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File Name: 19a0293p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EMILY KOLLARITSCH, et al.,

Plaintiffs-Appellees,

v.

MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES; DENISE MAYBANK, in her individual and official capacity as Vice President for Student Affairs,

Defendants-Appellants.

> Nos. 17-2445/18-1715

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.
No. 1:15-cv-01191—Paul Lewis Maloney, District Judge.

Argued: March 20, 2019

Decided and Filed: December 12, 2019

Before: BATCHELDER, ROGERS, and THAPAR, Circuit Judges.

COUNSEL

ARGUED: Michael E. Baughman, PEPPER HAMILTON LLP, Philadelphia, Pennsylvania, for Appellants. Alexander S. Zalkin, THE ZALKIN LAW FIRM, P.C., San Diego, California, for Appellees. **ON BRIEF**: Michael E. Baughman, Hedya Aryani, PEPPER HAMILTON LLP, Philadelphia, Pennsylvania, for Appellants. Alexander S. Zalkin, THE ZALKIN LAW FIRM, P.C., San Diego, California, for Appellees. Seanna R. Brown, BAKER & HOSTETLER LLP, New York, New York, for Amicus Curiae.

BATCHELDER, J., delivered the opinion of the court in which THAPAR, J., joined, and ROGERS, J., joined in part. THAPAR, J. (pp. 16–19), delivered a separate concurring opinion. ROGERS, J., (pg. 20), delivered a separate opinion concurring in part and in the result.

OPINION

ALICE M. BATCHELDER, Circuit Judge. A victim of "student-on-student sexual harassment" has a private cause of action against the school under Title IX of the Education Amendments of 1972 (Title IX), 86 Stat. 373, codified as 20 U.S.C. § 1681, *et seq.*, based on the formula first set out in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). Under that formula, the sexual harassment must meet a certain standard and the evidence must satisfy the elements for an intentional tort. Our particular focus in this appeal is on the requirements that the harassment must be "pervasive" and the school's response must "cause" the injury. In short, we hold that a student-victim plaintiff must plead, and ultimately prove, that the school had actual knowledge of actionable sexual harassment and that the school's deliberate indifference to it resulted in further actionable sexual harassment against the student-victim, which caused the Title IX injuries. A student-victim's subjective dissatisfaction with the school's response is immaterial to whether the school's response caused the claimed Title IX violation. Because none of the plaintiffs in this case suffered any actionable sexual harassment *after* the school's response, they did not suffer "pervasive" sexual harassment as set out in *Davis* and they cannot meet the causation element. We also find that the individual defendant is entitled to qualified immunity. Altogether, we REVERSE the district court's order

and REMAND for entry of a final judgment dismissing these claims.

I.

This lawsuit stems from four student-on-student sexual assaults at Michigan State University. In each case, a male student sexually assaulted a female student and she reported it to campus police and to the proper administrative authorities, which undertook a response beginning with an investigation. The plaintiffs are the female student victims: Emily Kollaritsch, Shayna Gross, Jane Roe 1, and Jane Roe 2. But this lawsuit is not about the sexual assaults, nor is it directed at the perpetrators; it is directed at the University administration and its response. The plaintiffs contend that the administration's response was inadequate, caused them physical and emotional harm, and consequently denied them educational opportunities. They sued the Michigan State University Board of Trustees (hereinafter "MSU") and Vice President for Student Affairs Denise Maybank, among several others, claiming violations of Title IX, Due Process and Equal Protection under 42 U.S.C. § 1983, and Michigan law.

The defendants moved to dismiss the claims pursuant to Federal Rule of Civil Procedure 12(b)(6). Following a hearing and the plaintiffs' withdrawal of several claims, the district court dismissed all but four claims: the claims by Kollaritsch, Gross, and Roe 1 that MSU violated Title IX, and the § 1983 claim by Gross that Maybank violated her right to equal protection. *See Kollaritsch v. Mich. State Univ. Bd. of Tr.*, 298 F. Supp. 3d 1089, 1096 (W.D. Mich. 2017).

Maybank filed an interlocutory appeal of the district court's denial of her assertion of qualified immunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (providing a defendant the right to an interlocutory appeal of the "denial of a claim of qualified immunity, to the extent that it turns on an issue of law"). Meanwhile, MSU moved the district court to certify its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (providing for interlocutory appeal of qualifying issues at the courts' discretion) and, upon certification, moved this court to permit the appeal. We granted the motion, explaining that "whether a plaintiff must plead further acts of discrimination to allege deliberate indifference to peer-on-peer harassment under Title IX" is a controlling question of law warranting immediate appeal. We consolidated the appeals.

From a procedural posture, a § 1292(b) interlocutory appeal such as this one is unusual in that it arises from a denial rather than a grant of a Rule 12(b)(6) motion to dismiss the complaint, so "we are not governed by the Rule 12(b)(6) standard of review" for granted motions. *Foster Wheeler Energy Corp. v. Metro. Knox Solid Waste Auth., Inc.*, 970 F.2d 199, 202 (6th Cir. 1992). This is a review "limited to pure questions of law." *Id.*; *but see Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) (explaining that we are not limited to only the specifically certified *question* but may "address any issue fairly included within the certified order"). We do not make any determination of any facts, even by implication; the analyses and decisions herein leave all questions of fact

unresolved and all allegations still merely alleged. *See Sheet Metal Emp'rs Indus. v. Absolut Balancing Co.*, 830 F.3d 358, 361 (6th Cir. 2016). This same limitation applies to the facts accepted as true for purposes of our deciding the qualified-immunity claim.

II.

By design and effect, the *Davis* Court's Title IX private cause of action against a school for its response to student-on-student sexual harassment is a "high standard" that applies only "in certain limited circumstances." *Davis*, 526 U.S. at 643. The school is "properly held liable in damages only where [it is] deliberately indifferent to sexual harassment, of which [it] has actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Id.* at 650.

Ordinarily, we state the *Davis* standard as a three-element test and ordinarily that is enough.[1] But, even without the careful parsing that follows, the *Davis* formula clearly has two separate components, comprising separate-but-related torts by separate-and-*un*related tortfeasors: (1) "actionable harassment" by a student, *id.* at 651-52; and (2) a deliberate-indifference intentional tort by the school, *id* at 643. The critical

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[1] *See, e.g., Gordon v. Traverse City Area Pub. Sch.*, 686 F. App'x 315, 323 (6th Cir. 2017); *Stiles ex rel. D.S. v. Grainger Cty.*, 819 F.3d 834, 848 (6th Cir. 2016); *Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 362 (6th Cir. 2012); *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 444-45 (6th Cir. 2009); *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 258-59 (6th Cir. 2000); *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999).

point here is that the *Davis* formulation requires that the school had actual knowledge of some actionable sexual harassment and that the school's deliberate indifference to it resulted in further actionable harassment of the student-victim.

Actionable Sexual Harassment. We can conservatively describe "harassment," without additional qualification, as some type of aggressive and antagonistic behavior that, from the victim's perspective, is uninvited, unwanted, and non-consensual. For student-on-student sexual harassment to be *actionable* under *Davis*'s Title IX private-cause-of-action formulation, it must be (a) severe, (a) pervasive, and (c) objectively offensive. *Id.* at 651; *see, e.g., Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 363 (6th Cir. 2012) (holding that harassment comprising a shove into a locker, an "obscene sexual gesture," and a "request for oral sex" did "not rise to the level of severe, pervasive, and objectively offensive conduct" (quotation marks omitted)).

"Severe" means something more than just juvenile behavior among students, even behavior that is antagonistic, non-consensual, and crass. The *Davis* Court made an explicit admonishment that "simple acts of teasing and name-calling" are not enough, "even where these comments target differences in gender." *Davis*, 526 U.S. at 651; 652 ("It is not enough to show . . . that a student has been teased or called offensive

names." (quotation marks and editorial marks omitted)).[2]

"Pervasive" means "systemic" or "widespread," *id.* at 652-53, but for our purposes, it also means *multiple* incidents of harassment; one incident of harassment is not enough. *Id.* (explaining that this cause of action does not cover "claims of official indifference to a single instance of one-on-one peer harassment"). The *Davis* Court hypothesized that a single incident could be sufficiently *severe* that it would result in the articulated injury—and we do not doubt that a sexual assault would be such a severe incident—but the Court held that a single incident would nonetheless fall short of Title IX's requirement of "systemic" harassment. As the Court put it:

> Although, in theory, a single instance of sufficiently severe one-on-one peer harassment *could be said to have such an effect, we think it unlikely* that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment. By limiting private damages actions to cases having a *systemic effect* on educational

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[2] We do not imply that "severe" requires physical contact, or that *Davis* holds that it does. *See Davis*, 526 U.S. at 653 (describing the harassment in that case). Obviously, verbal harassment can exceed teasing and name-calling, and the severity of harassment on social media is virtually boundless. But we have no such scenario in this case.

> programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored.

Id. at 652-53 (emphasis added). The *Davis* dissent offered its view of this passage, which the majority did not dispute: "The majority appears to intend [the pervasiveness] requirement to do no more than exclude the possibility that a single act of harassment perpetrated by one student on one other student can form the basis for an actionable claim." *Id.* at 677 (Kennedy, J., dissenting). That a single incident is insufficient on its own to state a claim correspondingly adds further support to the requirement that at least one more (*further*) incident of harassment, after the school has actual knowledge and implements a response, is necessary to state a claim.[3]

"Objectively offensive" means behavior that would be offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively. *Id.* at 651. "Whether gender-oriented conduct rises to the level of actionable harassment

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[3] In *Vance v. Spencer County Public School District*, 231 F.3d 253, 259 n.4 (6th Cir. 2000), we mistakenly opined that a single incident of sexual harassment could satisfy a Title IX claim. But the *Vance* plaintiff had presented several instances of severe and pervasive sexual harassment, *id.*, making the assertion dicta, so we are not bound by it. Regardless, *Davis* holds that a single incident cannot constitute pervasive harassment under Title IX.

thus depends on a constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved." *Id.* (quotation marks omitted). The victim's perceptions are not determinative. "Indeed, the [*Davis* majority] . . . suggests that the 'objective offensiveness' of a comment is to be judged by reference to a reasonable child at whom the comments were aimed." *Id.* at 678 (Kennedy, J., dissenting).

Deliberate Indifference Intentional Tort. Even upon establishing actionable student-on-student harassment, a plaintiff must also plead and prove four elements of a deliberate-indifference-based intentional tort: (1) knowledge, (2) an act, (3) injury, and (4) causation.

"Knowledge" means that the defendant school had "actual knowledge" of an incident of actionable sexual harassment that prompted or should have prompted a response. *Id.* at 650; 642 (rejecting an imputed-knowledge standard under agency principles or a should-have-known standard based in negligence); *see McCoy v. Bd. of Educ.*, 515 F. App'x 387, 392 (6th Cir. 2013) ("[T]here is a connection between what school officials know and whether their response is clearly unreasonable."). Ordinarily, "deliberate indifference" means that the defendant both knew and consciously disregarded the known risk to the victim. *See Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 410 (1997).

An "Act" means a response by the school that was "clearly unreasonable in light of the known circumstances," *Davis*, 526 U.S. at 648, thus demonstrating

the school's deliberate indifference to the foreseeable possibility of *further* actionable harassment of the victim. *Id.* at 643 ("Deliberate indifference makes sense as a theory of direct liability under Title IX only where the [school] has some control over the alleged harassment . . . [and] authority to take remedial action."); *but see id.* at 667 (Kennedy, J., dissenting) ("Yet the majority's holding would appear to apply with equal force to universities, which do not exercise custodial and tutelary power over their adult students."). Because the further harassment must be inflicted against the same victim, the plaintiff "cannot . . . premise the [further harassment] element of her Title IX claim on conduct [by the perpetrator] directed at third parties." *Pahssen*, 668 F.3d at 363; *see also Patterson v. Hudson Area Sch.*, 551 F.3d 438, 452 (6th Cir. 2009) (Vinson, J., dissenting) ("Obviously, the school district is not responsible for failing to stop harassment of which it was not made aware, nor can it be held responsible for failing to punish harassment by unknown individuals.").

"Injury" in this Title IX context means the deprivation of "access to the educational opportunities or benefits provided by the school," *Davis*, 526 U.S. at 650, which the fifth-grade victim in *Davis* described as her inability "to concentrate on her studies" (causing her grades to deteriorate), her fear of attending school (telling her mother "at one point . . . that she didn't know how much longer she could keep [the perpetrator] off her"), and eventually a suicide note, *id.* at 634 (quotation marks, editorial marks, and citations omitted). *See also Vance v. Spencer Cty. Pub. Sch. Dist.*,

231 F.3d 253, 259 (6th Cir. 2000) (describing the victim's injuries as her having to "complet[e] her studies at home" and her deteriorating grades due to her being "diagnosed with depression"). Emotional harm standing alone is not a redressable Title IX injury.

"Causation" means the "Act" caused the "Injury," such that the injury is attributable to the post-actual-knowledge *further* harassment, which would not have happened but for the clear unreasonableness of the school's response. *Davis*, 526 U.S. at 644. Importantly, *Davis* does not link the deliberate indifference directly to the injury (i.e., it does *not* speak of subjecting students to *injury*); *Davis* requires a showing that the school's "deliberate indifference 'subject[ed]' its students to *harassment*," necessarily meaning further actionable harassment. *Id.* (emphasis added); *see also Thompson v. Ohio State Univ.*, 639 F. App'x 333, 343-44 (6th Cir. 2016) (relying on further harassment in finding that "Thompson did not raise any further harassment or discrimination with OSU's HR office, nor did OSU have any other reason to believe that its efforts to remediate were ineffective or disproportionate" (quotation and editorial marks omitted)). But the occurrence of further harassment is not enough by itself; the response's *unreasonableness* must have caused the further harassment. *Stiles ex rel. D.S. v. Grainger Cty.*, 819 F.3d 834, 851 (6th Cir. 2016) ("Although the school's efforts did not end [the victim's] problems, Title IX does not require school districts to eliminate peer harassment."). The school's response must be clearly unreasonable *and* lead to further harassment. But the critical point is that the response

must bring about or fail to protect against the further harassment, which the Court stated as: "[T]he deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it." *Davis*, 526 U.S. at 645 (quotation marks, editorial marks, and citations omitted).

The plaintiffs contend that the isolated phrase *make them vulnerable* means that post-actual-knowledge *further* harassment is not necessary—that vulnerability alone is its own causal connection between the Act and the Injury. They point to *Davis*'s causation statement that "the deliberate indifference must, at a minimum, [1] cause students to undergo harassment *or* [2] make them liable or vulnerable to it," *id.* (emphasis added), from which they argue: this statement poses two alternatives (cause *or* make vulnerable); the first (cause) clearly requires some further harassment; therefore, the second must *not* require further harassment or else it would be redundant and surplusage. But this logical argument is predicated on a faulty unstated premise: that the two alternatives are necessarily between further harassment and no further harassment. That is a misreading of *Davis* as a whole and the causation element in particular. *See* Zachary Cormier, *Is Vulnerability Enough? Analyzing the Jurisdictional Divide on the Requirement for Post-Notice Harassment in Title IX Litigation*, 29 Yale J.L. & Feminism 1, 23 (2017) (concluding from a "natural reading" of *Davis* that, "[r]ather than beginning an entirely separate idea, the vulnerability component completes the idea that began within the causation component").

A plain and correct reading of that two-part causation statement, *Davis*, 526 U.S. at 645, particularly when read in conformity with the overall opinion, reveals that the two alternatives are actually two possible ways that the school's "clearly unreasonable" response could lead to further harassment: that response might (1) be a detrimental action, thus fomenting or instigating further harassment, or it might (2) be an insufficient action (or no action at all), thus making the victim vulnerable to, meaning unprotected from, further harassment. Stated in a more articulate way:

> The *Davis* Court described wrongful conduct of both *commission* (directly causing further harassment) and *omission* (creating vulnerability that leads to further harassment). The definition presumes that post-notice harassment *has* taken place; vulnerability is simply an alternative pathway to liability for harassment, not a freestanding alternative ground for liability. In sum, the vulnerability component of the . . . 'subjected' definition was not an attempt at creating broad liability for damages for the *possibility* of harassment, but rather an effort to ensure that a student who experiences post-notice harassment may obtain damages regardless of whether the harassment resulted from the institution *placing* the student in a position to experience that harassment or *leaving* the student vulnerable to it.

Cormier, 29 Yale J.L. & Feminism at 23-24. We find this explanation persuasive.

The plaintiffs cite several cases that rely on their same misreading of *Davis* to support that same inapt logical argument. But none of those cases is controlling. And, because we find none of them persuasive, we decline to address them specifically or discuss them here.

Finally, the plaintiffs argue that a Title IX student-on-student cause of action cannot require *further* harassment because, they contend, a single, sufficiently severe sexual assault is enough to state a viable action. But that too is a misreading of *Davis*, as was explained, *supra*, in the analysis of the "pervasive" element, which quoted and relied on *Davis*, 526 U.S. at 652-53. A single assault—particularly before any notice or response—does not state a claim under *Davis*.

A Title IX private cause of action against a school for deliberate indifference to student-on-student sexual harassment comprises the two components of actionable sexual harassment by a student and a deliberate-indifference intentional tort by the school, along with the underlying elements for each. We hold that the plaintiff must plead, and ultimately prove, an incident of actionable sexual harassment, the school's actual knowledge of it, some further incident of actionable sexual harassment, that the further actionable harassment would not have happened but for the objective unreasonableness (deliberate indifference) of the school's response, and that the Title IX injury is attributable to the post-actual-knowledge further harassment.

III.

In a § 1292(b) interlocutory appeal, we decide "pure questions of law," *Foster Wheeler*, 970 F.2d at 202, regarding "any issue fairly included within the certified order," *Yamaha Motor Corp.*, 516 U.S. at 205. The next question in this appeal is whether the perpetrators' behavior after the school's response, as pleaded in the Complaint, satisfies the causation element, *supra*, or whether that post-response behavior could not, as a matter of law, satisfy the standard for *actionable* sexual harassment and, consequently, could not satisfy the causation element.

In January 2012, Emily Kollaritsch reported to MSU that a male student had sexually assaulted her, which triggered MSU's response. MSU completed an investigation in August 2012 and disciplined the perpetrator in November 2012 by placing him on probation and forbidding him any contact with Kollaritsch. But Kollaritsch subsequently encountered him at least nine times—she says that he "stalked, harassed and/or intimidated" her at least nine times. Kollaritsch also says that when she filed a formal "retaliation complaint" in March 2013, the MSU administrator said "there was a difference between retaliation and just seeing [him,] and consistently suggested that Kollaritsch needed mental health services." MSU nonetheless conducted an investigation, which determined that no retaliation had occurred.

Kollaritsch has not pleaded further actionable sexual harassment. She did not provide any details or assert any facts about these encounters to show—or even suggest—that they were sexual, or that they were se-

vere, pervasive, or objectively unreasonable. In describing her encounters in the Complaint, she suggested that these were merely their mutual presence at the same location:

> [The perpetrator] and Kollaritsch lived in the same dormitory and frequented the same cafeteria and public areas around the dormitory. Kollaritsch actually encountered [him] on multiple occasions, subsequent to filing her official report. On more than one instance, Kollaritsch encountered [him] at a dormitory cafeteria. On each of these occasions, Kollaritsch experienced a panic attack, and was forced to leave the building, often crying, lightheaded, and significantly distraught.

Kollaritsch characterized the nine encounters as "stalking, harassing, and intimidating," but those conclusory statements, without supporting facts, are meaningless. In the Complaint, Kollaritsch expressed her indignation at the MSU administrator for discounting the encounters as nothing more than her "just seeing him," but she did not provide any rebuttal that would describe the encounters as something more (i.e., something sexual, severe, pervasive, or objectively offensive).[4] *See Gordon v. Traverse City Area*

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[4] It is noteworthy that the plaintiffs' overall theory and argument is that *further* actionable harassment is not necessary, arguing in their appellate brief that "a victim need not suffer actual, subsequent harassment in order to state a claim[, but] [r]ather, a vulnerability to additional harassment . . . is sufficient." That is

Pub. Sch., 686 F. App'x 315, 325 (6th Cir. 2017) (because plaintiffs "offer no details on the nature of this additional harassment, when it occurred, or how [defendant] responded," "these missing pieces doom [their] case").

We hold as a matter of law that Kollaritsch's allegations, as stated in her Complaint, do not plead actionable further sexual harassment and, therefore, she has not pleaded and cannot show causation necessary to state a viable deliberate-indifference claim under Title IX and *Davis*.

In February 2014, Shayna Gross reported to MSU that a male student had sexually assaulted her, which triggered MSU's response. MSU completed an investigation in October 2014, finding sexual assault, and disciplined the perpetrator in January 2015 by expelling him from the university. MSU denied his first appeal, but his second appeal led to a new investigation by an outside law firm, which found no sexual assault, and MSU presumably reinstated him. At no point after the initiation of MSU's response did that male student have any contact with or commit any *further* harassment of Gross. In the Complaint, Gross said only that she "could have encountered him at any time" due to his "mere presence . . . on campus." Gross did not plead any facts that would show any post-response encounter, much less any further sexual harassment that was actionable.

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an unnecessary theory if the facts and circumstances of these encounters *could* demonstrate actionable further sexual harassment.

We hold as a matter of law that Gross's allegations, as stated in her Complaint, do not plead actionable further sexual harassment and, therefore, she has not pleaded and cannot show causation necessary to state a viable deliberate-indifference claim under Title IX and *Davis*.

In February 2014, Jane Roe 1 reported to MSU that a male student had sexually assaulted her, which triggered MSU's response. MSU completed an investigation in November 2014, declining to find sexual assault due to insufficient evidence. At no point after the initiation of MSU's response did the male student have any contact with or commit any further harassment of Roe 1; in fact, he withdrew from the university in April 2014. There is no indication that he ever returned. In her Complaint, Roe 1 said that the male student "could return to campus without [her] knowledge," and that his "mere presence . . . on campus, after [she] made her report to MSU . . . created a hostile environment for [her] and made her vulnerable to further harassment." She did not plead any facts that would show any post-response encounter, much less any further sexual harassment that was actionable.

We hold as a matter of law that Roe 1's allegations, as stated in her Complaint, do not plead actionable further sexual harassment and, therefore, she has not pleaded and cannot show causation necessary to state a viable deliberate-indifference claim under Title IX and *Davis*.

IV.

When Shayna Gross reported that a male student had sexually assaulted her, MSU undertook an investigation that found sexual assault and it ordered the male student expelled from the University. The male student appealed and MSU denied his first appeal, but when he appealed again, Denise Maybank, MSU's Vice President for Student Affairs, set aside the previous findings and ordered that a new investigation be conducted by an outside law firm, which found no sexual assault. Gross claimed that Maybank's response was deliberately indifferent and violated her clearly established right to equal protection, making Maybank liable to Gross under § 1983. Maybank moved to dismiss the claim, asserting qualified immunity, but the district court denied the motion, holding that Gross had stated an "equal protection right to be free from student-on-student discrimination" that was "well-established." *Kollaritsch*, 298 F. Supp. 3d at 1109 (quotation marks and citation omitted). Although the Complaint was not so specific, the district court reasonably determined that the claim centered on Maybank's decision to set aside the initial investigation's finding of sexual assault and order a new investigation by outside counsel. *Id.* at 1107.[5] The district court did not elaborate further on the specifics, but emphasized that, "[a]t least in the [C]omplaint, no explanation for this decision is provided," and declared the decision "unreasonable under the circumstances

[5] On appeal, Gross has described the violation as: "Maybank, without authority in the policies or procedures of MSU[,] nullified the prior investigation of [Gross's] assailant and voided his sanctions on an unsanctioned second appeal by the assailant." We can accept this description for our purposes.

as a response to Gross's allegation of a sexual assault." *Id.*

Qualified immunity shields government officials from standing trial for civil liability in their performance of discretionary functions, unless their actions violate clearly established rights. *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 897 (6th Cir. 2019). To survive a motion to dismiss based on qualified immunity, the complaint must allege facts that, if proven to be true, would show the violation of a right so clearly established that a reasonable official would necessarily have recognized the violation. *Id.* at 898. "[D]amage claims against government officials arising from alleged violations of constitutional rights must allege, with particularity, facts that demonstrate what each defendant did to violate the asserted constitutional right." *Id.* at 899. The Supreme Court has been emphatic and explicit in what it means by "clearly established":

> [T]he legal principle [must] clearly prohibit the offic[ial]'s conduct in the particular circumstances before him. The rule's contours must be so well defined that it is clear to a reasonable offic[ial] that his conduct was unlawful in the situation he confronted. This requires a high degree of specificity . . . . [C]ourts must not define clearly established law at a high level of generality, since doing so avoids the crucial question [of] whether the official acted reasonably in the particular circumstances that he or she faced. A rule is too general if the unlawfulness of the offic[ial]'s conduct does not follow

> immediately from the conclusion that the rule was firmly established.

District of Columbia v. Wesby, 583 U.S. --, 138 S. Ct. 577, 590 (2018) (quotation marks, editorial marks, and citations omitted). And, as we have said, "[t]here does not need to be a case directly on point, but existing precedent must have placed the constitutional question beyond debate." *Cahoo*, 912 F.3d at 898 (quotation marks, editorial marks, and citation omitted).

Gross claims that Maybank's decision to set aside the initial investigation's finding of sexual assault (and the initial order of expulsion) and, without explanation or citation to authority, order a new investigation by outside counsel, violated her clearly established equal-protection right to be free from student-on-student discrimination. Gross cites two cases for support, *Shively v. Green Local School District Board of Education*, 579 F. App'x 348, 358 (6th Cir. 2014), and *Doe v. Forest Hills School District*, No. 1:13-cv-428, 2015 WL 9906260, at *14 (W.D. Mich. Mar. 31, 2015), but neither case addresses with a "high degree of specificity" anything like Maybank's act of setting aside one investigation in favor of another without explanation or apparent authority, much less under these "particular circumstances," as is required by *Wesby*, 138 S. Ct. at 590.

Moreover, Gross's theory fundamentally contradicts *Davis*, 526 U.S. at 648. *Davis* explained that "[s]chool administrators will continue to enjoy the flexibility they require" in conducting investigations and imposing discipline, and "courts should refrain from second-guessing the disciplinary decisions made by

school administrators." *Id.* at 648 (citation omitted). Particularly prescient here is the *Davis* dissent's comment that "[o]ne student's demand for a quick response to her harassment complaint will conflict with the alleged harasser's demand for due process," putting the school in a position where it is "beset with litigation from every side." *Id.* at 682 (Kennedy, J., dissenting). Such were Maybank's "particular circumstances," as she was caught between Gross's demand for judgment and punishment on one side and the accused male student's appeal for additional due process on the other. *See also M.D. v. Bowling Green Indep. Sch. Dist.*, 709 F. App'x 775, 777 (6th Cir. 2017) ("Often, school administrators face the unenviable task of balancing victims' understandable anxiety with their attackers' rehabilitation.").

Gross is clearly dissatisfied with Maybank's decision to overturn the male student's punishment (expulsion), which also served as Gross's remedy.[6] But Gross has no "right" to her preferred remedy. *Davis* expressly denied the prospect "that administrators must engage in particular disciplinary action," and stressed that the victim does *not* "have a Title IX right to make particular remedial demands." *Id.* at 648; *see also Stiles*, 819 F.3d at 848; *M.D.*, 709 F. App'x at 777.

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[6] Gross is also dissatisfied with Maybank's decision to set aside the initial investigation's findings and order a new investigation to be conducted by an outside law firm, but Gross would have little, if any, genuine complaint if the new investigation had upheld the initial investigation and led Maybank to sustain the initial punishment.

Gross claimed a right to be free from student-on-student discrimination and predicated the alleged violation of that right on her belief that Maybank's decision about the punishment (her remedy) was deliberately indifferent. But Gross has pointed us to no legal principle or precedent that clearly prohibits Maybank's otherwise discretionary decision under these "particular circumstances." *See Wesby*, 138 S. Ct. at 590. Gross has not claimed a violation of any other right.

The Complaint does not allege facts showing that Maybank violated Gross's clearly established constitutional right to equal protection. Maybank is entitled to qualified immunity.

V.

For the foregoing reasons, we REVERSE the district court's order denying the defendants' motion to dismiss the Complaint and REMAND for entry of judgment dismissing these claims.

CONCURRENCE

THAPAR, Circuit Judge, concurring. I join the majority opinion in full. But since the question here has divided our sister circuits, I write separately to explain why.

To begin with, I should emphasize that the allegations in this case are troubling. The plaintiffs allege facts suggesting that Michigan State University seriously mismanaged its Title IX process. And that matters to everyone involved—the victims, the accused, their families and friends, and the broader University community. Everyone has an interest in a timely, fair, and transparent process for resolving claims of sexual assault. So long as we expect universities to adjudicate such claims, we should expect them to do better.

But this case is not about whether the University mismanaged its Title IX process. Rather, the question here is whether Michigan State University "subjected" the plaintiffs to "discrimination" (as those terms are used in Title IX). To answer that question, the parties agree, we should look to the Supreme Court's decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). There, the Court decided that a school may be held liable for "student-on-student harassment" only if the school "acts with deliberate indifference to known acts of harassment in its programs or activities" and that harassment is "severe, pervasive, and objectively offensive." *Id.* at 633. The parties also agree that *Davis* established a causation requirement.

The Court made clear that a school "may not be liable for damages unless its deliberate indifference 'subjects' its students to harassment." *Id.* at 644 (alteration adopted). Yet the parties—as well as our sister circuits—disagree about what this requirement entails.

That confusion has arisen based on the Supreme Court's definition of the term "subjects." In *Davis*, the Court said that the school's deliberate indifference must "'cause students to undergo' harassment or 'make them liable or vulnerable' to it." *Id.* at 645 (alteration adopted) (quoting *Random House Dictionary of the English Language* 1415 (1966); *Webster's Third New International Dictionary* 2275 (1961)). Some courts have read this language broadly. Students must allege only that the school's deliberate indifference made harassment more likely, not that it actually led to any harassment. *See, e.g., Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1103–04 (10th Cir. 2019); *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 172 (1st Cir. 2007), *rev'd on other grounds,* 555 U.S. 246 (2009). Other courts have read the language more narrowly. Students must allege that the school's deliberate indifference actually led to harassment, not that it only made such harassment more likely. *See, e.g., K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1057–58 (8th Cir. 2017); *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1155–56 (10th Cir. 2006); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000).

Today, our circuit adopts the latter view, and I think rightly so. Under Title IX, schools can "subject" their students to harassment in two different ways.

First, the school can "cause" the harassment directly. Imagine, for instance, that the school sent disparaging emails to just its female students. In that scenario, we would have no trouble saying that the school had "subjected" the students to harassment. After all, the school's conduct quite directly led to the harassment. Yet *Davis* also said that schools can "subject" their students to harassment in a second way: the school can make its students "vulnerable" to harassment. Take the facts of *Davis* itself. There, the school "subjected" a student to harassment because it failed to take any effort to prevent or end ongoing harassment by another student. *Davis*, 526 U.S. at 635, 654. Unlike in the first scenario, the school's conduct did not directly cause the harassment. But still the Court concluded that the school had "effectively caused" the harassment. *Id.* at 642–43 (cleaned up). And that's because the school's conduct indirectly led to the harassment: it left the student vulnerable to her harasser.

But in either scenario, we wouldn't say that the school had "subjected" its students to harassment if the students never experienced any harassment as a result of the school's conduct. To be "subjected" to a harm, as a matter of ordinary English, requires that you experience that harm. And that holds true whether someone directly causes the harm or simply makes you vulnerable to it.

That more precise reading also makes sense when you consider the specific statutory text. Under Title IX, "[n]o person in the United States shall, on the basis of sex . . . be *subjected to discrimination* under any ed-

ucation program or activity receiving [federal funding]." 20 U.S.C. § 1681(a) (emphasis added). If a person can be "subjected to harassment" without experiencing any harassment as a result of the defendant's conduct, then a person can also be "subjected to discrimination" without experiencing any discrimination as well. And that surely can't be right. The Supreme Court has long debated whether the phrase "subjected to discrimination" (used in various statutes) requires the plaintiff to prove a discriminatory intent. *See, e.g.*, *Guardians Ass'n v. Civil Serv. Comm'n of City of New York*, 463 U.S. 582 (1983). But no one has questioned whether the plaintiff must prove some discriminatory *effect*.

Consider also the statutory context. The phrase "subjected to discrimination" appears in a parallel list with the phrases "excluded from participation" and "denied the benefits." 20 U.S.C. § 1681(a). To "exclude" means to "shut out," "hinder the entrance of," or "expel." *Random House Dictionary of the English Language* 497 (1966); *Webster's Third New International Dictionary* 2275 (1961). So to be "excluded from participation" means that something blocked your participation—not just that something made it more likely that you wouldn't be able to participate. To "deny" (as relevant here) means "to withhold" or "refuse to grant." *Random House Dictionary of the English Language* 387 (1966); *Webster's Third New International Dictionary* 603 (1961). So to be "denied [ ] benefits" means that something held the benefits back—not just that something made it more likely that you wouldn't be able to receive them. This context reinforces the

point. To be "subjected to discrimination" means that something led you to experience discrimination—not just that something made it more likely that you would face it.

And if you're still not convinced, two more points favor this reading. First, Congress enacted Title IX under the Spending Clause. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998). In effect, Congress offered the states a deal: they would receive federal funding so long as they complied with the requirements of Title IX. But the states could not knowingly accept that offer if they didn't know its terms. So Congress had to identify any condition on its funding "unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). And if it didn't, then the states may not be held liable for a violation. *See Gebser*, 524 U.S. at 287–88. So even if there were any ambiguity, that very ambiguity would require us to adopt the less expansive reading of Title IX.

Second, the opinion in *Davis* itself supports this reading. There, the Court went to great lengths to emphasize the narrowness of its decision. *See Davis*, 526 U.S. at 648–49, 652–53. And it expressly warned against any "characterization" of its opinion that would "mislead courts to impose more sweeping liability" than Title IX requires. *Id.* at 652. But some of our sister circuits have adopted just such a characterization. To hold schools liable for any act or omission that makes students "vulnerable to" harassment is to hold schools liable for a wide range of decisions. Could a university be held liable for reducing its Title IX staff as a result of budget cuts? What about for allowing a

bar to open on campus? Or for expanding coed housing options? All these decisions could make students vulnerable to harassment. Yet surely Title IX does not make schools liable for these everyday decisions. In short, I would not read the term "subjects" so broadly as to erase the causation requirement enacted by Congress and confirmed by the Supreme Court.

Of course, all this does not resolve what should count as "discrimination" under Title IX. But the plaintiffs in this case premised their suit on student-on-student harassment. And *Davis* made clear that "discrimination" in such cases means "severe, pervasive, and objectively offensive" harassment—not just the risk of harassment. *Id.* at 650. We have no authority to say otherwise.

For these reasons, the plaintiffs have failed to state a claim under Title IX. The plaintiffs have not adequately alleged that they experienced any harassment *after* Michigan State University had notice of their complaints. As a result, they cannot show that the University "subjected" them to harassment.

CONCURRENCE

ROGERS, Circuit Judge, concurring. I join parts I, III, and IV of the majority opinion, and concur in the result. I agree with the analysis in support of our holding that a Title IX sexual harassment plaintiff must plead post-notice sexual harassment, and that mere vulnerability to sexual harassment after the school has actual notice is not enough.

There is no reason, however, for us to address what a plaintiff must show to establish the required actual notice. What constitutes actual notice in this case is not at issue, and in particular was not an issue discussed by the parties on appeal. The plaintiffs here all allege sufficiently severe sexual assault, plus reporting to MSU, to demonstrate that they meet the actual notice requirement under Title IX. Any statement by us that notice must, as one example, be notice of "actionable" sexual harassment is accordingly not necessary to our decision and, whether right or wrong, is usefully avoided and in any event not controlling on future panels.

Judge Leval, in his timeless 2005 Madison Lecture, tellingly criticized the tendency of judges "to promulgate law through utterance of dictum made to look like a holding—in disguise, so to speak. When we do so, we seek to exercise a lawmaking power that we do not rightfully possess." Pierre Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. Rev. 1249, 1250 (2006).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EMILY KOLLARITSCH, et al., Plaintiffs,	)	
	)	No. 1:15-cv-1191
-v-	)	
	)	Honorable Paul L. Maloney
MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES, et al., Defendants.	)	

ORDER GRANTING MOTION FOR CERTIFICATE OF APPEALABILITY FOR INTERLOCUTORY APPEAL

Defendant Michigan State University requests the Court issue a certificate of appealability for an interlocutory appeal. (ECF No. 70.) For the following reasons, Defendant's motion is **GRANTED.**

Plaintiffs are four former students at Michigan State University (MSU). Each alleges that she was sexually harassed or assaulted by another student and reported the incident to MSU. Not satisfied with the manner in which the assaults were investigated and resolved, Plaintiffs filed this Title IX lawsuit. Defendants filed a motion to dismiss. This Court granted the motion in part and denied the motion in part. The Court dismissed the Title IX claim brought by one plaintiff, but

allowed the Title IX claims brought by three other plaintiffs to proceed. The Court denied the request for qualified immunity sought by Defendant Denise Maybank on an Equal Protection violation claim. Defendants have appealed the denial of qualified immunity.

In this motion, Defendants asked the Court to certify an issue for an interlocutory appeal. According to Defendants, Title IX requires plaintiffs to plead that a school's deliberate indifference caused them to suffer further harassment. In denying the motion to dismiss the Title IX claims brought by three of the plaintiffs, the Court found that the allegations in the complaint were sufficient to state a claim under Title IX. Each of the three plaintiffs pleaded sufficient facts to establish the deliberate indifference element and that they three were denied educational opportunities as a result of MSU's deliberate indifference. The Court did not determine whether the complaint alleged facts to support the conclusion that MSU's deliberate indifference caused further harassment.

Generally, parties may only appeal final decisions of district courts to the courts of appeal. 28 U.S.C. § 1291; *see Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009). However, parties may take an interlocutory appeal when certain conditions are met. The statute authorizing interlocutory appeal provides:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion the such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from

> the order may materially advance the ultimate termination of the litigation, he may shall so state in writing in such order . . . .

28 U.S.C. § 1292(b). The Sixth Circuit Court of Appeals has held that this statute requires three elements be present before a court may, in its discretion, certify an order for interlocutory appeal: (1) the order involves a controlling question of law, (2) a substantial ground for differences of opinion exists concerning the correctness of the decision, and (3) an immediate appeal may materially advance the ultimate termination of the litigation. *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002) (citing *Cardwell v. Chesapeake & Ohio Ry. Co.*, 504 F.2d 444, 446 (6th Cir. 1974)). The Sixth Circuit has cautioned that certification under § 1292(b) should be "sparingly applied" and used "only in exceptional cases." *Kraus v. Bd. of County Rd. Comm'rs*, 364 F.2d 919, 922 (6th Cir. 1966) (quoting *Milbert v. Bison Labs.*, 260 F.2d 431, 433 (3d Cir. 1958)).

Defendant has established the requirements for the Court to certify an issue for an interlocutory appeal. At the outset, the Court makes two observations. First, in August 2017, the United States District Court for the District of Kansas certified the same issue for an interlocutory appeal. *Weckhorst v. Kansas State University*, No. 16-cv-2255, 2017 WL 3701163 (D. Kan. Aug. 24, 2017). Of course, how the Tenth Circuit resolves the certified issue would only be persuasive, not binding, authority.

Second, the Sixth Circuit has not directly addressed this issue in a published decision. The Sixth Circuit's statement in *Vance v. Spencer County Public School*

District, 231 F.3d 253, 259 (6th Cir. 2000) that "one incident can satisfy a claim" does not resolve the matter. In that case, the plaintiff pleaded multiple incidents of sexual harassment and, read in context, the Sixth Circuit was explaining that the allegations met the requirement that the harassment must be severe and pervasive enough to deprive a plaintiff of educational opportunities. The statement does not clarify whether a single incident which is then reported would be sufficient, or if a single incident after the school is put on notice is necessary.

The more recent decision, *M.D. v. Bowling Green Independent School District*, --F. App'x--, 2017 WL 4461055 (6th Cir. Oct. 6, 2017), similarly leaves open the question of whether further harassment is required. Although the plaintiff alleged that the mere presence on campus of the person who assaulted her created a hostile environment, caused her grades to suffer, and resulted in lost opportunities with the cheerleading coaches, the court resolved the claim on the deliberate indifference element. The court concluded that even if the plaintiff felt vulnerable, the school's response to the incident was not clearly unreasonable. *Id.* at *2. And, the court held that it had to refrain from second-guessing the decisions made by the school administrators. *Id.*

In an unpublished decision in 2004, the Sixth Circuit affirmed this Court's decision granting a school district's motion for summary judgment on a Title IX claim. *Noble v. Branch Intermediate Sch. Dist.*, 112 F. App'x. 507 (6th Cir. 2004). In the underlying opinion, the Court reasoned that a Title IX recipient cannot be

liable merely because the plaintiff had a fear of future harassment or a feeling of vulnerability. *Noble v. Branch Intermediate Sch. Dist.* No. 4:01-cv-58, 2002 U.S. Dist. LEXIS 19600 *67 (W.D. Mich. Oct. 9, 2002). The holding, however, was preceded by the conclusion that the school's response was not deliberately indifferent. *Id.* at 56-65. Therefore, the portion of the opinion discussing the "further harassment" requirement is dicta. *See United States v. Hardin*, 539 F.3d 404, 411-12 (6th Cir. 2008) (explaining that when a holding is not necessary to the determination of the issue on appeal, the holding is dicta).

Defendant has established that the issue to be certified is a controlling issue of law. Defendant filed a motion to dismiss. The question for certification asks about a pleading requirement, a legal issue. Without dispute, resolution of the question would "materially affect the outcome of the case." *In re City of Memphis*, 293 F.3d at 351. This Court denied Defendant's motion regarding the Title IX claims on facts that did not require each plaintiff to prove harassment subsequent to the initial report. Plaintiffs do not dispute that Defendant has established this requirement for certification of an interlocutory appeal.

Defendant has established that a substantial ground for difference of opinion exists with respect to the pleading requirements of a Title IX claim. As evidenced by the summaries below, the question raised by Defendant is difficult and has little direct precedent. *See In re Miedzianowski*, 735 F.3d 383, 384 (6th Cir. 2013). And, although the *Davis* opinion has been binding law for many years, the proper interpretation

of relevant passage appears to be a novel issue. *See id.* Where the district courts have considered whether further acts of harassment are required, they have acknowledged a difference of opinion on the issue. And, where the circuit courts have included language that appears favorable to Defendant's position here, a careful reading of the passage undermines the precedential value of the holdings.

Resolving Defendant's motion to dismiss, this Court relied on the language in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 644-45 (1999) indicating a Title IX claim arises when the defendant's deliberate indifferent leaves the plaintiff "liable or vulnerable to" further harassment. Multiple district courts have permitted Title IX claims to proceed past the pleading stage where the plaintiff did not allege specific acts of further harassment. *E.g., Hernandez v. Baylor Univ.*, --F. Supp. 3d.--, 2017 WL 1322262, at *5 (W.D. Tex. Apr. 7, 2017) (holding that the pleading requirement for further harassment can be met if the plaintiff pleads that a school left the student vulnerable to further harassment) (collecting cases). And, district courts have questioned the reasoning of a requirement that a student must suffer further harassment to have a viable claim. *E.g., Karasek v. Regents of the Univ. of California*, No. 15-cv-3717, 2015 WL 8527338, at *10-*12 (N.D. Cal. Dec. 11, 2015) (collecting cases with opposing holdings and concluding that requiring a plaintiff must be harassed or assaulted a second time before the school's unreasonable response become actionable runs counter to the goals of Title IX). In these opinions, the district courts addressed the question

presented by Defendant here, whether the institution can be liable when its deliberately indifferent response leaves a student vulnerable to further harassment.

Defendant is correct that several published circuit court opinions exist that contain language from which it can be inferred that a plaintiff must plead acts of further harassment caused by the institution's deliberate indifference. These opinions lay the foundation for the difference of opinion requirement. For example, in *Williams v. Board of Regents of University System of Georgia*, 477 F.3d 1282, 1296 (11th Cir. 2007), the Eleventh Circuit wrote that the plaintiff must plead that the "Title IX recipient's deliberate indifference to the initial discrimination subjected the plaintiff to further discrimination." But, subsequent statements by the court suggest that the further discrimination need not be in the form of acts of harassment or assault. Several paragraphs after the above quoted statement, the court found that the school's delayed and inadequate investigation constituted deliberate indifference which "was followed by further discrimination, this time in the form of effectively denying Williams an opportunity to continue to attend UGA. Although Williams withdrew from UGA the day after the January 14 incident, we do not believe that at this stage her withdrawal should foreclose her argument that UGA continued to subject her to discrimination." *Id.*

Other opinions contains language favorable to Defendant, but the relevant passages were not addressing whether a plaintiff must plead acts of further harassment. For example, in *K.T. v. Culver-*

Stockton College, 865 F.3d 1054, 1058 (8th Cir. 2017), the plaintiff alleged that she was sexually assaulted by another student, reported the incident to the school, which did nothing. The court resolved the matter by concluding the plaintiff failed to plead facts to show deliberate indifference. *Id.* To show deliberate indifference, the plaintiff alleged the school was "deliberately indifferent by failing to adopt practices to prevent sexual assault and also by failing to investigate or offer [her] medical services." *Id.* The court found that these allegations did not show how the school's indifference caused the assault. *Id.* The court did not consider or otherwise address whether further acts of harassment were required at the pleading stage.

Like the *Noble* opinion, the language in other circuit opinions favorable to Defendant is dicta. The holding in *Escue v. Northern Oklahoma College*, 450 F.3d 1146, 1155 (10th Cir. 2006), is typical. The court found, at summary judgment, that the Title IX recipient was not deliberately indifferent. *Id.* Only then, after finding sufficient reason to dismiss the Title IX claim, did the court note, as significant, that the plaintiff did not allege further sexual harassment. *Id.*

Finally, Defendant has demonstrated that an immediate appeal will materially advance the ultimate termination of the litigation. One of the remaining plaintiffs, Jane Roe 1, did not plead any subsequent or further harassment from her alleged attacker. And, if the other two plaintiffs must proceed under the theory advanced by Defendant, the number of issues to be resolved in this litigation will be reduced.

The Court also notes, as significant, that the parties will already be submitting briefs to the Sixth Circuit for Defendant Maybank's qualified immunity appeal. Certifying this issue would, therefore, constitute an efficient use of judicial resources.

Accordingly, the Court certifies its previous Opinion and Order (ECF No. 66) for interlocutory appeal and for a determination of the controlling questions of law: (1) must a plaintiff plead, as a distinct element of a Title IX claim, that she suffered acts of further discrimination as a result of the institution's deliberate indifference, rather than alleging mere vulnerability to further acts of discrimination; and (2) if a plaintiff must plead acts of further discrimination, does a plaintiff's allegations that the institution's deliberate indifference caused the deprivation of educational opportunities satisfy the pleading requirement?

IT IS SO ORDERED.

Date: January 26, 2018

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EMILY KOLLARITSCH, SHAYNA GROSS, JANE ROE 1, and JANE ROE 2, Plaintiffs,	)	
	)	No. 1:15-cv-1191
-v-	)	
	)	Honorable Paul L. Maloney
MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES, et al. Defendants.	)	

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Plaintiffs are four women who allege they were sexually harassed or assaulted by other students while they were students at Michigan State University (MSU). Each plaintiff alleges she reported the assault to the MSU, which did not adequately respond. Plaintiffs assert claims for violations of Title IX and Michigan's Elliott-Larsen Civil Rights Act (ELCRA). Through § 1983, Plaintiffs also assert claims for violations of their constitutional rights to Due Process

and Equal Protection.[27] Defendants filed a motion to dismiss. (ECF No. 28.) The Court held a hearing on the motion.

The motion will be granted in part and denied in part. Plaintiffs have conceded several of the claims, including the violations of Due Process and violations of the ELCRA. The Title IX claim brought by Jane Roe 2 will be dismissed, as the allegations in the complaint do not establish deliberate indifference. Plaintiffs' Equal Protection claim against MSU Board of Trustees has been withdrawn, and the motion will be granted for the Equal Protection claims against Defendants Simon and Youatt. The complaint does not allege sufficient facts to show how those individuals violated the constitutional rights of any of the plaintiffs.

I.

At the outset, the Court must clarify the individual defendants in this case. In the caption for the initial complaint, Plaintiffs named the Michigan State University Board of Trustees (Trustees); Lou Anna Simon, the president of the university; and Denise Maybank, the vice president of student affairs. With leave of the Court, Plaintiffs filed an amended complaint, which is the controlling pleading. (ECF No. 25.) Plaintiffs did not alter the caption, but did add defendants. In the "Parties and Jurisdiction" portion of the complaint, Plaintiffs named Trustees (Compl. ¶ 1), Maybank (*id.*

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[27] Plaintiffs also asserted a claim for negligence against a campus fraternity and the national chapter. Those claims, and the campus fraternity national chapter, have been dismissed. (ECF No. 48.)

¶ 2), and Simon (*id.* ¶ 3). As a defendant, Plaintiffs added June Pierce Youatt, the acting Provost, or the Provost and Executive Vice President for Academic Affairs. (*Id.* ¶ 4.) Plaintiffs also added Paulette Granberry Russell, who at "all times relevant was MSU's appointed Title IX Coordinator." (*Id.* ¶ 5.) Plaintiffs have not requested any additional summonses since their initial complaint was filed. Defendants Youatt and Russell made appearances in this lawsuit when the motion to dismiss was filed on their behalf.

In the portion of the complaint where Plaintiffs identify and outline their causes of action, Plaintiffs list the defendants against which each claim is brought as part of the heading and also identify the defendants within the claim itself. Count 1 is Plaintiffs' claim for violations of Title IX, and is brought against Defendant Trustees only. (Compl. PageID.257–58.) Count 3 is Plaintiffs' claim for violations of the ELCRA, and is brought against Defendant Trustees only. (*Id.* PageID. 359–60.)

The confusion about the individual defendants arises in Count 2, Plaintiffs' constitutional claims. (Compl. PageID.258–59.) Plaintiffs name as the defendants for this count the Trustees, Maybank, Simon and Youatt. Plaintiffs also name as a defendant Amanda Garcia-Williams. In paragraph 32 of the complaint, Plaintiffs identify Garcia-Williams as MSU's Title IX Coordinator, the same position held by Russell "at all times relevant." Then, in paragraph 84, Plaintiffs describe Russell as the Senior Advisor to the President for Diversity and as the Director of the Of-

fice of Inclusion and Intercultural Initiatives. Plaintiffs also describe Russell as Garcia-Williams's supervisor. (*Id.* ¶ 84.) Garcia-Williams is mentioned in the factual allegations for each of the individual plaintiff's claims.

Based on this brief summary, the Court reaches two conclusions. First, Plaintiffs have not asserted a claim against Defendant Paulette Russell. Plaintiffs do not identify Russell as a defendant for any of their counts.[28] There is no claim for which Russell must file an answer. The confusion about Russell's title does not affect this conclusion. Second, Garcia-Williams is not currently a named defendant in this lawsuit. Plaintiffs did not identify Garcia-Williams as a defendant in the "Parties and Jurisdiction" portion of their complaint. Plaintiffs have never requested a summons for Garcia-Williams. Garcia-Williams has not made an appearance in this lawsuit. This Court does not currently have personal jurisdiction over Garcia-Williams.

II.

Defendant filed a motion to dismiss, relying on Rule 12(b)(6) of the Federal Rules of Civil Procedure. Under the notice pleading requirements, a complaint must contain a short and plain statement of the claim showing how the pleader is entitled to relief. Fed. R.

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[28] Russell is mentioned only in paragraphs 5, 84 and 85. Paragraphs 5 and 84 contain conflicting descriptions of Russell's role at MSU. At best, paragraphs 84 and 85 allege that Russell was a bad supervisor. Plaintiffs allege that the mother of Jane Roe 1 complained to Russell about the manner in which the investigation of her daughter's complaint was handled and Russell did not look into the matter or call the mother back.

Civ. P. 8(a)(2); see *Thompson v. Bank of America, N.A.*, 773 F.3d 741, 750 (6th Cir. 2014) (holding that to survive a Rule 12(b)(6) motion, the complaint "must comply with the pleading requirements of Rule 8(a)."). The complaint need not contain detailed factual allegations, but it must include more than labels, conclusions, and formulaic recitations of the elements of a cause of action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A defendant bringing a motion to dismiss for failure to state a claim under Rule 12(b)(6) tests whether a cognizable claim has been pled in the complaint. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988).

To survive a motion to dismiss, "[t]he complaint must 'contain either direct or inferential allegations respecting all material elements necessary for recovery under a viable legal theory.'" *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 774 (6th Cir. 2015) (citation omitted). The plaintiff must provide sufficient factual allegations that, if accepted as true, are sufficient to raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 555. And the claim for relief must be plausible on its face. *Id.* at 570. "A claim is plausible on its face if the 'plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011) (quoting *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678

(2009) (citations omitted). When considering a motion to dismiss, a court must accept as true all factual allegations, but need not accept any legal conclusions. *Ctr. for Bio-Ethical Reform,* 648 F.3d at 369. Naked assertions without further factual enhancement, formulaic recitations of the elements of a cause of action, and mere labels and conclusions will be insufficient for a pleading to state a plausible claim. *SFS Check, LLC v. First Bank of Delaware,* 774 F.3d 351, 355 (6th Cir. 2014) (citations omitted).

III.

For this motion, all well-pled factual allegations are assumed to be true. Plaintiffs describe the events giving rise to the claims brought by all four students.

A. Plaintiff Kollaritsch

John Doe attempted to rape Plaintiff Kollaritsch in his dormitory room in October 2011. (Compl. ¶ 28.) On October 15, John Doe sexually assaulted Kollaritsch in the stands at an MSU football game. (*Id.* ¶ 29). Kollaritsch reported the assaults to the MSU Police on January 30, 2012. (*Id.* ¶ 30.) On February 3, Kollaritsch met with Garcia-Williams to formally commence an investigation against John Doe by MSU. (*Id.* ¶ 32.) While the investigation was occurring, MSU did not restrict John Doe or accommodate Kollaritsch so that she would not encounter John Doe. (*Id.* ¶ 33.) Sometime in August, some 200 days later, Kollaritsch received the Investigation Report from MSU. (*Id.* ¶ 37.) The report concluded that John Doe violated the MSU Sexual Harassment Policy, but did not identify the specific policies or provisions that were violated. (*Id.* ¶ 39.) The

report did not conclude that John Doe sexually assaulted Kollaritsch. John Doe accepted responsibility (*id.* ¶ 41), and, on November 13, 2012, was placed on probationary status, and was issued a no-contact order (*id.* ¶ 44). Garcia-Williams did not inform Kollaritsch that she had a right to appeal the sanction. (*Id.* ¶ 45.)

John Doe thereafter violated the no-contact order and began stalking, harassing, and otherwise intimidating Kollaritsch. (Compl. ¶¶ 47-48.) After reporting his conduct in February, on March 11, 2013, Kollaritsch filed a formal complaint with MSU about John Doe's retaliatory harassment. (*Id.* 50 and 53.) On March 13, Kollaritsch sought a Personal Protection Order against John Doe in the East Lansing District Court, which was issued the next day. (*Id.* ¶ 55.) In May 2013, Garcia-Williams issued a report concluding that John Doe had not retaliated against Kollaritsch and had not further violated MSU's Code of Conduct. (*Id.* ¶ 58.) Kollaritsch was not informed that she could appeal the conclusions. (*Id.* ¶ 59.) Between June and August, Kollaritsch pressed the matter with MSU, complaining that the investigation was inadequate. (*Id.* ¶¶ 60-65.)

B. Plaintiff Jane Roe 1

John Doe 2 sexually assaulted Jane Roe 1 in November 2013. (Compl. ¶ 70.) The assault occurred on the MSU campus. (*Id.*) Jane Roe 1 "immediately" reported the assault to the MSU Police and also went to Sparrow Clinton Hospital to have a Sexual Assault Nurse Examiner (SANE) perform an exam. (*Id.* ¶ 72.) In February 2014, Jane Roe 1 filed a formal complaint with Garcia-Williams, who promised to interview two witnesses before Spring Break. (*Id.* ¶ 73.) Jane Roe 1

contacted Garcia-Williams in March and April. (*Id.* ¶¶ 73 and 74.) Both times she was told that MSU was waiting for the SANE report. (*Id.*) In late April and again in May, Jane Roe 1's mother contacted MSU. (*Id.* ¶ 75 and 76.) Both times she was told that MSU was still waiting for the SANE report. (*Id.*) In April, the mother was told that John Doe 2 had not yet been interviewed. (*Id.* ¶ 75.) After the telephone call in May, the mother called Sparrow Hospital and was told that the SANE report had been sent to MSU on March 14, 2014. (*Id.* ¶ 27.)

Jane Roe 1's mother made several attempts over the next few months to speak with Garcia-Williams and her supervisor, Defendant Russell, with varying success. (Compl. ¶¶ 77-85.) In November, MSU informed Jane Roe 1 that it had completed its investigation and that the report was available for Jane Roe 1 to pick up. (*Id.* ¶ 86.) Jane Roe 1 did not respond. (*Id.*) On December 15, 2014, Garcia-Williams emailed Jane Roe 1 and informed her that MSU had concluded there was insufficient evidence to find that John Doe 2 violated MSU's Sexual Harassment Policy. (*Id.* ¶ 87.)

C. Plaintiff Jane Roe 2

John Doe 3 sexually assaulted Jane Roe 2 on August 23, 2013. (Compl. ¶ 92.) Jane Roe 2 reported her assault on August 26. (*Id.* ¶ 93.) Garcia-Williams interviewed John Doe 3 on September 3. (*Id.* ¶ 94.) On December 10, 2013 MSU issued a report finding John Doe 3 violated MSU's Student Code of Conduct. (*Id.* ¶ 95.) John Doe 3 was expelled on January 29, 2014, after a hearing. (*Id.* ¶ 96.) John Doe 3 appealed his suspension, which was upheld by Defendant Maybank. (*Id.* ¶ 97.)

While the investigation and appeals occurred, John Doe 3 was able to complete the semester, and he subsequently transferred to another school. (Compl. ¶ 104.) John Doe 3 was allowed to remain on campus throughout the investigation and appeal, subject to a personal protection order. (*Id.* ¶ 105.) Nevertheless, Jane Roe 2 did encounter John Doe 3 on at least one occasion. (*Id.* ¶ 106.) On May 5, 2014, MSU contacted Jane Roe 2 to let her know that John Doe 3 received permission to return to campus on May 10 to attend a graduation ceremony. (*Id.* ¶ 98.) Jane Roe 2 was not consulted about the decision. (*Id.* ¶ 99.)

D. Plaintiff Gross

Plaintiff Shayna Gross was an acquaintance of, and was friendly with, John Doe. (Compl. ¶ 139.) In February 2013, John Doe invited Gross to hang out at the Kappa Sigma fraternity house. (*Id.* ¶ 140.) Gross made clear to John Doe that they would be hanging out only as friends. (*Id.*) Gross and a friend went together to the fraternity house that night, where John Doe served Gross alcoholic drinks. (*Id.* ¶ 141.) Gross can only remember flashes of the evening. (*Id.* ¶ 142.) The next morning, John Doe informed Gross that they had sex in the fraternity house, in her dorm room, and also in his dorm room. (*Id.*) Approximately one year later, Gross reported the sexual assault to MSU on February 12, 2014. (*Id.* ¶ 144.) Gross contacted Garcia-Williams multiple times for status updates about the investigation, and never received a timely response. (*Id.* ¶ 146.) MSU completed the investigation on October 14, 2014, concluding that John Doe had sexually assaulted

Gross. (*Id.* ¶ 147.) A hearing occurred in January 2015, and John Doe was expelled in February. (*Id.* ¶¶ 150-51.)

John Doe filed two appeals. His first appeal was denied on March 2, 2015, by MSU's appellate board. (Compl. ¶ 153.) After he filed a second appeal, Defendant Maybank informed Gross that MSU's conclusions would be set aside and that an outside law firm would be hired to conduct a new investigation. (*Id.* ¶ 155.) The law firm issued a report on May 13, 2015. (*Id.* ¶ 157.) The report concluded that John Doe and Gross had sexual relations that night, but could not conclude that the relations were non-consensual. (*Id.*) Gross appealed the decision, which was denied. (*Id.* ¶¶ 159-60.) Throughout the investigation and appeals, John Doe was allowed to remain on campus, without restrictions. (*Id.* ¶¶ 149 and 161.)

For each plaintiff, Plaintiffs allege Defendants' reactions to victims' reports were inadequate, leaving each plaintiff vulnerable on campus and causing deprivation of her educational opportunities. (Comp. ¶¶ 66–68 Kollaritsch; ¶¶ 89–91 Jane Roe 1; ¶¶ 107–09 Jane Roe 2; ¶¶ 163–65 Gross.)

IV.

Defendants argue Plaintiffs' Title IX claim should be dismissed. Defendants argue Plaintiffs have not pleaded sufficient facts to show deliberate indifference by the institution, MSU. Defendants also argue that complaint does not established how each plaintiff suffered harassment as the result of deliberate indifference.

Title IX prohibits sex discrimination in education programs that receive federal funding. "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). Title IX is enforceable through a private right of action. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998) (citing *Cannon v. University of Chi.*, 441 U.S. 677 (1979)). For a Title IX claim, the plaintiff must plead facts demonstrating deliberate indifference by the recipient of federal funding. *Id.* at 290. Deliberate indifference occurs when the recipient's response to known acts of sexual harassment, or lack thereof, "is clearly unreasonable in light of the known circumstances." *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629, 648 (1999); *see Williams ex rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 367-68 (6th Cir. 2005). Deliberate indifference does not occur through a collection of sloppy, or even reckless oversights; it arises from obvious indifference to sexual harassment. *See Doe v. Claiborne Cty., Tennessee*, 103 F.3d 495, 508 (6th Cir. 1996). The standard for deliberate indifference is a "high bar," and is not a "mere reasonableness" standard. *Stiles ex rel. D.S. v. Grainger Cty., Tennessee*, 819 F.3d 834, 848 (6th Cir. 2016). Title IX does not require recipients of federal funding to purge their institutions of actionable sexual harassment and does not require the institutions to undertake any particular disciplinary sanctions. *Id.* And, Title IX does not give the victim a right to demand a particular remedy to the harassment. *Id.* Under the deliberate indifference

standard, courts should not second-guess an institution's disciplinary decisions. *Id.* (citing *Davis*, 526 U.S. at 648).

Gebser involved sexual harassment of a high school student by a teacher. The issue was whether the school district could be held liable for damages. The Supreme Court explained the notice requirement and the necessary response by officials. Where the plaintiff's claim does not involve an official policy, "we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails to adequately respond." *Gebser*, 524 U.S. at 290. The response must amount to deliberate indifference to discrimination. *Id.*

The following year, the Supreme Court revisited Title IX in *Davis*. The case was brought on behalf of a fifth-grade girl who had been sexually harassed by another student in her class. The Court considered whether the school board could be held liable for peer harassment. The Court held recipients of federal funding may be held liable under Title IX only when (1) they are deliberately indifferent to sexual harassment, (2) of which they have actual knowledge, (3) that is so severe, pervasive, and objectively offensive that it deprives the victims of access to the educational opportunities or benefits provided by the school. *Davis*, 526 U.S. 560; *see Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 362 (6th Cir. 2012). The funding recipient's deliberate indifference must cause the

deprivation of educational opportunities and benefits. *Davis*, 526 U.S. at 645. Liability for deliberate indifference arises in circumstances where the funding recipient "exercises substantial control over both the harasser and the context in which the known harassment occurs. Only then can the recipient be said to 'expose' its students to harassment or 'cause' them to undergo it 'under' the recipient's programs." *Id.*

The institution's response to knowledge of sexual harassment must be reasonable in light of the known circumstances. *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000); *see Davis*, 526 U.S. at 648 (explaining that deliberate indifference arises only when the funding recipient's "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."). The promptness of the institution's response, or lack thereof, may be a consideration in determining the reasonableness of the response. *See Bruneau ex rel. Schofield v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 761 (2d Cir. 1998) (finding no error in the jury instructions for a Title IX case when the court declined to instruct the jury that the school district had to take "prompt" remedial action, reasoning that, implicit in the concept of an appropriate response was that the response must be prompt) *abrogated on other grounds by Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009).

Emphasizing the actual knowledge element of a Title IX claim, courts have rejected use of agency and negligence principles. The *Davis* Court summarized the holding in *Gebser*: agency principles cannot be used to impute liability to the district for misconduct by its

teachers. *Davis*, 526 U.S. at 642. *Davis* also held that the "should have known" standard for negligence actions did not apply, the institution must have actual knowledge of the harassment. *Id.*; *Pahssen*, 668 F.3d at 365 ("Negligence, however, does not establish deliberate indifference.").

A. Plaintiff Kollaritsch

The facts alleged in the complaint are sufficient to state a plausible Title IX claim based on MSU's response to Kollaritsch's circumstances.

Defendants do not challenge their knowledge of the alleged sexual harassment. Plaintiffs allege Kollaritsch reported the assaults to MSU police, MSU's Office of Inclusion, and to an official with MSU, Garcia-Williams, for the purpose of starting an investigation. (Compl. ¶¶ 30–32.)

Plaintiffs' allegations are sufficient to plead the deliberate indifference element. Taken as true, the allegations establish that Defendants' response was unreasonable in light of the known circumstances. MSU's investigation took more than six months. During the investigation, MSU did not put in place any accommodations to prevent Kollaritsch from encountering her harasser. The final report did not accurately describe the allege assaults and Kollaritsch was not informed of her right to appeal the sanctions that were imposed.

A no-contact order was imposed on John Doe as part of the sanctions against him. He then violated the no-contact order on at least nine occasions, which Kollaritsch reported to MSU. MSU did not provide any

interim safety measures after Kollaritsch reported the violations of the no-contact order. Kollaritsch was not permitted to be involved in the retaliation investigation, no hearing was held, and when MSU concluded its investigation, Kollaritsch was again was not informed of her ability to file an appeal.

Finally, Plaintiffs have alleged sufficient facts to show that MSU's deliberate indifference deprived Kollaritsch of educational opportunities. Here, the Court focuses on what occurred after Kollaritsch made her initial report. Because she feared for her safety, Kollaritsch took leaves of absence from MSU and did not take classes. (Compl. ¶ 66.)

B. Plaintiff Jane Roe 1

The facts alleged in the complaint are sufficient to state a plausible Title IX claim based on MSU's response to Jane Roe 1's circumstances.

Defendants do not challenge their knowledge of the alleged sexual assault of Jane Roe 1. Plaintiffs allege Jane Roe 1 reported the assault to the MSU Police and to appropriate MSU officials. (Compl. ¶¶ 71–72.)

Plaintiffs' allegations are sufficient to plead the deliberate indifference element. Taken as true, the allegations show that Defendants' response was unreasonable in light of the known circumstances. The investigation took approximately nine months. The explanations for the delay provided by the investigator appear questionable. Jane Roe 1 and her mother had to reach out to the investigators every few weeks to check on the status of the investigation. The Court infers that

John Doe 2 remained on campus, at least for a portion of the semester.[29] (Compl. ¶¶ 75 and 90.)

Plaintiffs' allegations are sufficient to show that MSU's deliberate indifference deprived Jane Roe 1 of educational opportunities. Taken as true, the inadequate manner in which MSU conducted its investigation created a situation where Jane Roe 1 did not feel safe on campus and avoided it at night, and led her to be absent or late to classes.

C. Plaintiff Jane Roe 2

The facts alleged in the complaint do not state a plausible Title IX claim against Defendants based on Jane Roe 2's circumstances.

Defendants do not challenge their knowledge of the alleged sexual assault of Jane Roe 2. Plaintiffs allege Jane Roe 1 reported the assault to appropriate MSU officials. (Compl. ¶ 93.)

Taken as true, the complaint does not allege facts establishing that MSU's actions were deliberately indifferent. The investigation took approximately six months. During the investigation, John Doe 3 was subject to a personal protection order granted to Jane Roe 2. Plaintiffs do allege that Jane Roe 2 did encounter

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[29] Defendants cite paragraph 75 for the proposition that "John Doe 2 was no longer enrolled at MSU by the time that she made her report, and never returned." (Def. Br. at 16 PageID.300.) The relevant portion of paragraph 75 does not support Defendants' proposition. It states "[f]or the first time, she did mention that John Doe 2 had withdrawn from MSU for the time being." (Compl. ¶ 27.) Jane Roe 1 filed her report on February 25. Paragraph 75 discusses a conversation in late April.

her assailant once during the investigation, but provide no context or description of the encounter. Plaintiffs do not allege that Jane Roe 3 suffered any additional harassment after she made her initial report. John Doe 3 was ultimately expelled. After he was expelled, MSU allowed him to return once to attend a graduation ceremony. And, MSU warned Jane Roe 2 that John Doe was allowed to be there.

Finally, taking the allegations in the complaint as true, Jane Roe 2 has not alleged sufficient facts to show that she was deprived of educational opportunities because of MSU's deliberate indifference. She has not alleged facts to show that MSU's response to her report caused the drop in her grades, or her decision to stop playing rugby, or any of the other events alleged in the complaint.

D. Plaintiff Gross

The facts alleged in the complaint state a plausible Title IX claim against Defendants based on Gross's circumstances.

Defendants do not challenge their knowledge of the alleged sexual assault of Gross's circumstances. Plaintiffs allege Gross reported the assaults to appropriate MSU officials. (Compl. ¶ 144.)

Taking the allegations in the complaint as true, Plaintiffs have alleged sufficient facts to establish that MSU's response to Gross's report was unreasonable in light of known circumstances. This was at least the second time MSU had to investigate John Doe; MSU had already investigated John Doe for the allegations

made by Kollaritsch.[30] The initial investigation, hearing, and appeals took more than one year to complete. Although the final decision was initially upheld after an appeal, John Doe's expulsion was subsequently set aside and second investigation was permitted. Throughout the investigation, John Doe remained on campus, although the complaint does not allege whether John Doe was subject to any restrictions on his contact with Gross.

Taking the allegations in the complaint as true, Plaintiffs have established that Gross was deprived of educational opportunities because of MSU's deliberate indifference. Because of the manner in which MSU investigated her report, she stopped participating in extra-curricular activities. Because of the stress caused by the investigation, Gross had problems in classes and had to seek accommodations from professors.

E. Claims Arising from the DCL, the Resolution Agreement, and a Policy of Inaction

To the extent Plaintiffs' Title IX claims rely on standards identified in the DCL, in the Resolution Agreement, or by a policy of inaction, those claims must be dismissed. In various parts of the complaint, Plaintiffs assert that MSU's investigations violated standards identified in the DCL or in MSU's own policies, as reflected in the Resolution Agreement. In their response to the motion, Plaintiffs argue their Title

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[30] Plaintiffs allege John Doe also assaulted a female member of the Reserve Officer's Training Corps (ROTC). (Compl. ¶¶ 136 and 144.) Plaintiffs do not allege, however, that MSU was aware of the assault against the ROTC member.

IX claims can be based on a policy of inaction in response to known risks of sexual harassment.

An institution's failure to follow published procedures will not necessarily establish deliberate indifference. Courts have generally not allowed plaintiffs to show deliberate indifference when a university does not follow the guidance suggested by the Department of Education's Dear Colleague Letter. *See Butters v. James Madison Univ.*, 208 F. Supp. 3d 745, 757–58 (W.D. Va. 2016) (collecting cases). The reasoning in those cases is persuasive. The DCL states that it is a standard for administrative enforcement for cases where plaintiffs are seeking injunctive relief. *Id.* The standard contained in the DCL is a negligence standard, not a deliberate indifference standard. *See id.*

The failure of a school to follow its own policies and regulations, standing alone, does not establish deliberate indifference. *Sanches v. Carrollton-Farmers Indep. Sch. Dist.*, 647 F.3d 156, 169 (5th Cir. 2011) (quoting *Gebser*, 524 U.S. at 291-92); *see, e.g., Oden v. Northern Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006) (failing to follow school policy to hold a hearing within 30 days, where the hearing did not occur for 9 months, was not deliberate indifference because the victim, at least in part, caused the delay). The Resolution Agreement issued in August 2015, *after* the events giving rise to each of the plaintiff's claims. MSU could not be deliberately indifferent to guidelines identified in the Resolution Agreement when the document did not exist when the underlying investigations were occurring.

Finally, in their response brief, Plaintiffs assert a theory of deliberate indifference based on a policy of inaction by MSU in light of known risks of sexual harassment, borrowing the theory from municipal liability cases. *See Simpson v. Univ. of Colorado Boulder*, 500 F.3d 1170, 1178-79 (10th Cir. 2007) (involving a university policy for hosting potential student athletes that created circumstances where sexual assaults occurred and the administration had been warned by the district attorney). The Sixth Circuit has not published any opinion adopting a policy of inaction theory, although at least one district court within this circuit found the reasoning in *Simpson* persuasive. *See Doe v. Univ. of Tennessee*, 186 F. Supp. 3d 788, 804–05 (M.D. Tenn. 2016).

Plaintiffs have not pled facts sufficient to support a policy of inaction theory of deliberate indifference for a Title IX claim. Plaintiffs focus on MSU's alleged failure to publish and distribute information about its sexual harassment policies and procedures. *Gebser* rejected this avenue for showing discrimination under Title IX. In *Gebser*, the Court rejected the argument that a failure to promulgate and publicize an effective policy and grievance procedure for sexual harassment, as required by the Department of Education's regulations, would constitute a Title IX deliberate indifference claim. 524 U.S. at 291–92. And, the circumstances in *Simpson* and *Doe v. University of Tennessee* are distinct from the circumstances at MSU. In *Simpson* and *Doe*, the institutions created the circumstances where the sexual assaults occurred. Plaintiffs here have not identified an official policy of MSU that created

situations where sexual harassment or sexual assaults had occurred in the past, and where the risk had been ignored.

V.

In their motion, Defendants argue that the complaint fails to allege facts sufficient to state a claim for violations of the Due Process Clause.

In their response, Plaintiffs voluntarily dismiss their Due Process claims. (ECF No. 39 Pl. Resp. at 22 n.8 PageID.438.) Plaintiffs have not identified any authority which would permit them to withdraw a claim without prejudice after Defendants filed a motion to dismiss. *See, e.g.,* Fed. R. Civ. P. 41(a)(1)(A) (permitting voluntary dismissal of actions by a plaintiff if the dismissal occurs before the opposing party files an answer or motion for summary judgment). Plaintiffs did not file an amended complaint removing their Due Process claims. *See* Fed. R. Civ. P. 15(a)(1). Because Defendants have moved to dismiss Plaintiffs' Due Process claims, and because Plaintiffs have not responded to that portion of the motion, Defendants' motion to dismiss the Due Process claims will be granted.

VI.

Defendants also argue that the complaint fails to allege facts sufficient to state a claim for violations of the Equal Protection Clause.

Claims for violations of constitutional rights may be brought under 42 U.S.C. § 1983. To state a § 1983 claim and avoid dismissal under Rule 12(b)(6), a plaintiff

must plead facts to support two elements: (1) there was the deprivation of a right secured by the United States Constitution, and (2) that the deprivation was caused by a person acting under color of state law. *Wittstock v. Mark A. Van Sile, Inc.*, 330 F.3d 899, 902 (6th Cir. 2003). "[T]he existence of a constitutional right must be the threshold determination in any section 1983 claim[.]" *Claiborne Cty.*, 103 F.3d at 509. The Sixth Circuit has "consistently held that damage claims against government officials arising from alleged violations of constitutional rights must allege, with particularity, facts that demonstrate what *each* defendant did to violate the asserted constitutional right." *Lanman v. Hinson*, 529 F.3d 673, 684 (6th Cir. 2008) (italics in original). "Allegations of *respondeat superior* do not sustain a § 1983 claim against state employees in their individual capacities, meaning that officials are personally liable for damages under that statute 'only for their own unconstitutional behavior.'" *Colvin v. Caruso*, 605 F.3d 282, 292 (6th Cir. 2010) (quoting *Leach v. Shelby Cty. Sheriff*, 891 F.2d 1241, 1246 (6th Cir. 1989)).

To state an Equal Protection claim under § 1983, the plaintiff must allege facts establishing that he or she was a victim of intentional and purposeful discrimination. *Webarg v. Franks*, 229 F.3d 514, 522 (6th Cir. 2000) (collecting cases); *see Washington v. Davis*, 426 U.S. 229, 239 (1976) (discussing race discrimination claims brought under the Fourteenth Amendment's Equal Protection Clause). "The Sixth Circuit recognizes two methods of proving an equal protection violation based on a school official's response

to peer to peer harassment: (1) disparate treatment of one class of students who complain about bullying as compared to other classes of students, and (2) deliberate indifference to discriminatory peer harassment." *Stiles*, 819 F.3d at 851-52 (citing *Shively v. Green Local Sch. Dist. Bd. of Educ.*, 579 F. App'x 348, 356-57 (6th Cir. 2014) and *Williams v. Port Huron Sch. Dist.*, 455 F. App'x 612, 618 (6th Cir. 2012)). The required discriminatory intent for an equal protection claim may be established by showing that school officials were deliberately indifferent to allegations of peer harassment. *Port Huron*, 455 F. App'x at 618.

The deliberate indifference claim for a § 1983 equal protection claim is "substantially the same" as the deliberate indifference standard used in Title IX cases. *Stiles*, 819 F.3d at 852 (quoting *Paint Valley Local Sch. Dist.*, 400 F.3d at 369). To state a deliberate indifference claim under the Equal Protection clause, the plaintiff must allege facts showing she was subjected to discriminatory peer harassment. *Id.* (collecting cases). The plaintiff must then allege facts establishing that school officials responded to the discriminatory peer harassment with deliberate indifference. *Id.*

A. Intentional Discrimination

Defendants' argue that Plaintiffs did not allege intentional discrimination because of their status as members of a protected group. Defendants' motion overlooks Sixth Circuit precedent which permits a plaintiff to show an Equal Protection violation through deliberate indifference to reports of peer sexual harassment. Binding authority allows a plaintiff to establish an Equal Protection claim by showing "either

that the defendants intentionally discriminated or acted with deliberate indifference." *Stiles*, 819 F.3d at 852 (quoting *Shively*, 579 F. App'x at 357). For their Equal Protection claim, Plaintiffs' rely on the alternative theory, each individual defendant's conduct amounted to deliberate indifference.

B. Deliberate Indifference

An individual defendant who is a government official may not be held liable under § 1983 under a theory of respondeat superior. Each individual must have acted in an unconstitutional manner. Plaintiffs have to show that each individual defendant demonstrated deliberate indifference to the peer harassment that occurred after the sexual assaults.

1. Defendant Simon

Plaintiffs have not alleged sufficient facts to show that Simon was deliberately indifferent. Simon's involvement is mentioned only in paragraphs 103 and 148 of the complaint.[31] None of those paragraphs allege facts suggesting deliberate indifference. Paragraph 103 provides background for Jane Roe 2's claim. Simon is alleged to have said that it was a mistake to allow John Doe 3 to return to campus. Plaintiffs have not alleged that Simon made the decision to allow John Doe 3 to return to campus. Plaintiffs have not alleged that Simon participated in the investigation. Paragraph 148 provides background information for Gross's claim. In

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[31] Not including a caption or heading, the Court cannot find where Plaintiffs even write Simon's name in their response to the motion to dismiss, let alone describe any conduct or inaction that might provide a basis for a claim against Simon.

that paragraph Plaintiffs allege that Gross emailed Simon to express concerns about how MSU handled the investigation. This allegation does not establish that Simon participated in the investigation.

2. Defendant Youatt

Plaintiffs have not alleged sufficient facts to show that Youatt was deliberately indifferent. Youatt is mentioned in only two paragraphs in the complaint.[32] In paragraph 4, Youatt is named as a defendant and her job duties are described. In paragraph 173, Youatt is identified as one of the defendants to Count 2. The complaint contains no allegations about any action taken by Youatt. The complaint does not allege that Youatt had knowledge of any of the events giving rise to any of the claims brought by Plaintiffs.

3. Defendant Maybank

Plaintiffs have alleged sufficient facts for an Equal Protection claim against Defendant Maybank for her deliberate indifference to Gross's report, but not for deliberate indifference to either Kollaritsch's report or Jane Roe 2's report. Maybank is mentioned in paragraphs 64 and 65 (Kollaritsch background), 97 and 102 (Jane Roe 2 background), and 155 (Gross background).

For the Equal Protection claim brought by Gross, Plaintiffs have alleged sufficient facts to show that Maybank was deliberately indifferent. In paragraph

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[32] Similar to the lack of information about Simon the Plaintiffs' response to the motion, Youatt's name does not appear in the brief, outside of the caption or heading.

155, Plaintiffs allege, in November 2015, Maybank informed Gross that the initial investigation and conclusion would be disregarded and a new investigation would be opened into Gross's allegations against John Doe, which would be conducted by outside counsel. At least in the complaint, no explanation for this decision is provided. Assuming the allegations in the complaint to be true, including the allegation that John Doe sexually assaulted Gross three times and that the initial appeal was denied, this decision was unreasonable under the circumstances as a response to Gross's allegation of a sexual assault.

For the Equal Protection claim brought by Kollaritsch against Maybank, Plaintiffs have not alleged sufficient facts to show deliberate indifference. Kollaritsch contends she met with Maybank in August 2013 and told Maybank she did not feel safe on campus. Two weeks later, Maybank emailed Kollaritsch, "effectively refused to do anything," and told Kollaritsch to contact MSU Police. The meeting occurred after John Doe had been disciplined, after Kollartisch's retaliation complaint and been resolved, and after Kollaritsch's appeal was denied. These allegations do not show deliberate indifference; Maybank's response was not clearly unreasonable under the circumstances. The investigation and appeals process had been completed, and Maybank was relying on those proceedings. The Court will not second guess Maybank's decision.

For the Equal Protection claim brought by Jane Roe 2 against Maybank, Plaintiffs have not alleged sufficient facts to show deliberate indifference. In paragraph 97, Plaintiffs allege as Maybank upheld the

expulsion of John Doe 3. This allegation cannot be the basis of a claim for deliberate indifference. Plaintiffs' claim must arise from the decision to allow John Doe 3 on campus for a graduation ceremony, the allegation in paragraph 107. It is not clear if Maybank made the decision to allow John Doe 3 on campus, or if Maybank denied Jane Roe 2's appeal of that decision. Neither decision amounts to deliberate indifference. MSU alerted Jane Roe 2 that John Doe 3 had been given leave to be on campus. Jane Roe 2 does not allege that she encountered John Doe 3 during this brief window.

VII.

Defendants assert that they are immune from Plaintiffs' constitutional claims. Defendants assert that MSU Trustees are immune under the Eleventh Amendment. Defendants assert that the individual defendants are entitled to qualified immunity.

A. MSU Trustees

MSU Trustees are immune under the Eleventh Amendment from Plaintiffs' constitutional claims. In their response, Plaintiffs concede that "Defendant Regents" are an arm of the state and are immune from liability. (ECF No. 39 Pl. Resp. at 23 n.9 PageID.439.) Accordingly, the constitutional claims brought against Defendant MSU Trustees will be dismissed.

B. Qualified Immunity

Because Plaintiffs have withdrawn their Due Process claims, the Court considers only the Equal Protection claims.

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is a legal question for the court to resolve. *Everson v. Leis*, 556 F.3d 484, 494 (6th Cir. 2009) (citing *Elder v. Holloway*, 501 U.S. 510, 516 (1994)). When resolving a governmental employee's assertion of qualified immunity, the court determines (1) whether the facts the plaintiff has alleged or shown establishes the violation of a constitutional right, and (2) whether the right at issue was clearly established at the time of the incident. *Stoudemire v. Michigan Dep't of Corr.*, 705 F.3d 560, 567 (6th Cir. 2013) (citing *Pearson v. Callahan* 555 U.S. 223, 232 (2009)).

Once the qualified immunity defense is raised, the plaintiff bears the burden of demonstrating both that the challenged conduct violates a constitutional or statutory right and that the right was so clearly established at the time that "'every reasonable officer would have understood that what he [was] doing violate[d] that right.'" *T.S. v. Doe*, 742 F.3d 632, 635 (6th Cir. 2014) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *al-Kidd*, 563 U.S. at 743 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

In determining whether a law is clearly established, ordinarily this Court looks to decisions of the Supreme Court and the Sixth Circuit. *Carver v. City of Cincinnati*, 474 F.3d 283, 287 (6th Cir. 2007); *see Wilson v. Layne*, 526 U.S. 603, 617 (1999). If controlling authority does not clearly establish the law, this Court may consider other circuit authority. *Andrews v. Hickman Cty., Tennessee*, 700 F.3d 845, 853 (6th Cir. 2012). Although a prior case need not be directly on point, "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at S.Ct. at 741. The clearly established prong will depend "substantially" on the level of generality at which the legal rule is identified. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). The right must be clearly established in a particularized sense, and not at a general or abstract sense. *Id.* at 640. "This standard requires the courts to examine the asserted right at a relatively high level of specificity and on a fact-specific, case-by-case basis." *Bletz v. Gribble*, 641 F.3d 743, 750 (6th Cir. 2011) (edits omitted) (quoting *Cope v. Heltsley*, 128 F.3d 452, 458-59 (6th Cir. 1997)).

The Court has already considered whether the allegations in the complaint establish that the individual defendants' conduct constituted deliberate indifference for an Equal Protection claim. For Defendants Simon and Youatt, the allegations were insufficient to establish deliberate indifference. Because the allegations do not establish an Equal Protection violation, their requests for qualified immunity are moot. *See Adams v. City of Auburn Hills*,

336 F.3d 515, 520 (6th Cir. 2003); *Ahlers v. Schebil*, 188 F.3d 365, 374 (6th Cir. 1999); *Mays v. City of Dayton*, 134 F.3d 809, 815 (6th Cir. 1998).

Defendant Maybank is not entitled to qualified immunity for the Equal Protection claim brought by Gross. Plaintiffs have established that the relevant rights were clearly established by 2012. By 1999, education administrators would have known that deliberate indifference to claims of peer harassment violates Title IX. *See Davis*, 526 U.S. at 648. In 2012, before any of these incidents occurred, the Sixth Circuit issued its opinion in *Williams v. Port Huron School District*. Although that case involved racial discrimination, the panel addressed a claim that individual government officials may violate a plaintiff's Equal Protection claim through deliberate indifference to claims of peer harassment. The defendants raised qualified immunity as a defense, and the court found that each defendant was not deliberately indifferent. The court then declined to determine whether the right was clearly established. *Port Huron*, 455 F. App'x at 620. And, in August 2014, in *Shively v. Green Local School District Board of Education*, the court denied a claim for qualified immunity, finding that the "equal protection right to be free from student-on-student discrimination is well-established." 579 F. App'x at 538. The *Shively* panel cited *Williams*, a 1999 published case from the Tenth Circuit, and a 2003 published case from the Ninth circuit. *Id.* The *Williams* and *Shively* opinions confirm that Plaintiffs' Equal Protection right was clearly established at the time of these incidents.

VIII.

Defendants assert Plaintiffs' ELCRA claims are barred by the Eleventh Amendment. In their response, Plaintiffs' concede that their ELCRA claims are improper and voluntarily dismiss the claims. (ECF No. 39 Pl. Resp. at 1 n.1 PageID.417.) The Court grants Defendants' motion for the ELCRA claims for the same reasons the Court grants Defendants' motion for the Due Process claims.

IX.

Defendants have demonstrated that some of Plaintiffs' claims cannot survive a motion to dismiss. Because Plaintiffs have conceded their Due Process claims, their ECLRA claims, and their claim against the Trustees for Equal Protection, those claims will dismissed. Jane Roe 2's Title IX claim must be dismissed because the complaint does not allege facts to show that MSU's response to her report was deliberately indifferent or that she was deprived of educational opportunities as the result of deliberate indifference. Plaintiffs' Title IX claims based on the DCL, the Resolution Agreement, and a policy of inaction in response to known dangers are dismissed. The DCL does not set forth standards that can be used for a Title IX claim and the Resolution Agreement was not issued when these events occurred. Plaintiffs have not alleged facts to support a claim based on a policy of inaction in response to known dangers, as that theory has been described in other Title IX opinions. The Equal Protection claims brought against Simon and Youatt are dismissed. The complaint does not plead sufficient facts to show either defendant acted with deliberate

indifference. For the same reason, the Equal Protection claims brought by Kollaritsch and Jane Roe 2 against Maybank are dismissed. Because the law was clearly established at the time, Defendant Maybank's request for qualified immunity for the Equal Protection claim is denied. The following claims are not dismissed: (1) Kollartich's Title IX claim against MSU Trustees, (2) Jane Roe 1's Title IX claim against MSU Trustees, (3) Gross's Title IX claim against MSU Trustees, and (4) Gross's Equal Protection claim against Maybank.

ORDER

For the reasons provided in the accompanying Opinion, Defendants' motion to dismiss (ECF No. 28) is **GRANTED IN PART** and **DENIED IN PART.**

The following claims are DISMISSED with prejudice: (1) Plaintiffs' Due Process claims, (2) Plaintiffs' ELCRA claims, (3) Plaintiffs' Equal Protection claim against Defendant Trustees, (4) Jane Roe 2's Title IX claim against Defendant Trustees, (5) Plaintiffs' Title IX claims arising from the DCL, the Resolution Agreement, and MSU Trustee's policy of inaction, (6) Plaintiffs' Equal Protection claims against Defendant Simon, (7) Plaintiffs' Equal Protection claims against Defendant Youatt, (8) Plaintiff Kollaritsch's Equal Protection claim against Defendant Maybank, and (9) Plaintiff Jane Roe 2's Equal Protection Claim against Defendant Maybank.

Also, Defendant Maybank's request for qualified immunity is DENIED.

IT IS SO ORDERED.

Date: November 2, 2017

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

Nos. 17-2445/18-1715

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
Feb 03, 2020
DEBORAH S. HUNT, Clerk

EMILY KOLLARITSCH, ET AL.,

Plaintiffs-Appellees,

v.

MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES; DENISE MAYBANK, IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS VICE PRESIDENT FOR STUDENT AFFAIRS,

Defendants-Appellants.

ORDER

BEFORE: BATCHELDER, ROGERS, and THAPAR, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EMILY KOLLARITSCH; SHAYNA GROSS; JANE ROE 1 and JANE ROE 2;

Plaintiffs,

v.

MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES; DENISE MAYBANK, in her individual and official capacity as Vice President for Student Affairs; LOU ANNA SIMON, in her individual and official capacity as President of the Michigan State University; and KAPPA SIGMA FRATERNITY,

Defendants.

Case No. 1:15-cv-01191

Hon. Paul L. Maloney

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FIRST AMENDED COMPLAINT AND JURY DEMAND

Plaintiffs, through their attorneys, submit this First Amended Complaint and state the following:

PARTIES AND JURISDICTION

1. Defendant Michigan State University Board of Trustees ("Trustees") operates and governs Michigan State University ("MSU"), a public, state university located in Lansing, MI.

2. Defendant Denise Maybank ("Maybank") is, and was at all times relevant, the Vice President for Student Affairs at MSU. Plaintiffs are informed and believe and thereon allege that as Vice President of Student Affairs, Defendant Denise Maybank is responsible

for participating in the making of policies, and communicating and enforcement of all policies and practices of MSU with respect to diversity and inclusion, including the avoidance of gender based discriminatory practices by MSU and its educational and other student programs.

3. Defendant Lou Anna Simon ("Simon") is, and was at all times relevant, the President of MSU. Plaintiffs are informed and believe and thereon allege that as President of MSU, Defendant Lou Anna Simon is responsible for managing and directing all of the affairs of MSU. She is responsible for issuing directives, and executive orders consistent with the policies of Defendant Trustees, including policies and practices associated with the avoidance of gender based discrimination associated with the schools educational and other student programs.

4. Defendant June Pierce Youatt, at all times relevant, was either the Acting Provost or the Provost and Executive Vice President for Academic Affairs of MSU. Plaintiffs are informed and believe, and thereon allege, that in all of these positions she oversaw or overseas issues involving the management of MSU, including oversight of academic policies, and the quality of student learning. Defendant Youatt is the principal academic officer of MSU and administer of the various colleges, special units and academic support facilities. Defendant Youatt is responsible for insuring that administrative procedures preserve academic freedom and insure academic responsibility.

5. Defendant Paulette Granberry Russell ("Russell") at all times relevant was MSU's appointed Title

IX Coordinator. As the designated Title IX Coordinator Russell was the federally mandated employee of MSU responsible for implementing and enforcing the requirements of Title IX (20 U.S.C. Sec 1681 Et. Seq.) at MSU including insuring the avoidance of gender based discrimination, conducting the investigation of any complaint of non-compliance with Title IX, allegations of conduct prohibited by Title IX, including student on student sexual harassment and sexual violence, taking remedial measures to avoid subjecting students to sexual harassment, and enforcing measures to eliminate a hostile environment based on a person's gender. On information and belief, Plaintiffs allege that Russell, at all times relevant herein, performed her duties in accordance with the policies and practices established by or that were allowed to exist at MSU by Defendants Trustees, Maybank, Simon and Youatt.

6. Defendant Kappa Sigma ("Kappa Sigma") is an international fraternity, headquartered in Charlottesville, VA.

7. Defendant Delta Psi ("Local Chapter") is an organization of unknown legal form and agent of Kappa Sigma operating in Michigan. Defendant Local Chapter is chartered, governed, managed and controlled by Defendant Kappa Sigma (together, collectively the "Fraternity Defendants"). Defendant Kappa Sigma exercises control over the social activities, assets, risk management, and members of Local Chapter.

8. Plaintiff Emily Kollaritsch ("Kollaritsch") was, at all times relevant, a student at MSU.

9. Plaintiff Shayna Gross ("Gross") was at all times relevant, and still is, a student at MSU.

10. Plaintiff Jane Roe 1 was, at all times relevant, and still is, a student at MSU.

11. Plaintiff Jane Roe 2 was, at all times relevant, and still is, a student at MSU.

12. Michigan State University receives federal financial assistance and is therefore subject to the dictates of Title IX.

13. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and over state law claims pursuant to 28 U.S.C. § 1367.

14. Venue in this Court is proper under 28 U.S.C. § 1391(b) because the events giving rise to this claim took place in this judicial district, and Defendants reside in this judicial district.

BACKGROUND FACTS RELEVANT TO ALL COUNTS

15. The Trustees, by the Michigan state constitution, are vested with the authority to supervise, control, and govern MSU.

16. The Office of Civil Rights ("OCR"), a division of the United States Department of Education ("DOE"), is responsible for the implementation, interpretation, and enforcement of Title IX.

17. The OCR has promulgated numerous documents outlining the requirements for an educational institution to be in compliance with Title IX, including the Dear Colleague Letter of April 4th, 2011 ("DCL"), which

deals specifically with peer-on-peer sexual harassment and sexual assault.

18. The DOE was authorized by Congress to promulgate regulations to govern the implementation, interpretation and enforcement of Title IX.

19. The DCL is a "significant guidance document," intended to provide educational institutions with clarity as to the requirements they must follow in order to be in compliance with the DOE. Pursuant to 72 Fed. Reg. 3432, a "guidance document" is "an agency statement of general applicability and future effect, other than a regulatory action ... that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue." A "significant guidance document" is "a guidance document disseminated to regulated entities or the general public that may reasonably be anticipated to ... (iv) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866, as further amended."

20. The DCL specifically outlines the requirements that educational institutions must follow regarding peer-on-peer sexual harassment and assault.

21. A failure to adhere to the requirements outlined in the DCL could result in the loss of federal funding for an educational institution.

22. In 2015, the OCR initiated an investigation into MSU to determine if MSU had violated their requirements under Title IX with regard to the handling of complaints of sexual harassment and sexual assault on campus.

23. In September 2015, the OCR released its report regarding the findings of its investigation into MSU. The OCR found that MSU:

- Failed to notify students and employees of the name or title of the Title IX Coordinator;
- Failed to notify students and employees of MSU's notice of non-discrimination;
- Had grievance procedures that were not in compliance with Title IX;
- Failed to respond to reports of sexual harassment and sexual violence in a prompt and equitable manner, thereby causing and contributing to a sexually hostile environment on campus.

24. At the time of the conduct alleged herein, MSU's official policy was to complete an investigation into a report of sexual harassment and/or sexual assault within ninety days of the formal report.

25. Based on information and belief, MSU consistently, and virtually always, failed to complete their sexual harassment and/or assault investigations within the ninety-day time period prescribed in MSU's official policies.

26. At the time of the conduct alleged herein, MSU had an official policy against retaliation for any person that filed a complaint of sexual assault and/or sexual harassment.

27. At the time of the alleged conduct herein, MSU had a policy to always take interim measures to

protect the complainant, based on the information reported, whether or not the claimant wished to proceed with a formal investigation. Some of the interim measures recognized by MSU were:

- No contact orders;
- Housing rearrangement for either party;
- No trespass orders;
- Interim suspensions; and
- Facilitating class changes for either party.

FACTS APPLICABLE TO PLAINTIFF KOLLARITSCH

28. Between October 1, 2011 and October 14, 2011, John Doe 1 attempted to rape Plaintiff Kollaritsch in his dormitory room at Case Hall, a dormitory owned and operated by MSU.

29. On October 15, 2011, John Doe 1 sexually assaulted Plaintiff Kollaritsch in the stands at an MSU football game.

30. On January 30, 2012, Kollaritsch reported her sexual assaults to the MSU Police Department.

31. Shortly afterward, the MSU Police Department reported the assaults to the MSU Office of Inclusions ("I3").

32. On February 3, 2012, Kollaritsch met with Amanda Garcia-Williams ("Garcia-Williams"), MSU's Title IX Coordinator, to formally commence a university investigation against John Doe.

33. Upon filing a formal complaint, MSU did not provide any accommodations to ensure that Kollaritsch would not encounter John Doe on campus, and John Doe was allowed to remain on campus, unrestricted, throughout the pendency of MSU's investigation.

34. John Doe and Kollaritsch lived in the same dormitory, and frequented the same cafeteria and public areas around the dormitory.

35. Kollaritsch actually encountered John Doe on multiple occasions, subsequent to filing her official report. On more than one instance, Kollaritsch encountered John Doe at a dormitory cafeteria. On each of these occasions, Kollaritsch experienced a panic attack, and was forced to leave the building, often crying, lightheaded, and significantly distraught.

36. Throughout the pendency of the investigation, Kollaritsch often slept in her friends' dormitory rooms, because she feared sleeping in her own room.

37. Approximately 200 days after her official complaint, Kollaritsch received an Investigation Report from MSU. This was 140 days longer than what the DOE considers reasonable for the length of an investigation, and 80 days longer than MSU's own policies require for the completion of an investigation.

38. The Investigation Report did not accurately reflect the facts surrounding Kollaritsch's allegations of sexual assault, and in fact, characterized the assaults in a much less egregious manner.

39. The Investigation Report concluded that John Doe had violated the MSU Sexual Harassment Policy,

but did not specify which policies were violated. In other words, John Doe was not explicitly found responsible for committing sexual assault.

40. Subsequently, John Doe was given the option to accept or deny the allegations prior to a judicial hearing to determine a sanction for his conduct.

41. John Doe accepted responsibility.

42. Kollaritsch was discouraged by Garcia-Williams from attending the MSU judicial board hearing to determine John Doe's sanction. The judicial board did not read the victim impact statement Kollaritsch prepared, nor was she ever informed of what the possible sanctions for John Doe could be.

43. Garcia-Williams specifically told Kollaritsch prior to the hearing that no student had ever been expelled from MSU as a result of sexually assaulting another student.

44. On November 13, 2012, over nine months after Kollaritsch's report, Kollaritsch was finally informed that as a sanction for his violation of the MSU Code of Conduct, John Doe was (1) put on a probationary status, (2) required to write an essay, and (3) required to obtain a letter from an employer organization demonstrating that John Doe could abide by MSU's rules of conduct. A "no contact" order was also issued to John Doe.

45. Garcia-Williams specifically informed Kollaritsch that John Doe had five days to appeal the sanctions. Garcia-Williams did not inform Kollaritsch of her right to appeal the sanction within five days as well.

46. Because Kollaritsch has a hearing disability, which was known to Garcia-Williams, on November 16th, 2012, Kollaritsch requested the official sanctioning documents to confirm the sanctions because it was difficult for her to hear the sanctions over the phone. After initially refusing, Garcia-Williams agreed to send Kollaritsch the documents. The document was sent to Kollaritsch on November 21, 2012, after her five-day period to appeal had expired.

47. After John Doe received his sanctions, he began to retaliate against Kollaritsch by stalking, harassing and intimidating Kollaritsch, despite the "no contact" order in place.

48. Kollaritsch was stalked, harassed and/or intimidated by John Doe on at least nine occasions after John Doe's sanctions had been levied.

49. Kollaritsch reported the additional harassment to her MSU advocate, Shari Murgittroyd ("Murgittroyd"). Murgittroyd responded by discouraging Kollaritsch from pursuing a formal complaint for the additional harassment she was experiencing. Eventually, after Kollaritsch continued to report John Doe 1's stalking behavior to Murgittroyd, Murgittroyd relented, and encouraged Kollaritsch to report the retaliation to MSU.

50. On February 4, 2013, Kollaritsch contacted Rick Shafer ("Shafer"), the Associate Director of MSU Student Life, and Garcia-Williams to report John Doe's retaliatory harassment. In response, Shafer specifically discouraged Kollaritsch from reporting the harassment

to the MSU police, and instead encouraged her to file a complaint with the MSU Office of Inclusion.

51. MSU did not provide any interim safety measures after Kollaritsch reported John Doe's retaliatory harassment to Shafer and Garcia-Williams.

52. Also in February 2013, Shafer admitted to Kollaritsch that he had made a mistake in allowing John Doe to remain in Case Hall, the same dormitory building in which Kollaritsch was living. Shafer informed Kollaritsch that she shouldn't be so afraid of John Doe, but did not offer to remove John Doe from the dormitory or restrict John Doe in any way. Instead, Shafer offered to void Kollaritsch's housing contract and encouraged her to move to an off-campus apartment.

53. On March 11, 2013, Kollaritsch filed a formal complaint ("Retaliation Complaint") regarding John Doe's retaliatory harassment with Garcia-Williams.

54. When Kollaritsch filed her Retaliation Complaint, Garcia-Williams told her that there was a difference between retaliation and just seeing John Doe, and consistently suggested that Kollaritsch needed mental health services.

55. Because MSU took no measures to protect Kollaritsch's safety following John Doe's sanction hearing, and through her Retaliation Complaint, Kollaritsch filed for a Personal Protection Order ("PPO") in East Lansing District Court on March 13, 2013. The next day, Kollaritsch was issued an ex-parte PPO by Judge Ball.

56. John Doe subsequently filed a motion to terminate the PPO, on the grounds that it was impacting his life and he had no desire to contact Kollaritsch. On June 4, 2013, Judge Ball denied John Doe's motion, ordering that the PPO remain in place because Kollaritsch was in reasonable danger.

57. On April 25, 2013, Murgittroyd told Kollaritsch that what had happened was not that bad because it was not actual rape. Murgittroyd also told Kollaritsch that Kollaritsch should be happy that John Doe was sanctioned at all.

58. On May 28, 2013, Garcia-Williams e-mailed Kollaritsch her investigative report regarding the Retaliation Complaint. Garcia-Williams had concluded that no retaliation had occurred, and John Doe had not further violated MSU's Code of Conduct.

59. Kollaritsch was not allowed to be involved in the investigation process, nor was there a hearing. Further, Kollaritsch was never informed of her right or ability to appeal the conclusions.

60. On June 4, 2013, Kollaritsch filed a written response to Garcia-Williams' report, and deemed it an appeal, because she had not been told if she could appeal the findings, or how to appeal the findings.

61. In her response, Kollaritsch pointed out that Garcia-Williams had failed to account for several pieces of evidence that Kollaritsch had provided. Further, Garcia-Williams failed to interview one of Kollaritsch's corroborating witnesses.

62. Further, Kollaritsch presented evidence that John Doe's corroborating witness was not credible. During the hearing on John Doe's motion to terminate the PPO, he produced a witness that, under oath, admitted that he could not identify Kollaritsch. This same witness was used as a corroborating witness during Garcia-Williams' investigation to show that John Doe did not harass Kollaritsch. When Kollaritsch pointed out that John Doe's witness was not credible, Garcia-Williams chose not to re-consider her final conclusions.

63. On June 25, 2013, Kollaritsch informed Murgittroyd that Kollaritsch was fearful for her safety on campus. Murgittroyd responded that Kollaritsch should just transfer to another university.

64. On August 5, 2013, Kollaritsch met with Denise Maybank, MSU's Vice President of Student Affairs and William Beekman, MSU's Vice President. Kollaritsch expressed her fear that she was not safe on campus. Maybank asked Kollaritsch what she thought the appropriate sanction should be for John Doe. Kollaritsch replied that John Doe should have been expelled or suspended.

65. On August 19, 2013, Kollaritsch received an e-mail from Maybank effectively refusing to do anything about Kollaritsch's complaints. Instead, she told Kollaritsch to contact the MSU Police Department to create a "safety plan." The MSU police department informed Kollaritsch that the "safety plan" consisted of locking her door, locking her windows and closing her blinds.

66. Frustrated, and fearful for her safety, Kollaritsch took multiple temporary leaves of absence from MSU. Kollaritsch did not attend classes during the fall semester of her senior year, nor during the fall semester of the following year.

67. Defendant's and MSU's actions and inactions in response to Kollaritsch's report of sexual assault, and later, her report of retaliation, subjected her to additional harassment and created a sexually hostile environment for Kollaritsch on campus.

68. As a result of Defendant's and MSU's actions and inactions in response to Kollaritsch's report of sexual assault, and later, her report of retaliation, Kollaritsch was deprived of several educational opportunities and/or benefits, including but not limited to:

- A drop in her GPA;
- The inability to sleep in her own dorm room;
- Avoidance of all social activities on campus, or sponsored by, or related to MSU;
- The need to seek multiple academic accommodations from professors;
- The need to take multiple temporary leaves of absence from classes; and
- An unusually large amount of absences from classes.

BACKGROUND FACTS RELATED TO

JANE ROE 1

69. Plaintiff Jane Roe 1 incorporates all paragraphs of this Complaint as if fully alleged herein.

70. On November 1, 2013, Plaintiff Jane Roe 1 was sexually assaulted on campus by John Doe 2, a fellow student at MSU.

71. Jane Roe 1 immediately went to Sparrow Clinton Hospital to have a Sexual Assault Nurse Examiner ("SANE") examination performed. She also reported the sexual assault to the MSU Police Department.

72. On February 25, 2014, Jane Roe 1 filed a formal complaint with Garcia-Williams. At this meeting, Garcia-Williams promised to interview two of Jane Roe 1's witnesses prior to the upcoming spring break.

73. On March 18, 2014, Jane Roe 1 contacted Garcia-Williams for an update on the status of her complaint. On March 19, 2014 Garcia-Williams responded that she was waiting for the results of Jane Roe 1's SANE examination. Jane Roe 1 asked if there was anything that could be done while Garcia-Williams was waiting for the SANE report. Garcia-Williams said that nothing could be done.

74. On April 18, 2014, Jane Roe 1 contacted Garcia-Williams again for an update on the status of her complaint. On April 19, 2014, Garcia-Williams informed Jane Roe 1 that she was still waiting for the SANE report. Again, Jane Roe 1 asked if there was an-

ything she could do to expedite the process. Garcia-Williams informed Jane Roe 1 that there was nothing she could do.

75. In late April of 2014, Jane Roe 1's mother contacted Garcia-Williams on behalf of her daughter. Garcia-Williams again told Jane Roe 1's mother that she had yet to obtain the SANE report, nor had she interviewed John Doe 2. For the first time, she did mention that John Doe 2 had withdrawn from MSU for the time being.

76. On May 6, Jane Roe 1's mother again contacted Garcia-Williams for an update. Garcia-Williams informed Jane Roe 1's mother that she had still not received the SANE report. Jane Roe 1's mother then called Sparrow Hospital to see why the SANE report had not been sent. She was informed that the SANE report had been sent to Garcia-Williams on March 14, 2014. The hospital indicated it would send the SANE report to Garcia-Williams again. Jane Roe 1's mother then called Garcia-Williams to inform her that the SANE report had already been sent, and was going to be sent again.

77. On May 20, 2015, Jane Roe 1's mother called Garcia-Williams and left a message asking for a status update.

78. On May 22 2015, after not receiving a call back, Jane Roe 1's mother called Garcia-Williams again. Garcia-Williams was unavailable, so Jane Roe 1's mother drove to campus to speak with her directly.

She was informed by the Title IX office that Garcia-Williams was in, but that she was busy with meetings all day.

79. Later that day, Garcia-Williams called Jane Roe 1's mother and informed her that she had spoken to John Doe 2, and the [sic] he was going to let her know what he wanted to do with regard to the investigation by May 30, 2014.

80. On May 30, 2014, the deadline for John Doe 2 to respond to Garcia-Williams, neither Jane Roe 1 nor her mother were contacted by Garcia-Williams.

81. On June 30, 2014, Jane Roe 1's mother called Garcia-Williams for a status update. Garcia-Williams told Jane Roe 1's mother that Garcia-Williams was working on setting up a time to meet with John Doe 2. There were no consequences for John Doe 2 missing the previous deadline to respond.

82. Jane Roe 1's mother also expressed her, and Jane Roe 1's, concern that John Doe 2 could return to campus without their knowledge. Jane Roe 1's mother also learned on this phone call that Garcia-Williams had not reviewed the SANE report.

83. On July 21, 2014, Jane Roe 1's mother called Garcia-Williams for a status update. Garcia-Williams did not pick up. Jane Roe 1's mother then drove to campus, and was told again, that Garcia-Williams was in the office, but was busy.

84. On July 30, 2014, Jane Roe 1's mother had a call with Garcia-Williams and Garcia-Williams' supervisor, Paulette Russell, Senior Advisor to the President

for Diversity and Director of the Office for Inclusion and Intercultural Initiatives. Jane Roe 1's mother expressed her dissatisfaction with the way Garcia-Williams had handled her daughter's investigation, and expressed her desire to have someone else handle the investigation from that point on. Russell promised to look into the matter and get back to Jane Roe 1's mother by the following Friday.

85. On August 1, 2014, the date on which Russell promised to respond to Jane Roe 1's mother, Russell did not respond. Russell, in fact, never responded to Jane Roe 1's mother.

86. On November 4, 2014, Garcia-Williams e-mailed Jane Roe 1 letting her know that she had drafted a report of findings related to Jane Roe 1's investigation, which was available for Jane Roe 1 to pick up at the Office of Inclusion. Frustrated with the whole process, Jane Roe 1 did not respond.

87. On December 15, 2014, Garcia-Williams e-mailed Jane Roe 1 and informed her that their investigation had determined that there was insufficient evidence to support a finding that John Doe 2 violated MSU's Sexual Harassment Policy.

88. In total, MSU took approximately nine months to complete the investigation.

89. Defendant's and MSU's actions and inactions in response to Jane Roe 1's report of sexual assault subjected her to additional harassment and created a sexually hostile environment for Jane Roe 1 on campus.

90. The mere presence of John Doe 2 on campus, after Jane Roe 1 made her report to MSU, also created a hostile environment for Jane Roe 1 and made her vulnerable to further harassment.

91. As a result of Defendant's and MSU's actions and inactions in response to Jane Roe 1's report of sexual assault, Jane Roe 1 was deprived of several educational opportunities and/or benefits, including but not limited to:

- Being forced to move back home due to the stress of dealing with the process;
- Seeking academic accommodations from several professors;
- Being absent from and tardy to class on a larger basis than ordinary;
- Avoiding MSU's campus at night; and
- Avoiding virtually all social events on MSU's campus, or in other ways affiliated with or sponsored by MSU.

BACKGROUND FACTS RELATED TO JANE ROE 2

92. Plaintiff Jane Roe 2 was sexually assaulted by John Doe 3 on August 23, 2013.

93. Jane Roe 2 reported her assault to I3 on or about August 26, 2013.

94. Garcia-Williams commenced an investigation, and interviewed John Doe 3 on September 3, 2013.

95. On December 10, 2013, Garcia-Williams issued her report, finding John Doe 3 to have violated the MSU Student Code of Conduct.

96. On January 29, 2014, six months after Jane Roe 2 made her initial report, MSU conducted a hearing to determine John Doe 3's sanction for sexually assaulting Jane Roe 2. Ultimately, John Doe 3 received a sanction of expulsion.

97. John Doe 3 appealed this decision to Maybank. On April 7, 2014, almost eight months after Jane Roe 2 filed her initial complaint, Maybank upheld John Doe 3's expulsion.

98. On May 5, 2014, Jane Roe 2 was notified by MSU that John Doe 3 had received permission to return to campus on May 10, 2014 to attend MSU's graduation ceremony.

99. This decision was made without any consultation whatsoever with Jane Roe 2.

100. That same day, Jane Roe 2 formally appealed this decision, as she intended to attend the graduation ceremony herself.

101. On May 7, 2014, Jane Roe 2's appeal was denied.

102. Subsequently, Jane Roe 2 met with Maybank to discuss Maybank's decision to allow John Doe 3 back on campus. Maybank informed Jane Roe 2 that there was nothing Maybank could do to prevent him from coming back.

103. After John Doe 3 had already been allowed back on campus, upon learning about the events leading up to John Does 3's allowance back on campus, President Simon said to Jane Roe 2 that it was a mistake that John Doe 3 was allowed to return back to campus.

104. By the time the entire process had played itself out, John Doe 3 was allowed to complete the semester. He subsequently transferred to another college, without having to disclose his expulsion.

105. Throughout this entire process, John Doe 3 was allowed to remain on campus, subject to the terms of a Personal Protection Order filed by Jane Roe 2. Nevertheless, Jane Roe 2 actually did encounter John Doe 3 on campus on at least one occasion.

106. Throughout the entire process, John Doe 3 was allowed to remain in his position as a front desk employee of the dormitory building directly across from the building in which Jane Roe 2 was an employee. Moreover, by virtue of his position, John Doe 3 had access to all of Jane Roe 2's contact information, including which dormitory and room number she lived in.

107. Defendant's and MSU's actions and inactions in response to Jane Roe 2's report of sexual assault subjected her to additional harassment and created a sexually hostile environment for Jane Roe 2 on campus.

108. The mere presence of John Doe 3 on campus, after Jane Roe 2 made her report to MSU, also created a hostile environment for Jane Roe 2 and made her vulnerable to further harassment.

109. As a result of Defendant's and MSU's actions and inactions in response to Jane Roe 2's report of sexual assault, Jane Roe 2 was deprived of several educational opportunities and/or benefits, including but not limited to:

- A drop in her academic grades;
- Being forced to register with the RCPD;
- The need to seek multiple academic accommodations;
- Avoiding all social events that did not take place within her own dormitory building;
- Withdrawing participation with MSU's rugby team;
- Withdrawing participation in events associated with her major, including but not limited to fashion shows and galas; and
- Frequently missing work due to meetings with the administration regarding her complaint.

BACKGROUND FACTS RELEVANT TO THE FRATERNITY DEFENDANTS

110. Defendant Kappa Sigma is structured and governed according to its constitution, and by-laws.

111. Defendant Kappa Sigma is a hierarchical organization. At the top of the hierarchy is the Supreme Executive Committee of the Fraternity. The Supreme Executive Committee consists of the Worthy Grand Master, the Worthy Grand Procurator, the Worthy

Grand Master of Ceremonies, the Worthy Grand Scribe, and the Worthy Grand Treasurer.

112. The Supreme Executive Committee is the governing body of the Kappa Sigma Fraternity, and is empowered to make any rules or regulations for the fraternity.

113. Before a local chapter can be recognized as a part of the Kappa Sigma Fraternity, it must first be given a charter after a unanimous vote by the Supreme Executive Committee.

114. The Supreme Executive Committee has the power and authority to discipline a local chapter for, among other infractions, (1) failure of a chapter or its members to maintain standards of moral conduct acceptable to the Supreme Executive Committee, (2) failure to comply promptly with any order issued by the Supreme Executive Committee, and (3) any other reason that the Supreme Executive Committee deems necessary.

115. The Supreme Executive Committee has the authority to impose any sanction against a local chapter as it deems appropriate, up to, and including, expulsion of a local chapter from the Kappa Sigma Fraternity.

116. The Kappa Sigma Fraternity is divided into Districts. The Supreme Executive Committee appoints a District Grand Master to oversee each District.

117. The District Grand Master is responsible for visiting each local chapter within his district. Upon each visit, the District Grand Master must submit a full

report to the Supreme Executive Committee detailing the condition of the local chapter, including any matter which he deems advisable to bring to the attention of the Supreme Executive Committee.

118. If a local chapter is not operating properly, the Supreme Executive Committee may give the District Grand Master the authority to remove some, or all, of the officers of the local chapter and install a new set of officers, or place the local chapter under the control of a committee of alumni appointed by the District Grand Master.

119. Not all college students can be a member of a local Kappa Sigma chapter. Membership is limited to males, over the age of 14, who have been selected as worthy to join the Fraternity based on standards of scholarship, conduct, morals and proficiency.

120. Once selected, each member is obligated to abide by the Kappa Sigma Code of Conduct. According to the Kappa Sigma Code of Conduct, "Each member of Kappa Sigma Fraternity is responsible for seeing that he: (1) Acts as a gentleman, setting an example of moral behavior, (2) Conducts himself as a good student, good neighbor, and good citizen, (3) Obeys the laws, rules and regulations of his country, state or province, city and county, and college or university, (4) Understands and abides by the Constitution, By-Laws and Rules of Kappa Sigma Fraternity, including the Standards of Conduct, the acts and resolutions of Grand Conclaves, and his Chapter's by-laws; and (5) Does not engage in, permit or tolerate hazing, or the unlawful use of alcohol or possession of controlled substances."

121. The Code of Conduct also contains a Standards of Conduct which outlines the rules members must follow with regard to several topics, including but not limited to, hazing and the use of alcohol.

122. With respect to the use of alcohol, the Standards of Conduct forbids the making of alcohol available to anybody that is under the legal drinking age.

123. A failure to abide by the Kappa Sigma Code of Conduct, which includes the Standards of Conduct, can result in the removal of the offending member from the Kappa Sigma Fraternity.

124. Members are subject to an internal judicial process, both at the local chapter level, and at the national fraternity level.

125. According to the Standards of Conduct, members of the local chapters are encouraged but not required, to engage in several educational programs relating to alcohol and other drug consumption.

126. Each local chapter is entitled to acquire property in its name. Each chapter acquiring property must hold said property in Trust for the use and operation of a Kappa Sigma local chapter, and for the use of the Kappa Sigma Fraternity, subject to administrative action by the Supreme Executive Committee.

127. When a local chapter house is owned by the Fraternity, that property must be used, maintained and operated for the benefit of the Kappa Sigma fraternity.

128. Each local chapter is self-governed, that is, each local chapter must make its own By-Laws, orders

and regulations all of which must not be inconsistent with Kappa Sigma's constitution, By-laws and Rules.

129. Despite requiring self-governance, the Fraternity Defendants fail to adequately and reasonably train themselves and abide by such responsibilities, particularly with respect to safety/risk management issues involving fraternity events, events inside the fraternity house, security, sexual abuse prevention, hazing, and the use and misuse of alcohol.

130. Statistics, insurance claims analyses, studies and reports, and widely known incidents of catastrophic injury, rape, and death have for decades demonstrated the foreseeable risk of dangerous injury and death from poorly or wholly unsupervised fraternity events and fundamentally flawed risk management policies that rely upon self-government.

131. In the late 1980s, the Fraternity Insurance Purchasing Group ("FIPG"), a consortium of Greek organizations organized to coordinate risk management strategies, widely published that "fraternities and sororities were ranked by the National Association of Insurance Commissioners as the sixth worst risk for insurance companies just behind hazardous waste disposal companies and asbestos contractors."

132. In 1997, the National Interfraternity Council ("NIC"), then comprising 66 Greek national organizations with 5500 chapters on 800 campuses throughout the United States and Canada, analyzed certain risks associated with Greek organizations and housing and concluded that improper fraternity oversight of alcohol was "frighteningly pervasive."

133. In 2001, the National Panhellenic Conference, representing sororities with more than 3 million members at campuses nationwide, adopted a resolution prohibiting its members from co-sponsoring alcohol-related events with fraternities. Most sorority houses have been alcohol-free since their inception.

134. The national fraternity, Phi Delta Theta ("Phi Delt"), implemented alcohol-free housing in 2000, and has published (globally, on the internet, and in paper-form) statistics and extensive information regarding the resultant success in reducing injuries and death. In "White Papers," authored by Dr. Edward G. Whipple in 2005 and 2010, Dr. Whipple documents over a ten-year period a 64% reduction in the number of injury/death claims against Phi Delt and a 94% reduction in its pay-outs, figures which correlate directly with a substantial reduction in the amount and severity of injuries and frequency of death.

135. Defendants Kappa Sigma, and Defendant Delta Psi knew, or in the exercise of reasonable care should have known, of such widely publicized and available information, studies and reports.

BACKGROUND FACTS RELATED TO SHAYNA GROSS

136. Based on information and belief, John Doe sexually assaulted another female student on campus while both were participating in MSU's ROTC program.

137. At all times relevant, John Doe was a member, in good standing of MSU's chapter of Defendant Kappa Sigma, Defendant Delta Psi.

138. Plaintiff Gross is informed and believes and theron [sic] alleges that prior to her sexual assault by John Doe, other members of Defendant Delta Psi were aware that John Doe had been disciplined by MSU for sexually assaulting Plaintiff Kollaritsch.

139. Plaintiff Gross was an acquaintance of, and friendly with John Doe.

140. In February of 2013, John Doe asked Gross, via text message, if she wanted to hang out with him at the Kappa Sigma fraternity house. Gross responded that she would hang out with him, but made it clear that it was "only as friends," to which John Doe agreed.

141. That night, Gross and a friend of hers, went to John Doe's fraternity house. Gross was given alcoholic drinks to drink by John Doe.

142. At one point during the night, and the next day, Gross could only recollect flashes of the evening. The next day, John Doe informed Gross that they had engaged in sexual intercourse one time at the fraternity house, one time in her dormitory room at Case Hall, and one time in his dormitory room in Case Hall.

143. Gross had little to no recollection of engaging in sexual intercourse with John Doe.

144. Gross officially reported her assault to the MSU Office of Inclusion on February 12, 2014, after John Doe had been disciplined by MSU for sexually assaulting Plaintiff Kollaritsch, and after John Doe, based on information and belief, sexually assaulted another female student in the ROTC program.

145. Upon reporting her assault, Gross was told by Garcia-Williams that her investigation would be completed in ninety days.

146. Gross e-mailed Garcia-Williams multiple times for status updates regarding her investigation. Garcia-Williams almost never responded immediately, often times waiting a week to respond.

147. In fact, Gross' investigation was not completed until October 14, 2014, over eight months after Gross made her official complaint. The report concluded that John Doe had sexually assaulted Gross.

148. On November 13, 2014, Gross e-mailed MSU President Simon to express her concerns with the way that the Office of Inclusion had handled her investigation.

149. Throughout the investigative process, John Doe was allowed to remain on campus, unrestricted.

150. On January 28, 2015, over three months after the investigation concluded, and almost a year after her initial report, a disciplinary hearing was held. Gross was told that the only way to get communications directly from MSU regarding the hearing was to attend the hearing herself. Otherwise, she would have to receive communications through Garcia-Williams. Though she did not want to attend the hearing, given Garcia-Williams' untimeliness in communicating with Gross and the excessive time it took for the investigation to actually conclude, Gross decided to attend so as to be able to receive communications directly.

151. On February 3, 2015, a sanction of expulsion was levied on John Doe.

152. On February 10, 2015, John Doe appealed the sanction.

153. On March 2, 2015, MSU's appellate board denied John Doe's appeal and upheld the sanction.

154. On March 16, 2015, John Doe submitted a second appeal.

155. On March 24, 2015, over thirteen months after Gross' initial report, Maybank informed Gross that she had decided to disregard the investigation completed by MSU, and hire the law firm of Warner Norcross & Judd LLP to conduct a brand new investigation. Nowhere in MSU's Student Life Handbook or MSU's Relationship Violence & Sexual Misconduct Policy was there authority for Maybank to order a brand new investigation, conducted by an independent law firm.

156. Gross was given no information regarding the parameters of the new investigation, how it would be conducted, or any timelines regarding its completion.

157. During Gross' interview with the lawyers from Warner Norcross & Judd LLP, Gross requested that her attorney and her MSU advocate, Murgittroyd be present. The lawyers allowed Gross' attorney to be present but not Murgittroyd. Murgittroyd then called someone at Defendant Regents directly, who told the lawyers to allow Murgittroyd to remain in the room during Gross' interview.

158. On May 13, 2015, Gross received the findings of the new investigation. The new investigation found

that John Doe 1 and his witnesses were not credible. Nevertheless, the report concluded that Gross and John Doe had engaged in sexual relations that night, but they could not find that the relations were "non-consensual."

159. On May 20, 2015, Gross appealed these findings.

160. On June 12, 2015, Gross' appeal was denied.

161. Throughout the pendency of the entire investigatory, adjudicatory and appellate process, John Doe was allowed to remain on campus, where Gross could have encountered him at any time. Based on information and belief, John Doe was also allowed to remain as a member in good standing of both ROTC and his fraternity.

162. At least one professor initially refused to provide academic accommodations to Gross, despite her being registered with the Resource Center for Persons with Disabilities ("RCPD"). Gross was forced to contact her sexual assault counselor, who then contacted a representative from the RCPD to help resolve the issue.

163. Defendant's and MSU's actions and inactions in response to Gross' report of sexual assault, subjected her to additional harassment and created a sexually hostile environment for Gross on campus.

164. The mere presence of John Doe on campus, after Gross made her report to MSU, and after Gross learned that John Doe had been found by MSU to have sexually assaulted Plaintiff Kollaritsch, also created a

hostile environment for Gross and made her vulnerable to further harassment.

165. As a result of Defendant's and MSU's actions and inactions in response to Gross' report of sexual assault, Gross was deprived of several educational opportunities and/or benefits, including but not limited to:

- Being forced to register with the RCPD due to her inability to maintain her academic schedule;
- Leaving multiple class sessions in tears due to the stress of the process;
- Falling asleep in class due to the sleep deprivation caused by the stress of the process;
- Dropping a class because one of John Doe's friends was on the same bus route at the same time as Gross needed to be to get to that class;
- Avoidance of all social activities on campus, or sponsored by, or related to MSU;
- Withdrawing participation in extra-curricular activities, including various theatre projects; and
- The need to seek multiple academic accommodations from professors.

FIRST CAUSE OF ACTION
DISCRIMINATION ON THE BASIS OF GENDER
IN VIOLATION OF 20 U.S.C. § 1681

(TITLE IX)
(ALL PLAINTIFFS AGAINST DEFENDANT TRUSTEES)

166. Plaintiffs incorporate all paragraphs of this Complaint as if fully set forth herein.

167. The acts, and failures to act, perpetrated against Plaintiffs amounted to unlawful sexual harassment and discrimination on the basis of gender. One or more administrators or officials of MSU, with authority to take corrective action on Plaintiffs' behalf, had actual notice of said discrimination and failed to adequately respond, in violation of their own policies. Those failures amounted to deliberate indifference toward the unlawful sexual conduct that had occurred, was occurring, or was likely to occur.

168. Additionally, and/or in the alternative, Defendant Trustees failed to enact and/or disseminate and/or implement proper or adequate policies to discover, prohibit or remedy the kind of discrimination that Plaintiffs suffered. This failure included, without limitation, non-existent or inadequate customs, policies or procedures for the recognition, reporting, investigation and correction of unlawful discrimination. Those failures amounted to deliberate indifference toward the unlawful sexual conduct that had occurred, was occurring, or was likely to occur.

169. Defendant Trustees acted with deliberate indifference in deviating significantly from the standard of care outlined by the DOE in the Dear Colleague Letter of 2011.

170. As a result of Defendant Trustees' deliberate indifference, Plaintiffs suffered loss of educational opportunities and/or benefits and have and will continue to incur attorney fees and costs of litigation.

SECOND CAUSE OF ACTION
VIOLATION OF CIVIL RIGHTS UNDER 42 U.S.C. §1983
(ALL PLAINTIFFS AGAINST DEFENDANT TRUSTEES, DEFENDANT MAYBANK, DEFENDANT SIMON, DEFENDANT YOUATT AND DEFENDANT GARCIA-WILLIAMS)

171. Plaintiffs incorporate all paragraphs of this Complaint as if fully set forth herein.

172. Plaintiffs, as female university students, were members of a protected class under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Plaintiffs also enjoyed the constitutionally protected Due Process right to be free from the invasion of bodily integrity through sexual molestation, abuse, assault or rape. The various acts as alleged herein amounted to a violation of these clearly established constitutionally protected rights, of which reasonable persons in the defendants' position should have known. Defendants Maybank and Simon had a duty to prevent student-on-student sexual molestation, abuse, assault and rape, said duty arising under the above-referenced constitutional rights and also under clearly established rights against discrimination pursuant to Title IX. By failing to prevent John Doe's, John Doe 2's, and John Doe 3's aforementioned molestations, abuse, assaults and rapes upon Plaintiffs, and/or by responding to known reports of John Doe's, John Doe 2's

and John Doe 3's sexually inappropriate behavior with female students, including Plaintiffs, in a manner that was so clearly unreasonable as to amount to deliberate indifference, Defendants Maybank and Simon are liable to Plaintiffs, pursuant to federal law 42 U.S.C. §1983.

173. Defendant Trustees, Maybank, Simon, Youatt, and Garcia-Williams are also liable to Plaintiffs under 42 U.S.C. §1983 for the following:

- Maintaining customs, policies and/or procedures of inadequate and/or non-existent monitoring and/or investigation of John Doe, John Doe 2 and John Doe 3, so as to amount to deliberate indifference as to known or obvious consequences of John Doe's, John Doe 2's, and John Doe 3's behavior, up to and including violations of the aforementioned equal protection and due process rights, and unlawful discrimination under Title IX; and
- Failing to adequately train administrators, employees and others in a position to discover, report, investigate or prevent the acts complained of herein, which amounted to the above referenced violations of constitutional rights and/or federal law.

THIRD CAUSE OF ACTION
ELCRA (SEX DISCRIMINATION)

(ALL PLAINTIFFS AGAINST DEFENDANT TRUSTEES)

174. Plaintiffs incorporate all paragraphs of this Complaint as if fully set forth herein.

175. Plaintiffs are members of a protected class pursuant to the Constitution of the State of Michigan and the ELCRA, MCL 37.2101 et seq. and MCL 37.2301.

176. The facilities operated by the Defendant Trustees were and are an educational institution under the ELCRA, MCL 37.2401 et seq. and MCL 37.2301.

177. Defendant Trustees' policies and practices, including failure to properly warn, train and/or educate its students regarding the prevention of sexual harassment and/or assault, and the failure to properly investigate reports of sexual harassment and assault have a disparate impact on Plaintiffs as females by subjecting them to increased levels of sexual abuse, assault and other violence on campus in comparison to male students and by subjecting them to increased levels of emotional distress and other harm by virtue of Defendants' failures to promptly and appropriately address complaints of sexual assault.

178. Defendant Trustees' acts and omissions based upon Plaintiffs' gender have resulted in harm to Plaintiffs including physical and emotional harm, and Plaintiffs being denied privileges and opportunities that should be available to MSU students in violation of MCL 37.2103 et seq.; MCL 37.2701(a)(f).

FOURTH CAUSE OF ACTION

NEGLIGENCE
(PLAINTIFF GROSS AGAINST FRATERNITY DEFENDANTS)

179. Plaintiffs incorporate all paragraphs of this Complaint as if fully set forth herein.

180. Defendant Kappa Sigma and Defendant Delta Psi had a duty to protect Plaintiff Gross as an invitee to Kappa Sigma's local MSU chapter Defendant Delta Psi. This created a special relationship between Defendants Kappa Sigma and Delta Psi with Plaintiff Gross who was temporarily entrusted to Defendants Kappa Sigma's and Delta Psi's care. Defendant Kappa Sigma and Defendant Delta Psi voluntarily accepted the entrusted care of Plaintiff Gross. As such, Defendant Kappa Sigma and Defendant Delta Psi owed Plaintiff Gross a duty of care.

181. Defendant Kappa Sigma, by and through its agents, including Defendant Delta Psi, and its servants and employees, knew or reasonably should have known of John Doe 1's dangerous and exploitive propensities. It was foreseeable that if Defendants Kappa Sigma and Delta Psi did not adequately exercise or provide the duty of care owed to invitees, including but not limited to Plaintiff Gross, female invitees would be vulnerable to sexual assault by John Doe 1.

182. Defendant Kappa Sigma and Defendant Delta Psi breached their duty of care to Plaintiff Gross by allowing John Doe 1 to come into contact with Plaintiff Gross without supervision; by failing to adequately supervise, or retain John Doe 1 who they permitted and enabled to have access to Plaintiff Gross; by failing to

investigate or otherwise confirm or deny such facts about John Doe 1; by failing to warn Plaintiff Gross that John Doe 1 posed a risk of sexually assaulting female students, including Plaintiff Gross; and/or by holding out John Doe 1 to Plaintiff Gross as being in good standing and trustworthy; by failing to adhere to the Kappa Sigma Code of Conduct, by providing alcohol to Plaintiff Gross in violation of the prohibition of making alcohol available to anybody that is under the legal drinking age.

183. As a result of the above-described conduct, Plaintiff Gross has suffered, and continues to suffer physical injury, great pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, humiliation, and loss of enjoyment of life; has suffered and continues to suffer spiritually; was prevented and will continue to be prevented from performing Plaintiff Gross' daily activities and obtaining the full enjoyment of life; has sustained and will continue to sustain loss of earnings and earning capacity; and/or has incurred and will continue to incur expenses for medical and psychological treatment, therapy, and counseling.

WHEREFORE, Plaintiffs pray for damages; punitive damages; costs; interest; statutory/civil penalties according to law; attorneys' fees and costs of litigation, pursuant to 42 U.S.C. §1988 or other applicable law; and such other relief as the court deems appropriate and just.

Dated: February 18, 2016 Respectfully submitted,

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DEMAND FOR TRIAL BY JURY

NOW COME Plaintiffs, by and through their counsel, and hereby demand a trial by jury as to all of those issues so triable as of right.

Dated: February 18, 2016 Respectfully submitted,

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