

No. __-__

IN THE
Supreme Court of the United States

TOM ROSSLEY,

Petitioner,

v.

DRAKE UNIVERSITY;
DRAKE UNIVERSITY BOARD OF TRUSTEES,
Respondents.

*On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Eighth Circuit*

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the conflict in fact among the Circuits involving, on the one hand, *Doe v. Purdue*, 928 F.3d 652 (7th Cir. 2019) (Barrett, J.), *Doe v. University of Sciences*, 961 F.3d 203 (3d Cir. 2020), *Doe v. Oberlin*, 963 F.3d 580 (6th Cir. 2020), *Doe v. Univ. of Arkansas–Fayetteville*, 974 F.3d 858 (8th Cir. 2020), and *Schwake v. Arizona Bd. of Regents*, 967 F.3d 949 (9th Cir. 2020), and, on the other hand, *Doe v. University of Denver*, 952 F.3d 1182 (10th Cir. 2020). and *Rossley Jr. v. Drake*, 979 F.3d 1184 (8th Cir. 2020), regarding the cause of action for Title IX discrimination in college and university disciplinary decisions present important federal questions of law that the U.S. Supreme Court should consider?
2. Does the dismissal on summary judgment of a disability discrimination claim involving failure to provide reasonable accommodations under the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12182(a), brought by a plaintiff university student with disabilities, present important federal questions of law the U.S. Supreme Court should consider when the dismissal is on the ground that the disabled student failed to request accommodations in a university disciplinary proceeding when: (a) the university was on constructive notice of the disabilities due to the provision of accommodations in the academic context, (b) the university has no formal mechanism for requesting accommodations in the disciplinary context, and (c) the student’s father, who was also a Trustee at the university

and who had submitted FERPA papers to the university, made a request to the university's Dean who headed the university's Office of Disability Services that the student be accommodated in an upcoming disciplinary hearing?

PARTIES

Plaintiff-Appellant-Petitioner Thomas Rossley Jr. ("Thomas") was a Drake University senior student when he was expelled on April 8, 2016, about one month short of his graduation. He has ADHD, anxiety and language-based disabilities. Thomas was a member of the Theta Chi fraternity. (JA1443-1444, 1447-1448, 1454, 1476, 1492-1493, 1797, 2312-2313, 2331, 2540-2562.)

Drake University ("Drake") is a private university located in Des Moines, Iowa, governed by its Board of Trustees and a recipient of federal funding. Jerry Parker was the acting Dean of Students in the fall of 2015 and the Associate Dean of Students in the spring of 2016, was the Dean's designee with respect to Jane Doe's complaint, and was the head of Drake's Office of Disability Services. Kathryn Overberg was Drake's Title IX Coordinator. Mary Sirna as lead investigator teamed with Tricia McKinney to investigate Jane Doe's complaint. Jerry Foxhoven was Drake's Hearing Officer in Thomas' case. (JA320, 1657-1659, 1696, 1672, 1858, 1862, 1965-1966, 2628.)

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DECISIONS BELOW

The Eighth Circuit ruled that Drake's expulsion of Thomas following disciplinary proceedings in connection with sexual assault of a female student "Jane Doe" was not motivated by gender bias, as required to support Thomas' Title IX claim and that Thomas failed to make an adequate request for accommodations during the disciplinary proceedings, as required to support Thomas' ADA claim. The opinion concluding with a dismissal of Thomas' case is reported at 979 F.3d 1184 (8th Cir. 2020) (1a-29a).

The District Court granted Drake's motion for summary judgment dismissing the Complaint except for the selective enforcement Title IX claim and related breach of contract claim. The opinion is reported at 342 F.Supp.3d 904 (S.D. Iowa 2018) (30a-123a).

STATEMENT OF JURISDICTION

This Court's jurisdiction is established by 28 U.S.C. § 1254(1) and Article III, Section 2 of the U.S. Constitution. The Eighth Circuit's opinion was issued November 5, 2020.

STATUTORY PROVISION INVOLVED

Title IX of the Education Amendments Act of 1972, at 20 U.S.C. § 1681(a), provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the bene-

fits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.”

The Americans with Disabilities Act, 42 U.S.C. § 12182(a), provides: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”

STATEMENT OF FACTS

Thomas had put in a fulsome summary judgment record of depositions, expert testimony and documents; the Appendix was 3,051 pages. The District Court’s statement of facts, however, does not comply with summary judgment rules and is rendered from Drake’s perspective: here are Drake’s Policies, this is what the investigation showed, this is what happened at the hearing and this is what the appeal panel said (32a-63a); the statement obscures how the timeline of events indicates the alleged sexual assault did not occur and ignores what witness depositions and Dr. Barden’s report showed about gender bias as a motivating factor for Drake’s erroneous expulsion. The Eighth Circuit “summary of facts,” without citations to the record (3a-15a), omits and misstates material facts and does not in fact comply with summary judgment rules. The following statement of facts is based on

the record per summary judgment rules with citations to Eighth Circuit Appendix.

A. October 8-9, 2015: Alleged Sexual Assault and Notice of Investigation.

The alleged sexual assault by Thomas occurred the night of October 8-9, 2015. Whereas Thomas consistently described Jane Doe (“Jane”) giving him oral sex in his car, having erectile dysfunction from Adderall and alcohol and denied sexual intercourse with Jane in his room, Jane’s account varied from what she told the Drake Public Safety Office, the Drake investigators and at the university hearing. Her first story to the Drake Public Safety Office did not include what she later admitted: she had initiated and performed oral sex on Thomas, Thomas could not maintain an erection and she had performed oral sex on another Student I that night. (JA282-286, 294-298, 307-308, 310, JA1457, 1466, 1468, 2027, 2406, 2423-2424, 2716-2718, 3051.)

Thomas received a letter dated October 9, 2015, from Drake, giving notice that a complaint of sexual misconduct had been made against Thomas by Jane, there would be an investigation and Thomas was not to have contact with Jane and not to engage in retaliation. (JA485, 1561-1562.)

B. The Investigation.

The two Drake investigators into Jane’s report of sexual misconduct were Mary Sirna, a former sex

crimes prosecutor, and Tricia McKinney. Both had received training that included gender biased notions of “trauma” and the assumption the complainant is telling the truth. (JA 1671-1672, 1717-1718, 1726, 1753, 1857, 1860, 1870-1872, 2563-2616.)

Sirna and McKinney interviewed Jane and Thomas, as well as other witnesses, regarding Jane’s allegation of sexual assault. They also collected some documentary evidence, but there was no forensic medical evidence because Jane did not take the rape test and no physical evidence (DNA) because Jane did not provide her underwear as she said she would and Drake’s investigation did not include DNA testing. The effects of Adderall were not verified, and Jane did not tell investigators about the oral sex she initiated before the alleged sexual assault and was not asked about it despite Thomas telling the investigators, Title IX Coordinator Overberg and Dean Parker about it. (JA1726-1729, 1740, 1863-1872, 1875-1876, 1904-1948, 2027.)

Thomas told investigators he has ADHD and language-based and word-retrieval disabilities. Thomas testified Sirna should have surmised he needed an accommodation and offered one to him by checking with Drake’s Disabilities Services. Thomas was “scared shitless,” “feeling attacked” and “could tell they [the investigators] were not on my side.” (JA1472-1474, 1476, 1916-1917.)

C. Thomas' Issue of Sexual Assault Against Him.

On November 9, 2015, Overberg and Dean Parker met with Thomas at his request. Thomas advised them that a friend had told him that he might be a victim of sexual misconduct by Jane performing oral sex when Thomas was not capable of giving consent. (JA1467-1469, 1479, 1671, 1676.) Dean Parker said Thomas could not take action to retaliate against Jane and Thomas' raising the issue of Jane committing sexual assault against Thomas could be punished as retaliatory. (JA1467-1469, 1479, 1521-1522, 1676, 1700-1701, 1917, 2617-2623.)

On November 10, 2015, McKinney and Sirna interviewed Thomas concerning his concern about having been a victim of sexual assault. Thomas referred to a female friend who suggested Thomas may have been sexually assaulted that night by Jane. Sirna's interest was limited to the identity of the female friend; Thomas refused to say. (JA1735-1736, 1888-1889, 1943, 2462-2463.)

Investigator Sirna asked if Thomas wanted conduct charges filed against Jane. Thomas said "I'm just verbalizing the issue." Thomas testified that Sirna was a mandatory reporter: an investigation should be done regardless of Thomas' personal feelings. (JA1489-1490, 1943, 2462-2463.)

D. The Investigation Report.

On December 9, 2015, Dean Parker, Overberg and McKinney received Sirna's report. (JA1863, 1904-1948.)

1. Jane's Account To Investigators. The report gave accounts of witness interviews, starting with Jane who is reported as saying she believed she was intoxicated, having consumed multiple alcoholic beverages the evening of October 8, 2015, even before arriving at the Drake Bakery, where she encountered Thomas that evening and continued drinking. The report states that after leaving the Drake Bakery with Thomas, "things became 'blurry'" in Jane's memory. Sirna's report states that Jane recalled being in a vehicle "parked in Theta Chi's parking lot," and remembers Thomas "trying to make out with her," to which she "recalls telling him, 'No, I don't like you like that,'" then after stating she felt ill, she "ran into the Theta Chi house in order to get away from him." This account had credibility issues because Jane could not run into the Theta Chi house because there is a security code. This account is also different from: (i) what would be stated at the university hearing when she testified initiating and giving oral sex to Thomas; (ii) the account told to Mark Risvold of the Drake Security Office, which had Thomas and Jane walking to Theta Chi; (iii) Thomas' recollection given to the investigators which included Jane giving him oral sex; and (iv) the safe cab driver Student B's recollection.

(Add. 69; JA1492, 1910-1918, 1920-1922, 2027, 2406, 2423-2424, 3051.)

Sirna's report states that Jane then recalled vomiting in the bathroom in the Theta Chi house, realizing she didn't have her purse, going to "look for [Thomas], and then 'everything goes black' until the sexual assault." The report then describes Jane waking up to Thomas on top of her and assaulting her with her pants unbuttoned and pushed down, underwear on pushed to the side and multiple tops not removed. (JA1912.) The Eighth Circuit never said that the account of Jane made sexual intercourse impossible and never notes the credibility problems with Jane's account: Thomas' erectile dysfunction from the effects of Adderall and alcohol, the description of the alleged sexual assault scene that would not permit there to be vaginal penetration and some of Jane's friends arrived at the fraternity to check on her but then left. (JA1457, 1466, 1740-1741, 1876-1881, 1885, 1888, 1910-1918, 1922-1924.)

Sirna's report describes Jane, after leaving Thomas, going to an annex to the Theta Chi fraternity and jumping on Student P there. Student P told her to get out of his room. Texts show Jane texting Student M at 1:54 AM saying she was going to Student P's and Student P texting Jane Doe at 2:03 AM asking where she went. Jane then went to Student I's room where "she admitted to 'making out' with him, which she described as kissing and taking her shirt off" and where she chatted with and slept next to him until morning. (Add. 70; JA1670-

1671, 1870, 1889, 1910-1918, 1949-1951, 2287-2290, 3051.)

Sirna's report discusses Jane's actions the morning of October 9: meeting with friends "to recreate" the night; giving a report to Drake's Public Safety Office; and going (allegedly) to Mercy Hospital, but doubting there she had been sexually assaulted and deciding not to take the "forensic sexual assault exam." Jane said to investigators she would provide text messages and had retained her underwear, but while doctored text messages were provided to Drake, the underwear was not. Drake investigators did not seek medical records. (JA1491, 1726-1728, 1868, 1890-1891, 1913.)

2. Thomas' and Student B's Accounts. For Thomas, the night of October 8-9, 2015 began by doing school work and taking Adderall for his ADHD. At around 11:00 to 11:30 pm, Thomas went to a fraternity gathering and then to Drake Bakery where he met up with Jane, a Drake junior and a social but not romantic friend of Thomas. (JA1447-1448, 1457, 1468-1469, 1487, 1587, 1920, 3051.)

When Jane arrived at Drake Bakery, she and Thomas flirted; Thomas asked Jane if she wanted to leave; she said yes. Thomas called the fraternity's safe cab driver Student B. Thomas and Jane went outside to wait for the safe cab and made out. At around 1:15 AM to 1:20 AM, Student B picked up the two and asked where they wanted to go; Jane said the Theta Chi House. According to Stu-

dent B, he drove them there, with Thomas and Jane making out in the cab, arriving at Theta Chi no later than 1:40 AM, probably closer to 1:30 AM or 1:35 AM. (Add. 74; JA1447-1448, 1468-1469, 1587-1588, 1915, 1920-1922, 3051.)

When Jane and Thomas arrived at Theta Chi, they went inside to Thomas' room where two of Thomas' fraternity brothers, Student G and Student H, were playing a video game. Jane asked Thomas if he had his car and asked if they could go there. Jane and Thomas went outside the Theta Chi house to Thomas' car and got inside it. There, Jane initiated performing oral sex on a drunk Thomas; but Thomas said he could not maintain an erection and was drifting in and out of a blackout state when Jane abandoned fellatio. According to Thomas, Adderall cuts off sex drive, and he had taken Adderall and drank alcohol that night. Thomas and Jane left his car and returned to the fraternity house. (JA1468-1469, 1588, 1740, 1892, 1915-1916.)

Thomas next remembers being in his fraternity room, lying on his loft bed with Jane standing on a mesh chair and kissing him. Thomas was not concerned about Jane's state because she could stand on the mesh chair which was hard to stand on. Jane then said to Thomas "Alright, I'm going to go." Thomas did not recall any sexual interaction with Jane in Thomas' room other than kissing, denied having intercourse and denied having any novelty or colored condoms. Sirna's report states "[s]pecifically, he did not recall having sexual intercourse

with [Jane] on his bean bag chair in his room.” (Add. 72-73, JA1463, 1588-1589, 1883, 1916-1917.) Thomas consistently stated he does not recall having sexual intercourse with Jane. (Add. 72-73; JA 1463, 1916-1917, 2239, 2248-2249.) The Eighth Circuit opinion never acknowledges that Thomas said he did not recall having intercourse (while referring to unverified, contradicted hearsay as if Thomas said it).

At around 3:59 AM, Thomas texted Jane asking “Make it back?”, to which Jane Doe texted “Yeah I’m good thks babe” to which Thomas in turn responded “Okay, wanted to make sure.” (Add. 71; JA1471, 1589, 1727-1728, 1736-1737, 1741, 1888, 1917, 1955.)

3. Student I’s Account. Student I described Jane in the early morning hours of October 9, 2015, as appearing “normal,” “intoxicated but not overly intoxicated,” with “nothing unusual about her appearance.” Jane climbed into Student I’s bed where they “spooned.” The report continued that Student I said Jane expressed the view they would make a good couple. When asked if Jane had divulged anything that had occurred between her and Thomas earlier, Jane only said Thomas was being weird but nothing else. Student I indicated before Jane left in the morning, she performed oral sex on him. At no time during the hours that Student I spent with Jane on October 9, 2015, did Jane say that Thomas had sexually assaulted her. The investigators learned nothing contrary to Student

I's account of receiving oral sex from Jane. (Add. 76-77; JA 1891-1892, 1933-1934, 3051.)

4. Student J's Account. Student J was a room-mate of Thomas who was in the room in his bed at the time of the alleged sexual assault. Where Student J's bed and the bean bag chair were located would have given him a clear view to see and hear activity in the room, making him a potential eye-witness. Student J heard Thomas and Jane in the room and heard the ladder to Thomas' bed creaking, but Student J did not hear any sex act in the room. Sirna interviewed Student J a second time beginning with Sirna's warning Student J about violating the Student Code by aiding and abetting non-academic misconduct. In that second interview, despite hostile questioning, Student J stated he did not want to change what he had said during the first interview. (Add. 78; JA1491, 1731-1734, 1876-1877, 1887, 1895, 1935-1938, 1945, 1952, 3051.)

5. No Analysis Of Arguable Jane Assault Of Thomas. Sirna's report described the investigators' second interview with Thomas, but otherwise did not address Thomas' issue about having been sexually assaulted by Jane performing oral sex on him when he incapacitated from giving consent. Sirna's report shows that Jane was not even asked about the oral sex Thomas had reported to investigators. (JA1889, 1911, 1942-1944.)

6. Sirna's Conclusions. Sirna's report observed that the case was unusual because both Jane and

Thomas stated they did not recall the initiation of the alleged complained of sex act of penile vaginal penetration and that “[Thomas] claims to have no knowledge of this sex at all, and only recalls [Jane Doe] performing oral sex on him.” (JA1876, 1894-1895, 1944-1948.)

Sirna’s report concluded that Thomas had engaged in the sex act of penile vaginal penetration based on the hearsay statement of Student K and crediting the account given by Jane. The report states Sirna’s belief that non-consensual intercourse occurred based on Jane’s incapacity and lack of consciousness. The report, however, does not find that Jane was not so incapacitated so as not to be able to initiate and perform oral sex on Thomas and on Student I. (JA1902, 1945-1948, 3051.)

7. Eighth Circuit Misstatements. The Eighth Circuit opinion omitted the oral sex in the car in recounting the basic sequence of facts and states that after Thomas assaulted Jane, she went to another person’s room to ask to sleep on his couch and then to a second person’s room—which is nowhere in the record. As discussed above, the record shows that Jane went to another fraternity brother’s room and jumped in bed with him and after he kicked her out, Jane went to another fraternity brother and spent the rest of the night with him, giving him oral sex. Some of these facts later come up in the Eighth Circuit opinion when discussing why Sirna credited Jane (12a), that she gave an account not helpful to her complaint. But

the Eighth Circuit does so without recognizing that why Sirna credited Jane and rationalized away her inconsistent and problematic story was “trauma,” which Dr. Barden testified was a gender biased pseudo-science popularized in Title IX “training” (JA 2563-2616).

E. Formal Disciplinary Process.

Dean Parker, based on the Sirna investigation report, decided to seek the sanction of expulsion against Thomas, triggering Drake’s formal disciplinary process. (JA1761, 1804-1805.)

In December 2015 Thomas’ father, then a Drake Trustee who had signed FERPA papers, had a telephone call with Dean Parker, who headed Drake’s Office of Disability Services. (The Eighth Circuit never recognizes that Dean Parker was head of Drake’s Office of Disability Services, 12a.) Dean Parker told Tom Sr. that Thomas’ disciplinary case would be moving to a formal university hearing and that he (Dean Parker) believed Thomas to be guilty of sexual assault and would be seeking his expulsion. Tom Sr. told Dean Parker that he (Tom Sr.) had grave concerns they were ignoring the sexual assault on Thomas and investigating that sexual assault might have an effect on the outcome of the case. Dean Parker told Tom Sr. that it didn’t matter what Jane Doe did sexually either immediately before or immediately after the alleged assault as claimed by Jane because all that mattered was whether or not she consented to it. (Dean Parker did not address whether Thomas consented

to the oral sex.) In response, Tom Sr. demanded that Dean Parker both accommodate Thomas' disabilities in the upcoming hearing and investigate Thomas's claim he had been sexually assaulted while incapacitated. Dean Parker never addressed the request for disability accommodations, and the call ended abruptly when Dean Parker's response was that Drake would not be investigating Thomas' claim because they believed Thomas' claim to be retaliatory and the investigation report was very damning. (JA2617-2623.)

On or about January 6, 2016, Dean Parker's office sent an e-mail notification to Thomas of a formal university hearing and the fact that Dean Parker or his designee would present the evidence to the hearing officer selected by Dean Parker and would seek the sanction of expulsion. (JA1761-1762, 1804-1805.)

Jerry Foxhoven was designated as Drake's hearing officer by Dean Parker. Foxhoven had conducted only one other disciplinary hearing for Drake and it did not involve Title IX. (JA1769, 1962-1963, 1966.) Prior to the hearing, Foxhoven issued a ruling stating that under the Drake Code, there were three parties in the hearing: Thomas, Jane, and the Dean. Foxhoven gave equal time to Jane and Thomas for opening and closing statements and Dean Parker half their time for opening and closing; Foxhoven later equalized the time between Thomas and Jane/Dean Parker. (JA1105, 1108, 1257, 1963-1964, 1968-1969, 1988-1990.)

Prior to the hearing, Jane requested redactions to the investigation report that included her performance of oral sex on Student I. The investigation report admitted at the hearing had Jane's redactions. (JA1591-1633, 1680, 1687, 1774-1776, 1863, 3051.)

F. The Hearing.

On February 12, 2016, Foxhoven convened a disciplinary hearing for Thomas. (JA1765.) All the witnesses at the hearing were called either by Dean Parker or Thomas—none by Jane. Opening statements were made by Dean Parker, by Jane's legal representative (made available by Drake), and by Thomas' attorney. Dean Parker acted as a prosecuting attorney making an opening statement saying Jane should be believed and he (the Dean) was seeking the expulsion of Thomas and calling witnesses to achieve expulsion. (The Eighth Circuit never says that Dean Parker was effectively the prosecuting attorney at the hearing.) During the presentation of witnesses, Thomas had to conduct the questioning of witnesses himself; it was a two versus one situation (Dean Parker and Jane as complainant versus Thomas as respondent). When Thomas attempted to cross-examine Sirna, he was met with a cascade of objections from Dean Parker and Jane's representative. No disability accommodations were extended to Thomas in the hearing procedure. Thomas commented in his deposition: "[H]aving a kid with a learning disability and a word retrieval problem acting as his lawyer for a

whole hearing is a task and a half, and something that should not have been expected and put on me. (JA1475, 1785-1786, 1792-1793, 1851-1852, 1970, 2000-2002, 2011-2012, 2151-2158, 2329.)

At the hearing, Jane admitted that she initiated oral sex on Thomas in his car. She testified she then blacked out until she suddenly “came to” lying on a bean bag chair in Thomas’ room, and remembered Thomas “being on top of me, violating me.” She testified that her pants were down and her underwear was pushed to the side. Jane testified that she pushed Thomas off and asked him to stop and remembered Thomas “getting off of me and saying something along the lines of ‘I’ve got whisky dick anyways.’” (Add. 69; JA1787, 2027, 2029-2030.) Jane also said her ability to trust people was destroyed (JA2036, 2044)—which was inconsistent with what Student I had told investigators that Jane said to him about having a relationship with him (JA1892, 1933-1934.) Jane’s testimony about discomfort (JA2031-2032) was contradicted by her behavior with Students P and I discussed above that Foxhoven excluded.

At the hearing, Thomas testified he had no memory “at all” of sexual intercourse with Jane and the timeline did not permit it. Thomas testified if he used the word “hook up” it would have been in reference to the oral sex. (JA1646, 1976, 2000-2002, 2192, 2239, 2245, 2249, 3051.)

At the hearing, Foxhoven ruled that evidence of Jane’s activity on the night in question after Jane

went to see Student P and Student I was not admissible. Foxhoven acknowledged there was no evidence submitted from a rape test and no evidence submitted from DNA physical evidence. (JA1776, 1976, 1980-1981, 2037-2039.)

The Eighth Circuit's "summary" of the hearing (13a) obscures the problems of the hearing being two (Parker and Jane) versus one (Thomas) and the unfairness of having Thomas try to do cross-examination.

G. Foxhoven's Ruling.

On February 17, 2016, Foxhoven issued a ruling on Thomas' disciplinary matter. (JA1491, 1974, 2292-2303.) Foxhoven wrote that a preponderance of the evidence supports the fact that vaginal intercourse between Jane and Thomas was "either attempted or completed on the evening in question," that Jane's "pants were off and her underwear were pushed aside." (JA2293.) Foxhoven's ruling re-wrote the facts that Jane's pants were off to make sex possible, which was not supported by the record (JA1740-1741, 1815, 2030) and was inconsistent with the evidence he excluded about Jane's conduct after the alleged assault. Foxhoven recommended expulsion because, he wrote, Thomas had taken advantage of a drunk, incapacitated girl. (JA2300-2301.)

The Eighth Circuit's "summary" (14a-15a) obscures Foxhoven's gender biased rulings and

treatments of evidence and Foxhoven's concoction of a "black out" argument never made by Thomas.

H. The Appeal.

Thomas appealed the disciplinary ruling. Dean Parker and Jane filed separate responses in support of the Foxhoven ruling. The appeal panel denied Thomas' appeal. (JA1633-1651, 2482, 2503-2536, 2538-2539.)

I. Thomas' Expulsion.

On April 8, 2016, President Martin sent a letter to Thomas, informing him that he (President Martin) had concurred in the hearing officer's and appeal panel's decision and that Dean Parker may impose the sanction of expulsion. When President Martin made his concurrence decision, he had before him only the appeal panel decision and the Foxhoven ruling. When pointed to the difference between Jane's hearing testimony concerning the alleged sexual assault and the Foxhoven ruling, President Martin said he did not review the hearing. (JA2312-2313, 2319, 2322-2323, 2331.)

Also on April 8, 2016, Dean Parker e-mailed Thomas that President Martin had concurred in the hearing officer's and appeal panel's decision and sanctioned him with expulsion from Drake. Thomas had no prior disciplinary complaints against him for sexual misconduct, Thomas was one month away from graduation when expelled and Thomas's case was the only case of expulsion

for sexual misconduct at Drake. (JA1445, 1492, 1653-1654, 1731, 1797, 1873, 2313.)

J. Court Proceedings.

Thomas brought this case. Subject matter jurisdiction arose under 28 U.S.C. §§ 1331, 1343 and 1367 because the claims brought under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and Title III of the ADA, 42 U.S.C. § 12181 *et seq.* arose under the laws of the United States and are civil rights claims and the state law claims are part of the same case or controversy.

After the parties conducted fact and expert discovery, Drake moved for summary judgment dismissing the Complaint, and Thomas opposed those motions. The District Court entered an opinion and order granting summary judgment dismissing all claims except the selective enforcement Title IX claim and the breach of contract claim regarding a failure to investigate, which opinion and order became a final judgment based on the stipulation of the parties dismissing without prejudice those two claims. (Add. 1-68, JA1022-1023.)

The Eighth Circuit affirmed in a result driven opinion based on a supposed “summary” of the facts without citations to the record and that in its omissions and misstatements disregarded the rules on summary judgment which the Eighth Circuit purported to recognize.

ARGUMENT

A. The Grounds For Granting The Petition.

This Court, per its Rule 10, should grant the petition for a writ of certiorari for two reasons:

1. The conflict in fact among the Circuits involving, on the one hand, *Doe v. Purdue*, 928 F.3d 652 (7th Cir. 2019) (Barrett, J.), *Doe v. University of Sciences*, 961 F.3d 203 (3d Cir. 2020), *Doe v. Oberlin*, 963 F.3d 580 (6th Cir. 2020), *Doe v. Univ. of Arkansas-Fayetteville*, 974 F.3d 858 (8th Cir. 2020), and *Schwake v. Arizona Bd. of Regents*, 967 F.3d 949 (9th Cir. 2020), and, on the other hand, *Doe v. University of Denver*, 952 F.3d 1182 (10th Cir. 2020), and *Rossley Jr. v. Drake*, 979 F.3d 1184 (8th Cir. 2020), regarding the cause of action for Title IX discrimination in college and university disciplinary decisions present important federal questions of law that the U.S. Supreme Court should consider and also in a supervisory capacity.
2. The dismissal on summary judgment of a disability discrimination claim involving failure to provide reasonable accommodations under the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12182(a), brought by a plaintiff university student with disabilities, presents important federal questions of law the U.S. Supreme Court should consider when the dismissal is on the ground that the disabled student failed to request accommodations in a university disciplinary proceeding when: (a) the university was on constructive notice of the

disabilities due to the provision of accommodations in the academic context, (b) the university has no formal mechanism for requesting accommodations in the disciplinary context, and (c) the student's father, who was also a Trustee at the university and who had submitted FERPA papers to the university, made a request to the university's Dean who headed the university's Office of Disability Services that the student be accommodated in an upcoming disciplinary hearing.

B. Conflicts Among Circuits On Important Federal Question.

The first reason for granting the writ of certiorari is the conflict in fact among the Circuits involving, on the one hand, *Doe v. Purdue*, 928 F.3d 652 (7th Cir. 2019) (Barrett, J.), *Doe v. University of Sciences*, 961 F.3d 203 (3d Cir. 2020), *Doe v. Oberlin*, 963 F.3d 580 (6th Cir. 2020), *Doe v. Univ. of Arkansas-Fayetteville*, 974 F.3d 858 (8th Cir. 2020), and *Schwake v. Arizona Bd. of Regents*, 967 F.3d 949 (9th Cir. 2020), and, on the other hand, *Doe v. University of Denver*, 952 F.3d 1182 (10th Cir. 2020), and *Rossley Jr. v. Drake*, 979 F.3d 1184 (8th Cir. 2020), regarding the cause of action for Title IX discrimination in college and university disciplinary decisions present important federal questions of law that the U.S. Supreme Court should consider and also in a supervisory capacity.

1. Title IX On Campus. Title IX provides, in relevant part, that “[n]o person in the United States shall, on the basis of sex, be excluded from partici-

pation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). Title IX may be violated by a school’s failure to prevent or remedy sexual harassment or sexual assault, *Davis v. Monroe Bd. of Education*, 526 U.S. 629 (1999), or by “the imposition of university discipline where gender is a motivating factor in the decision to discipline,” *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994). In either case, the statute is enforceable through an implied private right of action. *Yusuf*, 35 F.3d at 714.

The crux of the problem is that the campus sexual tribunals have operated in ways at odds with the text of Title IX passed by Congress. A. Scalia, *Reading Law: The Interpretation of Legal Texts* (West Pub. 2012). Title IX by text and original legislative history is a non-discrimination statute, requiring equally fundamental fairness for women and men. Neither the text nor the original legislative history of Title IX justifies biased decision-makers and investigators who treat females as “victims” presumptively telling the truth and males as rapists unlikely to be telling the truth. Nor does Title IX countenance institutions to choose to address sexual assault through favoring female complainants and discriminating against male respondents.

Current Title IX regulations, influenced in part by *Doe v. Purdue*, were announced May 6, 2020 and went into effect August 20, 2020, and those regula-

tions have brought greater due process and fairness. U.S. Department of Education Press Release, “Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students,” May 6, 2020; U.S. Department of Education Press Release, “U.S. Department of Education Launches New Title IX Resources for Students, Institutions as Historic New Rule Takes Effect,” Aug. 14, 2020; “Secretary DeVos Announces New Title IX Regulation,” <https://www.youtube.com/watch?v=hTb3yfM-NGuA>. But legal experts are already predicting the Biden Administration will reverse the DeVos regulations. “Biden Administration Expected to Reverse DeVos’s Title IX Regulations, Legal Experts Say,” Jan. 21, 2021, <https://www.thecrimson.com/article/2021/1/20/experts-on-title-ix-under-biden>.

2. *Doe v. Purdue*: The Lodestar. *Doe v. Purdue* has become the lodestar for interpreting Title IX in discrimination suits against universities who were respondents in university sexual misconduct disciplinary proceedings. Four Circuits have cited *Doe v. Purdue* when reinstating the Title IX federal court suits brought by the male plaintiffs: the Third Circuit in *Doe v. University of Sciences*, the Sixth Circuit in *Doe v. Oberlin*, the Eighth Circuit in *Doe v. Univ. of Arkansas-Fayetteville*, and the Ninth Circuit in *Schwake v. Arizona Bd. of Regents*. Two Circuit Court decisions, the Tenth Circuit in *Doe v. University of Denver* and the Eighth Circuit in this case, while paying lip service to *Doe v. Purdue*, went to extraordinary inappropriate lengths to dismiss Title IX federal court suits

brought by males who were respondents with rationales at odds with *Doe v. Purdue*.

3. *Doe v. University of Denver*. The Tenth Circuit opinion begins with the 2011 Dear Colleague Letter, citing *Doe v. Purdue*, 928 F.3d at 668, saying that the evidence of the 2011 Dear Colleague Letter is not enough unless coupled with “something more,” but then goes through the following six other areas of proof rationalizing each away to deny that “something more” was provided, as it was in *Doe v. Purdue*:

(a) Between 2011 and 2016, all but one of the complainants were female and all respondents were male, yet the Tenth Circuit panel said inferring gender bias on the part of the school is not reasonable because the statistical disparity “might be” explained by “non-discriminatory possibilities” (e.g., males commit the assaults), but the establishment of a victim-centric system favoring complainants such as the one at the University of Denver means that males are discriminated against *de facto*.

(b) University Title IX training treated (female) complainants as survivors, and support resources were only for (female) complainants and not (male) respondents. This evidence of anti-respondent bias was deemed, however, not to create a reasonable inference of anti-male bias because both males and females “can be” respondents—never mind the reality at the University of Denver and elsewhere is that males are almost always the respondents.

(c) Evidence of railroading investigator bias was discussed in a long footnote 18 of the panel opinion, and from that evidence, a reasonable factfinder could infer gender bias. Yet, the panel essentially ignored it.

(d) The panel opinion noted the statement in the Second Circuit opinion in *Doe v. Columbia*, 831 F.3d at 57-58 (2d Cir. 2016), that “[w]hen the evidence substantially favors one party’s version of a disputed matter but an evaluator forms a conclusion in favor of the other side (without an apparent reason based in the evidence), it is plausible to infer . . . that the evaluator has been influenced by bias.” The panel opinion denied *Doe v. Columbia* helped the male plaintiff because it was said university investigators were not faced with a comparable situation. That supposed distinction depends upon the panel not grappling with the evidence recounted in footnote 18 of railroading investigator bias that explains how the investigators reached the conclusion of the male plaintiff’s responsibility despite the evidence. The male plaintiff told a largely consistent story of consensual sexual intercourse involving a more sexually experienced female complainant; the female complainant, while claiming “coercion,” had to account for how she got into the male plaintiff’s bed, “spooned” with him at her request until they engaged in sexual intercourse multiple times, switching positions, but never attempted to wake the male plaintiff’s roommate who was sleeping a few feet away, and was not physically restrained or otherwise prevented

from leaving the room; the female complainant further had to account for six months passing before her new boyfriend filed a complaint on her behalf.

(e) The male plaintiff had no prior misconduct record; after their tryst, plaintiff and the female complainant met socially and no interim suspension was imposed; yet the male plaintiff was expelled for what was treated as non-consensual sexual intercourse, reflecting a gender biased belief that males need to be sanctioned severely for sexual misconduct. Gruber, *Anti-Rape Culture*, 64 U. Kansas L. Rev. 1027 (2016).

4. *Rossley Jr v. Drake.* The Eighth Circuit noted it had in *Doe v. Univ. of Arkansas-Fayetteville* adopted *Doe v. Purdue*, but then purported to analyze the case per the “erroneous outcome” doctrine to rule that the record did not show that a motivating factor for the expulsion of Thomas Rossley Jr. was his sex. In doing so, the Eighth Circuit failed to address Thomas’ real arguments and misstated the record.

Thomas made nine arguments (not four) that the Eighth Circuit does not really address:

(a) *Case Precedents* were reviewed identifying facts showing gender bias that were present here—disregard of facts showing consensual sex, investigator bias, finding males guilty regardless of evidence, disregarding witnesses in respondent favor. The Eighth Circuit recognizes the cases, but says Thomas does not have comparable facts (20a-22a), but does so on the basis of conclusory asser-

tions while ignoring the record evidence that makes those cases right on point.

(b) *Overwhelming Evidence* showed erroneous outcome pointing to bias to find otherwise, citing *Doe v Columbia*: Jane decided not to take rape test; no medical evidence; before the alleged assault, Jane's initiating and performing oral sex on Thomas that stopped when Thomas could not maintain an erection; Thomas does not recall having sexual intercourse with Jane; Jane's description of the sexual assault would make vaginal intercourse impossible; Thomas' roommate Student J did not hear any sex occurring; Thomas was suffering from erectile dysfunction; timeline of events did not allow for the alleged sexual assault to occur; Jane, right after the alleged sexual assault, went to Student P's room in the fraternity annex across the street, "jumping" on him in his bed and being kicked out; in response to Thomas texting at 3:59 am whether she got home, Jane texted Thomas saying "Yeah I'm good thx babe"; Jane going to Student I's room where she got into bed with him, made out, talked with Student I about having a relationship but never telling Student I about any sexual assault and then performed oral sex on Student I before leaving in the morning; Thomas woke up the next day fully clothed. Overwhelming evidence showed an erroneous outcome pointing to bias was the ground of decision in *Doe v. Oberlin* relying upon *Doe v. Purdue*. The Eighth Circuit does not address this argument.

(c) *Investigator Sirna Irregularities*: (i) failing to interview key witnesses; (ii) misusing gender biased “trauma” to explain away Jane’s inconsistent accounts of events and of her behavior inconsistent with a sexual assault by Thomas having occurred; and (iii) in order to conclude Thomas committed rape, relying on a uncorroborated hearsay statement of Student K and credited Jane despite the accumulated evidence, which reflected a gender biased reaching for a conclusion that objective evidence did not permit. Dr. Barden’s expert testimony explained how the investigators relied upon the gender biased junk science of “trauma,” suffered from confirmation bias in wanting to find a sexual assault against Jane leading to disregard of evidence for Thomas. (JA 2563-2617.)

The Eighth Circuit’s treatment of this issue is to deny in conclusory terms that Sirna was biased (19a) and to fail to deal with the record facts on summary judgment there was evidence of Sirna being biased: (i) Dr. Barden’s testimony; (ii) Sirna’s gender biased misuse of “trauma” to rationalize away Jane Doe’s inconsistencies and problematic account; (iii) Sirna’s threatening Thomas’s roommate for testifying he did not hear sexual activity in the room; and (iv) Sirna’s not asking about Jane Doe performing oral sex on Thomas. The Eighth Circuit also does not address specifically whom Sirna did not interview (for two examples, first fraternity brother on whom Jane jumped after being with Thomas, ex-boyfriend of Jane); Sirna’s supposed “belief” about whether whom she did not

interview was duplicative cannot be determinative as it was product of gender biased pre-judgment according to Dr. Barden.

(d) *Hearing Officer Foxhoven Irregularities*: (i) excluding evidence of Jane's behavior the night in question after the alleged sexual assault, ruling as inadmissible the conduct of Jane that was highly inconsistent with a sexual assault having occurred; (ii) rewriting the facts of the alleged sexual assault without supporting evidence to make penetration possible—Jane's pants were said to have been pulled off instead of just pulled down as Jane had testified; (iii) inconsistently treating Jane as not incapacitated to give oral sex to Thomas but 15 minutes later as incapacitated to have intercourse with Thomas; and (iv) making up what was said to be Thomas' “black out” argument about not being responsible for his behavior for the purpose of demonizing Thomas as an irresponsible male.

The Eighth Circuit's defense of Foxhoven was based on rationalizing away investigation bias (19a) and did not address Foxhoven's irregularities.

(e) *Irregularities As To Capacity*: Jane was not incapacitated to give Thomas oral sex in the car, but incapacitated 15 minutes later to be unable to consent to intercourse (which never happened), but was then not incapacitated right thereafter to jump on one fraternity brother in his bed, to text Thomas “all's good, babe,” and then spend the rest of the night with another fraternity brother in his bed

and to whom she gave oral sex? Foxhoven excluded evidence and avoids dealing with it. Sirna rationalized Jane's behavior as "trauma," but according to Dr. Barden, it is gender bias to view that way (JA 2563-2617); and Eighth Circuit's treatment is conclusory.

(f) *Trauma*: The District Court impermissibly ruled "no reasonable jury could find" that Drake's application of trauma in their decision-making showed a motivating factor for the erroneous outcome was gender bias (77a), and the Eighth Circuit gave a back of the hand treatment to it (22a). The record did not allow those treatments. Dr. Barden's expert report explains how gender biased notion of "trauma" critically influenced Drake's proceedings against Thomas to Thomas' prejudice. (JA2571-2596.) The testimony of Sirna, McKinney and Dean Parker showed the embrace of the idea of "trauma" which was used to explain away Jane's inconsistencies and "counterintuitive" behavior that pointed to no sexual assault having occurred and led to a prosecutorial approach toward witnesses such as Student J whose information pointed to no sexual assault having occurred. Drake's treatment of this subject reflected the "training" Drake personnel had in "trauma." (Add. 75, 79, 82-83; JA1726, 1749-1750, 1870-1872.) It also led to Dean Parker's denunciation, as "slut shaming," of citing Jane's "counterintuitive" behavior to show a sexual assault did not occur. (Add. 80-81, 83; JA1777-1779, 1871.)

(g) *Drake's Gender Biased Victim Centered Disciplinary Process*: The District Court accepted and there was no dispute that Drake has a victim-centric sexual misconduct disciplinary process (78a). Drake's Sexual Misconduct Policy shows that victim-centric nature by having a whole section for "Option for Survivors of Sexual or Interpersonal Misconduct" with a statement of victims' rights, orders of protection and accommodations and interim measures. There is another section for "Resources for Victims of Sexual or Interpersonal Misconduct" with a listing of telephone numbers. There is another section on "Prevention and Awareness" of sexual assault and misconduct. There is no section in Drake's Misconduct Policy for respondents' rights and resources. (JA1539-1559, 1697, 1700-1702.) The Eighth Circuit ignored these facts.

The dispute was whether Drake's victim-centric sexual misconduct disciplinary process is gender biased. Thomas testified in his deposition that Drake railroaded him and treated Jane "as the victim because she was female and I was just the male, and like I said, Drake leaned one way. They were very into the Dear Colleague Letter and they picked a side and they backed it the whole way." (JA1444, 1446-1447.)

To say the process is "victim centered, but not gender biased" ignores: (i) the norm is female complainant/male respondent; and (ii) what these university sexual misconduct tribunals have been about. If the system is victim-centered, it is not

neutral and impartial; and the norm at Drake and elsewhere is that females are the “victim” complainants and males are the “accused” respondents. The express conception of these campus sexual misconduct tribunals has been to protect women. The 2011 Dear Colleague Letter (p. 2) premised the need for universities to discipline sexual misconduct, using a preponderance of the evidence standard, with the statistic that 1 in 5 *women* on campus were victims of sexual assault. While the real number of college women assault victims is .03 in 5, *Rape and Sexual Assault Victimization among College Age Females, 1995-2013* (Special Report), U.S. Department of Justice, December 2014, the 1 in 5 statistic has propelled the establishment of campus sexual misconduct tribunals to protect women. To deny the female protectionist nature of campus sex tribunals is not law, but gender identity politics aimed at undercutting fairness for male respondents for the sake of female “survivors” and protecting the campus sex tribunals from challenge.

The Eighth Circuit treated this issue by saying that sexual assault materials are worded gender neutral and thus not inherently discriminatory, which is not responsive to the *de facto* gender bias; and the Eighth Circuit’s invoking the mantra that anti-respondent does not mean anti-male (18a, 22a-23a) ignored reality reflected in the record: all respondents in the 2015-2016 school year at Drake were male; to talk about anti-respondent does not mean anti-male ignores the reality of who are the

complainants (female) and who are the respondents (male). (JA1667, 2346-2355, 2631, 2636-2646.) The Eighth Circuit's speculation about possibly being other explanations than gender bias for the statistical reality is not appropriate on summary judgment.

(h) *Universities Responsibility and 2011 Dear Colleague Letter*: Thomas' position was that while the 2011 Dear Colleague Letter called universities into policing sexual misconduct, universities still had the responsibility of establishing fair procedures that did not discriminate against men and that the 2011 Dear Colleague Letter led Drake into punitive, one-sided investigations against male respondents and very differently than how *Doe v. Purdue* discussed the 2011 Dear Colleague Letter. Drake, knowing the gender make up of complainants and respondents, wrongly established a "victim-centered" process and did not attend to what is required for fairness to male respondents. University administrators' employment of processes that unfairly favor a female complainant over a male respondent provides the basis for an inference that the administrators were in fact so motivated by gender bias. *Doe v. Columbia*, 831 F.3d at 57-58; *Doe v. Miami*, 882 F.3d 579 (6th Cir. 2018).

The Eighth Circuit's response was to defend the 2011 Dear Colleague Letter, asserting that it ushered in a more rigorous approach to sexual misconduct (25a), as if former Secretary of Education DeVos had not denounced the 2011 Dear Colleague Letter campus tribunals for setting up an "un-

American” denial of due process, U.S. Department of Education Archives, “Secretary DeVos Prepared Remarks on Title IX Enforcement,” Sept. 7, 2017, and vacated the 2011 Dear Colleague Letter with a 2017 Dear Colleague Letter, Department of Education, Office for Civil Rights, Dear Colleague Letter (Sept. 22, 2017). The Eighth Circuit also cited what were false statistics in the vacated 2011 Dear Colleague Letter on sexual assault (25a-26a) for which there was no evidence in the record. To the contrary, Dr. Barden testified, *inter alia*, that the 1 in 5 statistic was false, citing the 2014 Department of Justice study. (JA 2563-2617.)

(i) *Selective Enforcement Gender Bias*: The District Court, while denying the record showed gender bias for erroneous outcome, ruled the record showed evidence of gender bias for selective enforcement (92a-94a). If, however, gender bias played a role in the decision not to pursue charges against Jane, then it is reasonable for a jury to believe that gender bias affected other actions and decisions of Drake in the disciplinary case against Thomas. This is an illustration of how the *Doe v. Purdue*’s approach is the better legal method of not adhering to the *Yusuf* doctrinal classifications.

C. ADA Important Federal Question.

The second reason for granting the writ of certiorari is that important questions of federal law are presented by this case’s claim of disability discrimination involving failure to provide reasonable

accommodations under the ADA, 42 U.S.C. § 12182(a).

The university was granted summary judgment dismissing the ADA claim of a plaintiff university student with disabilities on the ground, affirmed by the Eighth Circuit, that he failed sufficiently to request accommodations in a university disciplinary proceeding even though: (a) the university was on constructive notice of the disabilities due to the provision of accommodations in the academic context, (b) the university has no formal mechanism for requesting accommodations in the disciplinary context and (c) the student's father, who was also a Trustee and who had submitted FERPA papers to the university, made a request to the university's Dean who headed the university's Office of Disability Services that the student be accommodated in an upcoming disciplinary hearing.

The District Court's and Eighth Circuit's technical decisions are contrary to the recognition of the ADA's remedial purpose. *Argenyi v. Creighton University*, 703 F.3d 441, 447 (8th Cir. 2013) (citing 42 U.S.C. § 12182(a)). The two versus one hearing in which Thomas was obstructed while attempting to cross-examine Sirna (objection, objection, objection) puts to shame the District Court's and Eighth Circuit's technical arguments, which is contrary to basic policy of ADA.

1. Constructive Notice. Any requirement for a request for accommodations was satisfied by Drake's constructive notice of Thomas' disabilities.

Drake was aware of Thomas' disabilities because he had requested and received accommodations in the academic setting. Information about Thomas' disabilities and the reasonable accommodations afforded him were in Thomas' disability file, accessible to University officials. Dean Parker, who supervised the Office of Disabilities, had access to information concerning Thomas' disabilities, and who as the Associate Dean of Students at the time of the alleged sexual assault, had responsibility for enforcing Drake's Code and supervised Thomas' disciplinary proceeding. (JA1471, 1745, 1747, 1749, 1784.)

At his first meeting with investigators, Thomas disclosed his ADHD, anxiety and language-based disabilities. (JA1914.) Thomas considered his statements to be a request for accommodation and believed that Drake would engage with him to provide appropriate accommodations during the investigation. (JA1472.) Thomas' father also considered his son's statement to the investigators to be a request for accommodations. (JA2621-2622.) At the hearing, Thomas stated he has ADHD and a "word-based learning disability" causing him to be "very bad at retrieving words." (Add. 55 n.10; JA1443-1444, 2217.) Drake wrongly failed to provide Thomas reasonable accommodations during either the investigation or the hearing. (JA1471-1475.)

Other courts have found that a university can be required to provide accommodations when it is already aware of a student's disability even absent a formal request. *Nathanson v. The Medical Col-*

lege of Pennsylvania, 926 F.2d 1368, 1382-83 (3d Cir. 1991) (medical school was on notice of student's disability based on administrator's conversation with student and there were issues of fact concerning whether request was made for reasonable accommodations); *Redding v. Nova Southeastern Univ., Inc.*, 165 F. Supp. 3d 1274, 1296 (S.D. Fla. 2016) (university was on notice of disability based on informal request for an accommodation).

The Eighth Circuit's reliance upon its own *Mershon v. St. Louis Univ.*, 442 F.3d 1069 (3d Cir. 2006), to foreclose constructive notice in this case (28a-29a) does not serve the purposes of the ADA.

2. No Formal Request Mechanism For Disciplinary Process. The District Court acknowledged "there was no formal process to request accommodations during the disciplinary procedure." (Add. 54.) Neither Drake's Student Conduct Code nor its Sexual Misconduct Policy contained any formal mechanism by which a respondent in a sexual misconduct investigation proceeding could make a specific request for a disability accommodation. (JA 1505-1560.) Yet, the District Court asserted Thomas "understood" from his academic accommodations and conversations with his disability coordinator, that "he must, at a minimum, ask that his disabilities be accommodated" in the hearing. (Add. 54.) That is flatly contrary to Thomas' testimony about his understanding. (JA1472.) The Eighth Circuit fails to recognize that Drake had no formal mechanism for requesting accommodations in disciplinary context.

The absence of a formal procedure further invalidates the District Court's and Eighth Circuit's reasoning. *Forbes v. St. Thomas Univ., Inc.*, 768 F. Supp.2d 1222, 1231-1232 (S.D. Fla. 2010) (because “[t]he [Academic Standing] Committee knew the pertinent facts of [plaintiff's] ordeal,” there were “sufficient . . . facts for a jury to conclude that [she] identified her disabilities and presented a case to [the university] for specific accommodations”).

The Eighth Circuit position that Thomas needed to make specific accommodation requests (27a-28a) is not satisfactory. Why is a burden placed on Thomas to make specific accommodation requests when he does not know the disciplinary process and there was no mechanism to make requests?

3. Actual Accommodations Request Made. Reasonable accommodations were requested. In a phone call in December 2015 with Dean Parker (who headed Drake's Office of Disability Services), Thomas' father (who was also a Drake Trustee and had signed FERPA papers after being advised of the disciplinary case against Thomas) requested accommodations for Thomas in the upcoming hearing, but Dean Parker never addressed the request. (JA2617-2621.)

Dean Parker, the head of Office of Drake's Disability Services, had a responsibility to enter into a discussion of what accommodations would be appropriate for Thomas and not just concentrate on

his role as prosecuting attorney aiming to expel Thomas on the eve of Thomas's graduation.

The District Court asserted that Thomas was an adult who himself had to request reasonable accommodations, instead of his father doing so on his behalf (98a-101a), ignoring Dean Parker's position as head of the university Office of Disability Services, Thomas' father having FERPA papers and that no case law supported the District Court.

The Eighth Circuit managed to ignore Dean Parker's position as head of the university Office of Disability Services and fault Thomas' father for not making specific accommodations requests. The Eighth Circuit says that the plaintiff has the burden of requesting accommodations, but Thomas' argument was that the request requirement of *Mershon v. St. Louis Univ.* was satisfied by: (i) the constructive notice from academic accommodations; and (ii) the request by Thomas's father armed with FERPA papers to Dean Parker, the head of Drake's Office of Disability Services.

In the employment context, courts have found that third party requests for accommodations, like the one made by Thomas' father, are sufficient to support ADA claims, and that should be the rule in this case's context. *See, e.g., EEOC v. CR England, Inc.*, 644 F.3d 1028, 1049 (10th Cir. 2011) ("Although *the notice or request 'does not have to be in writing, be made by the employee, or formally invoke the magic words "reasonable accommodation,"'* it 'nonetheless must make clear that the

employee wants assistance for his or her disability.’”) (emphasis added); *Corbett v. National Prods. Co.*, 1995 WL 133614, at *4 (E.D. Pa. Mar. 17, 1995) (“While [plaintiff] did not specifically request a reasonable accommodation from [his employer], he did so in essence when his wife called to inform [his employer]. . . . ‘The statute does not require the plaintiff to speak any magic words before he is subject to its protections. The employee need not mention the ADA or even the term ‘accommodation’’); *Schmidt v. Safeway Inc.*, 864 F.Supp. 991, 997 (D. Ore. 1994) (The jury could have reasonably inferred that [plaintiff’s employer] knew that [he] wanted to retain his job while in rehabilitation even if he did not specifically request that [his employer] provide him with such an accommodation.”); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 303, 313-14 (3d Cir. 1999) (son requested accommodations for mother).

CONCLUSION

Based on the foregoing, this Court should grant the petition for a writ of certiorari and such other and further relief as deemed just and proper.

Dated: New York, New York
February 2, 2021

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APPENDIX

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

No. 18-3258

Filed: November 5, 2020
Submitted: November 12, 2019

Thomas ROSSLEY, Jr.

Plaintiff-Appellee

v.

DRAKE UNIVERSITY, et al.

Defendant-Appellant

Appeal from United States District Court
for the Southern District of Iowa – Des Moines

Before COLLTON, WOLLMAN, and BENTON, Circuit
Judges.

Opinion

WOLLMAN, Circuit Judge.

Drake University and its Board of Trustees (Drake) expelled student Thomas Rossley, Jr. after university officials found that he had sexually assaulted a female student (hereinafter referred to as Jane Doe or Doe). Rossley sued Drake in an eight-count complaint, which alleged, as relevant

here, violations of Title IX and the Americans with Disabilities (ADA), as well as claims related to breach of contract. The district court¹ granted summary judgment in favor of Drake on all but Rossley's Title IX claim based on a selective enforcement theory and his breach of contract claim based on Drake's failure to investigate his allegation of sexual misconduct on Doe's part. *Rossley v. Drake Univ.*, 342 F. Supp. 3d 904 (S.D. Iowa 2018). Following the district court's ruling, the parties stipulated to the dismissal without prejudice of those two claims. On appeal, Rossley challenges the district court's grant of summary judgment on his Title IX claim based on an erroneous outcome theory, his ADA claim, and his breach of implied duty of good faith and promissory estoppel claims.

We address first whether we have jurisdiction to review Rossley's appeal in light of the stipulated dismissal of the two above-described claims. We have "jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. § 1291; see *Ruppert v. Principal Life Ins. Co.*, 705 F.3d 839, 842-43 (8th Cir. 2013). When a district court dismisses a claim "without prejudice pursuant to the parties' stipulation," there is "no final decision" for purposes of appellate jurisdiction. *W. Am. Ins. Co. v. RLI Ins. Co.*, 698 F.3d 1069, 1071 n.1 (8th Cir. 2012). During oral argument before us, however, Rossley agreed to dismiss these claims with preju-

¹ The Honorable Rebecca Goodgame Ebinger, United States District Judge for the Southern District of Iowa.

dice. We accordingly conclude that we have jurisdiction to consider the appeal. *See Ruppert*, 705 F.3d at 843 (“[U]nless the appellant’s claims are unequivocally dismissed with prejudice, there is no final appealable decision.”).

We review *de novo* the district court’s grant of summary judgment dismissing Rossley’s Title IX, ADA, breach of implied duty of good faith, and promissory estoppel claims. *See Quinn v. St. Louis Cty.*, 653 F.3d 745, 750 (8th Cir. 2011) (standard of review). Summary judgment is appropriate if, when the record is viewed in the light most favorable to the nonmoving party, there are no genuine disputes of material fact and the moving party is entitled to judgment as a matter of law. *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005). “An issue of fact is genuine when ‘a reasonable jury could return a verdict for the nonmoving party’ on the question.” *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). “We may affirm the district court’s grant of summary judgment on any ground supported by the record.” *Id.*

Drake, a private university in Des Moines, Iowa, receives federal funding. Two documents govern Drake’s sexual assault investigations and disciplinary hearings: the Code of Student Conduct (Code) and the Sexual and Interpersonal Misconduct Policy and Notification of Complainant’s Rights (Policy). The Code proscribes certain forms of misconduct, including sexual misconduct. It states that Drake may “take whatever disciplinary action is appropriate (up to and including expulsion from

the University) to protect the safety and well-being of students.” The Policy addresses Drake’s policies and procedures relating to sexual and interpersonal misconduct and is “intended to ensure that [these policies] are interpreted and applied consistently with Title . . . IX.” The Policy also “notif[ies] victims/survivors of their rights and resources that are available to them” and “explains the investigatory and disciplinary procedures . . . and possible sanctions” Drake may impose.

The Code and Policy define sexual assault as “an extreme form of sexual misconduct ranging from forcible rape to nonphysical forms of pressure that compel individuals to engage in sexual activity against their will.” Sexual assault includes “[e]ngaging in sexual activity with a person who is unable to provide consent due to the influence of drugs, alcohol, or other condition[s].” The Policy defines “consent” in the context of sexual activity as “clear, unambiguous action, agreeing, giving permission or saying ‘yes’ to sexual activity with someone else.” The Policy states that “an individual cannot give consent if incapacitated from doing so due to the influence of . . . alcohol.”

The Code provides that any student or staff member may file a complaint against a student suspected of sexual misconduct by contacting the Dean of Students Office or the Title IX Coordinator. The Dean of Students is assigned the responsibility of overseeing the investigation of the complaint. The individuals who coordinate and investigate the complaint shall have “received special training or have experience in (1) handling

complaints of sexual and/or interpersonal misconduct; and (2) applicable confidentiality requirements.” Both the complainant and the accused student are advised that they may have a “personal advisor” present “at any stage of the process,” including at “any meeting or hearing.” Formal disciplinary proceedings may be initiated if the Dean forms a “reasonable belief that the charge . . . can be proven by a preponderance of the evidence.”

The hearing officer at the disciplinary hearing “shall determine (1) whether a preponderance of the evidence establishes the accused student engaged in . . . misconduct; and (2) recommended disciplinary sanction(s), if any.” “The accused, the complainant and Dean/designee may call witnesses, conduct cross-examination, and may answer any evidence presented by others through rebuttal.” The accused’s personal representative’s sole role is to “provide counsel and advice.” An attorney personal representative may “make an opening statement, a closing argument and may present written questions to be read by the hearing officer to a witness.” The complainant and accused may cross-examine witnesses, but may not cross-examine one another. Rather, the hearing officer will pose to the adverse party the questions that each party has submitted, as well as asking such questions as the hearing officer may decide to pose at any time. The hearing officer will provide to all parties a post-hearing written opinion.

The accused student may appeal any adverse finding and proposed sanction by requesting a hearing before a three-member appeals panel, at

which the appeals panel will “meet with the appealing and responding parties (and their personal representatives, if any) for the purpose of hearing argument.” If the appeals panel determines that none of the enumerated grounds for an appeal has been shown, the appeal is dismissed and the hearing officer’s decision becomes final. If the appeals panel finds a showing of grounds for an appeal, the panel may affirm or reverse the hearing officer’s decision or modify the sanction imposed. If the President of Drake concurs with the panel’s findings, the Dean “shall have the authority to impose the sanction of expulsion,” and only the President “may recommend readmission.”

The district court’s comprehensive opinion sets forth a detailed account of the interactions between Rossley and Jane Doe that resulted in the expulsion from Drake that led to this appeal. Our summary of those events follows.

Jane Doe, a female student at Drake, contacted Drake Public Safety on October 9, 2015, to report that Rossley had sexually assaulted her earlier that morning. She reported that she had consumed a large amount of alcohol, “blacked out” for an “unknown amount of time,” and next remembered being on a bean bag chair in Rossley’s room, with Rossley being on top of and having intercourse with her. Drake Public Safety filed Doe’s report with Gerald Parker, the acting Dean of Students. Rossley was sent a letter notifying him of the complaint of sexual misconduct and requiring him to attend a later-scheduled meeting regarding the complaint, to which he could “bring a personal representa-

tive.” Because Dean Parker was ill at the time, Drake employed Mary Howell Sirna to serve as the lead investigator. Sirna had been a prosecutor for thirteen years, during which time she prosecuted sexual violence crimes and served as Iowa State University’s interim Title IX coordinator. She had also received training on handling students’ complaints of sexual assault. Sirna worked with similarly trained Tricia McKinney, Drake’s Assistant Director of Public Safety, in conducting the investigation.

Sirna and McKinney interviewed Doe and Rossley separately on October 23, 2015. Rossley did not bring a personal representative with him to the meeting and admitted that he had not finished reading the email that informed him of his right to do so. Sirna questioned Rossley about the evening of October 8 and early morning of October 9. Sirna and McKinney interviewed twelve witnesses and collected documentary evidence during the course of their investigation. Sirna chose not to interview any additional witnesses, believing that their statements might be duplicative.

Dean Parker and Drake’s Title IX Coordinator met with Rossley a month later. Rossley said that a friend had told him that Rossley might have been a victim of sexual assault, as Rossley himself did not remember the event. At a meeting with Sirna and McKinney the following day, Rossley reiterated that perhaps he had been a victim of sexual assault. Sirna asked Rossley if he wanted to file a sexual assault charge against Doe, to which

Rossley replied, “I’m not doing that right now. I’m just verbalizing the issue.”

Sirna’s investigative report to Parker, Rossley, and Doe set forth the following account: Rossley said that he and Doe had exchanged text messages and were friends, but had not “hung out one on one.” To help him focus on an assignment that he was working on the evening of October 8, Rossley took his prescribed ADHD/dyslexia medication. After completing the assignment, Rossley played a drinking game with friends, resulting in his becoming “pretty drunk.” Rossley explained that his medication often extends his sobriety, lowers his sex drive, and exacerbates the severity of any resulting blackout.

Sirna and McKinney found that Doe believed that she was intoxicated when she arrived at the bar at which she had met Rossley on the evening of October 8. Bar witnesses stated that Doe was noticeably drunk, including a bartender who recalled having refused to serve Doe because of her intoxicated condition. Rossley recalled thinking that he himself was “more drunk tha[n] [Doe] was” and that Doe was acting in a “flirty way” towards him. Doe agreed with Rossley’s suggestion that they leave the bar. A fraternity brother (the driver of the “sober cab,” whose bounden duty it was to transport his intoxicated brethren to the fraternity house) picked them up at Rossley’s request. Doe stated that once she and Rossley left the bar, things became “blurry.” Rossley stated that he could not remember what had happened in the car, but a witness reported seeing him and Doe “making

out." Rossley alleges, and the fraternity brother so stated, that Doe asked to go to the fraternity house at which Rossley resided.

Witnesses observed Doe "stumbling over herself" when she and Rossley reached the fraternity house. Doe remembered throwing up upon entering the house, after which point "everything [went] black." Doe and Rossley then went to Rossley's room, where they found two fraternity members playing video games. Rossley stated that Doe asked if he had a car and suggested that the two go there. Rossley remembered Doe's performing oral sex on him in the car before he blacked out. He stated that he did not believe he had ejaculated. Doe and Rossley then left the car and returned to the fraternity house.

Rossley stated that his last memory involving Doe once they were back in his room was her standing on a chair near his bed. He remembered her kissing him good night and leaving. He stated that he was "confused about the situation" and did not "know what happened" or whether they "had sex." He stated that his night with Doe did not result in the post-intercourse pain he suffers as a result of a back injury. Rossley also stated that Doe had complained to a friend about Rossley's inability to ejaculate. Rossley's roommate, who was present in the room during the alleged assault, reported that he remembered Rossley and a girl walking into the room, but did not recall hearing anything indicative of sexual activity.

Sirna and McKinney's report stated that Doe next remembered waking up to Rossley's being "on

top of [her] and assaulting [her].” She reported as having been confused and asking herself, “How did I get here,” as well as thinking that she was “not passed out and [Rossley’s] having sex with me.” She remembered that they were having penetrative intercourse, as she had felt his weight on her. After pushing him off her body, she noticed that he was wearing a yellow condom, that her pants were pushed down, and that her underwear had been “pushed to the side.” Doe remembered telling Rossley to “get off of [her]” and his saying, “Fine. I’ve got whiskey dick anyway.” Rossley told Doe not to leave, to which she responded by saying, “I’m going to be sick” and running to the bathroom.

Doe recalled sending a text message to another witness while in the bathroom, asking if she could sleep on his couch. Receiving no response, she went to the witness’s house and started kissing him. The witness recalled that Doe appeared to be intoxicated, but not “overly intoxicated.” Doe expressed having felt “weird around [Rossley]” and that Rossley “was being weird.” At 3:59 a.m., October 9, Rossley sent a “Make it back?” text to Doe, to which she responded, “Yeah I’m good thx babe.”

Upon returning to her apartment, Doe asked friends to help her recreate the events of the previous evening and the remainder of the night. At midmorning, she filed a report against Rossley with Drake Public Safety and went to Mercy Hospital, where she received a preliminary exam. She reported “freaking out” and doubting herself, wondering whether she had consented, if she was wrong, or had made a mistake. She declined to

undergo a forensic exam. When asked about her doubts, Doe replied that she did not recall giving consent and did not think she was capable of doing so. She stated that she had noticed blood stains on the underwear that she was wearing that night. Neither the underwear nor Doe's medical record was made available to Sirna during the investigation.

When asked by Sirna about Doe's account, Rossley replied that in addition to the oral sex in the car, he remembered only Doe's kissing him goodbye. A witness reported, however, that Rossley had said that he had "hook[ed] up" with Doe and had "wasted a condom" because he could not ejaculate.

Sirna determined that a reasonable person could conclude "based on the preponderance of the evidence" that Rossley had engaged in the sex act alleged in Doe's complaint. Sirna wrote that "given that there are no eye witnesses to the event, and [Rossley] claims not to recall the event we then must turn to the evidence provided by [Doe]." She pointed to the testimony regarding Doe's incapacitated state, as well as to Rossley's contradictory admission to a friend that he had had intercourse with Doe despite his inability to ejaculate—an admission supported by Doe's recollection of Rossley's statement that he was suffering from alcohol-induced erectile dysfunction. Sirna also noted that Rossley seemed to have been less incapacitated than Doe. Moreover, she found Doe credible in light of the statements she had made to investigators "against her own interest," including her expression of self-doubt and the fact that she had engaged

in sexual activity with a different person after the assault. Sirna's report mentioned Rossley's thought that he himself might have been a victim of sexual assault, but she made no findings regarding that allegation. After reviewing Sirna's report, Dean Parker determined that a disciplinary hearing was warranted and so informed Rossley.

Later that month, Rossley's father, then a Drake Trustee, called Parker, who told him that Rossley's case would be moving to a formal hearing. Rossley's father expressed concern that the investigators had refused to investigate his son's claim of having been sexually assaulted on the ground that it would have constituted a retaliatory action. He demanded that Parker accommodate Rossley's disabilities during the upcoming hearing.

Jerry Foxhoven, who had received training on sexual misconduct investigations, was Drake's hearing officer at the time. Foxhoven determined that there would be three parties at the hearing: Rossley, Doe, and Parker, who would be acting as the Dean. Rossley argued through his representative that because Parker and Doe were on the same "side," it was unfair to give equal time to all parties. Foxhoven ruled that Doe and Rossley could have five minutes for opening statements and ten minutes for closing statements, while Parker could have five minutes for opening and closing but could not make statements that were cumulative of Doe's.

Foxhoven notified the parties and their representatives that he would not admit "any testimony or evidence of the prior sexual conduct or mental

health issues of either” Doe or Rossley. Rossley’s representative argued that evidence regarding Doe’s post-Rossley encounter performance of oral sex on another person should be admissible as probative of her state of mind on that night and her capacity to consent mere hours earlier. Foxhoven then ruled that this evidence would be admitted.

Parker stated during his opening statement at the disciplinary hearing that the Dean of Students Office had “found [Doe’s] account of this incident as being more credible” and recommended that “the appropriate sanction be expulsion.” Rossley’s representative argued during his opening statement that “the two people involved were both blackout drunk,” but later during the statement argued that “we can know that [Doe] was not incapacitated.” Foxhoven interpreted the opening statement as an admission by Rossley that Doe was incapacitated during the time in question, rendering the extent of her incapacitation uncontestible. Foxhoven accordingly amended his previous order by precluding any testimony and evidence regarding Doe’s actions after leaving Rossley’s room.

In addition to Doe’s and Rossley’s testimony, eleven witnesses testified and were cross-examined during the hearing, with Foxhoven reading Doe’s and Rossley’s respectively submitted questions. In addition to reiterating that which she had told investigators regarding the events of October 8 and 9, Doe testified that in an attempt to persuade Rossley to take her to her home, she had provided that which she knew he wanted by “giving him oral sex” while the two were in the back seat of his car.

She denied having initiated or consented to having vaginal intercourse.

Foxhoven's order stated that sufficient evidence existed to support a finding of sexual misconduct. Although he noted "a lack of definitive evidence" in light of the absence of corroboration, as well as the lack of any test conducted on Doe's underwear, Foxhoven ultimately concluded that the remaining evidence was sufficiently probative of his findings. He first determined that "a preponderance of evidence supports the fact that vaginal intercourse between [Doe] and [Rossley] was either attempted or completed on the evening in question," noting that the Code provides that contact with genitals without consent constitutes sexual assault. Foxhoven pointed to Doe's not being "conscious during the assault," awakening to Rossley's "violating" her while her pants were off, later remembering Rossley's mentioning his alcohol-induced erectile dysfunction, and her stating that "walking was painful in a way that indicated to her that she had been subjected to vaginal sex." Foxhoven also determined that "a preponderance of evidence supports the fact that [Doe] did not give her consent to the sexual contact in question" because she was "so intoxicated . . . that she was rendered unable to give her consent." He pointed to Doe's pain-resulting experiences with penetrative sex, to the testimony from numerous witnesses, and to Rossley's representative's statement that both Rossley and Doe were "blackout drunk on the night in question."

Foxhoven rejected Rossley's argument that he should not be responsible for his conduct because

he was “blacked out.” Foxhoven concluded that the evidence showed that Rossley was “clearly more in control of himself than [Doe was]” and that he was aware of her level of intoxication. Foxhoven did not address Rossley’s allegation that he had not consented to Doe’s performance of oral sex on him before his alleged assault on her.

Foxhoven recommended that Rossley be expelled, rejecting Rossley’s representative’s request that Rossley be allowed to graduate as planned just a month later and emphasizing Rossley’s awareness of Doe’s intoxicated state.

Upon receiving Rossley’s notice of appeal, the appeals panel scheduled a hearing, following which the panel affirmed Foxhoven’s findings and recommended expulsion. Parker notified Rossley of the panel’s decision and of Drake’s President’s concurrence therein, as well as of Rossley’s immediate expulsion from the university. Rossley then filed the action that gave rise to this appeal.

Title IX prohibits federally funded universities from discriminating against students on the basis of sex. *See* 20 U.S.C. § 1681(a). As relevant here, Rossley pursued his Title IX claim under the two categories set forth in *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994)—“selective enforcement” and “erroneous outcome.”² With respect to

² We had not applied or adopted the *Yusuf* framework at the time of the district court’s ruling on Drake’s summary judgment motion, but a number of courts of appeals had done so. *E.g.*, *Robinson v. Wutoh*, 788 F. App’x 738, 738 (D.C. Cir. 2019) (per curiam); *Klocke v. Univ. of Tex.*, 938 F.3d 204, 210 (5th Cir. 2019); *Austin v. Univ. of Or.*, 925 F.3d 1133, 1138

erroneous outcome, Rossley argued that there was a genuine dispute of material fact whether gender bias had resulted in an erroneous outcome in his disciplinary proceedings. *See Id.* at 715 (explaining that the erroneous outcome category involves claims that “the plaintiff was innocent and wrongly found to have committed the offense”). The district court applied *Yusuf* and dismissed Rossley’s Title IX claim to the extent it was based on an erroneous outcome theory. As set forth above, Rossley decided to dismiss with prejudice the remainder of his Title IX claim so that he could obtain final judgment and appellate jurisdiction.

Subsequent to the submission of Rossley’s appeal, we announced the following pleading standard for Title IX claims: a plaintiff “must allege adequately that the University disciplined [the plaintiff] on the basis of sex—that is, because he is a male.” *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 864 (8th Cir. 2020). In so holding, we cited the Seventh Circuit’s decision in *Doe v. Purdue University*, 928 F.3d 652, 667-68 (7th Cir. 2019), which rejected *Yusuf’s* categories of Title IX claims and asked instead whether “the alleged facts, if true, raise a plausible inference that the university discriminated against [the plaintiff] ‘on the basis of sex.’” The court explained that *Yusuf’s* categories

(9th Cir. 2019); *Doe v. Loh*, 767 F. App’x 489, 491 (4th Cir. 2019) (per curiam); *Doe v. Valencia Coll.*, 903 F.3d 1220, 1236 (11th Cir. 2018); *Doe v. Trs. of Bos. Coll.*, 892 F.3d 67, 90 (1st Cir. 2018); *Doe v. Miami Univ.*, 882 F.3d 579, 592 (6th Cir. 2018).

“simply describe ways in which a plaintiff might show that sex was a motivating factor in a university’s decision to discipline a student.” *Doe v. Purdue Univ.*, 928 F.3d at 667.³

To survive summary judgment, then, Rossley was required to set forth sufficient evidence to allow a reasonable jury to find that Drake disciplined him on the basis of sex. See *Id.*; *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d at 864. The district court’s application of *Yusuf* is of no consequence, however, in light of its ultimate conclusion that no reasonable jury could find that Drake’s “actions were motivated by gender bias.” *Rossley*, 342 F. Supp. 3d at 926. As explained below, we similarly conclude that there is no genuine dispute of material fact whether being male was a motivating factor for Rossley’s expulsion from Drake.

Rossley advances several theories in support of his argument to the contrary. Specifically, he contends that:

- (1) Drake countenanced various procedural flaws in the investigation, disciplinary hearing, and appeals process and reached a decision against the weight of the evidence; (2)

³ The United States Courts of Appeals for the Third and Ninth Circuits have adopted the Seventh Circuit’s pleading standard. *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 947 (9th Cir. 2020); *Doe v. Univ. of the Scis.*, 961 F.3d 203, 209 (3rd Cir. 2020); *see also Doe v. Univ. of Denver*, 952 F.3d 1182, 1190 (10th Cir. 2020) (considering whether the plaintiff had adduced “sufficient evidence to raise a genuine dispute that gender was a motivating factor in [the university’s] decision to expel him”).

Drake’s “victim-centered” approach punishes male respondents; (3) gender-specific data of those accused of sexual misconduct at Drake reveals gender bias; and (4) the Department of Education’s guidance document (the “Dear Colleague” letter—of which more later) pressured Drake to protect female victims at the cost of erring against accused male students.

Rossley argues that he has shown a genuine dispute whether Drake’s actions during the investigation and disciplinary hearing were motivated by gender bias. He points to alleged flaws in Drake’s decisions throughout the disciplinary process, including Foxhoven’s decision allowing Doe and Drake separate time in the hearing, the requirement that Rossley and Doe conduct their own cross-examination of certain witnesses, and Foxhoven’s reliance on Doe’s unverified statements regarding intercourse-induced pain. He argues that the appeals panel failed to take into account his imminent graduation date, condoned the decision to allow both Doe and Drake to proceed against him, and viewed only the evidence presented to it.

The Code and Policy processes Rossley challenges use gender-neutral language. As recounted above, the Policy allows the accused student’s representative to be present during the disciplinary hearing for the purpose of making opening and closing statements and presenting questions to the hearing officer. The accused student is given the opportunity to submit a written response to the complaint. We conclude that these procedures,

although not equivalent to those provided in non-academic settings, are not reflective of gender bias, either in statement or in application.

Rossley contends that the hearing panel reached decisions contrary to the weight of the evidence, which he argues demonstrates that gender bias permeated the investigation, the hearing, and the decision that resulted in his expulsion. He points to Sirna's decision to not interview certain witnesses, her reliance on hearsay, and her finding that Rossley's roommate lacked credibility. He points also to Foxhoven's and the appeals panel's reliance on the alleged erroneous findings that flowed from Sirna's flawed investigation. We conclude, however, that whatever the deficiencies in Sirna's investigation, they did not result in findings so devoid of substantive content as to be unworthy of credence. As pointed out earlier, for example, Sirna's decision not to interview certain witnesses was based on her belief that such an effort might prove to be duplicative of her other interviews. Likewise, the alleged deficiencies did not rise to the level of the "clear procedural irregularities" that occurred in *Menaker v. Hofstra University*, 935 F.3d 20, 35 (2nd Cir. 2019).

We also find to be without merit Rossley's argument that the decision regarding Doe's alcohol-impaired decision-making capacity was contrary to the substantial weight of the evidence. True enough, as was also the case in *Doe v. University of Arkansas-Fayetteville*, 974 F.3d at 864-65, Doe was able to converse, to send text messages (including a post-encounter thank-you reply), and to return

safely to her apartment, but there was also substantial, if indeed not overwhelming evidence of her intoxication that greatly exceeded that which existed in the Arkansas case.

Rossley argues that a university official's actions during a disciplinary process can raise a plausible inference of gender bias. *See, e.g., Doe v. Purdue Univ.*, 928 F.3d at 669 (crediting female accuser "on her accusation alone" and taking "no other evidence into account" raised a plausible inference of gender bias); *Doe v. Columbia Univ.*, 831 F.3d 46, 57 (2d Cir. 2016) ("When the evidence substantially favors one party's version of a disputed matter, but an evaluator forms a conclusion in favor of the other side (without an apparent reason based in the evidence), it is plausible to infer . . . that the evaluator has been influenced by bias."); *Prasad v. Cornell Univ.*, No. 5:15-cv-322, 2016 WL 3212079, at *17 (N.D.N.Y. Feb. 24, 2016) (holding that allegations of a slanted investigative report, a drastic change in position by one investigator, and a possibility that male respondents are invariably found guilty at the university "plausibly establishes a causal connection between gender bias and the outcome of [plaintiff's] disciplinary proceeding"); *Doe v. Washington & Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996, at *10 (W.D. Va. Aug. 5, 2015) (holding that investigators' omissions in witness summaries and failure to consider evidence of plaintiff and accuser's post-incident consensual sexual encounter "plausibly established a causal link between [plaintiff's] expulsion and gender bias"). Whatever force similar arguments might

have in a given case, we conclude that Rossley has failed to make a sufficient showing that the procedural or substantive deficiencies that he alleges occurred in his case were the equivalent of those in these cases.

As was also the situation in *Doe v. University of Arkansas-Fayetteville*, the cases Rossley cites were being considered at the pleadings stage of the proceedings. They also concerned allegations more probative of gender bias than any of the evidence Rossley points to here. In *Doe v. Columbia University*, the court noted that “substantial criticism” attacking the manner in which the university treated female accusers could motivate officials “to refute those criticisms by siding with the accusing female and against the accused male.” 831 F.3d at 57-58. In *Doe v. Purdue University*, the dean of students and Title IX Coordinator reached a decision without ever having spoken with the complainant, and the university center dedicated to supporting victims of sexual violence had posted an article insinuating that men were “the cause of campus sexual assault.” 928 F.3d at 669. Similarly, in *Doe v. Washington & Lee University*, the court held that “gender bias could be inferred” from the Title IX Coordinator’s hosting a presentation that endorsed the idea “[a]lmost [e]very [g]irl” experiences non-consensual sex. 2015 WL 4647996, at *10. In *Prasad v. Cornell University*, the district court noted that it had to accept as true plaintiff’s allegation of “a gender stereotype adverse to males charged with sexual assaults . . . at Cornell causing . . . disciplinary proceedings to ‘invariably’ end

adversely to male respondents.” 2016 WL 3212079, at *16. We conclude that Rossley has not established the existence of any comparatively similar facts in his case.

Rossley contends that in addressing allegations of sexual misconduct, Drake officials employ a “victim-centered approach” rooted in “bad science,” in which they “rationalize away” behavior “plainly inconsistent with a sexual assault having occurred.” *Rossley*, 342 F. Supp. 3d at 927 (citing Rossley’s brief in opposition to summary judgment). Although Drake itself does not use the term “victim-centered,” Rossley infers its existence from the literature Drake provides on resources for sexual assault survivors, as well as from the Policy’s information on prevention and awareness of assault. As the district court observed, however, the language in the Policy is gender-neutral and Sirna and McKinney used gender-neutral language in describing why victims may engage in counterintuitive behavior following a sexual assault. Whatever descriptive phraseology one might use to characterize Drake’s approach in dealing with sexual misconduct cases, we do not believe that it can fairly be found to be inherently gender-biased. See *Sahm v. Miami Univ.*, 110 F. Supp. 3d 774, 778 (S.D. Ohio 2015) (“Demonstrating that a university official is biased in favor of the alleged victims of sexual assault claims, and against the alleged perpetrators, is not the equivalent of demonstrating bias against male students.”); *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 579 (E.D. Va. 1996) (explaining that certain allegations “at

best reflect bias against people accused of sexual harassment and in favor of victims and indicate nothing about gender discrimination").

Rossley asserts that the "norm" of female complainant and male accused at Drake and nationwide show gender bias. Rossley alleges that all fifty-one persons accused of sexual misconduct at Drake during the 2015-16 academic year were male. Although Drake points out that in several of the cases there is no evidence regarding the accused student's gender, we agree with the district court that even assuming that all of the cases involved males, the data does not demonstrate gender bias.

Again, Rossley bases his argument on cases that were being considered at the pleadings stage of the proceedings. In *Doe v. Miami University*, the Sixth Circuit held that it was plausible to infer gender bias from the evidence that every male student accused of sexual misconduct had been found responsible for the alleged sexual misconduct, from the fact that ninety percent of the students found responsible for such conduct between 2011 and 2014 had male names, and from an attorney's affidavit that the university pursued investigations involving only male students. 882 F.3d at 593-94. The Sixth Circuit also expressed its cautiousness, however, observing that "[d]iscovery may reveal that the alleged patterns of gender-based decision-making do not, in fact, exist. That information, however, is currently controlled by the defendants." *Id.* at 594. Drake has produced its evidence, however, and the statistical account does not on its

own, nor in conjunction with Drake’s “victim-centered” approach and the hereinafter discussed “Dear Colleague” letter, demonstrate a pattern of preordained gender-based decision-making. We concur in the First Circuit’s assessment in *Doe v. Trustees of Boston College* that “[i]t is unreasonable to draw such an inference from this information rather than recognize that other non-biased reasons may support the gender makeup of the sexual misconduct cases at [the university].” 892 F.3d at 92. We also concur in that court’s observation that the statistical “data fail to address an array of alternative explanations” for the disparity between the number of males and females charged with sexual assault. *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 75 (1st Cir. 2019); *see also Doe v. Univ. of Denver*, 952 F.3d at 1193-94.

We turn, then, to the then-governing “Dear Colleague” Letter, which provided guidance on how universities may comply with Title IX’s requirements pertaining to sexual harassment and violence. Department of Education, Dear Colleague Letter (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> p. 1. It cited a statistic that one in five women are victims of sexual assault or attempted sexual assault while in college, together with a statistic that 6.1 percent of males were also “victims of completed or attempted sexual assault during college.” *Id.* at 2. It then discussed the relevant enforcement mechanisms in gender-neutral terms, referring to “students,” “harassers,” “victims,” and characterizing complainants as male or female (“his or her” com-

plaint, name, etc.). *Id.* at 4. The letter explicitly stated that Title IX “prohibits gender-based harassment, which may include . . . hostility based on sex or sex-stereotyping.” *Id.* at 3 n.9.⁴

The letter, aptly characterized as the “now-famous ‘Dear Colleague’ letter . . . ‘ushered in a more rigorous approach to campus sexual misconduct allegations’ by defining ‘“sexual harassment” more broadly than in comparable contexts’ and requiring that ‘schools prioritize the investigation and resolution of harassment claims’ and adopt a lower burden of proof when adjudicating claims of sexual misconduct.” *Menaker*, 935 F.3d at 26 (quoting *Doe v. Purdue Univ.*, 928 F.3d at 668); *see also*, e.g., *Doe v. Univ. of the Scis.*, 961 F.3d at 213-14 (discussing potentially ruinous loss of federal funds that might result from noncompliance with the letter’s requirements); *Doe v. Univ. of Denver*, 952 F.3d at 1192 (“[A]s other plaintiffs have in recent years, Plaintiff sets the stage for his Title IX claim by shining a spotlight on the 2011 Dear Colleague Letter. . . .”).

Rossley argues that a reasonable juror could conclude that the letter coerced Drake into pursuing punitive, one-sided investigations of male respondents in sexual misconduct disciplinary cases. He argues that the letter’s false statement that one in five women on campus are victims of sexual assault led to the establishment of tribunals and proce-

⁴ The Department’s current stance regarding the “Dear Colleague Letter” is set forth in *Doe v. University of Arkansas-Fayetteville*, 974 F.3d at 868 n.1.

dures specifically geared to the prosecution of cases of sexual assaults against women. Whatever the validity of Rossley's allegation that the letter's statistics are inaccurate, his argument ignores the letter's data that both men and women have been victims of campus sexual assault, as well as the letter's use of gender-neutral language. We thus do not accept Rossley's argument that, influenced by the "Dear Colleague" letter's *in terrorem* effect, Drake "did not attend to what is required for fairness to male respondents." Appellant's Brief 53. We instead affirm the district court's grant of summary judgment on Rossley's Title IX claim. In so holding, we note that the pressure that was being put on Drake to investigate and adjudicate IX complaints by females against males does not appear to have approached that described in *Doe v. University of Arkansas-Fayetteville*, 974 F.3d at 865, nor was it combined with the clearly irregular investigative and adjudicative processes that were found to support a *prima facie* claim of sex discrimination in *Doe v. Columbia University*, 831 F.3d at 56-57, and in *Menaker*, 935 F.3d at 34-37.

Rossley argues that the district court erred granting summary judgment on his claim that Drake failed to accommodate his ADHD, dyslexia, and word-retrieval issues during the investigation, disciplinary hearing, and appeals hearing. Title III of the ADA "prohibit[s] public accommodations from discriminating against individuals because of their disabilities." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 681-82, 121 S.Ct. 1879, 149 L.Ed.2d 904 (2001); *see also* 42 U.S.C. § 12182(a).

[I]n the higher education context, a person alleging a failure to accommodate under Title III . . . must show (1) that the plaintiff is disabled and otherwise qualified academically, (2) that the defendant is a private entity that owns, leases or operates a place of public accommodation . . . , and (3) “that the defendant failed to make reasonable modifications that would accommodate the plaintiff’s disability without fundamentally altering the nature of the public accommodation.”

Mershon v. St. Louis Univ., 442 F.3d 1069, 1076 (8th Cir. 2006) (quoting *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1027 (8th Cir. 1999)). Drake does not dispute that Rossley can establish the first two elements of a Title III claim. *Rossley*, 342 F. Supp. 3d at 936. On the third element, the plaintiff “bears the initial burden of demonstrating that he requested reasonable accommodations.” *Mershon*, 442 F.3d at 1077. Additionally, the plaintiff must “explain how each requested accommodation was necessary to enable him to participate in light of his disabilities.” *Id.* Drake argues that Rossley failed to produce evidence that he—or anyone on his behalf—adequately requested an accommodation for his disabilities during the disciplinary process.

To accommodate Rossley’s dyslexia, ADHD, and word-retrieval difficulties, Drake had previously provided him “time and a half” for exams, as well as other accommodations “var[ying] from class to class” based on his discussions with professors.

Rossley alleges that he had made Sirna, McKinney, Foxhoven, and Parker aware of his disabilities. Rossley concedes, however, that neither he nor his representative explicitly requested that he be provided accommodations during the disciplinary process. He instead alleges that legally sufficient requests were made (1) constructively, because Drake was aware of his academic accommodations, which he mentioned during the hearing, and (2) in-fact, when his father asked a university official to accommodate those disabilities.

Rossley relies on *Nathanson v. Medical College of n Pennsylvania*, 926 F.2d 1368, 1382-83 (3d Cir. 1991), and *Redding v. Nova Southeastern University, Inc.*, 165 F. Supp. 3d 1274, 1293-94 (S.D. Fla. 2016), in support of his constructive-notice argument. In *Nathanson*, the court determined that plaintiff had shown that she had requested a specific kind of chair to accommodate her disability. 926 F.2d at 1382. In *Redding*, the plaintiff made a specific, albeit informal request for accommodation. 165 F. Supp. 3d at 1296. Here, however, Rossley made no specific request, formal or informal, for an accommodation.

Rossley argues that *Mershon v. St. Louis University* does not foreclose his constructive notice argument. *Mershon* nonetheless requires a plaintiff to connect a request to the stated disability by explaining “how each requested accommodation was necessary to enable him to participate in light of his disabilities.” 442 F.3d at 1077. Rossley’s requests for extra time during the disciplinary hearing “were consistently raised as an issue of

procedural fairness.” *Rossley*, 342 F. Supp. 3d at 937. Rossley’s demand that he “deserved time and a half for anything and everything” or “double anything” did not “explain how each requested accommodation was necessary to enable him to participate in light of his disabilities.” *Mershon*, 442 F.3d at 1077. Rossley thus failed to connect his demands to his disability, nor did he allege that he could not participate effectively in the disciplinary proceedings without those accommodations.

Rossley argues that his father requested reasonable accommodations during his December 2015 phone call with Dean Parker. Putting aside the question whether third-party requests are cognizable, Rossley’s father did not request any specific accommodation and did not explain how an accommodation would enable Rossley to better participate in the hearings. We therefore affirm the district court’s ruling that no genuine issue of material fact existed regarding Rossley’s need for accommodations.

We have considered Rossley’s argument that the district court erred in granting summary judgment on his breach of implied duty of good faith and promissory estoppel claims and conclude that it did not err in ruling as it did.

We affirm the district court’s grant of summary judgment in favor of Drake and remand with instructions to dismiss with prejudice the claims that had previously been dismissed without prejudice by stipulation.

30a

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT IOWA, CENTRAL DIVISION.

No. 4:16-cv-00623-RGE

Signed October 12, 2018

Thomas ROSSLEY, Jr.,
Plaintiff,
v.

DRAKE UNIVERSITY and
DRAKE UNIVERSITY Board of Trustees,
Defendants.

David Harris Goldman, Phillip F. Van Liew,
Babich Goldman, P.C., Des Moines, IA, Andrew T.
Miltenberg, Diana R. Warshow, Pro Hac Vice,
Philip Arwood Byler, Pro Hac Vice, Nesenoff &
Miltenberg, LLP, New York, NY, for Plaintiff.

Frances M. Haas, Nyemaster Goode PC, Cedar
Rapids, IA, Frank B. Harty, Mary E. Funk, Nye-
master Goode PC, Des Moines, IA, for Defendants.

**ORDER RE: DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

Rebecca Goodgame Ebinger, United States District
Judge

I. INTRODUCTION

Plaintiff Thomas Rossley, Jr. brings this suit against Defendants Drake University and Drake University Board of Trustees, challenging Defendants' Title IX investigation that concluded Plaintiff sexually assaulted a female student, and contesting Defendants' failure to investigate his own sexual assault allegations. Plaintiff asserts Defendants violated both Title IX of the Education Amendments Act of 1972 and the Americans with Disabilities Act (ADA). Plaintiff also brings state law claims alleging breach of contract, breach of the covenant of good faith and fair dealing, and estoppel.

Defendants move for summary judgment on all of Plaintiff's claims, asserting: 1) Plaintiff has not identified any genuine issues of material fact showing gender was a motivating factor in the disciplinary process; 2) Plaintiff did not request a reasonable accommodation and thus cannot bring an ADA claim; and 3) Plaintiff has not shown Drake violated any promise or contractual provisions contained in its Code of Conduct or Sexual Misconduct Policy. The Court grants Defendants' motion for summary judgment as to Plaintiff's Title IX claim regarding Plaintiff's erroneous outcome

and deliberate indifference theories, but denies Defendants' motion for summary judgment on Plaintiff's Title IX claim regarding Plaintiff's selective enforcement theory. The Court grants Defendants' motion for summary judgment as to Plaintiff's Americans with Disabilities Act claim. As for Plaintiff's state law claims, the Court first determines Plaintiff's estoppel and breach of covenant of good faith and fair dealing claims are subsumed by his breach of contract claim. The Court denies Defendants' motion for summary judgment on some but not all of Plaintiff's alleged breaches of contract. The Court also dismisses Plaintiff's claim of negligent infliction of emotional distress because Plaintiff does not resist Defendants' motion for summary judgment on this claim.

II. FACTUAL & PROCEDURAL BACKGROUND

The following facts are either uncontested or, if contested, viewed in the light most favorable to Plaintiff. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Munz v. Michael*, 28 F.3d 795, 796 (8th Cir. 1994).

A. Drake's Code of Conduct & Sexual Misconduct Policy

Two documents govern sexual assault investigations and discipline at Drake: the Code of Student Conduct ("the Code") and the Sexual and Interpersonal Misconduct Policy and Notification of Com-

plainant's Rights ("the Policy"). Defs.' Suppl. App. Supp. Defs.' Mot. Summ. J. at APP. 099–132, 133–51, ECF No. 137. The Code addresses various forms of academic and non-academic misconduct. *Id.* at APP. 102–03. The Policy specifically addresses Drake's "policies and procedures related to [s]exual and [i]nterpersonal [m]isconduct" and is meant to ensure those policies are "interpreted and applied consistently with Title . . . IX . . . and other applicable law." *Id.* at APP. 133. Additionally, the Policy is "intended to notify victims/survivors of their rights and resources that are available to them when [s]exual or [i]nterpersonal [m]isconduct occurs." *Id.*

"Sexual assault" is defined in the Code and Policy as "an extreme form of sexual misconduct ranging from forcible rape to nonphysical forms of pressure that compel individuals to engage in sexual activity against their will." *Id.* at APP. 111, 134. "The term 'consent,' in the context of sexual activity, means by clear, unambiguous action, agreeing, giving permission or saying yes to sexual activity with someone else . . . an individual cannot give consent if incapacitated from doing so due to the influence of drugs, alcohol, or other condition." *Id.* at APP. 105; *see also id.* at APP. 134. Neither the Code nor the Policy defines "incapacitation." When there is no consent, "[s]exual intercourse (vaginal, anal, oral)" and "[o]ral sex," among other conduct, constitute sexual assault. *Id.* at APP. 111–12, 134. Additionally, "[e]ngaging in sexual activity with a person who is unable to provide consent due to the influence of drugs, alcohol, or other condition" is consid-

ered sexual assault. *Id.* The Code states Drake students “acknowledge[] the right of the University to initiate disciplinary procedures when an allegation or a complaint of non-academic misconduct is made and to impose disciplinary sanctions when it has been determined that non-academic misconduct has occurred.” *Id.* at APP. 103. Such discipline may include expulsion from the University. *Id.*

In cases of alleged non-academic misconduct, “[a]ny student, student organization, faculty member or staff member may initiate a complaint against a student or student organization . . . by contacting the Dean of Students office or Title IX Coordinator in the case of alleged sexual misconduct.” *Id.* at APP. 116. “Alternatively, the Dean of Students office may initiate a complaint on his or her own initiative, in which case the Dean/designee will be considered the complainant.” *Id.* Under the Policy, “[a]ny University employee who is not statutorily prohibited from doing so . . . who becomes aware of [s]exual or [i]nterpersonal [m]isconduct should bring the information to the Title IX Coordinator/Equity and Inclusion Policy Specialist, Dean of Students, or the Director of Human Resources.” *Id.* at APP. 138.

Following a report of alleged sexual misconduct, the Dean of Students will conduct an investigation into the complaint. *Id.* at APP. 116–17.¹ The indi-

¹ The Policy governs conduct of students, employees, and certain third parties. ECF No. 137 at APP. 134. If the Policy is invoked in a complaint against a student, the Policy instructs that the procedures outlined in the Code govern the investigation and adjudication process. *Id.* at APP. 138.

viduals responsible for coordinating and investigating the complaint “receive special training or have experience in (1) handling complaints of sexual and/or interpersonal misconduct; and (2) applicable confidentiality requirements.” *Id.* at APP. 131. Both the complainant and respondent are advised they may have a personal advisor present “at any stage of the process.” *Id.* at APP. 138. Following the investigation, the Dean of Students or his designee may initiate formal disciplinary proceedings if he has a “reasonable belief that the charge . . . can be proven by a preponderance of the evidence.” *Id.* at APP. 117; *see also id.* at APP. 119–20 (setting forth disciplinary hearing process). “A preponderance of the evidence exists when it is more likely than not, or the greater weight of the evidence suggests, a violation occurred.” *Id.* at APP. 106.

At the disciplinary hearing, a hearing officer must determine “(1) whether a preponderance of the evidence establishes the accused student engaged in non-academic misconduct; and (2) recommended disciplinary sanction(s), if any.” *Id.* at APP. 121. All of the University’s evidence against the accused will be presented by the Dean of Students or his designee. *Id.* Each party’s personal representative may only provide counsel and advice and is otherwise prohibited from “advocat[ing] or tak[ing] an active role in the hearing.” *Id.* at APP. 121–22. However, a personal representative who is an attorney “may make an opening statement, a closing statement and may present written questions to be read by the hearing officer to a witness.” *Id.* at APP. 122. The hearing officer is not required

to read any written questions he determines “to be inappropriate or irrelevant.” *Id.*

During the hearing, “[t]he accused, the complainant and the Dean/designee may call witnesses, conduct cross-examination, and may answer any evidence presented by others through rebuttal.” *Id.* Following the hearing, the hearing officer will provide a written decision to the complainant, respondent, and Dean of Students detailing the hearing officer’s decision and any associated sanctions. *Id.* at APP. 123.

If a respondent is found to be responsible for sexual misconduct, the respondent, complainant, or the Dean of Students may appeal the decision or sanctions in writing. *Id.* Following notice of an appeal, the parties can submit a written response. *Id.* at APP. 123–24. A party may request a hearing before the appeals council. *Id.* at APP. 125. The appeals council will then “meet with the appealing and responding parties (and their personal representatives, if any).” *Id.* at APP. 124–25. “[A]n appeal is limited to a review of the record from the disciplinary hearing, the notice(s) of appeal and the response(s).” *Id.* at APP. 124. After reviewing the applicable materials, the appeals council may dismiss the appeal, affirm the hearing officer’s determination, or reverse the previous decision. *Id.* at APP. 125. If the President concurs with the council’s findings, “the Dean/designee shall have the authority to impose the sanction of expulsion.” *Id.* at APP. 126. “Only the President of the University may recommend readmission of a student who has been expelled.” *Id.*

B. Factual Background

Plaintiff is a former student of Defendant Drake University, a private university located in Des Moines, Iowa. Am. Compl. ¶¶ 5–6, ECF No. 46; Pl.’s Resp. Defs.’ Statement Undisputed Material Facts ¶¶ 1–2, ECF No. 111-2. Defendant Drake University Board of Trustees is Drake’s governing body. ECF No. 46 ¶ 7; ECF No. 111-2 ¶ 2.

In the fall of 2015, Jerry Parker was the acting Dean of Students. ECF No. 111-2 ¶ 3; Defs.’ App. Supp. Defs.’ Mot. Summ. J. at APP. 041, Parker Dep. 14:1–22, ECF No. 103. In the spring of 2016, Parker was the Associate Dean of Students, acting as the Dean’s designee for the disciplinary proceeding against Plaintiff. *Id.* In these positions, Parker was responsible for enforcing Drake’s Code of Conduct. ECF No. 111-2 ¶ 3; Parker Dep. 164:8–10, ECF No. 103 at APP. 049. Kathryn Overberg was Drake’s Title IX Coordinator and her duties included overseeing Defendants’ response to complaints of sexual misconduct. ECF No. 111-2 ¶ 4; *see* Overberg Dep. 16:21–17:2, ECF No. 103 at APP. 025. Overberg began working in her position shortly after the female student known to the Court as Jane Doe filed her complaint of sexual misconduct against Plaintiff. *See* Parker Dep. 40:22–41:1, ECF No. 103 at APP. 042.

1. Plaintiff’s Disabilities

Plaintiff suffers from a mild form of dyslexia, ADHD, and word-retrieval issues. Defs.’ Resp. Pl.’s Statement Material Facts ¶ 1, ECF No. 133; *see*

Pl.'s Dep. 129:1–9, 172:20–173:4, ECF No. 103 at APP. 009, APP. 014–15; Pl.'s Sealed App. Supp. Pl.'s Resp. Defs.' Mot. Summ. J. at APP. 775–76, Hr'g Tr. 218:17–219:12, ECF No. 118-8. Due to his disabilities, Plaintiff regularly requested and received academic accommodations through Drake's Disability Services. *See* Pl.'s Dep. 169:16–170:24, ECF No. 103 at APP. 014; Defs.' Br. Supp. Mot. Summ. J. 27–28, ECF No. 104. Although Plaintiff was generally awarded "time and a half" for exams, the accommodations he requested and utilized "varie[d] class to class." Pl.'s Dep. 170:6–14, ECF No. 103 at APP. 014. In order to secure accommodations, Plaintiff met with each professor individually to determine what accommodations were necessary. Pl.'s Dep. 169:23–170:5, ECF No. 103 at APP. 014. Due to his word-retrieval disability, Plaintiff was often permitted to refer to written notes during oral presentations rather than doing the presentations by memory. Pl.'s Dep. 171:2–15, ECF No. 103 at APP. 014.

1. The Report & Investigation

On the morning of October 9, 2015, Jane Doe, a female Drake student, contacted Drake Public Safety reporting she had been sexually assaulted by Plaintiff. *See* App. Supp. Defs.' Mot. Summ. J. at APP. 155, ECF No. 103-1 (noting in Drake University Public Safety Report "Incident Discovered/Called In" at 10:21 a.m. on October 9, 2015). Jane Doe explained the previous night she had consumed a large amount of alcohol and had accompa-

nied Plaintiff, who she considered a friend, to his fraternity house, Theta Chi. *Id.* at APP. 172. Jane Doe stated she “blacked out for an unknown amount of time” after they arrived. *Id.* She explained that, the next thing she remembered was that she was on a bean bag chair and Plaintiff was on top of her having sexual intercourse with her. *Id.* Jane Doe reported Plaintiff was wearing a condom. *Id.* Jane Doe stated she told Plaintiff to stop but he refused. *Id.* When she explained she was going to be sick, he stopped and let her go to the bathroom. *Id.* Jane Doe reported she did not get sick at that time but instead left Theta Chi and went to a friend’s house in the area. *Id.* Jane Doe did not file a report with the police but, per the Policy, Drake University Public Safety filed a case report with the Dean of Students. *See id.* at APP. 155; ECF No. 137 at APP. 138 (“Reports to Campus Public Safety . . . will automatically be referred to . . . the Dean of Students . . . , who will follow up for further processing.”).

The same day Jane Doe filed her report with Drake University Public Safety, the Dean of Students’ Office sent Plaintiff an email with a letter informing him about the complaint. ECF No. 103-1 at APP. 152–53. The letter provided Jane Doe’s name and noted the section of the Code of Conduct the complaint was filed under. *Id.* It also explained two “interim provisions” prohibiting Plaintiff from contacting Jane Doe or retaliating against her for filing the complaint. *Id.* at APP. 152. The letter also listed the University Counseling Center as an available service. *Id.* at APP. 153. Finally, Plaintiff

was informed he would need to attend a later-scheduled meeting and that he was permitted “to bring a personal representative to this meeting.” *Id.* at APP. 152.

At the time Jane Doe filed her complaint, Parker was ill and thus could not conduct the investigation himself. Overberg Dep. 65:25–66:6, ECF No. 103 at APP. 027–28; Parker Dep. 39:5–24, ECF No. 103 at APP. 042. Consequently, Drake hired an outside investigator, Mary Howell Sirna, to serve as the lead investigator. Parker Dep. 39:14–24, ECF No. 103 at APP. 042; ECF No. 111-2 ¶041. At the time she was appointed to investigate Jane Doe’s complaint, Sirna was serving as Iowa State University’s interim Title IX coordinator. Sirna Dep. 9:12–10:5, ECF No. 103 at APP. 054–55. Prior to working at Iowa State University, Sirna served as a prosecutor for thirteen years and prosecuted crimes of sexual violence. Sirna Dep. 8:14–23, ECF No. 103 at APP. 054; ECF No. 111-2 ¶42. She had received training on handling student complaints of sexual assault. Sirna Dep. 18:2–21:24, ECF No. 103 at APP. 056. Sirna was paired with Tricia McKinney, Drake’s Assistant Director of Public Safety, to conduct the investigation. McKinney had also received training on how to handle sexual assault complaints. *See* McKinney Dep. 14:16–15:16, ECF No. 103 at APP. 097.

According to the investigative report Sirna and McKinney produced, on October 14, 2015, Parker met with Plaintiff to discuss Jane Doe’s complaint and the investigative process. ECF No. 103-1 at APP. 185. Parker discussed “internal and external

resources” available to Plaintiff, Jane Doe’s ability to bring criminal charges, and Plaintiff’s right to “have a personal representative of his choosing to attend any and all meetings throughout the disciplinary process.” *Id.* Parker also met with Jane Doe that day and discussed the same topics. *Id.*

On October 23, 2015, Sirna and McKinney interviewed Jane Doe. *Id.* at APP. 188. Jane Doe explained that, although she and Plaintiff had never interacted one-on-one, they had mutual friends and had each other’s cell phone numbers. *Id.* Jane Doe stated she believed Plaintiff was attracted to her and that he often texted Jane Doe to invite her to hang out with him or visit him at Theta Chi, which Jane Doe described as “annoying.” *Id.* at APP. 188–89. Jane Doe explained that on the night of October 8, 2015, she had attended a party at the Pi Kappa Phi fraternity house from approximately 9:30 p.m. to midnight. *Id.* at APP. 189. She attended the party with her friend, Student M, and consumed alcohol. *Id.*; *see also* Sealed Joint Suppl. App., ECF No. 134 (providing a reference key for the names of students and witnesses).² Although Jane Doe could not remember the exact number of drinks she had consumed, “[s]he described herself as getting tired and noticing she was stumbling.” ECF No. 103-1 at APP. 189. Following the house party, Jane Doe went to Peggy’s Tavern, a nearby bar, with Witness C, Student O,

² The Court uses this key throughout this Order and, when necessary, replaces the names of witnesses and students with their identifying letters. *See* ECF No. 134.

and Witness E. *Id.* When interviewed by Sirna and McKinney, the students with Jane Doe at Peggy's Tavern reported that she was noticeably drunk. *Id.* at APP. 201, 204. Jane Doe stated she only had "flashes of memories" at Peggy's Tavern and believed she had only one rum and Coke drink while there. *Id.* at APP 189. Witness F worked as a bartender at Peggy's Tavern that night and informed the investigators that she had refused to serve Jane Doe because of Jane Doe's level of intoxication. *Id.* at APP. 205–06.

After Peggy's Tavern, Jane Doe went to Drake Bakery Café and Bar, a nearby restaurant, where she first interacted with Plaintiff. *Id.* at APP. 189. Although she described herself as "pretty drunk," she told investigators she believed Plaintiff was sober because he offered to drive her home. *Id.* Witness C told investigators he observed Plaintiff with his arm around Jane Doe and that they were "talking close." *Id.* at APP. 201. Witness C stated Jane Doe was "by far in worse shape" than Plaintiff and recalled seeing Jane Doe holding onto Plaintiff while she stumbled. *Id.* at APP. 201. Witness C described Plaintiff as walking straight. *Id.* Witness A, a bartender at Drake Bakery, told investigators he believed both Plaintiff and Jane Doe were drinking but could not recall any signs that they were impaired. *Id.* at APP. 197. Witness A stated Plaintiff and Jane Doe appeared "flirty and were laughing and touching but not groping." *Id.* at APP. 198.

Jane Doe stated she then recalled getting into the backseat of a car and telling Plaintiff to take her home because she was drunk. *Id.* at APP. 189.

Witness B later told investigators that he was responsible for driving the “sober cab” on the night of October 8, 2015, to transport intoxicated fraternity brothers home. *Id.* at APP. 198. Witness B stated that after receiving a call from Plaintiff at approximately 1:15 a.m., Witness B picked up Jane Doe and Plaintiff. *Id.* Witness B explained that when he asked where they wanted to go, Jane Doe stated she wanted to go to Theta Chi. *Id.* at APP. 198–99. Jane Doe told investigators she recalled Plaintiff attempting to kiss her and that she told him she “did not like [him] like that.” *Id.* at APP. 189. Witness B stated both Jane Doe and Plaintiff appeared drunk and that “[s]he may have been a little more drunk than him.” *Id.* at APP. 199. When asked about Plaintiff’s level of intoxication, Witness B explained, “He was drunk. He was not belligerently hammered. He was not vomiting.” *Id.* When they arrived at Theta Chi, Jane Doe told Plaintiff she felt ill and ran into the Theta Chi house. *Id.* at APP. 189. Witness B stated he “noticed the girl falling” when she exited the car. *Id.* at APP. 199. Another student, Witness L, told investigators she had observed a woman being pulled into Theta Chi that evening and that “the guy was pulling her into the house” while the “girl was stumbling over herself.” *Id.* at APP. 219. Witness L stated Plaintiff was walking straight, “seemed sober,” and was pulling the woman “a distance behind him.” *Id.*

Jane Doe told investigators she recalled vomiting in the second floor bathroom after she entered Theta Chi. *Id.* at APP 189. After realizing she did

not have her purse, she left the bathroom to look for Plaintiff, at which point “everything [went] black.” *Id.* at APP. 190. Meanwhile, at Pi Kappa Phi, where Jane Doe began her evening, Witness E, a student who met Jane Doe at Pi Kappa Phi earlier that night, told investigators Witness C approached her and stated he had “lost” Jane Doe and that she had left “with some random guy from Theta Chi.” *Id.* at APP. 204. Witness E, Witness C, and Student O then went to Theta Chi, where they were informed that a drunk woman was upstairs vomiting. *Id.* Witness E stated she entered the bathroom stall to check on Jane Doe. *Id.* at APP. 204–05. According to Witness E, Jane Doe was visibly impaired but still able to converse. *Id.* at APP. 205. When Witness E asked Jane Doe whether she needed assistance, Jane Doe stated Plaintiff would take her home. *Id.* Witness E then told Plaintiff, who had entered the bathroom, that he should take Jane Doe home when she was feeling better. *Id.* According to Witness E, Plaintiff was packing a bowl of marijuana, “was responsive to questions and didn’t seem that drunk or messed up.” *Id.* Witness C told investigators that when Witness E and Student O came back downstairs, they stated Jane Doe was “pretty drunk” and that Plaintiff had agreed to take her home. *Id.* at APP. 202. Witness E, Witness C, and Student O then left Theta Chi and returned to Pi Kappa Phi. *Id.* According to Witness C, on the way back to Pi Kappa Phi, Witness E told him “I don’t know of anyone who’s a monster enough to have sex with someone . . . like that.” *Id.*

Jane Doe told investigators after she had vomited in the bathroom, she was “fairly certain [she] passed out” due to alcohol consumption. *Id.* at APP. 190. Jane Doe explained she then woke up to Plaintiff “on top of [her] and assaulting [her]” in his room. *Id.* She stated half of her body was on a beanbag chair and half was on the floor. *Id.* Jane Doe reported her pants were unbuttoned and pulled down and that she was still wearing her underwear but it had been “pushed to the side.” *Id.* Jane Doe told investigators she told Plaintiff to stop, at which point Plaintiff stated, “Fine. I’ve got whiskey dick anyway.” *Id.*³ Jane Doe told Plaintiff she needed to leave because she was going to be sick. *Id.*

Jane Doe explained that after exiting Plaintiff’s room and entering the bathroom, Jane Doe texted Witness I asking if she could sleep on his couch. *Id.* When Jane Doe did not receive a response from Witness I, Jane Doe walked to Witness I’s house, which was close to Theta Chi. *Id.* at APP. 191. When Jane Doe entered Witness I’s house, she woke up Student P by jumping on him. *Id.* Student P told Jane Doe she was “drunk” and asked her to get out of his room. *Id.* Jane Doe explained she then went to Witness I’s room, where she got into bed with him, removed her shirt, and began kissing him. *Id.* She did not tell Witness I what had happened with Plaintiff. *Id.* When interviewed, Wit-

³ The Court understands “whiskey dick” to be slang for an individual’s inability to maintain an erection due to alcohol consumption. See ECF No. 46 ¶90; ECF No. 103-1 at APP 190.

ness I told investigators Jane Doe appeared intoxicated, but not “overly intoxicated” and that there was nothing unusual about her appearance. *Id.* at APP. 211. Witness I explained they talked for about two or three hours and Jane Doe only said she felt “weird around [Plaintiff]” and that “[Plaintiff] was being weird.” *Id.* at APP. 211–12. At approximately 6:45–7:00 a.m. that morning, Jane Doe performed oral sex on Witness I and then left. Pl.’s Sealed App. Supp. Pl.’s Resp. Defs.’ Mot. Summ. J. at APP. 493, ECF No. 118-5.⁴ At 3:59 a.m., Plaintiff texted Jane Doe and asked “Make it back?”, to which Jane Doe responded, “Yeah I’m good thx babe.” ECF No. 126-1 at APP. 181.001.

After returning to her apartment, Jane Doe told investigators, she requested Student M, Witness C, and Student Q come to her apartment in order to recreate the events of the previous night. ECF No. 103-1 at APP. 191. After discussing the evening

⁴ Witness I’s statement regarding his sexual encounter with Jane Doe was in the original investigative report Sirna filed with Parker. See Sirna Dep. 147:16–148:8, ECF No. 118-5 at APP. 451; compare ECF No. 118-5 at APP. 493, with Overberg Dep. 128:5–20, ECF No. 103 at APP. 35. Overberg stated a request was made by Jane Doe to redact that information from the original report. Overberg Dep. 129:5–15, ECF No. 103 at APP. 35. Plaintiff had also requested comments about his father and additional “gossip” regarding that night be redacted. Overberg Dep. 99:6–24, 128:25–129:3, ECF No. 103 at APP. 32, 35. Both Plaintiff and Jane Doe’s requests were followed. *Id.* The report that was ultimately submitted to Jerry Foxhoven, the hearing officer, during the disciplinary hearing did not include the redacted information. Parker Dep. 130:5–25, ECF No. 103 at APP. 48.

with them, Jane Doe contacted Drake Public Safety and filed a report against Plaintiff. *Id.* Jane Doe then went to Mercy Hospital, where she received a preliminary exam. *Id.* Jane Doe told investigators she began “freaking out” at Mercy, began doubting herself, and thought: “[w]hat am I doing?”, “[w]hat if I did consent?”, “[w]hat if I’m wrong?”, “[w]hat if I made a mistake?” *Id.* Jane Doe then declined to take a forensic sexual exam. *Id.* When asked about her doubts, Jane Doe reiterated to investigators that she did not recall giving consent to Plaintiff nor did she believe she was capable of giving consent. *Id.* Jane Doe explained she had retained her underwear from the night of the assault and that she had noticed blood stains on her underwear. *Id.* Jane Doe agreed to provide a medical release to the investigators, if necessary. *Id.* Sirna later stated that Jane Doe’s medical record and underwear were not available to her during the investigation. Sirna Dep. 143:11–16, ECF No. 103 at APP. 066.

On October 23, 2015, investigators interviewed Plaintiff. Plaintiff did not bring a personal representative and later stated he had not finished reading the email he was sent regarding Jane Doe’s complaint, which stated he could do so. *See* Pl.’s Dep. 176:23–177:14, ECF No. 103 at APP. 015–16. During the interview, Plaintiff explained he was friends with Jane Doe and they texted each other, but they had not “hung out one-on-one.” ECF No. 103-1 at APP. 192–93. Plaintiff reported on the night of October 8, 2015, he had an assignment due. *Id.* at APP. 192. Due to his ADHD and dyslexia, he took Adderall to focus. *Id.* After he completed

the assignment, Plaintiff explained, he began playing a drinking game with friends, during which he drank approximately six beers within thirty or forty-five minutes. *Id.* He described himself as “pretty drunk.” *Id.* Plaintiff explained when he mixes Adderall and alcohol, he remains sober longer but then the alcohol “hits him” and his blackouts are more severe. *Id.* at APP. 193. However, Plaintiff stated he “still functions during a blackout.” *Id.* Plaintiff told investigators he also experiences a decreased sex drive when he takes Adderall. *Id.*

Plaintiff explained, following the drinking game, he and his friends went to Drake Bakery, where he had additional drinks. *Id.* Witness A, a bartender at Drake Bakery, told investigators he recalled serving Plaintiff multiple drinks. *Id.* at APP. 197. Plaintiff told investigators he remembered Jane Doe entering Drake Bakery and believed he was “more drunk tha[n] she was.” *Id.* at APP. 193. Plaintiff explained Jane Doe acted in a “flirty way” toward him and that when he asked if she wanted to leave, she agreed. *Id.* Plaintiff then called the “sober cab,” which arrived at around 1:12 a.m. *Id.* Plaintiff reported that although he could not remember getting into or out of the car, Witness B told him later that he and Jane Doe were “making out.” *Id.* Plaintiff could not tell investigators who decided to go to Theta Chi. *Id.*

Plaintiff told investigators he recalled going to his room with Jane Doe after arriving at Theta Chi. *Id.* at APP. 194. Plaintiff stated two fraternity members, Witness G and Witness H, were playing

video games in his room. *Id.* Plaintiff explained he then began to black out. *Id.* Witness G confirmed Plaintiff and Jane Doe arrived at Plaintiff's room that evening, but stated he did not see Jane Doe walk or talk at that time. *Id.* at APP. 207. Witness G told investigators Plaintiff appeared pretty drunk and was "tipping a little bit." *Id.* He also stated Plaintiff appeared "zoned out." *Id.* Witness H stated he was playing video games in Plaintiff's room and noted Jane Doe had slurred speech. *Id.* at APP. 209. When asked about Plaintiff's intoxication, Witness H said he did not have an opinion. *Id.*

Plaintiff stated he next recalled Jane Doe performing oral sex on him in his car, which was parked outside the Theta Chi house. *Id.* at APP. 194. He was only aware of this for fifteen to twenty seconds before blacking out again. *Id.* He reported he did not believe he ejaculated "because [he] can't get stimulated" while drinking. *Id.*

Plaintiff's last memory involving Jane Doe was waking up and finding Jane Doe standing on a chair next to Plaintiff's loft bed. *Id.* He stated he had no idea how he had gotten onto his loft bed. *Id.* Plaintiff reported to investigators he was not concerned about Jane Doe's state of intoxication because the chair she was standing on was mesh and therefore difficult to stand on when the person was sober. *Id.* at APP. 179–80. When investigators asked whether anything physical or sexual had occurred in his bed, he stated he only remembered Jane Doe kissing him good night and leaving. *Id.* at APP. 194. Plaintiff told investigators he did not recall having any sexual intercourse with Jane Doe

that night. *Id.* at APP. 195. He did not remember Jane Doe appearing sick at any time during the evening. *Id.* When asked about his own intoxication level, Plaintiff explained: “I was not in a state to be with her” and “I was not able to give consent that night.” *Id.* Plaintiff reported Jane Doe was “not as bad as [he] was.” *Id.* He stated he was “confused about the situation” and said: “I don’t know what happened. I don’t know if we had sex.” *Id.* He also explained because of a back injury, he usually experiences pain after having intercourse, but that on the morning of October 9, 2015, his back was not sore. *Id.* He stated he did not wake up until 12:30 p.m. the afternoon after the alleged assault, and thus missed his shift at work. *Id.* Finally, Plaintiff explained Witness I had told him that, when Jane Doe came into Witness I’s room, she was “bitching because you [Plaintiff] couldn’t cum.” *Id.* at APP. 196. Plaintiff was informed about resources on campus, including the counseling center. *Id.*

The investigators also interviewed Plaintiff’s roommate, Witness J, who was present in his dorm room during the alleged assault. Both Witness G and Witness H described Witness J as being intoxicated the night of October 8, 2015. *See id.* at APP. 207, 209. However, Witness J told investigators he had not consumed any alcohol or marijuana that evening. *Id.* at APP. 212. Witness J explained he initially went to sleep and remembered Plaintiff and a “girl” walking into the room. *Id.* at APP. 213. He then went back to sleep. *Id.* Witness J stated that, approximately 15 minutes later, he heard “them” get down from Plaintiff’s bed, based on the

sound of Plaintiff's ladder. *Id.* Witness J explained he did not hear anything indicative of people having sex. *Id.* Witness J also explained Plaintiff knew he was in the room and never asked him to leave. *Id.* Witness J stated when he left to get some water, he saw Jane Doe in the stall of a bathroom and observed Plaintiff in the bathroom outside the stall. *Id.* at 213. Once he was sure Jane Doe was taken care of, he returned to the room and went to bed. *Id.* The investigators interviewed Witness J a second time because they believed "Witness J was being less than forthcoming." *Id.* at APP 215. Witness J reiterated what he had previously said. *See id.* at APP. 215–16.

The investigators also interviewed Witness K, a member of Theta Chi. *Id.* at APP 217. Witness K explained that, on the morning of October 9, 2015, Student T was making fun of Plaintiff for leaving Drake Bakery with a girl. *Id.* Plaintiff then admitted to "hooking up" with the girl and explained he had "wasted a condom because he couldn't cum." *Id.*

Following his interview with Sirna and McKinney, Plaintiff requested a meeting with Parker and Overberg in November 2015. Overberg Dep. 62:15–24, ECF No. 103 at APP. 027. During that meeting, Plaintiff explained that a friend had told him that since he could not remember part of the evening of October 8, 2015, and because Jane Doe had performed oral sex on him, perhaps he was a victim as well. Overberg Dep. 63:6–12, ECF No. 103 at APP. 027. Overberg stated she was unsure why Plaintiff was telling them this information and wanted to

ensure that whatever information he wanted to share would be included in the investigative report. Overberg Dep. 83:18–84:6, ECF No. 103 at APP. 30. In response to Plaintiff’s comments, Overberg and Parker set up a second interview with the investigators. Overberg Dep. 85:24–87:8, ECF No. 103 at APP. 030–31. Overberg then emailed Sirna and McKinney, explaining they should ask Plaintiff whether he was “sharing this information in response to the allegations against [him], or [is he] asking that a conduct charge be filed against [Jane Doe] for sexual assault?” *Id.* at APP. 308. Overberg directed Sirna and McKinney to get the necessary information from Plaintiff if he was requesting that a charge be filed against Jane Doe. *Id.* Additionally, Overberg explained to Sirna and McKinney that, although it was likely they could perform an investigation into both claims simultaneously, they “would need to be sure the investigation into [Plaintiff’s] charge was complete.” *Id.*

On November 10, 2015, McKinney met with Plaintiff in person while Sirna joined them on the phone. Sirna Dep. 134:16–23, ECF No. 103 at APP. 065; *id.* at APP. 182. Plaintiff explained to the investigators that a female friend of Plaintiff’s had suggested he had been sexually assaulted, since Jane Doe had made fun of Plaintiff for not being able to ejaculate and Plaintiff had no memory of such an issue. *Id.* at APP. 220; *see* Sirna Dep. 134:1–11, ECF No. 103 at APP. 065. Sirna asked whether there was any additional information or witnesses he wanted to provide at that time concerning his statement, and he responded “I don’t think so.” *Id.*

at APP. 182, 220. When asked whether he wanted to file a complaint against Jane Doe, he stated he did not want to file a conduct charge at the time and said: "I'm just verbalizing the issue." Sirna Dep. 135:5–13, ECF No. 103 at APP. 065; *id.* at APP. 182–83. Sirna asked if Plaintiff needed any additional resources, Plaintiff explained he was fine. *Id.* at APP. 183. Plaintiff later stated he had told the investigators he was not that bothered by the investigation because "it took me months to be able to admit that I was a victim." Pl.'s Dep. 181:4–11, ECF No. 103 at APP. 017. Plaintiff's father, Thomas Rossley, Sr., stated in a declaration that during a phone call with Parker, Parker stated the school would not investigate Plaintiff's alleged assault because it was a form of retaliation. Pl.'s Sealed App. Supp. Pl.'s Resp. Defs.' Mot. Summ. J. at APP. 1179–80, Rossley, Sr. Decl. ¶10, ECF No. 118-13. Plaintiff stated his father told him about this meeting and Parker's belief regarding retaliation. Pl.'s Dep. 153:23–154:5, ECF No. 103 at APP. 012.

On December 9, 2015, Sirna submitted the investigative report to Parker. *Id.* at APP. 184. In the course of their investigation, the investigators interviewed twelve witnesses, including Plaintiff and Jane Doe. *Id.* Sirna listed nine other students they had not interviewed and briefly explained why they had not been questioned. *Id.* at APP. 186–87. For instance, Sirna explained Student P, who Jane Doe had jumped on after leaving Theta Chi, had a "limited interaction with [Jane Doe]." *Id.* at APP. 187. Similarly, Student T, who was present during

the conversation between Plaintiff and Witness K in which Plaintiff is reported to have said he wasted a condom, “would [have] provided duplicative statements.” *Id.* at APP. 186. The investigators also did not interview Student N, Jane Doe’s ex-boyfriend, because Jane Doe had asked them not to contact him and he had not been present that evening. *Id.* at APP. 187.

Sirna ultimately determined there was a preponderance of evidence suggesting a sex act had occurred and the act was not consensual, because Jane Doe was either unconscious or incapacitated. *Id.* at APP. 221–22. Sirna based this determination largely on six facts: 1) there were no eye witnesses and Witness J, Plaintiff’s roommate who was reportedly in the room during the alleged assault, had limited credibility because there were inconsistent reports about whether he was drinking that evening; 2) Plaintiff’s claims regarding his lack of memory were “contradicted by [his] own words to Witness K . . . when he . . . stated he ‘wasted a condom because he couldn’t cum’”; 3) although both parties were drinking that evening, multiple witnesses corroborated Jane Doe’s “impairment and eventual incapacitation”; 4) neither Witness I nor Jane Doe stated that Jane Doe had complained that Plaintiff had been unable to “cum”; 5) if Jane Doe had made such a comment, “it was likely she was merely repeating what [Plaintiff] had told her when she regained consciousness during the assault”—namely, that he had “whiskey dick”; and 6) there was little evidence that Plaintiff was incapacitated, as the witnesses indicated either they had not

formed an opinion about his level of intoxication or he wasn't as drunk as Jane Doe. *Id.* at APP. 222–24. In the conclusion section, Sirna noted Jane Doe was largely credible because Jane Doe had made statements to investigators “against her own interest,” including an admission she had doubted herself at Mercy Hospital and had engaged in sexual activity with Witness I following the assault. *Id.* at APP. 225. Sirna’s report mentions Plaintiff thought he might also be a victim during his second interview, but the report does not analyze Plaintiff’s complaint nor does it make any findings about these allegations. *Id.* at APP. 184–225.

2. The Disciplinary Hearing

After reviewing Sirna’s report, Parker determined a disciplinary hearing on the matter was warranted. Parker Dep. 73:8–15, ECF No. 103 at APP. 043. Parker emailed Plaintiff in January 2016 to inform him of this decision and discuss the report. Parker Dep. 95:14–96:4, ECF No. 103 at APP. 45.

Jerry Foxhoven was serving as Drake’s hearing officer at the time. Parker Dep. 102:7–21, ECF No. 103 at APP. 046. Foxhoven had received training regarding sexual misconduct. Foxhoven Dep. 11:18–12:17, ECF No. 103 at APP. 073. Prior to the hearing, Foxhoven issued a notice to all parties (Jane Doe, Parker, and Plaintiff) and their representatives explaining Foxhoven would not admit “any testimony or evidence of the prior sexual conduct or mental health issues of either” Jane Doe or

Plaintiff. ECF No. 137 at APP. 230. Plaintiff's personal representative, Matt Kaiser, filed a motion seeking to admit Witness I's statement that Jane Doe performed oral sex on him, arguing the ban on prior sexual conduct did not apply and that Jane Doe's actions were "highly probative of her state of mind on that night and her capacity to consent mere hours earlier." ECF No. 103-1 at APP. 299. Foxhoven permitted Plaintiff to introduce evidence regarding Jane Doe's subsequent actions with Witness I to show Jane Doe's level of intoxication and thus her ability to consent. ECF No. 137 at APP 231.

Additionally, Foxhoven considered how much time each party (Jane Doe, Parker, and Plaintiff) should have to present their arguments during the hearing. *See* ECF No. 103-1 at APP. 294. Foxhoven first gave each party equal time to make closing and opening arguments. *Id.* After considering Plaintiff's pre-hearing motion, Foxhoven determined both Jane Doe and Parker would each have five minutes for an opening statement and ten minutes for a closing, while Plaintiff was given ten minutes for an opening statement and up to twenty minutes for a closing statement. *Id.* at APP. 234. After Parker argued Title IX requires all parties to be treated equally, however, Foxhoven amended his earlier decision. *Id.* at APP. 227. Under the amended order, Plaintiff and Jane Doe would both have five minutes for opening argument and ten minutes for closing argument. *Id.* Parker was given five minutes for both his closing and opening statements, although his argument was limited to "any

position that is inconsistent with the position of [Jane Doe].” *Id.*

The disciplinary hearing was held on February 12, 2016. ECF No. 103-1 at APP. 236. After Jane Doe’s personal representative gave her opening statement, Parker stated during his opening statement that, based on all the evidence available to the Dean of Students’ Office, the Office “found [Jane Doe]’s account of this incident as being more credible” and thus recommended “the appropriate sanction be expulsion.” Pl.’s Sealed App. Supp. Pl.’s Resp. Defs.’ Mot. Summ. J. at APP. 570–71, ECF No. 118-6. During his opening statement, Plaintiff’s personal representative explained “the two people who were involved were both blackout drunk.” *Id.* at APP. 571. During a later portion of his opening statement, however, Plaintiff’s personal representative argued, based on the timeline of the evening, “[w]e can know that [Jane Doe] was not incapacitated by looking at [the] window of 45 minutes . . . incapacitation doesn’t turn on a dime.” *Id.* at APP. 575–76. Based on Plaintiff’s personal representative’s statement that both Plaintiff and Jane Doe were “blackout drunk” during the events of the evening, Foxhoven amended his previous order regarding the admissibility of Jane Doe’s actions after she left Plaintiff’s room. *See id.* at APP. 596–98. Foxhoven explained because his order permitting the evidence was premised on the issue of whether Jane Doe was incapacitated and Plaintiff’s personal representative’s concession that Jane Doe was “blackout drunk” made her incapacitation no longer a contested issue, Jane Doe’s

subsequent actions were irrelevant. *Id.* at APP. 596, 597. Thus, Plaintiff was not permitted to inquire into Jane Doe's actions with Witness I or Student P after leaving his room.

Along with Jane Doe and Plaintiff, eleven witnesses testified at the disciplinary hearing. *See id.* at APP. 559–61. All parties engaged in cross-examination. *Id.* Per the Code and the Policy, Jane Doe and Plaintiff did not cross-examine each other directly; rather, Foxhoven read questions each party had submitted. *See id.* at APP. 559, 561; ECF No. 137 at APP. 122. Additionally, Plaintiff's personal representative questioned Plaintiff on direct examination. Pl.'s Sealed App. Supp. Pl.'s Resp. Defs.' Mot. Summ. J., ECF No. 118-8 at APP. 771; *see also* ECF No. 137 at APP. 121–22.

During her testimony, Jane Doe reiterated what she had previously told the investigators about the events of October 8 and 9, 2015. *See generally* ECF No. 118-6 at APP. 578–611. However, for the first time, Jane Doe also testified that because she often experiences pain when she has vaginal intercourse, she did not believe she would have consented to having vaginal intercourse with Plaintiff. ECF No. 118-6 at APP. 590. Plaintiff's personal representative did not submit a question about the pain Jane Doe experiences during vaginal intercourse for Foxhoven to ask during Jane Doe's cross examination. *See id.* at APP. 611–22 (transcript showing Foxhoven asked Jane Doe various questions submitted by Plaintiff's personal representative but not about the pain Jane Doe experiences during vaginal intercourse).

Plaintiff called two individuals who had not been interviewed by Sirna: Student S and Student T. *Id.* at APP. 560. No party called Plaintiff's roommate, Witness J, who had been present in Plaintiff's room that evening. *Id.* at APP. 559–61. Additionally, no party called Witness K, who had previously reported to investigators that Plaintiff had told Witness K that Plaintiff had wasted a condom on Jane Doe. *Id.*; *see also* ECF No. 103-1 at APP. 217. However, Plaintiff did call Student T, who was also present during that conversation. ECF No. 118-6 at APP. 560. Student T testified that, although Plaintiff confirmed he had "hooked up" with Jane Doe the previous night, he did not remember Plaintiff ever saying he had "wasted a condom" on Jane Doe. ECF No. 118-8 at APP. 751. Plaintiff's personal representative also did not call Student P, the individual Jane Doe jumped on after leaving Plaintiff's room, although Plaintiff's personal representative argued to Foxhoven that investigators should have interviewed Student P in order to establish a timeline for the evening. *Id.* at APP. 619, 620.

On February 17, 2016, Foxhoven filed his order regarding the case. ECF No. 103-1 at APP. 236–46. Foxhoven determined first "that a preponderance of evidence supports the fact that vaginal intercourse between [Jane Doe] and [Plaintiff] was either attempted or completed on the evening in question. . . . In any event, it is clear that [Plaintiff] touched the genitals of [Jane Doe] on the evening in question." *Id.* at APP. 237. Foxhoven also noted no one else appeared to be present in the room during their interaction and "[n]o sexual

exam of [Jane Doe] was completed, resulting in a lack of definitive evidence of a sexual assault.” *Id.* Instead, Foxhoven based his determination on the fact that although Jane Doe was “not conscious during the assault,” she awoke to Plaintiff “violating” her, “[h]er pants were off,” Plaintiff stated he had “whiskey dick,” and that when Jane Doe left the fraternity house, “walking was painful in a way that indicated to her that she had been subjected to vaginal sex.” *Id.*

Foxhoven also determined “a preponderance of evidence supports the fact that [Jane Doe] did not give her consent to the sexual contact in question,” as she was incapacitated. *Id.* Foxhoven considered the following facts in making his decision: 1) Jane Doe’s testimony that she experiences pain when having vaginal intercourse and thus does not have vaginal intercourse unless she is comfortable and trusts her partner, “[n]one of [which] apply to the relationship between [Jane Doe] and [Plaintiff]”; 2) testimony from Witnesses C, F, A, E, L, H, B, and G as to Jane Doe’s level of intoxication; and 3) the argument of “[Plaintiff] and his counsel . . . that both [Plaintiff] and [Jane Doe] were ‘black out drunk’ on the night in question.” *Id.* at 237–40. Foxhoven also noted although Witness H stated upon initial contact with Jane Doe, he was not aware of anything that would have led him to believe Jane Doe was intoxicated, “he further testified that he believed that the complainant was extremely intoxicated by the fact that she was vomiting.” *Id.* at APP. 240.

Foxhoven next discussed Plaintiff's position that he was also incapacitated in a section entitled "[Plaintiff]'s Argument of Mitigation." *Id.* at APP. 241. As to Plaintiff's argument "that he was basically 'blacked-out' and that, therefore, he should not be held responsible for his conduct," Foxhoven determined Plaintiff's account lacked credibility. *Id.* Rather, Foxhoven concluded although Plaintiff had been drinking that evening, the evidence showed he was "clearly more in control of himself than [Jane Doe]" and was aware of her level of intoxication. *Id.* Foxhoven based this determination on: 1) statements from Witnesses C and L and Student S regarding Plaintiff's level of intoxication at Drake Bakery and when entering the fraternity house; 2) Witness B's statement that, although Plaintiff was intoxicated that evening, Jane Doe was more intoxicated during the sober cab ride; 3) Witness E's testimony regarding Plaintiff's actions and ability to "pack[] a bowl" in the bathroom at Theta Chi while Jane Doe vomited; 4) Witness H's comment that Plaintiff did not seem intoxicated; 5) Witness G's testimony that Plaintiff told him he "had the situation handled" in reference to Jane Doe's vomiting; and 6) Plaintiff's testimony indicating "that he was able to call the 'sober cab'" and had likely punched in the security code to enter the fraternity house, although he stated he did not remember doing so. *Id.* at APP. 241–43. Foxhoven's findings did not address Plaintiff's complaint that he did not consent to Jane Doe giving him oral sex in the car before his alleged assault of Jane Doe.

Based on his findings, Foxhoven recommended Plaintiff be expelled. *Id.* at APP. 245. Acknowledging Plaintiff's personal representative's request Plaintiff be permitted to complete his degree, Foxhoven noted, due to Jane Doe's level of intoxication, Plaintiff's knowledge of Jane Doe's intoxication, and the "particularly aggravating factor" that the assault occurred after Jane Doe vomited, Foxhoven recommended expulsion. *Id.* at APP. 244. Plaintiff was informed about his right to appeal. *Id.* at APP. 245.

3. Appeals Panel Decision & Expulsion

On February 29, 2016, Plaintiff's personal representative filed a timely notice of appeal. *Id.* at APP. 248–63. Prior to the appeals hearing, the panel sent all parties a notice explaining the procedure it would follow at the hearing. ECF No. 137 at APP. 266–68. The panel concluded each party would be given twenty minutes to present their argument. *Id.* at APP. 267. All parties were permitted to reserve five minutes for rebuttal. *Id.* The panel also noted "each member of the three person appeals panel has no relationship or connection with either [Plaintiff] or [Jane Doe]." *Id.* at APP. 268.

On March 24, 2016, the hearing was held as scheduled and according to the procedure set forth in the panel's notice. ECF No. 137 at APP. 266–268. After the hearing, the panel affirmed Foxhoven's findings and his recommendation of expulsion. ECF No. 103-1 at APP. 269–70. The panel noted it

had reviewed written responses from the parties regarding Plaintiff's appeal, in addition to "all of the exhibits and documents from the hearing as well as the audio recording of the hearing." *Id.* at APP. 269; *see also* Peters Dep. 37:5–40:18, ECF No. 103-1 at APP. 310. The panel determined Foxhoven's decision was supported by substantial evidence, explaining: 1) witnesses testified as to Plaintiff's and Jane Doe's differing level of intoxication; and 2) Plaintiff corroborated Jane Doe's testimony that Plaintiff had been using a condom during a conversation with his friends the next day. ECF No. 103-1 at APP. 270. The panel affirmed Foxhoven's recommendation of expulsion, noting having sexual intercourse while someone was incapacitated and unable to give consent "is the worst kind of sexual assault." *Id.*

On April 8, 2016, Parker emailed Plaintiff confirming the panel's decision and explaining that the President of the University, Earl Martin, concurred in the decision. ECF No. 103-1 at APP. 271. Consequently, Plaintiff was officially "expelled from Drake University effective immediately." *Id.*

C. Procedural Background

On December 1, 2016, Plaintiff filed suit against Defendants, as well as other individually named defendants. Compl., ECF No. 1. Plaintiff's complaint alleged eight counts, asserting Defendants violated: Title IX of the Education Amendments of 1972 (Count I); the Fourteenth Amendment of the United States Constitution (Count II); and Title II

of the Americans with Disabilities Act (Count VI). He also brought state law claims based on breach of contract (Count III), breach of the covenant of good faith and fair dealing (Count IV), negligent infliction of emotional distress (Count V), and estoppel and reliance (Count VII). Finally, Plaintiff sought declaratory relief (Count VIII). On August 2, 2017, Plaintiff filed an Amended Complaint, in which he brought the same substantive claims but no longer filed under a pseudonym. *Compare* Am. Compl., ECF No. 46, *with* ECF No. 1. On August 11, 2017, the Court dismissed Plaintiff's constitutional claim, Count II, against all Defendants and dismissed all other Counts against the individually named defendants. Order Defs.' Partial Mot. Dismiss 10, ECF No. 48.

On May 17, 2018, Defendants filed the current motion for summary judgment on all counts. ECF No. 99. Plaintiff resists. ECF No. 111; ECF No. 121. Defendants have replied. ECF No. 135. The matter came before the Court for a hearing on July 20, 2018. Hr'g Mins. Defs.' Mot. Summ. J., ECF No. 143. Attorneys Philip Byler and David Goldman represented Plaintiff. *Id.* Attorneys Frances Haas and Mary Funk represented Defendants. *Id.*

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(a), the Court must grant a party's motion for summary judgment if there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v.*

Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (describing material considered in a Rule 56 analysis). Partial summary judgment is also permissible. *See Fed. R. Civ. P. 56(a)* (allowing summary judgment for “the part of each claim or defense”). A material fact is one that “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute of material fact is genuine if “‘a reasonable jury could return a verdict for the nonmoving party’ on the question.” *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005) (quoting *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505). The Court must give the non-moving party all reasonable inferences from the facts presented. *Munz*, 28 F.3d at 798. The Court does not “weigh the evidence or attempt to determine the credibility of the witnesses,” *Kammueler v. Loomis, Fargo & Co.*, 383 F.3d 779, 784 (8th Cir. 2004), and instead must only “determine whether a dispute about a material fact is genuine,” *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1377 (8th Cir. 1996).

To defeat a motion for summary judgment, the non-moving party “may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505 (omission in original); *see also Anda v. Wickes Furniture Co.*, 517 F.3d 526, 531 (8th Cir. 2008) (“In order to establish the existence of a genuine issue of material fact, [a] plaintiff may not merely point to unsupported self-serving allega-

tions’ ” (alteration in original) (quoting *Bass v. SBC Commc’ns, Inc.*, 418 F.3d 870, 873 (8th Cir. 2005), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031, 1058 (8th Cir. 2011))).

IV. DISCUSSION

The Court first considers Plaintiff’s negligent infliction of emotional distress claim (Count V). ECF No. 46 ¶¶ 225–34. Because Plaintiff does not resist Defendants’ motion for summary judgment on this claim, *see* ECF No. 111 ¶ 6, the Court dismisses it. The Court next considers Plaintiff’s claim for declaratory judgment (Count VIII). ECF No. 46 ¶¶ 248–52. The Court finds Count VIII does not state an independent basis for relief, but that the remedy of declaratory judgment may be applied to the other claims if applicable.

The Court then turns to Plaintiff’s Title IX claim (Count I). *Id.* ¶¶ 169–88. The Court grants Defendants’ motion for summary judgment for Count I under Plaintiff’s Title IX erroneous outcome and deliberate indifference theories, but denies Defendants’ motion for summary on Plaintiff’s Title IX claim under his selective enforcement theory. The Court then analyzes Plaintiff’s ADA claim (Count VI), *id.* ¶¶ 235–40, and grants Defendants’ motion summary judgment on that claim. Finally, the Court turns to Plaintiff’s state law contract claims (Counts III, IV, and VII). *Id.* ¶¶ 203–24, 241–47. The Court finds Plaintiff’s estoppel and covenant of good faith and fair dealing claims are subsumed by his breach of contract claim. The Court grants sum-

mary judgment to Defendants on some, but not all, of Plaintiff's breach of contract claims.

A. Negligent Infliction of Emotional Distress (Count V)

Defendants request summary judgment as to Plaintiff's negligent infliction of emotional distress claim. ECF No. 99 ¶¶ 14–16. Plaintiff does not resist Defendants' motion as to this claim. ECF No. 111 ¶ 6 (“Plaintiff states that he will not proceed further with the claim for negligent infliction of emotional distress.”). Consequently, the Court dismisses Count V.

B. Declaratory Judgment (Count VIII)

In Count VIII, Plaintiff asserts an independent count for declaratory judgment. ECF No. 46 ¶¶ 248–52.⁵ Defendants move for summary judgment on Plaintiff's claim, asserting the Declaratory Judgment Act, 28 U.S.C. § 2201, “does not create any new substantive right but rather creates a procedure for adjudicating existing rights.” ECF No. 104 at 40 (quoting *W. Cas. & Sur. Co. v. Herman*, 405 F.2d 121, 124 (8th Cir. 1968)). At the hearing on Defendants' motion, Plaintiff's counsel conceded the declaratory judgment he seeks cannot form the

⁵ Plaintiff also requests a declaration that “Drake's Code is unconstitutional as applied.” ECF No. 46 ¶ 252. Because the Court previously determined Plaintiff may not assert constitutional claims against Defendants, *see* ECF No. 48 at 4–7, the Court need not address Count VIII as it relates to this request.

basis of a separate count. Mot. Summ. J. Hr'g Tr. 22:23–23:2, ECF No. 146. Consequently, to the extent Count VIII asserts an independent claim for relief, the Court grants Defendants' motion.

The Court notes the relief Plaintiff requests in Count VIII references Plaintiff's other substantive claims. *See* ECF No. 46 ¶¶ 248–49 (referencing Plaintiff's previous counts and requesting declaratory judgment based on his assertion that "Drake has committed numerous violations of the Parties' contracts and of federal and state law"). Furthermore, Plaintiff reiterates these requests in his Prayer for Relief. *Id.* at 59–60. Consequently, although Count VIII fails to state an independent claim for relief, both Count VIII and Plaintiff's Prayer for Relief identify some permissible remedies for Plaintiff's other substantive counts. Specifically, all of Plaintiff's requested relief, except a declaration that "Drake's Code is unconstitutional as applied" may, if appropriate, be applied to the applicable counts discussed below.

C. Title IX Claims (Count I)

In Count I, Plaintiff brings a claim under Title IX based on his disciplinary proceeding and resulting expulsion as well as Defendants' failure to investigate Plaintiff's complaint of alleged sexual assault by Jane Doe. *See* ECF No. 46 ¶¶ 180–81, 185.

Title IX claims based on alleged gender discrimination in disciplinary proceedings may be analyzed under the erroneous outcome, deliberate indifference, or selective enforcement theories. *See Roe v.*

St. Louis Univ., 746 F.3d 874, 882 (8th Cir. 2014) (describing deliberate indifference); *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994) (describing erroneous outcome and selective enforcement). For the reasons set forth below, the Court determines Plaintiff has not identified a genuine dispute of material fact as to whether gender bias caused an erroneous outcome in his disciplinary proceeding. Plaintiff also has not identified a genuine dispute of material fact as to whether Defendants were deliberately indifferent toward Plaintiff by failing to investigate his claim that Jane Doe sexually assaulted him. Plaintiff has identified a genuine dispute of material fact as to whether gender affected Defendants' decision to selectively enforce a disciplinary process. The Court thus grants Defendants' motion for summary judgment as to Plaintiff's Title IX claims under the erroneous outcome and deliberate indifference standards but denies Defendants' motion for summary judgment for Plaintiff's Title IX claims under the selective enforcement standard.

1. Erroneous outcome

In order to establish a violation of Title I under the erroneous outcome theory, a plaintiff must show: 1) evidence illustrating an “articulable doubt” as to the accuracy of the outcome of the proceeding; and 2) particular circumstances showing gender bias was a motivating factor in the erroneous outcome. *Doe v. Miami Univ.*, 882 F.3d 579, 592 (6th Cir. 2018); *see Yusuf*, 35 F.3d at 715; *see*

also Doe v. Univ. of St. Thomas, 240 F.Supp.3d 984, 990 (D. Minn. 2017). To show an articulable doubt, a plaintiff may point to “particular evidentiary weaknesses behind the finding of an offense such as a motive to lie on the part of a complainant or witnesses, particularized strengths of the defense, or . . . particular procedural flaws affecting the proof.” *Yusuf*, 35 F.3d at 715. A plaintiff may illustrate gender bias by identifying “statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender.” *Id.*

“As a general rule, Title IX is not an invitation for courts to second-guess disciplinary decisions of colleges or universities.” *Univ. of St. Thomas*, 240 F.Supp.3d at 989. Rather, “Title IX should be construed to give ‘[s]chool administrators . . . the flexibility they require’ to initiate a reasonable disciplinary response.” *Id.* at 990 (alteration and omission in original) (quoting *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648–49, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999)); *see also Haidak v. Univ. of Mass. at Amherst*, 299 F.Supp.3d 242, 269 (D. Mass. 2018) (granting summary judgment to the defendant and holding the university disciplinary panel’s “conclusion was supported by substantial evidence and involved a credibility determination it was in the best position to make”).

In his Response to Defendants’ Motion for Summary Judgment, Plaintiff identifies various procedural and substantive flaws in the investigation, disciplinary hearing, and appeals process he

believes led to an erroneous outcome. ECF No. 46 ¶¶ 101–09, 142–47, 182. Specifically, Plaintiff contends Foxhoven erred by allowing Jane Doe to testify about her medical condition that made it painful for her to engage in vaginal intercourse, information that was not previously disclosed during the investigation, and which Foxhoven then relied on in determining whether Jane Doe had consented to sexual intercourse with Plaintiff. *Id.* ¶¶ 144–45. Plaintiff likewise asserts there was insufficient medical or physical evidence supporting Jane Doe’s claim that sexual intercourse occurred, noting Jane Doe did not get a sexual assault exam and did not provide the underwear she was wearing at the time of the alleged assault as evidence in the investigation. *Id.* ¶¶ 146–48. Plaintiff also contends Foxhoven erred by allowing Parker to present evidence and argument, arguing Parker was not an “independent actor,” as Foxhoven concluded, but instead presented evidence against Plaintiff and sought his expulsion. *Id.* ¶ 152.

As to the appeals process, Plaintiff first contends Defendants refused to allow Plaintiff’s father to present Plaintiff’s appeal. ECF No. 46 ¶ 153. Plaintiff additionally asserts the panel never heard the audio recording of the disciplinary hearing “before rendering their short and vague affirmation of guilty against Plaintiff.” *Id.* ¶ 154. Rather, Plaintiff contends the panel was a “rubber stamp” for Foxhoven’s findings. ECF No. 121 at 24.

To show the alleged erroneous outcome was motivated by gender bias, Plaintiff asserts Defendants’ actions, in general, during the investigation, the

disciplinary hearing, and in making the ultimate decision to expel him reveal gender bias because they were taken against the weight of the evidence. ECF No. 121 at 15–24. Plaintiff also specifically contends the investigators, Foxhoven, Parker, and the appeals panel were all biased by the gender-based “trauma trope,” which allowed them to explain away Jane Doe’s inconsistencies and “counterintuitive” behavior that would otherwise discredit her. *Id.* at 24–25. Plaintiff also argues the “trauma trope” led Parker to testify that he would consider it “slut shaming” to imply Jane Doe’s sexual activity after leaving Plaintiff’s room was inconsistent with having been assaulted earlier. *Id.* at 25.

In addition, Plaintiff contends Drake was “victim centered” against male respondents. *Id.* at 26. To show that being victim-centered means being gender-biased, Plaintiff points to evidence that most claims of sexual misconduct at Drake were brought by a female complainant against a male respondent. *Id.* at 26. Plaintiff also asserts the Policy is gender-biased against respondents, who are “disproportionately” male, because it provides resources to complainants and labels them as “survivors.” ECF No. 46 ¶ 185; ECF No. 121 at 27. Plaintiff further asserts the general purpose of the “female protectionist nature of campus sex tribunals” is a “misconceived political effort to undercut fairness for respondents.” ECF No. 121 at 27. This political pressure, Plaintiff argues, stems from a April 2011 “Dear Colleague Letter” issued by the U.S. Department of Education’s Office of Civil Rights which

called on universities to improve their sexual assault review process or risk losing federal funding. ECF No. 121 at 26–27.

Plaintiff's Title IX claim cannot survive Defendants' motion for summary judgment under an erroneous outcome theory. Plaintiff fails on the second prong of his erroneous outcome claim as a matter of law. Viewing the evidence in the light most favorable to the Plaintiff, no reasonable jury could find the undisputed facts show Defendants' actions were motivated by gender bias. Because Plaintiff fails on the second prong of the erroneous outcome test, the Court need not address the first prong—whether there is articulable doubt as to the accuracy of the proceedings.

First, no reasonable jury could find Defendants' choices regarding the investigative report and the disciplinary hearing were inherently gender-biased because Defendants found a male respondent responsible for sexual assault. Plaintiff asserts Defendants' “[r]eliance on hearsay and crediting the female complainant despite the accumulated evidence reflected a gender biased reaching for a conclusion that objective evidence did not permit.” ECF No. 121 at 16. Plaintiff points to, among other things, Sirna's decisions to interview some witnesses and not others, ECF No. 46 ¶¶ 102–104, Sirna's finding that Plaintiff's roommate's testimony was not credible, *id.* ¶ 101, and Foxhoven's characterization that Plaintiff argued he was intoxicated to avoid responsibility, ECF No. 121 at 22. Plaintiff also cites other evidence he claims is objective, such as his erectile dysfunction and Jane Doe's

decision not to be medically examined after the alleged assault, that he claims call for an opposite conclusion than the one made by Defendants. ECF No. 121 at 16. In sum, Plaintiff argues that Defendants viewed the evidence through a gender-biased lens in a way that disfavored Plaintiff and favored the female complainant.

When ruling on a motion to dismiss under Rule 12(b)(6), some courts have found that an action by a university official during the disciplinary process can raise a plausible inference of gender bias. *Prasad v. Cornell Univ.*, No. 5:15-cv-322, 2016 WL 3212079, at *17 (N.D.N.Y. Feb. 24, 2016). These accepted inferences have been based on specific actions and decisions by university officials responsible for investigating or adjudicating complaints. *See Cornell*, 2016 WL 3212079, at *17 (“Given the totality of the circumstances, including that Jane Doe was treated more favorably than Plaintiff, that the investigators seemingly slanted the Investigative Report against Plaintiff, . . . Plaintiff plausibly establishes a causal connection between gender bias and the outcome of his disciplinary proceeding.”); *Doe v. Washington & Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996, at *10 (W.D. Va. Aug. 5, 2015) (determining it was plausible that gender bias determined the outcome of university disciplinary proceedings where a university official depended on an article that posited “sexual assault occurs whenever a woman has consensual sex with a man and regrets it because she had internal reservations that she did not outwardly express”). However, conclusory allegations of gender bias

based on the procedures of the disciplinary proceedings or decisions about the weight of the evidence are insufficient to defeat a motion for summary judgment under Rule 56. *See Pacheco v. St. Mary's Univ.*, No. 15-cv-1131 (RCL), 2017 WL 2670758, at *15–18 (W.D. Tex. June 20, 2017) (holding that the plaintiff's allegations of evidentiary and procedural shortcomings of the disciplinary process did not amount to evidence of gender-biased decision-making sufficient to defeat defendant's motion for summary judgment); *see also Mallory v. Ohio Univ.*, 76 F. App'x 634, 640 (6th Cir. 2003) (unpublished) (holding plaintiff's allegations of procedural problems in the disciplinary process did not amount to gender bias and granting defendant's motion for summary judgment).

Plaintiff depends on the United States Court of Appeals for the Second Circuit's decision in *Doe v. Columbia University*, 831 F.3d 46 (2d Cir. 2016), to support his general argument about gender bias in the procedure and outcome of the disciplinary process. ECF No. 121 at 25. In *Columbia University*, the Second Circuit reasoned “[w]hen the evidence substantially favors one party's version of a disputed matter, but an evaluator forms a conclusion in favor of the other side (without an apparent reason based in the evidence), it is plausible to infer . . . that the evaluator had been influenced by bias.” 831 F.3d at 57. *Columbia University* is distinguishable from the facts at hand. First, the Second Circuit in *Columbia University* was considering a ruling on a motion to dismiss under Rule 12(b)(6).

Id. at 48. In that procedural context, the plaintiffs only had to show “plausible minimal inference of bias” for their claim to move forward. *Id.* Second, the climate on Columbia’s campus at the time was tense (“there was substantial criticism of the University, both in the student body and in the public media”) and the university official who wrote the report had herself “suffered personal criticism in the student body for her role in prior cases.” *Id.* at 57, 58. Considering those circumstances, the Second Circuit held “[i]t is plausible that [the official] was motivated to refute those criticisms by siding with the accusing female and against the accused male.” *Id.* at 58.

Although Plaintiff argues Defendants here viewed the evidence through the same kind of gender-biased lens as the defendant in *Columbia University*, the different factual context at Columbia as well as the different legal standard applied at this later pleading stage make the comparison inapt. *Columbia University* does not support Plaintiff’s argument that a disciplinary hearing that results in an outcome—which, according to Plaintiff, is in opposition to the objective evidence—automatically reveals gender bias. To the contrary, the Court will not step into the shoes of the university’s decision-makers and evaluate the weight and credibility of the evidence Defendants found demonstrated Plaintiff was responsible for misconduct. *See Univ. of St. Thomas*, 240 F.Supp.3d at 989–90 (citing *Davis*, 526 U.S. at 648–49, 119 S.Ct. 1661).

Second, no reasonable jury could find that Defendants’ application of the concept of trauma in their

decision-making or Defendants' overall victim-centered procedure reveal they were motivated by gender bias. Plaintiff asserts "Sirna's misuse of 'trauma' to rationalize away Jane Doe's behavior plainly inconsistent with a sexual assault having occurred is gender biased bad science." ECF No. 121 at 17. Plaintiff also asserts Parker's testimony that he would consider it "slut-shaming" to imply sexual activity after being assaulted was inconsistent behavior for a victim was a gender-biased comment. ECF No. 121 at 25. Plaintiff retained an expert witness who opined Sirna and other officials justified Jane Doe's "inconsistent behaviors" and memories and thought Jane Doe could reasonably "behave in any way whatsoever post-assault." Pl.'s Sealed App. Supp. Pl.'s Resp. Defs.' Mot. Summ. J. at APP. 1148–49, ECF No. 118-12. Based on Plaintiff's expert's conclusion, Plaintiff asserts that Drake's decision-makers relied on "gender biased junk science." ECF No. 121 at 17–18.

Even if a reasonable jury found Plaintiff's expert's theories⁶ demonstrated the system was slanted toward Jane Doe because of the trauma-based approach, a trauma-based approach does not mean a gender-biased one. Courts have found a victim-centered approach does not raise an inference of gender bias. *See Doe v. Univ. of Colo., Boulder ex rel. Bd. of Regents of Univ. of Colo.*, 255 F.Supp.3d 1064, 1075, 1076, 1079 (D. Colo. 2017) (granting the defendant's motion to dismiss, and acknowledg-

⁶ The Court does not rule on the admissibility of the expert's report.

ing “the possibility of gender-specific stereotypes influencing [an] investigation” when the majority of accusers are women and the accused are men but agreeing with other courts that “if anything, the inference of pro-victim bias is an obvious alternative explanation that overwhelms any potential of gender bias”); *Univ. of St. Thomas*, 240 F.Supp.3d at 991 (citing *Sahm v. Miami Univ.*, 110 F.Supp.3d 774, 778 (S.D. Ohio 2015) (granting the defendant’s motion to dismiss and noting a university official showing bias in favor of alleged victims is not equivalent to demonstrating bias against male students)).

The Court similarly concludes a victim-centered approach does not create an inference of gender bias without evidence of gender bias in its formulation or application. Plaintiff cannot show the trauma-based theories used by Defendants were used because Plaintiff is a man. The statements Plaintiff suggests demonstrate Sirna’s victim-centric approach were gender-neutral. For instance, McKinney stated in her deposition that “people behave differently” after a traumatic event. McKinney Dep. 50:6–51:22, ECF No. 118-3 at APP. 285. When Sirna was asked if she thought Jane Doe’s behavior directly after the traumatic event was relevant to her credibility, Sirna stated: “victims often engage in counterintuitive behavior after a sexual assault. It’s very common for them to want to regain control, and so they go and they have sex that’s consensual with somebody else.” Sirna Dep. 172:9–15, ECF No. 118-5 at APP. 457; *see also* Pl.’s Sealed App. Supp. Pl.’s Resp. Defs.’ Mot. Summ. J. at APP. 430, Sirna

Dep. 64:10–12, ECF No. 118-4 (noting “[v]ictims often engage in counterintuitive behavior.”). Plaintiff argues a system focused on victims, even if stated in gender-neutral terms, is gender-biased because victims are women. ECF No. 121 at 26. Plaintiff asserts “females being both victims and accused” is a “theoretical but non-existent possibility.” *Id.* Plaintiff does not cite any evidence for this proposition.

In addition, Plaintiff argues the Policy is gender-biased because it provides resources for victims and lists ways to prevent sexual assault but does not provide any resources for accused students. *Id.* at 27. But these sections also use gender-neutral language. *See* Pl.’s Sealed App. Supp. Pl.’s Resp. Defs.’ Mot. Summ. J. at APP. 087–117, ECF No. 118-1. Moreover, the Policy itself states it “applies regardless of sexual orientation or gender identity.” ECF No. 118-1 at APP. 099. Plaintiff asserts the gender-neutral language is “a pretext for Drake’s anti-male discrimination.” ECF No. 46 ¶50. Notwithstanding his conclusory allegations discussed here, Plaintiff does not show how victim-centric or trauma-informed language reveals a gender-biased approach.

Here, at the summary judgment stage when Plaintiff has had the opportunity to review discovery to demonstrate gender bias, the Court finds Plaintiff is unable to do so. Without more, a jury could find the statements and decisions by Defendants and the Policy itself reveal a victim-centered, trauma-informed approach, but could not find they reveal a bias toward one gender.

Third, no reasonable jury could find the data about the gender of those accused of sexual misconduct at Drake reveal Defendants operated their nonacademic disciplinary procedure with gender-biased motives. Plaintiff asserts that because all 51 respondents in sexual misconduct disciplinary proceedings at Drake during the 2015–2016 academic year were male, the disciplinary system is infected with gender bias. ECF No. 121 at 26. Defendants point out the tracking chart provided by the Drake University Title IX coordinator indicates that although no respondents for sexual misconduct are labeled as female, there is no information provided about the gender of the respondent in numerous cases. ECF No. 135 at 1 n.1; *see generally* ECF No. 118-13 at APP. 1195–1254. Even when viewing the statistics as Plaintiff presents them, this data is not enough to show gender bias.

Courts have declined to infer a gender-biased motive on the part of university officials from the disparity in gender among those who are accused of sexual assault, noting that schools are not responsible for which students choose to report sexual misconduct. *Doe v. Trs. of Bos. Coll.*, 892 F.3d 67, 92 (1st Cir. 2018) (“It is unreasonable to draw such an inference from this information rather than recognize that other non-biased reasons may support the gender makeup of the sexual misconduct cases.”); *Doe v. Cummins*, 662 F. App’x 437, 454 (6th Cir. 2016) (unpublished) (reasoning there were “more innocent” causes for the gender disparity between male and female respondents in sexual-misconduct cases than gender bias); *Tsuruta v.*

Augustana Univ., No. 4:15-CV-04150-KES, 2015 WL 5838602, at *4 (D.S.D. Oct. 7, 2015) (“The fact that males are more often the subject of disciplinary (or criminal) proceedings stemming from allegations of sexual assault does not suggest that those proceedings are tainted by an improper motive.”).

The Sixth Circuit, on the other hand, has reasoned it is plausible to infer gender bias from data showing all men accused of sexual misconduct during an academic year were found responsible for the alleged violation and data showing nearly ninety percent of students accused of sexual assault over several years had male first names. *Miami Univ.*, 882 F.3d at 593. As with the Second Circuit’s decision in *Columbia University*, discussed above, this reasoning is distinguishable from the procedural setting of this case. *Miami University* was decided on a motion to dismiss under Rule 12(b)(6). *Id.* at 584. In noting the allegations were sufficient to raise an inference of gender bias at the motion to dismiss stage, the Sixth Circuit noted “[d]iscovery may reveal that the alleged patterns of gender-based decision-making do not, in fact, exist.” *Id.* at 594. Here, on a motion for summary judgment under Rule 56, the court finds the Court of Appeals for the First Circuit’s decision in *Boston College* more persuasive. In *Boston College*, the First Circuit reasoned “after the parties have engaged in substantial discovery, a complete lack of evidence —whether direct or circumstantial—will not allow a party to survive a motion for summary judgment. Conclusory allegations are not enough.” *Bos. Coll.*,

892 F.3d at 92. As in *Boston College*, the Court concludes no reasonable jury could find the statistics Plaintiff relies on are anything more than conclusory allegations of gender bias.

Finally, no reasonable jury could conclude Defendants were influenced by outside pressure to carry out sexual misconduct investigations and disciplinary hearings that impermissibly favored women and unfairly punished men. Plaintiff asserts the “Dear Colleague Letter” pressured universities to create tribunals with the purpose of finding men responsible for sexual assault or risk losing federal funding. ECF No. 121 at 26–27; ECF No. 46 ¶¶ 20, 51. Again, courts have not found this argument persuasive—particularly at the summary judgment stage. *See Bos. Coll.*, 892 F.3d at 92–93; *Doe v. Purdue Univ.*, 281 F.Supp.3d 754, 780 (N.D. Ind. 2017); *Univ. of Colo.*, 255 F.Supp.3d at 1078 (“Moreover, pressure from the federal government to investigate sexual assault allegations more aggressively—either general pressure exerted by the Dear Colleague Letter or specific pressure exerted by an investigation directed at the University, or both—says nothing about the University’s alleged desire to find men responsible because they are men.”); *Univ. of St. Thomas*, 240 F.Supp.3d at 992.

For the reasons discussed above, Plaintiff’s claim for erroneous outcome cannot survive Defendants’ motion for summary judgment. The Court therefore grants summary judgment in Defendants’ favor on this theory.

2. Deliberate indifference

As part of Plaintiff's Title IX claim, Plaintiff asserts Defendants "demonstrated deliberate indifference when they refused to investigate and dismissed the sexual assault claim by Plaintiff, a male complainant, as well as by Plaintiff's father, a trustee of the college." ECF No. 46 ¶ 135. Plaintiff contends Parker's statement that Drake would not investigate Plaintiff's claim of sexual assault because it was a form of retaliation indicates deliberate indifference. ECF No. 121 at 33–34. Defendants contend Plaintiff's claim fails because one assault does not constitute a "systematic" denial of an education program and Drake's conduct did not cause Plaintiff's alleged assault or make him vulnerable to it. ECF No. 104 at 23–24. As explained below, the Court grants Defendants' motion for summary judgment as to this theory because Plaintiff has not shown how Defendants' alleged inaction subjected him to harassment.

For a school to incur liability under a Title IX deliberate indifference claim, "it must be (1) deliberately indifferent (2) to known acts of discrimination (3) which occur under its control." *Shrum ex rel. Kelly v. Kluck*, 249 F.3d 773, 782 (8th Cir. 2001). Because Plaintiff's claim is premised on Defendants' failure to investigate peer-on-peer sexual harassment (specifically Jane Doe's alleged sexual assault of him), Plaintiff must also establish the discrimination was "so severe, pervasive, and objectively offensive that it can be said to deprive [him] access to the educational opportunities or

benefits provided by the school.” *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1057 (8th Cir. 2017) (quoting *Davis*, 526 U.S. at 650, 119 S.Ct. 1661). Finally, the “deliberate indifference must either directly cause the abuse to occur or make students vulnerable to such abuse.” *Shrum*, 249 F.3d at 782; *see also* *K.T.*, 865 F.3d at 1058 (noting “while [the plaintiff] was dissatisfied with [the school]’s response,” because the plaintiff only reported emotional distress following the alleged assault, “the response cannot be characterized as deliberate indifference *that caused the assault* ”).

Plaintiff’s deliberate indifference claim cannot survive Defendants’ motion for summary judgment. Specifically, Plaintiff does not claim Defendants’ alleged failure to investigate his sexual assault caused him to experience any separate harassment following his assault. The Eighth Circuit requires such a showing. *See K.T.*, 865 F.3d at 1058 (dismissing the plaintiff’s deliberate indifference claim because “at most, [the plaintiff’s complaint] link the [the defendant’s] inaction with emotional trauma [the plaintiff] claims she experienced following the assault”); *see also* *Davis*, 526 U.S. at 644, 119 S.Ct. 1661 (explaining a plaintiff reporting student-on-student harassment must show the school’s deliberate indifference caused the student to be “subject[ed] to harassment”). Furthermore, as the Eighth Circuit and other courts have noted, failure to follow Title IX regulations is not a sufficiently severe form of discrimination to give rise to a deliberate indifference claim. *See, e.g.*, *St. Louis Univ.*, 746 F.3d at 883–84; *Sanchez v.*

Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 169 (5th Cir. 2011) (noting that although a school district's Title IX policy required the principal to contact the district's Title IX coordinator in the event of a sexual misconduct allegation, "just because [the principal] failed to follow district policy does not mean that her actions were clearly unreasonable" and thus deliberately indifferent); *Klocke v. Univ. of Tex. at Arlington*, No. 4:17-CV-285-A, 2018 WL 2744972, at *6 (W.D. Tex. June 7, 2018) (determining the plaintiff had failed to state a claim for relief for deliberate indifference based on the school's violations of Title IX regulations); *Doe ex rel. Doe v. Saint Paul Conservatory for the Performing Arts*, No. 17-5032 (DWF/FLN), 2018 WL 2431849, at *3 (D. Minn. May 30, 2018) (same); *Haidak*, 299 F.Supp.3d at 270 (determining on summary judgment that because the plaintiff only asserted one instance of sexual assault, "[e]ven with the court accepting [p]laintiff's claim that he declined to pursue a charge against [the complainant] because Defendants indirectly discouraged him from doing so, this evidentiary insufficiency is fatal to any claim of a pervasive environment of harassment").

Moreover, to the extent Plaintiff asserts part of the harassment he faced was also due to Defendants' decision to investigate and ultimately expel him for sexual assault, Plaintiff's claim fails. See ECF No. 46 ¶¶135–36; ECF No. 121 at 32–34. Plaintiff does not explain how the adjudication of Jane Doe's complaint and his expulsion are connected to Plaintiff's alleged assault and Defen-

dants' alleged failure to investigate. Both the disciplinary proceedings against Plaintiff and his ultimate expulsion were triggered by Jane Doe's complaint, rather than by Plaintiff's own assertions regarding the sexual assault he allegedly experienced. Significantly, Plaintiff concedes Defendants were required to investigate Jane Doe's complaint against him. *See* ECF No. 121 at 30. Consequently, Defendants' decision to investigate Plaintiff and expel him cannot form the basis of his deliberate indifference claim.

For the reasons discussed above, even if Defendants failed to investigate Plaintiff's report of sexual harassment, because Plaintiff cannot show how such a failure subjected him to "severe and pervasive" harassment, his claim is insufficient as a matter of law. The Court thus grants Defendants' motion for summary judgment as to this theory.

3. Selective enforcement

Plaintiff also asserts Defendants subjected him to selective enforcement. ECF No. 121 at 28. A Title IX selective enforcement claim is premised on the allegation that "regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender." *Yusuf*, 35 F.3d at 715. To support a claim of selective enforcement, Plaintiff "must demonstrate that a female was in circumstances sufficiently similar to his own and was treated more favorably by the University." *Mallory*, 76 F. App'x at 641.

There are factual questions as to whether Defendants' decision to initiate disciplinary proceedings against Plaintiff but not Jane Doe—even though they were both accused of sexual misconduct—was motivated by gender. These factual questions make it impossible for the Court to grant Defendants' motion for summary judgment on Plaintiff's selective enforcement claim. In considering Defendants' motion as to this claim, the Court addresses two factual questions. First, were Plaintiff and Jane Doe treated equally when they brought their respective complaints of sexual misconduct? In considering this question, the Court must also consider whether Plaintiff and Jane Doe were similarly situated. Second, if Plaintiff and Jane Doe were treated differently, was the disparate treatment motivated by gender?

Plaintiff contends comparison to “similarly situated” individuals is not required for a selective enforcement claim. ECF No. 121 at 29. Plaintiff asserts *Yusuf*, 35 F.3d 709, which first articulated this theory, does not establish such a requirement. ECF No. 121 at 29. However, the *Yusuf* court implied the gender of the plaintiff and other accused students must be taken into account in order to bring a selective enforcement claim. *Yusuf*, 35 F.3d at 716. Specifically, while the court determined the plaintiff had sufficiently alleged an erroneous outcome claim, it dismissed the plaintiff's selective enforcement allegation based primarily on the fact that both the plaintiff and his comparator were male. *Id.* Plaintiff also argues the cases cited by Defendants requiring opposite-gender

complaints were called into question by the Second Circuit's decision in *Doe v. Columbia University*, 831 F.3d 46, ECF No. 121 at 28–30. Although the court in *Columbia University* overturned the district court's decision that had inquired into whether the plaintiff and comparator were “similarly situated,” nothing in *Columbia University* touched on the actual elements for such a claim or called into doubt the district court's formulation of the theory. *See generally Columbia Univ.*, 831 F.3d 46. Rather, the Second Circuit focused on whether outside pressure could indicate gender bias under Title IX in general. *Id.* at 57–58.

Furthermore, following the decision in *Columbia University*, courts have continued to require a plaintiff asserting a selective enforcement claim to point to a similarly situated individual of the opposite gender who was treated more favorably. *See, e.g., Plummer v. Univ. of Houston*, 860 F.3d 767, 778 (5th Cir. 2017) (determining plaintiffs had failed to assert a selective enforcement claim because, in part, “during the discipline process they—a male and a female— were treated equally”); *Cummins*, 662 F. App'x at 452 n.10 (finding plaintiffs' selective enforcement claim inapplicable because plaintiffs did not allege a similarly accused female was treated differently); *Stenzel v. Peterson*, No. 17-580 (JRT/LIB), 2017 WL 4081897, at *4–5 (D. Minn. Sept. 13, 2017) (finding the male plaintiff's selective enforcement claim failed because plaintiff could not show he and the female complainant were similarly situated); *St. Mary's Univ.*, 2017 WL 2670758, at *18 (examining whether the plaintiff

and the female accuser were similarly situated). These cases do not provide a detailed analysis of how the test for a selective enforcement claim should be applied. Nonetheless, the Court concludes, consistent with the reasoning in these cases, a plaintiff asserting a selective enforcement Title IX claim must demonstrate a similarly situated individual of the opposite sex was treated more favorably than the plaintiff.

There is a genuine issue of material fact as to whether Jane Doe and Plaintiff are similarly situated. Although Jane Doe and Plaintiff both alleged sexual misconduct by the other, they reported their allegations in different manners. *See* ECF No. 103-1 at APP. 155, APP. 182–83. Jane Doe reported she had been assaulted to the Department of Public Safety. *Id.* at APP. 155. As required by the Policy, the Department of Public Safety reported her complaint to the Dean of Students. ECF No. 103 at APP. 139; ECF No. 103-1 at APP. 155. The Dean of Students then investigated the complaint, a process required by the Code. ECF No. 137 at APP. 116. Plaintiff first alleged he was also a victim of sexual assault during a meeting with Overberg and Parker after the initial interviews regarding Jane Doe's assault had taken place. Overberg Dep. 63:6–12, ECF No. 103 at APP. 027. In response, Overberg set up a time for Plaintiff to meet with investigators Sirna and McKinney to talk about his allegations. Overberg Dep. 87:5–10, ECF No. 103 at APP. 031. Overberg also instructed Sirna and McKinney to ask Plaintiff if he wanted to initiate a conduct charge against Jane Doe and to get all the

relevant information from him about it. ECF No. 103-1 at APP. 308. When investigators asked Plaintiff how he wanted to proceed, he told them he did not want to file a conduct charge against Jane Doe “right now” and he was just “verbalizing the issue.” *Id.* at APP. 182–83.

An accused student and his or her accuser can be compared to show selective enforcement if the parties allege misconduct against each other. *See Stenzel*, 2017 WL 4081897, at *5–6. But if the accused student did not similarly initiate or attempt to initiate a complaint against his or her accuser, the two cannot be compared. In *Stenzel v. Peterson*, the court held the plaintiff’s selective enforcement claim failed as a matter of law because the plaintiff had not filed a formal complaint even though the plaintiff who was accused of sexual assault told a university employee that his accuser engaged in nonconsensual sexual contact with him and the university failed to follow up on his complaint. 2017 WL 4081897, at *6. The court found without an “allegation that [the plaintiff] was not encouraged to file a report or was dissuaded from filing a report,” “there are not specific facts to indicate [the plaintiff] was treated differently during the process because of his gender.” *Id.*⁷ In *Doe v. Amherst Col-*

⁷ Plaintiff argues the United States District Court for the Southern District of Ohio’s ruling in *Gischel v. University of Cincinnati* indicates whether an accused student filed a formal complaint is irrelevant if the university had actual knowledge of the alleged conduct. Notice ¶1, ECF No. 140. The *Gischel* court relied on *Doe v. Miami University*, 882 F.3d 579 (6th Cir. 2018) for this holding. Order 2–4, *Gischel v.*

lege, however, school officials encouraged the female student to file a complaint against the male plaintiff but did not do the same for the male plaintiff even though he also made allegations of sexual misconduct against the female student. 238 F.Supp.3d 195, 223 (D. Mass. 2017). The court found these factual allegations of active encouragement by the school of the female student's complaint were sufficient to survive a motion for judgment on the pleadings. *Id.*

Here, there is a genuine issue of material fact as to whether Defendants dissuaded Plaintiff from initiating his complaint. If Plaintiff was discouraged from filing his complaint, then Jane Doe and Plaintiff would be similarly situated—they both were in the position to initiate complaints of sexual misconduct. Jane Doe was successful in initiating formal disciplinary proceedings. Plaintiff was not. Plaintiff claims he chose not to initiate his complaint because he was told it would be retaliatory. Pl.'s Dep. 151:13–152:25, 153:14–154:5, ECF No. 118 at APP. 38–39. Defendants respond that all accused students, male or female, receive the same

Univ. of Cincinnati, No. 1:17-cv-00475-SJD, (S.D. Ohio June 26, 2018), ECF No. 27. In *Miami University*, however, the Sixth Circuit found the filing of a formal complaint is not necessary to show the school had actual knowledge of misconduct for the plaintiff to bring a deliberate indifference claim. 882 F.3d at 590–91. *Miami University* did not consider the plaintiff's selective enforcement claim and did not discuss whether a formal complaint versus informal notification impacts whether two students can be compared. *Id.* at 594–95. Hence, the Court does not find *Gischel* persuasive.

general warning that they may not retaliate against their accuser. Parker Decl. ¶¶ 4–5, ECF No. 103-1 at APP. 306. The Code includes a general prohibition of retaliation. The Code states: “[r]etaliation occurs when action is taken against another because they have sought guidance, filed [a] complaint or participated in an investigation.” ECF No. 137 at APP. 115. “Examples of retaliation include, but are not limited to, any action that has an adverse impact on the complainant’s employment, compensation or work assignments, or, in the case of students, grades, class selection or any other matter pertaining to [the] student.” *Id.* at APP. 115–16. This same language was included in the email that Plaintiff received initially informing him he was the subject of a complaint. ECF No. 103-1 at APP. 152–53. These general warnings against retaliatory actions, although not an exhaustive list, do not specifically mention counter-complaints of sexual misconduct against a student’s accuser.

Plaintiff alleges he was told a counter-complaint would be retaliatory, Pl.’s Dep. 153:14–154:5, ECF No. 118 at APP. 39, and the general warning against retaliation in the Code does not list counter-complaints as an example of retaliatory action. ECF No. 137 at APP. 115–16. Viewing the evidence in the light most favorable to Plaintiff, a reasonable jury could find Plaintiff was dissuaded from filing a complaint.

There is also a genuine issue of material fact as to whether the allegations of Plaintiff and Jane Doe were treated differently and whether this dis-

parate treatment was motivated by gender. It is undisputed Plaintiff told the Dean of Students he might be a victim of sexual assault. Overberg Dep. 62:15–63:12, ECF No. 103 at APP. 27. It is disputed, however, if the Dean of Students investigated or dismissed his complaint. According to the Code, the Dean of Students can initiate an investigation of sexual misconduct. ECF No. 137 at APP. 116. Plaintiff contends Parker told his father on a phone call before the disciplinary hearing that “Drake would not be investigating [Plaintiff’s] claim because they believed [Plaintiff’s] claim to be retaliatory.” Rossley Sr. Decl. ¶10, ECF No. 118-13 at APP. 1180. Defendants, however, contend Plaintiff’s complaint was “effectively investigated and adjudicated and found to be without merit.” ECF No. 104 at 20. As evidence of the investigation of Plaintiff’s allegations, Defendants rely on Sirna’s findings from the investigation and Foxhoven’s ruling after the disciplinary hearing that indicated Plaintiff lacked credibility. ECF No. 103-1 at APP. 220–25, 241. Sirna and Foxhoven, however, made this credibility determination about Plaintiff regarding Jane Doe’s allegations of sexual assault by Plaintiff—not specifically about Plaintiff’s allegations of sexual assault by Jane Doe. Thus, there is a dispute of material fact as to how Plaintiff’s allegations of sexual misconduct by Jane Doe—and subsequent decision not to initiate disciplinary proceedings against Jane Doe—were treated by Defendants.

Although Defendants claim Plaintiff cannot allege facts to show any possible disparate treat-

ment was motivated by gender, the disputed facts themselves—whether an arguably similarly situated man and woman were treated differently—raise the specter of gender bias. Defendants have provided different explanations for their approach to Plaintiff's allegations. Parker is reported to have told Plaintiff's father that Plaintiff's complaint would not be investigated, while Defendants have argued that the allegations were investigated and found to be without merit. ECF No. 118-13 at APP. 1180; ECF No. 104 at 20. These differing explanations can be evidence of pretext. *Cf. Fitzgerald v. Action, Inc.*, 521 F.3d 867, 873 (8th Cir. 2008) (finding that defendant employer's varying explanations for its decision to terminate plaintiff employee "raise a question [as to] the true reason for its decision"). This inquiry of gender-based motivations is distinct from the inquiry of gender bias in Plaintiff's erroneous outcome claim. Plaintiff cannot show evidence that gender bias influenced the disciplinary process followed to determine if sexual misconduct against an alleged victim, Jane Doe, had occurred. Victim-centric disciplinary proceedings do not equate to gender-biased, female-centric disciplinary proceedings. *See Univ. of Colo.*, 255 F.Supp.3d at 1075, 1079; *Univ. of St. Thomas*, 240 F.Supp.3d at 991. But when contrasting the experiences of two alleged victims—one a woman and the other a man—and noting the possible disparate treatment, it is reasonable for a jury to consider gender-biased motivations based on these facts.

Defendants' motion for summary judgment is therefore denied as to Plaintiff's Title IX claim under a selective enforcement theory.

D. ADA Claim (Count VI)

In Count VI, Plaintiff asserts Defendants violated Title III of the American with Disabilities Act by failing to provide Plaintiff with reasonable accommodations during the investigation, disciplinary hearing, and appeals hearing. ECF No. 46 ¶ 239.⁸ Specifically, Plaintiff claims due to his ADHD, dyslexia, and word-retrieval issues, Defendants should have provided the following accommodations during the disciplinary process:

- (i) having someone else with him in the room [during] the meeting with the investigator; (ii) having questions by the investigators written down before [the Plaintiff] would be expected to answer them; and (iii) time and a half, or at least more time at the hearing in a situation where it was two 'parties' . . . versus one 'party.'

ECF No. 121 at 39; *see also* Pl.'s Dep. 125:12–128:23, 133:7–136:24, ECF No. 103 at APP. 008,

⁸ Although Plaintiff's Amended Complaint was brought under Title II of the ADA, both parties agree Plaintiff's claim is only actionable under Title III, as the former applies to public institutions and the latter applies to private institutions. *See* ECF No. 104 at 26; ECF No. 121 at 35. Because both parties treat Plaintiff's claim as if it were brought under Title III, the Court does as well.

APP. 010. Defendants assert they are entitled to summary judgment on this count as Plaintiff never requested a reasonable accommodation; and the accommodations Plaintiff now identifies were either offered to him, are speculative, or would have amounted to an undue burden. ECF No. 104 at 26–30.⁹ Because the Court determines no reasonable jury could find Plaintiff requested an accommodation, the Court grants Defendants' motion for summary judgment as to Count VI.

1. Applicable Law

Under Title III of the ADA, it is unlawful for “any place of public accommodation” to “fail[] to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities.” 42 U.S.C. § 12182(b)(2) (A)(ii); *see also Mershon v. St. Louis Univ.*, 442 F.3d 1069, 1076 (8th Cir. 2006) (“Discrimination under Title III specifically includes the failure to make reasonable modifications.”). However, an entity need not accommodate an individual if “the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, serv-

⁹ Defendants also assert Plaintiff’s claim “fails because [Plaintiff] failed to generate any evidence that his expulsion was based upon his disability.” ECF No. 104 at 30 (citations and internal quotation marks omitted). As explained below, in cases asserting failure to accommodate under the ADA, a plaintiff is not required to separately establish a defendant’s actions were based on discriminatory animus.

ices, facilities, privileges, advantages, or accommodations.” 42 U.S.C. 12182(b)(2)(A)(ii). Because the “discrimination” in a failure to accommodate claim “is framed in terms of the failure to fulfill an affirmative duty,” a plaintiff is not required to separately show the defendant’s actions were motivated by intentional discriminatory animus. *Peebles v. Potter*, 354 F.3d 761, 767 (8th Cir. 2004) (“The concern is compelling behavior, not policing an employer’s actions that, when accompanied by an invidious discriminatory intent, are unlawful.”); *see also Mershon*, 442 F.3d at 1076–77 (listing the elements for a failure to accommodate claim under Title III without reference to intentional discrimination).

Thus, in the context of higher education, an individual bringing a failure to accommodate claim under Title III of the ADA must show:

- (1) that the plaintiff is disabled and otherwise qualified academically,
- (2) that the defendant is a private entity that owns, leases or operates a place of public accommodation (for ADA purposes) . . . , and
- (3) ‘that the defendant failed to make reasonable modifications that would accommodate the plaintiff’s disability without fundamentally altering the nature of the public accommodation.’

Id. at 1076 (quoting *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1027 (8th Cir. 1999)). “As to the third requirement, [the plaintiff] bears the initial burden

of demonstrating that he requested reasonable accommodations.” *Id.* at 1077. Such requests must specifically identify the particular accommodations and “explain how each requested accommodation was necessary to enable [the plaintiff] to participate in light of his disabilities.” *Id.*

2. Analysis

Defendants do not contest that Plaintiff can establish the first two elements of his ADA claim. *See Mershon*, 442 F.3d at 1076–77. *See generally* ECF No. 104 at 26–28. As to the third element, the parties dispute whether Plaintiff sufficiently requested a reasonable accommodation under the ADA. *Id.*; ECF No. 104 at 27; ECF No. 121 at 36–39. Based on the parties’ arguments, the Court first considers if Plaintiff specifically requested an accommodation during the disciplinary process. The Court then examines whether Defendants were nonetheless on constructive notice and if Plaintiff’s father sufficiently requested accommodations for the disciplinary hearing.

a. Specific request

The Court determines there are no genuine issues of material fact indicating Plaintiff or his attorney ever specifically requested an accommodation during the investigation, disciplinary hearing, or appeals hearing. It is undisputed Plaintiff suffers from a mild form of dyslexia, ADHD, and word-retrieval issues. ECF No. 133 ¶1; Pl.’s Dep. 129:1–9, 172:20–173:4, ECF No. 103 at APP. 009, APP.

014–15; Pl.’s Sealed App. Supp. Pl.’s Resp. Defs.’ Mot. Summ. J. at APP. 775–76, Hr’g Tr. 218:17–219:12, ECF No. 118-8. Due to his disabilities, Plaintiff regularly requested, and received, academic accommodations from Defendants. *See* Pl.’s Dep. 169:16–170:24, ECF No. 103 at APP. 14; ECF No. 104 at 27. As Plaintiff explained in his deposition, although he was generally awarded “time and a half” for exams, the accommodations he requested and utilized “varie[d] class to class.” Pl.’s Dep. 170:6–14, ECF No. 103 at APP. 014; Pl.’s Dep. 130:8–131:8, ECF No. 118 at APP. 033. Furthermore, Plaintiff stated in order to secure accommodations, Plaintiff met with each professor individually to determine what accommodations were necessary. Pl.’s Dep. 169:23–170:5, ECF No. 103 at APP. 014. Because he initiated these requests, Plaintiff had not discussed whether the disability coordinator was authorized to speak to professors independently about Plaintiff’s disabilities. Pl.’s Dep. 171:16–172:16, ECF No. 103 at APP. 014.

The evidence also indicates during the disciplinary process, Plaintiff did make Parker, the investigators, and Foxhoven aware of his disabilities, and some of the associated symptoms. *See, e.g.*, Parker Dep. 232:2–233:7, ECF No. 103 at APP. 050 (mentioning Plaintiff’s parents statements to Parker about Plaintiff’s disabilities); ECF No. 103-1 at APP. 192 (noting Plaintiff’s statements about his disabilities to the investigators); Pl.’s Sealed App. Supp. Pl.’s Resp. Defs.’ Mot. Summ. J. at APP. 775–76, Hr’g Tr. 218:17–219:12, ECF No. 118-8 (noting

Plaintiff's statements about his disabilities during the disciplinary hearing with Foxhoven). However, both Plaintiff and Plaintiff's personal representative stated they never requested Plaintiff be provided accommodations. Pl.'s Dep. 120:19–121:10, 129:10–130:10, ECF No. 103 at APP. 006–07, 009; Defs.' Second Suppl. App. at APP. 314, Kaiser Dep. 25:18–26:13, ECF No. 132. Plaintiff also did not request accommodations during the investigation. Sirna Decl. ¶ 4, ECF No. 103-1 at APP. 301. Rather, Plaintiff stated he assumed Defendants would follow up about any necessary accommodations once he revealed he had taken Adderall on October 8, 2015, due to his ADHD. *See* Pl.'s Dep. 120:23–123:13, ECF No. 103 at APP. 006–07. Furthermore, although Plaintiff's personal representative requested Plaintiff be given extra time during the disciplinary hearing, these requests were consistently raised as an issue of procedural fairness, rather than Plaintiff's disabilities. *See* Hr'g Tr. 6:14–19, ECF No. 118-6 at APP. 563 (arguing “having ten minutes arguing that [the Plaintiff] is responsible and we get five minutes to rebut that is not fair”); ECF No. 137 at APP. 233; *see also* Foxhoven Dep. 23:15–24:6, ECF No. 103 at APP. 076; Pl.'s Dep. 133:7–19, ECF No. 103 at APP. 010 (“[E]ven my accommodations aside, we should have gotten double anything anyway. But on top of my accommodations, I already deserved time and a half for anything and everything.”). The Court determines no reasonable jury could find Plaintiff or his attorney affirmatively requested any accom-

modations during the investigation, disciplinary hearing, or appeals hearing.

b. Constructive notice

Absent an affirmative request for an accommodation, Plaintiff contends Defendants were constructively on notice of Plaintiff's disabilities due to his academic accommodations and statements regarding his ADHD, dyslexia, and word-retrieval issues. ECF No. 121 at 37–38. Consequently, Plaintiff asserts Defendants were required to affirmatively engage with Plaintiff regarding possible accommodations. *Id.* Plaintiff relies on two cases, both outside the Eighth Circuit, to support his argument. *Id.* at 38 (citing *Nathanson v. Med. Coll. of Pa.*, 926 F.2d 1368 (3d Cir. 1991) and *Redding v. Nova Southeastern Univ., Inc.*, 165 F.Supp.3d 1274 (S.D. Fla. 2016)). Both cases are distinguishable. First, in *Redding*, the United States District Court for the Southern District of Florida considered claims brought by a dismissed medical student under the ADA and § 504(a) of the Rehabilitation Act of 1973. 165 F.Supp.3d at 1279. The plaintiff claimed she had been dismissed from medical school because of her disability and had also been denied reasonable accommodations. *Id.* at 1289, 1295 (noting the plaintiff's failure to accommodate claim was premised on her academic training, while her dismissal claim only focused on her subsequent clinical rotations). As to the plaintiff's failure to accommodate claim, the court noted although it was unclear whether a student's failure to follow a

formal procedure nullified an informal request for an accommodation, the plaintiff's argument was ultimately moot as the plaintiff testified she had attempted to comply with the formal procedure and had previously received accommodations outside the school's formal process. *Id.* at 1296 & n.25. Additionally, in examining the defendant's decision to dismiss the plaintiff, the court ultimately determined the plaintiff was not a "qualified individual" during her clinical rotation as she had not identified or requested the reasonable accommodations that would permit her to satisfy the program's essential requirements. *Id.* at 1293–94. While *Redding* thus stands for the proposition that formal requests may not be required, particularly when informal requests have previously been granted, *Redding* does not support Plaintiff's position.

First, unlike Plaintiff, the *Redding* plaintiff's informal requests actually identified the accommodations she was requesting. *Id.* at 1296. Plaintiff has not identified any informal requests he made during the disciplinary process that specified the accommodations he now contends were necessary. Second, as noted above, the *Redding* court ultimately determined the plaintiff had not requested a reasonable accommodation during her clinical rotation, and was thus not a "qualified individual." *Id.* at 1293–94. The court specifically distinguished the plaintiff's earlier approved accommodations, which were given during her academic training, with any accommodations she may have requested during her clinical rotation. *Id.* ("[The plaintiff]

requested accommodations only in relation to the make-up exam policy, and it was incumbent on her to request additional accommodations if she sought accommodations related to the clinical rotation attendance policy.”). Similarly, Plaintiff only points to his past requests for academic accommodations to support his claim that Defendants were on constructive notice as to his requests for accommodations during the investigation and subsequent hearings. Although Plaintiff asserts his academic accommodations put Defendants on notice of his need for the disciplinary accommodations he now identifies, the academic accommodations addressed different contexts than the disciplinary procedures set out in the Code and the Policy. For instance, “time and a half” during an exam is not procedurally or substantively comparable to “time and a half” during a disciplinary procedure involving credibility and factual determinations. Furthermore, while there was no formal process to request accommodations during the disciplinary procedure, to receive academic accommodations Plaintiff had previously, he had to, at the very least, affirmatively approach a professor regarding his request and identify the particular accommodations he needed. He stated the disability coordinator had told him he needed to be more “accountable” regarding this affirmative responsibility. Pl.’s Dep. 230:2–24, ECF No. 118 at APP. 058. Thus, although he may not have been required to follow a formal procedure to request an accommodation, Plaintiff understood he must, at a minimum, ask that his disabilities be accommo-

dated. As discussed above, he failed to do so during the disciplinary procedure.

Nathanson is similarly distinguishable. In *Nathanson*, the Court of Appeals for the Third Circuit considered the plaintiff's failure to accommodate claim under § 504 of the Rehabilitation Act. 926 F.2d at 1370. Noting the school "must know or be reasonably expected to know of [the plaintiff]'s handicap" to be liable under the Act, the court ultimately concluded there were genuine issues of material fact as to whether the school was on notice of the accommodations the plaintiff sought. *Id.* at 1381, 1385. Specifically, the court noted either the school was on constructive notice due to the plaintiff's repeated statements that she was unable to attend the school without an accommodation, or the school was on direct notice due to the plaintiff's "direct requests for accommodations." *Id.* at 1382–83, 1387. Although *Nathanson* provides a closer fit to the facts at issue here than *Redding*, *Nathanson* is also ultimately distinguishable. First, unlike Plaintiff, the student in *Nathanson* repeatedly requested a particular accommodation (a type of desk) as it applied to her general ability to attend school. *Id.* at 1381–82. In contrast, while Plaintiff requested and received academic accommodations, he did not request such accommodations for his disciplinary procedures. Rather, his requests were specifically directed to his academic pursuits. Plaintiff did not indicate that, due to his disabilities, he would be unable to participate in the inves-

tigation or subsequent hearings.¹⁰ Second, to the extent the court determined constructive notice triggers some duty to accommodate absent a request for an accommodation, the Court is bound by Eighth Circuit precedent to the contrary. *See Mershon*, 442 F.3d at 1077 (noting under both Title III of the ADA and the Rehabilitation Act, a party bringing a failure to accommodate claim “bears the initial burden of demonstrating that he requested reasonable accommodations, and that those accommodations would render him otherwise qualified for admission”); *see also Pierre v. Univ. of Dayton*, No. 3:15-cv-362, 2017 WL 1134510, at *10 (S.D. Ohio Mar. 27, 2017) (holding a student in a disciplinary proceeding failed to state a claim for failure to accommodate “because he did not mention a need for any accommodation until after his disciplinary hearing” and noting “[t]hat the University’s Office of Learning Resources department knew that [the plaintiff] had a disability does not trigger an obligation on every department of the University to offer him accommodations when dealing with him”). Thus, the Court concludes Plaintiff’s argu-

¹⁰ The Court notes during his disciplinary hearing, Plaintiff explained: “I also have a . . . word-based learning disability where I’m very bad at retrieving words and—like literally what is happening now—I guess like a word-retrieval issue and a mild form of dyslexia as well.” Hr’g Tr. 219:8–12, ECF No. 118-8 at APP. 776. However, as detailed above, Plaintiff did not explain he was unable to participate in the hearing due to this issue, nor did he—nor his personal representative—request an accommodation during the hearing following Plaintiff’s statement.

ment that Defendants were on constructive notice of his need for accommodations fails as a matter of law.

c. Third-party request

Finally, Plaintiff contends even if he did not request an accommodation during the disciplinary procedure, his father, Thomas Rossley, Sr. requested an accommodation on his behalf. ECF No. 121 at 38–39. In his declaration, Plaintiff’s father stated during a “contentious” phone call with Parker in December 2015, he “demanded” that Parker “accommodate [Plaintiff]’s disabilities in the upcoming hearing” and that “Parker never addressed this request for disability accommodations.” Rossley, Sr. Decl. ¶ 10, ECF No. 118-13 at APP. 1179–80. Further, he explained he “was infuriated that [Plaintiff] had to defend himself against Dean Parker’s call for [Plaintiff]’s expulsion with no accommodations that [Plaintiff’s father] had requested for [Plaintiff]’s ADHD, anxiety, and language-based learning disabilities.” Rossley, Sr. Decl. ¶ 14, ECF No. 118-13 at APP. 1182.

Plaintiff does not cite to any case law to support his claim that a third party may request an accommodation on behalf of an adult student during a disciplinary procedure. *See* ECF No. 121 at 38–39.¹¹ Although the Court has identified cases from

¹¹ At the hearing on this motion, Plaintiff pointed the Court to both *Nathanson* and *Redding* to support this contention. Mot. Summ. J. Hr’g Tr. 51:8–52:5, ECF No. 146. However, neither case involves a third-party request for an

other Circuits in which the courts, in dicta, determined a third party could sufficiently request an accommodation on behalf of a disabled individual, these cases are inapposite. First, they involve discrimination in employment (Title I of the ADA), rather than private education (Title III of the ADA). *See, e.g., E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1049 (10th Cir. 2011); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 303, 313–14 (3d Cir. 1999) (determining the plaintiff sufficiently requested an accommodation through her son after being admitted to a psychiatric hospital); *Corbett v. Nat'l Prods. Co.*, No. 94-2652, 1995 WL 133614, at *4 (E.D. Pa. Mar. 27, 1995) (finding the plaintiff had requested an accommodation “in essence when his wife called to inform [his employer] of his entry into the treatment program”). In determining the plaintiffs in those cases sufficiently requested accommodations, the courts relied on the employer’s duty to engage in an interactive process. *See Taylor*, 184 F.3d at 314 (noting once the school had notice of the plaintiff’s disability, it was required to engage in an interactive process to accommodate any requested accommodation, and thus “it would be especially inappropriate to insist that [the plaintiff]’s son must have specifically invoked the ADA” to begin that process); *see also C.R. England*, 644 F.3d at 1049 (noting the interac-

accommodation; rather, both plaintiffs requested their own accommodations during their respective academic programs. *Nathanson*, 926 F.2d at 1370; *Redding*, 165 F.Supp.3d at 1293–94.

tive process was envisioned to facilitate reasonable accommodations and that in the employment context, the request does not need to “be made by the employee” (quoting *Taylor*, 184 F.3d at 313)). Meanwhile, the Eighth Circuit has noted its skepticism as to whether institutions are required to engage in an interactive process under the ADA generally and in the academic setting specifically, thus further limiting the applicability of the above cases. See *Koester v. Young Men’s Christian Ass’n of Greater St. Louis*, 855 F.3d 908, 912 & n.2 (8th Cir. 2017) (noting it was “assuming with a hefty dose of skepticism that these concepts [of the interactive process] are applicable in this Title III case”); *Mershon*, 442 F.3d 1069 (explaining “even if such an interactive process is required in an academic setting,” the plaintiff would bear the burden of showing he needed accommodations to gain entry to graduate school (citing *Stern v. Univ. of Osteopathic Med. & Health Scis.*, 220 F.3d 906, 909 (8th Cir. 2000))).

Moreover, unlike the current case, the plaintiffs in *Taylor* and *Corbett* were both incapable of requesting the accommodations themselves, as they were in treatment facilities. See *Taylor*, 184 F.3d at 302; *Corbett*, 1995 WL 133614, at *1. Plaintiff was capable of requesting accommodations for himself, as evidenced by the fact that he consistently did so in the academic setting and understood he was required to raise the issue of individual accommodations with his professors.

During the hearing on this motion, Plaintiff’s counsel also asserted, because Plaintiff had waived

his rights under the Family Educational Rights and Privacy Act (FERPA), his father was serving as his representative when he requested accommodations from Parker. Mot. Summ. J. Hr'g Tr. 52:5–14, ECF No. 146. However, FERPA only protects a student's privacy as applied to his academic and medical records; it does not provide a parent with representative authority once the FERPA rights are waived. *See generally* 20 U.S.C. § 1232g. This is particularly true when, as here, the adult student is capable of requesting accommodations for himself and is represented by independent counsel. *See* Pl.'s Dep. 194:7–14, ECF No. 103 at APP. 019 (stating that at the time Plaintiff had the second meeting with the investigators, he had an attorney); ECF No. 103-1 at APP. 219 (noting the second interview occurred on November 10, 2015); Rossley, Sr. Decl. ¶ 12, ECF No. 118-13 at APP. 1180–81 (stating Rossley, Sr. spoke with Parker regarding Plaintiff's disabilities in December 2015). Plaintiff stated he understood his attorney was responsible for discussing any accommodations he might need with Defendants and that he "delegated [that duty] to [his] lawyer." Pl.'s Dep. 126:8–22, ECF No. 103 at APP. 008. For the reasons set forth above, Rossley, Sr. could not request an accommodation for his adult son and Defendants were not required to engage with Plaintiff in response to his father's statements.

Finally, even if Plaintiff's father could request an accommodation for his adult son, the record does not provide any indication of what accommodations Rossley, Sr. specifically requested. Rossley, Sr.'s

declaration states he “demanded” that Defendants “accommodate [Plaintiff]’s disabilities in the upcoming hearing” and that he was “infuriated” that Defendants had not provided the “accommodations that [he] had requested for [Plaintiff]’s ADHD, anxiety, and language-based learning disabilities.” Rossley, Sr. Decl. ¶ 12, 14, ECF No. 118-13 at APP. 1179, 1182. This declaration does not indicate what accommodations were necessary in the hearing, which accommodations Rossley, Sr. believed should have been provided during the investigation, and how Defendants should accommodate Plaintiff’s disabilities. Although Plaintiff received academic accommodations, as noted above, those accommodations were provided in a separate process and involved accommodations for different requirements under the Code. As the Eighth Circuit has explained, plaintiffs seeking accommodations must “request[] reasonable specific accommodations.” *Mershon*, 442 F.3d at 1077. Looking at the facts in the light most favorable to Plaintiff, the Court thus determines there is no genuine dispute of material fact that Plaintiff, his attorney, or his father, requested any reasonable accommodations. Because Plaintiff is required to show he requested such an accommodation as a basis for his ADA claim, the Court thus grants Defendants’ motion for summary judgment as to Count VI.

E. Contract Claims (Counts III, IV, and VII)

Plaintiff brings three state law contract claims: breach of contract (Count III), breach of the covenant of good faith and fair dealing (Count IV), and estoppel and reliance (Count VII). ECF No. 46 ¶¶ 203–19, 220–24, 241–47. All of Plaintiff's claims are premised on, and encompassed by, the contractual language contained in the Code and the Policy. For purposes of summary judgment, Defendants concede the Code and the Policy constitute contracts under Iowa state law. *See* ECF No. 104 at 34. Defendants argue Plaintiff's contractual claims fail because: 1) Plaintiff cannot show Defendants violated any contractual rights due to him under the Code or the Policy, including the requirement to conduct a fair hearing; 2) Plaintiff's covenant of good faith and fair dealing claim would alter the terms of the contract; and 3) the Code and the Policy explained all of the promises made to Plaintiff, and by conducting a fair and equitable hearing, Defendants kept their promise. *Id.* at 34–40.

The Court first considers whether Plaintiff's claims asserting estoppel and breach of the covenant of good faith and fair dealing are subsumed by his claim alleging breach of contract. Determining they are, the Court next examines whether Plaintiff has identified genuine issues of material fact as to whether Defendants breached their contractual duties to Plaintiff under the Code or Policy. The Court finds Plaintiff has shown that

some, but not all, of the alleged breaches include genuine issues of material fact.

1. Estoppel & covenant of good faith and fair dealing (Counts IV and VII)

In Count VII, Plaintiff asserts a claim for estoppel and reliance. Plaintiff alleges “Drake’s various policies constitute representations and promises that Drake should have reasonably expected to induce action or forbearance by Plaintiff,” including the “express and implied promises that Drake would not tolerate, and Plaintiff would not suffer, harassment by fellow students” and that Drake “would not deny Plaintiff his procedural rights should he be accused of a violation of Drake’s policies.” ECF No. 46 ¶¶ 242–43. Because Plaintiff asserts he suffered harm after reasonably relying on “representations and promises” by Defendants, the Court understands Plaintiff to be making a promissory estoppel, rather than equitable estoppel, claim.¹²

Under Iowa law, “[t]he theory promissory estoppel allows individuals to be held liable for their promises despite an absence of the consideration typically found in a contract.” *Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43, 48 (Iowa 1999).

¹² Equitable estoppel is based on a misstatement of fact; promissory estoppel requires a plaintiff show he detrimentally relied upon a promise. *See Merrifield v. Troutner*, 269 N.W.2d 136, 137 (Iowa 1978) (discussing these distinctions).

Consequently, in order to establish a claim for promissory estoppel, a plaintiff must show:

- (1) [A] clear and definite promise; (2) the promise was made with the promisor's clear understanding that the promisee was seeking an assurance upon which the promisee could rely and without which he would not act; (3) the promisee acted to his substantial detriment in reasonable reliance on the promise; and (4) injustice can be avoided only by enforcement of the promise.

Id. at 49. Because promissory estoppel is a form of equitable relief and applies only where a contract otherwise does not exist, a plaintiff may not assert a claim of promissory estoppel if the promise at issue is encompassed by a written and formal contract. *See, e.g., PFS Distrib. Co. v. Raduechel*, 574 F.3d 580, 599 (8th Cir. 2009) (affirming dismissal of the employee's promissory estoppel claim and explaining "[the employee]'s allegations do not sufficiently show the statements of [the employer's] officers created oral contracts or warrant promissory estoppel because the alleged statements, at most, restated the terms of [the employee]'s written compensation agreement"); *John T. Jones Constr. Co. v. Hoot Gen. Constr.*, 543 F.Supp.2d 982, 1021 (S.D. Iowa 2008) ("Because [the plaintiff] has a complete remedy at law for breach of contract there is no reason to resort to equity."); *Blackledge v. Puncture Proof Retread Co.*, 190 Iowa 1303, 181 N.W. 662, 664 (1921) (reasoning an "oral contract must be independent in fact, and must not be a con-

tradiction, modification, or qualification of the written contract, either as to its enforcement, its consideration, or its executory obligation"); 28 Am. Jur. 2d, *Estoppel & Waiver* § 54 (1964 & Aug. 2018 Update) ("A promissory estoppel claim is precluded by the existence of an enforceable contract, and in fact, promissory estoppel does not apply when the dispute arises out of a valid contract between the parties.").

As applied to this case, Plaintiff claims he reasonably relied upon Defendants' promises "that Drake would not tolerate, and Plaintiff would not suffer, harassment by fellow students" and that Drake "would not deny Plaintiff his procedural rights should he be accused of a violation of Drake's policies." ECF No. 46 ¶¶ 242–43. Apart from the plain language contained in the Code and the Policy, Plaintiff does not point to any "clear and definite" statements by Defendants relating to these alleged promises. *See Schoff*, 604 N.W.2d at 48. Plaintiff asserts Parker, Martin (President of Drake), and Vanessa Macro, the Chief Administrative Officer for Drake, stated respondents in sexual misconduct investigations must be treated fairly during the disciplinary process and are entitled to due process. *See* ECF No. 121 at 42–43. However, these statements by Parker, Martin, or Macro were made during depositions after Plaintiff was expelled and thus cannot form the basis of a promissory estoppel claim. Plaintiff does not identify any statements Defendants made to him before he matriculated at Drake which were intended to provide "an assurance upon which [Plaintiff] could

rely and without which he would not [have] act[ed]." *Schoff*, 604 N.W.2d at 49.

Furthermore, even if Plaintiff could point to affirmative statements by Defendants regarding due process or equitable proceedings made by Defendants before the disciplinary proceedings, such statements are encompassed by the Code and the Policy. *See ECF No. 137 at APP. 111–12, 134* (defining "sexual assault" as a form of nonacademic misconduct); *id. at APP. 138* (explaining, per the Policy, "[t]he University disciplinary process will include a prompt, fair, and impartial investigation and resolution process"); *see also id.* (noting when a complaint of sexual misconduct is filed against a student, the Policy and the Code follow the same disciplinary procedure). Thus, to the extent Defendants promised Plaintiff a fair and equitable disciplinary procedure and assured him he would not be subjected to sexual harassment, any alleged breach of such promises is encompassed by the Code and the Policy and it thus limited to a remedy at law for breach of contract. *See PFS Distrib. Co.*, 574 F.3d at 599 (dismissing the employee's promissory estoppel claim when "the alleged statements, at most, restated the terms of [the employee]'s written [contract]"); *John T. Jones Constr.*, 543 F.Supp.2d at 1021 (determining there is no reason "to resort to equity" when the plaintiff's remedy is encompassed by his breach of contract claim).

For similar reasons, the Court determines Plaintiff's claim for breach of the covenant of good faith and fair dealing is subsumed by his breach of contract claim. In Count IV, Plaintiff asserts Defen-

dants “breached and violated the covenant of good faith and fair dealing implied in the agreement(s) with Plaintiff by meting out the disproportionately severe sanction of expulsion where there was a lack of credible evidence concerning the claims against him.” ECF No. 46 ¶222. Plaintiff identifies two examples of Defendants’ alleged breach: 1) Foxhoven’s decision to “allow[] Jane Doe to admit to her own sexual assault of Plaintiff,” “lie in her testimony without consequences,” and “doctor her text message evidence to try to prove the plaintiff was stalking her”; and 2) Defendants’ refusal to take action against Jane Doe for these violations of the Code. *Id.* ¶221. Defendants contend Iowa law does not recognize Plaintiff’s claim as Plaintiff is seeking to alter the terms of the Code and the Policy. ECF No. 104 at 38. Defendants also assert Plaintiff was only expelled after he was found responsible for sexual misconduct in accordance with the Code; the Code does not give Plaintiff “a contractual right to have Drake initiate disciplinary action against other students”; and Defendants followed the terms of the contracts by providing all the evidence they had to Plaintiff before the disciplinary hearing. *Id.* at 38–39.

Iowa law recognizes an implied covenant of good faith and fair dealing in all contracts. *See Alta Vista Props., LLC v. Mauer Vision Ctr., PC*, 855 N.W.2d 722, 730 (Iowa 2014); *Bagelmann v. First Nat’l Bank*, 823 N.W.2d 18, 34 (Iowa 2012). “The underlying principle is that there is an implied covenant that neither party will do anything which will have the effect of destroying or injuring the

right of the other party to receive the fruits of the contract.” *Am. Tower, L.P. v. Local TV Iowa, LLC*, 809 N.W.2d 546, 550 (Iowa Ct. App. 2011) (quoting 13 Richard A. Lord, *Williston on Contracts* § 38.15, at 435 (4th ed. 2000)). The covenant thus “prevents one party from using technical compliance with a contract as a shield from liability when that party is acting for a purpose contrary to that for which the contract was made.” *Mid-America Real Estate Co. v. Iowa Realty Co.*, 406 F.3d 969, 974 (8th Cir. 2005). Importantly, however, the covenant “does not give rise to new substantive terms that do not otherwise exist in the contract.” *Bagelmann*, 823 N.W.2d at 34 (quoting *Mid-America Real Estate*, 406 F.3d at 974). Thus, an implied covenant of good faith and fair dealing is contained in the Code and the Policy. Plaintiff’s alleged violations of the covenant of good faith and fair dealing are subsumed by his breach of contract claims. Because Counts IV and VII are more appropriately considered as part of Plaintiff’s breach of contract claims, the Court grants summary judgment in Defendants’ favor on Counts IV and VII.

2. Breach of Contract (Count III)

Plaintiff alleges Defendants breached its express and implied agreements with Plaintiff. ECF No. 46 ¶205. Under Iowa law, to prevail on a contract claim, a plaintiff must prove: 1) the existence of a contract; 2) the terms and conditions of the contract; 3) that the plaintiff has performed all the terms and conditions required under the contract;

4) the defendant's breach of the contract in some particular way; and 5) that the plaintiff has suffered damages as a result of the breach. *Molo Oil Co. v River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998). Contracts between a university and a student have been construed narrowly. *See Jackson v. Drake Univ.*, 778 F.Supp. 1490, 1493 (S.D. Iowa 1991) (holding financial aid documents included express terms of an agreement but did not contain an implicit agreement for the student to play basketball). The Court relies on Plaintiff's Amended Complaint—which identifies specific contract terms he alleges were breached by Defendants—and not on Plaintiff's Response in which Plaintiff argues generally that Defendants treated him unfairly in violation of their agreement. *Compare* ECF No. 46 ¶¶203–19, *with* ECF No. 121 at 42.

The first breach Plaintiff alleges is that Defendants failed to conduct an equitable investigation of Jane Doe's claims. ECF No. 46 ¶¶207–08. Plaintiff contends this breach violates the Policy term which states: “[t]he University disciplinary process will include a prompt, fair, and impartial investigation and resolution process.” ECF No. 137 at APP. 138. Plaintiff next alleges Defendants failed to conduct an equitable investigation of Plaintiff's claim of sexual misconduct by Jane Doe. ECF No. 46 ¶¶209–213. Plaintiff claims Defendants' failure to do so violates the term of the Code stating the Dean of Students will investigate student complaints. ECF No. 137 at APP. 116. Third, Plaintiff alleges Defendants breached the Code by discriminating

against Plaintiff on the basis of sex. ECF No. 46 ¶¶ 214–15. Plaintiff alleges this discrimination violates the term of the Code stating Drake prohibits discrimination on the basis of sex. ECF No. 137 at APP. 099. Fourth, Plaintiff alleges Defendants breached the contract by failing to apply the proper burden of proof during the disciplinary proceedings. ECF No. 46 ¶¶ 216–17. Plaintiff claims that this breach corresponds with the term in the Code that provides “[a] violation of this Code is established upon proof of a charge by a preponderance of the evidence; a preponderance of the evidence exists when it is more likely than not, or the greater weight of the evidence suggests, a violation occurred.” ECF No. 137 at APP. 122.

Plaintiff’s first and last identified breaches—that Drake failed to conduct an equitable investigation and failed to apply the correct burden of proof—do not present a genuine issue of material fact. Although Plaintiff challenges various procedural characteristics of the disciplinary process, Plaintiff provides nothing more than conclusory allegations that the process was biased and partial. Plaintiff claims Defendants failed to provide “procedural equity” and argues, among other things, that “[t]he investigation report was positioned to support Jane Doe’s accusation of lack of consent and incapacitation” and the “[s]anction was unwarranted and disproportionate in light of the circumstances.” ECF No. 46 ¶ 208. Similarly, Plaintiff argues the wrong burden of proof was applied because “[a] fair reading of the evidence” calls for a different outcome. *Id.* at ¶ 217.

Plaintiff expresses disagreement with the procedure and the outcome, but does not demonstrate a genuine issue of material fact that shows the proceeding was not prompt, fair, and impartial. Plaintiff agreed to accept the Code's "rules, regulations and policies" through "voluntary entrance into Drake University." ECF No. 137 at APP. 103. A Drake student also "acknowledges the right of the University to initiate disciplinary procedures when an allegation or a complaint of non-academic misconduct is made and to impose disciplinary sanctions when it has been determined that non-academic misconduct has occurred." *Id.* Because Plaintiff has not pointed to any genuine issue of material fact beyond his opinions about partiality and unfairness, Defendants' motion for summary judgment is granted as to these alleged breaches of contract.

However, there is a genuine issue of material fact as to Plaintiff's claim that Defendants breached the contract by failing to conduct an equitable investigation of Plaintiff's allegations against Jane Doe. There is also a genuine issue of material fact as to whether this failure was motivated by sex discrimination. The Code requires the Dean of Students conduct investigations into student complaints of sexual misconduct. ECF No. 137 at APP. 116. There are genuine issues of material fact as to whether Plaintiff filed a complaint, what Defendants decided to do with Plaintiff's complaint if it was initiated, and, finally, if any of these decisions were the result of sex discrimination. A jury must weigh the evidence to answer these questions and

determine if Defendants breached their contract with Plaintiff. *See Amherst Coll.*, 238 F.Supp.3d at 218 (holding the specific factual allegations that “the [defendant] responded differently to similar reports when the genders of the potential victims and aggressors were different” sufficient to show a breach of an agreement to hold a fair hearing to survive a motion for a judgment on the pleadings). Thus, Defendants’ motion for summary judgment is denied as to the alleged breaches of contract that Defendants failed to conduct an equitable investigation of Plaintiff’s claim and Defendants discriminated against Plaintiff on the basis of sex.

V. CONCLUSION

The Court grants in part and denies in part Defendants’ Motion for Summary Judgment. Plaintiff did not contend dismissal of his negligent infliction of emotional distress claim. Plaintiff did not request a reasonable accommodation and thus cannot maintain his ADA claim. Plaintiff has not identified genuine issues of material fact to support his deliberate indifference and erroneous outcome claims under Title IX. The Court thus grants summary judgment in favor of Defendants on Plaintiff’s negligent infliction of emotional distress claim, his ADA claim, and his Title IX claim under his erroneous outcome and deliberate indifference theories.

However, there are genuine issues of material fact as to whether Defendants selectively enforced their Code and Policy against Plaintiff in violation of Title IX. The Court thus denies Defendants’

motion for summary judgment on Plaintiff's Title IX claim under a selective enforcement theory.

Plaintiff may not maintain an independent claim for declaratory judgment, so the Court grants Defendants' motion for summary judgment as to that claim. Plaintiff's estoppel and covenant of good faith and fair dealing claims are subsumed by his other contractual claims. Consequently, Defendants' motion for summary judgment on Plaintiff's estoppel and covenant of good faith and fair dealing claims is granted.

However, there are genuine issues of material fact as to whether Defendants breached their contract with Plaintiff by failing to investigate his claim of sexual misconduct. The Court denies Defendants' motion for summary judgment on Plaintiff's contract claims as to these two breaches. Summary judgment is granted in favor of Defendants on all of Plaintiff's other breach of contract claims.

IT IS SO ORDERED that Defendants' Motion for a Summary Judgment, ECF No. 99, is **GRANTED IN PART** and **DENIED IN PART**. The Court **GRANTS** Defendants' Motion for Summary Judgment on Plaintiff's Title IX claim (Count I) under Plaintiff's erroneous outcome and deliberate indifference theories. The Court **DENIES** Defendants' Motion for Summary Judgment on Plaintiff's Title IX claim (Count I) under Plaintiff's selective enforcement theory. The Court **GRANTS** Defendants' Motion for Summary Judgment on Plaintiff's breach of contract claim (Count III) regarding Defendants' failure to conduct an equitable investigation and to

apply a proper burden of proof. The Court **DENIES** Defendants' Motion for Summary Judgment on Plaintiff's breach of contract claim (Count III) regarding the Defendants' failure to investigate Plaintiff's allegations of sexual misconduct and its discrimination against Plaintiff on the basis of sex. The Court finds Plaintiff's estoppel and covenant of good faith and fair dealing claims (Counts IV and VII) are subsumed by Plaintiff's breach of contract claim and thus **GRANTS** Defendants' Motion for Summary Judgment on Counts IV and VII. Defendants' Motion for Summary Judgment on Plaintiff's claim of negligent infliction of emotional distress (Count V) is not resisted by Plaintiff and is thus **DISMISSED**. The Court **GRANTS** Defendants' Motion for Summary Judgment on Plaintiff's ADA claim (Count VI). Plaintiff's claim for a declaratory judgment (Count VIII) does not constitute an independent claim of relief. The Court thus **GRANTS** Defendants' Motion for Summary Judgment on Plaintiff's Count VIII for declaratory judgment.

The parties are responsible for their own costs.