed fraternities for the majority of sexual assaults at Colgate, and argued for their abolition. Dkt. No. 67-11 ("Rugg Declaration") ¶ 36; see also Dkt. Nos. 73-3 ("Forum Article 1"), 73-4 ("Forum Article 2"), 73-5 ("Forum Article 3"). In Winter 2015, defendant Herbst, then the president of Colgate University, wrote an article in a Colgate publication that stated, "[N]early 20 percent of college-age women and about 6 percent of undergraduate men will be victims of attempted or actual sexual assault during their college years." Dkt. No. 73-27 ("Herbst Article") at 3. The article also mentioned a seminar called "Yes Means Yes," which it hailed as "empowering our young men and women to effect change" regarding sexual assault. Id.

3. EGP Training

Rugg, as Colgate's Title IX Coordinator, was charged with attending and implementing training for Colgate administrators and faculty tasked with responding to sexual assault on campus. Rugg. Decl. ¶ 8. An EGP training presentation that Rugg delivered in Fall 2013 covered issues of sexual misconduct and consent. Dkt. No. 73-8 ("Plaintiff's Exhibit 8"). The presentation includes an example of effective consent, featuring the hypothetical parties "John and Kate." Id. at 4.[2] Another slide states, "a capable complainant's unreasonable failure to communicate her expectations to her partner may be grounds for departure from . . .

[2] The cited page numbers for this document refer to those generated by the Court's electronic filing system ("ECF").

recommended sanctions." Id. at 8. Another slide asks, "Did the sexual aggressor know of the incapacity of his partner?" Id. at 13. Rugg also attended a training in April 2014, hosted by the Association of Title IX Administrators ("ATIXA"). Rugg Dep. at 149. Attendees of this training were advised to refer to sexual assault complainants as "victims" when speaking to the complainant, but to refer to the complainant as "complainant" when speaking to the respondent. Id. Attendees at the training were also advised to discourage the respondent from "lawyer[ing] up and refus[ing] to give a statement." Id. at 150. Colgate did not incorporate these three practices into its EGP. Id.; Dkt. No. 84 ("Reply") at 3.

4. The Complaints Against Plaintiff

On October 28 and 29, 2014, Colgate received three anonymous complaints—one by each of Jane Does 1, 2, and 3—accusing Plaintiff of sexually assaulting them. Dkt. No. 67-4 ("Defendants' Statement of Material Facts") ¶ 21. Jane Doe 1 alleged that, on October 28, 2011, she was heavily intoxicated at a party and accepted Plaintiff's offer to walk her home. Dkt. No. 67-18 ("Taylor Exhibit N") at 66. While walking her home, Plaintiff put his hands down Jane Doe 1's underwear, making her uncomfortable. Id. Jane Doe 1 believed that Plaintiff followed her into her dorm room "under the guise of looking out for [her]." Id. While she was "laying in bed," Plaintiff allegedly inserted his fingers into her vagina. Id.

Jane Doe 2 alleged that, on February 11, 2012, she, Jane Doe 1, Plaintiff, and several other students smoked marijuana behind a building on campus, and Jane Doe 2 was allegedly "uncomfortable" because Plaintiff was touching and kissing her. Id. at 11. Jane Doe 2 states that she was highly intoxicated after mixing alcohol and marijuana. Id. Jane Does 1 and 2 hid in a bathroom in a dormitory building "to see if [Plaintiff] would leave while [they] stood inside." Id.

Plaintiff was still waiting outside the bathroom when they exited, and Jane Doe 1 invited Jane Doe 2 to sleep in her room. Id. Plaintiff "overheard and proposed a sleepover." Id. Plaintiff followed the two women into Jane Doe 1's bed, and "touch[ed] [Jane Doe 2] all over." Id. Jane Doe 2 says that Jane Doe 1 left, "probably feeling uncomfortable," and Plaintiff then "pulled his pants down and kept trying to force [Jane Doe 2] to touch his penis." Id. Jane Doe 2 entered "the fetal position" and "kept pulling [her hand] back." Id. at 12. Once Jane Doe 2 realized that she could leave, she told Plaintiff that she needed to use the bathroom. Id. The next day, Plaintiff sent Jane Doe 2 a text message that stated, "Hey, I don't remember anything that happened last night, but if I did something wrong, I'm sorry." Id. at 12.

Jane Doe 3's complaint relates to the night of April 28, 2012. She alleged that she "consented to" leaving a party with Plaintiff to "make out" with him. Id. at 69. While walking back to Colgate's dormitories, Jane Doe 3 repeatedly refused Plaintiff's request for sex. Id. They began kissing, and Plaintiff allegedly "tried to finger" her. Id. Jane Doe 3 "kept pushing his hand away and he kept shoving his hand up [her] skirt and past [her] spandex," and eventually penetrated her vagina with his finger. Id. at 69. Jane Doe 3 said she wanted to go home, and entered her dormitory building, Andrews Hall. Id. Plaintiff followed her, "shepherded" her into a bathroom, and, without her consent, touched her breasts, put his hands down her pants, exposed his penis to her, and tried to "push [it] against" her. Id. Jane Doe 3 pushed him and ran out of the bathroom. Id. Several days after the incident, she "told [Plaintiff] that what he did was unacceptable and he could get in big trouble for it." Id. at 70.

5. The Investigation

a. Investigators' Meetings with the Complainants

On November 7, 2014, Jane Doe 2 approached Rugg, revealed that she authored one of the complaints against Plaintiff, and asked to file a "formal complaint." SMF ¶ 22. Rugg assigned Brogan and defendant Flack as co-investigators for the complaint. Rugg Decl. ¶¶ 38–39. Brogan was Colgate's Assistant Director for Investigations in the Campus Safety Department, and previously worked as a detective in the Abused Persons Unit within the Onondoga County Sheriff's Department. Dkt. No. 67-6 ("Brogan Declaration") ¶¶ 1–3. She interviewed Jane Doe 2 regarding her complaint on November 7. Id. ¶ 15. Brogan interviewed Jane Does 1 and 3 on December 2 and 3, 2014, as witnesses for Jane Doe 2's complaint. Id. ¶¶ 18–19. Jane Does 1 and 3 each admitted that they authored their respective complaints, and were interviewed about their complaints after answering questions about Jane Doe 2. Id.

b. Investigators' Meetings with Plaintiff

Brogan and Flack interviewed Plaintiff regarding the three incidents on December 12, 2014. SMF ¶ 37. Regarding Jane Doe 1, Brogan wrote that Plaintiff first claimed to have no memory of anything involving her in October 2011, and that he never had sexual contact with her. Taylor Ex. N. at 30. After further questioning, Plaintiff recalled attending a party with Jane Doe 1 and thinking that she was drunk. Id. at 31. He recalled walking her home and entering her dorm room, where Jane Doe 1 began undressing. Id. He stated that she hugged him while partially dressed and then he left. Id. Regarding Jane Doe 2, Plaintiff had "very little memory" of the evening and only remembered "snapshots" because he drank heavily and smoked marijuana. Id. One snapshot involved Plaintiff being in Jane Doe 1's room, and the next and final snapshot

of the night "was of [Jane Doe 2] lying on top of him and they were kissing" and his pants were unzipped. Id. Plaintiff texted Jane Doe 2 the next morning asking if she was okay. Id. at 32. Regarding Jane Doe 3, Brogan wrote that Plaintiff "remembered that he said some sexually aggressive things," which upset Jane Doe 3. Id. Plaintiff stated that Jane Doe 3 expressed her discomfort with his language when they met in person several days later. Id. Plaintiff denied entering Andrews Hall, stating that he "recalled standing outside of Andrews and watched her walk inside alone." Id.

After Colgate's winter break, on January 28, 2015, the investigators met once more with Plaintiff, and explained that the allegations against him constituted Sexual Misconduct I and II, which they defined for him. Brogan Decl. ¶ 31. Plaintiff submitted a written statement with his version of events on February 16. Id. ¶ 32. In relevant part, the statement adds to his previous description of events by stating that, during the Jane Doe 1 incident, Plaintiff started "touching [her]" while she was "stripped down to just her underwear." Taylor Ex. N. at 56. The investigators met with Plaintiff again on February 27, and he clarified "that he had touched [Jane Doe 1's] bare breasts." SMF ¶ 63. In total, Brogan and Flack interviewed sixteen witnesses during their investigation, including every witness that Plaintiff asked them to interview. SMF ¶ 60. The investigation was completed in March 2015. Brogan Decl. ¶ 40.

6. Hearing Preparation

a. Decision to Proceed to Hearings

Rugg and defendant Taylor, who served as "the non-voting EGP Co-Chair," Taylor Decl. ¶ 4, agreed that hearings were necessary after reviewing the investigators' documents. Rugg Decl. ¶ 54. Taylor and Rugg determined that Jane Doe 1's allegations constituted Sexual

Misconduct I and II. Taylor Decl. ¶ 33. Jane Doe 2's allegations constituted Sexual Misconduct II and Sexual Exploitation. Id. ¶ 34. Jane Doe 3's allegations constituted Sexual Misconduct I and II, as well as Sexual Exploitation. Id. ¶ 35.

b. Selection of the Hearing Panel and Issuance of Charge Letters

Taylor decided to organize the three complaints into three separate hearings before the same panel. Taylor Decl. ¶¶ 54–55. The panel would hear each case individually and conclude it before proceeding to the next case. Id. ¶ 55. To find panelists for Plaintiff's adjudication, Rugg screened potential panelists for conflicts of interest, and eventually selected faculty members Jeff Bary, Mary Moran and Nichole Doroshenko, the Biology Department's Head Technician. Rugg Decl. at ¶¶ 43–50. Jane Doe 2 was a Women's Studies major, and Bary's wife was a Women's Studies professor, but he did not know Jane Doe 2's major. Dkt. No. 67-5 ("Bary Declaration") ¶ 7. Moran was a professor in Colgate's Sociology and Anthropology Department and its Africana and Latin American Studies Program. Dkt. No. 67-8 ("Moran Declaration") ¶ 2. She once served on a lunchtime discussion panel with Jane Doe 2, but did not speak directly to Jane Doe 2 "before are after this panel" and did not know her well. Id. ¶ 10.

On March 24, 2015, Taylor issued the parties "charge letters in each of the three cases," which informed the parties that the hearings were scheduled for April 7, 2015. Taylor Decl. ¶ 37. The charge letters were sent "to Plaintiff and the applicable complainant in each case." Id. As the non-voting chair of the hearing panel, Taylor reviewed the documents compiled during the investigation of the complaints against Plaintiff, and removed information that she deemed irrelevant or overly prejudicial. Id. ¶ 40–46.

c. Plaintiff's Preparation for the Hearings

The investigation documents that would be used during the hearing—all the investigation materials that Taylor did not remove during her review—became "available for review on" March 27, 2015. Taylor Decl. ¶ 47. Subject to Taylor's availability in her office, Plaintiff could access the EGP hearing file at any time between then and April 7. Dkt. No. 67-2 ("Doe Deposition") at 214; Dkt. No. 73-29 ("Response Statement of Material Facts") ¶ 97. Plaintiff met with his attorney on March 30. Taylor Decl. ¶ 52; Dkt. No. 67-19 ("Exhibits O–V") at 2–3.[3] Plaintiff had strep throat on March 31. Doe Dep. at 122–23. He first requested to review the files on April 3, and he and his attorney reviewed the files for "[h]ours" later that day. SMF ¶ 98. They reviewed the documents again on April 7, before the hearings. Id. ¶ 99. Plaintiff was permitted to call additional witnesses for the hearings, and to seek more information from previously interviewed witnesses, but he did neither. Doe Dep. at 127–28. He similarly elected not to prepare additional documentation to support his case during the hearings. SMF ¶ 107. Plaintiff's attorney asked Taylor to postpone the hearings to give him and Plaintiff more time to review the hearing materials. Id. ¶ 100. Taylor declined the request because she believed that Plaintiff had an ample opportunity to review the materials. Taylor Decl. ¶ 52.

7. The Hearings

The three hearings were held on April 7, 2015. SMF ¶ 102. Plaintiff "did not request questions to be asked of the complainants." Id. ¶ 108. He was permitted to offer information beyond that contained in his written statement, and could have voiced his disagreement with any items in the hearing materials. Id. ¶¶ 111–12. Plaintiff also asked questions of Brogan during the

[3] The cited page numbers for this document refer to those generated by ECF.

hearings "and spoke at the hearing and was not prevented from saying or asking anything." Id. ¶ 113.

8. Determining Responsibility and Imposing Sanctions

The hearings were held consecutively, a separate hearing for each complaint. Bary Decl. ¶ 13. At the close of the final hearing, the panel discussed each case individually, and came to a decision regarding responsibility in each case before moving to the next case. Id. ¶ 15. Regarding Jane Doe 2, the panel found that Plaintiff's credibility was diminished because he could not remember much of the night. Id. ¶ 20; Moran Decl. ¶ 20; Dkt. No. 67-7 ("Doroshenko Declaration") ¶ 22. The panelists also viewed Plaintiff's apology text as an "admission" that he had behaved inappropriately. Bary Decl. ¶ 21; Doroshenko Decl. ¶ 28; Moran Decl. ¶ 22. Regarding Jane Doe 3, the panelists were persuaded by the level of detail in her recounting of the April 2012 incident, and the fact that, shortly after the incident, she told multiple witnesses that Plaintiff had engaged in sexual misconduct. Bary Decl. ¶ 25; Doroshenko Decl. ¶ 37; Moran Decl. ¶ 26.

Regarding Jane Doe 1, the panelists found Plaintiff's account unpersuasive because his story changed significantly over time. Bary Decl. ¶ 33; Doroshenko Decl. ¶ 42; Moran Decl. ¶ 31. Namely, the panel considered his initial reluctance to admit that he touched Jane Doe 1 to be suspicious. Doroshenko Decl. ¶ 42; Moran Decl. ¶ 31. Moreover, the panelists perceived that Plaintiff's behavior with each complainant amounted to a pattern of behavior—engaging in non-consensual sexual activity with the Jane Does after walking them home following a night of drinking—and found that Jane Doe 1's account was more credible because it fit that pattern. Moran Decl. ¶ 34; Bary Decl. ¶ 34. Therefore, the panelists found Plaintiff responsible for each

of the violations alleged. Bary Decl. ¶¶ 21, 31, 34–35; Doroshenko Decl. ¶¶ 29–31, 38, 43; Moran Decl. ¶¶ 24, 29, 36. Plaintiff received one decision letter for each hearing, Dkt. No. 67-19 ("Taylor Exhibits S, T, & U") at 13–21,[4] and each letter stated that "[t]he Hearing Panel received conflicting accounts of the events in question," and that the panel found Plaintiff responsible because it considered the applicable Jane Doe's "account to be more credible." Id.

Regarding the imposition of sanctions, Taylor provided "comparator information" indicating that "expulsion . . . had been imposed in previous Sexual Misconduct I cases where non-consensual penetration . . . was determined to have occurred," but did not mandate the imposition of any sanction. Moran Decl. ¶ 37; Bary Decl. ¶ 37; Doroshenko Decl. ¶ 50. The panel imposed the sanctions of expulsion for the Jane Does 1 and 3 incidents and suspension for Jane Doe 2. SMF ¶ 119. Plaintiff appealed the panel's decisions, and Dean of the College Nelson was in charge of deciding the appeals. SMF ¶ 126. Nelson reviewed the hearing materials, listened to an audio recording of each hearing, and read Plaintiff's appeal letter. Id. ¶ 129. Nelson denied the appeals after "finding that none of the grounds for an appeal had been met." Id. ¶ 131.

9. Alleged Retaliation

Before Plaintiff was expelled, one of the complainants' friends elbowed him in the kidney at a bar. Doe Dep. at 168. Furthermore, posts on the "anonymous forum" Yik Yak referenced Plaintiff, id. at 165, and at least one post referred to him as "[a] serial rapist." Dkt. No. 73-11 ("Yik Yak Posts") at 3. That Yik Yak post was forwarded to Taylor by a concerned student. Id. Plaintiff never complained of retaliation to Colgate. SMF ¶ 132.

[4] The cited page numbers for this document refer to those generated by ECF.

B. Procedural History

Plaintiff filed a Complaint in this Court on August 31, 2015. Compl. The Complaint alleged seven causes of action against Defendants: (1) violations of Title IX; (2) violation of New York HRL; (3) breach of contract; (4) breach of the covenant of good faith and fair dealing; (5) violation of New York General Business Law § 349; (6) liability based on an equitable estoppel theory; and (7) negligence.[5] Id. ¶¶ 189–298. In addition, Plaintiff seeks a declaratory judgment under 28 U.S.C. § 2201. Id. ¶ 298. On June 21, 2017, Defendants moved for summary judgment on all of Plaintiff's causes of action, including his request for a declaratory judgment. Summary Judgment Mot.; Dkt. No. 67-3 ("Memorandum"). Plaintiff opposed the Motion, Resp., and Defendants filed a reply, Reply. Defendants also seek to preclude testimony from Plaintiff's proposed expert witness. Preclusion Mot.

III. LEGAL STANDARD

A. Motion to Preclude

Defendants move to preclude the expert testimony, Dkt. No. 73-13 ("Report") at 1, proffered by Plaintiff's expert, law professor Aya Gruber. Preclusion Mot. They argue that Gruber (1) is unqualified to opine on Title IX investigations or the relationship between trauma and sexual assault reporting; (2) impermissibly provides opinions on legal conclusions and the credibility of witnesses; and (3) fails to support her opinions with reliable data. See Dkt. No. 85-1 ("Preclusion Memorandum").

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony,

[5] Plaintiff withdrew the negligence cause of action in his response, Dkt. No. 73-28 ("Response") at 1, n.1. The Court, therefore, grants Defendants' Summary Judgment Motion with respect to the negligence claim.

codifying rules outlined in Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Rule 702 states:

> A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine the fact at issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. "The party offering the testimony has the burden of establishing its admissibility by a preponderance of the evidence." In re Mirena IUD Prods. Liab. Litig., 169 F. Supp. 3d 396, 411 (S.D.N.Y. 2016) (citing Bourjaily v. United States., 483 U.S. 171, 175–76 (1987)). To determine the admissibility of expert testimony, "First, the district court must determine whether an expert is qualified," a determination that "'may be based on 'a broad range of knowledge, skills, and training.'" Id. at 412 (citing In re Fosamax Prods. Liab. Litig., 645 F. Supp. 2d 164, 172 (S.D.N.Y. 2009)). Second, the district court must evaluate whether the proposed testimony will "help the trier of fact." Id. at 413 (citing Fed. R. Evid. 702). Accordingly, expert testimony that "usurp[s] either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it" is inadmissible. United States v. Bilzerian, 926 F.2d 1285, 1294 (2d Cir. 1991).

Finally, the district court must determine whether the expert testimony is reliable. Daubert, 509 U.S. at 593–94. To determine reliability, "the district court should undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case

at hand." Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 267 (2d Cir. 2002). If the expert's reasoning is flawed, "[t]he judge should only exclude the evidence if the flaw is large enough that the expert lacks 'good grounds' for his or her conclusions." Id. (quoting In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 745 (3d Cir. 1994)). Nevertheless, "[n]othing . . . requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997); see also Bah v. City of New York, No. 13-CV-6690, 2017 WL 435823, at *9 (S.D.N.Y. Jan. 31, 2017) ("[E]xpert testimony should be excluded if it is speculative or conjectural.") (alteration in original) (quoting Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 21 (2d Cir. 1996)).

B. Summary Judgment Motion

A court must grant summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The nonmoving party must then "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id.

While the nonmoving party must do "more than simply show that there is some metaphysical doubt as to the material facts," Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986), a court at the summary judgment stage must "review all of the

evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 150 (2000); see United States ex rel. O'Donnell v. Countrywide Home Loans, Inc., 822 F.3d 650, 653 n.3 (2d Cir. 2016).

IV. DISCUSSION

A. Motion to Preclude

1. Opining on Trauma, Serial Rapists, and Consent

Gruber makes the following arguments in the section of her expert report devoted to Title IX and gender bias: (1) although most rape victims recover from trauma very quickly or are not traumatized at all, college administrators, influenced by feminist ideology, presume that sexual assault complainants are traumatized, which leads to procedural defects in Title IX hearings; (2) Colgate presumed that the complainants were traumatized in the cases against Plaintiff, which caused bias in the investigation and hearing; (3) administrators possess the erroneous belief that most male rapists are serial rapists; (4) Colgate's administrators and the complainants treated Plaintiff's alleged behavior as sexual assault instead of "unpleasant" but consensual sexual activity because they bought into the "serial rapist trope," and; (5) the hearing panel may have "mistakenly interpreted non-consensual sex to mean internally unwanted sex." Report at 5–9.

a. The "Trauma Trope"

Gruber provides an inadequate factual basis to support her sweeping assertion that administrators presume that all complainants are traumatized. See Fed. R. Evid. 702 (stating that expert testimony "must be based upon sufficient facts or data"). Her Report cites no evidence for these conclusions, and her Declaration cites only her Report and four law journal articles that she

authored. Dkt. No. 95-7 ("Gruber Declaration") ¶¶ 9–10. Two of the cited articles, Not Affirmative Consent, Dkt. No. 95-14, and Consent Confusion, Dkt. No. 95-9, contain no supporting information. Another article, Rape Law Revisited, relies on sparse anecdotal evidence and conjecture to support the conclusion that "reform is more about protecting complainants from trauma . . . than truth-seeking." Dkt. No. 95-13 at 286–89. The fourth article, Anti-Rape Culture, asserts that "today's campus factfinders regard questioning a victim's credibility . . . as victim-blaming." Dkt. No. 95-13 ("Anti-Rape Culture") at 1046. Gruber provides one example for this proposition, citing a Harvard Law Review Article criticizing Harvard's sexual misconduct training. Id.; Trading the Megaphone for the Gavel in Title IX Enforcement, 128 Harv. L. Rev. Forum 103, 110 (2015).

Gruber also cites the 2011 Dear Colleague Letter ("2011 DCL"), authored by the Department of Education's Office for Civil Rights ("OCR"), that states: "OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating." Anti-Rape Culture at 1046. During the period relevant to this action, the 2011 DCL set forth OCR's interpretation of Title IX and encouraged colleges and universities to more aggressively respond to sexual assault. Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. to Title IX Coordinators (Apr. 4, 2011), available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. The recommendation Gruber cites has nothing to do with "victim-blaming," as she asserts. Moreover, it does not assume that *all* complainants are traumatized, nor does it suggest that the credibility of complainants should not be challenged—as discussed below, many Title IX respondents,

including Plaintiff, are permitted to cross-examine complainants by directing questions to the complainant through the hearing panel.

Most importantly, analyzing the 2011 DCL does not provide insight into the beliefs of administrators incorporating its requirements into their Title IX programs. A "[u]niversity's adoption of positions recommended by the federal government does not in turn suggest that the [u]niversity did so because of gender bias—all it plausibly suggests is that the [u]niversity sought to comply with OCR's recommendations." Doe v. Univ. of Chicago, No. 16-C-8298, 2017 WL 4163960, at *5 (N.D. Ill. Sept. 20, 2017); see Mancini v. Rollins Coll., No. 16-CV-2232, 2017 WL 3088102, at *6 (M.D. Fla. July 20, 2017) ("[A]bsent university-specific allegations of community pressure, allegations of a national bias against males based on the [2011 DCL] have been found insufficient to support an inference of gender bias." (citing Doe v. Cummins, 662 F. App'x 437, 452–53 (6th Cir. 2016))).

In sum, Gruber's research shows only that *some* administrators in *some* Title IX offices believe that complainants are traumatized, which does not permit the conclusion that all, or even many, administrators share this belief. Additionally, Gruber provides no factual basis for her opinion that those administrators who *do* believe that all complainants are traumatized also rely on that belief to "explain away the complainants' credibility problems." Report at 6. These conclusions rely too heavily on overgeneralization and a smattering of anecdotes to be considered reliable. See Charter Practices Nternational, LLC v. Robb, No. 12-CV-1768, 2015 WL 13000251, at *5 (D. Conn. Mar. 31, 2015) (granting motion to exclude "because [the expert's] analysis is largely anecdotal and does not rely upon any particular type of expertise, scientific methodology, or principles that would assist the jury"); Playtex Prods., Inc. v. Procter & Gamble

Co., No. 02-CV-8046, 2003 WL 21242769, at *10 (S.D.N.Y. May 28, 2003) (holding that expert's conclusions were unreliable because they were "based on 'anecdotal conversations' she has had with some patients, and not on any survey or scientific study").

Plaintiff argues that the Court should accept the above conclusions as reliable because, "[i]n certain fields, experience is the predominant . . . basis for a great deal of reliable expert testimony." Dkt. No. 94 ("Preclusion Response") at 17 (citing Cruz v. Kumho Tire Co., Inc., 2015 WL 2193796, at *4 (N.D.N.Y. May 11, 2015)). While personal experience can be the basis for reliability, it is hard to imagine how Gruber's personal experiences could form a sufficiently comprehensive factual basis for her sweeping claim regarding the prevalence of feminist bias among Title IX administrators. Furthermore, her relevant personal experience is not extensive—for instance, she has never attended a Title IX training, served on a Title IX panel, conducted a Title IX investigation, or interviewed a Title IX coordinator, investigator, or decision-maker to learn whether they presumed that all complainants are traumatized. Dkt. No. 85-5 ("Gruber Deposition") at 35, 41, 50–51, 67–68. Cf. Valentin v. New York City, No. 94-CV-3911, 1997 WL 33323099, at *21 (E.D.N.Y. Sept. 9, 1997) (permitting expert testimony regarding retaliation against police officers despite lack of "formal studies" because the expert engaged in "innumerable conversations with members of the New York City's three . . . police agencies . . . over twenty-three years of active police service and twenty years of scholarly research on the police"). Therefore, the Court finds that Gruber's conclusion regarding Title IX administrators' acceptance of the "trauma trope" is speculative and unreliable.

Because the Court finds that Gruber's general conclusions regarding Title IX administrators' acceptance of the trauma trope is unreliable, it also rejects her application of

these conclusions to Colgate's administrators. Report at 4. The remainder of Gruber's opinion regarding the "presumption of trauma" at Colgate is unsupported by any citation to the record and instead relies on conclusory assertions. See Report at 6 (stating that Colgate relied on the "trauma framework" when it "explain[ed] away the complainants' credibility problems, such as the three-year gap in reporting, memory lapses, and inconsistent testimony"); Gruber Decl. ¶ 16 ("[T]he presumption that the complainants were traumatized led the investigator to pursue the case in a manner that indicated the goal was to confirm that . . . sexual misconduct occurred."). The Court finds that these opinions are speculative and unreliable.

b. The "Serial Rapist Trope"

Gruber states that "[a] common claim from anti-rape activists and Title IX administrators is that the epidemic of campus rapes is attributable to a small number of 'serial rapists' on campus," and that this belief is erroneous. Report at 7. Even if this is a "common claim," Gruber provides no facts to support her opinion that the "'myth' of the campus serial rapist appears to have had a profound effect in [Plaintiff's] case." Id. at 8. She states, "[h]ad the three complainants been unaware of each other, it is probable that none would have conceived of their case as an assault meriting official report," and that they only complained about Plaintiff after meeting with one another and deciding that he was a serial rapist. Id. Gruber points to nothing in the record to support this assertion, and her opinion is inadmissible for this basis alone. Moreover, Gruber's attempt to divine the internal reasoning of the complainants is improper because her testimony usurps the jury's role of assessing a witness' motivations. See Scott v. Chipotle Mexican Grill, Inc., 315 F.R.D. 33, 45 (S.D.N.Y. 2016) ("Inferences about the intent or motive of parties or others lie outside of the bounds of expert testimony." (quoting In re Rezulin

Prods. Liab. Litig., 309 F. Supp. 2d 531, 547 (S.D.N.Y. 2004)); In re Diet Drugs, No. MDL 1203, 2000 WL 876900, at *9 (E.D. Pa. June 20, 2000) ("The question of intent is a classic jury question and not one for the experts.").

Finally, Gruber states that Colgate's administrators relied on the serial rapist myth when they "regarded the bare fact that there were three accusers as evidence of a 'pattern' and therefore proof that all three incidents were, in fact, sexual assaults rather than unpleasant" but consensual sexual activity. Gruber Decl. ¶ 17. However, Taylor's undisputed declaration testimony reveals that she determined that the three incidents constituted a pattern after considering that all the incidents happened during Plaintiff's freshman year, each incident involved Plaintiff returning to a residence hall with a complainant after a night of drinking "under the guise of friendship," two of the incidents involved similar alleged sexual acts, and the incidents "reflected a troubling escalation to the April 2012 incident." Taylor Decl. ¶ 26. Therefore, the premise of Gruber's opinion—that Taylor relied only on the fact that there were three accusers—has no factual basis, and the Court deems this testimony unreliable.

c. Consent

Gruber opines that Plaintiff's hearing panel likely "misapplied the nonconsent standard in the" EGP by finding Plaintiff responsible in each case based on the erroneous belief that non-consensual sex means "internally unwanted sex" rather than sex with an objectively unwilling participant. Report at 8–9. In her deposition, Gruber stated that this opinion is based solely on her impression that this misunderstanding of consent is a "common belief." Gruber Dep. at 60. She then admitted that she could not "recall anything the administrators particularly said in this case" to suggest that they misunderstood the EGP's objective consent standard, and that it was

"impossible for [her] to know" whether the panelists misunderstood consent "based on what [she] had seen." Id. at 59–60. Gruber's opinion regarding the panel's application of the EGP's nonconsent standard is precisely the sort of "guesswork" that renders expert testimony inadmissible. Kakeh v. United Planning Org., Inc., 587 F. Supp. 2d 125, 130 (D.C. Cir. 2008).

2. Opining on Procedural Deficiencies in the Cases against Plaintiff

The final section of Gruber's Report opines, at length, on the various ways that Colgate was allegedly unfair to Plaintiff. Report at 9–28. She argues that (1) the EGP inadequately protects students from conflicts of interest; (2) Colgate did not provide Plaintiff with sufficient notice of the allegations against him; (3) Plaintiff was given insufficient time to prepare for his hearing; (4) Colgate "[i]mproperly [j]oined the [c]ases"; (4) at least two members of the hearing panel had conflicts of interest; (5) Plaintiff was denied "a meaningful opportunity to appeal," and; (6) Brogan's investigation was biased. Id. Gruber concludes that "the procedural problems with the cases likely impacted the panel's decision on some, if not all, of the charges for which Plaintiff was found responsible." Id. at 28.

First, the Court finds Gruber's conclusion improper because the question of whether there were defects in the proceedings against Plaintiff that impacted the outcomes of his hearings is, as noted in the Title IX discussion below, a legal conclusion. "[W]hile an expert 'may opine on an issue of fact within the jury's province,' an expert 'may not give testimony stating ultimate legal conclusions based on those facts.'" Snyder v. Wells Fargo Bank, N.A., No. CV-4496, 2012 WL 4876938, at *5 (S.D.N.Y. Oct. 15, 2012) (quoting Muller-Paisner v. TIAA, No. 03-CV-6265, 2012 WL 3205583, at *8 (S.D.N.Y. Aug. 9, 2012); see also Andrews v. Metro North Commuter R. Co., 882 F.2d 705, 709 (2d Cir. 1989) (rejecting expert's statement that "the railroad was

negligent" as an improper conclusion); Roniger v. McCall, No. 97-CV-8009, 2000 WL 1191078, at *5 (S.D.N.Y. Aug. 22, 2000) (holding that an expert opining on plaintiff's "efforts to find comparable employment" could not offer opinions on "whether [plaintiff's] job search was 'reasonable,' 'active and proper,' 'vigorous,' 'serious,' and the like").

Second, as discussed below, Plaintiff's breach of contract claim is premised on Colgate's violation of the EGP. Gruber concludes that Colgate violated the EGP in Plaintiff's hearing, Decl. ¶¶ 22 ("[T]he University's failure to give [Plaintiff] adequate time to prepare not only violated the rights contemplated by the Equity Grievance Procedures but the equitable principles of Title IX."), and the headings in this section of her Report state conclusions that closely track the allegations in Plaintiff's breach of contract claim, e.g., Report at 10 ("The University Provided Deficient Notice of Charges"), 13 ("Dean Taylor Improperly Joined the Cases"), 17 ("The University Denied Plaintiff a Meaningful Opportunity to Appeal"). These are all conclusions to be reached by the fact-finder, not Gruber.

Third, Gruber's discussion of Brogan's allegedly biased investigation, Report at 19–26 (scrutinizing the questions that Brogan asked of witnesses, listing questions that an unbiased investigator should have asked, stating that Brogan "approach[ed] this case more like an SVU detective concerned with making a case against a criminal suspect than a neutral investigator"), not only offers opinions in service of an improper legal conclusion, but is also an opinion that Gruber is unqualified to make. Even if Gruber is an accomplished legal scholar with respect to criminal procedure, Report at 1–2, and even if Title IX discussions make up a small portion of her criminal law courses, Gruber Dep. at 31–34, she has never conducted an investigation of an alleged sexual assault, attended a Title IX training, or served as a Title IX investigator, id. at 27,

41, 67–68. Moreover, Gruber does not state that she has performed any research, written any articles, taught a class, or delivered a presentation discussing what constitutes appropriate conduct for a Title IX investigator. See Gruber Decl. ¶¶ 29–46.

Although Gruber teaches a criminal procedure course that discusses "investigative bias," id. ¶ 31, her knowledge of bias in *criminal* investigations is not a sufficient experiential foundation for her exacting scrutiny of Brogan's conduct during a qualitatively distinct *Title IX* investigation. As she concedes elsewhere, what constitutes appropriate conduct can vary dramatically between criminal and Title IX investigations. E.g., Report at 20 (observing that "the university investigator, unlike the police investigator, is permitted to opine on the relative credibility of the witnesses in the case"). See also Bleiler v. Coll of Holy Cross, No. 11-CV-11541, 2013 WL 4714340, at *13 (D. Mass. Aug. 26, 2013) ("[I]n the intimate setting of a college or university, prior contact between the participants is likely and does not per se indicate bias."). Therefore, Gruber is unqualified to render an opinion regarding the thoroughness of or presence of bias in Brogan's investigation. Bazile v. City of New York, 215 F. Supp. 2d 354, 365 (S.D.N.Y. 2002) (holding that expert was unqualified because, even though expert had "experience . . . in supervision of law enforcement personnel, he [had] none in conducting internal disciplinary investigations").

Finally, Gruber observes that Brogan was "a former police sex-crimes investigator," that "the police necessarily function in a manner that is pro-victim," and that "[i]t *seems* as though a person with a police background *might find it difficult* to" work as an unbiased Title IX investigator. Report at 19–20 (emphasis added). Gruber's qualified language is telling; this claim is nothing but conjecture. Because this opinion lacks a factual basis, the Court finds it

inadmissible. In conclusion, Gruber's report is replete with speculation, improper legal conclusions, and opinions that she is unqualified to make. "Because [Gruber's] Report is so ridden with improper statements and opinions, [the Court] decline[s] to identify the limited portions that might qualify as expert testimony." Snyder, 2012 WL 4876938, at *5. The Court grants Defendants' Motion to Preclude Gruber's testimony.

B. Summary Judgment Motion

1. Title IX

Title IX states, "[n]o person in the United States shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving federal assistance." § 1681(a). Plaintiff brings an "erroneous outcome" claim under Title IX. Resp. at 2. To establish an erroneous outcome claim, a plaintiff must first provide evidence indicating that the outcome of the proceeding was flawed. Yusuf v. Vassar Coll., 35 F.3d 709, 716 (2d Cir. 1994). Second, the plaintiff must provide evidence indicating that "gender [was] a motivating factor in the decision to discipline." Doe v. Columbia, 831 F.3d 46, 53 (2d Cir. 2016) (quoting Yusuf, 35 F.3d at 715). For instance, "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" can create an inference of gender bias. Yusuf, 35 F.3d at 715; see id. at 716 (holding that evidence that males "are invariably found guilty" helps to establish gender bias).

However, evidence of bias against the accused in sexual misconduct hearings does not equate to bias against men. Columbia, 831 F.3d at 57 (observing that, while allegations that a hearing process favored victims over the accused may "support the inference of bias, they do not

necessarily relate to bias on account of sex"); Doe v. Trs. of Boston Coll., No. 15-CV-10790, 2016 WL 5799297, at *25 (D. Mass. Oct. 4, 2016); Haley v. Va. Commonwealth Univ., 948 F. Supp. 573, 579 (E.D. Va. 1996) ("[B]ias against people accused of sexual harassment and in favor of victims . . . indicate[s] nothing about gender discrimination."). The Court addresses each of Plaintiff's arguments in support of his erroneous outcome claim below, and finds that Plaintiff fails to provide sufficient evidence that gender bias motivated Colgate's decision to expel him.

a. Pressure on Colgate Administrators

Plaintiff alleges that "Colgate's sexual climate during the 2014–15 academic year" is evidence of "outside pressure[]" on Defendants that caused Plaintiff's proceeding to be tainted by gender bias. Resp. at 3. In Columbia, the Second Circuit found allegations that Columbia faced external pressure to favor female complainants over male respondents sufficient to survive a motion to dismiss. 831 F.3d at 57–58. Columbia faced significant criticism from the public press. Id. Student groups also called on the university to provide "statistics on sanctions issued by [Columbia] in sexual assault cases," criticized the leniency of sexual misconduct procedures in the student newspaper, and accused Columbia's Title IX investigator of conducting "inadequate investigation[s]." Id. at 51 (alteration in original). The Court, emphasizing the plaintiff's minimal burden at the motion to dismiss stage, held that criticism of Columbia's "toleration of sexual assault of female students" may plausibly have led to its "adopt[ing] a biased stance in favor of the accusing female and against the defending male . . . to avoid further fanning" this criticism. Id. at 57–58. Unlike in Columbia, "the parties [here] have reached the summary judgment stage and [Plaintiff] must demonstrate a genuine issue of material fact, not merely allegations of a plausible inference of gender bias." Boston Coll., 2016 WL 5799297, at *25 n.7.

i. Student Activism

Plaintiff's argument that Colgate's 2014 Sexual Climate Forum exerted gender-biased pressure on Colgate, Resp. at 4, is unavailing. Plaintiff states that the Forum contained a "keynote speaker [who] described male students as sexual aggressors who ply females with alcohol," that "[a] student reporter criticized the speaker as biased," and that "[m]en were portrayed as sexual predators and serial rapists." Id. None of Plaintiff's citations to the record support this startling description of the Forum. No evidence indicates that any Forum speaker said anything about male aggressors "ply[ing] females with alcohol."[6] The phrase "serial rapists" comes from Jane Doe 1's complaint, which says only that she heard "disturbing statistics about serial rapists" at the Forum, and says nothing about men being portrayed as rapists. Taylor Ex. N at 66. Finally, the only mention of bias comes from a Colgate Maroon-News article that suggests that the Forum's speaker was biased against "Greek Life," but does not claim that the speaker was biased against *men*. Forum Article 3.

The Court observes that, as demonstrated here and as will be demonstrated throughout this opinion, Plaintiff's counsel regularly supports arguments with statements that mischaracterize the record. The frequency with which these mischaracterizations appear in Plaintiff's Response and Response Statement of Facts is unprofessional and inappropriate, and the Court admonishes Plaintiff's counsel and cautions counsel to avoid this practice in future filings.

---

[6] Plaintiff cites for this proposition an article in the Colgate Maroon-News. Forum Article 1. The author is describing her own assessment about the nature of sexual assault on college campuses, not her observations of the speech, when she states that "the idea is men give women alcohol, women get drunk and so women are willing to hook up with men." Id.

Plaintiff also argues that the fact that Colgate saw "a huge amount of student activism centered around survivor support" in the 2014–15 academic year is evidence of a gender-biased campus climate, and cites the student group Breaking the Silence as an example. Resp. at 4. However, the only evidence regarding Breaking the Silence suggests that it sought to raise awareness of sexual assault at Colgate, making no distinction between male and female victims. Pl.'s Ex. 2. The Court holds that raising awareness of sexual assault, without drawing gendered assumptions about males, does not raise an inference of anti-male bias. See also Doe v. Coll. of Wooster, 243 F. Supp. 3d 875, 886 (N.D. Ohio 2017) (distinguishing Columbia and holding no inference of gender bias where public criticism leveled against the university's handling of sexual assault was "gender neutral"); Univ. of Chicago, 2017 WL 4163960, at *5 (holding that a university's approval of student groups "dedicated to breaking the silence about violence against women" does not create an inference of gender bias).

ii. The 2011 DCL

Plaintiff points to the 2011 DCL as evidence of "pressure" on Colgate to erroneously find men responsible for sexual misconduct. Resp. at 5. As stated in the Preclusion Motion discussion, Colgate's effort to comply with the 2011 DCL, standing alone, is not evidence of gender bias. Plaintiff also observes that men "found responsible for digital penetration after the issuance of the DCL were expelled." Resp. at 5. However, in one of only two post-2011 DCL hearings at Colgate where digital penetration was alleged, the male respondent was found *not* responsible for digital penetration. Dkt. No. 73-6 ("Plaintiff's Exhibit 6").[7] Therefore, Plaintiff's

[7] This evidence also defeats Plaintiff's allegation that "male respondents in sexual misconduct cases at Colgate . . . are invariably found guilty, regardless of the evidence, or lack thereof." Compl. ¶ 219. In fact, between 2012–14, Colgate held nine EGP hearings related to

reliance on previous EGP outcomes fails to support a link between the 2011 DCL and gender bias.

Finally, in a supplemental filing, Dkt. No. 89 ("Supplemental Filing"), Plaintiff directs the Court's attention to OCR's recently-issued Dear Colleague Letter, Letter from Candice Jackson, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. to Title IX Coordinators (Sept. 22, 2017) ("2017 DCL"). The 2017 DCL criticizes the 2011 DCL for recommending that schools establish sexual misconduct procedures that reduce protections for the accused and "are in no way required by Title IX law or regulation." 2017 DCL at 1. The 2017 DCL does not impact the Court's analysis of Plaintiff's Title IX claim. Plaintiff appears to rely on the 2017 DCL to argue that Colgate violated Title IX by conforming its EGP to the 2011 DCL's less stringent procedural requirements. Supplemental Filing. However, the 2017 DCL's different interpretation of Title IX simply demonstrates that OCR can "from time to time change its interpretation" of a statute. Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, 467 U.S. 837, 863 (1984). It does not mean that Colgate's compliance with the 2011 DCL, the governing interpretation of Title IX during the period relevant to this action, somehow violated Title IX.

iii. Rugg's Presentation to Campus Tour Guides

Plaintiff cites Rugg's deposition testimony for the proposition that she "trained campus tour guides to advise concerned parents . . . that Colgate . . . would expel students who violated the sexual misconduct policy." Resp. at 3–4. However, not only does this accusation as written

---

sexual misconduct (in addition to Plaintiff's), all involving male respondents. SMF ¶¶ 133–35; Pl.'s Ex. 6. Three respondents were found responsible and expelled, two were found responsible of only some of the alleged violations and received less severe sanctions, one "accepted responsibility and received probation and a housing ban," and three were found not responsible. SMF ¶¶ 133–35; Pl.'s Ex. 6.

contain no reference to gender, Plaintiff mischaracterizes Rugg's testimony. Rugg did not state that she trained campus tour guides to promise parents that Colgate would expel students found responsible for committing sexual misconduct—rather, Rugg prepared a presentation for campus tour guides that stated, "We *have* expelled students for violating our EGP policy." Rugg Dep. at 159 (emphasis added). This is a factual statement, not a promise of future punishment.

iv. President Herbst's Winter 2015 Message

Plaintiff cites as evidence of gender-biased pressure a university publication authored by Colgate's former President Herbst in Winter 2015. Resp. at 4. However, the portion of the article that Plaintiff excerpts acknowledged that both men and women can be victims of sexual assault, and makes no reference to men as aggressors or women as victims. Herbst Article at 3; see Doe v. Salisbury Univ., 123 F. Supp. 3d 748, 767 (D. Md. 2015) (holding that "public notices or newsletters informing the student body writ large about the risk of sexual assault on college campuses . . . in a gender-neutral tone" do not create an inference of gender bias). Plaintiff states that Herbst "touted the 'Yes Means Yes' seminar, which focused on 'female sexual power' and a 'world without rape.'" Resp. at 4. However, Plaintiff does not explain the content of the seminar, whether it criticizes Colgate's EGP hearings, or whether it impacts Colgate to a degree that would support an inference of pressure on administrators. In conclusion, Plaintiff presents insufficient evidence to permit a reasonable jury to find that Colgate faced pressure that caused gender bias to infect his EGP hearing.

b. Alleged Gender Bias in Colgate's EGP Training

Plaintiff next contends that gender bias motivated the outcome of his hearing because Colgate's EGP training was gender-biased. Resp. at 6–8.

i. Rugg's Training Materials

First, Plaintiff assert that the trainings Rugg provided to Colgate's EGP panelists and investigators "promoted the biased assumption that males are sexually aggressive," citing the use of gendered language in one of Rugg's training presentations. Resp. at 6. One slide in this presentation describes a generic complainant as "she," another describes a generic respondent as "he," and one recurring example depicts "John" asking for, and receiving, consent from "Kate." Pl.'s Ex. 8. The presentation does not otherwise mention gender, and does not, for instance, encourage attendees to presume that female complainants tell the truth or contain biased assumptions about men. Id. The mere use of gendered pronouns does not permit an inference of gender bias. See Hardy v. New DN Co., No. 95-CV-5818, 1997 WL 666212, at *11 (S.D.N.Y. Oct. 24, 1997) ("[U]se of the term 'him' suggests perhaps an insensitivity to the desirability of using gender-neutral language, but cannot reasonably be understood as evidence of a discriminatory bias."). Even if gendered language, standing alone, could generate an inference of gender bias, Plaintiff provides evidence of limited use of gendered pronouns in one training presentation, which is too benign and isolated to permit an inference that Rugg's training materials caused the training's attendees to become gender-biased.

ii. ATIXA Training

Plaintiff alleges that Rugg's attendance at an ATIXA presentation in April 2014 instilled Colgate's hearing procedures gender bias. Resp. at 7–8. Plaintiff states that the ATIXA representative at the training advised attendees to implement several allegedly biased strategies in

Title IX implementation. Id.[8] However, Colgate does not appear to have implemented any of these strategies. Rugg Dep. at 149–50. Defendants correctly observe that "all Plaintiff has done is point to outside advice that Colgate chose not to follow." Reply at 3. Therefore, there is insufficient evidence to establish that Colgate's EGP training created an inference of gender bias.

c. Colgate's EGP

Plaintiff first states that Colgate's EGP inherently suffers from gender bias because ATIXA drafted it. Resp. at 8. However, putting aside the issue of whether ATIXA is a gender-biased organization, the Court rejects the argument that the EGP, regardless of its contents, is inherently gender-biased because an organization that helped draft it may have been biased. Second, Plaintiff states that the EGP was gender-biased for the following reasons:
(1) complainants could get an advisor when they filed a report, but respondents could not get an advisor until after the investigation was completed; (2) Colgate could jointly investigate separate complaints that form a "pattern" of behavior; (3) "[A] respondent did not know the specific allegations against him until *after* the investigation was completed"; (4) panels were permitted to "sanction respondents for policy violations not included in the charge letter"; (5) complainants could have dividers placed between them and respondents at hearings; and
(6) "complainants—but not respondents—received amnesty for student misconduct such as

[8] Plaintiff states that the strategies included (1) referring to complainants as "victims" when speaking to complainants but as "complainants" when speaking to respondents; (2) discouraging respondents from hiring an attorney for the hearing; (3) "not question[ing] complainants at the hearing"; and (4) treating multiple complaints as a "pattern of behavior" to encourage reporting. Resp. at 7. Plaintiff's sole citation for this information is a sheet of notes that Rugg took during the meeting. Resp. at 8; Dkt. No. 73-10 ("Plaintiff's Exhibit 10"). The Court observes that this exhibit says nothing to suggest that the ATIXA training mentioned the third or fourth strategies alleged by Plaintiff. Pl.'s Ex. 10.

alcohol violations." Resp. at 8.

None of these cited provisions make assumptions regarding the gender of the complainant or respondent. Facially gender-neutral sexual misconduct policies like Colgate's EGP do not create an inference of gender bias. Yu v. Vassar Coll., 97 F. Supp. 3d 448, 478 (S.D.N.Y. 2015) (rejecting argument that university hearing policies reflected gender bias where policies were "entirely gender neutral"). Because Plaintiff does not establish that Colgate's EGP intentionally discriminated against males, the EGP does not create an inference of gender bias.

In fact, although the Court need not comment further, it notes that Colgate's procedures do not even support an inference of bias against respondents generally, let alone male respondents. For instance, two of Plaintiff's allegations described above rely on misconstruction of the EGP. See, e.g., Taylor Ex. G at 13 (stating nothing regarding a respondent's inability to get an advisor), 18 (stating that hearing panels can find respondent responsible for charges not included in the charge letter only when "the evidence does not support the charge as stated in the charge letter but does support a lesser violation"). Colgate's implementation of its hearing procedures similarly contradicts Plaintiff's understanding of these procedures. See, e.g., Doe Dep. at 101–02 (admitting that Plaintiff was able to seek an advisor as early as December 2014 or January 2015), Dkt. No. 73-7 ("Taylor Deposition") at 103–04 (stating that both complainants and respondents can, and have, requested dividers at hearings). Plaintiff presents other provisions—clauses permitting joint investigation of complaints and assuring complainants that they can report alleged sexual misconduct without fear of reprisal for alcohol use—with no explanation for how these provisions cause unfair results for respondents. In any case, Plaintiff's failure to demonstrate that the EGP creates an inference of gender bias renders this argument

incapable of supporting his Title IX claim.

d. The Investigation

Plaintiff first alleges that the investigation of the complaints against him were tainted by gender bias because the primary investigator, Val Brogan, once worked in the Abused Persons Unit at the Onondaga County Sheriff's Department. Resp. at 9; Brogan Decl. ¶ 3. Plaintiff reasons that Brogan may be biased against "males accused of sexual misconduct" because "she historically had an adversarial relationship" with them. Resp. at 9. This assessment of Brogan's history with alleged sexual assault perpetrators is entirely conjectural, however, and the Court rejects the notion that a person must harbor bias against men because that person handled sexual assault cases while working for law enforcement. See Sahm v. Miami Univ., 110 F. Supp. 3d 774, 778 (S.D. Ohio 2015) (finding that the fact that a Title IX investigator also served "as a part-time police officer [and] a member of the Task Force on the Prevention of Sexual Assault" did not raise inference of gender bias).

Second, Plaintiff states that Brogan "believes that most victims tell the truth," and states that this is so because "her subjective reports . . . refer[] to the complainants as 'victims.'" Resp. at 9. However, Brogan's statement that her "experience" has been that most victims tell the truth, Dkt. No. 73-12 ("Brogan Deposition") at 126–27, does not permit the conclusion that Brogan *assumes* that victims tell the truth, or that she assumed the complainants in this case were telling the truth before gathering evidence. Plaintiff's citation to two documents in the investigative file where Brogan uses the word "victim" once and otherwise only refers to the complainants by their names, or as "student" or "her," Taylor Ex. N at 13–16, 67, does not alter this conclusion. Most importantly, a belief that complainants tell the truth does not reflect gender bias because males

can also be victims of sexual assault.

Third, Plaintiff complains that Brogan asked some witnesses questions about Plaintiff that she did not ask about complainants. Id. However, he provides no explanation for why an investigator's mere failure to ask reciprocal questions of an alleged victim and alleged perpetrator of sexual assault is evidence of any bias, let alone gender bias. Moreover, Brogan asked several questions crafted to find favorable evidence for Plaintiff, undermining his assertion of bias. See, e.g., Taylor Ex. N at 31 (asking Plaintiff if Jane Doe 1 "had come on to him"), 32 (asking Plaintiff to provide names of people he had spoken to about the incident with Jane Doe 2, and asking him whether "he could think of any reason" that the complainants would lie), 39 (asking a witness why Jane Doe 3 "decided to report this incident" in 2014), 48 (asking a witness if she was "shocked when [Jane Doe 3] told [her] something happened with [Plaintiff] she wasn't comfortable with").

Fourth, Plaintiff argues that Brogan exhibited gender bias by "assuming that he was responsible in every instance for obtaining consent" because she did not ask if Jane Doe 2 received Plaintiff's consent before engaging in sexual activity with him even though "he was incapacitated and vomiting." Resp. at 10. However, Plaintiff never complained that Jane Doe 2 sexually assaulted him, Doe Dep. at 145, and he never suggested that this was the case during the investigation. Because Plaintiff's consent was never at issue, it is unremarkable that Brogan did not independently investigate whether Jane Doe 2 obtained his consent.

Fifth, Plaintiff alleges that Brogan had a "conflict of interest" because she "served on the panel for Colgate's Sexual Climate Forum." Compl. ¶ 131. However, as discussed above, participation in the Forum, by itself, does not indicate gender bias. Moreover, although Jane

Doe 2 helped organize the Forum and "invite[d Brogan] to appear as a panelist," Brogan had "very limited" communication with Jane Doe 2 and "did not develop any familiarity with her," and therefore did not deem it necessary to recuse herself. Brogan Decl. ¶ 11. As stated in the Preclusion Motion discussion, this limited interaction between participants in a hearing is common in the university setting and is insufficient to create an inference that Brogan conducted a biased investigation, let alone a gender-biased investigation.

For these reasons, Plaintiff has provided insufficient evidence to demonstrate gender bias in the investigation.

e. Taylor's Alleged Gender Bias

Plaintiff states that Taylor should not have been heavily involved in so many aspects of his hearings, that she had a relationship with the complainants, that she provided complainants with "a quiet space" during the hearing, and that she only sent charge letters to Plaintiff after Jane Doe 3 sent her an email threatening litigation if Colgate did not move quickly on her complaint. Resp. at 11–12. However, these observations are unhelpful for Plaintiff's Title IX claim. His assertion that Taylor's significant involvement in the proceedings against him establishes bias is unsupported by any reasoning, id. at 11–12, and is thus conclusory.

Second, although Plaintiff observes that Taylor knew the complainants, as stated above, an administrator's mere prior contact with a hearing participant does not create an inference of bias. Moreover, Taylor's undisputed declaration testimony indicates that she did not know Jane Does 1 or 3, and that she interacted infrequently with both Plaintiff and Jane Doe 2 through various events on campus. Taylor Decl. ¶¶ 7–10. This is not evidence of a conflict of interest with respect to any party in the proceedings.

Third, the fact that Taylor accommodated the complainants' requests to reserve a "waiting room" for them and another for their friends during the hearing, Taylor Dep. at 98–99, does not suggest unfairness because Plaintiff never alleges that he asked for, and was denied, similar accommodations. Furthermore, Plaintiff fails to account for accommodations that Taylor provided him during the hearing process. For instance, before Plaintiff's hearings, Taylor ensured that no investigation materials that she considered overly prejudicial to him would be presented to the hearing panel for their consideration. Taylor Decl. ¶¶ 40–41. For instance, she removed information indicating that two additional Colgate students had accused Plaintiff of sexual assault. Id. ¶ 42. She also declined to add to the hearing file an anonymous report received on March 11, 2015, that accused Plaintiff of photographing a nude, unconscious female student. Id. ¶ 43. This seriously undermines Plaintiff's assertion that Taylor was biased against him.

Fourth, while Jane Doe 3 did send Taylor an email on March 23, 2015, the day before the charge letters were issued to Plaintiff and the complainants, Dkt. No. 73-14, this is ultimately not probative of any bias on Taylor's part. The email urged Taylor to hurry and select a hearing date, and hinted that Jane Doe 3 was concerned about "the legality of the proceedings so far." Id. However, it is unclear what Plaintiff intends the e-mail to prove. If he is arguing that the e-mail prompted his hearing panel to find him responsible, this is unsupported by any evidence. If he is arguing that Colgate only decided to proceed to a hearing because of Jane Doe 3's threat of litigation, this would defeat the theory of his case—that Colgate intended to expel him, regardless of the evidence, from the moment the complainants accused him of sexual assault. Moreover, the available evidence suggests that the decision to proceed to a hearing, and

the date of the hearing, must have been made before Jane Doe 3 sent her email. Taylor explained in her deposition that the charge letter contained the hearing date, and the hearing date could only be set after Rugg confirmed "the availability of all the EGP members, the investigator," and Taylor. Taylor Dep. at 67. As Taylor observes, "it would have been virtually impossible to . . . make all of those arrangements between 5:00 [PM] on the 23rd and" when she sent the charge letter to Plaintiff on the 24th. Id.

Finally, and most importantly, none of the allegations that Plaintiff raises against Taylor constitute allegations of *gender* bias. Plaintiff's Response seems aware that these allegations do not establish intentional gender discrimination, arguing only that the evidence "suggests that Taylor favored complainants, who were historically all female." Resp. at 12. Without any evidence connecting Taylor's alleged improprieties to a gender-biased motive, Plaintiff's allegations against her cannot support his Title IX claim.

f. Plaintiff's "Pattern of Behavior"

Plaintiff argues that Rugg' and Taylor's decision to view the complaints against him as constituting a possible pattern of behavior reflects gender bias and affected the outcome of his case. Resp. at 12–14. Plaintiff supports this claim by challenging the existence of a pattern and restating the previously rejected assertion that "Colgate's administrators viewed males as sexual predators and serial rapists." Id. at 12. As stated in the Preclusion Motion discussion above, the Court found that Defendants' explanation for treating the complaints against Plaintiff as a pattern was well-reasoned. Moreover, because Plaintiff provides no evidence to suggest that Rugg' and Taylor's decision was motivated by his gender, this argument cannot support a Title IX claim.

g. The Hearings and Outcomes

Plaintiff presents a litany of allegations of gender bias regarding the April 7, 2015 hearings and their outcomes. First, he complains that Taylor wrongly denied his request to postpone the hearings to give him and his attorney advisor more time to review the hearing materials. Compl. ¶ 202. Second, Plaintiff alleges that he received inadequate notice of the Sexual Exploitation charges because he did not know about them until March 24, 2015. Id. ¶ 162. Third, Plaintiff presents a bullet point list of fourteen reasons why his April 7, 2015 hearing reflected gender bias. Resp. at 14–16. These include, for example, assertions that Brogan was "hostile . . . and intimidating" when Plaintiff asked her questions, that her credibility findings presupposed that the complainants were "victims," that the panel did not ask questions that Plaintiff thought they should have asked, that the panelists attended "Rugg's biased training programs," asked the complainants leading questions, and "assumed that [Plaintiff] was required to obtain Jane Doe 2's consent." Resp. at 14–15. In addition to the bullet points, Plaintiff asserts that, "[m]otivated by gender bias, the EGP panel disregarded exculpatory evidence . . . and made faulty credibility assessments in finding [Plaintiff] responsible for sexual misconduct." Id. at 17.

The Court has already found that the allegations relating to Colgate's Title IX training and the issue of Plaintiff's consent do not raise an issue of gender bias. The remainder of the allegations similarly fail to support an inference of gender bias. At most, Plaintiff details a list of perceived procedural flaws and tacks on a conclusory allegation that these procedural flaws were motivated by gender bias. The Court also observes that these alleged procedural flaws are a combination of unsubstantiated assertions based on Plaintiff's subjective impressions at the

hearing and a series of alleged procedural errors that are addressed and rejected in the breach of contract section below.

Similarly, although Plaintiff complains that the panel decided to expel him without considering several mitigating factors, Compl. ¶¶ 185–88, he does not explain how this decision was motivated by gender bias. Moreover, the panelists' declarations reveal that they considered the six character references that Plaintiff provided, and the fact that he was close to graduation, but ultimately concluded that these factors did not warrant a reduced sanction. Bary Decl. ¶¶ 36–40, Doroshenko Decl. ¶¶ 50–53 , Moran Decl. ¶¶ 37–38. Therefore, Plaintiff's argument that mitigating factors were not considered is without merit.

Finally, Plaintiff's allegations that hearing panelists Bary and Moran had a relationship with Jane Doe 2, Compl. ¶¶ 131, 170, are unsubstantiated. Although Bary was married to a Women's Studies professor at Colgate, it is undisputed that he did not know that Jane Doe 2 was a Women's Studies major and that he did not mention Jane Doe 2's name to his spouse. Bary Decl. ¶ 7. Regarding Moran, Plaintiff concedes in his Response Statement of Facts that she was not a Women's Studies professor and did not have any relationship with Jane Doe 2. SMF ¶¶ 69, 73; RSMF ¶¶ 69, 73. Therefore, contrary to Plaintiff's allegations in his Complaint, the two panelists appeared to have a negligible or nonexistent relationship with Jane Doe 2.

For these reasons, Plaintiff's allegations regarding the hearings and their outcomes do not create an inference of gender bias and cannot support a Title IX claim.

h. Denial of Plaintiff's Appeal

Plaintiff appealed the hearing panel's decision, and Dean of the College Nelson denied the appeal. SMF ¶ 131. Plaintiff argues that Nelson's denial was tainted by gender bias. Resp.

at 21. His argument, however, relies on many of the same arguments that the Court has already rejected as not presenting evidence of gender bias. For instance, the fact that Nelson "regularly attended sexual awareness events around campus," without more, is not evidence of gender bias. Similarly, Plaintiff argues that the denial of his appeal was tainted by gender bias because he believes that the hearing process was tainted by gender bias. Id. at 21–22. This argument fails because the Court, as discussed above, found Plaintiff's arguments raised against the hearing process to be unpersuasive. Plaintiff's observation that Nelson "attended . . . Women's Studies Brown Bag Lunches," Resp. at 21, is inconsequential, because he does not describe what was discussed at these lunches or explain Nelson's involvement in the lunches. Therefore, Plaintiff provides insufficient evidence to establish that the denial of his appeal was the product of gender bias.

In conclusion, Plaintiff presents insufficient evidence to permit a reasonable jury to conclude that Colgate's decision to expel him was motivated by gender bias. Accordingly, the Court grants Defendants' Motion for Summary Judgment with respect to Plaintiff's Title IX claim.

2. New York State HRL

Plaintiff alleges a violation of New York State HRL § 296(4). Compl. ¶ 283–93. However, "identical standards apply to" discrimination causes of action under § 296(4) and Title IX. Weinstock v. Columbia Univ., 224 F.3d 33, 42 (2d Cir. 2000). Because the Court rejected Plaintiff's Title IX claim, it also grants summary judgment with respect to his Human Rights Law cause of action.

3. Breach of Contract

Plaintiff argues that the promises Colgate makes in its EGP constituted a contract with Plaintiff and that Colgate breached its obligations under the EGP in no less than sixteen ways. Resp. at 24–27. "In New York, the relationship between a university and its students is contractual in nature." Papaspiridakos v. Educ. Affiliates, Inc., No. 10-CV-5628, 2013 WL 4899136, at *3 (E.D.N.Y. Sept. 11, 2013), aff'd, 580 F. App'x. 17 (2d Cir. 2014). The contract's terms are "supplied by the bulletins, circulars and regulations made available to the student." Gally v. Columbia Univ., 22 F. Supp. 2d 199, 206 (S.D.N.Y. 1998). Finally, "[w]hen a disciplinary dispute arises between a student and an institution, judicial review is limited to whether the institution acted arbitrarily or whether it substantially complied with its own rules and regulations." Routh v. Univ. of Rochester, 981 F. Supp. 2d 184, 208 (W.D.N.Y. 2013).

As a preliminary matter, Defendants observe that Colgate's Student Handbook, which contains the EGP, includes a disclaimer that clarifies,"[T]his handbook is not to be regarded as a contract between the student and the university." Mem. at 2. However, "[w]hile [a university can] disclaim the existence of a specific promise through the use of such a disclaimer, it [cannot] unilaterally disclaim all contractual relations between the parties." Gally, 22 F. Supp. 2d at 206 n.7. Because the Handbook's disclaimer attempts to disclaim the Handbook's entire contractual force, the Court will not consider the disclaimer, and treats Colgate's EGP as containing terms of an agreement between Plaintiff and Colgate. The Court addresses each of Plaintiff's breach of contract arguments below, and finds that none create a genuine issue of material fact.

a. Inadequate Training

Plaintiff alleges that Colgate violated the EGP because "EGP members received only four hours of training annually." Resp. at 25. However, the EGP only requires that "EGP members receive annual training," Taylor Ex. G at 12, and does not specify how many hours of training will be provided. Therefore, this argument fails to establish that Colgate violated its EGP.

b. Untimely Complaints

Plaintiff takes issue with the fact that the complainants were able to submit their complaints approximately three years after the alleged incidents occurred. Resp. at 25. However, the EGP explicitly states that "[t]here is no formal time limitation on the bringing of a complaint, as long as the accused individual is a member of the campus community," and that "[t]he associate provost for equity and diversity may exercise discretion in handling complaints when substantial time has passed since an alleged incident." Taylor Ex. G at 13. Plaintiff was a member of the campus community when the complainants accused him of sexual assault, and Rugg—the associate provost for equity and diversity—had discretion to initiate investigation of the complaints despite the passage of time. Therefore, this argument fails to establish breach of contract.

c. Pattern of Misconduct

Plaintiff alleges that "jointly investigat[ing all three complaints] . . . even though the allegations differed significantly" violated the EGP. Resp. at 25. However, Defendants correctly state that "[n]othing in the Policy prohibits this or guarantees separate investigations." Reply at 10.

d. Lengthy Investigation

Plaintiff alleges that, because the investigation against him lasted from November 2014 to March 2015, it breached the EGP provision that states, "The University aims to complete all investigations within a 60-day calendar period." Compl. ¶ 226. However, the words "aim to" indicate that the goal of completing investigations within sixty calendar days is an "aspirational" statement that "is not enforceable" as a contractual obligation. Knelman v. Middlebury Coll., 898 F. Supp. 2d 697, 709 (D. Vt. 2012) (citing Gally, 22 F. Supp. 2d at 208); see Pierre v. Univ. of Dayton, No. 15-CV-362, 2016 WL 1134510, at *6 (S.D. Ohio Mar. 27, 2017) (finding that student handbook promise to complete investigations "in most cases within 60 working days" was a "hortatory pronouncement[]" and not an enforceable obligation).

e. Equal Opportunity to Share Information During Investigation

Plaintiff argues that he did not have "an 'equal opportunity to share information' during the investigation," as required by the EGP, Resp. at 25 (quoting Taylor Ex. G at 14), because he did not know the "exact nature of the allegations against him until five and a half months after the commencement of the investigation," Compl. ¶¶ 230–31. However, in his December 12, 2014 meeting with the investigators, just one week after the investigators interviewed the complainants, SMF ¶ 30, Plaintiff knew enough about the incidents in question to recall the incidents in detail and present his side of the story, Doe Dep. at 96–97, 209–10. Furthermore, in February 2015, Plaintiff submitted a detailed written statement containing his version of each incident after the investigators informed him that the allegations against him constituted violations of Sexual Misconduct I and II. Taylor Ex. N at 56–61. Therefore, Plaintiff "was hardly in the dark" during the investigation. Mem. at 5.

More importantly, he does not explain how the complainants were given greater opportunities to share information to the investigators. Although he had to provide his version of events during the investigation without the benefit of knowing the *complainants'* version of events, Doe Dep. at 106–07, Plaintiff does not allege that the complainants were appraised of *his* version of events during the investigation.

Furthermore, Plaintiff's argument that he was denied an equal opportunity to share information because he was not aware of the Sexual Exploitation charges until his receipt of the charge letters in March 2015, Resp. at 25; Compl. ¶ 162, is unpersuasive. Colgate defined Sexual Exploitation as including, in relevant part, "exposing one's genitals in non-consensual circumstances." Taylor Ex. G at 5. Plaintiff knew that the allegations against him constituted Sexual Misconduct I and II before he sent his written statement to the investigators, and these charges were based on allegations that Plaintiff "forced Jane Doe 2 to . . . touch[] his penis and . . . placed his penis on Jane Doe 3's thigh." Taylor Decl. ¶ 36. To perform the acts constituting Sexual Misconduct I and II, Plaintiff "necessarily exposed himself." Id. Because the Sexual Exploitation charges relied on the same facts as the charges of which Plaintiff was already aware, it is implausible to suggest that earlier knowledge of the Sexual Exploitation charges would have altered his defense. See Boston Coll., 2016 WL 5799297, at *14 (holding that plaintiff in sexual misconduct hearing was not unfairly deprived of notice where "the noticed charge" and the "charge of which he was found responsible . . . have, at their core, the same conduct"). Therefore, Plaintiff provides insufficient evidence to permit the conclusion that he was deprived of a reasonable opportunity to share information during the investigation.

f. Rugg Pre-Determined That a Hearing was Necessary

Plaintiff alleges that Rugg's decision to search for hearing panelists before Brogan's investigation was completed breached an EGP provision requiring Rugg to decide whether a hearing is necessary only after the investigation is completed and after Rugg meets with the investigators. Resp. at 25–26; Taylor Ex. G at 15. However, Rugg searched for *potential* EGP panelists in early February 2015 because she thought that the "allegations *likely* would proceed to hearing." Rugg Decl. ¶¶ 42–43 (emphasis added). Searching for potential panelists does not equate to a decision to proceed to a hearing. There is no serious dispute that the official decision to proceed to a hearing was made "in early March," after Rugg conferred with Taylor and the investigators and "reviewed the investigation materials." Rugg Decl. ¶ 54. Therefore, this argument does not establish a breach of contract.

g. Taylor's Decision to Hold One Hearing for All Complaints

Plaintiff alleges that Taylor breached the EGP by "decid[ing] that one hearing should be held for all complaints," Resp. at 26. There were three hearings on April 7, 2015. SMF ¶ 87. That the three hearings occurred on the same day in front of the same panel, Resp. at 26, does give the Court pause. Such an arrangement creates a risk that the panel may not judiciously separate the facts in each hearing and may find a respondent responsible for an act in one case based only on his behavior in another case.

However, as stated above, regardless of whether Plaintiff's hearings were held on one day or over several weeks and in front of different panels, the same information relating to all three complaints would still be available for each panel to consider as a possible pattern of misconduct. See Taylor Decl. ¶ 28 ("Given that the end result was the same (i.e., the hearing panel in all of

the cases hearing and considering all of the information in all three cases), I made the decision that it was not appropriate or necessary to empanel three separate hearing panels."). Therefore, while Colgate's practice is inadvisable, the Court is not persuaded that holding Plaintiff's hearings on one day created a risk of impropriety.

More importantly for the purposes of Plaintiff's breach of contract claim, the Court is not persuaded that holding three hearings on one day in front of the same panel transforms three hearings into one. Nothing in the EGP required Taylor to provide different panelists for each hearing. Moreover, the panel did not behave as if it was conducting a single hearing. If Taylor had held a single hearing, each of the complainants "would have been entitled to remain present throughout each other's testimony," and she thought this "would be potentially intimidating to [Plaintiff]." Id. ¶ 29. After conferring separately with Plaintiff and the three complainants, Taylor decided *not* to join the cases into one hearing because Plaintiff did not consent to the arrangement. Id. ¶ 54. Instead, Taylor "open[ed] one case; conduct[ed] the case; close[d] it; dismiss[ed] the parties; and then convene[d] the complainant and [Plaintiff] for the next case." Taylor Decl. ¶ 55. Only the applicable Jane Doe was permitted in the room during each hearing. Taylor Dep. at 84. The panel deliberated each case separately, and made separate findings of responsibility in each case before proceeding to deliberation of the next case. Bary Decl. ¶ 15; Doroshenko Decl. ¶ 21; Moran Decl. ¶ 18; Taylor Decl. ¶ 80.

Therefore, the Court finds that Plaintiff has not established that Colgate failed to substantially comply with its obligation to provide him with three hearings.

h. Taylor's Unilateral Decision to Present Pattern Evidence

Plaintiff alleges that Taylor, by unilaterally deciding to allow the panel to consider pattern

evidence in each hearing, breached a provision of the EGP that states, "Any information that the chair *and* panel believes is relevant and credible may be considered, including hearsay, history and information indicating a pattern of behavior." Resp. at 26; Taylor Ex. N at 17 (emphasis added). The Court agrees with Defendants' reasoning that Taylor did not breach this provision by placing arguably relevant and credible "evidence before the panel and let[ting] them decide *at the hearing* whether the evidence was relevant and credible." Reply at 10 (emphasis in original). As required by the EGP, the only evidence considered at Plaintiff's hearings was evidence that Taylor and the panel both considered relevant and credible.

i. Insufficient Notice of Charges

Plaintiff "received thirteen days' notice of the charges against him," but alleges that "Colgate should have given him at least one week's notice *per complaint*," for a total of three weeks' notice. Resp. at 26 (emphasis added). This is an unfounded interpretation of the EGP. The EGP provides that parties must receive notice of charges "at least one week prior to the hearing," Taylor Ex. N at 16, but it does not state that a respondent facing multiple consecutive hearings must receive one additional week of notice per complaint.

j. Taylor's Denial of Plaintiff's Request to Adjourn the Hearing

Plaintiff argues that "[t]he EGP permits Taylor, as Co-Chair, to reschedule hearings for 'compelling reasons,'" and that Taylor breached the EGP by denying his request to reschedule the hearing even though he presented "compelling reasons" to do so. Resp. at 26. However, this Court previously rejected an identical argument regarding this provision of Colgate's EGP. Faiaz v. Colgate Univ., 64 F. Supp. 3d 336, 361 (N.D.N.Y. 2014). Colgate's EGP states that the panel Chair "*may* reschedule the hearing" if there exist compelling reasons to do so. Id. (emphasis in

original). "The use of the word 'may' clearly indicates that the determination of 'compelling circumstances,' and the decision to reschedule the hearing is in the discretion of the hearing panel chair." Id. Just like in Faiaz, the Court holds that Taylor's denial of Plaintiff's request to reschedule the hearing does not constitute a breach of contract.

k. Taylor's Request that Plaintiff "Enter a Plea"

Plaintiff alleges that, at the start of the hearing, "Taylor read the charges against [Plaintiff], and asked him to enter a plea, which is not part of the EGP." Resp. at 26. However, Taylor never used the word "plea" at the hearing. See Dkt. No. 73-16 ("Hearing Audio"). Defendants accurately observe that "Taylor's practice is to read the charges and ask the student to respond. There is no language in the Policy that prohibits this, and Plaintiff has not pointed to any." Reply at 11 (citations omitted).

l. Reasonable Opportunity to Present Facts, Arguments, and Witnesses

Plaintiff alleges that, because he "had inadequate time to prepare for the hearing," he was denied a "'reasonable opportunity' to present facts and arguments, present witnesses and question witnesses at the hearing," as required by the EGP. Resp. at 27. The Court finds this contention unpersuasive. First, Plaintiff provides insufficient evidence to establish that he had inadequate time to prepare for the April 7, 2015 hearings. As stated above, Plaintiff knew enough about the charges against him and the incidents in question to submit a detailed written account of the incidents in February 2015. SMF ¶¶ 46–53; Taylor Ex. N at 56–61. Plaintiff could also review the EGP hearing materials in Taylor's office "at any time he chose between March 27 and April 7." SMF ¶ 97.

He did not seek to review the file until April 3, and states that he did not review it earlier

because of scheduling difficulties with his attorney. Doe Dep. at 123. However, Plaintiff could have reviewed the files at an earlier time without his attorney, and Colgate will not be held accountable for scheduling difficulties between a student and their advisor. The Court is also not persuaded that Plaintiff's March 31 bout of strep throat, id. at 122–23, deprived him of adequate time to prepare for the hearing. Plaintiff does not explain why he was unable to review the file before March 31, or, given that he was well enough to review the files on April 3, why he did not try to review the files again on April 4, 5, or 6. Therefore, the Court finds that Plaintiff did not had adequate time to prepare.

Second, undisputed evidence reveals that Plaintiff was permitted to call witnesses during his hearings, he could have supplemented existing witness statements, Brogan interviewed every witness that he asked her to, those interviews were provided in the investigation file, Plaintiff could have asked questions of the complainants, and he could ask Brogan questions during his hearings. Id. at 125–30, 132, 139–40. Moreover, Plaintiff was permitted to present his side of the story during the hearing. Taylor Decl. ¶¶ 72–73, 76–77.

Finally, Plaintiff's claim that his right to question the complainants was violated because Colgate requires parties to submit questions to one another through Taylor, Compl. ¶ 237; Taylor Ex. G at 17, fails as a matter of law. See Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987) (holding that a hearing respondent's failure to direct questions through the "presiding board chancellor . . . cannot be characterized as denial of process"); Yu, 97 F. Supp. at 465 ("[A]ny claim of unfairness due to a requirement that questions be asked through the panel Chair fails as a matter of law."). Therefore, the Court finds insufficient evidence to permit the conclusion that Plaintiff was deprived of a reasonable opportunity to present facts and arguments

at his hearings.

m. Rationale for the Decision

Colgate's EGP required that parties to a hearing receive "simultaneous written notification of the outcome, which will include a rationale for the outcome." Taylor Ex. G at 20. The Court rejects Plaintiff's argument that the decision letters that he received "contained no rationale for the decision." Resp. at 27. Plaintiff received one decision letter for each hearing, Taylor Exs. S, T, & U at 13–21, and each letter stated that "[t]he Hearing Panel received conflicting accounts of the events in question," and that the panel found Plaintiff responsible because the panelists found the applicable complainant's "account to be more credible." Id. at 14, 17, 20. Perhaps Plaintiff would have preferred more elaboration on the panel's decision-making, but the EGP required *a* rationale for the outcome, not a *detailed* rationale.

n. Retaliation against Plaintiff

Plaintiff alleges that Colgate violated the EGP by "fail[ing] to address retaliation against [him] on social media where students attacked him as a serial rapist." Resp. at 27. The EGP provided that "retaliation against an individual . . . for assisting in providing information in the context of an investigation or disciplinary proceeding is a serious violation of Colgate's policy." Taylor Ex. G at 10. Plaintiff does provide evidence that students antagonized him in connection with the allegations that he committed sexual assault. For instance, posts on an anonymous social media application called "Yik Yak" accused Plaintiff of being a "rapist," Yik Yak Posts at 3, and other students called Plaintiff "a bad guy," Doe Dep. at 169–70. However, Plaintiff provides no evidence to indicate that students antagonized him "for assisting in" the investigation into the Jane Does' complaints rather than "because [the students] believed he had engaged in the acts of

which he was accused." Mem. at 13. The EGP's anti-retaliation provision only protected students from the former.

Also, Plaintiff never complained to any Colgate administrator about retaliation, Doe Dep. at 167–68, 223–24. Although Colgate *did* become aware of the Yik Yak Posts, Defendants reasonably state that there was little that the University could do to address these posts since they "were entirely anonymous and no one (including [Plaintiff]) knows who posted them." Mem. at 13. Colgate could do little about alleged harassment that it had no reason to be aware of or that was wholly anonymous. Therefore, Plaintiff provides insufficient evidence to establish that Colgate breached the EGP's anti-retaliation provision.

o. Wrongful Imposition of Sanctions

The EGP provides a list of factors for hearing panels to consider when deciding what sanctions to impose. Taylor Ex. G at 19. Plaintiff cites to Moran's Declaration for the proposition that, instead of considering these factors, "[t]he EGP panel decided to expel [Plaintiff] for 'penetration' offenses because Taylor advised them that penetration cases mandated expulsion." RSMF ¶ 121. This argument is unsuccessful because it blatantly misrepresents Moran's declaration testimony. Moran states that, "[w]hile Dean Taylor offered comparator evidence [regarding previous sanctions imposed in EGP hearings with similar findings], she did not otherwise participate in deliberations and *did not dictate a particular sanction*." Moran Decl. ¶ 37 (emphasis added).

p. Preponderance of the Evidence Standard

Plaintiff alleges that Colgate breached the EGP's requirement that the panel make findings of responsibility in Title IX hearings using a "preponderance of the evidence" standard.

Compl. ¶¶ 239–243. If the panel had properly applied the standard in his proceeding, he argues, "it would have reached the opposite conclusion; namely, that [Plaintiff] was not responsible for the misconduct alleged." Id. ¶ 240. The Court cannot engage in a granular examination of the record to find fault in the Panel's decision-making. Yu, 97 F. Supp. 3d at 461 ("The Court's role . . . is neither to advocate for best practices or policies nor to retry disciplinary proceedings."); Boston Coll., 2016 WL 5799297, at *18 ("That this Court or a jury may have come to a different outcome than the hearing board is not the determinative test."); Walker v. President and Fellows of Harvard Coll., 82 F. Supp. 3d 524, 531–32 (D. Mass. 2014) ("It is not the business of . . . judges to tell universities what statements they may consider and what statements they must reject."). Rather, "[t]he Court need only find that were was enough evidence, which, if believed, could have supported the board's decision." Boston Coll., 2016 WL 5799297, at *18.

Here, the panelists acknowledged that the "three cases hinged on the credibility of the complaining and responding parties because there were conflicting accounts of what occurred on the three nights." Bary Decl. ¶ 10. The panel deliberated on each case individually, assessed the credibility of the parties in each case, and considered the evidence proffered by Plaintiff and the three complainants before finding Plaintiff responsible in each case. Bary Decl. ¶¶ 15, 20–21, 25, 33, 34; Doroshenko Decl. ¶¶ 22, 28, 37, 42; Moran Decl. ¶¶ 20, 26, 31, 34. This included consideration of the arguments that Plaintiff presented, see, e.g., Bary Decl. ¶ 21 (stating that he considered and rejected Plaintiff's explanation of the apology text he sent to Jane Doe 2 the morning after the alleged incident); Doroshenko Decl. ¶ 45 (stating that the panel considered, and ultimately rejected, Plaintiff's theory that the complainants "were colluding and making things

up"). The panelists, having engaged in reasoned decision-making, were free to credit the complainants' accounts and find that it was more likely than not that Plaintiff was responsible for the alleged charges. See Boston Coll., 2016 WL 5799297, at *19 (holding that the panel did not fail to apply the preponderance of the evidence standard even though "the case was . . . a close circumstantial case"). The Court cannot hold that the Panel did not apply the correct evidentiary standard.

Plaintiff asserts that the panelists' declarations are unreliable because they were filed two years after his hearings, and because they require the Court to assess whether the declarants acted in good faith. Resp. at 16. However, Plaintiff's unsupported statements with respect to the veracity of these declarations are insufficient to create a genuine issue of material fact. Plaintiff did not depose the panelists to illuminate any credibility issues, and makes no effort to locate record evidence that would create an issue of fact with respect to the veracity of their testimony. The Court, therefore, rejects his baseless argument, and finds that there is insufficient evidence to establish that Colgate breached its obligation to utilize the preponderance of the evidence standard.

For the foregoing reasons, the Court finds that there is insufficient evidence to support Plaintiff's breach of contract claim.

4. Covenant of Good Faith and Fair Dealing

In support of his argument that Colgate breached the covenant of good faith and fair dealing, Plaintiff states that Colgate violated the covenant by imposing an unwarranted sanction despite insufficient evidence. Compl. ¶¶ 256–57. "[I]mplicit in every contract [is] a covenant of good faith and fair dealing in the course of contract performance." Payday Advance Plus, Inc. v.

Findwhat.com, Inc., 478 F. Supp. 2d 496, 503 (S.D.N.Y. 2007). This "claim may be brought . . . where one party's conduct, though not breaching the terms of the contract in a technical sense, nonetheless deprived the other party of the benefit of its bargain." JPMorgan Chase Bank v. IDW Grp., No. 08-CV-9116, 2009 WL 321222, at *4 (S.D.N.Y. Feb. 9, 2009). Moreover, "New York law 'does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled.'" Ely v. Perthuis, No. 12-CV-1078, 2013 WL 411348, at *5 (S.D.N.Y. 2013) (quoting Harris v. Provident Life & Accident Ins. Co., 310 F.3d 73, 81 (2d Cir. 2001)).

Plaintiff's good faith and fair dealing cause of action relies on the same facts as his breach of contract claim—specifically, that the panel found him responsible for sexual misconduct and expelled him despite insufficient evidence. Therefore, this cause of action is duplicative of the breach of contract claim.

Plaintiff's Response—in one sentence—attempts to avoid this conclusion by raising several new claims in support of his good faith and fair dealing cause of action. Resp. at 28. He states that "Colgate acted in bad faith" by being biased against Plaintiff, taking a long time to investigate the complaints against him, "encouraging" him not to get an attorney advisor, "refus[ing] his request to stay on campus during the pendency of his appeal and wait[ing] until after he would have graduated to decide his appeal." Id. Plaintiff makes no effort to develop these arguments. His allegation of "bad faith" is conclusory, and he does not explain how any of these actions, if true, deprived him of the benefit of the bargain of his contract with Colgate. "[T]he Court need not address [these] argument[s] because [they are] completely undeveloped." Metro. Prop. & Cas. Ins. Co. v. Sarris, No. 15-CV-780, 2017 WL 3252812, at *15 (N.D.N.Y. July 28,

2017) (Kahn, J.) (quoting Herbert v. Architect of Capitol, 839 F. Supp. 2d 284, 298 (D.D.C. 2012). Therefore, the Court grants Defendants' Motion for Summary Judgment with respect to Plaintiff's good faith and fair dealing claim.

5. New York General Business Law ("GBL") Violations

Plaintiff alleges that Colgate engaged in deceptive trade practices in violation of New York GBL § 349 by misrepresenting to him, and the "consumer public at large . . . that if he paid tuition and fees to Colgate, that Colgate would uphold its . . . policies." Compl. ¶ 265. Plaintiff additionally states that "Colgate had no intention of following its own policies and procedures for [Plaintiff] as the male accused of sexual misconduct," id. ¶ 266, and that his "case is an exemplar of how [other sexual misconduct] cases were handled," Resp. at 29. "To state a GB § 349 claim [sic], a plaintiff must allege (1) that a 'consumer-oriented' practice was deceptive or misleading in a material respect and (2) that plaintiff was injured thereby." Prasad v. Cornell Univ., No. 15-CV-322, 2016 WL 3212079, at *22 (N.D.N.Y. Feb. 24, 2016). Moreover, "[a] private contractual dispute" is insufficient to state such a claim. Id. Rather, the complained-of deceptive act must have "a broader impact on consumers at large." Id.

Instead of providing evidence that Colgate practiced any deception with respect to other students, Plaintiff makes the unsubstantiated assertion that "Colgate . . . violated the EGP in numerous ways in a manner that was . . . injurious to [Plaintiff] and that would be injurious to all students accused of sexual misconduct." Resp. at 29. Because the evidence does not permit a conclusion that Plaintiff's dispute with Colgate was anything but a private contractual dispute, and because the Court already rejected Plaintiff's allegations that Colgate violated its policies, the Court grants Defendants' Motion for Summary Judgment with respect to this cause of action.

6. Equitable Estoppel

Plaintiff's fifth cause of action is premised on an equitable estoppel theory. Compl. ¶¶ 271–77. He alleges that "Colgate's various policies constitute representations . . . that Colgate should have reasonably expected to induce action or forbearance by [Plaintiff]," and that Plaintiff "relied to his detriment on these . . . representations . . . by choosing to attend Colgate." Id. ¶¶ 272–74. To establish an equitable estoppel claim, a Plaintiff must show

> with respect to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts. The parties asserting estoppel must show with respect to themselves: (1) lack of knowledge and of the means of knowledge of the true facts; (2) reliance upon the conduct of the party to be estopped; and (3) prejudicial changes in their positions.

Prasad, 2016 WL 3212079, at *22 (quoting Yu, 97 F. Supp. 3d at 482–83).

Plaintiff supports his equitable estoppel claim by alleging that he faced "harassment from other students," which violated Colgate's promise to provide "an education and environment free from discrimination." Id. However, as discussed in the breach of contract section, Plaintiff provides insufficient evidence to permit the conclusion that Colgate failed to protect him from retaliation by other students. He concedes that the remainder of his claims are duplicative of his breach of contract claim, Resp. at 29, which the Court already rejected. Therefore, the Court grants Defendants' Motion for Summary Judgment with respect to this cause of action.

7. Declaratory Judgment

Plaintiff also seeks a declaratory judgment pursuant to the Declaratory Judgment Act, 28. U.S.C. § 2201, that:

> (i) the outcome and findings made by the Panel at Colgate be reversed; (ii) [Plaintiff's] reputation be restored; (iii) [Plaintiff's] disciplinary record be expunged; (iv) the record of [Plaintiff's] expulsion from Colgate be removed from his education file; (v) any record of the complaint against [Plaintiff] be permanently destroyed; (vi) [Plaintiff] be permitted to finish the courses required to graduate from Colgate and receive his degree and diploma; and (vii) Colgate's rules, regulations and guidelines are unconstitutional as applied.

Compl. ¶ 298. However, the Declaratory Judgment Act "does not create an independent cause of action." Chevron Corp. v. Naranjo, 667 F.3d 232, 244 (2d Cir. 2012) (citation omitted). Therefore, because "[Plaintiff] has failed to establish his other claims, and the declaratory relief sought rests on those claims, the claim for declaratory judgment also fails." Yu, 97 F. Supp. 3d at 484.

V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that Defendants' Motion to Preclude (Dkt. No. 85) is **GRANTED**; and it is further

ORDERED, that Defendants' Motion for Summary Judgment (Dkt. No. 67) is **GRANTED** with respect to each of Plaintiff's causes of action and the case is dismissed; and it is further

ORDERED, that the Clerk of the Court is directed to close this case; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

DATED: October 31, 2017
Albany, New York

Lawrence E. Kahn
U.S. District Judge

***** UNITED STATES DISTRICT COURT *****

NORTHERN DISTRICT OF *NEW YORK*

JUDGMENT IN A CIVIL CASE

DO CKET NO: 5:15-CV-1069 (LEK/DEP)

JOHN DOE,

Plaintiff,

-AGAINST-

COLGATE UNIVERSITY, *et al.*,

Defendants.

_____ JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__XX__ DECISION by COURT. This action came to trial or hearing before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in the above entitled action, the case is DISMISSED and judgment is entered in favor of the Defendants as against the Plaintiff, in accordance with the MEMORANDUM-DECISION AND ORDER of the Honorable Lawrence E. Kahn, U. S. District Judge, dated October 31, 2017.

DATE: October 31, 2017

LAWRENCE K. BAERMAN
CLERK OF THE COURT

Scott A. Snyder
Courtroom Deputy to the
Honorable Lawrence E. Kahn

Federal Rules of Appellate Procedure Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court.

United States District Court for the District of
NORTHERN DISTRICT OF NEW YORK

File Number 5:15-CV-1069 (LEK/DEP)

JOHN DOE)
Plaintiff,)
v.) Notice of Appeal
)
COLGATE UNIVERSITY, et al.,)
Defendant.)

Notice is hereby given that Plaintiff John Doe , (plaintiffs) (defendants) in the above-named case*, hereby appeal to the United States Court of Appeals for the Second Circuit (from the final judgment) (from an order (describing it)) entered in this action on the 31 day of October, 2017.

/s/ Andrew T. Miltenberg
Nesenoff & Miltenberg, LLP
Attorney for Plaintiff John Doe
363 Seventh Avenue, 5th Floor
Address:
New York, New York 10001

*See Rule 3(c) for permissible ways of identifying appellants

About the Panelists…

Maria C. Anderson is Associate University Counsel, Office of the President, at Montclair State University (MSU) in Montclair, New Jersey. She has been employed by MSU since 2008 and handles all legal matters for the University. For the past several years, Ms. Anderson was the lead negotiator for all software licensing, cloud computing, maintenance and support contracts to replace the University's ERP system. She also created a Compliance Plan, HIPAA Privacy and Security Policies, a Data Breach Response Protocol, and worked with its Chief Information Officer to develop University IT policies to maintain the confidentiality and security of all other electronic records.

Admitted to practice in New Jersey and New York, Ms. Anderson is a member of the New Jersey State Bar Association and Foundation. Prior to joining the University she practiced law in New York and New Jersey and focused on insurance coverage litigation, commercial transactions, real estate development and eminent domain.

Ms. Anderson is a high honors graduate of Rutgers University and received her J.D., *cum laude*, from Seton Hall University School of Law.

Helen Archontou, MSW, LSW is Chief Executive Officer of the YWCA Bergen County with facilities in Hackensack and Ridgewood, New Jersey. Her focus is on guiding the organization towards living its mission, which involves partnering with others in the community to broaden the YWCA's scope of services to include all Bergen County, and developing new initiatives aimed at empowering women and eliminating racism.

In 2016 Ms. Archontou was appointed to serve on the New Jersey Task Force on Campus Sexual Assault. She is Co-Chair of the New Jersey Coalition Against Human Trafficking's Legislative Committee and a member of AAUW's Diversity and Inclusion Committee. She is a Board member of the Bergen Community College Women's Institute, a member of the International Institute of New Jersey's Cultural Competency Taskforce and formerly served as Multidisciplinary Team Coordinator for the Bergen County Prosecutor's Office Sex Crimes & Child abuse Unit.

In May 2017, Ms. Archontou traveled to Washington, D.C. to present at a Capitol Hill policy briefing that focuses on girls' financial literacy. Often sought after by the media for her expertise in several areas, she has made several television appearances, focusing on gender pay equity for women of color in an interview on FOX 5 NY, and on improving communications surrounding the reporting of sexual assault on college campuses for NJTV News. She has been an adjunct professor in the Master's Degree program for the Center for Child Advocacy at Montclair State University.

Ms. Anchontou received her B.A. from Montclair State University and her Masters of Social Work from Rutgers University. She is also a graduate of the New Jersey Child Abuse Institute and completed the Finding Words NJ program.

Tamara J. Britt is general counsel at Manhattan College in New York City. A member of the College's cabinet and reporting directly to the President, she oversees and manages the provision of all legal services to the College, and is responsible for strategic guidance, consultation and

support on a comprehensive range of legal and associated issues involved in carrying out the College's mission. She formerly served as general counsel to Rutgers University and as counsel to the Rutgers University Foundation. Prior to joining Rutgers, she was an associate based in the New York office of Cleary Gottlieb Steen & Hamilton LLP, where she concentrated her practice in white collar defense, enforcement matters and bankruptcy litigation.

Admitted to practice in New York and New Jersey, and before the United States District Court for the District of New Jersey and the Southern District of New York, Ms. Britt has co-authored several articles, including "Guide to Human Research Subject Protections Laws in West Africa" (*Journal of Empirical Research on Human Research Ethics*), "At the Border Your Laptop is Wide-Open" (*The National Law Journal*) and "Why Financial Statements Matter: Enforcement and Litigation Implications" (*The Banking Law Journal*). She is an adjunct professor of law at Rutgers, where she teaches a course on higher education law, and has also served as a guest lecturer in an introduction to public administration course. She was active in providing *pro bono* services to low-income individuals in bankruptcy and housing court proceedings and to nonprofit organizations in the New York/New Jersey area, and prior to becoming an attorney worked in the nonprofit and higher education sectors.

Ms. Britt received her B.A., with honors, from Hampton University; her M.P.A. from George Washington University, where she was a Patricia Roberts Harris Fellow; and her J.D. from Rutgers University School of Law-Newark, where she was an editor of the *Rutgers Law Review* and an Eagleton Institute of Politics Fellow.

Raymond M. Brown, Jr. is a Partner in the Litigation Department of Greenbaum, Rowe, Smith & Davis LLP in Iselin and Roseland, New Jersey, and Chair of the firm's White-Collar Defense & Corporate and International Human Rights Compliance Practice Group. He concentrates his practice in white collar criminal defense, international human rights issues, internal investigations and complex commercial litigation, and has appeared in high-profile trials including the nine-month trial involving former Labor Secretary Raymond J. Donovan and the successful eight-year defense of senior executives of a major multinational corporation charged with environmental violations, as well as serving as Defense Co-Counsel for Senator Robert Menendez against criminal allegations of public corruption and bribery brought by the U.S. government.

Admitted to practice in New Jersey and New York, and before the Special Court for Sierra Leone, Mr. Brown is a Fellow of the Litigation Counsel of America, the American College of Trial Lawyers, the American Board of Criminal Lawyers and the American Bar Association, and a member and Past President of the Association of Criminal Defense Lawyers of New Jersey. He is also a member of the American Bar Association Sections of Criminal Justice and International Law, and the New Jersey State Bar Association's Criminal Law Section and Task Force on Judicial Independence. A Trustee of the Association of the Federal Bar of New Jersey, he is a member of the National Association of Criminal Defense Lawyers, where he a former Board Member and Parliamentarian.

Host of the Emmy Award-winning New Jersey Network program *Due Process*, Mr. Brown is a Visiting Professor and Research Scholar at Seton Hall University School of Law, where he has taught international criminal law, criminal procedure and professional responsibility. He has also taught international criminal law at the Seton Hall/American University Program in Cairo, Egypt, and at Seton Hall University's School of Diplomacy and International Relations. Mr. Brown is the recipient of the Litigation Counsel of America's Peter Perlman Service Award and

the (inaugural) 2018 Francis X. Dee Award bestowed by the American College of Trial Lawyers. His articles have appeared in the *New Jersey Law Journal* and other professional publications, and he has lectured for ICLE, the New Jersey State Bar Association, the Professional Education Group and other organizations.

Mr. Brown received his B.A. from Columbia University and his J.D. from Boalt Hall School of Law, University of California at Berkeley.

Philip A. Byler is senior litigation counsel with Nesenoff & Miltenberg LLP in New York City. He has an extensive background in litigation and has represented business and individual clients in matters including First Amendment issues, copyright infringement, partnership disputes, securities fraud allegations, Section 1983 civil rights, and real estate-related litigation. Mr. Byler has also represented college students accused of misconduct, arguing forcefully for students' rights to due process in major Title IX lawsuits against universities. His significant victories include a landmark libel case at the appellate level, an extensive property-related jury trial in New York State Supreme Court, a two-month federal securities fraud trial, and reversal of discovery sanctions in a breach of contract case in New York County Supreme Court.

Mr. Byler is admitted to practice in New York and Ohio, and before the United States District Court for the Southern and Eastern Districts of New York and the Southern District of Ohio; the United States Court of Appeals for the Second, Sixth, Eleventh and Federal Circuits; the United States Tax Court; and the United States Supreme Court. He is a member of the New York State Bar Association, where he is Chair of the Discovery in Disciplinary Proceedings Subcommittee, Secretary of the Professional Discipline Committee, Past Chair of the Trial Evidence Rules Subcommittee and a former member of the Trial Evidence Committee. Mr. Byler is a member of the New York City Bar Association, where he serves on the Professional Discipline Committee and is a former Secretary of the International Security Committee. He is also a member of the American Bar Association's Federalist Society and has served as a local and county committeeman and delegate to the Republican National Convention.

Mr. Byler received his B.A., *summa cum laude*, from DePauw University and his J.D. from Harvard Law School. He was a law clerk to the Honorable John W. Peck, United States Court of Appeals for the Sixth Circuit.

Honorable Sohail Mohammed, JSC is a Superior Court Judge, Criminal Part, Passaic County, and sits in Paterson, New Jersey. He formerly sat in the Family Division for 4 years. Prior to becoming a judge, he was a defense attorney and concentrated his practice in immigration law.

Judge Mohammed has served on the New Jersey Supreme Court Committees on Family Practice and Language Access Plan, as well as the Committee on Attorney Fee Arbitration and the District XI Attorney Ethics Committee. He has been a Trustee of the Passaic County Bar Association and has served as an Executive Board Member of the New Jersey State Bar Association Young Lawyers Division and as Chair of the Passaic County Bar Association's Young Lawyers Division. For more than 10 years he has run the New Citizens' Swearing-in program each year as part of the annual Law Day celebration at the Passaic County Courthouse.

In 1997 Judge Mohammed was the recipient of the NJSBA YLD Professional Achievement Award and in 2005 he received a Distinguished Service Award from the Superior Court of New

Jersey for promoting cultural understanding. He has received citations from the New Jersey Senate, the New Jersey State General Assembly and the Clifton Municipal Council, and has been interviewed by several news organizations and television stations regarding immigration law, Muslim issues and other community issues. Judge Mohammed has taught courses for ICLE, the New Jersey Judicial College, the Family and Criminal Division Conferences, and the Judiciary Institute for Staff Attorneys (JISA), and has lectured on immigration law, family law, diversity and motor vehicle laws. He is also a former Adjunct Professor of Medical Law and Ethics.

Judge Mohammed received his Electrical Engineering degree, *cum laude*, from the New Jersey Institute of Technology. He worked as an electrical engineer while attending law school and received his law degree from Seton Hall University Law School, where he was the founder and Past President of the Seton Hall Law School Science and Technology Law Society as well as the recipient of several awards.

Lynn Fontaine Newsome, Certified as a Matrimonial Law Attorney by the Supreme Court of New Jersey, is a Partner in Newsome O'Donnell, LLC in Florham Park, New Jersey, where she limits her practice to family law matters.

Admitted to practice in New Jersey and before the United States District Court for the District of New Jersey and the United States Supreme Court, Ms. Newsome is President of the New Jersey State Bar Foundation, Past President of the New Jersey State Bar Association, a former Chair of the NJSBA Family Law Section and a past President of the Morris County Bar Association, where she also served as Chair of the Morris County Family Law Committee. She has also been a member of the New Jersey Supreme Court Family Practice Committee and is Past President of the Morris County Bar Foundation. A member of the American Bar Association, Ms. Newsome has served in the ABA House of Delegates, is a member of the Family Law and Litigation Section and sits on the Executive Council of the General Practice, Solo and Small Law Firm Division. She is also a member of the Association of Trial Lawyers of America and a former member of the District X Ethics Committee and the NJSBA Ethics Diversionary Committee.

Ms. Newsome has been a member of the Editorial Board of the *New Jersey Law Journal* and regularly lectures for ICLE and other organizations on family law and professional responsibility. She is a recipient of the Saul Tischler Family Law Section Award, the Samuel Saiber Professional Award and ICLE's Distinguished Service Award, among other honors.

Ms. Newsome received her B.A. and J.D. from Seton Hall University. She was Law Secretary to the Honorable George P. Helfrich, Superior Court of New Jersey.

Patricia Teffenhart, MPA is Executive Director of the New Jersey Coalition Against Sexual Assault (NJCASA) in New Brunswick, New Jersey. NJAC elevates the voice of sexual violence survivors and service providers by advocating for survivor-centered legislation, training allied professionals and supporting statewide prevention strategies that work to address and defy the socio-cultural norms that permit and promote rape culture. Prior to joining NJCASA, she served as the Assistant Executive Director of Woman Aware, the state-designated domestic violence organization serving Middlesex County.

Ms. Teffenhart serves on the advisory boards of the Women's Political Caucus of New Jersey and the National Alliance to End Sexual Violence. She began her career with New Jersey Women and AIDS Network (NJWAN), where she utilized her passion for female-focused programming to provide critical health information to New Jersey women living with HIV/AIDS. Following her time at NJWAN, she was the Regional Programs for the National Latina Health Network, advancing the national health promotion infrastructure in support of Latinas and their families.

The keynote speaker for the Asbury Park Women's March, Ms. Teffenhart was awarded the Evangelina Menendez Trailblazer Award by United States Senator Bob Menendez. She is also the recipient of the 2014 Alice Paul Equality Award, the 2015 President Ronald W. Reagan Award and the 2016 Above and Beyond Award, the latter bestowed by the Rutgers University Office for Violence Prevention and Victim Assistance.

Ms. Teffenhart received her B.A. from Douglass College, Rutgers University, and her M.P.A. from the Rutgers University School of Public Affairs and Administration.