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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-15450

D.C. No. 3:19-cv-04923-SI

[Filed: June 1, 2021]

JANE DOE,

Plaintiff-Appellant,

v.

TIMOTHY WHITE; et al.,

Defendants-Appellees.

MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
Susan Illston, District Judge, Presiding

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted March 9, 2021
Submission Vacated March 9, 2021
Resubmitted May 25, 2021
San Francisco, California

Before: WALLACE, GOULD, and FRIEDLAND, Circuit Judges.

Plaintiff Jane Doe was investigated for sexual misconduct while she was enrolled as a graduate student at Sonoma State University (the University). She alleges that she was suspended from the University for fourteen months while the complaints against her were investigated. She further alleges that the University failed to afford her a hearing before suspending her, which she claims violated her procedural due process rights under the Fourteenth Amendment.

She brought this action for damages pursuant to 42 U.S.C. § 1983 against various University administrators in their individual capacities. The district court dismissed the case, concluding that the University administrators were entitled to qualified immunity. "Qualified immunity shields . . . state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). We may address the two requirements in either order. *Id.* Because the district court correctly concluded that Doe has not alleged the deprivation of a clearly established property or liberty interest, we affirm.

A procedural due process claim requires a plaintiff to, "as a threshold matter, identify a liberty or property interest protected by the Constitution." *United States v. Guillen-Cervantes*, 748 F.3d 870, 872 (9th Cir. 2014). To overcome a qualified immunity defense, clearly established law must recognize the claimed liberty or property interest. *Krainski v. Nevada ex rel. Bd. of Regents*, 616 F.3d 963, 970 (9th Cir. 2010).

1. Doe has not alleged a deprivation of a clearly established property interest. Because the Due Process Clause does not create freestanding property interests, a plaintiff must identify a cognizable property interest based on an "independent source such as state law." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972); *see Goss v. Lopez*, 419 U.S. 565, 572–73 (1975). We, therefore, examine California law to decide whether Doe had a clearly established property interest in her continued attendance at a state university.

Some California appellate courts have recognized a contractual relationship between students and universities, and Doe argues this contractual relationship creates a property interest. *See, e.g.*, *Zumbrun v. Univ. of S. Cal.*, 101 Cal. Rptr. 499, 504 (Ct. App. 1972); *Andersen v. Regents of Univ. of Cal.*, 99 Cal. Rptr. 531, 535 (Ct. App. 1972). Although these cases have persuasive value, they do not put the existence of a property interest "beyond debate." *Ashcroft*, 563 U.S. at 741.

The California Supreme Court itself has never held that the relationship between students and universities sounds in contract. To the contrary, it has expressed concern that "the framing of the student-university

relationship in contractual terms . . . incorrectly portrays the manner in which the parties themselves view the relationship." *Paulsen v. Golden Gate Univ.*, 602 P.2d 778, 783 n.7 (Cal. 1979). Given the state supreme court's ambivalence, the intermediate appellate courts have recognized uncertainty in the state law. *See, e.g.*, *Lachtman v. Regents of Univ. of Cal.*, 70 Cal. Rptr. 3d 147, 156 (Ct. App. 2007) (acknowledging the lack of controlling authority on whether "a student has a property or liberty interest in continued enrollment in good standing in an academic program"); *Kashmiri v. Regents of Univ. of Cal.*, 67 Cal. Rptr. 3d 635, 646 n.9 (Ct. App. 2007) (observing that "[t]here are very few California cases addressing the relationship between the student and educational institutions").

Because California law remains unsettled, we cannot conclude that the precedent is "clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018).[1] We therefore hold that Doe has not alleged

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[1] We reject the argument that cases reviewing the fairness of university disciplinary procedures under California's writ of administrative mandate statute, Cal. Civ. Proc. Code § 1094.5, establish a property interest. Although these cases have incorporated some concepts from the due process caselaw, writ of mandate proceedings do not turn on whether a plaintiff has been deprived of a property interest. *See Pomona Coll. v. Superior Ct.*, 53 Cal. Rptr. 2d 662, 664, 670 (Ct. App. 1996) (holding that a writ of mandate was the exclusive remedy for the plaintiff's claims, even though "he ha[d] not been deprived of any liberty or property interest sufficient to require a formal hearing under the due

the deprivation of a clearly established property interest.

2. Doe also has not stated a claim for the deprivation of a liberty interest protected by the Due Process Clause. Under the "stigma-plus" test, a plaintiff has a liberty interest in avoiding "reputational harm only when [that] plaintiff suffers stigma from governmental action plus alteration or extinguishment of a right or status previously recognized by state law." *Endy v. County of Los Angeles*, 975 F.3d 757, 764 (9th Cir. 2020) (quotation marks omitted). Doe's stigma-plus claim fails for two reasons.

First, to succeed on a stigma-plus claim, "a plaintiff must show the public disclosure of a stigmatizing statement by the government." *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002). Doe's Complaint contains no allegations that Defendants publicly disclosed the charges in the misconduct investigation.

Second, Doe has not alleged a sufficient "plus" factor. Damage to Doe's academic reputation is "mere reputational injury," which does not itself create a liberty interest. *Krainski*, 616 F.3d at 971. Similarly, loss of future earning potential and reduced employment or graduate education opportunities are

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process clause"); *see also Doe v. Univ. of S. Cal.*, 238 Cal. Rptr. 3d 856, 862 n.11 (Ct. App. 2018) (recognizing that a different standard of review would apply if the student "had a vested contractual right and property interest in attending" the university, and that the student had abandoned the property-interest argument on appeal).

not by themselves enough to support a claim. *Id.* To the extent Doe claims that the University changed her legal status by suspending her, she seems to be restating her contract-based property interest theory, not articulating a stigma-plus claim. *See WMX Techs., Inc. v. Miller*, 197 F.3d 367, 376 (9th Cir. 1999) (en banc).

3. Because we conclude that Doe has not alleged a deprivation of a clearly established property or liberty interest, we need not decide whether the procedures employed by the University comported with due process. The Defendants are entitled to qualified immunity, and the district court correctly dismissed the case.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 19-cv-04923-SI

[Filed: February 24, 2020]

JANE DOE,

Plaintiff,

v.

TIMOTHY WHITE, *et al.*,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS WITHOUT LEAVE TO AMEND

Re: Dkt. No. 24

On January 29, 2020, the Court held a hearing on defendants' motion to dismiss. For the reasons set forth below, the Court GRANTS the motion without leave to amend the complaint.

BACKGROUND

This lawsuit arises out of a Title IX investigation into alleged sexual harassment/misconduct by plaintiff

Jane Doe while she was a graduate student at Sonoma State University. Plaintiff was enrolled in Sonoma State University's two-year master's program in Depth Psychology beginning September 2016. Compl. ¶ 26 (Dkt. No. 1).[1] Plaintiff alleges that defendants denied her procedural due process by effectively suspending her for an academic school year while the investigation took place.

Defendant Timothy White is Chancellor of the California State University system, and responsible for issuing its Title IX Policy, Executive Order (EO) 1097. *Id*. at ¶ 9 ("Parties").[2] Defendants Sarah Clegg, Joyce Suzuki, William Kidder, and Jesse Andrews are or were responsible for administering and operating EO 1097 at Sonoma State University as Director, Coordinator, Acting Coordinator, and Deputy Coordinator of Title IX, respectively; defendant Clegg is also "Director of HR Compliance Services," and defendant Andrews is also a Title IX Senior Investigator and Trainer. *Id*. at ¶¶ 10-13 ("Parties"). At different times, defendants Suzuki, Kidder, and Andrews handled the Title IX investigation into plaintiff's alleged misconduct. Defendants are sued in their individual capacities. The Title IX investigation

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[1] The Complaint has several sequences of consecutively numbered paragraphs. Unless otherwise noted, the citations refer to the paragraphs in the "Facts" section of the complaint.

[2] EO 1097 implements Title IX throughout the California State University system by laying out investigation and disciplinary procedures. Title IX is a federal civil rights law protecting against sex discrimination in education, and includes protections against sexual harassment. 20 U.S.C. §§ 1681–1688.

began on May 18, 2017, plaintiff was found innocent of the charges of misconduct on August 22, 2018, and the complainants' appeal was denied on October 10, 2018. *Id*. at ¶¶ 59, 77, 81, 90, 94, 96.

I. The Incident Under Investigation

The Title IX investigation arose out of a complaint filed by fellow students accusing plaintiff of engaging in "a display of a sexual activity, masturbation" during a Methods of Depth Psychology class held on April 27, 2017. *Id*. at ¶¶ 33, 64. The eleven students in plaintiff's master's program cohort "took all of their classes together," and thus this class included plaintiff and complainants DB, VH, and NH.[3] *Id*. at ¶¶ 29-30. The class curriculum included an "Authentic Movement" exercise. *Id*. at ¶ 33. The principles of the Authentic Movement exercise were discussed in class on April 20 and before the exercise began on April 27. *Id at* ¶ 33. The instructor began the class on April 27 "by directing the students to gyrate their hips in 'hip circles' and inviting the students to 'move like snakes.'" *Id*. at ¶ 34. Students were then paired to form two concentric circles with "movers" on the inside and "witnesses" on the outside. *Id*. at ¶¶ 35, 37. Guidelines for movers included to "[c]hallenge yourself to move in ways that might be taboo or that you might not normally move." *Id*. at ¶ 41. Guidelines for witnesses included to "stick with it, try to contain it" if they began to feel uncomfortable; "[i]f you feel overwhelmed at any point,

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[3] NH is later designated as MH, from paragraph 57 of the complaint onward. For the sake of consistency, this order refers to "NH."

you can step back or step out of the circle." *Id*. at ¶ 40. Plaintiff was paired with NH. *Id*. at ¶ 36. The movers were instructed "to get into their starting dream image, and then to begin to physically move the dream forward from there . . . the goal was to allow the dream to unfold spontaneously, guided by the body." *Id*. at ¶ 42. Witnesses were instructed to "re-enact three images from the movement that they had witnessed," and subsequently to switch roles. *Id*. at ¶¶ 45-46. At the end of the exercise, the class engaged in a discussion and debrief with the instructor, during which "[n]o one mentioned anything unusual or upsetting." *Id*. at ¶ 49.

After the class, DB wrote to the instructor that she was uncertain if plaintiff's movements during the exercise "crossed a line or [were] just authentically expressing what's going on for her," and that she was concerned about NH processing those movements as plaintiff's witness. *Id*. at ¶ 50. On April 30, NH wrote to the instructor "to complain about Doe's dance." *Id*. at ¶ 52. The instructor replied that she did not see plaintiff's movements but, based on DB's description, "I want you to know that [Jane Doe]'s behavior was not appropriate for the classroom." *Id*. On May 6, VH emailed the Program Coordinator "threatening to withdraw from the program," and explained, "After last week's actions by [Jane Doe,] I know that I cannot complete my program with her as part of my cohort." *Id*. at ¶ 54. VH admitted to not witnessing any of plaintiff's movements herself, but that "hearing about her actions alone was triggering and anxiety producing." *Id*. On May 10, student MR emailed the Student Conduct Coordinator, "writing that Doe's

dance was not sexual." *Id*. at ¶ 56. On May 11, DB filed a written report "alleging that Jane Doe had sexually harassed NH during the movement exercise," and stating, "I am not sure how I am going to finish out the last two weeks let alone be in the cohort for another year with [Doe]." *Id*. at ¶ 57. VH also filed a complaint on the same day. *Id*. at ¶ 58. On May 19, NH submitted a written complaint, "which contained certain passages identical to the complaint DB had submitted eight days earlier." *Id*. at ¶ 62. NH wrote, "I never want to work with [Jane Doe] again, or have a conversation with her, and I do not wish to ever have to endure her facilitating a classroom experiential activity ever again." *Id*. The instructor wrote to plaintiff on May 27, "[r]est assured that I hold the perspective that … your movement … was not egregious nor directed at anyone in a harassing manner. You were simply doing the exercise and your interpretation of it." *Id*. at ¶ 66.

II. The Investigation Under Defendant Suzuki

Defendant Suzuki initiated a Title IX investigation on May 18, 2017, and interviewed DB, NH and VH the same day. *Id*. at ¶ 59. On May 19, Suzuki sent plaintiff a letter stating: "[NH] and [DB] have alleged that on April 27, 2017, during an experiential exercise called Authentic Movement, you engaged in a display of a sexual activity, masturbation, instead of the assigned activity. You did so without getting consent from [NH], the person assigned as the 'witness,' for the activity, or your other classmates who were exposed to your display." *Id*. at ¶ 64. Suzuki offered an informal resolution to plaintiff on June 12, "represent[ing] . . . that Sonoma State would drop the investigation if Doe

left Sonoma State and agreed to forego the credits she earned in her first year . . . and informed her that Sonoma State would forgive her student loans if she did so." *Id*. at ¶ 67. Plaintiff declined the offer on July 10. *Id*. at ¶ 68.

Suzuki interviewed plaintiff for three hours on July 18, during which she informed plaintiff "that she could return to class when school resumed in late August." *Id*. at ¶ 69. "According to the Complainants [DB, VH, and NH], during a meeting on July 27, 2017, Defendant Joyce Suzuki 'stated unequivocally that [Jane Doe] would, in fact, be in class during the investigation.'" *Id*. at ¶ 70. Suzuki interviewed the Methods of Depth Psychology instructor on August 4. *Id*. at ¶ 72.

Plaintiff alleges that EO 1097 required that the investigation be completed within "60 working days absent an official extension of time," or "no later than August 15, 2017." *Id*. at ¶ 60. On August 19, 2017, Suzuki informed plaintiff that she "will not be allowed to attend classes while the investigation is on-going." *Id*. at ¶ 74. Suzuki described this as an "interim remedy." *Id*.

III. The Investigation After Defendant Suzuki's Departure

Suzuki separated from Sonoma State University in September 2017, and the investigation was transferred several times, first to defendant Andrews. *Id*. at ¶¶ 76-77. On October 30, Andrews went on parental leave and the case was transferred to defendant Kidder. *Id*. at ¶ 81. On May 15, 2018, Kidder took a personal leave and transferred the case back to Andrews. *Id*. at ¶ 90.

Plaintiff was informed by either Andrews or Kidder that "she should expect a result in the case by mid-October, 2017." *Id*. at ¶ 77. Depth Psychology student GD sent an email to defendant Andrews on September 25, in which she "expressed her opinion that Doe was being scapegoated in a manner that 'is inappropriately discrediting her career and her work.'" *Id*. at ¶ 79. Plaintiff requested to withdraw from the university on October 27, 2017. *Id*. at ¶ 80.[4] Plaintiff learned of Andrews's parental leave when she requested an update on the case, and received an out-of-office message in response. *Id*. at ¶ 81. On November 21, Kidder interviewed the complainants. *Id*. at ¶ 82. On November 29, Kidder received a letter from the attorney representing MH, DB, and VH; the letter averred that Kidder represented in the meeting on the 21st that "'the evidence review would be produced approximately the first week of December' and 'the report should be issued by December 15.'" *Id*. at ¶ 83. On December 19, plaintiff emailed Kidder "saying she was 'awaiting the result of the Title IX investigation,' and noting that she had been informed that she 'could expect to hear something by mid-October.'" *Id*. at ¶ 85. Kidder responded later that day that "[t]he report should be issued in a few days." *Id*. at ¶ 86. On January 13, 2018, plaintiff emailed Kidder again about the investigation's status, and received no reply. *Id*. at ¶¶ 87-88.

On June 2, 2018, Andrews sent a notice to plaintiff and the complainants that the evidence could be

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[4] The complaint does not state what happened in response to plaintiff's request to withdraw.

reviewed, with responses due by July 8. *Id.* at ¶ 91. Plaintiff obtained additional time to review and respond to the evidence, which she did on July 30. *Id.* at ¶¶ 92-93.

On August 22, 2018, Andrews informed the parties that plaintiff "was not responsible for sexually harassing anyone." *Id.* at ¶ 94. The complainants submitted an appeal that day. *Id.* at ¶ 95. On October 10, 2018, the Chancellor's Office denied the appeal and concluded that "Complainants do not present evidence that … Respondent's behavior, especially within the constructs of a graduate level degree, would be considered by a reasonable person, in the shoes of Complainants, as sufficiently severe to limit the ability to participate in university programming." *Id.* at ¶ 96. The complaint does not state whether plaintiff returned to Sonoma State to complete the master's Program.

In this lawsuit, plaintiff brings one cause of action pursuant to 42 U.S.C. § 1983, alleging that defendants violated her Fifth and Fourteenth Amendment rights to Due Process. *Id.* at ¶¶ 102-104. Plaintiff alleges that she has a contract-created property interest in continued enrollment at Sonoma State University because she paid tuition and fees, and that this interest implicates the Due Process Clause in higher education disciplinary actions. *Id.* at ¶¶ 105-107. Plaintiff also alleges a liberty interest in her academic reputation and the freedom to pursue her chosen career. *Id.* at ¶ 108. Plaintiff alleges that her "circumstances entitled her to a hearing prior to an effective 14 month suspension," and that Sonoma State University had a

Constitutional obligation to provide her with "an explanation of the evidence in their possession and an opportunity to present her side of the story." *Id.* at ¶ 110. The complaint seeks damages, costs and attorney's fees.

LEGAL STANDARD

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. Pro. 8(a)(2), and a complaint that fails to do so is subject to dismissal pursuant to Rule 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a Defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 544, 555. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal,* 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.*

In reviewing a Rule 12(b)(6) motion, a district court must accept as true all facts alleged in the complaint

and draw all reasonable inferences in favor of the plaintiff. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, a district court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

If the Court dismisses the complaint, it must then decide whether to grant leave to amend. The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal quotation marks omitted).

DISCUSSION

Defendants move to dismiss the complaint on numerous grounds. Defendants contend that plaintiff's procedural due process claim fails because she did not exhaust her state judicial remedies prior to filing this lawsuit. Defendants also contend that because plaintiff is seeking monetary damages from defendants in their individual capacities, defendants are entitled to qualified immunity from suit because the law surrounding due process rights in post-secondary education is not clearly established. Defendants further contend that plaintiff has failed to state a claim because she has not alleged a constitutionally protected property or liberty interest, and that even if she has, the due process afforded her was adequate. Finally, defendants assert plaintiff should not be permitted to

proceed anonymously as Jane Doe, and they move to dismiss defendant Timothy White from the suit in the absence of allegations that he was involved in the investigation.

I. State Judicial Exhaustion

Defendants contend that plaintiff was required to exhaust state judicial remedies by filing state writs of mandate under Cal. Code Civ. Proc. § 1094.5 or § 1085 before pursuing a 42 U.S.C. § 1983 claim. Defendants argue that "[i]t is unclear whether Plaintiff is challenging (1) the decision to remove her from classes pending investigation, or (2) the delay in receiving the final adjudication of the complaint against her (which was an innocence finding). Regardless of which aspect Plaintiff challenges, Plaintiff had recourse to writ proceedings in state court under Section 1094.5 (which applies to final decisions), or Section 1085 (which applies to allegations of delay)." Mot. at 11 (Dkt. No. 25).[5]

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[5] California Code of Civil Procedure section 1094.5 provides a mechanism to seek judicial review of a "final administrative order or decision," Cal. Code Civ. Proc. § 1094.5(a), and section 1085 provides that "A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person." Cal. Code Civ. Proc. § 1085(a). "It is generally recognized that traditional mandamus under section 1085 applies to 'quasi-legislative' decisions, defined as those involving 'the formulation of a rule to be applied to all future cases,' while

Plaintiff contends that there is no requirement to exhaust her state judicial remedies prior to filing suit under 42 U.S.C. § 1983. Plaintiff also argues that section 1094.5 is inapplicable because that provision governs challenges to final decisions of administrative bodies, while here plaintiff is not challenging the final decision finding her innocent. Plaintiff does not specifically address defendant's argument about the availability of section 1085 relief to challenge the delay, but she does challenge defendants' factual description and asserts that throughout the Title IX investigation, defendants repeatedly told her that the disciplinary process would end soon.

The Court agrees with plaintiff and finds that based upon the nature of plaintiff's claim – which does not challenge the validity of a final administrative order – plaintiff was not required to seek a writ in state court prior to filing this lawsuit. The Supreme Court held in *Patsy v. Board of Regents of the State of Florida* that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516 (1982). Moreover, the availability of federal relief under § 1983 is notwithstanding additional relief available under state law: "It is no answer that the State has a law which if

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administrative mandamus under section 1094.5 applies to 'quasi-judicial' decisions, which involve 'the actual application of such a rule to a specific set of existing facts.'" *S. California Cement Masons Joint Apprenticeship Comm. v. California Apprenticeship Council*, 213 Cal. App. 4th 1531, 1541 (2013) (internal quotation marks and citation omitted).

enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

The Court finds *Doe v. Regents of the Univ. of Cal.*, 891 F.3d 1147 (9th Cir. 2018), upon which defendants rely heavily, distinguishable. In *Doe*, after an investigation and two hearings, the university suspended John Doe after finding that he was responsible for the sexual assault of a fellow student. The *Doe* plaintiff filed a federal lawsuit alleging federal and state law claims, including a claim under 42 U.S.C. § 1983 for a violation of his procedural due process rights, and alleging that he had not sexually assaulted the student and that the sexual encounter was consensual. The Ninth Circuit held that the plaintiff's section 1983 and Title IX causes of action were precluded because he had failed to file a section 1094.5 writ in state court challenging the validity of the final administrative decision. The Ninth Circuit noted that "[u]nder federal common law, federal courts accord preclusive effect to state administrative proceedings that meet the fairness requirements of *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), . . . [and] [w]e evaluate the fairness of a state administrative proceeding by resort to both the underlying administrative proceeding and the available judicial review procedure." *Id.* at 1154 (internal citations modified and omitted). The Ninth Circuit found that a section 1094.5 petition "provides 'an adequate opportunity for de novo judicial review.'" *Id.* (internal citation omitted). The court concluded that because "California has adopted the *Utah Construction*

standard, [a federal court in California] give[s] preclusive effect to a state administrative decision if the California courts would do so," and that the university's suspension of Doe after an investigation and two hearings was "the sort of 'adjudicatory, quasi-judicial decision' that is subject to the judicial exhaustion requirement." *Id*. (citation omitted). Here, however, plaintiff does not seek to challenge Sonoma State University's final determination that she was innocent of misconduct, and thus the *Doe* requirement to file a § 1094.5 writ of administrative mandate to review an agency decision is inapplicable.

The Court is also not persuaded by defendants' contention that because plaintiff could have filed a traditional writ of mandate under § 1085, she was therefore required to exhaust this remedy prior to filing suit. Defendants do not cite any authority holding that a section 1983 plaintiff is required to file such a writ prior to seeking relief under section 1983. Instead, the cases cited by defendants involve factually distinguishable circumstances, *see DeCuir v. Cnty. of Los Angeles*, 64 Cal. App. 4th 75, 82 (1998) (holding unsuccessful applicant for civil service job was required to exhaust internal procedure for review of administrative decisions by seeking mandamus rather than bypassing such review by filing civil suit for damages), or simply hold that a section 1085 writ is an available remedy to challenge the deprivation of a property interest. *See Bostean v. Los Angeles Unified Sch. Dist.*, 63 Cal. App. 4th 95, 105, 112, 117 (1998) (in lawsuit alleging claims under 42 U.S.C. § 1983 and Cal. Code Civ. Proc. § 1085, holding school district employee placed on involuntary leave had a federally protected

property interest in his continued employment was thus entitled to a hearing before his deprivation).

Accordingly, the Court DENIES defendants' motion to dismiss for failure to exhaust state remedies.

II. Procedural Due Process and Qualified Immunity

Plaintiff claims that her right to procedural due process was violated when defendants did not provide her with a hearing prior to an effective 14 month suspension and by not providing her with an explanation of the evidence in their possession and an opportunity to present her side of the story. Compl. ¶ 110.

Defendants contend that they are entitled to qualified immunity because during the time period at issue, it was not clearly established that plaintiff had a protected property or liberty interest in continued class attendance while under investigation for sexual misconduct in the context of post-secondary education in California. Defendants also argue that the qualified immunity analysis must be particularized to the facts of the case, and they cite authority for the proposition that "the law regarding procedural due process claims can rarely be considered clearly established at least in the absence of closely corresponding legal and factual precedent." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 983 (9th Cir. 1998). Defendants also argue that they did not violate plaintiff's due process rights.

"A procedural due process claim has two distinct elements: (1) a deprivation of a constitutionally

protected liberty or property interest, and (2) a denial of adequate procedural protections." *Id.* at 982. "In seeking to defeat a claim of qualified immunity, the plaintiff bears the burden of proving not only that both elements of his claim are resolved in his favor, but also that both elements are 'clearly established' in his favor." *Id.*; *see also Davis v. Scherer*, 468 U.S. 183, 197 (1984) ("A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.").

A. Qualified Immunity

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (citation and quotation marks omitted). Courts have discretion to decide which of the two prongs of qualified-immunity analysis to address first. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

"A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would [have understood] that what he is doing violates that right.'" *al-Kidd*, 563 U.S. at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "In assessing claims of qualified immunity, reviewing courts must not view constitutional rights in the abstract but rather

'in a more particularized, and hence more relevant, sense.'" *Brewster*, 149 F.3d at 977 (quoting *Anderson*, 483 at 640). "Thus, in order to ensure that government officials receive necessary guidance, courts should focus the qualified immunity inquiry at the level of implementation." *Id.*

To be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly*, 137 S. Ct. 548, 551 (2017). "The right must be settled law, meaning that it must be clearly established by controlling authority or a robust consensus of cases of persuasive authority." *Tuuamalemalo v. Greene*, 946 F.3d 471, 477 (9th Cir. 2019) (citing *District of Columbia v. Wesby*, 138 S. Ct. 577, 590-91 (2018)). "A right can be clearly established even though there was no binding precedent in this circuit." *Lum v. Jensen*, 876 F.2d 1385, 1387 (9th Cir. 1989) (citation omitted). In such a case, the court "evaluate[s] the likelihood that this circuit or the Supreme Court would have reached the same result as courts that had already considered the issue." *Id.* In the absence of binding precedent, the court may look to all available decisional law, including the law of other circuits and district courts. *See Tuuamalemalo*, 946 F.3d at 477; *Carrillo v. Cnty. of Los Angeles*, 798 F.3d 1210, 1223 (9th Cir. 2015). Unpublished district court decisions may also "inform" the court's analysis. *Bahrampour v. Lampert*, 356 F.3d 969, 977 (9th Cir. 2004).

In *Lum*, where no binding precedent addressed the issue in question and other circuits' decisions were in conflict, the Ninth Circuit found that qualified

immunity was appropriate because the law was not "clearly established." *Id*. at 1389. At issue was whether there was a clearly established substantive due process right to continued public employment that would preclude an arbitrary, capricious and pretextual termination. *Id*. at 1387. The Ninth Circuit had not yet addressed the issue; four other circuits had affirmatively established substantive due process protections; five other circuits had left the issue open or summarily addressed the issue without finding a violation; and one circuit had held there was no substantive due process right. *Id*. at 1387-88. The Ninth Circuit held that the "absence of binding precedent in this circuit plus the conflict between the circuits is sufficient, under the circumstances of this case, to undermine the clearly established nature of a right." *Id*. at 1389.

B. Deprivation of Constitutionally Protected Property or Liberty Interest

Plaintiff alleges that she has a contract-created property interest in continued enrollment at Sonoma State University because she paid tuition and fees. Compl. ¶ 107.[6] Plaintiff alleges that the her property

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[6] Plaintiff's opposition largely focuses on her alleged property interest in continued enrollment, and the complaint clearly alleges a contract-based property interest as the basis for the procedural due process claim. Plaintiff also alleges harm to her reputation, *see* Compl. ¶ 108, although it is not clear from the complaint or plaintiff's opposition if plaintiff contends that her liberty interest provides a separate and independent basis for her procedural due process claim. In any event, as discussed *infra*, the Court finds that there is no clearly established liberty or property right in the

interest is clearly established because "the majority of federal courts that have decided the issue have held that students at public institutions of higher education have a property right to continued enrollment" and "[t]he Ninth Circuit has several times ruled on procedural due process claims involving public institutions of higher education; suggesting that the court assumed that a student has a protected liberty or property interest." *Id.* ¶ 109. Plaintiff argues that "[a]ny reasonable official in Defendants' shoes would have understood that suspending Jane Doe for a year without notice and an opportunity to be heard violated her constitutional rights to liberty and property." Opp'n at 15 (Dkt. No. 28).

Defendants counter that neither the Supreme Court nor the Ninth Circuit have held that a student has a property or liberty interest in continued enrollment in a public higher education program, and that there is no controlling precedent or robust consensus of cases that has "placed the statutory or constitutional question beyond debate." Defendants assert that "[p]laintiff fails to identify even a single case – not in the U.S. Supreme Court, not in any circuit court, and not even in any district court – involving facts similar to those alleged here, whereby a higher education student was temporarily barred from attending classes while under investigation for alleged sexual harassment ('interim remedy'), but was later subsequently found not to have violated university policy." Reply at 1 (Dkt. No. 29).

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context of higher education, and thus that defendants are entitled to qualified immunity.

In *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court held that public high school students who had been suspended for misconduct for up to 10 days without a hearing had property and liberty interests protected by the Due Process Clause. The Court held that where state law has created a student's entitlement to a public education, that entitlement constitutes a property interest that is constitutionally protected. *Id.* at 573-74 (analyzing Ohio law that directed local authorities to provide a free education to all residents between five and 21 years of age and a compulsory-attendance law). The Court noted that such property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id*. at 586 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). The *Goss* court also held that "[w]hen discipline like lengthy suspension or expulsion from a public elementary or secondary school is at issue, this state law property right also gives rise to a constitutionally protected liberty interest in reputation." *Id.* at 576.

In cases of higher education, however, the Supreme Court has never decided whether students have a protected property or liberty interest in continued enrollment. Instead, the Court has assumed that students have such an interest and held that the procedures provided satisfied due process. *See Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 84-85 (1978) (medical student who was dismissed during final year of study due to failure to meet academic standards alleged liberty interest to "continue her medical education or to return to employment in a medically

related field"; the Supreme Court "[a]ssum[ed] the existence of a liberty or property interest" and held process provided was sufficient); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 222-23 (1985) ("remembering Justice Brandeis' admonition not to 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied' . . . [we] accept the University's invitation to 'assume the existence of a constitutionally protectible property right in [Ewing's] continued enrollment,' and hold that even if Ewing's assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of record disclose no such action.") (citations and internal quotation marks omitted).

As plaintiff acknowledges, the Ninth Circuit has not squarely addressed whether there is a property or liberty interest in continued attendance in higher education, under California law or the law of any other state.[7] Plaintiff cites *Lucey v. Nevada ex rel. Bd. of*

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[7] The Ninth Circuit has held that a physician who was employed as a medical resident had a property interest in his residency, and thus that he was entitled to due process in connection with the termination of the residency prior to the end of the training program. *Stretten v. Wadsworth Veterans Hosp.*, 537 F.3d 361, 367 (9th Cir. 1976) ("Dr. Stretten, at the time of his appointment, was advised that he would be employed for the 'duration of this training unless sooner terminated, and subject to periodic review by resident review board' and, as found by the district court, the duration of the training was four years. We rely primarily on these facts in finding no error in the district court's conclusion that Dr. Stretten's claim to his residency is a property interest deserving of appropriate due process before it is removed."). The Ninth Circuit

Regents of Nevada Sys. of Higher Educ., 380 Fed. App'x 608 (9th Cir. May 21, 2010), in which the Ninth Circuit affirmed in an unpublished memorandum disposition a district court's grant of summary judgment. The district court had granted summary judgment in favor of university officials, holding that the officials did not violate the plaintiff student's procedural due process rights when they placed a hold on his transcript and notated his records with allegations of wrongdoing because he was provided with sufficient notice and an opportunity to be heard. *See Lucey v. Nevada ex rel. Bd. of Regents of Nevada Sys. of Higher Educ.*, No. 2:07-cv-00658-RLH-RJJ, 2009 WL 971667, at *4 (D. Nev. Apr. 9, 2009). The district court also held that the defendants were entitled to qualified immunity because there was no constitutional violation and did not reach the question of whether the right was clearly established. *Id.* at *5.

The Ninth Circuit affirmed, holding that "Lucey's right to procedural due process at the December 4 hearing was satisfied because Lucey was subject to sanctions less than suspension or expulsion and received 'some kind of notice and [was] afforded some kind of hearing.'" *Lucey*, 380 Fed. App'x at 610 (quoting *Goss*, 419 U.S. at 579). However, neither the district court nor the Ninth Circuit addressed the nature of the plaintiff's protected interest. *See also Gamage v. Nev. ex rel. Bd. of Regents of Higher Educ.*, 647 Fed. App'x

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reversed the district court's finding of a due process violation, however, holding that the physician had been provided with adequate process. *Stretten* is inapposite because the due process right arose in the context of employment.

787, 788 (9th Cir. Apr. 7, 2016) (affirming in unpublished opinion a district court's summary judgment in favor of defendants in case brought by student who was removed from doctoral program due to plagiarism, holding student "received more process than was due").[8]

More recently, the Ninth Circuit affirmed in a published decision a district court's dismissal of a complaint brought by student athletes against the University of Oregon challenging their suspensions after a finding of sexual misconduct in violation of the Student Conduct Code. *Austin v. Univ. of Oregon*, 925 F.3d 1133, 1139 (9th Cir. 2019). In the district court, the students asserted property and liberty interests in their education, scholarships, reputation, and future potential NBA careers, and they alleged that the university defendants had denied them procedural due process in connection with the suspensions. *See Austin v. Univ. of Or.*, 205 F. Supp. 3d 1214, 1221 (D. Or. 2016). The district court held that the individual defendants were entitled to qualified immunity because there was no clearly established property or liberty interest. *Id.* at 1221-22.

The Ninth Circuit affirmed. The court "assume[d], without deciding, that the student athletes have

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[8] In *Gamage*, the district court held that the student plaintiff had a protected property interest in continued enrollment at a public institution of higher learning. *See Gamage v. Nevada ex rel. Bd. of Regents of Nevada Sys. of Higher Educ.*, No. 2:12-CV-00290-GMN, 2014 WL 250245, at *8 (D. Nev. Jan. 21, 2014) (citing *Horowitz*, 435 U.S. at 84-85). The Ninth Circuit did not specifically address this holding in its unpublished opinion.

property and liberty interests in their education, scholarships, and reputation as alleged in the complaint," and held that the students received sufficient due process by receiving notice and a meaningful opportunity to be heard. *Austin*, 925 F.3d at 1139.[9] Because the court found that there were no due process violations, the court did not reach the district court's qualified immunity finding. *See id.* at 1139 n.1.

District courts within the Ninth Circuit have recognized that "[t]here 'is a dearth of binding case law addressing the issue of whether there is a constitutionally protected right to continued enrollment in a state college or university.'" *Edwards v. MiraCosta College*, Case No. 3:16-cv-01024-BEN-JMA, 2017 WL 2670845, at *5 (S.D. Cal. June 20, 2017) (quoting *Hunger v. Lassner*, No. 12-00549, 2014 WL 12599630, at *9 (D. Haw. Apr. 30, 2014)); *see also Lachtman v. Regents of Univ. of Cal.*, 158 Cal. App. 4th 187, 199 (2007) ("No United States or California Supreme Court opinion holds a student has a property or liberty interest in continued enrollment in good standing in an academic program."). These courts have noted that "[c]ourts have often assumed, without deciding, that students pursuing post-secondary education have a constitutionally protected liberty or property interest in continued enrollment," generally in the context of dismissing due process claims on the ground that the

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[9] *See also Oyama v. Univ. of Hawaii*, 813 F.3d 850, 874 (9th Cir. 2015) ("But even if we accept Oyama's argument that the University's decision deprived him of a constitutionally protected interest, the University provided him with adequate process.").

process provided was adequate. *Edwards*, 2017 WL 2670845, at *5 (citing cases). In *Edwards*, the district court held that a community college student who had been suspended had "plausibly alleged a constitutionally protected liberty interest sufficient to survive a motion to dismiss" based on allegations that "the suspension has negatively affected his grade point average, resulted in him being placed on academic probation, and caused him to be ineligible for academic scholarships." *Id.*

Some district courts within the Ninth Circuit have held that there is a property interest in continued enrollment, *see Hunger*, 2014 WL 12599630, at *13, and *Gamage*, 2014 WL 250245, at *8, and other courts have held that there is no such property interest. *See, e.g.*, *Harrell v. Southern Oreg. Univ.*, No. CV 08-3037 CL, 2010 WL 2326576, at *8-9 (D. Or. Mar. 24, 2010) (holding plaintiff student had no property interest because, *inter alia*, there is no entitlement to post-secondary education); *see also Ryan v. Harlan*, No. CV-10-626-ST, 2011 WL 711110, at *7 (D. Or. Feb. 22, 2011) ("Even if he was denied due process, Ryan has no recognized due process interest in graduate level education.").

The Court is aware of only one case within the Ninth Circuit holding that the property right was clearly established, *see Hunger*, 2014 WL 12599630, at *13,[10] and several cases granting qualified immunity on

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[10] The *Hunger* court reached that conclusion based on what it viewed as "the Ninth Circuit's broad interpretation of what constitutes 'clearly established' law in the absence of binding

the ground that the right was not clearly established. *See Doe v. Univ. of Oregon*, No. 6:17-CV-01103-AA, 2018 WL 1474531, at *11-14 (D. Or. Mar. 26, 2018) (holding Oregon law provided the plaintiff with underlying substantive interest in continued enrollment in higher education based on payment of tuition and fees, but granting qualified immunity to defendants because "[t]he circuits are split on whether there education at a public university implicates the Due Process Clause, and there is no Supreme Court or Ninth Circuit authority on resolving the question"); *Brady v. Portland State Univ.*, No. 3:18-CV-01251-HZ, 2019 WL 4045652, at *4 (D. Or. Aug. 23, 2019) (Oregon law may create property interest but the right was not clearly established).

Plaintiff relies on cases from other circuits to argue that it is clearly established that students at public institutions of higher education have a protected

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precedent" and based upon *Goss*, the Ninth Circuit's unpublished decision in *Lucey*, the district court's decision in *Gamage*, and the Eleventh Circuit's decision in *Barnes v. Zaccari*, 669 F.3d 1295, 1303 (11th Cir. 2012). *See Hunger*, 2014 WL 12599630, at *13. However, as discussed *supra*, *Goss* involved K-12 students and the Ninth Circuit in *Lucey* did not specifically hold that post-secondary students have a protected property right. In *Barnes*, the Eleventh Circuit held that the plaintiff, who had been expelled without notice or a hearing, had a protected property right based upon the Georgia Constitution and the university's regulations, which constituted official regulations of the state of Georgia. *See Barnes*, 669 F.3d at 1303. The Eleventh Circuit also held that the right was clearly established as of May 2007 because the university's regulations "clearly established that Zaccari could not suspend or expel Barnes without cause—i.e., Barnes violating a provision in the Code." *Id.* at 1307.

property right to continued enrollment. However, although a number of courts have held that there is a protected interest, the source of that interest varies or is not clearly identified The First and Sixth Circuits have cited *Goss* and held that the Due Process Clause is implicated by higher education disciplinary decisions. *See Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 12 (1st Cir. 1988); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633 (6th Cir. 2005). However, the *Gorman* and *Flaim* decisions do not specify whether the protected interest is a liberty interest or arises from a property right (and if the interest stems from property, the courts do not identify the source of that property right).

The Tenth and Eleventh Circuits have found a property interest in higher education created by particular state laws. *See Harris v. Blake*, 798 F.2d 419, 422 (10th Cir. 1986) (property interest created by Colorado law directing that state colleges be open to all residents upon payment of reasonable tuition); *Barnes*, 669 F.3d at 1303 (property interest created by university Board Policy Manual and Student Code of Conduct, which were official regulations created under Georgia constitution).

The Second Circuit has held that a graduate student had a property interest in continuing his education based upon "New York law's recognition of an 'implied contract between [a college or university] and its students' requiring the 'academic institution to act in good faith in its dealing with its students.'" *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991)

(quoting *Olsson v. Board of Higher Education*, 49 N.Y.2d 408, 414 (1980).[11]

The Seventh Circuit has rejected a "stand-alone" property interest in higher education, and indicated that there may be circumstances under which a student could allege a property interest based in contract. In *Charleston v. Bd. of Trustees of Univ. of Ill. at Chicago*, 741 F.3d 769 (7th Cir. 2013), the Seventh Circuit affirmed the dismissal of complaint brought by a former medical student who had been dismissed for unprofessional conduct. The court first noted that "our circuit has rejected the proposition that an individual has a stand-alone property interest in an education at a state university, including a graduate education." *Id.* at 772 (citing *Bissessur v. Ind. Univ. Bd. of Trs.*, 581 F.3d 599, 601 (7th Cir. 2009), and *Williams v. Wendler*, 530 F.3d 584, 589 (7th Cir. 2008)). The Seventh Circuit stated that *Goss* "was inapposite" because the plaintiff's complaint "does not point to an Illinois statute that promises him an education at a state medical school." *Id.* at 772 n.2. The Seventh Circuit framed the question as "whether the student has shown that he has a legally protected entitlement to his continued education at the university":

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[11] District courts in the Third and Fourth Circuits have also held that students have a property interest based on contract. *See Borrell v. Bloomsburg Univ.*, 955 F. Supp. 2d 390, 402 (M.D. Pa. 2013) (property interest based in Pennsylvania law, which recognizes a contractual relationship between a student and university); *Doe v. Alger*, 228 F. Supp. 3d 713, 729 (W.D. Va. 2016) (property interest based in Virginia law, which recognizes implied-in-fact contracts).

> Charleston could establish that he has this legitimate entitlement by pleading the existence of an express or implied contract with the medical school. *See Bissessur*, 581 F.3d at 601. For instance, Charleston could point to an agreement between himself and the school that he would be dismissed only for good cause. *Id*. But as we held in *Bissessur*, it is not enough for a student to merely state that such an implied contract existed. *Id*. at 603. Instead, the student's complaint must be specific about the source of this implied contract, the exact promises the university made to the student, and the promises the student made in return. *See id*. at 603–04.

Id. at 773. The court held that the plaintiff had failed to meet that standard because he had only alleged that his dismissal was in violation of the university's student disciplinary policies and university statutes, and had not described any specific promises made to him in the disciplinary policies nor had he identified specific university statutes. *Id*. To the extent the student was claiming that the university failed to follow the procedures laid out in the disciplinary policies, the court stated: "We have rejected similar claims of an interest in contractually-guaranteed university process many times, but we will be clear once more: a plaintiff does not have a federal constitutional right to state-mandated process." *Id*. (internal citation omitted).

Finally, the Fifth Circuit has recognized a liberty interest in higher education. In *Plummer v. University*

of Houston, 860 F.3d 710, 774 & n.6 (5th Cir. 2017), the Fifth Circuit held that two students had a liberty interest under the Texas Constitution in their higher education, but noted that "Texas has not recognized a property interest in graduate higher education." *See also Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961) (holding students who had been expelled, without notice or opportunity to be heard, for participating in civil rights lunch counter demonstration had right to due process based on "right to remain at a public institution of higher learning in which the plaintiffs were students in good standing"); *see also Mathai v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll.*, 959 F. Supp. 2d 951, 958 (E.D. La. 2013) (where student faced academic dismissal, court "assume[d] without deciding that plaintiff has a property or liberty interest in her continuing education at LSU"), *aff'd*, 551 F. App'x 101 (5th Cir. 2013).[12]

After careful review of this case law, the Court concludes that plaintiff has not met her burden to show that at the time of the Title IX investigation, she had a clearly established property or liberty interest in her continued enrollment at Sonoma State. There are no binding Supreme Court or Ninth Circuit cases establishing such a right, and a number of district courts within the Ninth Circuit have recognized that

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[12] The Eighth Circuit has assumed *arguendo* that a graduate student who was academically dismissed from a program had liberty or property interest. *See Schuler v. Univ. of Minn.*, 788 F.2d 510, 513 n.6 (8th Cir. 1986) ("Assuming the existence of a property or liberty interest, Schuler was awarded at least as much due process as the Fourteenth Amendment requires.").

there is a "dearth" of case law on the subject, with several recent decisions finding school officials entitled to qualified immunity. Looking outside the Ninth Circuit, there is no "robust consensus" holding that students have a protected property or liberty interest in continued enrollment in higher education at a public college or university. The First and Sixth Circuits have extended *Goss* without articulating the nature of the protected interest; the Tenth and Eleventh Circuits have found a property interest arising out of Colorado and Georgia law; the Second Circuit has held there is a property interest based on New York law's recognition of an implied contract; the Seventh Circuit has rejected a "stand-alone" property interest and indicated that a property interest could be based on contract under specific circumstances; and the Fifth Circuit has found a liberty interest while noting that Texas law does not provide a property interest. In order to deny defendants' claim of qualified immunity, "existing precedent must have placed the statutory or constitutional question beyond debate." *White*, 137 S. Ct. at 551. The Court finds that the unsettled nature of the law in this area does not meet this standard, and accordingly the Court GRANTS defendants' motion to dismiss on qualified immunity grounds.[13]

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[13] Based upon the Court's research, it appears that cases involving procedural due process claims by post-secondary students accused of misconduct arise with some frequency. Thus, these issues will continue to be litigated, and the Court would welcome guidance from the Ninth Circuit about the standards governing such claims. Here, although the Court concludes that plaintiff's lawsuit is barred by qualified immunity, the Court finds plaintiff's allegations unsettling. Taking the allegations of the complaint as true, plaintiff has raised serious questions about whether she was

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS defendants' motion to dismiss because defendants are entitled to qualified immunity.

IT IS SO ORDERED.

Dated: February 24, 2020

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

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provided due process during the Title IX investigation and imposition of the "interim remedy" of preventing plaintiff from attending class for 14 months while the inordinately lengthy investigation took place.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 19-cv-04923-SI

[Filed: February 24, 2020]

JANE DOE,

Plaintiff,

v.

TIMOTHY WHITE, *et al.*,

Defendants.

JUDGMENT

The Court has dismissed the complaint on the ground that defendants are entitled to qualified immunity. Judgment is hereby entered against plaintiff and in favor of defendants.

IT IS SO ORDERED AND ADJUDGED.

Dated: February 24, 2020

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-15450

D.C. No. 3:19-cv-04923-SI
Northern District of California, San Francisco

[Filed: July 8, 2021]

JANE DOE,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
TIMOTHY WHITE; et al.,	)
	)
Defendants-Appellees.	)
	)

ORDER

Before: WALLACE, GOULD, and FRIEDLAND, Circuit Judges.

The panel has unanimously voted to deny Appellant's petition for rehearing. Judge Gould and Judge Friedland have voted to deny the petition for rehearing en banc, and Judge Wallace so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote

on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA OAKLAND OR SAN FRANCISCO DIVISION

Case No. 19-cv-4923

[Filed: August 15, 2019]

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Attorneys for Plaintiff Jane Doe

JANE DOE,	)
	)
Plaintiff,	)
	)
v.	)
	)
TIMOTHY WHITE, Chancellor; SARAH CLEGG, Title IX Coordinator, Sonoma State University; JOYCE SUZUKI; WILLIAM KIDDER; JESSE ANDREWS,	)
	)
Defendants.	)
	)

COMPLAINT FOR DAMAGES

1. Plaintiff Jane Doe brings this action for a declaratory judgment and damages against the above-named defendants under 42 U.S.C. § 1983, for violations of her rights under the First, Fifth, and Fourteenth Amendments to the U.S. Constitution.

2. This case arises out of Sonoma State University's decision to proceed with a disciplinary proceeding against Jane Doe in violation of her constitutional right to due process and in the process, deliberately depriving Doe of her education.

3. Jane Doe was falsely accused of sexually harassing three classmates by engaging in a sensual dance during a school-sanctioned dream-based movement exercise. A brief investigation would have concluded that the allegations, which included the

absurd claim that Doe masturbated in class, were demonstrably false, and that the three students who made the allegation deeply disliked Doe and did not want her to be in their eleven-person graduate studies cohort. Instead, in direct violation of Doe's constitutional rights, not to mention Title IX and relevant university policies, Defendants buckled under pressure from the complaining students, who threatened to withdraw from the school if Doe was allowed to continue going to class. To assuage the complainants, Defendants purported to "investigate" the case for 14 months. Doe was summarily suspended for that entire time, prohibited from returning to class for her second year of study while the purported investigation was ongoing.

4. In so doing, Defendants deprived Doe of the ability to finish her Master's degree. Defendants informed Doe three days before the commencement of her second year of school that she could not attend classes until the investigation was completed. The investigation—of what should have been an open-and-shut case because the allegations were plainly baseless—was not completed until what would have been the end of Doe's second and final year.

5. On August 22, 2018, three months after Doe would have completed her Master's degree, and a year after telling her she couldn't attend her second year of classes, Sonoma State found Doe *not responsible* for the alleged misconduct. From start to finish, the so-called investigation of an obviously frivolous complaint took 15 months. During that entire time, Doe could not go to school.

6. The Complaining students appealed the finding for Doe. The Office of the Chancellor affirmed that no sexual harassment occurred and that *no reasonable person* would have found that the alleged conduct constituted sexual harassment.

7. Defendants knowingly deprived Doe of her constitutional rights by suspending Doe without a hearing.

PARTIES

8. Plaintiff Jane Doe ("Doe") was from August 2016 to October 2017 a graduate student at Sonoma State University.

a. Doe is a California resident with a residence at [OMITTED]. In 2016 and 2017, Doe completed two semesters of coursework in Sonoma State's Master's program in Depth Psychology.

b. Doe was scheduled to graduate from Sonoma State with a Master's Degree in Depth Psychology in May 2018, but was forced to withdraw from the program and the University after being prohibited from attending class by Title IX Officer Joyce Suzuki on or about August 19, 2017.

c. The disclosure of Jane Doe's identity will cause her irreparable harm as this case involves matters of the utmost personal intimacy, including education records protected from disclosure by the Family Educational Rights and Privacy Act

("FERPA"), 20 U.S.C. § 1232g; 34 CFR Part 99.

9. Defendant TIMOTHY WHITE is the Chancellor of the California State University System, with a principal place of business at 401 Golden Shore, Long Beach, California 90802. Chancellor White is responsible for the issuance of Executive Orders that govern policy throughout the CSU system, including Executive Order 1097 (the CSU Title IX Policy), and for overseeing appeals filed under Executive Order 1097. White is sued in his individual capacity for damages.

10. Defendant SARAH CLEGG is the Director of Title IX & HR Compliance Services at Sonoma State. She has a principal place of business at International Hall, 2nd Floor, Sonoma State University, Rohnert Park, California, 94928.

a. Clegg is sued in her individual capacity for damages.

b. On information and belief, Clegg has been acting under the policies, procedures, and practices of the CSU, and, in particular, those policies designed to implement Title IX.

c. Clegg is responsible for administering and operating Executive Order 1097 on Sonoma State's campus.

11. Defendant Joyce Suzuki was the Sonoma State University Title IX coordinator from at least January 1, 2017, to approximately September 2017.

a. Suzuki is sued in her individual capacity for damages.

b. On information and belief, Suzuki was at all relevant times acting under the policies, procedures, and practices of the CSU, and, in particular, those policies designed to implement Title IX.

c. Suzuki was during the relevant time period responsible for administering and operating Executive Order 1097 on Sonoma State's campus.

12. Defendant William Kidder was the Sonoma State University Acting Title IX Coordinator from approximately September 2017 through May 2018, and oversaw the investigation of the underlying matter during that time.

a. Kidder is sued in his individual capacity for damages.

b. On information and belief, Kidder was at all relevant times acting under the policies, procedures, and practices of the CSU, and, in particular, those policies designed to implement Title IX.

c. Kidder was during the relevant time period responsible for administering and operating Executive Order 1097 on Sonoma State's campus.

13. Defendant Jesse Andrews was the Sonoma State University Deputy Title IX Coordinator and a Sonoma

State University Title IX Senior Investigator and Trainer during the relevant time period.

a. Andrews is sued in his individual capacity for damages.

b. On information and belief, Andrews was at all relevant times acting under the policies, procedures, and practices of the CSU, and, in particular, those policies designed to implement Title IX.

c. Andrews was during the relevant time period responsible for administering and operating Executive Order 1097 on Sonoma State's campus.

JURISDICTION AND VENUE

14. This case arises, in part, under the laws of the United States, specifically 42 U.S.C. § 1983 and Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 et seq. Accordingly, this Court has jurisdiction in this matter pursuant to 28 U.S.C. §§ 1331 and 1343.

15. This Court is an appropriate venue for this cause of action pursuant to 28 U.S.C. § 1391. The defendants are residents of the State in which this district is located and a substantial part of the events or omissions giving rise to the claim occurred in this district.

FACTS

SEXUAL MISCONDUCT ON CAMPUSES

1. Sonoma State University is one of the 23 campuses of the California State University system, which was created by the California State Legislature in the 1960 Donohoe Higher Education Act. Sonoma State's principal place of business is 1801 E. Cotati Avenue, Rohnert Park, California, 94928. The California State University Board of Trustees is the governing body of Sonoma State University and all CSU schools. The Board of Trustees consists of 25 members—nine voting members and two student nonvoting members.

2. After years of criticism for being too lax in enforcing prohibitions on campus sexual assault, colleges and universities are overcorrecting by using Title IX to crack down on alleged perpetrators. This overcorrection has come at the cost of due process. In case after case,—both state and federal courts around the country have found that schools, including CSU institutions, have denied accused students fundamental constitutional rights in a rush to find them "responsible" and impose severe sanctions.

3. More specifically, California's state appellate courts have held that California universities, in their zeal to comply with the spirit of regulatory guidance – and threats of deprivation of funds – by the U.S.

Department of Education, overcorrected and subverted due process.[1]

4. In response to the California Court of Appeals' 2019 ruling in *Doe v. Allee*, schools including the CSU have overhauled the very Title IX process under which Ms. Doe was investigated and disciplined.

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[1] See, *e.g.*, *Doe v. Allee*, 30 Cal.App.5th 1036 (2019); *Doe v. Claremont McKenna College* 25 Cal.App.5th 1055 (2018); *Doe v. University of Southern California*, 246 Cal.App.4th 221 (2016); *Doe v. Regents of the University of California*, 5 Cal.App.5th 1055 (2016); *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), *reh'g en banc denied*, 2018 U.S. App. LEXIS 28773; *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017). A number of recent lawsuits challenging similar procedures have survived preliminary motions as federal courts expressed concern about the failure of schools to comply with their own procedures. *See*, *e.g*, *Doe v. Amherst* College, D.Mass. Civ. No. 15-30097-MGM, 2017 U.S. Dist. LEXIS 28327, at *41 (Feb. 28, 2017) (denying motion for judgment on pleadings for breach of contract for school policies enacted due to OCR pressure); *Naumov v. McDaniel College, Inc.*, D.Md. No. GJH-15-482, 2017 U.S. Dist. LEXIS 49887, at *29 (Mar. 31, 2017) (rejecting argument that Dear Colleague Letter required breach of college handbook); *Collick v. William Paterson Univ.*, D.N.J. No. 16-471 (KM) (JBC), 2016 U.S. Dist. LEXIS 160359, at *69-70 (Nov. 17, 2016) ("the Complaint sufficiently alleges that Defendants did not adhere to [the school's] own rules, that the procedure they followed was unfair, and that the decision was not based on sufficient evidence"); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 600 (D.Mass.2016) ("the Court concludes that the complaint plausibly alleges that [the school] did not provide 'basic fairness' to" accused student); *Doe v. Lynn Univ., Inc.*, S.D.Fla. No. 9:16-CV-80850, 2017 U.S. Dist. LEXIS 7529, at *17 (Jan. 19, 2017) (plaintiff stated valid claims for of contract and breach of the implied covenant of good faith and fear dealing in connection with sexual assault investigation).

I. Title IX Statutory & Regulatory Framework.

5. The issue of sexual assaults on college and university campuses is, at the federal level, primarily addressed by an act of Congress known as Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688.

6. Title IX requires every college and university that receives federal funds to establish policies and procedures to address sexual assault and sexual harassment, including a system to investigate and adjudicate charges of sexual assault by one student against another. A school violates a student's rights under Title IX regarding student-on-student sexual violence if: (1) the alleged conduct is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's educational programs;[2] and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. The fundamental legal and regulatory principle of this system, is that it be "prompt and equitable."[3] OCR, which is in charge of the administrative enforcement of Title IX, has expanded on this basic mandate through (a) regulations promulgated through notice-and-

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[2] OCR requires that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances.

[3] 34 C.F.R. § 106.8 (b).

comment rule making[4] that "have the force and effect of law;"[5] and (b) "significant guidance documents" such as the "Q&A on Campus Sexual Misconduct" issued September 2017 and the September 22, 2017 "Dear Colleague Letter."[6]

7. A school's procedures must, at a minimum, (1) "ensure the Title IX rights of the complainant," and "accord due process to both parties involved,"[7] a requirement applicable to both state and private schools;[8] (2) provide an "adequate, reliable, and impartial investigation;"[9] (3) provide the complainant and the accused student "an equal opportunity to

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[4] OCR, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties – Title IX (2001) at 36 n.98 (notice of publication at 66 Fed. Reg. 5512 (January 19, 2001) ("2001 Guidance") (http://www.ed.gov/ocr/docs/shguide.html).

[5] *Chrysler Corp. v. Brown* (1979) 441 U.S. 281, 295, 301-02 (regulations promulgated pursuant to notice-and-comment rulemaking that affect individual rights and obligations "have the force and effect of law").

[6] Available at https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html.

[7] 2001 Guidance at 22. S

[8] *E.g.*, OCR Ruling re Complaint #04-03-204 (*Christian Brothers Univ.*) (Mar. 26, 2004) at 7 ("due process protections [are] inherent in the Title IX regulatory requirements").

[9] 2001 Guidance at 20.

present relevant witnesses and other evidence;"[10] (4) ensure that the "factfinder and decision maker . . . have adequate training or knowledge regarding sexual violence"[11]; and (5) require proceedings to be documented and include written findings of fact and reports that summarize all evidence, both inculpatory and exculpatory evidence.[12]

8. When OCR set forth guidance that "in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard"[13]. . . OCR also advised that Title IX has incorporated and adopted the procedural provisions applicable to Title VI of the Civil Rights Act of 1964.[14]

9. The Administrative Procedure Act requires that that any sanction imposed must be "supported by and in accordance with [] reliable, probative and substantial evidence,"[15] (*See* 5 U.S.C. § 556(d).) 5 U.S.C. § 556(d) also provides in relevant part:

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[10] *Id.*; 2017 Dear Colleague Letter at 3.

[11] *Id.*; 2001 Guidance at 21.

[12] 2017 Dear Colleague Letter at 5.

[13] The findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard. 2017 Dear Colleague Letter, at 5.

[14] *See* 34 C.F.R. § 106.71.

[15] 5 U.S.C. § 556(d).)

> . . . A party [in an administrative proceeding] is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.[16]

10. Given the disruptive and intrusive nature of a Title IX investigation, the psychological toll it exacts on the students involved, and the need for prompt action, the regulations make clear that delay in the investigation and resolution of complaints should be avoided.[17] "A critical issue under Title IX is whether the school recognized that sexual harassment has occurred and took prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects."[18] Extensions of time are to be based on good cause, and schools must provide notice to the parties with the reason for the delay.[19]

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[16] *Id.*

[17] 34 C.F.R. § 106.8 (b); 34 C.F.R. § 106.8(b); 2001 Guidance at (V)(D); see also 34 C.F.R. § 668.46(k)(2)(i) (proceedings arising from an allegation of dating violence, domestic violence, sexual assault, or stalking must "[i]nclude a prompt, fair, and impartial process from the initial investigation to the final result.")

[18] 2001 Guidance at iii.

[19] 2001 Guidance at IX; see also 34 C.F.R. § 668.46(k). Postsecondary institutions are required to report publicly the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, and stalking (34

11. Students facing suspension or expulsion have interests qualifying for protection of the Due Process Clause.[20]

12. California's procedural and substantive standards for student disciplinary proceedings begin with Code Civ. Proc. § 1094.5 subdivisions (b) and (c), which require that (1) there be "a fair trial," which "means that there must have been 'a fair administrative hearing'"[21]; (2) the proceeding be conducted "in the manner required by law"; (3) the decision be "supported by the findings"; and (4) the findings be "supported by the weight of the evidence," or where an administrative action does not affect vested fundamental rights, the findings must be "supported by substantial evidence in the light of the whole record."[22] In addition, a reviewing court does not "blindly seize any evidence in support of the respondent in order to affirm the judgment. . . . It must be

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C.F.R. § 668.46 (k)(1)(i)), and to include a process that allows for the extension of timeframes for good cause with written notice to the parties of the delay and the reason for the delay. 34 C.F.R. § 668.46 (k)(3)(i)(A).

[20] *Goss v. Lopez*, 419 U.S. 565, 577 (1975).

[21] *Doe v. Univ. of Southern California* (2016) 246 Cal.App.4th 221, 239 (citations omitted).

[22] California has undertaken to protect vested fundamental rights "from untoward intrusions by the massive apparatus of government." *Bixby v. Pierno*, 4 Cal.3d 130, 142-143 (1971).

reasonable . . . credible, and of solid value."[23] "The ultimate determination is whether a reasonable trier of fact could have found for the respondent based on the whole record." (Id.)

a. Access to Evidence

13. A fair process also requires the university to present the evidence to the accused student so that the student has a reasonable opportunity to prepare a defense and to respond to the accusation. : ". . . requiring [the accused] to request access to the evidence against him does not comply with the requirements of a fair hearing.[24]

14. In effectively suspending Doe without providing her this requirement of a fair process, Respondents improperly deprived Doe of "a full opportunity to present [her] defense."[25]

15. The CSU has adopted certain policies and procedures for the investigation and adjudication of alleged sexual misconduct, as required by Title IX.

16. The CSU policy governing alleged student sexual misconduct during the relevant time period is

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[23] *Kuhn v. Dep't of General Services*, 22 Cal.App.4th (1994) 1627, 1633.

[24] *Doe v. USC*, *supra*, 246 Cal.App.4th at 245-246, *citing Goss v. Lopez*, 419 U.S. 565, 582 (1975).

[25] *Andersen v. Regents of Univ. of Cal.*, 22 Cal.App.3d 763, 771 (1972) ("The hearing need not be a full dress judicial hearing but one giving the student a full opportunity to present [their] defenses.")

Executive Order 1097, "Systemwide *Policy* Prohibiting Discrimination, Harassment and Retaliation, Sexual Misconduct, Dating and Domestic Violence, and Stalking against Students and Systemwide *Procedure* for Addressing Such Complaints by Students," Revised October 5, 2016 (emphasis in original). (A copy of Executive Order 1097 is attached as Exhibit A.)

17. Executive Order 1097 is founded on the CSU's commitment "to maintaining an inclusive community that values diversity and fosters tolerance and mutual respect," and states that "[a]ll students have the right to participate fully in CSU programs and activities free from Discrimination, Harassment, and Retaliation." Ex. A at 3 (EO 1097 at 1). As such, E.O. 1097 "prohibits Harassment of any kind, including Sexual Harassment, as well as Sexual Misconduct, Dating and Domestic Violence, and Stalking." *Id.*

18. Sexual harassment is defined by Executive Order 1097 as "a form of Sex Discrimination" that "is unwelcome verbal, nonverbal, or physical conduct of a sexual nature that includes but is not limited to sexual advances, requests for sexual favors, and any other conduct of a sexual nature where:

a. Submission to, or rejection of, the conduct is explicitly or implicitly used as the basis for any decision affecting a Complainants academic status or progress, or access to benefits and services, honors, programs, or activities available at or through the University; or

b. The conduct is sufficiently severe, persistent, or pervasive that its effect, whether or not intended, could be considered by a reasonable person in the shoes of the Complainant, and is in fact considered by the Complainant, as limiting his or her ability to participate in or benefit from the services, activities or opportunities offered by the University; or

c. The conduct is sufficiently severe, persistent or pervasive that its effect, whether or not intended, could be considered by a reasonable person in the shoes of the Complainant, and is in fact considered by the Complainant, as creating an intimidating, hostile or offensive environment. E.O. 1097 at

19. Examples of Sexual Harassment are listed in Executive Order 1097:

a. Sexual Harassment could include being forced to engage in unwanted sexual contact as a condition of membership in a student organization; being subjected to video exploitation or a campaign of sexually explicit graffiti; or frequently being exposed to unwanted images of a sexual nature in a classroom that are unrelated to the coursework.

b. Sexual Harassment also includes acts of verbal, non-verbal or physical aggression, intimidation or hostility based on Gender or sex-stereotyping, even if those acts do not involve conduct of a sexual nature.

c. This policy covers unwelcome conduct of a sexual nature. While romantic, sexual, intimate, personal or social relationships between members of the University community may begin as consensual, they may evolve into situations that lead to Sexual Harassment or Sexual Misconduct, including Dating or Domestic Violence, or Stalking, subject to this policy. E.O. 1097 at 27.

Executive Order 1097 Due Process Requirements

20. Executive Order 1097 provides that allegations of sexual misconduct – including sexual harassment – involving accused students will be investigated by a Discrimination, Harassment, and Retaliation Administrator/Title IX Coordinator.

a. The policy requires that "All investigation and reviews shall be conducted impartially and in good faith." E.O. 1097 at 20.

b. The policy requires all students "to cooperate with the investigation and other processes set forth" in Executive Order 1097. E.O. 1097 at 18.

c. Executive Order 1097 requires that "**Within sixty (60) Working Days after the intake interview,** the Investigator shall complete the investigation, write and submit an investigation report to the campus designated DHR Administrator or Title IX Coordinator. If this timeline is extended

pursuant to Article V.E, it shall not be extended for a period longer than an additional thirty (30) Working days from the original due date." E.O. 1097 Attachment B at 1 (emphasis in original).

i. The policy allows for "reasonable" extensions of time for campus investigations "that should not exceed and additional **30 Working Days**" (emphasis in original), and mandates that the complainant and accused student "shall receive written notification of any period of extension." E.O. 1097 at 18.

d. Both the complainant and accused student have the right to identify witnesses and other evidence "for consideration," but "the CSU shall decide what evidence is relevant and significant to the issues raised." E.O. 1097 at 18.

e. At the conclusion of the investigation, the investigator will prepare a written report of the findings of the investigation.

21. The standard of review used to determine whether there is a violation of Executive Order 1097 is "preponderance of the evidence," which Executive Order 1097 defines as "the greater weight of the evidence; i.e., that the evidence on one side outweighs, preponderates over, or is more than, the evidence on the other side."

a. The preponderance standard applies "for demonstrating facts and reaching conclusions in an investigation conducted pursuant to" Executive Order 1097. E.O. 1097 at 25.

22. "Interim Remedies" are available to Complaining students "prior to the conclusion of an investigation in order to immediately stop any wrong-doing and/or reduce or eliminate any negative impact, when appropriate." E.O. 1097 at 25. Interim Remedies are not provided for the Respondent.

a. Interim Remedies must be "reasonable." E.O. 1097 at 26.

b. Executive Order 1097 lists the following examples of possible Interim Remedies:

i. Psychological counseling services;

ii. Changes to academic or living situations;

iii. Completing a course and/or courses on-line (if otherwise appropriate);

iv. Academic tutoring;

v. Arranging for the re-taking of a class or withdrawal from a class without penalty; and/or

vi. Any measure as appropriate to stop further alleged harm until an investigation is concluded or a resolution is reached. E.O. 1097 at 26.

23. Pursuant to Executive Order 1097, the Title IX Coordinator is required to "assist and provide the Complainant with reasonable Remedies as requested throughout the reporting, investigation, appeal, and disciplinary processes, and thereafter. E.O. 1097 at 26. No similar requirement of reasonable assistance and support is mandated to be provided to Respondents.

24. Possible sanctions for violations of Executive Order 1097 include expulsion, suspension, and probation.

25. If a student is expelled, suspended for more than one year, or withdraws either in lieu of expulsion or suspension or pending a misconduct investigation, the student's transcript will be marked with this result "permanently without exception."[26]

THE DISCIPLINARY PROCEEDINGS AGAINST JANE DOE

26. Jane Doe entered Sonoma State University as a graduate student in a two-year Masters Program in Depth Psychology on or about September 1, 2016.

27. According to Defendant Sonoma State's Depth Psychology program website, "Students describe the program as fundamentally altering the way they experience their lives," providing "a container for exploring, experimenting with, and developing new and creative parts of the self" that "calls on head and heart" by being "both academically rigorous and experientially rich."

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[26] E.O. 109 at 22.

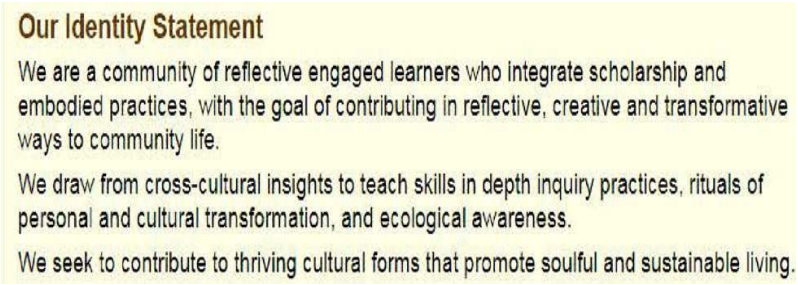
M.A. in Psychology, Depth Psychology Emphasis

The Master's in Psychology degree offers an emphasis in depth psychology with a curriculum centered on the psychology of C. G. Jung. Students learn the basic concepts and theories of Jungian psychology, learn basic methods and skills of in-depth work, survey worldwide cross-cultural mythological and symbolic motifs, learn research methods and group facilitation skills, complete an internship, and author a second year paper in an area of their passionate interest. Small seminars in selected topics in the second year complete the experience.

What Students Say

Students describe the program as fundamentally altering the way they experience their lives. In addition to teaching skills in depth inquiry, teaching, group work, and facilitating transformation in individuals, it catalyzes the students' own transformation. The program provides a container for exploring, experimenting with, and developing new and creative parts of the self. It calls on head and heart: it's both academically rigorous and experientially rich.

28. The Depth Psychology program's "Identity Statement" emphasizes the integration of scholarship with "embodied practices…"



Our Identity Statement

We are a community of reflective engaged learners who integrate scholarship and embodied practices, with the goal of contributing in reflective, creative and transformative ways to community life.

We draw from cross-cultural insights to teach skills in depth inquiry practices, rituals of personal and cultural transformation, and ecological awareness.

We seek to contribute to thriving cultural forms that promote soulful and sustainable living.

29. The 2016 – 2018 Depth Psychology cohort consisted of eleven students, including Jane Doe (then age 31), DB (then age 45), VH (then age 51), and NH (then age 25), and eight other students of varying genders.

30. The students took all of their classes together, including Psychology 542b "Methods of Depth Psychology."

31. Laurel McCabe, Director of the Depth Psychology Program, taught Psychology 542b during the Fall 2016 semester, and Defendant Felicia Matto-Shepard, a member of Sonoma State's Depth Psychology faculty, taught the course during the course during the Spring 2017 semester.

32. Felicia Matto-Shepard emphasized participation and engagement with uncomfortable topics in Psychology 542b. Her syllabus for the course included a section entitled "Learning Environment," which encouraged students' "experimenting and maintaining curiosity in the face of discomfort." The Learning

Environment description concludes, "I encourage you to ride the edge of your comfort zone and push yourself into new terrain."

33. During the month of April 2017, the curriculum for Psychology 542b included an "Authentic Movement" exercise that was to occur on April 27, 2017. The principles of authentic movement were discussed in class on April 20 and again on April 27, before the exercise was conducted.

34. Instructor Matto-Shepard began the April 27 class by directing the students to gyrate their hips in "hip circles" and inviting the students to "move like snakes."

35. Instructor Matto-Shepard instructed the students to pair up with a partner.

36. Student NH made eye contact with Doe, and the two decided to pair up.

37. Matto-Shepard arranged the class in two concentric circles: the inner circle made up of "movers," and the outer circle made up of "witnesses."

38. In the exercise, the movers would engage in authentic movement while the witness would observe, and then the two circles would switch places and roles.

39. Due to the odd number of students – 11 –Matto-Shepard herself acted as a partner for one of the students.

40. Matto-Shepard made the following statements to the witnesses before initiating the movement:

> Witnesses agree to watch your mover. Try not to watch anyone else. It is important to keep eye contact on your mover so that if they open their eyes, they will see you and know that you are paying attention to them. Pay attention to your own body. Track your own sensations as they move as you are tracking your mover. Keep a double focus – one eye in and one eye out. Watch your mover without judgment and with acceptance.
>
> If you begin to feel uncomfortable, stick with it, try to contain it. If you feel overwhelmed at any point, you can step back or step out of the circle. It is your responsibility to take care of yourself. If you need to step out, the other witnesses can help hold the container. Now, look around the room at the other witnesses. Make eye contact. Do you agree to uphold this container and help each other hold it?"

The witnesses all looked around the room and affirmed their assent to follow these guidelines.

41. Before the exercise began, Matto-Shepard made the following statements to the movers: Movers you are being held in a safe container. Agree to keep your eyes closed and focus on your internal experience. This is not about acting out the dream, but about moving your body authentically in the moment. **Don't limit yourself by following cultural norms. This**

> **is not about dancing, but moving authentically. Challenge yourself to move in ways that might be taboo or that you might not normally move.**
>
> Everything that happens can be a part of your "Authentic Movement" and can be turned into a learning experience. It is your job not to take anything personally and to "own your own triggers." For example, if someone accidentally hits you, notice your response. Do you recoil in fear? Do you have the urge to hit them back? Notice your response and let it affect you, make it part of your movement.
>
> This is not the space to do your deepest work. You can choose how far you go. If you start to feel overwhelmed, you can change your movement. If it feels intense, you can change your dream image. If you feel overwhelmed, you have the option to open your eyes and connect with your witness.

42. As the exercise began, Matto-Shepard instructed the movers to get into their starting dream image, and then to begin to physically move the dream forward from there. Matto-Shepard emphasized that the goal was to allow the dream to unfold spontaneously, guided by the body.

43. During the movement, Matto-Shepard guided the movers to breathe and feel their bodies, to notice their spines and to and "stay connected" to the sensation.

44. After several minutes of movement, Ms. Matto-Shepard instructed the movers to stop, and then to record reflections in their journals for several minutes.

45. Matto-Shepard then instructed the witnesses to re-enact three images from the movement that they had witnessed.

46. Matto-Shepard then instructed the movers and witnesses to switch roles.

47. Matto-Shepard again reviewed the guidelines to each group of students, and the students assented to the guidelines of the "container."

48. The class then went through the same cycle of steps again, with the students' mover/witness roles reversed.

49. Following the Authentic Movement exercise, the class engaged in a discussion and debrief, along with Matto-Shepard. No one mentioned anything unusual or upsetting during that discussion.

50. After the April 27 class, DB emailed professor Matto-Shepard, "I'm not sure if you saw how NH was reacting to [Jane Doe] when [Doe] was being the mover, but I'm a little worried about NH processing what she witnessed." In the same email, DB wrote "I'm torn between whether I think [Jane Doe] crossed a line or is just authentically expressing what's going on for her. It's a hard line to find and I am really more concerned about how [NH] has reacted to it."

51. On April 29, Matto-Shepard wrote to Doe, telling her that there was a "concern" about her Authentic Movement dance.

52. On April 30, NH wrote to Ms. Matto-Shepard to complain about Doe's dance. Matto-Shepard wrote back to NH, "I could only see you," during the movement exercise. "[DB] described to me what she saw," Matto-Shepard continued, "[h]ad I seen this, I would have intervened." Despite the fact that she had admittedly not seen Doe's authentic movement, Matto-Shepard wrote to NH that "I want you to know that [Jane Doe]'s behavior was not appropriate for the classroom."

53. On or about May 1, 2017, Matto-Shepard informed Doe in a phone call that Doe had been accused of breaching Title V of the Sonoma State Code of Conduct, which prohibits "disorderly, lewd, indecent, or obscene behavior at a University related activity, or directed toward a member of the University community."

54. On Saturday, May 6, Depth Psychology student VH emailed Program Coordinator Laurel McCabe, threatening to withdraw from the program if Jane Doe was not disciplined for what VH termed "illegal" behavior. VH wrote: "I do not feel like I can be successful as a student while [Jane Doe] is in the cohort …," and wrote in her concluding paragraph, "I want to continue to participate in the pursuit of my degree. After last week's actions by [Jane Doe,] I know that I cannot complete my program with her as part of my cohort." (35) Though VH made clear that she did not witness any of Doe's movements on April 27, VH

wrote to McCabe that "hearing about her actions alone was triggering and anxiety producing."

55. On May 9, 2017, Doe contacted Student Conduct Coordinator, Idonas Hughes, to inquire about any pending discipline. Mr. Hughes wrote to Defendant Shepard, copying Doe, asking for more information on Doe's report that the alleged violation came about "as a result of an assignment involving self-expression/ movement."

56. On May 10, 2017, Psychology 542b student MR emailed Mr. Hughes, writing that Doe's dance was not sexual.

57. On May 11, 2017, student DB filed a written report alleging that Jane Doe had sexually harassed MH during the movement exercise on April 27, 2017. DB expressed concern that MH wouldn't speak up for herself. DB indicated that she likely would not continue as a student if Jane Doe was permitted to remain a student, writing "I am not sure how I am going to finish out the last two weeks let alone be in the cohort for another year with [Doe]."

58. Student VH also filed a complaint on May 11, 2017.

59. On May 18, 2017, Defendant Joyce Suzuki initiated an investigation pursuant to Executive Order 1097, and interviewed Complainants DB, MH, and VH together in one room.

60. Pursuant to Executive Order 1097, which requires that all investigations be completed within 60 working days absent an official extension of time, the

investigation was required to be completed no later than August 15, 2017.

61. Also on May 18, 2017, Student Conduct Coordinator Idonas Hughes emailed Ms. Doe, assuring her in writing that "there will be no disciplinary action against you and it is my understanding that there will not be any academic consequence as a result of your actions during the class exercise."

62. On May 19, 2017, MH submitted a written complaint against Doe, which contained certain passages identical to the complaint DB had submitted eight days earlier. In her complaint, MH wrote, "I never want to work with [Jane Doe] again, or have a conversation with her, and I do not wish to ever have to endure her facilitating a classroom experiential activity ever again."

63. Faced with the prospect of three out of eleven students potentially withdrawing from the Depth Psychology program because of their dislike of and baseless sexual harassment allegations against a fellow student, Sonoma State proceeded with its investigation against Jane Doe.

64. On May 19, 2017, Defendant Suzuki sent Doe a letter alleging that "[MH] and [DB] have alleged that on April 27, 2017, during an experiential exercise called Authentic Movement, you engaged in a display of a sexual activity, masturbation, instead of the assigned activity. You did so without getting consent from [MH], the person assigned as the 'witness,' for the activity, or your other classmates who were exposed to your display."

65. On May 27, 2017, Jane Doe wrote to Instructor Matto-Shepard that "the situation has gotten extremely serious for me and there is a lot on the line for me in terms of my academic future, financial situation and life trajectory."

66. On May 27, 2017, Matto-Shepard emailed Doe, writing "[r]est assured that I hold the perspective that … your movement … was not egregious nor directed at anyone in a harassing manner. You were simply doing the exercise and your interpretation of it." Matto-Shepard further assured Doe that "my sense is that [the investigation process] should be over soon and that it won't derail your education."[27]

67. On or about June 12, 2017, Defendant Suzuki represented to Doe that Sonoma State would drop the investigation if Doe left Sonoma State and agreed to forego the credits she earned in her first year in the Masters program (during which she received As in all of her classes). Defendant Suzuki encouraged Doe to accept this informal resolution, and informed her that Sonoma State would forgive her student loans if she did so.

68. On July 10, 2017, Doe declined informal resolution.

69. On July 18, 2017, Defendant Suzuki interviewed Doe for three hours. During that meeting, Suzuki informed Doe that she could return to class when school resumed in late August.

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[27] Email from Felicia Matto-Shepard to Jane Doe (May 27, 2017, 7:54 p.m.)

70. According to the Complainants, during a meeting on July 27, 2017, Defendant Joyce Suzuki "stated unequivocally that [Jane Doe] would, in fact, be in class during the investigation."

71. During the same general time period – Summer 2017 – Doe and Doe's father participated in a phone call with Sonoma State's Dean of Extended Studies, who assured Doe that the Title IX matter would not threaten her ability to obtain her Masters Degree at Sonoma State.

72. On August 4, 2017, Defendant Suzuki interviewed Defendant Felicia Matto-Shepard.

73. The investigation did not end on August 15, 2017, and there is no evidence that an extension was requested or granted.

74. On August 19, 2017, Defendant Suzuki informed the parties that, as an "interim remedy," "[Jane Doe] will not be allowed to attend classes while the investigation is on-going."

75. On Tuesday, August 22, 2017, Sonoma State's fall semester commenced.[28]

76. According to the Title IX Report in this case, Defendant Suzuki "separated" from Sonoma State University in September 2017 (her LinkedIn page still lists her as Director of Employee Relations and

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[28] Academic Calendars 2017 – 2022, *available at* https://www.sonoma.edu/academics/academiccalendar/ academic-calendars-2017-2022 (last visited August 1, 2019).

Compliance at Sonoma State University, a position that dates back to October 1998).[29]

77. When Defendant Suzuki separated from the University, the case was transferred to Defendant Jesse Andrews. Either Defendant Andrews or Defendant Kidder informed Doe that she should expect a result in the case by mid-October, 2017.

78. Defendant Andrews did not alter the Interim Remedies imposed by Defendant Suzuki, meaning that Doe was still prohibited from attending her second year of the two-year Masters Program in Depth Psychology.

79. On September 25, 2017, Defendant Andrews received an email from Depth Psychology student GD, entitled "letter of concern regarding scapegoating of [Jane Doe]." GD, a chaplain and registered nurse, expressed her opinion that Doe was being scapegoated in a manner that "is inappropriately discrediting her career and her work."

80. On Friday, October 27, 2017, Jane Doe requested to withdraw from Sonoma State.

81. On October 30, 2017, Defendant Andrews went on parental leave, and transferred the investigation to Defendant William Kidder, who was serving as Interim Title IX Director. Doe learned of Andrews' leave when she received an out-of-office message in response to a request for an update on the case.

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[29] Joyce Suzuki LinkedIn profile, https://www.linkedin.com/in/joyce-suzuki-57860512 (last visited May 22, 2019).

82. On November 21, 2017, Mr. Kidder interviewed the Complainants one at a time.

83. On November 29, 2017, Defendant Kidder received a letter from attorney Samantha Ramsey on behalf of her clients, MH, DB and VH. The letter avers that Mr. Kidder represented in a November 21 meeting that "the evidence review would be produced approximately the first week of December" and "the report should be issued by December 15."

84. On information and belief, on December 1, 2017, DB and MH both withdrew from their Fall 2017 classes at Sonoma State.

85. On December 19, 2017 – two months after the mid-October date she had been told to expect a result – Jane Doe emailed Defendant Kidder saying she was "awaiting the result of the Title IX investigation," and noting that she had been informed that she "could expect to hear something by mid-October."

86. Later on December 19, 2017, Mr. Kidder responded that "[t]he report should be issued in a few days." The report was issued nine months later.

87. On January 13, 2018, Jane Doe again emailed Mr. Kidder asking about the status of the investigation.

88. Defendant Kidder never responded to Doe's January 13, 2018 email.

89. The second semester of classes at Sonoma State began on Monday, January 22, 2018.

90. On May 15, 2018 – more than one year after the Authentic Movement Exercise – Defendant Kidder took

a personal leave, and the investigation was transferred back to Defendant Andrews.

91. On June 29, 2018, Defendant Andrews sent the Doe and the Complainants a notice that they could review the evidence adduced in the case and respond by July 8.

92. Doe consulted with counsel and successfully obtained additional time to review and respond to the evidence.

93. Doe reviewed the evidence and submitted a response on July 30, 2018.

94. On August 22, 2018, one year after Jane Doe has been prohibited from returning to class for the second year of her Masters program, Mr. Andrews informed Doe and the Complainants that Ms. Doe was not responsible for sexually harassing anyone.

95. On August 202, 2018, the Complainants submitted an appeal.

96. On October 10, 2018, the CSU Chancellor's Office denied the Complainants' appeal. Among other things, the Chancellor's Office concluded that "Complainants do not present evidence that … Respondent's behavior, especially within the constructs of a graduate level degree, would be considered by a reasonable person, in the shoes of Complainants, as sufficiently severe to limit the ability to participate in university programming."

97. On information and belief, Sonoma State, from the outset, presumed that Jane Doe was responsible in

order to appease the Department of Education and advocates.

a. On information and belief, the Sonoma State administration was cognizant of, and sensitive to, criticisms by students and the media about the manner in which colleges and universities around the country resolved allegations of sexual misconduct. As a result, Sonoma State's decision-makers were motivated to favor the accusers over the accused, so as to protect themselves and Sonoma State from accusations that they had failed to protect students from sexual harassment and assault.

b. Defendant Sonoma State was heavily invested in acceding to the demands of accusers even when there is no evidence of wrongdoing in order to avoid scrutiny from the Department of Education. This is illustrated, in part, by Sonoma State's persistence in pursuing the investigation of the incident despite clear evidence that:

    i. The Complainants' colluded in providing evidence;

    ii. The Complainants' central allegation – that Doe masturbated in class – was contradicted by their own statements, the statements of other witnesses, and the glaring fact that no one else in their small class corroborated this allegation.

iii. The allegations as described by the Complainants clearly did not amount to sexual harassment under Executive Order 1097.

c. On information and belief, Sonoma State effectively expelled Jane Doe by prohibiting her from attending class because it was afraid of an investigation from the Department of Education and/or a Title IX lawsuit from the Complainants.

d. Defendant Sonoma State had a financial interest in assuaging the three Complainants who threatened to withdraw if Doe was allowed to continue in the program.

98. The Defendants' actions against Jane Doe caused substantial damage to Doe's education, reputation, and earning potential.

99. Doe was constructively expelled on or about August 19, 2019, when Defendant Suzuki prohibited her from returning to class for her second year of school, and one full year before Defendants Andrews, Sonoma State, and Trustees of the CSU all affirmed that no policy violation occurred.

100. Defendants' actions denied Doe the benefits of the education at her chosen school, damaged her academic and professional reputations, and will impact her future earning potential and ability to apply to other graduate programs.

COUNT I
(42 U.S.C. §1983 -- VIOLATION OF DUE PROCESS PROVISIONS OF UNITED STATES CONSTITUTION)

101. Plaintiff Doe repeats and incorporates all of the allegations of this Complaint, as if fully set forth herein.

102. This Count is brought against the Defendants under 42 U.S.C § 1983.

103. The Fifth Amendment to the United States Constitution, made applicable to the State of California by the Fourteenth Amendment, provides that no person shall "be deprived of life, liberty, or property, without due process of law."

104. The Fourteenth Amendment to the United States Constitution provides that no state shall deprive "any person of life, liberty, or property, without due process of law."

105. The Due Process Clauses of the United States Constitutions are implicated by higher education disciplinary decisions, including the disciplinary decisions under the CSU Executive Orders.

106. Doe has a protected interest in continued enrollment at California state colleges and Universities.

107. Doe paid tuition and fees to Sonoma State University, therefore, creating a property interest in continued enrollment. This contract-created property interest in continued enrollment at the University is

the sort of legitimate entitlement protected by the Due Process Clause.

108. Doe faced damage to her academic reputation and her freedom to her chosen career. The suspension and investigation inflicted reputational damage by effectively branding her, falsely, as a Title IX sex offender. Sonoma State changed her legal status by effectively suspending her and removing her from the program, making it virtually impossible for her to seek employment in her field of choice or attend another school to continue her education.

109. Doe's property interest is well established.

a. The majority of federal courts of appeals that have decided the issue have held that students at public institutions of higher education have a property right to continued enrollment.[30]

b. The Ninth Circuit has several times ruled on procedural due process claims involving public institutions of higher education; suggesting that the court assumed that a student has a protected liberty or property interest.

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[30] *See e.g. Doe v. Purdue Univ.,* 7th Cir. No. 17-3565, 2019 U.S. App. LEXIS 19464 (June 28, 2019); *Barnes v. Zaccari,* 669 F.3d 1295 (11th Cir. 2012*); Flaim v. Medical Coll. of Ohio,* 418 F.3d 629 (6th Cir. 2005); *Harris v. Blake*, 798 F.2d 419 (10th Cir. 1986); *Charleston v. Bd. of Trustees of Univ. of Ill. at Chicago*, 741 F.3d 769, 772 (7th Cir. 2013); *Plummer v. Univ. of* Houston, 860 F.3d 767 (5th Cir. 2017).

110. Defendant Sonoma State University has a constitutional obligation to provide a fundamentally fair and reliable hearing process. Doe's circumstances entitled her to a hearing prior to an effective 14 month suspension. Sonoma State University's process fell short of due process requires by not providing Doe, who had denied the allegations, an explanation of the evidence in their possession and an opportunity to present her side of the story.

111. Jane Doe was entitled under the Constitution of the United States to the opportunity to be heard in a meaningful manner at a hearing before being deprived of her education.

112. Jane Doe has suffered severe damage as a result of Defendants' actions, including:

a. Constructive expulsion from Sonoma State, which denied her the benefits of education at her chosen school, where she excelled in her first year of study;

b. Irreparable damage to her academic and professional reputation;

c. Derailment of her education and career while she waited in limbo for fourteen months to find out the results of the investigation, during which time she was prohibited from transferring to another institution.

d. Severe emotional distress caused by Defendants' arbitrary decision to prohibit her from returning for her second year just days before the beginning of that school year, and

Defendants' failures to communicate with Doe and to timely complete the investigation.

e. Costs associated with unexpected moving and living costs and loss of merit-based scholarships.

113. Pursuant to 42 U.S.C. §1988, Jane Doe is entitled to her attorney's fees incurred in bringing this action.

PRAYER FOR RELIEF

Wherefore, Plaintiff Jane Doe prays that the Court grant the following relief:

1. Judgment in favor of Jane Doe awarding damages in an amount to be determined at trial.

2. Court costs and other reasonable expenses incurred in maintaining this action, including reasonable attorney's fees as authorized by 42 U.S.C. §1988.

JURY DEMAND

Plaintiff Jane Doe hereby demands a trial by jury of all issues so triable.

DATED: August 15, 209

Respectfully submitted,

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