Appendix - Table of Contents

Appendix A - Eighth Circuit Opinion 1a

Appendix B - District Court Summary Judgment Opinion 17a

Appendix C - En Banc Rehearing Denial 51a

Appendix D - Judgment in a Civil Case 52a

Appendix E - Excerpt from Defendants Motion to Dismiss Reply Brief 53a

Appendix F - Defendant Keller Testimony 54a

Appendix G - Plaintiff's Appellate Opening Brief 94a

Appendix H - Plaintiff's Appellate Reply Brief 152a

Appendix I - Plaintiff's Statement of Material Facts - Summary Judgment 182a

Appendix J - Constitutional and Statutory Provisions Involved 208a

- U.S. Const. amend. XIV, § 1 ..... 208a
- 20 U.S.C. § 1681(a) 208a

APPENDIX A

United States Court of Appeals for the Eighth Circuit

No. 21-3340

John Doe
Plaintiff – Appellant

v.

University of Iowa; Board of Regents, State of Iowa; Tiffani Stevenson Earl, individually and in official capacity; Iris Frost, individually and in official capacity; Lyn Redington, individually and in official capacity; Angie Reams, individually and in official capacity; Constance Schriver Cervantes, individually and in official capacity; John Keller,individually and in official capacity; Monique DiCarlo, individually and in official capacity; Mark Braun, individually and in official capacity
Defendants - Appellees

Stop Abusive and Violent Environments
Amicus on Behalf of Appellant(s)

Appeal from United States District Court for the Southern District of Iowa - Eastern

Submitted: October 19, 2022
Filed: September 14, 2023

Before KELLY, WOLLMAN, and KOBES, Circuit Judges.

KELLY, Circuit Judge.

The University of Iowa expelled graduate student John Doe after investigating two accusations of sexual misconduct brought against him by different complainants. The Iowa Board of Regents affirmed the decision. Doe sued the University and University officials, claiming, in part, discrimination on the basis of sex under Title IX, 20 U.S.C. § 1681(a), and procedural due process violations, 42 U.S.C. §1983. The district court[1] granted qualified immunity to the University officials, dismissed the procedural due process claims against them, and granted the University summary judgment on the remaining claims. Doe appeals. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

John Doe, who proceeds under pseudonym, was a graduate student at the University of Iowa when he was accused of sexual assault and sexual harassment by Complainant 1 and Complainant 2, both of whom were female undergraduate students at the University at the time. Doe met the Complainants in the Sociology Undergraduate Research Group (SURG) Lab, which was supervised by Professor Michael Lovaglia, Doe's mentor. Doe was the only graduate student in the SURG Lab. Complainant 1, Complainant 2, and Lovaglia testified that Doe had an informal managerial role in the Lab, although Doe disclaimed the title "lab manager."

In October 2016, Complainant 1 told Lovaglia that she and Doe had engaged in sexual activity and that she had asked Doe "to not pursue her anymore." Lovaglia met with Doe to discuss Doe's professionalism and conduct in the SURG Lab.

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

In February 2017, Complainant 1 told Lovaglia of Doe's repeated inappropriate conduct. She further said that in September 2016 Doe had touched her breast and kissed her without her consent. Lovaglia reported the complaints to Monique DiCarlo, the University's Sexual Misconduct Response Coordinator and Title IX Coordinator, and the University began its investigation that same month.

Another complaint against Doe was also filed in February 2017. Complainant 2 reported that Doe had brought alcohol into the SURG Lab and touched her breast without her consent. Doe received a Notice of Complaint and Investigation and Interim Sanctions for each complaint from Lyn Redington, the University's Assistant Vice President and Dean of Students. Tiffini Stevenson Earle, a compliance specialist in the University's Office of Equal Opportunity and Diversity, investigated the allegations and found sufficient evidence to charge Doe with violating University policies. In written reports, Stevenson Earle recommended a formal hearing on the charges.

Constance Schriver Cervantes, compliance coordinator in the University's Office of Equal Opportunity and Diversity, issued Doe a Notice of Formal Hearing, listing the specific charges and policy violations. Iris Frost, a University professor of rhetoric and former prosecutor, was appointed adjudicator of Doe's hearing. Frost found Doe responsible for sexual assault and sexual harassment and filed a written Decision. Redington issued a Notice of Sanctions, informing Doe of his immediate expulsion. Doe appealed, and John Keller, the University's Associate Provost of Graduate Education, upheld the decision. Doe appealed again to the Iowa Board of Regents, which affirmed the University's decision.

Doe sued the University and its officials, alleging, in part, discrimination on the basis of sex under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), and procedural due process violations, 42 U.S.C. § 1983. The district court found the University officials entitled to qualified immunity and dismissed the procedural due process

claims against them. The district court also granted summary judgment to the University on the Title IX claim and the remaining procedural due process claim. Doe appeals.

We review all of Doe's claims on appeal de novo. See Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir. 2005) (en banc) (standard of review for a grant of summary judgment); Scott v. Baldwin, 720 F.3d 1034, 1036 (8th Cir. 2013) (standard of review for the grant of a motion to dismiss on qualified immunity). "Summary judgment is proper 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" Torgerson, 643 F.3d at 1042 (quoting Fed. R. Civ. P. 56(c)(2)). The nonmovant "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Torgerson, 643 F.3d at 1042 (quoting Ricci v. DeStefano, 557 U.S. 557, 586 (2009)).

II.

Doe appeals the grant of summary judgment on his Title IX claim. "Title IX provides that '[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.'" Does 1-2 v. Regents of the Univ. of Minn., 999 F.3d 571, 577 (8th Cir. 2021) (alteration in original) (quoting 20 U.S.C. § 1681(a)); Rossley v. Drake Univ., 979 F.3d 1184, 1191 (8th Cir. 2020) ("Title IX prohibits federally funded universities from discriminating against students on the basis of sex." (citing 20 U.S.C. § 1681(a))). "Title IX is 'understood to bar[] the imposition of university discipline where [sex] is a motivating factor in

the decision to discipline.'" Rowles v. Curators of the Univ. of Mo., 983 F.3d 345, 359 (8th Cir. 2020) (alteration in original) (quoting Doe v. Columbia Univ., 831 F.3d 46, 52 (2d Cir. 2016)).

To survive summary judgment on his Title IX claim, Doe had to present sufficient evidence to allow a reasonable jury to find that the University disciplined him on the basis of sex. See Rossley, 979 F.3d at 1192 (first citing Doe v. Purdue Univ., 928 F.3d 652, 667 (7th Cir. 2019); and then citing Doe v. Univ. of Ark.- Fayetteville, 974 F.3d 858, 864 (8th Cir. 2020)); see also Univ. of Ark.-Fayetteville, 974 F.3d at 864 (clarifying the pleading standard for Title IX claims: a plaintiff "must allege adequately that the University disciplined him on the basis of sex—that is, because he is a male"). Doe argues that he has raised a genuine factual dispute as to whether the University disciplined him because he is a male based on evidence that (1) the adjudicator reached a decision that was against the substantial weight of the evidence; (2) decisionmakers exhibited express anti-male bias; and (3) the University was under outside pressure to bring disciplinary proceedings against him as a male accused of sexual misconduct.

A.

First, Doe argues that we should infer bias in the University's decision because it was rendered against the substantial weight of the evidence.[2] Doe asserts that Frost omitted material information from her Decision: Lovaglia's testimony that he understood the "sexual behavior" between Doe and Complainant 1 was consensual. But Doe highlights only a limited portion of the relevant testimony. At the hearing, Lovaglia interrupted the questioning "to clarify" that it was his "recollection" that Complainant 1 "conveyed the idea that all of [the] sexual behavior was

[2] Doe makes a passing reference to "procedural irregularities," but he addresses only the weight of the evidence. We address his procedural concerns in Section IV.

consensual." But, he continued, he "[a]bsolutely" considered the possibility that the real reason Complainant 1 "did not want to make a complaint against [Doe]" was that she "didn't want to cause any trouble." And Lovaglia was not confident of his own recollection, stating "[he] really hoped [he] did not misunderstand [Complainant 1]." Frost did not find the totality of Lovaglia's observations helpful,[3] and Doe fails to explain how this equivocal testimony is "exculpatory."

Doe also asserts that evidence he considers material was omitted as early in the proceedings as Stevenson Earle's initial reports. But Stevenson Earle's investigation spanned three months, culminating in two reports, each over twenty pages, in which she summarized the interviews she conducted and the evidence she gathered. Doe has not explained how Stevenson Earle's choices in winnowing the collected information into usable reports resulted in a decision against the substantial weight of the evidence. Stevenson Earle's reports did not omit material information establishing that either Complainant consented to the sexual conduct with Doe. And nothing in the record suggests that any of the omissions Doe identifies affected the written Decision. Frost explained that she reads investigative reports before a hearing but does not view them as "any kind of guidance" in resolving a case.

Doe also contends that Keller's summary affirmance reflects an inadequate review of the record on appeal. But the form of Keller's November 30, 2017, letter to Doe conformed to the University's policies, concluding that the adjudicator's decision was "based on substantial evidence . . . not arbitrary, capricious, unreasonable, or an abuse of discretion . . . not unreasonable [sic] harsh in light of the circumstances" and "all procedures were properly followed and did not result in any prejudice towards [Doe]." Doe does not

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[3] Doe also does not mention Lovaglia's testimony that "[Doe] had offered [Complainant 1] a wine, which she said she was not particularly interested in drinking, but that he encouraged her to drink, and so she had some."

challenge the University's policy that required nothing more.

Finally, Doe argues that, because the Complainants gave conflicting testimony and had ulterior motives for lodging their allegations against him, they were not credible witnesses. Unfounded credibility determinations may indicate a decision rendered against the substantial weight of the evidence. See Doe v. Baum, 903 F.3d 575, 585-86 (6th Cir. 2018). Here, however, Frost based her decision on a thorough review of the testimony and evidence presented at the hearing, where Doe was represented by counsel. Cf. Purdue Univ., 928 F.3d at 663-64 (circumstances in which committee members admitted they did not read the investigative report and did not speak to or receive a statement from the accuser "suggest[ed] that [the Committee] decided that [Doe] was guilty based on the accusation rather than the evidence"). Doe disagrees with the adjudicator's fact finding and her credibility determinations, but this alone does not support the conclusion that the University's decision is against the substantial weight of the evidence.

B.

Next, Doe argues that he has presented direct evidence of sex bias. In Doe's view, Frost relied on a sex-based stereotype when she asked Complainant 2 at the hearing whether she feared Doe would physically harm her. But as Frost later explained, "[T]he rules do make reference to a concern for physical safety. I wanted to be certain that there was no physical concern on [Complainant 2's] part, and that's why I probed that, not to suggest that there was but to be certain that nobody was acting out of fear or acting out of concern for their physical safety." Doe also objects to Frost's finding that his version of an encounter with Complainant 2—which had occurred "within a couple of hours of their first conversation"—was not credible, saying it "sounded like fantasy, not reality." Doe notes that in a subsequent case, Frost described the testimony of an ac-

cused male as a "young man's fantasy," which resulted in an investigation by the University's Office for Civil Rights. Here, Frost testified that Doe's "retelling of the story" to include a "wild" and "passionate intimate encounter" "just didn't seem credible to [her]." The word "fantasy" may have more than one connotation, but we are unable to infer sex discrimination from its single use in a lengthy decision that included exhaustive credibility determinations.

Doe also asserts that Keller exhibited sex bias at the appellate level. In assessing whether the sexual conduct between Doe and Complainant 1 was consensual, Keller said he considered the age disparity and the "power differential" between an undergraduate and a graduate student like Doe, who was viewed as a "leader and manager of the activities" in the SURG lab. He also said that Complainant 1's sex was relevant, observing that younger students, particularly young women, often have less experience with intimate relationships than they would if they were older. In addition, Keller had been reviewing Title IX appeals for fifteen years, and every sexual assault case he had reviewed involved a female alleging a sexual assault by a male. He simply had no opportunity to evaluate consent when the accuser was a male. Keller's answers, placed in context, are not sufficient to warrant an inference that the University disciplined Doe because he was a male.

Doe also claims that Keller relied on an "outdated view" of consent when affirming the University's decision. Keller testified how consent—and manifestations of it—can be nuanced when a younger, inexperienced subordinate is caught off-guard by sexual advances from someone in a position of authority like Doe. Keller also understood he was bound by the University's policies, including its definition of consent. And that definition states that "[i]t is the responsibility of the person who wants to engage in the sexual activity to ensure that consent is obtained from the other person," and that "[l]ack of protest or resistance does not mean consent, nor does silence mean consent." Contrary to Doe's asser-

tion, Keller's testimony about consent was sex-neutral and in line with the University's policies.

C.

Finally, Doe argues that evidence of external pressure on the University supports an inference of bias against male students accused of sexual misconduct. Doe identifies five lawsuits that were in the news during the pendency of his case, and he asserts the media coverage was critical of how the University handled the conflicts. However, three of these were gender-based employment discrimination— not sexual misconduct—lawsuits brought by former employees of the University or Board of Regents. The remaining two involved Title IX sexual assault complaints, but Doe simply points to the fact of the lawsuits themselves, without explaining how the lawsuits, or the attention given to them, amounted to "outside pressure" on the University.[4]

Doe also alleges that DiCarlo's involvement in the proceedings reflected the type of external pressure the University faced to investigate claims of sexual assaults perpetrated by males. Because DiCarlo was the Title IX Coordinator, Doe contends that she "functioned as an initial advocate for complainants." However, nothing in the record

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[4] Compare Univ. of Ark.-Fayetteville, 974 F.3d at 865 (finding external pressure where the Office for Civil Rights and state legislature were investigating the university for failing "properly to investigate and adjudicate Title IX complaints by females against males"; the University was facing a "highly-publicized" lawsuit for mishandling the Title IX complaint of a female student athlete against a male student athlete; and the complainant "orchestrated a campus-wide protest" against the university for not finding Doe responsible for sexual assault, prompting a public statement by the university) with Doe v. Stonehill Coll., Inc., 55 F.4th 302, 335-37 (1st Cir. 2022) (affirming dismissal on the pleadings because external pressure was "too weak to create a plausible inference" of sex bias where Doe was disciplined during the #MeToo movement at the same time as complaints of the college's mishandling of sexual misconduct allegations were pending before the Office for Civil Rights, generating two news articles related to investigations of the college).

supports the idea that DiCarlo was an advocate only for those who accused males of sexual assault. Doe also argues that DiCarlo's email communication with Stevenson Earle about a draft investigative report suggests improper interference. But he does not contend that this type of communication violated University policy. Nor does he explain how DiCarlo's input reflected bias against Doe because he is a male.

Finally, Doe points to DiCarlo's comments at a faculty senate meeting about a "multi-disciplinary effort to address prevention, training, and intervention," which included "expanding programming on healthy masculinity." DiCarlo later explained that the programming was part of an antiviolence plan based on a public health model from the CDC. And she said that the University's goal was to question "the social construct of gender" and students' rigid beliefs and attitudes about "gender role expectations," and to approach men as "allies" in the effort to prevent sexual misconduct. According to DiCarlo, this programmatic framework "assumes that all of us can have a role" in preventing sexual violence. And it instructs against making assumptions about "who is always a victim or who could be a victim" because, DiCarlo noted, a woman or "a man," or "someone in the LGBT community," all could be complainants.

We are not convinced that institutional efforts to prevent sexual misconduct on campus, including educational programs that challenge students to evaluate the impact of gender norms on rape culture, amount to evidence of external pressure on the University that supports an inference of bias. See Rossley, 979 F.3d at 1194-95 ("Demonstrating that a university official is biased in favor of the alleged victims of sexual assault claims, and against the alleged perpetrators, is not the equivalent of demonstrating bias against male students." (quoting Sahm v. Miami Univ., 110 F. Supp. 3d 774, 778 (S.D. Ohio 2015))). On this record, Doe has failed to show that the University faced pressure "to find males responsible for sexual assaults" to an extent that would permit the inference that the University discrimi-

nated against him because he is male. See also Doe v. Univ. of Cincinnati, 173 F. Supp. 3d 586, 606- 07 (S.D. Ohio 2016) (finding no sex discrimination claim when, "at worst," the facts alleged showed "[the university's] actions were biased in favor of alleged victims of sexual assault and against students accused of sexual assault," since "sexual assault victims can be either male or female" (internal citation omitted)).

In sum, Doe has failed to provide "sufficient evidence to allow a reasonable jury to find that [the University] disciplined him on the basis of sex." Rossley, 979 F.3d at 1192 (citations omitted). We affirm the district court's grant of summary judgment on Doe's Title IX claim.

III.

Next, Doe argues that the district court erred by granting qualified immunity to the University officials on his procedural due process claims. "Our qualified- immunity inquiry involv[es] two questions—whether the official's conduct violated a constitutional or statutory right, and whether that right was clearly established." Hovick v. Patterson, 37 F.4th 511, 516 (8th Cir. 2022) (citation omitted). We may address either question first. Id.

Doe argues that Frost and Cervantes violated his constitutional right to due process by not giving him adequate notice of the charges against him. See Univ. of Ark.-Fayetteville, 974 F.3d at 866 ("The Due Process Clause forbids a State to deprive a person of life, liberty, or property without due process of law."); Monroe v. Ark. State Univ., 495 F.3d 591, 594 (8th Cir. 2007) ("[W]e assume without deciding that [Doe's] interest in pursuing his education constitutes a constitutionally protected interest." (citing Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 222-23 (1985))). Specifically, Doe asserts that Frost found him responsible for a charge of "'educational leadership role,' despite the investigation concluding that he had no such role in the [SURG] Lab," and that Cervantes failed to give

him notice that he could be held responsible for the "educational mission" of the Complainants.

Doe was not "charged" with an "educational leadership role" or with responsibility for the "educational mission" of the Complainants. Cervantes sent Doe a Notice of Formal Hearing, dated August 21, 2017, which told him he was facing four charges: two violations of the Sexual Misconduct Policy and two alcohol-related violations.[5] Frost also recited these four charges at the start of the hearing, and Doe's counsel responded that he and his client "underst[oo]d the charges" and had no questions.

Nor was Doe formally found responsible for an "educational leadership role" or the "educational mission" of Complainants. Instead, Frost made factual findings relevant to the charges, including that Doe was the SURG lab's leader,

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[5] The charged violations read:

Violation 1: I will charge that you violated Rule 2.2 of the Sexual Misconduct Policy, as defined by section 2.3 of the policy, and Rule 13 of the Code of Student Life with regard to [Complainant 1], a University of Iowa student, during the fall 2016 and spring 2017 semesters, for engaging in sexual activity/contact with [Complainant 1] without obtaining her consent, and for sexually harassing her. Section 2.2 of the policy prohibits "sexual misconduct. . . including sexual assault or sexual harassment, and any form of nonconsensual sexual conduct." Rule 13 of the Code of Student Life requires that students observe the conduct rules in the Sexual Misconduct Policy.

Violation 2: I will charge [alcohol-related violation].

Violation 3: I will charge that you violated Rule 2.2 of the Sexual Misconduct Policy, as defined by section 2.3 of the policy, and Rule 13 of the Code of Student Life with regard to [Complainant 2], a University of Iowa student, during the fall 2016 and spring 2017 semesters, for engaging in sexual activity/contact with [Complainant 2] without obtaining her consent, and for sexually harassing her. Section 2.2 of the policy prohibits "sexual misconduct. . . including sexual assault or sexual harassment, and any form of nonconsensual sexual conduct." Rule 13 of the Code of Student Life requires that students observe the conduct rules in the Sexual Misconduct Policy.

Violation 4: I will charge [second alcohol-related violation].

that undergraduate students viewed him as an authority figure, and that the Complainants felt uncomfortable in the lab because of Doe's "sexual comments and sexual innuendo that masquerade[d] as friendly chatter" and his uninvited, intimate physical contact. The Complainants testified they experienced stress, discomfort, and a desire to avoid the SURG Lab as a result. Frost concluded that Doe's behavior, over time, had "a detrimental effect on their educational experiences, stymied their educational performances, and curtailed their educational opportunities in the SURG program." Frost relied in part on these facts to find Doe responsible for sexual misconduct. Doe's argument to the contrary conflates the violations with the facts supporting them.

The University provided adequate notice of the charges. Because Doe fails to show the University officials' conduct violated his federal rights,[6] we affirm the district court's dismissal of Doe's claims against the University officials. See Hall v. Ramsey Cty., 801 F.3d 912, 917 (8th Cir. 2015) ("If either question is answered in the negative, the public official is entitled to qualified immunity.") (quoting Vaughn v. Ruoff, 253 F.3d 1124, 1128 (8th Cir. 2001)).

IV.

Finally, Doe argues the district court erred in granting summary judgment on his remaining procedural due pro-

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[6] Doe also alleges that "Cervantes entered new evidence towards the end of the hearing, even though [University] policies state that Doe should be provided any new evidence at least two days before the hearing." But Doe fails to identify the evidence at issue and cites only to his third amended complaint in support of his argument. See United States v. Golliher, 820 F.3d 979, 984 (8th Cir. 2016) ("Rule 28(a)(8)(A) of the Federal Rules of Appellate Procedure requires an appellant's argument section to include citations to the parts of the record on which the appellant relies. We have in the past refused to consider arguments not supported by proper record citations." (cleaned up) (quoting Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1055 n. 14 (8th Cir. 2002))). We decline to consider Doe's argument because we cannot do so properly.

cess claim against the University. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). Doe asserts that he received a "fundamentally unfair" hearing because Frost failed to ask all of the questions he proposed for the witnesses.[7]

"Students accused of sexual misconduct are not 'entitled to a hearing of one's own design.'" Regents of the Univ. of Minn., 999 F.3d at 582 (quoting Austin v. Univ. of Or., 925 F.3d 1133, 1139 (9th Cir. 2019)). "A process under which the adjudicating panel poses questions to witnesses is not 'so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation.'" Univ. of Ark.-Fayetteville, 974 F.3d at 867 (quoting Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 69 (1st Cir. 2019)). Procedural due process rights do not guarantee "all of the formal procedural requirements of a common law criminal trial." Id. at 868 (citing Gorman v. Univ. of R.I., 837 F.2d 7, 16 (1st Cir. 1988)).

Frost conducted the examination of all witnesses at the hearing, and Doe does not challenge this procedure.[8] Rather, Doe identifies a list of questions he submitted but were not asked, which he alleges resulted in a "material[ly] flaw[ed]" hearing process[9] A review of the record indicates

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[7] Doe also reiterates his arguments from Section III. Because the district court did not err in granting qualified immunity to the University officials, we do not address those arguments here.

[8] Section 12(H)(7) of the University Student Judicial Procedure allows the "accused student . . . [to] suggest questions to the adjudicator," but "[t]he adjudicator has discretion to determine the questions posed." Similarly, Section 12(H)(8) advises "[i]rrelevant, immaterial, or unduly repetitious evidence should be excluded."

[9] Doe contends that Frost "promised to ask all questions given to her before the hearing[]" and then "reneged on this promise," but we find no support for this assertion in the record.

that Frost asked questions that addressed the topics underlying Doe's questions.[10] Moreover, Doe's questions were almost all in the form of impeachment intended to discredit the Complainants by emphasizing perceived inconsistencies in their interactions with Doe. As Frost explained, her role as adjudicator was "to collect information," not to cross-examine witnesses as an advocate for either side. It was within Frost's discretion to reframe the parties' submitted questions to fit her role as adjudicator. In any event, Doe has not explained how asking his particularly worded questions would have resulted in nonduplicate answers that were "material to the truth-finding process." Univ. of Ark.-Fayetteville, 974 F.3d at 868. We find no material procedural flaw in Doe's hearing.[11]

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[10] For example, Doe claims Frost did not ask Complainant 1 the following question: "Please describe your time with [Doe] in the Lab on October 7, 2016. If you were harassed and assaulted by [Doe], why did you decide to spend time with him alone after lab meeting got over?" But Frost did ask Complainant 1 a substantially similar question: "After the events of August 31st, 2016, did you continue to be in the lab alone with [Doe] in the evening hours? . . . And would that happen often? Not so often?" Doe also requested that Frost ask Complainant 1 about specific playful text message conversations she had with Doe. Instead, Frost asked: "Did you try to remain lighthearted after the events of August 31st? . . . Did you laugh with him? Did you joke with him? Did you try to pretend nothing had happened? . . . So you were . . . trying to maintain a relationship with him. Why?"

[11] Doe also argues that Frost's questioning was designed to "deflate [his] credibility while inflating the [C]omplainants' credibility." See Haidak, 933 F.3d at 70 ("Efforts . . . to put a witness 'at ease,' when applied only to a complaining witness, helped render potentially unfair the proceedings in another recent [First Circuit case]." (citing Doe v. Trs. of Bos. Coll., 892 F.3d 67, 79 (1st Cir. 2018))). But Doe cites only his third amended complaint in support of this assertion, and, even there, he provides only one example of Frost's disparate questioning: Doe claims Frost asked him whether he asked a Complainant for consent before kissing her, while Frost asked the Complainants "about both verbal and nonverbal consent." This single example is insufficient to demonstrate a violation of Doe's right to due process. Moreover, Frost's questioning probed whether the Complainants may have given

Doe received adequate notice of and was present throughout his hearing where he testified and was represented by counsel; and Doe's counsel offered and objected to exhibits, submitted questions to the adjudicator, had the opportunity to call witnesses, and presented a closing argument. At the end of the hearing, Frost invited Doe to provide any additional information he believed would assist her in the decision. Doe fails to show a genuine issue of material fact as to whether he had the opportunity to be heard at a meaningful time and in a meaningful manner. See Mathews, 424 U.S. at 333.

The district court properly granted the University's motion for summary judgment on Doe's remaining procedural due process claim.

V.

The judgment of the district court is affirmed.

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affirmative, nonverbal consent to their sexual conduct with Doe, even if they had not consented verbally.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN DOE, Plaintiff, v. UNIVERSITY OF IOWA; BOARD OF REGENTS, STATE OF IOWA; TIFFINI STEVENSON EARL; IRIS FROST; LYN REDINGTON; ANGIE REAMS; CONSTANCE SCHRIVER CERVANTES; JOHN KELLER; MONIQUE DICARLO; and MARK BRAUN, Defendants.	**No.3:19-cv-00047-RGE-HCA** **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiff John Doe sues the University of Iowa, the Board of Regents of the State of Iowa, and several University and Board officials for allegedly violating his rights under state and federal law during sexual misconduct disciplinary proceedings that led to his expulsion from the University. The Court previously dismissed two of Doe's three claims of sex discrimination, as well as Doe's claims for race discrimination. Defendants now move for summary judgment on Doe's remaining claims. Because Doe fails to generate a genuine issue of material fact as to his remaining claims, the Court grants Defendants' motion.

II. BACKGROUND

A. Relevant Facts

The following facts are either uncontested or, if contested, viewed in the light most favorable to Doe, the nonmoving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

At the time of the events alleged in the complaint, Doe was a graduate student of sociology at the University of Iowa. Defs.' Statement Material Facts Supp. Mot. Summ. J. ¶ 1, ECF No. 128-1. Though Doe was a graduate student of sociology, he participated in the Sociology Undergraduate Research Group, "SURG," lab. *Id.* ¶¶ 1, 12. Doe's mentor, University of Iowa professor Dr. Michael Lovaglia, supervised the SURG lab. *Id.* ¶ 12. Doe was the only graduate student member of the SURG lab. Defs.' Sealed App. Vol. 7 Supp. Mot. Summ. J. Appx. 628, ECF No. 136. Complainants #1 and #2, both female undergraduate students, participated in the SURG lab. ECF No. 128-1 ¶ 13. Complainants met Doe through the SURG lab. Pl.'s Sealed Am. App. Vol. 1 Supp. Resist. Defs.' Mot. Summ. J., Hr'g Tr. 202:14–19, ECF No 179-1 at 53 (Complainant #1 hearing testimony); *id.* at 51:15–52:9 (Complainant #2 hearing testimony). Complainants understood Doe to have a leadership role in the lab. *See id.* at 52:6–12 (Complainant #2 hearing testimony); *id.* at 213:22–214:11 (Complainant #1 hearing testimony). Lovaglia similarly considered Doe to have an informal role as lab leader. *See id.* at 469:7–470:8 (Lovaglia hearing testimony). Doe contends he never wanted his participation in the SURG lab to be as a lab leader and did not refer to himself as the lab leader. ECF No. 136 at Appx. 628; *see also* Pl.'s Sealed Am. App. Vol. 2 Supp. Resist. Defs.' Mot. Summ. J., Hr'g Tr. 672:20–673:8, ECF No. 179-2 at 8 (Doe's hearing testimony).

In October 2016, Complainant #1 told Lovaglia some sexual activity occurred between her and Doe. Defs.' Sealed

App. Vol. 5 Supp. Mot. Summ. J. Appx. 503, Lovaglia Dep. 479:19–22, 480:17–481:1, ECF No. 134. She told Lovaglia she asked Doe "not to pursue her anymore." *Id.* at 481:2–6. Lovaglia then met with Doe to discuss Doe's relationships with SURG lab members and Lovaglia's expectations for Doe's professionalism. ECF No. 128-1 ¶¶ 15–16.

In early February 2017, Complainant #1 met with Lovaglia again to inform him Doe continued to pursue her. *Id.* ¶ 17. Complainant #1 described incidents from the previous September in which Doe had touched her breast and kissed her without her consent. *Id.*; Hr'g Tr. 291:4–19, ECF No. 179-1 at 75.

Lovaglia reported Complainant #1's claims to Defendant Monique DiCarlo, the University's Sexual Misconduct Response Coordinator and Title IX Coordinator. ECF No. 128-1 ¶¶ 10, 18. That same day, DiCarlo notified Defendant Tiffini Stevenson Earl, a Compliance Specialist in the University's Office of Equal Opportunity and Diversity, about Complainant #1's allegations against Doe. *Id.* ¶¶ 4, 29. DiCarlo met with Complainant #1 to confirm her allegations against Doe and confirm her request that the University proceed with a formal investigation. *Id.* ¶ 22; *see also* Defs.' Sealed App. Vol. 1 Supp. Mot. Summ.J. Appx. 60–62, ECF No. 130. Within days, Defendant Lyn Redington, the University's then-Assistant Vice President and Dean of Students for Student Affairs, issued a Notice of Complaint and Investigation and Interim Sanctions to Doe. ECF No. 128-1 ¶¶ 6, 23; *see also* ECF No. 130 at Appx. 63–65 (Notice). The Notice informed Doe of Complainant #1's formal complaint of sexual assault and sexual harassment against him and indicated Redington had assigned Stevenson Earl to conduct a formal investigation into the allegations. ECF No. 128-1 ¶ 23; *see also* ECF No. 130 at Appx. 63–65. Stevenson Earl then interviewed Complainant #1. ECF No. 128-1 ¶ 27.

In late February 2017, DiCarlo received a report from Complainant #2 alleging Doe sexually assaulted her during the first semester and brought alcohol into the SURG lab.

ECF No. 128-1 ¶¶ 10, 28; ECF No. 130 at Appx. 77–78. DiCarlo met with Complainant #2 to confirm her allegations against Doe and confirm Complainant #2's request that the University proceed with a formal investigation. ECF No. 128-1 ¶ 29; ECF No. 130 at Appx. 79–80. Then, Stevenson Earl interviewed Complainant #2. ECF No. 128-1 ¶ 30.

Redington issued a Notice of Complaint and Investigation and Interim Sanctions to Doe, informing him of Complainant #2's allegations and explaining Stevenson Earl would conduct the formal investigation into Complainant #2's allegations due to the similarity with Complainant #1's allegations. ECF No. 128-1 ¶ 32; ECF No. 130 at Appx. 94–96. The Notice detailed Complainant #2's allegations, including that Doe touched Complainant #2's breast without her consent. ECF No. 130 at Appx. 94–95. The Notice further prohibited Doe from entering Seashore Hall, where the SURG Lab was located, without written permission from the Dean of Students. *Id.* at Appx. 96.

Doe and Complainants identified potential witnesses for Stevenson Earl to interview. ECF No. 128-1 ¶ 47; *see also* Stevenson Earl Dep. 13:20–14:8, 85:5–10, ECF No. 136 at Appx. 857–58, 875. Stevenson Earl exercised discretion regarding interviewees based on Doe's and Complainants' description of the information the potential witnesses could provide. *See* Stevenson Earl Dep. 84:16–24, 85:11–86:2, ECF No. 136 at Appx. 875–76. Between March and May 2017, Stevenson Earl investigated both complaints and conducted interviews of student witnesses, Lovaglia, Doe, and Complainants. ECF No. 128-1 ¶¶ 35–38, 42. Stevenson Earl did not interview a custodian that allegedly walked in on Doe and Complainant #2 in the SURG lab following the events giving rise to Complainant #2's claims. Pl.'s Am. Statement Add'l Material Facts Supp. Resist. Defs.' Mot. Summ. J. ¶ 7, ECF No. 185-2. Stevenson Earl also did not interview a restaurant worker who served Doe and Complainant #2 on one occasion. *Id.* ¶ 8. During Stevenson Earl's interviews with Lovaglia and Doe, Defendant Constance Schriver Cervantes, an Equity Investigator with the

University's Office of Diversity, Equity, and Inclusion, sat in as a notetaker. ECF No. 128-1 ¶¶ 8, 42–43; Schriver Cervantes Dep. 12:20–14:2, ECF No. 136 at Appx. 750–51; ECF No. 185-2 ¶ 4. Doe's counsel was also present during his interview. *See* ECF No. 130 at Appx. 109.

Stevenson Earl issued a Memorandum of Findings, reporting the results of her investigation into Complainant #1's and Complainant #2's allegations. ECF No. 128 ¶ 50; Defs.' Sealed App. Vol. 3 Supp. Mot. Summ. J. Appx. 285–309, ECF No. 132 (Memorandum of Findings as to Complainant #1); *id.* at 310–32 (Memorandum of Findings as to Complainant #2). Stevenson Earl found there was sufficient evidence as to Complainant #1's and Complainant #2's allegations to charge Doe with violating the "Code of Student Life" and the "Sexual Misconduct, Dating/Domestic Violence, or Stalking Involving Students" policy. ECF No. 128 ¶ 50; *see also* ECF No. 132 at Appx. 285, 310. In her reports, Stevenson Earl included details of the Complainants' accounts and Doe's account of the events at issue. ECF No. 132 at Appx. 286–395; *id.* at Appx. 310–32.

As to Complainant #1, Stevenson Earl's report indicates in early September 2016, Doe invited Complainant #1 to an improv comedy show. *Id.* at Appx. 287. After the show, they went back to Doe's apartment and drank wine. *Id.* While at Doe's apartment, Complainant #1 contends Doe kissed her and touched her breast without her consent. *Id.* Complainant #1 alleges she indicated her lack of consent by pulling away from Doe. *Id.* Doe maintains there were several instances of consensual kissing between him and Complainant #1 that night. *Id.* at Appx. 290. Doe denies touching Complainant #1's breast. *Id.* Complainant #1 alleges she went to Lovaglia after Doe continued to pursue a relationship with her. *See id.* at Appx. 286, 288–89. In January 2017, Complainant #1 alleges Doe tickled her while they were cleaning the lab together. *Id.* at Appx. 289. Complainant #1 reported Doe's conduct to Lovaglia again shortly after the tickling incident. *Id.*; *see also* 128-1 ¶ 17. Doe alleges he tickled Complainant #1 in response to her tickling him

first. ECF No. 132 at Appx. 292. He alleges she did not indicate it made her uncomfortable until Doe confronted her about not turning in work on time and signing in at the lab to receive credit when she was not doing lab work. *Id.* at Appx. 293.

Complainant #1 explained she waited to file a report because she thought she "could take care of the issues [her]self." *Id.* at Appx. 286. But due to Doe's failure to change after she told him she only wanted a professional relationship and after his October meeting with Lovaglia, she knew she had to bring the issues to Lovaglia's attention again. *Id.* at Appx. 286–87. She stated she could not "bear thinking [she] would be treated . . . [ ]flirtatiously and aggressively[ ] for another few years at the least." *Id.* at Appx. 287.

As to Complainant #2, Stevenson Earl's report summarizes that in late August 2016, Doe met with Complainant #2 to assist her in applying for research approval to facilitate her participation in the SURG lab. *Id.* at Appx. 312. After discussing lab matters, Complainant #2 alleges she agreed to stay and study with Doe. *Id.* Complainant #2 alleges Doe brought beer into the lab for both of them. *Id.* Complainant #2 indicates at some point Doe began asking her questions related to sex, which made her uncomfortable. *Id.* Complainant #2 alleges she contacted a friend to come pick her up. *Id.* At Doe's suggestion, she moved to the couch in the lab where Doe attempted to kiss her and she pulled away. *Id.* She also alleges Doe put his hand under her bra and touched her breast. *Id.* Complainant #2 alleges she removed Doe's hand and told him a friend was coming to get her. *Id.* Complainant #2 alleges Doe tried to kiss her on other occasions and made sexual comments to her. *Id.* at Appx. 313. Doe denies Complainant #2 pulled away when he kissed her in the SURG lab. *Id.* at Appx. 315. Doe alleges while on the couch Complainant #2 sat on Doe's lap facing him and they kissed for several minutes. *Id.* Doe alleges Complainant #2 then moved her shirt to expose her breast and gave Doe consent to touch her breast after he asked. *Id.*

When Stevenson Earl asked why Complainant #2 waited months to come forward, she responded she was embarrassed and "in shock." *Id.* at Appx. 311. She also explained she heard Doe "starting to make sexual comments" to a new lab member and so she reported to help herself and others "feel safe at Iowa." *Id.* at Appx. 312. In the notes for her interview with Complainant #2, Stevenson Earl wrote Complainant #2 came forward, in part, after talking to Complainant #1. ECF No. 185-2 ¶ 19; *see* Pl.'s Sealed Am. App. Vol. 7 Supp. Resist. Defs.' Mot. Summ. J. 119, ECF No. 179-7. Stevenson Earl did not include this fact in her Memorandum of Findings. *See* ECF No. 132 at Appx. 311–14.

Stevenson Earl recommended the cases against Doe proceed to formal hearing. *See* ECF No. 132 at Appx. 309, 331. Stevenson Earl initially recommended disciplinary reprimand—which is a Step 1 sanction under the University's Student Judicial Procedure. *See* Pl.'s Sealed Am. App. Vol. 3 Supp. Resist. Defs.' Mot Summ. J. 158–59, ECF No. 179-3 (draft investigation report as to Complainant #1); *id.* at 124–25 (draft investigation report as to Complainant #2). However, after reviewing Stevenson Earl's draft report for the first investigation, DiCarlo and Redington inquired whether Stevenson Earl would be comfortable recommending a higher sanction given that there were two complainants. Pl. Am. App. Vol. 4 Supp. Resist. Defs.' Mot. Summ. J. 1, 32, 60, 107, 131, ECF No. 179-4. Stevenson Earl then recommended the sanction of suspension or expulsion should Doe be found responsible for the alleged violations following a formal hearing. ECF No. 132 at Appx. 309, 331.

After Stevenson Earl issued her investigation reports, Redington assigned Schriver Cervantes as the University's Charging Officer for Doe's case. ECF No. 128-1 ¶ 8; ECF No. 132 at Appx. 354. Schriver Cervantes issued a Formal Hearing Date and Notice of Charges to Doe and Complainants. ECF No. 128-1 ¶ 58. The Notice of Formal Hearing identified Defendant Iris Frost, a University Professor, as the Adjudicator. *Id.* ¶¶ 5, 60. It also informed Doe he was charged with two violations of the University of Iowa Sexu-

al Misconduct Policy Rule 2.2 and Code of Student Life Rule 13 arising from the conduct alleged by Complainant #1 and Complainant #2. ECF No. 132 at Appx. 354–55. Rule 2.2 of the Sexual Misconduct Policy prohibits "sexual misconduct . . . including sexual assault or sexual harassment, or any form of non-consensual sexual contact." ECF No. 136 at Appx. 625. Rule 2.3(c) of the Sexual Misconduct Policy defines consent as "a freely and affirmatively communicated willingness to participate in particular sexual activity or behavior, expressed either by words or clear, unambiguous actions." *Id.* at Appx. 626. Rule 13 of the Code of Student Life requires students abide by the Sexual Misconduct Policy. ECF No. 130 at Appx. 49.

Student Judicial Procedure Rule 12(D)(1) provides the Charging Officer with discretion to combine two or more complaints against the same student into a single hearing. ECF No. 136 at Appx. 620. Schriver Cervantes exercised her discretion to combine Complainant #1's and Complainant #2's complaints against Doe into a single hearing. *See id.* The complaints came before Frost for hearing on September 18, 2017. *Id.* Schriver Cervantes appeared as the Charging Officer on behalf of the University. *Id.* The hearing continued through September 20, 2017. *Id.*

At the hearing, Doe, through his attorney, and the University offered exhibits for consideration. *Id.* ¶ 68. Frost accepted some of Doe's exhibits into the evidentiary record. *Id.* ¶¶ 69–70; *see* ECF No. 136 at Appx. 623. Doe's attorney withdrew some exhibits and Frost excluded some exhibits following Schriver Cervantes's relevance, materiality, and authenticity objections. ECF No. 128-1 ¶ 69; ECF No. 136 at Appx. 622–23.

The parties submitted witness questions to Frost. ECF No. 128-1 ¶ 72; ECF No. 136 at Appx. 621. Frost indicated witness questions should be "relevant, material, and not dully repetitive," and she would ask all such questions submitted to her. Hr'g Tr. 14:12–19, ECF No. 179-1 at 6. During her examination of Complainant #1, Frost did not ask certain questions and related follow-up questions sub-

mitted by Doe. ECF No. 185-2 ¶ 30. Frost maintained three of the proposed questions, which were related to the height differences between Complainant #1 and Doe, were immaterial. ECF No. 136 at Appx. 638. Frost did not ask Doe's submitted question "Is it true that you initiated and engaged in frequent conversations with him after the incident? If yes, why did you do that?" exactly as posed. ECF No. 185-2 ¶ 30; *see also* Defs.' Resp. Pl.'s Am. Statement Add'l Facts, ECF No. 187-1 ¶ 30. However, Frost asked questions regarding Complainant #1's interactions with Doe after the alleged incident of sexual assault. Hr'g Tr. 283:11–284:18, ECF No. 179-1 at 73.

During the examination of Complainant #2, Frost also omitted certain questions and follow-up questions submitted by Doe. *See* ECF No. 185-2 ¶ 30; ECF No. 187-1 ¶ 30. Frost did not ask whether Complainant #2's decision to file a complaint was prompted by Complainant #1 filing a complaint. *Id.* However, Frost did ask Complainant #2 about her interactions with Complainant #1. Hr'g Tr. 138:16–14310, 166:18–167:19, ECF No. 179-1 at 37–38, 44. Frost also did not ask Complainant #2 about her friendly communications with Doe after the alleged incident and her decision to spend time with him after the alleged incident. *See* ECF No. 187-1 ¶ 30.

The Complainants, Doe, student witnesses, and Lovaglia testified at the hearing. *See* Hr'g Tr., ECF No. 179-1 at 3 to ECF No. 179-2 at 72. Lovaglia testified at the hearing that when Complainant #1 reported problems with Doe in October 2016, Complainant #1 told him the kiss with Doe was consensual. *See* ECF No. 136 at Appx. 646; Hr'g Tr. 480:5–481:13, ECF No. 179-1 at 123. Lovaglia then clarified "I really hope I did not misunderstand her . . . my recollection is that she conveyed the idea that all of th[e] sexual behavior" occurring in Doe's apartment was consensual. Hr'g Tr. 483:23–484:8, ECF No. 179-1 at 124. Lovaglia further testified he considered Complainant #1 might be conveying it was consensual so as not to "cause any trouble"

and that he "had a great deal of difficulty coming to a decision as to how to handle it" *Id.* at 484:9–19.

On October 3, 2017, Frost issued the Adjudicator's Decision. ECF No. 128-1 ¶ 77; ECF No. 136 at Appx. 620–48 (Adjudicator's Decision). Frost found Doe responsible for sexual misconduct by sexually assaulting and sexually harassing both Complainants. ECF No. 136 at Appx. 647–48.

Frost found Complainant #1 credible. *Id.* at Appx. 638. Frost credited Complainant #1's testimony that she attempted to leave Doe's apartment alone the night Doe allegedly touched her breast and kissed her without her consent. *Id.* Frost placed weight on Complainant #1's testimony that she waited for Doe to leave after he walked her to her dorm and then contacted a close friend to go directly to his room to talk. *Id.* Frost noted Complainant #1's act of "seeking comfort from a trusted friend immediately upon being free of [Doe] speaks loudly." *Id.* Frost further found the testimony of Complainant #1's friend that he observed Complainant #1 to be shaken and confused to be consistent with a "troubled student subjected to a non-consensual sexual experience . . . ." *Id.* at Appx. 639. In her report, Frost did not include Lovaglia's testimony regarding his "recollection" of Complainant #1's remarks as to consent. *See* ECF No. 136 at Appx. 646; Hr'g Tr. 480:5–481:13, ECF No. 179-1 at 123.

As to Complainant #2, Frost noted Doe's account and Complainant #2's account diverged significantly as to events surrounding the alleged kissing and nonconsensual breast touch. *See* ECF No. 136 at Appx. 629–30. Frost described Doe's account of his interaction with Complainant #2 as "highly unlikely," further opining "it sounded like fantasy, not reality." *Id.* at Appx. 630. Frost found Complainant #2 to be credible. *Id.* Frost credited testimony from Complainant #2's boyfriend that Complainant #2 walked quickly away from the building when he picked her up that night and kept looking over her shoulder as consistent with Complainant #2's "version of the unwanted, unwelcome intimate events of August 31, 2016." *Id.* at Appx. 630–31.

Ultimately, Frost found Doe responsible for sexual assault and sexual harassment in violation of Sexual Misconduct Policy Rules 2.2, 2.3(1)(e)(3) and (4), and 2.3(2)(f)(2)(a)–(c), as to Complainant #1 and Complainant #2. *Id.* at Appx. 636, 646–47. Specifically, Frost found by a preponderance of the evidence Doe made intentional contact of a sexual nature when he kissed Complainants and touched Complainants' breasts without their consent. *Id.* at Appx. 631, 639. As such, Frost found Doe responsible for sexual assault in violation of Rule 2.2 and Rule 2.3(1)(e)(3) and (4). *Id.* at Appx. 631, 640, 647–48. Frost also found by a preponderance of the evidence Doe's repeated and persistent efforts to engage in a romantic relationship with Complainant #1 and Complainant #2 throughout their participation in the SURG lab constituted sexual harassment in violation of Rule 2.3(f)(2)(c). *Id.* at Appx. 635–36, 644–45.

Redington issued a Notice of Sanctions to Doe, informing Doe of his immediate expulsion from the University. ECF No. 128-1 ¶ 83. Doe appealed the Adjudicator's Decision. *Id.* ¶ 86. The University's Associate Provost for Graduate Education, Defendant John Keller, decided Doe's internal appeal. *Id.* ¶ 9. Keller affirmed the Adjudicator's Decision and the sanctions imposed. *Id.* ¶ 88; *see also* ECF No. 136 at Appx. 655.

Doe further appealed to the Defendant Board of Regents. ECF No. 128-1 ¶¶ 11, 91; ECF No. 136 at Appx. 656. Doe also requested Defendant Mark Braun, Executive Director of the Board of Regents, issue a stay on Doe's expulsion pending his appeal. ECF No. 128-1 ¶ 92. Braun denied Doe's request for a stay. *Id.* ¶ 94; ECF No. 136 at Appx. 680–82. Doe submitted his appeal brief. ECF No. 128-1 ¶ 97. Complainant #1 and the University submitted responses to Doe's appeal. *Id.* ¶¶ 98–99. The Board of Regents voted in favor of affirming the University's disciplinary decision and notified Doe of its decision on June 11, 2018. *Id.* ¶¶ 100–01; ECF No. 136 at Appx. 739.

Additional facts are set forth below as necessary.

B. Procedural History

Doe filed a complaint in this Court on June 21, 2019. ECF No. 1. Doe amended his complaint several times, the last iteration being his third amended complaint filed February 14, 2020. ECF No. 57. Doe's third amended complaint contains eight counts and alleges claims under Title IX of the Education Amendments of 1972; 42 U.S.C. §§ 1981 and 1983; and state law. *See id.* Defendants moved to dismiss Doe's third amended complaint. ECF No. 60. The Court granted Defendants' motion as to Doe's claims in Counts 3, 4, 5, and 7. Order Grant. Part Den. Part Defs.' Mot. Dismiss 44–45, ECF No. 106. The Court granted Defendants' motion to dismiss Counts 1 and 8 in part. *Id.* at 45. The Court determined the individual Defendants were entitled to qualified immunity on Doe's procedural due process claims in Count 1, but denied Defendants' motion on Doe's substantive due process claims in Count 1. *Id.* The Court further determined Doe's request for declaratory and injunctive relief in Count 8 survived to the extent Doe's procedural due process claim survived on the merits. *Id.* The Court denied Defendants' motion to dismiss Doe's Title IX claim in Count 2 and Doe's equal protection claim in Count 6 in full. *Id.*

Defendants' now move for summary judgment on the remaining counts. ECF No. 128. Doe resists Defendants' motion. Pl.'s Am. Resist. Defs.' Mot. Summ. J., ECF No. 185. On June 3, 2021, the Court held oral argument on Defendants' motion. Hr'g Mins., ECF No. 191. At the hearing, Attorneys Kayla Reynolds and Christopher Deist represented Defendants. *Id.* Attorney Rockne Cole represented Doe. *Id.* Having considered the parties' briefing, supporting appendices, and arguments made at the hearing, the Court grants Defendants' motion for summary judgment.

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, the Court must grant a party's motion for summary judgment if there

are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). A genuine issue of material fact exists where the issue "may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248. Where there is a genuine dispute of facts, those "facts must be viewed in the light most favorable to the nonmoving party." *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) (internal quotation marks omitted) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

To defeat a motion for summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248 (omission in original) (quoting a prior version of Fed. R. Civ. P. 56(e)). In analyzing whether a party is entitled to summary judgment, a court "may consider only the portion of the submitted materials that is admissible or useable at trial." *Moore v. Indehar*, 514 F.3d 756, 758 (8th Cir. 2008) (internal quotation marks omitted) (quoting *Walker v. Wayne Cnty.*, 850 F.2d 433, 434 (8th Cir. 1988)). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial" and the moving party is entitled to judgment as a matter of law. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042–43 (8th Cir. 2011) (en banc) (internal quotation marks omitted) (quoting *Ricci*, 557 U.S. at 586).

IV. DISCUSSION

Defendants move for summary judgment on Doe's Title IX claim in Count 2, arguing Doe cannot demonstrate that sex was the motivating factor in the University's decision to discipline him. ECF No. 128 ¶ 2. Doe resists, arguing there

is a genuine issue of material fact as to whether procedural irregularities in the investigation and hearing, in addition to biased statements by the decisionmakers, demonstrate the University disciplined Doe on the basis of sex. ECF No. 185 at 5–12. Defendants further argue they are entitled to summary judgment on Doe's claims under 42 U.S.C. § 1983 in Counts 1 and 6 because Doe fails to establish the individual Defendants violated his right to substantive due process, procedural due process, or equal protection of the laws. ECF No. 128 ¶¶ 1, 3. Doe resists Defendants' arguments as to each of his § 1983 claims. ECF No. 185 at 15, 31. Doe argues there is sufficient evidence to demonstrate a genuine issue of material fact as to whether: 1) the individual Defendants' acted in an arbitrary and capricious manner during the disciplinary proceedings in violation of his substantive due process rights; 2) the individual Defendants denied him the right to a hearing before an impartial decisionmaker in violation of his procedural due process rights; and 3) the individual Defendants relied on sex-based stereotypes in violation of his equal protection rights. ECF No. 185 at 15–35. Finally, Defendants contend summary judgment is proper on Doe's claim for declaratory and injunctive relief in Count 8 because his claims fail on the merits. ECF No. 128 ¶ 4. Doe resists, arguing he is entitled to his requested declaratory and injunctive relief. ECF No. 185 at 35–39.

The Court finds Doe fails to show a genuine issue of material fact exists as to whether sex was a motivating factor in the University's decision to expel him. Additionally, no genuine factual dispute exists as to Doe's due process, equal protection, or declaratory relief claims. As such, Defendants are entitled to summary judgment on Doe's remaining claims.

A. Title IX (Count 2)

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in,

be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Does 1–2 v. Regents of the Univ. of Minn.*, 999 F.3d 571, 577 (8th Cir. 2021) (alteration in original) (quoting 20 U.S.C. § 1681(a)). To establish a Title IX claim, "a plaintiff must allege adequately that the University disciplined [the plaintiff] on the basis of sex—that is, because he is a male." *Rossley v. Drake Univ.*, 979 F.3d 1184, 1192 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 1692 (2021) (alteration in original) (internal quotation marks omitted) (quoting *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 864 (8th Cir. 2020)).

A plaintiff can demonstrate bias by showing "clearly irregular investigative and adjudicative processes" combined with pressure on the University to investigate and adjudicate Title IX claims by females and against males. *See id.* at 1196. "A plaintiff may illustrate gender bias by identifying 'statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender.'" *Doe v. Wash. Univ.*, 434 F. Supp. 3d 735, 758 (E.D. Mo. 2020) (quoting *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994)). "A decision that is against the substantial weight of the evidence and inconsistent with ordinary practice on sanctions may give rise to an inference of bias, although not necessarily bias based on sex." *Univ. of Ark.-Fayetteville*, 974 F.3d at 865 (citing *Doe v. Baum*, 903 F.3d 575, 585–86 (6th Cir. 2018); *Doe v. Miami Univ.* 882 F.3d 579, 592–93 (6th Cir. 2018); *Doe v. Columbia Univ.*, 831 F.3d 46, 57 (2d Cir. 2016)).

To survive summary judgment on his Title IX claim in Count 2, Doe is required "to set forth sufficient evidence to allow a reasonable jury to find that [the University] disciplined him on the basis of sex." *Rossley*, 979 F.3d at 1192. Doe points to alleged issues with Stevenson Earl's investigation; Redington's and DiCarlo's review of the draft investigatory reports; Frost's adjudication; and Keller's handling of the internal appeal as demonstrating sex bias motivated

the University's decision to expel him. The Court addresses each of Doe's arguments in turn.

1. Stevenson Earl

Doe argues Stevenson Earl's decision not to interview two of his proposed witnesses constitutes a procedural irregularity demonstrating sex bias. *See* ECF No. 185 at 12. Doe fails to show sex bias motivated Stevenson Earl's interview decisions.

As the investigator, Stevenson Earl had discretion to determine which witnesses to interview. During her investigation she did not interview two witnesses suggested by Doe: a custodian and a waiter. The custodian is alleged to have walked in after the events giving rise to Complainant #2's claims. The custodian's encounter with Doe and Complainant #2 is alleged to have been very brief. *See* Hr'g Tr. 101:18–24, ECF No. 179-1 at 27; Hr'g Tr. 692:7–15, ECF No. 179-2 at 13. Stevenson Earl did not interview the custodian because she did not believe the custodian would provide information material to her investigation. Stevenson Earl Dep. 67:12–69:1, ECF No. 136 at Appx. 871. It is reasonable that Stevenson Earl determined the custodian would not have information material to whether Doe kissed and touched Complainant #2's breast without consent if the custodian only entered the room for a short time after any contact had occurred.

Similarly, Stevenson Earl did not interview the waiter who served Doe and Complainant #2 at a restaurant because she determined he would not provide evidence relevant to Complainant #2's claims. *Id.* at 85:5–86:2. To the extent the waiter could have provided information about Doe and Complainant #2's interactions, such information would have been limited to the time Doe and Complainant #2 spent in the restaurant. Given the potentially limited scope of the waiter's observations, it was reasonable for Stevenson Earl to conclude the waiter was unlikely to have information regarding a sexual assault occurring in the

SURG lab and a pattern of sexual comments to Complainant #2 throughout the semester. The Court finds Stevenson Earl's conduct does not indicate a "clearly irregular investigative . . . process[ ]." *Rossley*, 979 F.3d at 1196.

Doe fails to provide sufficient evidence to generate a genuine dispute of material fact that Stevenson Earl acted with sex bias in exercising her discretion not to interview two of Doe's suggested witnesses.

2. DiCarlo and Redington

Doe alleges DiCarlo's and Redington's commentary on Stevenson Earl's draft investigative reports demonstrates sex bias. ECF No. 185 at 9. DiCarlo and Redington requested Stevenson Earl consider recommending the complaints move to a formal hearing and a higher

sanction due to the number of complaints against Doe. *See* ECF No. 179-4 at p. 32, 60, 107, 131. DiCarlo and Redington do not appear to characterize their recommendations in terms of sex. *See id.* Doe points to no evidence to support a connection between DiCarlo's and Redington's comments on the draft investigative report and sex bias. *Cf. Univ. of Ark.-Fayetteville*, 974 F.3d at 865. Additionally, Doe fails to identify any University policy indicating it was clearly irregular for DiCarlo and Redington to review draft investigatory reports and provide comments. *Cf. Rossley*, 979 F.3d at 1196. None of Doe's other broad allegations against DiCarlo and Redington are supported in the record. As such, Doe fails to generate a genuine dispute of material fact that sex bias by DiCarlo and Redington motivated the University's decision to expel him.

3. Frost

Doe argues the Adjudicator's Decision demonstrates sex bias through Frost's description of Doe's alleged interaction with Complainant #2 and Frost's exclusion of Lovaglia's testimony regarding Complainant #1. ECF No. 185 at 10–

12. The Court finds Doe's arguments as to Frost unpersuasive.

First, Frost's characterization of Doe's account of his interaction with Complainant #2 as "fantasy" does not demonstrate sex bias. *See* ECF No. 136 at Appx. 630. Examining Frost's language in the context of her entire decision, it is clear Frost is describing Doe's drastically different account as fantastical in the sense it exceeded realistic expectations of an encounter between two individuals that just met. Such an interpretation is further supported by Doe's description of Complainant #2 as shy. *See* ECF No. 136 at Appx. 629–30. In support of his sex bias argument, Doe points to Frost's later use of the term "young man's fantasy" to describe a student's invitation to intimacy in a subsequent adjudication that was subject to an OCR investigation. ECF No. 185 at 10–11; *see also* Pl.'s Sealed Am. App. Vol. 5 Supp. Resist. Defs.' Mot. Summ. J. 92, ECF No. 179-5. Doe argues Frost's use of this term in a subsequent case demonstrates Frost was motivated by sex bias in her adjudication of Doe. ECF No. 185 at 10–11. However, the subsequent case is distinguishable because Frost used gendered language to describe the student's recounting of events as a "young man's fantasy." ECF No. 179-5 at 92. Here, in contrast, Frost's use of the term "fantasy" appears straightforward and descriptive of the dramatic difference between Doe's and Complainant #2's versions of events. *See* ECF No. 136 at Appx. 630. Doe's reliance on Frost's use of the term "fantasy" in a subsequent adjudication to show she was motivated by sex bias in his case is unpersuasive.

Second, Frost's exclusion of Lovaglia's uncertain testimony about his "recollection" of Complainant #1's statements regarding consent does not demonstrate sex bias. In her deposition, Frost explained she did not include the testimony because Lovaglia qualified his testimony as being his "recollection." *See* Pl.'s Sealed Am. App. Vol. 6 Supp. Resist. Defs.' Mot. Summ. J. 34–36, Frost Dep. 35:14–16, 37:15–21, 39:19–25, 41:19–42:8, ECF No. 179-6. Frost further explained Lovaglia "was very hard on himself" and she

"sense[d] that he was taking a great deal of responsibility and not placing blame in any direction." *Id.* at 37:15–21. Frost's explanation is reasonable considering Lovaglia's hearing testimony. After answering affirmatively that Complainant #1 told him the sexual behavior between her and Doe was consensual, Lovaglia clarified this was only his "recollection" and qualified that he hoped he did not misunderstand her. Hr'g Tr. 483:23–484:8, ECF No. 179-1 at 124. In qualifying his testimony, Lovaglia appeared to waiver on his statement that Complainant #1 said the kiss was consensual and explained he recalled "she conveyed the idea" the kiss was consensual. *See id.* He also conceded that he considered Complainant #1 may have indicated it was consensual because she did not want to cause trouble. *Id.* at 484:9–19. Even if Frost's exclusion of Lovaglia's testimony demonstrates bias, it is insufficient to show bias on the basis of sex. *Cf. Rossley*, 979 F.3d at 1196.

4. Keller

Doe argues Keller's deposition testimony—wherein he describes why he did not consider Lovaglia's testimony significant enough to reverse Frost's decision as to Complainant #1 or the Adjudication Decision as a whole—indicates Keller affirmed the Adjudication Decision and Doe's sanction on the basis of sex. ECF No. 185 at 5–7.

In describing why he did not find Lovaglia's testimony sufficient to reverse Frost's decision as to Complainant #1, Keller explained he considered the age of the students and the power differentials resulting from their positions as undergraduate student and graduate student in a leadership position. Keller Dep. 20:25–21:17, ECF No. 179-6 at 7. Keller then appeared to discuss consent stating, "you know, my experience with younger students, particularly females, is that they are sort of surprised by what might be taking place . . . so things happen without them really engaging in any kind of . . . verbal or physical sort of indication that there's approval there. . . ." *Id.* at 21:25–22:7. Doe's counsel

then asked if the sex of the accuser was a factor in Keller's rejection of Lovaglia's testimony that Complainant #1 indicated her sexual activity with Doe was consensual. *See id.* at 29:17–20. Keller explained it was "a factor in the decision that [he] came to." *Id.* at 30:16–17. Keller clarified every sexual assault case he had dealt with involved a male accused of sexual assault by a female student and in his experience "young undergraduate women. . . tend to be more vulnerable and impressionable than they would be if they were older and more experienced " *Id.* at 30:21–31:15. In light of the context of Keller's testimony, Keller's discussion of sex when prompted by Doe's counsel is incidental to his primary focus on age and resulting power differentials.

Further, Keller performed a thorough review of the investigation and the Adjudication Decision. ECF No. 136 at Appx. 655; *see id.* at 8:20–9:2, 12:10–13:7, 41:1–43:3. Keller was familiar with the facts set forth in the investigation report that prompted the University to proceed with a formal hearing. Keller Dep. 12:16–18, ECF No. 179-6 at 5. Keller was also apprised of Frost's decision, which provided a recounting of the parties' versions of events, identified the exhibits considered, and explained Frost's reasons for crediting Complainants' versions of events over Doe's. *See id.* at 12:19–21. The decision to expel Doe was based on the culmination of all of these processes. *See* ECF No. 136 at Appx. 655. To the extent Keller's observations constitute sex bias, they are insufficient to demonstrate Doe was expelled on the basis of sex. *Cf. Rossley*, 979 F.3d at 1194. A reasonable jury could not find Keller's narrow statement about why he did not consider the testimony of one witness as sufficient evidence that sex bias motivated the University to expel Doe.

Doe also argues external pressure placed on the University to investigate and adjudicate Title IX claims against males, when considered in connection with Keller's comments, demonstrates sex bias motivated the University to expel him. In affirming this Court's grant of summary

judgment on the plaintiff's Title IX claim in *Rossley*, the Eighth Circuit noted the pressure on the school to investigate and adjudicate Title IX complaints by females against males did not rise to the level described in *Doe v. University of Arkansas-Fayetteville*. *Rossley*, 979 F.3d at 1196 (citing *University of Ark.-Fayetteville*, 974 F.3d at 865). In *Rossley*, plaintiff relied on the "2011 Dear Colleague Letter" to argue the school was under pressure to investigate and adjudicate Title IX complaints by women against men. *Id.* In *University of Arkansas-Fayetteville*, plaintiff highlighted that the Office for Civil Rights and the Arkansas legislature were investigating the school for its alleged improper handling of sexual assault claims by females against males. 974 F.3d at 863. There, plaintiff's accuser also publicly criticized the school's initial finding of no misconduct, spoke with multiple media outlets, and started a campus-wide protest. *Id.* at 863–64. Here, Doe argues the University was subject to external pressure to investigate and adjudicate Title IX claims against males in part because of an employment discrimination lawsuit and an athletics discrimination lawsuit. ECF No. 185 at 13–15. Doe attempts to make a connection between discrimination suits writ large and Title IX sexual assault complaints by females against males. Due to the general nature of Doe's reliance on discrimination suits, the external pressure identified here is more like plaintiff's reliance on the 2011 Dear Colleague Letter in *Rossley*. 979 F.3d at 1196. Such generalization is insufficient to demonstrate the extensive external pressure present in *University of Arkansas-Fayetteville*. 974 F.3d at 863–64. As such, Doe fails to demonstrate the existence of sufficient external pressure on the University so as to generate a genuine dispute of material fact that sex bias motivated Doe's expulsion.

Considering the evidence in the light most favorable to Doe, a reasonable jury could not find Stevenson Earl's investigation, DiCarlo's and Redington's commentary on the draft investigation reports, Frost's adjudication, and Keller's internal appeal decision sufficient to demonstrate sex

bias motivated the University's decision to expel Doe. Nor could a reasonable jury find there existed sufficient external pressure on the University to adjudicate Title IX claims in favor of females alleging complaints against males to suggest the University acted on the basis of sex. *Cf. Rossley*, 979 F.3d at 1196. As such, Defendants are entitled to summary judgment on Doe's Title IX claim in Count 2.

B. Due Process (Count 1)

1. Substantive due process

In Count 1, Doe brings claims under 42 U.S.C. § 1983, alleging the individual Defendants violated his substantive due process rights, as set forth in the Fourteenth Amendment. ECF No. 57 ¶¶ 340–88. Defendants argue they are entitled to summary judgment on Doe's claims because he fails to identify any fundamental right entitled to substantive due process protection. ECF No. 139 at 31–36. Even if Doe identified a protected right, Defendants argue his claims nevertheless fail because he cannot show Defendants' actions shocked the conscience or that Defendants were deliberately indifferent to his fundamental rights. *Id.* at 36–37. Doe's resistance identifies a variety of alleged fundamental rights. ECF No. 185 at 31–34. At the hearing, Doe narrowed his substantive due process claims to the deprivation of his right to consensual sexual conduct. Doe argues Frost's adjudication was arbitrary and capricious. *Id.* at 32. Doe further argues Keller's and Braun's appellate review of Frost's decision was arbitrary and capricious. *Id.* at 31–33.

"Section 1983 provides a remedy against 'any person' who, under color of state law, deprives another of rights protected by the Constitution." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 120 (1992) (quoting 42 U.S.C. § 1983). The Due Process Clause of the Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S.

Const. amend. XIV, § 1. "Fundamental rights or liberties that are protected by substantive due process are those implicit in the concept of ordered liberty or derived from our Nation's history and tradition" *Van Orden v. Stringer*, 937 F.3d 1162, 1168 (8th Cir. 2019), *cert. denied sub nom. Orden v. Stringer*, 140 S. Ct. 1146 (2020). "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,'...." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

In *Lawrence v. Texas*, the Supreme Court determined the right to liberty under the Due Process Clause gave same-sex couples the right to engage in private sexual conduct without government intervention. 539 U.S. 558, 578 (2003). Due in part to the Supreme Court's apparent application of rational basis scrutiny to the statute at issue in *Lawrence*, the Circuit Courts of Appeal are split as to whether the Supreme Court intended to recognize a fundamental right to private, consensual sexual conduct. *Id.* at 579. ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."); *see, e.g.*, *Seegmiller v. LaVerkin City*, 528 F.3d 762, 771–72 (10th Cir. 2008) (holding there is no broad fundamental right to sexual conduct under *Lawrence*'s application of a rational basis analysis); *Lofton v. Sec'y of Dep't of Child. & Fam. Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) (holding *Lawrence* did not create a fundamental right to private sexual conduct and only requires rational basis standard of review); *Cook v. Gates*, 528 F.3d 42, 56 (1st Cir. 2008) (determining *Lawrence* applied a balancing test that is neither strict scrutiny nor rational basis and recognized a liberty interest in private, consensual sexual conduct); *Witt v. Dep't of Air Force*, 527 F.3d 806, 816–17, 821 (9th Cir. 2008) (finding *Lawrence* requires the application of heightened scrutiny). The Eighth Circuit has not addressed whether *Lawrence* recognizes a fundamental right to private consensual sexual conduct. For purposes of analyzing Defendants' motion, the Court assumes, without

deciding, Doe has a fundamental right to private, consensual sexual conduct.

"[S]ubstantive due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty." *Riley v. St. Louis Cnty. of Mo.*, 153 F.3d 627, 630–31 (8th Cir. 1998) (alteration in original) (internal quotation marks omitted) (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)); *see also Doe v. Univ. of Neb.*, 451 F. Supp. 3d 1062, 1110 (D. Neb. 2020) ("The 'core of the concept [of substantive due process is] protection against arbitrary action' by the government." (alteration in original) (quoting *Putnam v. Keller*, 332 F.3d 541, 547 (8th Cir. 2003))). A substantive due process claim can be stated in two ways. *Riley*, 53 F.3d at 631. "One, substantive due process is violated when the state infringes 'fundamental' liberty interests without narrowly tailoring that infringement to serve a compelling state interest." *Id.* Or, two, "substantive due process is offended when the state's actions either shock the conscience or offend judicial notions of fairness or human dignity." *Id.* (cleaned up).

"To prevail on an as-applied substantive due process claim, the [plaintiff] must show both that the state officials' conduct is conscience-shocking and that it violated a fundamental right." *Van Orden*, 937 F.3d at 1167. "One question in a substantive due process challenge . . . is 'whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" *Id.* (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 848 n.8 (1998)). Conduct is conscience-shocking when it is "intended to injure in some way unjustifiable by any government interest." *Putnam*, 332 F.3d at 548. Conduct "evinc[ing] a deliberate indifference to protected rights" can also be conscience shocking when the actor "had an opportunity to consider other alternatives before choosing a course of action." *Id.* (internal quotation marks and citation omitted); *Neal v. St. Louis Cnty. Bd. of Police Comm'rs*, 217 F.3d 955, 958 (8th Cir. 2000) ("[W]here

a state actor is afforded a reasonable opportunity to deliberate various alternatives prior to electing a course of action, the chosen action will be deemed 'conscience shocking' if the action was taken with 'deliberate indifference.'" (quoting *Lewis*, 523 U.S. at 850–51)). "Mere negligence can never be conscience-shocking and cannot support a claim alleging a violation of substantive due process rights." *Hart v. City of Little Rock*, 432 F.3d 801, 805 (8th Cir. 2005). "Because the conscience-shocking standard is intended to limit substantive due process liability, it is an issue of law for the judge, not a question of fact for the jury." *Truong v. Hassan*, 829 F.3d 627, 631 (8th Cir. 2016) (internal quotation marks and citation omitted).

a. Frost

Doe fails to show Frost's actions in the disciplinary proceeding and the Adjudication Decision rise to the level of conscience-shocking conduct violative of Doe's substantive due process rights. *Cf. Van Orden*, 937 F.3d at 1167. As discussed above, Frost's decision to omit Lovaglia's hearing testimony regarding Complainant #1 from her decision was reasonable given the nature of the testimony and Lovaglia's clarification that it was only his "recollection." Lovaglia's qualification of his testimony in this manner suggested some uncertainty regarding Complainant #1's remarks regarding consent. This is apparent in Lovaglia's change from his affirmative testimony that Complainant #1 told him it was consensual to his testimony that he recalled she "conveyed the idea" the sexual conduct was consensual. *See* Hr'g Tr. 483:23–484:8, ECF No. 179-1 at 124. Further, there is no evidence Frost failed to consider Doe's recounting of the facts giving rise to the Complaints. In her decision, Frost summarized the accounts of Complainants and Doe. *See* ECF No. 136 at Appx. 627–646. Doe points to no conduct by Frost that indicates she acted with an intent to injure Doe or with deliberate indifference to his fundamental rights. *Cf. Riley*, 53 F.3d at 631. Defendants are entitled

to summary judgment on Doe's substantive due process claim as to Frost.

b. Keller

Doe also fails to demonstrate Keller engaged in conscience-shocking conduct during Doe's internal appeal in violation of his substantive due process rights. Doe contends Keller did not review all of the materials necessary to conduct his appellate review. ECF No. 185 at 7–9; ECF No. 185-2 ¶ 88. Doe further claims Keller spent "inadequate time" reviewing the allegedly truncated record. ECF No. 185-2 ¶ 89. The Court finds Doe fails to demonstrate Keller's conduct in his appellate review was conscience-shocking as to the materials he reviewed or the duration of his review.

The Court first considers the substance of the record before Keller. In his deposition, Keller testified he reviewed Doe's appeal letter and any appeal documentation from the University, though he did not believe he had access to the hearing transcript. Keller Dep. 8:20–9:1, 12:6–10, ECF No. 179-6 at 4–5; *see also* ECF No. 136 at Appx. 654 (Letter from Redington to Keller indicating Redington transmitted appeal documents to Keller). However, Keller confirmed he had access to the investigative report, Adjudicator's Decision, exhibits to the hearing on Complainants' claims, and Doe's student record. *Id.* at 12:10–13:7. Even assuming Keller did not have the hearing transcripts available to him, the Court finds Keller did not act in a conscience-shocking manner in reviewing the comprehensive documents. In Doe's appeal letter he provides a lengthy account of "his side of the story" and identifies where he claims Frost erred. ECF No. 179-3 at p. 82–98. In his resistance, Doe acknowledges he notified Keller of "filtered facts and material misrepresentations," and discriminatory motives. ECF No. 185 at 32. The investigative report and Adjudicator's Decision similarly contain summaries as to where Doe's factual recounting differs from Complainants'. Doe fails to

show Keller engaged in conscience-shocking conduct related to the substance of the materials he considered in conducting his appellate review.

Next, the Court considers the duration of Keller's review of the materials. Keller explained his appellate review varies based on the facts of each case. Keller Dep. 41:24–43:3, ECF No. 179-6 at p. 12. He testified his initial review may take two to three hours. However, he explained he returns to the materials to engage in another careful review. *Id.* at 42:14–24. Keller testified he spent eight to ten hours reviewing the materials for Doe's appeal. *Id.* at 43:1–3. Thus, Keller spent several hours on multiple occasions reviewing the materials necessary to conduct his appellate review. Doe fails to demonstrate Keller's methodical, multi-hour appellate review process is conscience-shocking conduct.

Given the extensive nature of the records before Keller, in addition to Keller's stated method of spending several hours reviewing materials and then returning to the materials to conduct another multi-hour review, Doe fails to demonstrate an intent to injure or a deliberate indifference to Doe's protected rights. *Cf. Riley*, 53 F.3d at 631. In fact, Keller's process demonstrates his intent to engage in a thorough and contemplative appellate review. Doe fails to provide support for his claim that Keller engaged in a "sham and cursory affirmation of Frost's biased, outrageous, and unsupported findings." ECF No. 185 at 33.

Viewing the evidence in the light most favorable to Doe, the alleged shortcomings of Keller's appellate review do not amount to the egregious and outrageous conduct necessary to shock the conscience. *Cf. Putnam*, 332 F.3d at 548. Doe points to no facts suggesting Keller intended to injure Doe or that Keller was deliberately indifferent to Doe's rights in conducting his appellate review. *See id.* Defendants are entitled to summary judgment on Doe's substantive due process claim as to Keller.

c. Braun

Finally, Doe fails to show Braun's actions as the Executive Director of the Board of Regents in conducting Doe's external appellate review were conscience-shocking in violation of Doe's substantive due process rights. *Cf. Van Orden*, 937 F.3d at 1167. Doe argues generally that Braun failed to engage in a deliberate and careful appellate review. ECF No. 185 at 32. Doe points to no specific actions taken by Braun demonstrating an alleged indifference to Doe's protected rights. *Cf. Neal*, 217 F.3d at 958. Doe merely argues Braun's indifference can be assumed from the Board of Regents's affirmation of Doe's expulsion. ECF No. 185 at 32. Without specific actions to consider, the Court cannot assess whether Braun acted in an outrageous and egregious manner. Braun's decision to uphold Doe's sanctions, without more, is insufficient to demonstrate a deliberate indifference to Doe's protected rights or an intent to injure Doe. *See Putnam*, 332 F.3d at 548; *Neal*, 217 F.3d at 958. Defendants are entitled to summary judgment on Doe's substantive due process claim as to Braun.

2. Procedural due process

In its order granting in part and denying in part Defendants' motion to dismiss Doe's third amended complaint, the Court granted the individual Defendants qualified immunity on Doe's procedural due process claims. ECF No. 106 at 45. The Court found Doe failed to plausibly allege he was denied the right to adequate notice of the charges against him or that he was not provided the right to review evidence against him prior to the disciplinary hearing. *See id.* at 27–29. The Court concluded Doe's request for declaratory and injunction relief survived to the extent Doe's procedural due process claim survived on the merits. *Id.* at 45.

Defendants argue they are entitled to summary judgment on Doe's procedural due process claims because Doe cannot demonstrate he was denied procedural due process

during his disciplinary proceedings. ECF No. 139 at 46–47. Doe argues the individual Defendants violated his procedural due process rights in several ways. ECF No. 185 at 15–31. At the summary judgment hearing, Doe argued Defendants deprived him of the right to be heard by an impartial decisionmaker and receive adequate notice. Because the Court has denied Doe's procedural due claim relating to the adequacy of notice, the Court only considers whether Defendants are entitled to summary judgment on Doe's claim that Defendants violated his right to a hearing before an impartial decisionmaker. *See* ECF No. 106 at 29. The Court finds Doe fails to show there is a genuine dispute of material fact as to whether Frost's credibility determinations and the manner of the proceedings demonstrate Defendants deprived him of the right to be heard by an impartial decisionmaker.

As in its order granting in part and denying in part Defendants' motion to dismiss, the Court assumes, without deciding, Doe has a liberty or property interest entitled to procedural due process protections. *See* ECF No. 106 at 21. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). "[P]rocedural due process must be afforded [to] a [disciplined] student on the college campus 'by way of adequate notice, definite charge, and a hearing with opportunity to present one's own side of the case and with all necessary protective measures.'" *Jones v. Snead*, 431 F.2d 1115, 1117 (8th Cir. 1970) (quoting *Esteban v. Cent. Mo. State Coll.*, 415 F.2d 1077, 1089 (8th Cir. 1969)). Courts "apply the standard of reasonableness in determining whether or not a student has been deprived of his constitutional rights." *Id.*

The record does not support Doe's claim that he was denied the opportunity for a hearing before an impartial decisionmaker. Doe appears to contend he was denied procedural due process because Frost did not credit his version of the events. However, Doe points to no evidence to sug-

gest Frost's credibility finding was motivated by sex bias. The record shows Frost credited Complainants' testimony, relying in part on consistent testimony from witnesses who had contact with Complainants directly after the events at issue. *See* ECF No. 136 at Appx. 630–31, 638–39. Further, as discussed above, Doe fails to show Frost's decision to omit a portion of Lovaglia's testimony from her decision or her description of Doe's account as "fantasy" demonstrate Frost was biased. Absent a showing of bias, Doe cannot maintain a claim for a violation of procedural due process merely because the adjudicator found the Complainants' version of events more credible than his. To the extent Doe alleges Frost's credibility determinations violated his right to procedural due process, his claim fails.

Doe also fails to show the manner of the proceeding violated his procedural due process rights. Doe was present throughout the hearing. He was represented by counsel, who offered exhibits and submitted witness questions to Frost. ECF No. 136 at Appx. 621–23. Doe's counsel objected to exhibits offered by the University and withdrew exhibits in response to objections by the University. *See* Hr'g Tr. 44:6–14, ECF No. 179-1 at 13; ECF No. 136 at Appx. 622. Doe argues he had to present "his side of the story" through submitting questions to Frost for her to ask witnesses. ECF No. 185 at 20–21. This method of proceeding is not inconsistent with the manner of disciplinary proceedings. Even so, Doe was given the opportunity at the end of his examination to provide Frost with any other information he thought she may need in rendering her decision. Hr'g Tr. 829:3–15, ECF No. 179-2 at 47; *see Jones*, 431 F.3d at 1117. Frost's decision demonstrates she was aware of and "heard" Doe's version of the events. *Mathews*, 424 U.S. at 333. Frost noted where Complainants' and Doe's versions of the facts diverged. *See* ECF No. 136 at Appx. 627–29, 637–39. Doe fails to provide sufficient evidence to show the manner of the proceedings violated his procedural due process rights.

Viewing the evidence in the light most favorable to Doe, a reasonable jury could not find Frost's adverse credibility

determinations as to Doe were the product of bias against him. Doe also fails to show the manner of the proceeding deprived him of the opportunity to be heard by an impartial decisionmaker. Because Doe fails to generate a genuine issue of material fact as to his procedural due process claims, Defendants are entitled to summary judgment on the procedural due process component of Doe's claims in Count 1.

Because Doe fails to generate a genuine issue of material facts as to both the substantive and procedural due process components of his claims in Count 1, Defendants are entitled to summary judgment on Count 1.

C. Equal Protection (Count 6)

In Count 6, Doe brings claims under 42 U.S.C. § 1983, alleging the individual Defendants violated his right to equal protection under the law, as set forth in the Fourteenth Amendment. ECF No. 57 ¶¶ 485–510. Defendants argue they are entitled to summary judgment on Doe's equal protection claims because Doe fails to raise a genuine issue of material fact as to whether Defendants intentionally discriminated against him based on his membership in a protected class. ECF No. 139 at 48–50. Specifically, Defendants argue Plaintiff cannot demonstrate a similarly situated individual outside of Doe's protected class received favorable treatment where he received unfavorable treatment. *Id.* at 49. Doe sets forth the law regarding equal protection but does not rebut Defendants' argument. *See* ECF No. 185 at 34–35. Doe's complaint appears to allege the individual Defendants discriminated against him on the basis of race, national origin, alienage, and sex. *See* ECF No. 57 ¶¶ 488–89, 494–95. However, at the hearing, Doe only argued the individual Defendants violated his equal protection rights by relying on sex-based stereotypes to make credibility determinations adverse to Doe. Because Doe fails to demonstrate any similarly situated individual outside his protected class received favorable treatment where

he received unfavorable treatment, his claim fails as a matter of law.

"Section 1983 provides a remedy against 'any person' who, under color of state law, deprives another of rights protected by the Constitution." *Collins*, 503 U.S. at 120 (quoting 42 U.S.C. § 1983). The Equal Protection Clause of the Fourteenth Amendment prohibits States from denying "any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. To establish a claim under the Equal Protection Clause, a plaintiff "must, as a threshold matter, demonstrate that [he] ha[s] been treated differently by a state actor than others who are similarly situated simply because [plaintiff] belong[s] to a particular protected class." *Keevan v. Smith*, 100 F.3d 644, 647–48 (8th Cir. 1996). "In general, the Equal Protection Clause requires that the government treat . . . similarly situated persons alike." *Id.* at 648. "Treatment of dissimilarly situated persons in a dissimilar manner by [a state actor] does not violate the Equal Protection Clause." *Id.* "Absent a threshold showing that [ ]he is similarly situated to those who allegedly receive favorable treatment, the plaintiff does not have a viable equal protection claim." *Id.* (internal quotation marks omitted) (quoting *Klinger v. Dep't of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994)).

Doe alleges Complainants received favorable treatment during the University's disciplinary proceeding. ECF No. 57 ¶ 497. Doe does not identify any other comparator in his complaint, resistance, or supporting materials. *See id.*; ECF No. 185 at 34–35. "It goes almost without saying that . . . sexual assault complainant[s] and those [they] accuse[ ] of sexual assault are not similarly situated as complainants." *Regents of the Univ. of Minn.*, 999 F.3d at 581 (internal quotation marks omitted) (quoting *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 74 (1st Cir. 2019)). Complainants, by reason of their position in the disciplinary proceeding, are not similarly situated to Doe. *See id.* ("Jane was not similarly situated because no one filed a complaint against her...."). Thus, any alleged difference in treatment between

Doe and Complainants does not violate the Equal Protection Clause. *See Keevan*, 100 F.3d at 648. Because Doe fails to meet the threshold requirement of demonstrating a similarly situated individual received favorable treatment, his equal protection claim fails as a matter of law. *Cf. id.* Defendants are entitled to summary judgment on Count 6.

D. Declaratory/Injunctive Relief (Count 8)

In Count 8, Doe seeks 1) a declaratory judgment that the University's sexual misconduct policies, both on their face and as applied to him, violate the Due Process Clause of the Fourteenth Amendment and analogous provisions of the Iowa Constitution; and 2) an injunction requiring the individual Defendants to reinstate him as a student, clear his record, and restrain the University from implementing further disciplinary proceedings against him. ECF No. 57 ¶¶ 531–47 (alleging the University's policies are unconstitutionally vague and overbroad, and violated his procedural due process rights). Following the Court's partial dismissal of Count 8, Doe's request for declaratory judgment and injunctive relief survived as to Doe's claims that the University's sexual misconduct policies are unconstitutionally vague and overbroad. Doe's request in Count 8 also survived to the extent Doe's procedural due process claim survived on the merits. ECF No. 106 at 9–10.

At the hearing, Doe confirmed he is not pursuing, and his complaint does not contain, a First Amendment claim. Because Defendants are entitled to summary judgment on Doe's substantive and procedural due process claims, as discussed above, the Court has no basis on which to order declaratory and injunctive relief. Thus, the Court need not perform an injunctive relief analysis. Defendants are entitled to summary judgment on Count 8.

V. CONCLUSION

Doe fails to demonstrate a genuine issue of material fact exists as to whether sex bias motivated the University's decision to expel him, as alleged in Count 2. As to his claims under § 1983, Doe fails to generate a genuine dispute of material fact that the University policy or individual Defendants deprived him of a fundamental right to consensual sexual conduct. Doe similarly fails to generate a genuine dispute of material fact as to whether he received a meaningful opportunity to be heard during the disciplinary proceedings. Thus, Defendants are entitled to summary judgment on Doe's substantive due process and procedural due process claims in Count 1. Finally, Doe fails to demonstrate a similarly situated comparator received favorable treatment, as required to establish an equal protection claim. Thus, his claim in Count 6 fails as a matter of law. Because Defendants are entitled to summary judgment on Doe's due process claims in Count 1, Doe's request in Count 8 for declaratory and injunctive relief on those claims must fail.

For the foregoing reasons, **IT IS ORDERED** that Defendants' Motion for Summary Judgment, ECF No. 128, is **GRANTED**.

The Clerk of Court shall enter judgment in favor of Defendants and against Plaintiff. The parties are responsible for their own costs.

IT IS SO ORDERED.

Dated this 20th day of September, 2021.

/s/ Rebecca Goodgame Ebinger
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 21-3340

John Doe

Appellant

v.

University of Iowa, et al.

Appellees

Stop Abusive and Violent Environments

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the Southern District of Iowa-Eastern (3:19-cv-00047-RGE)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Melloy, Judge Colloton, and Judge Stras did not participate in the consideration or decision of this matter.

November 13, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

JOHN DOE,

Plaintiff(s),

v.

UNIVERSITY OF IOWA; BOARD OF REGENTS, STATE OF IOWA; TIFFINI STEVENSON EARL; IRIS FROST; LYN REDINGTON; ANGIE REAMS; CONSTANCE SCHRIVER CERVANTES; JOHN KELLER; MONIQUE DICARLO; and MARK BRAUN,

Defendant(s),

CIVIL NUMBER: 3:19-cv-00047-RGE-HCA

JUDGMENT IN A CIVIL CASE

☐ **JURY VERDICT.** This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

☑ **DECISION BY COURT.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

Defendants' Motion for Summary Judgment is granted. Judgment is entered in favor of Defendants' and against Plaintiff.

Date: September 21, 2021

CLERK, U.S. DISTRICT COURT
/s/ Brian Phillips

_____

By: Deputy Clerk

APPENDIX E

III. Defendants Are Shielded from Plaintiff's § 1983 Money Damages Claims by the Doctrine of Qualified Immunity.[12]

Plaintiff appears to believe that one court's decision of a particular issue in his favor should have placed Defendants[13] "on notice" that certain acts were violative of Plaintiff's constitutional rights. This, however, is not the standard the Court should apply in determining whether the individual Defendants are shielded by qualified immunity. The question before the Court is whether the state of the law, with regard to each of Plaintiff's claims, was so clearly established at the time of the purported violation that the individually-named Defendants had "fair and clear warning of what the Constitution require[d]" of them. *City and County of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1778 (2015).

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[12] Defendants agree that the doctrine of qualified immunity does not bar claims for prospective or injunctive relief. However, Plaintiff's claims against the named Defendants in their individual capacities should be dismissed, as Plaintiff has not shown that the law regarding his claims was so clearly established that a reasonable university administrator would have known that his or her actions would directly violate Plaintiff's constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

[13] Defendants do not concede, as Plaintiff suggests, that Defendants Stevenson Earl and Frost "violated § 1983 but mention only that it was not undoubtedly established." Docket 87, p. 16. Rather, as Defendants understand the 12(b)(6) standard, they concede that Plaintiff has alleged sufficient "facts" against Defendants Stevenson Earl and Frost to maintain his § 1983 claims against them at this time.

APPENDIX F

Deposition of JOHN KELLER, taken via Zoom videoconference, commencing at 2:36 p.m., October 14, 2020, before Tracy Anita Hamm, Certified Shorthand Reporter and Notary Public in and for the State of Iowa who was physically located in North Liberty, Iowa.

APPEARANCES

On behalf of Plaintiff:
Cole Law Firm, PC
Attorneys at Law
209 East Washington Street
Suite 304
Iowa City, IA 52240
By: Rockne Cole

On behalf of Defendants:
Christopher J. Deist
Kayla Burkhiser Reynolds
Assistant Attorneys General
Office of the Attorney
General of Iowa
Special Litigation Division
1305 East Walnut Street
Des Moines, IA 50319

JOHN KELLER,

witness herein, called as a witness by Plaintiff, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. COLE:

Q. Could you state and spell your name for the record, please.

A. Sure. John Charles Keller, K-e-l-l-e-r.

Q. Where do you currently work?

A. University of Iowa.

Q. What was your position in the fall of 2017 at the University of Iowa?

A. Was associate provost for graduate education and dean of the graduate college.

Q. How long had you acted in that capacity as of fall of 2017?

A. Well, I started in this position as an interim dean of the graduate college in 2000, and I was appointed to the position permanently in 2002.

Q. And you're familiar with the contents of this case?

A. I am.

Q. You -- explain just for record purposes, what was your role in the fall of 2017 in relation to the disciplinary matter of [John Doe]?

A. I was charged with -- on behalf of the provost's office in reviewing [John Doe]'s appeal to his – the decision made, you know, by the dean of students to dismiss him from the University.

Q. How many of those sorts of appeals did you consider in 2017, just approximately?

A. Boy, probably several, couple; yeah.

Q. Okay. And who's the person that keeps track, then, of the number of appeals that you personally would have considered in 2017?

A. Well, I do. I mean I could go back and look at that, you know, if we have to do that, but, yeah, be -- I mean I keep a record of the -- the appeals and the other judgmental decisions that I have to make on behalf of my role in the graduate college.

Q. Okay. So in 2017, were you, then, essentially the final person, the final level of appeal as it applied to expulsion disciplinary decisions at the graduate college?

A. Yeah; within the University, yes. Uh-huh.

Q. So in terms of whether the pers -- the student is expelled, you would be the last decision-maker at the University of Iowa before it gets to the Iowa Board of Regents; am I correct in that characterization?

A. Yes, you're correct.

Q. So let's talk a little bit about the power that you have in your role as the provost in the appeal process in a case such as [Doe], okay?

A. Okay.

Q. Now, it's my understanding that you had full authority to grant -- or to reverse [Doe]'s appeal, correct?

A. That's one option, uh-huh.

Q. You could have re -- you also could have lowered the sanctions, correct?

A. Correct.

Q. And in making those decisions, you're bound by the University of Iowa policies regarding to how those decisions are made, correct?

A. Correct.

Q. Now, prior to the time that you reviewed [Doe]'s appeal, did you consult with any other -- I'm not talking about attorneys advising you.

A. Uh-huh.

Q. But other than attorneys, did you consult with anyone outside of any appeal materials you would have received from any of the parties in connection with this case?

A. No, I did not.

Q. Okay. So your decision-making was based solely on the documents that you received from [Doe], correct?

A. Yeah; in regards to his case, correct. Uh-huh.

Q. As well as from the University of Iowa; would that also be correct?

A. Yes, that would be correct.

Q. So in your capacity as decision-maker, how long have you performed similar duties to that? I mean how many years have you considered appeals such as [Doe]'s in an expulsion case?

A. Oh, since I was appointed as dean in two thousand -- well, 2002, yeah. I don't recall having any of those while I was interim dean, but since 2002 when I was formally appointed the position in a permanent basis, yeah, since that time so 15 years.

Q. And so in your capacity as the final decision-maker, I would expect that you would have to have decision -- training in how to properly consider Title IX-related appeals; is that correct?

A. That's correct, yeah.

Q. And in connection with this particular case, I direct your attention to Deponent's Exhibit 56; do you have that in front of you?

A. Yeah, let's -- let me get to it. Yeah, I have it right here.

MR. COLE: And it's my understanding -- and this we'll submit as Plaintiff's Exhibit 56. It's my understanding, Ms. Burkhiser, you have no objection to consideration of this exhibit; would that be correct?

MS. BURKHISER REYNOLDS: That's correct.

BY MR. COLE:

Q. So Plaintiff's Exhibit 56, would this be the final decision that you made on behalf of the University of Iowa in connection with Mr. [John Doe]'s appeal?

A. That would be correct, yes.

Q. And in that particular -- I direct your attention to the second paragraph, first sentence where you said: In reviewing these cases and the subsequent appeal, I find no violation of any of the following five grounds on which an appeal may be overturned.

A. Okay.

Q. And then you list subparagraph 16A through 16E; correct?

A. Correct. Uh-huh.

Q. And then you -- then you said: Therefore, I uphold the decision for your expulsion from the University of Iowa, effective October 10th, 2017, correct?

A. Correct.

Q. Now, at the time you made this decision, you had indicated that you had reviewed Mr. [John Doe]'s appeal letter, correct?

A. Correct.

Q. And any appeal documentation from the University of Iowa, correct?

A. Correct. Uh-huh.
Q. And other than those two documents, were there any other appeal documents that you considered in making your final decision?
A. Not that I can recall.
Q. So you understand that the ultimate finding here is that there was multiple disciplinary violations that [Doe] was found to have committed at the University of Iowa --
A. That's correct.
Q. -- correct?
A. Uh-huh.
Q. And one was sexual assault against [Complainant 2], correct?
A. Correct.
Q. And the second would be sexual assault versus [Complainant 1], correct?
A. Correct. Uh-huh.
Q. Now, you do recall that this case did not involve any nonconsensual penetration intercourse, correct?
A. Correct. Uh-huh.
Q. And it also involved -- the allegation, sexual conduct, as to both women was allegation of one nonconsensual breast touch for each woman, [Complainant 1] as well as [Complainant 2], correct?
A. Correct. Uh-huh. As I recall, that's correct.
Q. And there was also an allegation of one incident of nonconsensual kissing that occurred during the same evening -- or the same time, correct?
A. Yes; I believe that to be the case, yes.
Q. Okay. So -- and would -- you'd also agree with me that he was also found guilty of sexual harassment as to both women during the fall of 2016 through I think January of 2017?
A. Yes, I believe those were allegations as well; uh-huh.
Q. And he was also found responsible for inappropriate use of -- or possession of alcohol, correct?
A. Correct; on campus, yes.
Q. As to both women, correct?

A. Correct.
Q. Now, as to that -- those last ones, you would agree with me that that sort of sanction, the use of alcohol, normally does not lead to expulsion, correct, in your train -- based upon your experience?
A. Based upon my experience, that would be correct, yes.
Q. And even a lot of cases, if it's a first-time offender, you normally would not even consider a suspension as a result of an alcohol-related first-time offense; isn't that true?
A. Well, I don't know that that's true because I don't recall having any cases come before my -- you know, being presented to me where that's the single issue that would be charged with as the student would be an offense of an alcohol possession on a campus facility.
Q. Okay. Well, let me just ask you based upon your knowledge of cases, prior to [Doe] in the ones that -- appeals that you have heard, in your training and experience, have you ever seen a case where a student was expelled for a first-time alcohol-related violation based upon your experience as the provost at the University?
A. Not that I can recall, no.
Q. And do you recall any situations where the only allegation is alcohol-related that you even heard appeals related to a suspension of a student?
A. Well, that was a single allegation in front of a student, yeah, I have not seen that in my experience as graduate dean or acting on behalf of the provost.
Q. So you'd agree with me as to both [Complainant 2] as well as [Complainant 1], the more serious allegation was the sexual harassment as well as the sexual assault, correct – or the sexual misconduct?
A. Well, I don't know that I would agree with that. I mean I'm looking at the case in its totality between the allegations of -- you know, that the two students brought as well as the issue of the alcohol possession on campus, and they were brought to me in their totality.
Q. Okay. And in your totality you found that that warranted expulsion from the University of Iowa.

A. I did, yes.
Q. Okay. So you mentioned the appeal letters that you had had -- that you had considered. Did you have access to the actual hearing transcript at the time you considered the appeal of [Doe]'s disciplinary sanction?
A. I don't believe I had access to the -- you know, the transcripts themselves. I had records -- access to records that were presented to me from the adjudicator and from the investigator and from the dean of students.
Q. Okay. So you basically had whatever – and Ms. Frost was the adjudicator in connection with this case?
A. I believe that to be the case, yes.
Q. So you had Tiffini Stevenson Earl's report that she had submitted, correct?
A. Correct. Uh-huh.
Q. And then you had the adjudication decision by Ms. Frost, correct?
A. Correct.
Q. And you also had, then, all of the exhibits that would have been submitted in connection with the disciplinary adjudication of Ms. Frost, correct?
A. By "exhibits," what do you mean by those?
Q. Well, in other words, exhibits that would have been submitted by either party during the adjudication hearing in front of Ms. Frost; did you have access to those?
A. Yes, I believe I did; yes.
Q. Okay. And then you would have had access to [Doe]'s student record, correct?
A. Correct. Uh-huh.
Q. And you would also agree with me that at the time of this sanction of expulsion, [Doe] had a completely clean disciplinary history with the University of Iowa, correct?
A. As far as I know, yes. Uh-huh.
Q. And he had -- and after -- and while this matter was pending, isn't it also correct that [Doe] had no allegations that he acted inappropriately with either women after he received the formal Notice of Violation in February of 2017; were you aware of any further violations by [Doe] other --

A. No.
Q. -- than what he had been accused here?
A. Not that I'm aware of, no.
Q. So when you were looking at this appeal, you saw a completely clean history prior to the allegation, correct?
A. Correct. Uh-huh.
Q. And you had also seen a complete honoring by [Doe] of all the stipulations that had been put – the interim sanctions that had been imposed upon [Doe] during the course of the investigation in this case, correct? I mean, in other words, he had had no further violations at the University of Iowa.
A. Not to my knowledge, no.
Q. And you also knew that he was very close to receiving his final degree at the University of Iowa; is that correct?
A. I'd have to go back and look at his specific academic record to verify that, but, yeah, I'll -- you know, he was pretty far along with his program, yes. Exactly how far away from graduation I don't recall, but I'd -- I'd have to look at his record.
Q. And in fashioning the sanction, is that sometimes a factor that you'll look at in deciding whether to expel a student or not if they're -- I mean, for example, if they're within a month of graduation, is that sometimes considered a mitigating circumstance in fashioning an appropriate sanction for a student?
A. It could be depending upon the circumstances of each individual case, yes.
Q. Okay. And so you'd agree with me that in your training as the final decision-maker, part of your job is to not make a decision that's arbitrary and capricious, correct?
A. Correct. Uh-huh.
Q. You actually have to have a basis for why you did what you did, correct?
A. Correct.
Q. And in fashioning a sanction, you'd agree with me that one of your responsibilities is to explain under the University policy why you rejected lesser sanctions short of the final sanction of expulsion.

A. You repeat that for me again, please.
Q. Part of your responsibility is to provide a rationale as to why you imposed the sanction that you did; would you agree with me that that's part of your responsibility as the final decision-maker?
A. Yeah, I would agree with that; yes.
Q. So my concern with Plaintiff's Exhibit 56, if you could just look at this --
A. Sure.
Q. -- I cannot see any rationale that you gave as to why you imposed the most severe sanction. Could you show me where you explain why you chose the most severe sanction here.
A. Sure, and my interpretation of what you're asking me would be found in -- basically in the opening sentence of the five stipulations that, you know, in reviewing [Doe]'s case and his appeal, I did not find any violation of those five basic principles on which I am -- you know, I am in my position expected to review and make decisions on, so overall, you know, my final statement of "therefore, I uphold the decision of your expulsion" to be the case, I mean I did not provide any substantial rationale, but I mean reviewing those five tenets of -- on how I'm supposed to look at it at an appeal process for those five issues, I did not find a violation of any of those issues.
Q. Okay. And you would agree with me that one of the key findings in sexual assault as to [Complainant 1] is that the sexual contact was nonconsensual between [Complainant 1] and [Doe]; you're aware that that was one of the central allegations against Ms. -- [Doe] as it applied to [Complainant 1], correct?
A. Correct. Yes.
Q. So I direct your attention to Exhibit 55, page 4, and I would just -- do you have that in front of you?
A. Yeah, let me -- let me get it out here, get to it.
I'm sorry, which page are you referring to?
Q. It'd be page 4.
A. Page 4.

Q. Of Exhibit 55.
A. Yep, 55, exhibit -- page 4. Okay.
MR. COLE: And it's my understanding that you did not have any objection to consideration of Plaintiff's Exhibit 55 for purposes of today's deposition.
MS. BURKHISER REYNOLDS: That's correct.
BY MR. COLE:
Q. Okay. So we're going to submit this and consider this as part of your deposition.
A. Okay.
Q. And the exhibit does contain written brackets throughout; those are from me, those are not part of the original document --
A. All right.
Q. -- but I'd just direct your attention to the bottom of page 4 and the top of page 5 relating to the brackets that were -- so just review the last paragraph and the top paragraph of page 5.
A. Okay. Give me a second. Okay. Yeah, I've reviewed those bracketed sections.
Q. So at the bottom of page 4 it states -- and I'll just read it for purposes of clarity in the deposition. He's discussing a conversation that [Complainant 1] had had with her professor, Professor Lovaglia, correct?
A. Correct. Uh-huh.
Q. And in that conversation between [Complainant 1] and Mr. Lovaglia, it indicated that: In fact, Professor Lovaglia wrote down the notes of the encounter which were provided in University evidence; and this is from [Doe] to you; you reviewed this document in your appeal, correct?
A. Correct. Uh-huh.
Q. And in it he said: When Professor Lovaglia was interviewed by the EOD -- which in this case I'll just indicate would've been I think Ms. Tiffini Stevenson Earl, and these are my comments --
A. Uh-huh.
Q. -- he said, and I quote: "He said that the way he was told, there was mutual attraction and that she had initially

been okay but she had changed her mind"; and then [Doe] continues, quote: "She mentioned that we kissed on the couch," period. "Professor Lovaglia testified at the hearing that [Complainant 1] told him that it was consensual." Now, the fact that Mr. Martinez -- [Complainant 1] told Mr. Lovaglia that it was consensual sexual contact, that's an important fact; would you agree with me?

A. Yes. Uh-huh.

Q. And, in fact, that was the central allegation against [Doe] that it was nonconsensual sexual contact between [Complainant 1] and [Doe], correct?

A. Say that again, please.

Q. In fact, it is the central fact, is it not, that the central allegation against [Doe] as it applied to sexual misconduct was that there was nonconsensual sexual contact between [Doe] and [Complainant 1], correct?

A. Correct. Uh-huh.

Q. And so you ultimately decided -- and you were also aware that in Ms. Frost's appeal, she did not even – or Ms. Frost's adjudication, she did not even mention that Lovaglia had testified during her hearing that he had heard [Complainant 1] say it was consensual; were you aware of that?

A. To be honest, I don't recall, you know, all the documents in that level of detail to be quite honest. No, I don't recall that.

Q. But you would agree with me that that is a very important fact that at least one witness heard [Complainant 1] report that it was consensual sexual behavior; you'd agree with me that's important, correct?

MS. BURKHISER REYNOLDS: I'm going to -- Rockne, I'll object to that as misrepresenting prior testimony and the facts in evidence. You can go ahead and answer, Dean Keller, if you know.

THE WITNESS: Okay. Would you -- so would you repeat that again, Rodney (sic), I'm sorry. I think I've lost him off of the --

MR. COLE: I'm sorry, I got disconnected, so could you just reread the question. (The requested portion of the record was

read back by the reporter.)
THE WITNESS: Okay. So -- yes. Sorry. So that's the question you're asking me?
BY MR. COLE:
Q. Yeah.
A. Yeah. Yeah, I would agree; yeah.
Q. So you ultimately determined that that information was not significant enough for you to reverse the finding of sexual misconduct as it applied to [Complainant 1]; why?
A. Again, I'm looking at the totality of the allegations that were brought against [Doe] and the findings of the adjudicator and then the investigators and the dean of students. I mean I was looking at the whole – the whole package of what was presented in front of me including [Doe]'s appeal.
Q. Well, Mr. Kelly, that's not what I'm asking. What I'm asking is is at -- you have the authority to partially reverse one of the findings in connection with this case, correct?
A. Correct. Uh-huh.
Q. So in other words, you have the authority to reverse the finding of sexual misconduct as it applied to [Complainant 1], correct?
A. Correct. Uh-huh.
Q. And then you could have affirmed the findings of sexual misconduct as to [Complainant 2], correct?
A. Correct.
Q. So I'm only talking about your decision to affirm the finding of sexual misconduct as against [Complainant 1]. Why did you not consider it important that at least one witness, that would be Dr. Lovaglia, heard from [Complainant 1] that the sexual behavior was consensual?
A. Well, I'm taking into consideration the age of the students and their positioning and their career at the institution and, you know, [Doe]'s situation as a graduate student, their view of him as sort of the lab leader and manager of the activities that they are involved in in the lab, and my observation and knowledge of many of these situations is that they're young -- particularly younger students, understand

there to be a power differential between themselves and graduate students in particular, lab managers in this particular case, and that consensual -- you know, it's -- these are very difficult because consensual does not necessarily mean approval. So I mean the power differential -- I mean there's also indications in the record that, you know, the students were concerned, they didn't want to get [Doe], you know, in trouble, so to speak, and there's this -- there's a fine line between relaying information because they don't wanna hurt somebody but also like -- you know. Yeah, it's because – you know, I suspect that nobody asked permission for those particular actions and there was no verbal affirmative, and I think -- you know, my experience with younger students, particularly females, is that they are sort of surprised by what might be taking place and don't know exactly how to respond so things happen without them really engaging in any kind of, you know, verbal or physical sort of indication that there's approval there, so that's sort of my observation and my thinking about how I came to this decision about to not take this into consideration as you probably would want me to.

Q. So do you have access to Plaintiff's Exhibit 8 in connection with today's case?

A. So what would that look like?

Q. It would just be a hearing transcript.

A. Oh, okay. I think I have it here. Yep.

Q. Okay. So let me just direct your attention, and I just want -- for record purposes, I think there was a previous objection that maybe I had misrepresented one of the – what one of the witnesses had said, so I want to just quote from the transcript just to make sure that we're accurate here.

A. Okay.

Q. So if you go to where it's Bates stamp I think Defendant's Exhibit 149 or -- I'm sorry, the defense -- I'm sorry, I misspoke. It was not Deponent's Exhibit 8. It would be Deponent's Exhibit 4 at page 2, sorry about that; do you have that in front of you?

A. I don't know that I do.

MS. BURKHISER REYNOLDS: Was that one that you had sent earlier?
MR. COLE: I believe we had.
MS. BURKHISER REYNOLDS: Otherwise I can email it.
MR. COLE: If you could just email Deponent's Exhibit 4, page 2.
THE WITNESS: Yeah, that might be the easiest thing to do at the moment.
MR. COLE: Yeah, why don't we just do that.
MS. BURKHISER REYNOLDS: On its way.
THE WITNESS: Okay. Got it.
BY MR. COLE:
Q. I'll just direct your attention to Plaintiff's Exhibit 2 -- or 4 at page 2.
A. Okay.
Q. Top of the page, right paragraph -- right side -- right column, top of the page, and it's -- I'll just represent for record purposes, this is the quote from Mr. Lovaglia in response to a question. It said -- Mr. Lovaglia said: "My recollection is -- and I really hope that I did not misunderstand her, is that my recollection is that she conveyed the idea that all of the behavior that occurred in [Doe]'s apartment was consensual and that she stated that she did not want to make a complaint against him." So -- and the hearing adjudicator followed up: Did you believe that she might -- didn't want to cause any trouble versus the fact that it was consensual; did that cross your mind? So -- so just for record purposes, at least as to
Mr. Lovaglia, he clearly testified that based upon what [Complainant 1] had conveyed to him, he believed the sexual behavior between the two was consensual; would you believe -- would you agree that that's a fair characterization of what he had testified to?
A. Well, it seems to be the case, yes; that's what's quoted here on the -- on the last part of it.
MR. COLE: Okay. Can we take a --
Q. So -- and you indicated that you were aware that [Doe] was complaining about that in his appeal when you were

considering his appeal, correct?
A. Uh-huh. Yeah, that's correct.
Q. So -- and I just want to make sure that I'm characterizing why you felt that that information was not sufficient enough to reverse the finding of sexual misconduct as to [Complainant 1], and if I mischaracterize anything, just feel free to clarify, okay?
A. Sure.
Q. So I understand one of the factors that you had mentioned was that -- because of the age differential between [Complainant 1] and [Doe], correct?
A. Correct.
Q. And so let me get this right, though; she was not an underage individual, correct?
A. Yeah -- well, she's -- yeah, I can't remember if she's -- she was a sophomore, I believe, second year student; is that correct? I can't remember now off the top of my head, but, yeah, she's certainly over 18, yes.
Q. Now, I understand that there was an allegation relating to the role in terms of whether there could have been a violation, but would've it been a University policy violation for a student of Mr. [John Doe]'s age to have sexual contact with a student of [Complainant 1]'s age as long as the contact is sexual -- or is consensual?
A. Yeah, you know, that's true; yeah.
Q. So had you agreed with Mr. Lovaglia that the behavior would have been -- or he believed it was consensual, had you accepted that finding, would've that changed your opinion at all in terms of whether he would have violated the sexual misconduct finding?
MS. BURKHISER REYNOLDS: I'm going to object to the question as compound; didn't really understand.
BY MR. COLE:
Q. If you had accepted Mr. Lovaglia's understanding of what had occurred in the apartment based upon his conversation with [Complainant 1], that it was consensual behavior
A. Uh-huh.
Q. -- would have that made any difference in your finding

as to whether there was sexual misconduct as to [Complainant 1]?

A. That's -- that's possible, yeah. That's possible.

Q. Okay. And one of the reasons why you rejected I think Mr. Lovaglia's testimony is because of the age differential between the two, correct?

A. Age and it's the relationship to [Doe] being a graduate student and [Complainant 1] being an undergrad, yes.

Q. Is age differential an expressed factor that University policy requires or allows you to consider in determining whether sexual conduct is consensual or not?

A. Not specifically that I know of, yeah.

Q. So that was just your particular view. You just added that as a relevant factor in rejecting --

A. Yeah, not so much the age as the power differential between the two positions, between the two students in question, yeah.

Q. Okay. So now you're saying that age had -- did not have any factor in terms of whether it was consensual or not between the two.

A. I'm not saying -- yeah, I'm not saying it's – the age is specifically not a factor. I'm saying that there's a difference in age between -- typically between a graduate student and an undergraduate, particularly a young undergraduate.

Q. So just because I'm not clear here, yes or no, did you consider age as a factor, the age differential, in determining to reject Dr. Lovaglia's testimony as an appeal ground?

A. Yes, I did.

Q. Okay.

A. Yeah.

Q. And I understood you also said something -- and if you could elaborate on something you had said, you said that consensual -- consent does not mean approval; what did you mean by that?

A. Well, I think -- you know, I was not one of the two people involved. You know, I wasn't, you know, a fly on the wall, as it were, or either one of the two students in question, but, you know, I believe it to be the case that, you know, a

younger undergraduate student and an older graduate student who is viewed as being a -- you know, a power differential because of the -- you know, the lab manager status, you know, things could happen that would be -- surprise them that they happened and not necessarily be an overt consensual sort of situation. So I mean I think that there's situations that arise that just surprise people and take them for what they were, you know, or what happened, and I believe that to be, you know, the case in this particular situation between [Complainant 1] and [Doe].

Q. So in terms of your statement about consent doesn't mean approval, is that -- is that something that – consent doesn't mean approval, does that -- is that a specified criteria that you were to consider in terms of determining whether someone has violated the Sexual Misconduct Policy?

A. It's something that I consider, yes, involved in these kinds of cases, yes.

Q. But to ask you again, does the University of Iowa -- you just can't offer your own opinions, right? Don't you have to make a decision based upon University policy, correct?

A. Correct. Yes. Uh-huh.

Q. Okay. And it's University policy that guides your decision about whether to reverse a finding of sexual misconduct or not, correct?

A. Correct. Uh-huh.

Q. And you would agree with me that you're not to just offer your own opinions that are outside the University policy to determine whether you should reverse or sustain an appeal, correct?

A. Yes, I would agree with that.

Q. Okay. So does the University for a Title IX appeal such as this have a concept that suggests that you could express consent but yet still violate if it turns out you didn't have consent to sexual misconduct, but you could -- let's just back up.

A. Yeah, please do. I was starting to get confused.

Q. I'm getting confused too. So --

A. Okay. That's fine.

Q. -- is there such a policy in which someone can manifest consent to sexual behavior and yet still possibly violate University policy if they didn't approve of it after the fact?
A. Yeah, I believe that to be the case; yes.
Q. Okay. And where -- in your review of the policy, would you be able to find where that sort of concept would exist? Do you have that policy in front of you?
A. No, I do not; not at the moment, no.
Q. Okay. And so that'd be the second reason that you rejected the Lovaglia-related testimony, correct?
A. Yes.
Q. And the third reason as far as I indicated, you actually expressly talked about the sex of the accuser in this case; that was a factor in rejecting the claim that it was consensual behavior between [Doe] and [Complainant 2].
A. So if you could --
MS. BURKHISER REYNOLDS: I'll object; that misstates the testimony. He did not testify that he rejected the appeal because the accuser was a woman. So if -- you know, if you can answer that question, feel free to go ahead, Dean Keller.
THE WITNESS: Yeah, I don't believe that to be a factor in the case. I mean it's -- yeah. I'm --
BY MR. COLE:
Q. Did -- okay. I'm confused now because I thought earlier on you had said the fact that it was a young woman was one reason you had identified -- and that he was a man --
A. Okay.
Q. -- earlier I had heard that you identify that as one reason that you rejected the importance of Mr. Lovaglia's testimony as to him believing that it was consensual, so you can clarify that; that's why I'm asking the question. What role did the sex of [Complainant 1] have in your decision to reject the Lovaglia-related ground of appeal that was set forth at Exhibit 55, bottom of page 4, by [Doe]?
A. Sure. Sure. No, I -- it has a factor in the decision that I came to the conclusion to, so, yeah.
Q. So elaborate on that. You confirm that it was a factor. Why did you consider for -- her sex as a basis to reject the

Lovaglia-related testimony?
A. Well, most -- most of the case -- well, I can't think of a case that -- that I've had to deal with in my time as dean that has been -- well, let me rephrase it. I think every case that I've had to deal with that has to do with a sexual assault has been a male alleged having done something to a female. I've never had a case to my knowledge that is a female to a male or female to female or male to male or any other combination thereof. It's always been male with a female.
Q. Okay. So -- and what relation -- so -- and again, then, if you can elaborate, then, why did you consider the sex of [Complainant 1] in rejecting that, if you can just elaborate?
A. Sure. Because young -- young -- young female undergraduate students in my experience of having one, having a daughter that age previously and having a lot of young women working in my office over the years that are young undergraduate women, you know, my observation of them is that they tend to be more vulnerable and impressionable than they would be if they were older and more experienced with many things in life including sexual relationships.
Q. Okay. So other than the three factors that you had just identified, were there any other factors that you considered in rejecting the Lovaglia-related testi – ground of appeal that [Doe] had made?
A. So could you review those three that we just talked about, because I --
Q. Well, as far as I can tell, one factor you identified was the age of [Complainant 1], correct?
A. Okay. Correct. Okay.
Q. And with that factor, is there anything else you would like to add with that?
A. No, I think we're good there.
Q. The other factor that I think you had identified was that sometimes even if you had accepted the finding by Mr. Lovaglia that it was consensual behavior, that that doesn't necessarily mean approval; that was one factor, correct?
A. Correct. Uh-huh.
Q. Now, is there anything else that you would like to add

to that factor?
A. I don't believe so, no.
Q. And then I believe you had just -- and correct me if I'm wrong. You had talked about the age -- I'm sorry, the sex of [Complainant 1] in rejecting the Lovaglia-related testimony that he believed that was consensual behavior; correct me if I'm wrong, you had just mentioned the sex, correct?
A. Uh-huh. Yes.
Q. Yes?
A. Yep.
Q. So would you like to add anything else related to that factor that you had not previously done so far?
A. No, I think we're good there too.
Q. So other than those three factors, were there any other reasons why you felt that the Lovaglia-related information about the -- that he believed that it was consensual behavior, are there any other factors that you considered in rejecting that as a ground to reverse the finding of sexual misconduct as it applied to [Complainant 1]?
A. No, I don't think so.
Q. Okay. Now, one of your tasks, is it not, is to determine that [Doe] had a fair disciplinary process, correct?
A. Correct. Uh-huh. Yes.
Q. In other words, part of your role is is to remand -- or you can -- you're entrusted to reverse if you find that there are any procedural irregularities in connection with how the appeal was handled.
A. Yes. Uh-huh.
Q. So first off, you did not provide any rationale as to why you rejected the Lovaglia-related information, correct?
A. Not to any great extent other than what we previously have discussed, yes; no, I did not.
Q. And why was that? I mean you do all of your appeal affirmations like this where you basically just do a one-pager?
A. So this situation, this case involving [Doe] came up at a time when -- well, let me put it this way: Since that time -- and I can't remember the exact dates to be honest with you,

but the University procedures now require these types of appeals to go into more extensive sort of rationale about each one of these situations that we referred to earlier; that was not the case back in 2017 when this particular situation came up with [Doe].

Q. So now it requires a more detailed rationale than it did in 2017.

A. Correct. Yes.

Q. And in terms of procedural irregularities, you would agree with me that Ms. Frost did not even mention that Dr. Lovaglia had testified that he believed that the sexual behavior was consensual; were you aware of that when you considered this appeal?

A. Again, I have not studied those documents from Ms. Frost or Tiffini Earl Stevenson (sic) to the -- you know, to that level of detail recently, but I don't recall that to be the case from back when I reviewed this back in 2017.

Q. So I guess my point is is that are you aware today, though, that Ms. Frost did not mention that Dr. Lovaglia had testified that he believed based upon his conversation with [Complainant 1] that all sexual behavior was consensual between [Doe] and [Complainant 1]; are you aware of that --

MS. BURKHISER REYNOLDS: I'll object to that on the basis of ambiguity with regard to the term "all sexual behavior" and also as asked and answered.

MR. COLE: Okay. Well, I don't think it is because for record purposes -- answer.

MS. BURKHISER REYNOLDS: Okay. He can go ahead and

MR. COLE: Okay. But let me just clarify in response to the objection for record purposes for subsequent court review, I do not believe the witness has gotten into whether he was aware that Ms. Frost did not consider -- or did not include this information in her adjudication at all unless I can be corrected on that.

MS. BURKHISER REYNOLDS: We can certainly ask the court reporter to read back his response, but I believe his answer was that he has not memorized the documents and does not recall at this time; however, if you remember or if you

can answer, Dean Keller, feel free to do so.
THE WITNESS: No, you know, in all honesty, I've not reviewed those documents to that level of degree, you know, in a while, and I don't recall that to be the case.
BY MR. COLE:
Q. Well, I think the party -- and I'll just represent to you for purposes of the deposition --
A. Sure.
Q. -- that it's not in there, that Ms. Frost did not even write in her decision about why she rejected Lovaglia's testimony about all sexual behavior being consensual; I'll just represent to you that's what happened, okay?
A. Okay.
Q. Does that -- does that -- in terms of your review, does that trouble you that she left off or left out that information completely from her adjudication?
A. Well, you're asking me to question something that happened three years ago, and that's difficult for me to do at this particular time, so --
Q. One of your appeal roles is reviewing procedural irregularities, correct?
A. Correct. Yes.
Q. And if you find that a judge -- one thing that you could have done is that if you had been aware that the adjudicator left out an important piece of information, you would have had the authority to remand for further consideration of Ms. Frost, correct?
A. Yes, that's correct. Uh-huh.
Q. Okay.
A. Yeah.
Q. And so today, I mean do you -- are you -- do you consider Lovaglia's statement about the information being important or not -- or consensual or not, is that important information?
A. I believe it to be important information, yes.
Q. Okay. So if you were -- just as a hypothetical matter, then, if you were confronted with this appeal today now that you do know that that information was left out, what if you

remanded for further consideration so she could at least explain why she rejected Dr. Lovaglia's testimony that he believed it was consensual behavior based upon his conversation with [Complainant 1]?
MS. BURKHISER REYNOLDS: I'll object to the extent that you're -- I know you've stated it's a hypothetical but to the extent that you're calling for a legal conclusion and asking the witness to speculate.
MR. COLE: Okay.
MS. BURKHISER REYNOLDS: You can go ahead and answer.
THE WITNESS: Hypothetically if that were the case?
MR. COLE: Yes.
THE WITNESS: Yes, I would certainly consider it, yes. I don't know that I would come to that conclusion, but I would certainly consider it, yes.
BY MR. COLE:
Q. So hypothetically then. Would you then reverse for further consideration, or not?
A. Hypothetically, that would be possible if I – once I review all the documents and all the information in front of me in its totality, yes; hypothetically.
Q. Now, in terms of your adjudicatory response – your appeal responsibility at the University of Iowa, can you also reverse if there is a procedural irregularity in the way the investigation was conducted; do you have authority to do that too?
A. I believe that to be the case, yes.
Q. Okay. Were you also aware that Tiffini Stevenson Earl did the investigative report in this case?
A. Yes, I'm aware of that. Uh-huh.
Q. And were you also aware that Tiffini Stevenson Earl also did not explain in her investigation report that the -- that Dr. Lovaglia had reported that the kissing was mutual?
A. I'd have to review all those records in great detail, but, no, I'm not aware of it at this particular -- this particular moment, no.
Q. Okay. And here I'll just -- I'll paraphrase for record

purposes hopefully to avoid an objection, but were you aware that there's nothing in Tiffini Stevenson Earl's report in which she rejects Mr. Lovaglia's statement about him believing that there was some mutual attraction between [Complainant 1] and [Doe]?

A. No, I don't believe that that's the case, yeah.

Q. Okay. So -- and you would have had authority to do remand based upon -- based upon that information, correct, if there was an improperly done investigation?

A. Yes, I would have had the -- you know, the ability and the authority to have them revisit the case, yes.

Q. Okay. So what I'd like to do is is direct your attention to page 7. Here -- sorry about this. I -- page 7 of Plaintiff's Exhibit 59.

A. Fifty-nine?

Q. I'm sorry, Plaintiff's Exhibit 55.

A. Okay.

Q. Page 7.

A. Fifty-five, page 7 you said?

Q. Yeah.

A. Okay. I'm there.

Q. And if you could just review what [Doe] had complained about at Plaintiff's Exhibit 55 and where it's indicated in bracket, you just review that paragraph.

A. Sure. Just to make it clear, it's the sentence that starts with "Ms. Stevenson Earl, in her report"?

Q. Yep.

A. Okay. Just want to be clear. Okay. I'm done reading.

Q. So in this particular paragraph, [Doe] was complaining that one of the witnesses -- so let me just read this and I'll ask some follow-up questions just for record purposes. So --

A. Okay.

Q. -- [Doe] had indicated: Let me explain, please. He said: [Complainant 1's boyfriend] was interviewed twice; and just for record purposes, [Complainant 1's boyfriend] is the boyfriend of [Complainant 1].

A. Okay.

Q. So [Complainant 1's boyfriend] was interviewed twice which Stevenson Earl wrote. What was not written was how during the first interview on 3-21-17, he gave a detailed description of everything he knows which seems like a lot. He reported the kissing yet he did not say anything about touching the breast; however, there was another call with him and EOD, and it was a short phone call on June 7, 2017. He just called to say that [Complainant 1] told him the next day after the incident that I unbuttoned her shirt and touched her breast and that he was still upset over it. I would think that if he were upset over this a lot, he would've have mentioned it during the first phone call. That was recorded in the phone call. This seems highly suspicious in terms of the way that it was done. So at least the way I'm interpreting that, [Doe] is complaining about the fact that during the very first interview, [Complainant 1's boyfriend], who is the boyfriend of [Complainant 1], did not mention anything about [Complainant 1] complaining about the breast touch; you'd agree -- agree with that?

A. That seems to be the case, yes.

Q. And it was only three months later that he mentioned the second time that there was the breast touch, correct?

A. Well, be nine months, but, yes, that's correct.

Q. Okay. Well, and just for record purposes, I'm talking about the difference between March and June during the second interview I think is my --

A. Oh, I'm sorry. Yes. Yes, yes. Miscalculated. You're right. Three months. Sorry.

Q. Yeah. So I guess what I'm getting at here is you also did not consider this grounds to reverse [Complainant 1]'s finding of sexual misconduct -- or the finding of sexual misconduct against [Doe] as it applied to [Complainant 1].

A. That's correct. Uh-huh.

Q. Okay. So what were your reasons there? Explain.

A. (No response.)

Q. Why did you consider that important?

A. Well, again, I'm looking at -- you know, yeah, I mean I -- again, I -- you know, you're asking me to reflect on

decisions made, you know, three years ago, and I'm happy -- you know, yeah, I mean there's differences in, you know, what

was reported apparently between the two phone calls, and, you know, I'm not quite sure why Ms. Stevenson Earl did not reflect on that to a greater extent, and, you know, I can't defend, you know, her situation. I can only defend what I did, and I -- this did not appear to be an overriding issue with me if it was not an overriding issue with all the investigators that took -- you know, that came to their conclusions.

Q. So -- but I'd imagine -- how much time did you take in reviewing this appeal? Do you have any estimate as to how much time you actually took to review the documentation in connection with this case?

A. Yeah, that's a good question. So typically when I receive, you know, the packet of materials on a -- on any particular appeal case that I'm asked to look at, as much as I can possibly do so I try to spend, you know, uninterrupted time to review everything sort of from start to finish; that's sometimes difficult to do depending on how -- the level of detail in each case and all that sort of thing, the number of documents, but I try to do that; that usually takes me two to three hours to do that, so, you know, if I can find the time for not being interrupted so I can think about it from start to finish, I do so. I typically will then let -- you know, I put it away for a few days until I have time to come back to it, you know, in earnest again. Usually during that time the way I kind of -- you know, the way I kind of operate is I'll read these things, let it bounce around in my head and think about it for a little while, you know, sort of in an unconscious sort of manner, kind of come back to it with any remembrances of questions that might have developed in the meantime, I'll look through the documents again -- you know, carefully again for another two to three hours and then spend time coming to a conclusion, you know, on the case.

Q. Okay.

A. Yeah, I'd say, you know, start to finish depending upon the case and this particular one, probably the better

part of, you know, eight to ten hours.
Q. Okay. So you'd agree with me, though, that this particular case did not involve any admissions of sexual misconduct on the part of [Doe], correct?
A. That's correct. Uh-huh.
Q. And there was also no direct eyewitnesses to the allegation of sexual misconduct as it applied to either [Complainant 1] or [Complainant 2], correct?
A. Correct. Uh-huh.
Q. So you had to rely completely on the credibility determinations of -- that Ms. Frost had made in her adjudication finding.
A. Yeah, I had to look at all -- you know, those documents -- those assertions made by her and, you know, the -- all of the records that I had to review, yeah.
Q. Okay. So you'd agree with me that as to the finding of sexual misconduct against Ms. [Complainant 1] -- [Doe] against [Complainant 1], it was not a case of overwhelming evidence against [Doe], correct, as to the sexual misconduct finding?
A. Define by what "overwhelming" means.
Q. Well, did you think that there was any doubt as to whether he committed sexual misconduct or not?
A. Yeah, I do -- I did at the time; that's why I was con -- you know, that's why I came to the conclusion that I did.
Q. Okay. So let's -- let's also -- during your career, let's start in 2017, how many cases did you preside over in 2017 that involved a finding of expulsion?
A. That, I'd have to go back and look at my records in terms of getting an exact number, but I would probably estimate a handful, a handful being more than one, less than five.
Q. And as it applies to sexual misconduct, then, based upon your early testimony, all of those cases would have been of the accuser being a woman, correct?
A. Correct. Uh-huh.
Q. And the accused being a man, correct?
A. Correct. Uh-huh.

Q. In your career prior to 2017, how many times has someone been expelled -- for the allegation of sexual misconduct been expelled where there's no allegation of nonconsensual sexual intercourse?
A. I'd have to go back and look at my records to be, you know, exactly specific, but I don't recall of any at the moment. I'd have to go back and look to be absolutely sure.
Q. Okay. So -- and after this particular expulsion finding, can you recall any situations in which a student has been expelled for sexual misconduct in cases where the allegation -- and let's just back up. Since 2017, have there been any cases where – where the allegation of sexual misconduct -- where the student is expelled where there's no allegation of nonconsensual sexual intercourse?
A. Again, I don't recall any, but I'd have to go back and look at my records to be specific.
Q. Okay. So -- and we'll just have some degree of, then, imprecision here and I'll stipulate that there's imprecision here, but would you agree with me with the adjective that it is very rare for someone to be expelled where there's no underlying allegation of nonconsensual intercourse?
A. Yeah, I would probably agree with that; yeah.
Q. Okay. So -- and around -- and I want to just direct your attention to a couple of exhibits we've submitted with this case. Direct your attention to Exhibit 53, so just take a second to just briefly review that.
A. Okay. That's the --
Q. And it's titled --
A. Yeah. In the Press Citizen? Yeah.
Q. Yep. Former UI student settles with the university over handling of sexual harassment claim.
A. Okay. Let me review this. Okay. I've taken a quick look at it.
Q. And then if you could just look at Plaintiff's Exhibit's 52 and just -- and that is the -- includes the title "Controversy over Iowa college president's remark shows pressure to curb campus sexual assaults."
A. Okay. Let me -- let me review that as well. Okay. I've

looked at them; pretty quickly, but I've looked at them.
Q. Okay. Fair enough. So let's just go to exhibit fifty -- let's just go to Exhibit 52, the controversy over Iowa college president's remark.
A. Uh-huh.
Q. The gist of this article were some comments that Ms. -- President Sally Mason made relating to allegations of how she handled a UI football sexual misconduct case; would you agree with me that that's the gist of the article?
A. Seems to be the case, yes. Uh-huh.
Q. Okay. And you were at the University during this timeframe.
A. Oh, yeah. Uh-huh.
Q. And that there was a lot of pressure at least during that timeframe in 2014 as to how the University of Iowa was handling allegations of sexual misconduct especially between students.
A. Yeah, I would agree with that; yeah.
Q. Okay. And especially as applied to women being victims of sexual assault, correct?
A. I would say that's accurate as well, yes.
Q. Okay. And when you adjudicate these sorts of appeals, is that ever in the back of your mind that, you know, you could be on a front page of a newspaper article based upon how you handled a sexual misconduct allegation?
A. Well, I don't know that it's on my mind. It's always, you know, an outcome that could take place, but it's not something that I enter into my -- you know, my decision-making about a particular case that it might end up, you know, on the front page of the paper; it's not what's on my mind. My -- what's on my mind is trying to do the best I can in reviewing the merits of the case.
Q. And for Exhibit 53, if you could just talk a little bit about that, the former UI student settles with the university over handling of sexual harassment claim.
A. Okay.
Q. This is an allegation of a lawsuit that was filed in 2017; her name was [plaintiff in lawsuit filed], correct?

A. Uh-huh. Yeah, apparently; that's in the article.
Q. Okay. And were you involved at all in -- or were you aware of this particular lawsuit at the same time that you were adjudicating -- or considering [Doe]'s appeal in 2017?
A. I knew of -- that it was, you know, ongoing based upon what I could read in the papers, but I had no knowledge of any great details about the case 'cause it did not come before me 'cause it did not involve, you know, a student that was -- you know, a graduate student that was being dismissed for those allegations.
Q. And isn't it true at the time you were considering [Doe]'s appeal, you had actually been named in other lawsuits based upon your decision to reverse appeals that were made by students at the University of Iowa?
A. Yes, I was involved in one of those cases; yes.
Q. Okay. And just -- for record purposes, what was the name of that case?
A. Of the students involved?
Q. Well, the name of the lawsuit. So if there's any --
MR. COLE: And by the way, Kayla, if there's any -- well, this is all under Protective Order anyway, so I think that you can; it will all be subject to Protective Order. Kayla, any concerns about naming of the student at this point?
MS. BURKHISER REYNOLDS: No, I mean I think her name was used in the file -- the public filing.
MR. COLE: Okay. So let's just --
MS. BURKHISER REYNOLDS: It's okay to go ahead and talk about her name as it relates to the public filings in the lawsuit.
BY MR. COLE:
Q. So to the extent that you can, Mr. Keller, what was the student's name that had sued based upon how you handled the appeal?
A. Samantha Lange.
Q. Okay. And when -- do you remember approximately when that case was settled?
A. When it was settled? Well, it was settled back in December -- well, January or early February because we were

preparing for a court case and it -- to my knowledge, it was -- I'm not sure what the exact words are. I'd have to look at the final letter in regards to that, but it was not something that I had to worry about, you know, being a witness in a court of law, so --

Q. It was filed, though -- at least the Exhibit 53 indicates that it was filed in October -- I'm sorry, in 2017, correct?

A. Well, that could be the case. I don't see that that -- well, wait a minute, unless it's on the front. I don't see that that was the case that it was filed in 2017, at least not in this article. That could be the case, but I don't see it in this article in the Press Citizen.

Q. All right. Does that sound about right for record purposes?

A. I would -- that's -- yeah, I mean I -- yeah, I have no reason to dispute that, yeah.

Q. So at the time you were considering [Doe]'s appeal, you had been named -- had you already been named as a defendant in connection with another case filed by a woman who had alleged that you had gone too easy on the male respondent?

A. Yeah, I don't know the -- again, I'd have to go back and look on my records to see when those documents appeared before me where I was named in that. I just know that the actual -- you know, in terms of the student issues and the appeals that I -- that I heard were much earlier than that; they took place in I wanna say 2013, '14, somewhere along in that range, so a number of years prior to the -- Ms. Lange's case being filed.

Q. And that had no -- that had no impact on your decision in connection with this case.

A. No. I try to look at each case on the individual merits that are presented in front of me.

Q. Okay. Now, your decision to not consider any lesser sanctions -- see it here. Let's do the -- okay. Let's go to Plaintiff's Exhibit 54.

A. Okay. Yeah, Lawsuits seek changes to University of Iowa sexual assault policies; that's the one?

Q. Yeah.
A. Okay. Uh-huh.
Q. And at least that -- that date was at least October of 2017 is my recollection.
A. Yes, I think that's correct.
Q. Okay. So at the time you were considering Mr. -- you had considered [Doe]'s appeal November 30th of 2017; is that correct?
A. Uh-huh.
Q. Yes?
A. Yes. Sorry.
Q. And at that same time there were publicly-filed lawsuits that were criticizing the way that the University of Iowa was considering Title IX appeals involved in sexual misconduct.
A. That's correct, yes; same timing, yes.
Q. Okay. And so did you have -- did you feel any pressure related to how those particular lawsuits were portraying the University in terms of how they handled allegations of sexual misconduct made by women against men?
A. No, it did not.
Q. Okay. But you were aware that those had been filed.
A. Yeah, I was aware of the situations, yeah, that are discussed in the newspaper article, yes. Uh-huh.
Q. And just finally, relating to training, how much training did you have in any given year relating to specifically Title IX adjudications; how much training do you have each year?
A. Each year? I would say it's not an every-year kind of training situation. I'm trying to recollect. I mean we did have training back in this sort of time period even before. We just had another one, quite honestly, over the course of the summer with the new Title IX changes that, you know, have taken place so we had an additional sort of presentation and preparation activities for how to look at these kind of cases in light of the new changes in Title IX.
Q. Okay. And do you keep track of your own training on a year-to-year basis?

A. I don't keep track of it per say, but it's kept track for me by Human Resources, I mean activities that all -- you know, many administrators have to undergo.
Q. Okay. And in terms of the roster of adjudicators, were you aware of the background of the adjudicators at the University of Iowa in 2017?
A. No, I was not.
Q. Okay. So that -- that would not be your job responsibility.
A. No. No, it would not be.
MR. COLE: Okay. I don't think I have any other further questions.

EXAMINATION
BY MS. BURKHISER REYNOLDS:
Q. I have several follow-up questions for you, Dean Keller.
A. Sure.
Q. Let's see here. Let's go ahead and start with your decision letter which I think is Exhibit 56.
A. Okay.
Q. If you could flip back to that.
A. I have it in front of me, yes.
Q. Okay. Thank you. I think it's been a little unclear throughout your testimony what your specific role was in this process, so I guess I just want to go through here and ask you several questions about your role in the process. So as the decider of appeals, are you the one who decides what sanctions should be issued to students initially?
A. Initially? No.
Q. Okay. So you initially review whatever sanctions have been proposed --
A. Correct.
Q. -- for appropriateness; is that correct?
A. Correct. Uh-huh.
Q. Okay. And then your review of the case, as far as I understand, is limited to those factors which are outlined in this letter in Exhibit 56; is that correct?

A. That's correct, yes.
Q. Okay. So the five factors that are laid out in this letter are the only factors to be considered for whether a student's appeal should be reconsidered, reversed, or denied; is that correct?
A. That's correct. Uh-huh.
Q. So in this case, would you consider yourself to have been a fact-finder, or more of an appellate decider?
A. An appellate decider.
Q. Okay. And what does that mean from your perspective to be in the appellate role?
A. Right. Right. So my role as I understand it and the way that I've tried to direct my actions has been to, again, receive all the materials that are presented to me and then in light of, you know, my own study and analysis of those documents, to address each one of these five issues to the best of my knowledge to see whether there's been any violations of these grounds or that sort of thing and then come to a conclusion about -- on whether a decision that was made against, you know, [Doe] in this particular case were appropriate or not and whether -- other possible actions on my behalf could be to, you know, go back, seek more information, reduce the sanctions, et cetera, et cetera, that we discussed earlier.
Q. Okay. So when you received this file, do you recall whether you had access to Tiffini Stevenson Earl's notes from all of her investigative interviews?
A. No, I don't recall that I had access to her notes.
Q. Okay. And would you have reviewed all of the documents that you had access to in this case?
A. Yes, I would have; yeah.
Q. So if we have a record that contained the entire file that you received, can you state with some degree of confidence that you would have reviewed every page of that?
A. Yes, I would have reviewed everything.
Q. Okay. So you've been asked a series of questions about whether you are aware about Dr. Lovaglia's testimony regarding sexual behavior and several other questions about

specific allegations in this case; do you recall those questions generally?

A. Yes. From this afternoon? Yes. Uh-huh.

Q. And when you were responding to those questions, were you saying that you were never aware that Dr. Lovaglia had testified as such, or are you saying that you don't remember now today as you give your deposition testimony whether or not that fact came to light?

A. I would say it's more accurate, the latter part of what you just -- the two options that you just gave me, it's like my recollection at this particular time, yes.

Q. If that information had been included in the documents that you were given, you would have been aware of it when you made your appeal decision.

A. Yes. Uh-huh.

Q. Okay. We talked a little bit about your appeal decision and the level of detail that you're required to give in explaining your rationale. Even now under the new guidelines that you described, are you required to address every single statement made by every single witness in a case in explaining your rationale?

A. No, not every particular -- not every situation like that. It would be the things that are listed in these five particular grounds that I -- are listed in this particular case with [Doe].

Q. So even in a more extensive decision, you would still be creating a summary of the case and not --

A. Correct.

Q. -- describing every statement made by every witness.

A. That's correct. Uh-huh.

Q. Do you believe that in coming to your decision in this case you thoroughly reviewed all the evidence?

A. I think that's a fair statement, yes.

Q. Do you believe that you made the correct decision in this case?

A. Yes, I do.

Q. Even if you had written out your rationale for deciding this case in great detail, do you believe that you would have

come to a different determination having gone through that process?
A. No, I don't believe that would have been the case. I think I would have come to the same conclusion.
Q. You were asked whether it's rare for the University to expel a student where there haven't been any allegations of nonconsensual rape; do you remember that questioning?
A. Yes, I do. Uh-huh.
Q. Do you recall whether there were any circumstances in this case that made [Doe]'s behavior more concerning than it might have otherwise been?
A. Um --
Q. For example --
A. (Unintelligible.)
Q. I'm sorry?
A. I need a little bit more detail in terms of your question.
Q. Sure. For example, were there multiple victims in this case?
A. Yes, there were.
Q. Did it appear that [Doe] used alcohol to lower the inhibitions of these two young women?
A. That entered into that equation, yes.
Q. And you have mentioned the use of a power differential to coerce young women into sexual behavior; was that something you considered?
A. The power differential was an important part, yes.
Q. Dean Keller, have you ever reduced sanctions in a case for an accused student?
A. Yes, I have.
Q. So that is something that you would be willing to do if you felt that the circumstances warranted it.
A. Correct.
Q. You don't always decide in favor of complaining students?
A. No, I do not.
Q. You were asked a series of questions about other lawsuits that have been filed, particularly in the 2017 time period.

A. Okay.
Q. Do you understand that part of [Doe]'s claim is that you and your colleagues involved in the student misconduct process have ruled more harshly against accused students because of the pressure on the University; you understand that that's part of his lawsuit?
A. Yes, I do.
Q. Do you agree with [Doe] that you and your colleagues have made harsher decisions against accused students not based on the evidence but because you're worried about public pressure related to lawsuits that have been filed against the University?
A. Well, I can't speak to other individuals involved in -- you know, in this particular case prior to these materials coming in front of me, but that did not enter into my -- my -- you know, reviewing the materials and analyzing them and coming to the conclusion that I did.
Q. Isn't it true that you could be sued by either party in any case that you decide?
A. Correct. Yeah.
Q. And just the act of filing a lawsuit does not mean that you've necessarily done anything illegal?
A. I hope that to be the case, yes.
Q. That's fair. Okay. Do you recall anything about the Samantha Lange case?
A. Yes.
Q. Do you recall whether you were named as an individual defendant in that case?
A. You know, I don't recall to be honest with you.
Q. Okay. Do you recall that case was dismissed on summary judgment?
A. I do recall that.
Q. You recall that the University won that case?
A. Yes, I do.
MS. BURKHISER REYNOLDS: I think that's all the questions that I have. Rockne might have a few follow-up questions.

FURTHER EXAMINATION BY MR. COLE:

Q. Just a few follow-up questions relating to just for record purposes, why did you -- I'll just direct your attention to Exhibit 55, page 16 quick.
A. Fifty-five, right?
Q. Yep.
A. Let me go back to find that.
Q. Page 16.
A. Fifty-five, page 16? I'm sorry, 16?
Q. Yep.
A. Okay. Okay. There's several spots here that you've bracketed, I believe.
Q. Yep. And just -- first off, before I get you -- into why you didn't consider reduction of sanctions, have you ever reduced the severity of an expulsion recommendation where the underlying allegation is nonconsensual intercourse?
A. I believe I have done that but not in the case of an expulsion.
Q. Okay. So you have at least lowered a sanction in the case of sexual nonconsensual intercourse.
A. Well, I don't recall if the case was specifically intercourse, but I believe it to have been at least digital penetration.
Q. Okay.
A. So, yeah. So sexual assault that's defined as rape, as I recall, can be a number of different factors, I suppose, that go into that definition.
Q. So that did not lead to expulsion in that case.
A. Correct. Uh-huh.
Q. So if you could, then, why did you feel expulsion was necessary in this case whereas in the other case you felt that it was not necessary?
A. Because those are -- the specifics of each case are different, and there were different -- different situations involved in the previous case that we referred to that led me to the decisions that I made in that particular case.
Q. In that particular case, do you recall the race of -- the

race of the accused person in which you recommended -- or you accepted a finding of recommendation less than expulsion?

A. I remember that individual's name, but I don't recall the race of that individual to be honest with you.

Q. Okay. And just in narrative form, why did you consider that a lesser sanction was not appropriate in this case?

A. Because I was looking at the totality of the case with allegations made by the two students and the findings that came to light by the investigators -- or adjudicator and the investigator and also the violation of the Code of Student Contact (sic) involving alcohol in a University facility.

Q. Okay. Now, you also understand that -- do you recall that [Doe] made a claim of sex-based discrimination in his appeal to you?

A. Uh-huh.

Q. Yes?

A. That is correct. Yes. I'm sorry.

Q. And did you respond to that claim of sex discrimination in his appeal?

A. No, I did not.

Q. Okay.

A. Not in my letter that's in Exhibit 56.

Q. Since you did not respond to that, can you see why Doe has alleged that you were deliberately indifferent to his discrimination claim?

A. Yeah, I -- that's -- that's his claim, yes.

MR. COLE: Okay. I don't have any further questions.

MS. BURKHISER REYNOLDS: I just have one follow-up.

FURTHER EXAMINATION BY MS. BURKHISER REYNOLDS:

Q. Dean Keller, are you typically the person to whom students and employees make discrimination claims?

A. Not typically. You mean directly to me that they've been discriminated against?

Q. Uh-huh.

A. I -- I don't recall of one in my career as graduate dean.
Q. Do you know whether there is a mechanism at the University of Iowa or an office that handles discrimination complaints?
A. Yeah, I do.
Q. And what office is that, if you know?
A. The EOD, Equal Opportunity; yeah, that office handles those discrimination cases.
MS. BURKHISER REYNOLDS: That's all I have.
MR. COLE: Nothing further. We're all finished up.
THE WITNESS: Okay.
MS. BURKHISER REYNOLDS: Thank you, Dean Keller.
THE WITNESS: Thank you, everyone.
MR. COLE: All right. Take care, everyone. All right. Thank you. All right. Good-bye.
THE WITNESS: Take care.
(The deposition concluded at 4:10 p.m., October 14, 2020.)

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 21-3340

John Doe

Appellant / Plaintiff

v.

University of Iowa, et al.

Appellees / Defendants

Appeal from U.S. District Court for the Southern District of Iowa - Eastern

(3:19-cv-00047-RGE)

Appellant Brief

Rockne O. Cole
Cole Law Firm, PC
209 E. Washington, Ste. 304
Iowa City, IA 52240
(319) 519-2540
(319) 359-4009 Fax
rocknecole@gmail.com
Iowa Pin AT1675
Attorney for Appellant

SUMMARY OF THE CASE

John Doe, an international student at the University of Iowa, was wrongly accused of sexual misconduct by two female students. After an investigation by the university and a hearing, he was found responsible for sexual misconduct and consuming alcohol on campus. He was expelled by the Dean of Students, who provided no rationale for her decision. Doe appealed the case to the Provost, who affirmed the decision without analysis. Doe exhausted his options by appealing to the Board of Regents, which also affirmed with no discussion. Because of the expulsion, Doe lost his F-1 visa and his assistantship. His advisor told him that the expulsion ended his career in counseling.

Doe sued the university, and several individual university and Board of Regents officials involved in his case. He alleged, *inter alia*, sex discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88, and violation of his procedural due process rights under 42 U.S.C. § 1983. The District Court dismissed his procedural due process claims against the individual defendants based on qualified immunity and granted summary judgment as to the rest of the case. Doe appeals the dismissal and the grant of summary judgment as to his Title IX, procedural due process, and declaratory judgment claims.

Doe believes that oral argument would aid this Court in its decision. This case involves a complex record, as well as important, statutory, and Constitutional rights. Doe believes 20 minutes would be sufficient for him to argue his case.

TABLE OF CONTENTS

SUMMARY OF THE CASE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 7

STANDARD OF REVIEW 9

ARGUMENT 10

The District Court Erred by Granting Summary Judgment to Appellees on Doe's Title IX Claims 10

A. The Outcome of Doe's Case was Against the Substantial Weight of Evidence 11

B. The Pressure on UI to Investigate and Adjudicate Title IX Complaints by Females Surpasses *Univ. of Ark.* 27

C. Sex Was a Motivating Factor in Disciplining Doe 31

D. UI's Failure to Follow its Own Policies Show Clearly Irregular Investigative and Adjudicative Processes 40

The District Court Erred by Dismissing Doe's 42 U.S.C. § 1983 Procedural Due Process Claims Against Individual Appellees Based on Qualified Immunity 41

A. Qualified Immunity Standard 41

B. Procedural Due Process Standard 43

C. Doe Alleged a Violation of His Due Process Rights 43

The District Court Erred by Granting Summary Judgment on Doe's Procedural Due Process Claim ____ **47**

A. The District Court Did Not Address Doe's Right to Adequate Notice and Definite Charges ____ 47

B. Doe Provided Substantial Evidence That the Method of Questioning at the Hearing Was Fundamentally Unfair ____ 47

CONCLUSION ____ **50**

TABLE OF AUTHORITIES

CASES

Anderson v. Creighton,
483 U.S. 635 (1987) ____ 42
Anderson v. Liberty Lobby,
Inc., 477 U.S. 242 (1986) ____ 37
Bd. of Regents v. Roth,
408 U.S. 564 (1972) ____ 44
BLinC v. Univ. of Iowa,
No. 19-1696 (8th Cir. 2021) ____ 43
Cole v. Arkansas,
333 U.S. 196 (1948) ____ 45
Corso v. Creighton Univ.,
731 F.2d 529 (8th Cir. 1984) ____ 44
Doe v. Baum,
903 F.3d 575 (6th Cir. 2018) ____ 28, 45
Doe v. Colgate Univ.,
457 F. Supp. 3d 164 (N.D.N.Y. 2020) ____ 25
Doe v. Columbia Univ.,
831 F.3d 46 (2d Cir. 2016) ____ 10, 32, 33, 39
Doe v. Grinnell Coll.,
473 F. Supp. 3d 909 (S.D. Iowa 2019) ____ 38
Doe v. Miami Univ.,
882 F.3d 579 (6th Cir. 2018) ____ 2, 50
Doe v. Oberlin Coll.,
963 F.3d 580 (6th Cir. 2020) ____ 15, 37, 40, 41
Doe v. Purdue Univ.,
464 F. Supp. 3d 989 (N.D. Ind. 2020) ____ 35
Doe v. Purdue Univ.,
928 F.3d 652 (7th Cir. 2019) ____ passim
Doe v. Quinnipiac Univ.,
404 F. Supp. 3d 643 (D. Conn. 2019) ____ 25
Doe v. Rector & Visitors of George Mason Univ.,
149 F. Supp. 3d 602 (E.D. Va. 2016) ____ 45
Doe v. Regents of Univ. of Cal.,
No. 20-55831 (9th Cir. Jan. 11, 2022) ____ passim

Doe v. Univ. of Ark.-Fayetteville,
974 F.3d 858 (8th Cir. 2020) ____ passim
Doe v. Univ. of Cincinnati,
872 F.3d 393 (6th Cir. 2017) ____ 44
Doe v. Univ. of Denver,
1 F.4th 822 (10th Cir. 2021) ____ passim
Doe v. Univ. of Scis.,
961 F.3d 203 (3d Cir. 2020) ____ 49
Doe v. Univ. of St. Thomas,
972 F.3d 1014 (8th Cir. 2020) ____ 41
Doe v. Wash. & Lee Univ.,
No. 6:19-cv-00023 (W.D. Va. Apr. 17, 2021) ____ 34
Does 1-2 v. Regents of Univ. of Minn.,
999 F.3d 571 (8th Cir. 2021) ____ 10, 29
Flaim v. Medical Coll. of Ohio,
418 F.3d 629 (6th Cir. 2005) ____ 1, 44
Goss v. Lopez,
419 U.S. 565 (1975) ____ 44, 49
Greenhill v. Bailey,
519 F.2d 5 (8th Cir. 1975) ____ 45
Hafley v. Lohman,
90 F.3d 264 (8th Cir. 1996) ____ 42, 47
Haidak v. Univ. of Mass.-Amherst,
933 F.3d 56 (1st Cir. 2019) ____ 2, 50
Harlow v. Fitzgerald,
457 U.S. 800 (1982) ____ 46
Healy v. James,
408 U.S. 169, 180 (1972) ____ 43
Henderson v. Munn,
439 F.3d 497 (8th Cir. 2006) ____ 43
Hoggard v. Rhodes,
141 S.Ct. 2421 (2021) ____ 43
Hopkins v. Saunders,
199 F.3d 968 (8th Cir. 1999) ____ 42
Intervarsity v. Univ. of Iowa,
5 F.4th 855 (8th Cir. 2021) ____ 43
Jones v. Snead,
431 F.2d 1115 (8th Cir. 1970) ____ 1, 45

Kegel v. Runnels,
793 F.2d 924 (8th Cir. 1986) ____ 9
Kyles v. E. Neb. Hum. Servs. Agency,
632 F.2d 57 (8th Cir. 1980) ____ 44
Mathers v. Wright,
636 F.3d 396 (8th Cir. 2011) ____ 43
Mathews v. Eldridge,
424 U.S. 319 (1976) ____ 44
Menaker v. Hofstra Univ.,
935 F.3d 20 (2nd Cir. 2019) ____ 10
Michael v. Trevena,
899 F.3d 528 (8th Cir. 2018) ____ 10
Moore v. Indehar,
514 F.3d 756 (8th Cir. 2008) ____ 40
Morrissey v. Brewer,
408 U.S. 471, 481 (1972) ____ 44
Nabozny v. Podlesny,
92F.3d 446 (7th Cir. 1996) ____ 41
Neal v. Colo. State Univ.-Pueblo,
Civil Action No. 16-cv-873-RM-CBS
(D. Colo. Feb. 16, 2017) ____ 44
Nelson v. Correctional Med. Services,
583 F.3d 522 (8th Cir. 2009) ____ 43
O'Neil v. City of Iowa City, Iowa,
496 F.3d 915 (8th Cir. 2007) ____ 9
Qamhiyah v. Iowa State Univ. of Sci. and Tech.,
566 F.3d 733 (8th Cir. 2009) ____ 33
Redmond v. Kosinski,
999 F.3d 1116 (8th Cir. 2021) ____ 40
Roberson v. Hayti Police Dept,
241 F.3d 992 (8th Cir. 2001) ____ 2
Rossley v. Drake Univ.,
979 F.3d 1184 (8th Cir 2020) ____ 1, 10, 28
Rowles v. Curators of the Univ. of Mo.,
983 F.3d 345 (8th Cir. 2020) ____ 10, 35, 39
Safford Unified Sch. Dist. # 1 v. Redding,
557 U.S. 364 (2009) ____ 43

Scott v. Baldwin,
720 F.3d 1034 (8th Cir. 2013) ____ 9
Stodghill v. Wellston Sch. Dist.,
512 F.3d 472 (8th Cir. 2008) ____ 9
Strickland v. Inlow,
519 F.2d 744 (8th Cir. 1975) ____ 45
Thomas v. First Nat'l Bank of Wynne,
111 F.3d 64 (8th Cir. 1997) ____ 35
Torgerson v. City of Rochester,
643 F.3d 1031 (8th Cir. 2011) ____ 9
Wagner v. Jones,
664 F.3d 259 (8th Cir. 2011) ____ 42
Watson v. Jones,
980 F.2d 1165 (8th Cir. 1992) ____ 2
Winslow v. Smith,
696 F.3d 716 (8th Cir. 2012) ____ 43
Wisconsin v. Constantineau,
400 U.S. 433 (1971) ____ 44
Wood v. Strickland,
420 U.S. 308 (1975) ____ 1, 42
Yusuf v. Vassar Coll.,
35 F.3d 709 (2d Cir. 1994) ____ 10, 33, 39

STATUTES

20 U.S.C. § 1681(a) ____ passim
42 U.S.C. § 1983 ____ 1, 42, 47

JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction over this action under 28 U.S.C. §§ 1343(a)(3) and 1343(a)(4), which provide for original jurisdiction in the United States District Court over all suits brought under 42 U.S.C. § 1983. The District Court also had jurisdiction under 28 U.S.C. §1331 because the action involved arises under the Constitution and a law of the United States. The District Court granted Appellees' summary judgment on September 20, 2021. Appellant filed a notice of appeal on October 14, 2021. *See.* Fed. R. App. Proc. 4 (a) (1) (A). This Court has jurisdiction under 28 U.S.C. § 1291 as an appeal from a final District Court decision.

STATEMENT OF ISSUES

The issues presented for review in this appeal are:

1. Whether the District Court erred by granting summary judgment to Appellees on Doe's Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 claim. The issue is whether Appellees expelled Doe on the basis of his sex. *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858 (8th Cir. 2020); *Rossley v. Drake Univ.,* 979 F.3d 1184 (8th Cir. 2020); *Doe v. Univ. of Denver*, 1 F.4th 822 (10th Cir. 2021); *Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019).

2. Whether the District Court erred by dismissing Doe's 42 U.S.C. § 1983 procedural due process claims for damages against Defendant Frost and Defendant Cervantes based on qualified immunity. *Wood v. Strickland*, 420 U.S. 308 (1975); *Jones v. Snead*, 431 F.2d 1115 (8th Cir. 1970); *Strickland v. Inlow*, 519 F.2d 744 (8th Cir. 1975); *Flaim v. Medical Coll. of Ohio*, 418 F.3d 629 (6th Cir. 2005).

3. Whether the District Court erred by granting summary judgment to Appellees on Doe's 42 U.S.C. § 1983 procedural due process claim against the Appellees in their official capacity for injunctive and declaratory relief. *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858 (8th Cir. 2020); *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56 (1st Cir.

2019); *Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019); *Doe v. Miami Univ.*, 882 F.3d 579 (6th Cir. 2018).

STATEMENT OF THE CASE

Doe was an undergraduate student of sociology and psychology at the University of Iowa ("UI") (App. 22-23; R. Doc. 57 at 8-9).[1] Dr. Michael Lovaglia, a sociology professor, was Doe's undergraduate research advisor. *Id.* Doe joined Lovaglia's Lab as an undergraduate student. *Id.* In Summer 2016, Doe began his Master's program in Mental Health Counseling and Rehabilitation at a different college at UI. (App. 301-302). He was still completing the independent research project he had begun as an undergraduate student in Lovaglia's Lab. (App. 23; R. Doc. 57 at 9). In Fall 2016, Doe met Complainant 1 and Complainant 2, both female undergraduate students. *Id.*

In Fall 2016, Doe and Complainant 1 went on a date and returned to his apartment later that night, where they engaged in consensual kissing. (App. 24; R. Doc. 57 at 10). At no point did Doe touch Complainant 1's breasts. *Id.* Doe then walked Complainant 1 to her place, where they engaged in more consensual kissing outside the building. *Id.* After arriving home that night, Complainant 1 spoke to her friend, R.C., saying, "'I think we ended up joking about it because I didn't take it so seriously at the time.'" *Id.* Doe and Complainant 1 kept a friendly relationship, evidenced by text messages, often initiated by Complainant 1, by her joining his improv comedy group, and by photographs. (App. 24-25; R. Doc. 57 at 10-11).

---

[1] Appellant's Third Amended Complaint ("TAC") is the equivalent of an affidavit for summary judgment, *Watson v. Jones*, 980 F.2d 1165, 1166 (8th Cir. 1992) (App. 129-132), and a complaint signed and dated as true under penalty of perjury satisfies the requirements of a verified complaint. *Id.* "Although a party may not generally rest on his pleadings to create a fact issue sufficient to survive summary judgment, the facts alleged in a verified complaint need not be repeated in a responsive affidavit in order to survive a summary judgment motion." *Roberson v. Hayti Police Dept*, 241 F.3d 992, 994-95 (8th Cir. 2001).

In January 2017, Doe told Complainant 1 twice that he needed data she was assigned for a project. Complainant 1 failed to provide the data, which led to a dispute between the two. (App. 23; R. Doc. 57 at 9). Less than one week after the argument, and five months after the alleged sexual contact, Complainant 1 filed a complaint against Doe, which expanded to include claims of sexual assault. (App. 26; R. Doc. 57 at 12).

In Fall 2016, Doe met Complainant 2 at the Lab. *Id.* They talked, had a drink, and then Doe asked Complainant 2 on a date, to which she agreed. (App. 27; R. Doc. 57 at 13). They began kissing. *Id.* Eventually, Complainant straddled Doe and lifted her shirt, inviting him to touch her breasts. *Id.* After obtaining verbal consent, Doe did so. *Id.* At no point did Complainant 2 object or claim to be uncomfortable. *Id.* Later, Doe walked Complainant 2 downstairs, where her friend, T.M., picked her up. (App. 28; R. Doc. 57 at 14). Doe and Complainant 2 continued to have a friendly relationship after this evening, including taking pictures and videos together, going to a restaurant together for dinner, Complainant 2 inviting Doe to the Lab at night, and Doe often walking Complainant 2 home after working late at the Lab, typically around 2:00 a.m. (App. 29-30; R. Doc. 57 at 15-16).

Complainant 2 also filed a sexual assault complaint against Doe. She also had an ulterior motive: Complainant 1 had told her there were "rumors going around," and Complainant 2 did not want to be seen "that way." (App. 39; R. Doc. 57 at 25).

Tiffini Stevenson Earl conducted a one-sided investigation against Doe. She omitted from her report exculpatory evidence, including material from D.L. and Lovaglia. (App. 141; R. Doc. 129-1 at 9). In his initial interview, D.L., Complainant 1's boyfriend, did not tell Stevenson Earl about any alleged touching of Complainant 1's breast. *Id.* Three months later, in another phone call, D.L. suddenly remembered the alleged touching. Stevenson Earl allowed D.L. to change his statement and made no note of the change in her report, nor did she explain her second contact with D.L. three months

after his initial interview *Id.* In addition, Stevenson Earl discounted Complainant 1's ulterior motive for complaining about Doe, their project-related dispute. *Id.* She also overlooked the substantial evidence of Doe's and Complainant 1's friendly relationship that continued five months after the alleged assault. (App. 30; R. Doc. 57 at 16).

Stevenson Earl accepted Complainant 2's version of events, despite her changing her story multiple times and in multiple ways, and even though her story contradicted other witnesses. (App. 27-28; R. Doc. 57 at 13-14). Stevenson Earl excluded from her report that after Complainant 1 filed her Complaint against Doe, Complainant 1 and Complainant 2 spoke about Doe, at which point Complainant 2 reinterpreted events to claim that Doe "crossed the line" because of his alleged leadership role at the Lab (which he did not have). (App. 363; R. Doc. 179-7 at 119). Stevenson Earl did not interview two witnesses requested by Doe, a janitor that walked in while he and Complainant 2 were kissing, and the server that waited on them while they were at dinner together. (App. 154; R. Doc. 185-2 at 2). Both witnesses could have described Complainant 2's demeanor while with Doe. *Id.*

Stevenson Earl, who had been conducting sexual misconduct investigations since 2005, at first recommended a reprimand of Doe, UI's lowest sanction. (App. 211; R. Doc. 187-1 at 9). But after intervention by DiCarlo and Redington, she changed the recommendation to a hearing and a potentially more severe sanction. (App. 211-212; R. Doc. 187-1 at 9-10).

Frost conducted the hearing in a one-sided fashion against Doe. She ignored questions requested by Doe, while questioning him as a hardened prosecutor. (App. 42; R. Doc. 57 at 28). She omitted from her report the testimony of Lovaglia that the kissing between Doe and Complainant 1 was consensual and that Complainant 1 said nothing about a breast touch. (App. 218; R. Doc. 187-1 at 16). Frost omitted testimony of R.C. that Complainant 1's demeanor after the alleged sexual assault was calm. (App. 217; R. Doc. 187-1 at 15). Frost omitted testimony of E.J., Complainant 1's best

friend and roommate, who testified that she knew nothing about Doe allegedly kissing her or touching her breast. (App. 217; R. Doc. 187-1 at 15).

Complainant 2 testified that she had "no evidence" and only her "words." (App. 524; R. Doc. 179-1 at 44). Appellees admitted that Doe, on the other hand, provided evidence of friendly interactions between Complainant 2 and him after the alleged assault, including text messages initiated by Complainant 2, emails, pictures, and even a video that shows Complainant 2 laughing with Doe one month after the alleged assault. (App. 89; R. Doc. 115 at 19). Appellees admitted that Complainant 2's only witness at the hearing, T.M., corroborated Doe's version of the events. (App. 219; R. Doc. 187-1 at 17). They also confirmed that Frost excluded such exculpatory evidence in her report. *Id.* Complainant 2 testified about being "concerned about rumors circulating the SURG lab" of what occurred between her and Doe.[2] (App. 523; R. Doc. 179-1 at 43).

Frost mentioned neither of the Complainants' ulterior motives for making allegations against Doe. (App. 159; R. Doc. 185-2 at 7) (App. 159; R. Doc. 185-2 at 7). Frost concluded that Doe held a leadership role at the Lab, even though that finding directly contradicted Stevenson Earl's report, which had dismissed this charge, and that Doe was not given notice that this charge would be considered. (App. 220; R. Doc. 187-1 at 18). Cervantes, the charging officer, entered additional evidence towards the end of the hearing, even though UI policies stated that she should provide Doe with any new evidence at least two days before the hearing. (App. 222; R. Doc. 187-1 at 20).

After this one-sided hearing, Frost found Doe responsible for sexual assault and sexual harassment and for consuming alcohol on campus. (App. 43-44; R. Doc. 57 at 29-30). Redington expelled Doe and provided no rationale for her decision. (App. 48; R. Doc. 57 at 34). Doe appealed the case to Keller,

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[2] At least one person in the Lab knew what happened between Complainant 2 and Doe, as confirmed by Complainant 1. (App. 39; R. Doc. 57 at 25).

who affirmed the decision without analysis. (App. 50; R. Doc. 57 at 36). Doe exhausted his options by appealing to the Board of Regents, which also affirmed with no discussion. (App. 53; R. Doc. 57 at 39).

Doe provided evidence that UI had been under substantial pressure from multiple sources to find males responsible for Title IX claims brought by females. (App. 167-173; R. Doc. 185-2 at 15-21). For example, during Doe's investigation, adjudication, and appeal, the media reported five Title IX and/or gender discrimination lawsuits. *Id.* While Doe was appealing his expulsion to Keller, UI and Keller faced media criticism for mishandling sexual misconduct against women. (App. 54; R. Doc. 57 at 40). While he was considering Doe's appeal, Keller admitted that a lawsuit was filed against him by a woman based on Keller's handling of her sexual assault case against a male graduate student. (App. 246-247; R. Doc. 179-6 at 14-15). After two sex discrimination lawsuits settled, DiCarlo was announced as a member of a 14-person committee tasked with reforming UI's response because of civil rights violations from women. (App. 171; R. Doc. 185-2 at 19).

On February 14, 2020, Doe filed his TAC, alleging, *inter alia*, claims for sex discrimination under Title IX and violation of his right to procedural due process. Doe sought damages and injunctive and declaratory relief. (R. Doc. 57). On February 25, 2020, Appellees moved to dismiss. (R. Doc. 61). Doe filed his amended resistance on March 25, 2020 (R. Doc. 87), and Appellees filed their reply on April 1, 2020. (R. Doc. 89). On July 17, 2020, the District Court granted the motion in part. (R. Doc. 106). The Court dismissed Doe's claim for procedural due process against the individual defendants based on qualified immunity, and other claims not relevant to this appeal. (R. Doc. 106).

On January 15, 2021, Appellees moved for Summary Judgment. (R. Doc. 128). Doe filed his amended resistance on May 10, 2021 (R. Doc. 185), and Appellees filed their reply on May 17, 2021. (R. Doc. 187). The District Court granted the motion on September 20, 2021. (R. Doc. 192). The Court

found that Doe did not present sufficient evidence that a reasonable jury could find in his favor. On October 14, 2021, Doe timely filed his Notice of Appeal. (R. Doc. 194).

SUMMARY OF THE ARGUMENT

The District Court erred by granting summary judgment to Appellees on Doe's Title IX claims. Doe presented evidence to show that sex was a motivating factor in the decision to expel him, such that a reasonable jury could have ruled in his favor. He presented evidence that Stevenson Earl's investigation of the claims against him by the Complainants was against the substantial weight of the evidence. Stevenson Earl omitted from her report substantial exculpatory evidence. Despite Doe's request, she also did not interview two witnesses, who would have provided relevant information.

The decision after the hearing conducted by Frost was also against the substantial weight of the evidence. Frost omitted from her final report substantial exculpatory evidence. She misrepresented witness testimony, cherry-picked evidence that supported the Complainants' claims, and rejected evidence that did not. She accepted the stories of the accusers, even though they were contradicted by evidence and, as for Complainant 2, filled with inconsistencies. Frost rejected Doe's unchanging, evidentially supported account of the events. On appeal, Keller, and then Braun rubber-stamped Frost's conclusions with no discussion or rationale.

Doe presented evidence of external pressure on UI to reform its handling of sexual assault cases brought by women against men. From 2014, UI received negative media coverage for its response to sexual misconduct. There was on-campus protesting. The U.S. Department of Education's Office for Civil Rights ("OCR") initiated investigations of UI, which remained ongoing during the adjudication of Doe's case. Five lawsuits were filed against UI by women challenging the university's handling of their sexual misconduct and sex discrimination cases. One lawsuit specifically implicated Stevenson Earl, and another implicated Keller. These external influences pressured the university and its officials, including key figures handling Doe's case, to favor women and

against men in cases involving sexual assault or sex discrimination.

After Stevenson Earl recommended a reprimand as the sanction, DiCarlo and Redington intervened and pressured Stevenson Earl to change the recommendation to a hearing, which would allow UI to expel Doe. After the hearing, DiCarlo again intervened, pressuring Redington to expel Doe. As the Title IX coordinator, DiCarlo oversaw the university's compliance with Title IX and was particularly susceptible to the external pressures described above.

This case revolved around the question of consent. Yet even as Appellees admitted that there was no evidence that Doe was violent in any way, Frost made comments to the contrary based on male stereotypes. Frost asked Complainant 2 about Doe punching or hitting her. Frost also concluded that Doe's account of the events with Complainant 2 sounded like a "fantasy," echoing language she would use later in a remarkably similar case against an accused male. OCR launched an investigation for possible sex bias based on Frost's use of this language in the subsequent case. The same bias was present in Doe's case.

Keller, meanwhile, *explicitly admitted* that he considered sex a factor in his decision on Doe's appeal. He described outdated gender stereotypes of "vulnerable and impressionable" young women. He applied his own definition of consent, again contrary to UI policy. Under Keller's definition, a woman could consent to sexual contact, but if she regretted it months later, the previous consent evaporates, and the man is now guilty of non-consensual sexual contact. In addition, the university's failure to follow its own policies provides sufficient evidence of sex bias against Doe.

The District Court erred by dismissing Doe's procedural due process claims against Frost and Cervantes based on qualified immunity. Cervantes did not give Doe adequate notice and definite charges. Frost knew what the charges were and found Doe responsible not only for something he was not given notice of, but a charge already dismissed by Stevenson Earl. Doe did not know this would be considered. These

constituted violations of Doe's procedural due process rights, which were clearly established at the time of the violations.

To the extent that Doe's procedural due process claims survived dismissal, the District Court erred by granting summary judgment on those claims. The District Court erroneously did not address, on summary judgment, Doe's claims for lack of notice and definite charges. Further, the fundamentally unfair method of questioning at Doe's hearing contradicted the relevant Eighth Circuit precedent.

STANDARD OF REVIEW

This Court reviews the grant of a motion to dismiss based on qualified immunity *de novo*. *Scott v. Baldwin*, 720 F.3d 1034, 1035 (8th Cir. 2013). "'This court accepts as true the plaintiffs' factual allegations, viewing them most favorably to the plaintiffs." *Id.* (quoting *Stodghill v. Wellston Sch. Dist.*, 512 F.3d 472, 476 (8th Cir. 2008)). Appellees must show that they are "'entitled to qualified immunity on the face of the complaint.'" *Id.* (quoting *Bradford v. Huckabee*, 394 F.3d 1012, 1015 (8th Cir. 2005)).

This Court reviews a grant of summary judgment *de novo* and will find it proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact." *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042-43 (8th Cir. 2011). Summary judgment is "an extreme remedy and should not be entered unless the movant has established its right to a judgment with such clarity as to leave no room for controversy and unless the other party is not entitled to recover under any discernible circumstances." *Kegel v. Runnels*, 793 F.2d 924, 927 (8th Cir. 1986). In reviewing motions for summary judgment, "'courts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the motion.'" *O'Neil v. City of Iowa City, Iowa*, 496 F.3d 915, 917 (8th Cir. 2007) (quoting *Scott v. Harris*, 550 U.S. 372, 378 (2007)).

So long as Appellant can identify at least one material fact that (a) is disputed, and (b) could change the outcome if construed in Appellant's favor, this Court must reverse the

summary judgment grant for the Appellees. *See, e.g.*, *Michael v. Trevena*, 899 F.3d 528, 533–34 (8th Cir. 2018) (finding a genuine dispute over what occurred on a videotape about a foot injury via automobile sufficient to reverse summary judgment). This appeal shows several disputed material facts that will change the outcome if construed in Appellant's favor.

ARGUMENT

THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT TO APPELLEES ON DOE'S TITLE IX CLAIMS

Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a). Title IX bars "'the imposition of university discipline where [sex] is *a motivating factor* in the decision to discipline.'" *Rowles v. Curators of the Univ. of Mo.*, 983 F.3d 345, 359 (8th Cir. 2020) (citing *Doe v. Columbia Univ.*, 831 F.3d 46, 53 (2d Cir. 2016) (first alteration in original) (quoting *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994)). Sex need not be the only motivating factor. *Does 1-2 v. Regents of Univ. of Minn.*, 999 F.3d 571, 579 (8th Cir. 2021).

"To survive summary judgment . . . [Doe] was required to set forth sufficient evidence to allow a reasonable jury to find that [Appellees] disciplined him on the basis of sex." *Rossley v. Drake Univ.,* 979 F.3d 1184, 1192 (8th Cir. 2020). "[C]learly irregular investigative and adjudicative processes" may support a *prima facie* claim of sex discrimination. *Id.* at 1196 (citing *Columbia Univ.*, 831 F.3d at 56-57, and *Menaker v. Hofstra Univ.*, 935 F.3d 20, 34-37 (2d Cir. 2019)). "It is precisely because procedural irregularity alone already suggests bias that even minimal evidence of sex-based pressure on the university is sufficient to establish bias on account of sex." *Menaker*, 935 F.3d at 33.

"[W]here there is a one-sided investigation plus *some* evidence that sex may have played a role in a school's disciplinary decision, it should be up to a jury to determine whether the school's bias was based on a protected trait or merely a non-protected trait that breaks down across gender lines." *Doe v. Univ. of Denver*, 1 F.4th 822, 836 (10th Cir. 2021) (emphasis in original).

In *Univ. of Ark.*, this Court identified three factors that—when taken in combination—would indicate gender bias in an accused student's lawsuit: (1) a finding against the substantial weight of the evidence; (2) amidst procedural irregularities (in that case, an anomalous punishment); and (3) outside pressure against the university that might increase the chances of bias against accused males. 974 F.3d at 865-866. Doe presented more than enough evidence on all three prongs to survive summary judgment.

A. The Outcome of Doe's Case was Against the Substantial Weight of Evidence

Here, Doe had argued that the outcome of UI's proceedings against him was unsupported by and contrary to the evidence. (App. 219-220; R. Doc. 57 at 30-31). With no substantive reasoning, Appellees denied it. (App. 104; R. Doc. 115 at 34). Doe then dug deeper to show that the decisions favored his version of the facts and that Appellees still found against him. (App. 160-162; R. Doc. 185-2 at 8-10).

1. Complainant 1's Complaint

a. Stevenson Earl's Investigation

Complainant 1 told Stevenson Earl that she participated in the first kiss with Doe at his apartment. (App. 24; R. Doc. 57 at 10)(App. 358; R. Doc. 179-3 at 24). She said, "I didn't outright say I wasn't sure about it, but I did try to pull away *when* I felt uncomfortable." *Id.* Thus, Complainant 1 initially indicated that she participated in the kiss, only later feeling 'uncomfortable.' Doe denied that she ever tried to pull away.

After Doe walked her home, Complainant 1 confirmed Doe's account that they kissed again outside her dorm and that she did not object or suggest an unwillingness to kiss

summary judgment grant for the Appellees. *See, e.g.*, *Michael v. Trevena*, 899 F.3d 528, 533–34 (8th Cir. 2018) (finding a genuine dispute over what occurred on a videotape about a foot injury via automobile sufficient to reverse summary judgment). This appeal shows several disputed material facts that will change the outcome if construed in Appellant's favor.

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After Doe walked her home, Complainant 1 confirmed Doe's account that they kissed again outside her dorm and that she did not object or suggest an unwillingness to kiss

Doe. *Id.* She stated she "did not tell [Doe] no" to the kissing. *Id.* After Complainant 1 arrived home, she told a friend, R.C., that "'I think we ended up joking about it because I didn't take it so seriously at the time.'" (App. 141; R. Doc. 129-1 at 9). Stevenson Earl omitted this material evidence from her report. *Id.*

Doe provided Stevenson Earl with subsequent text messages (September 2, 2016 - January 27, 2017) between Doe and Complainant 1, many initiated by Complainant 1 herself. (App. 24; R. Doc. 57 at 10). "These text conversations were friendly and playful in tone, often flirtatious, and frequently lasted 2-3 hours, twice a week, sometimes until 4 a.m." *Id.* This conduct, at the least, cast doubts on Complainant 1's suggestion that Doe violated her.

Stevenson Earl excluded Lovaglia saying that he saw a "mutual attraction" between Complainant 1 and Doe (App. 141; R. Doc. 129-1 at 9). He said that Complainant 1 "had initially been okay" (App. 355; R. Doc. 179-3 at 17), but she "changed [her] mind" about the relationship later. (App. 352; R. Doc. 179-3 at 10). Given that Lovaglia was both a neutral witness and a UI employee, his testimony would seem to have been important to the university. But Stevenson Earl excluded this information from her report. (App. 141; R. Doc. 129-1 at 9).

In his first interview, D.L., Complainant 1's boyfriend,[3] did not tell Stevenson Earl about any alleged touching of Complainant 1's breast. *Id.* Only three months later did D.L. conveniently remember the alleged touching. *Id.* Stevenson Earl allowed D.L. to change his statement and made no note of the change in her report, nor did she explain her second contact with D.L. three months after his first interview. (App. 141; R. Doc. 129-1 at 9). As with the Lovaglia material, UI's investigator, without explanation, omitted exculpatory evidence from her report.

Both Complainants were single at the time of the alleged incidents. (App. 349; R. Doc. 179-3 at 4); (App. 726; R. Doc. 179-2 at 124).

Ultimately, Complainant 1 had an ulterior motive to file a complaint against Doe. In January 2017, Doe told Complainant 1 twice that he needed data she was assigned for a project. (App. 364; R. Doc. 179-3 at 49). Complainant 1 failed to provide the data, which led to a dispute between the two (App. 141; R. Doc. 129-1 at 9). The timing is critical here. Less than one week after the argument, and five months after the alleged sexual contact, Complainant 1 alleged sexual assault. Stevenson Earl excluded from her report that Complainant 1 said that Doe questioning her work ethic upset her. *Id.*

b. The Frost Hearing

Lovaglia testified, consistent with his October 2016 notes, that Complainant 1 told him the sexual activity with Doe was consensual. (App. 218; R. Doc. 187-1 at 16). Lovaglia knew nothing of any alleged touching, which he said he would have remembered had Complainant 1 told him. *Id.* (App. 602-603; R. Doc. 179-1 at 123-124).

Frost asked Complainant 1 if she told R.C. about the alleged breast-touching, and she answered, "yes." But R.C. did not remember her saying that and testified that it probably would have stood out to him as a dramatic event if she had. (App. 587; R. Doc. 179-1 at 108). R.C. testified the following about Complainant 1's demeanor that night: a) "She definitely was like kind of *calm*." b) "Her appearance was more or less like *tranquil* . . . ." c) "Her voice was *not tense* . . . ." e) "She sounded *normal* . . . ." f) "She *looked fine*." g) "Conversation started pretty normal, just catching up and then she started talking about this "interesting encounter" that she had . . . ." (App. 216; R. Doc. 187-1 at 14)(App. 585-587; R. Doc. 179-1 at 106-108).

Although R.C. testified that Complainant 1 was calm and tranquil, Frost nonetheless asked, as if she had prejudged the case, "At any time during this conversation in the stairwell did you find Complainant 1 to be upset? Crying? Shaken? Disturbed?" R.C. responded that she "was much more shaken upon telling me what happened than she was when she walked into the bottom of the dorm. So yeah, I

would say she was a *little* confused, a *little* freaked out, *maybe* (emphasis added). (App. 587; R. Doc. 179-1 at 108). But Frost wrote that Complainant 1 was "confused, freaked and shaken," and that Complainant 1's responses, such as talking to a friend after this alleged incident proved her distress. (App. 735; R. Doc. 179-2 at 133).

Frost excluded R.C.'s description of Complainant 1's calm demeanor in her report. (App. 217; R. Doc. 187-1 at 15). Frost also omitted R.C.'s qualifier—"little" and, more importantly, "maybe"—in describing Complainant 1's demeanor as "confused" and "freaked out," thus producing a far more unequivocal statement than the witness actually gave. In his Board appeal, Doe criticized Frost, saying that she "blatantly led and coaxed the complainants, putting words in their mouths, through her questioning methods and found them credible and emotionally distressed." (App. 100; R. Doc. 115 at 30). A reasonable jury could find that Frost's mischaracterization of witness testimony in her report was procedurally irregular.

E.J., Complainant 1's roommate and best friend, testified that she knew "intimate parts of Complainant 1's relationship[s]." (App. 217; R. Doc. 187-1 at 15). Yet, Appellees also admitted that E.J. testified that she knew nothing about Doe allegedly kissing her or touching her breast—further calling into doubt Complainant 1's veracity. *Id.* In *Doe v. Oberlin Coll.*, 963 F.3d 580, 587 (6th Cir. 2020), the Court considered it "remarkable" that in a proceeding in which credibility was paramount, the hearing panel failed to comment on contradictions. Frost's similar failures here were also remarkable.

Doe pressed Frost to probe Complainant 1 about potentially exculpatory evidence. He provided Frost with the friendly text messages between Complainant 1 and him from September 2, 2016, to January 27, 2017. Based on this evidence, examples of material questions Doe requested Frost to ask were:

1. About three days after the incident, [Doe] has provided a text conversation apparently between the two

of you in which you texted [Doe] at 1:47 am, which he says you initiated, stating that Citrix is taking "so looong to install." [See Ex A-1] The conversation seems friendly and playful. Could you please explain why you were initiating and engaging in a friendly and playful conversation with him after this incident?

2. Is it true that you initiated and engaged in frequent conversations with him after the incident? If yes, why did you do that?

3. [Doe] claims that you filed your complaint shortly after he had questioned you about not handing projects on time, and writing in lab hours when you were not directly doing lab work, which led to an argument. [See Ex 11-13] Is that true?

(App. 157-158; R. Doc. 185-2 at 5-6).

Frost chose not to ask these questions and provided no rationale for this decision. (App. 213-214; R. Doc. 187-1 at 11-12).

Frost's report found Doe guilty of sexual assault comprising "non-consensual acts"– kissing Complainant 1 and touching her breast (over her bra) without prior consent (App. 218; R. Doc. 115 at 34), even though the only evidence was self-serving testimony from the Complainant and her boyfriend. (App. 45; R. Doc. 57 at 31). Lovaglia testified that Complainant 1 told him the kissing was consensual. (App. 602-603; R. Doc. 179-1 at 123-124). S.B., Doe's friend, testified that Doe told him the kissing was consensual. (App. 45; R. Doc. 57 at 31). Doe himself testified that the kissing was consensual. (App. 31; R. Doc. 57 at 17). A conclusion that the kissing was consensual is bolstered by evidence that Doe and Complainant 1 engaged in friendly texting after the alleged incident, often initiated by Complainant 1, and by the evidence that Complainant 1 had an ulterior motive for filing a complaint against Doe. Frost found Doe responsible for sexual assault, against the weight of the evidence.

Frost did not mention in her report that Complainant 1 testified that Doe's displeasure with her tardiness in

completing her tasks concerned her because of how it might affect her relationship with Lovaglia. (App. 216; R. Doc. 187-1 at 14). Frost did not mention that Complainant 1 testified that Doe did not really affect her schoolwork and that even if he was displeased with Complainant 1's work being late, he could not have affected her GPA. *Id.* To the contrary, Frost concluded that Doe "stymied" Complainant 1's educational performance. *Id.* Based on UI policies, if it did not affect Complainant 1's education, the sexual harassment charge should be dismissed. (App. 38; R. Doc. 57 at 24). Thus, Frost misrepresented Complainant 1's own testimony to find that Doe was responsible for sexual harassment.

Frost found that Doe had a history of hugging Complainant 1, which constituted sexual harassment. (App. 38; R. Doc. 57 at 24). Complainant 1 and Doe hugged about four times during their friendship. Complainant 1 testified that they did not hug "regularly," that she never objected to the hugging, and that the hugs did not constitute "tight embrace[s]," but were "mostly shoulder" hugs and were not full-body contact hugs. (App. 555; R. Doc. 179-1 at 75). Frost wrote: "'This inappropriate physical contact - face-to-face body contact - was persistent, unwelcomed and sexual in nature." (App. 740; R. Doc. 179-2 at 138). Frost again misrepresented Complainant 1's own words—showing a clearly irregular adjudicative process.

Frost found that Doe tickling Complainant 1 on her side/below arm also rose to the level of sexual harassment. (App. 45; R. Doc. 57 at 31). In her interview, Complainant 1 could not remember whether she tickled Doe first, before a picture was taken. (App. 360; R. Doc. 179-3 at 29). Doe said both during the investigation and in his testimony at the hearing that she did. Doe provided pictures before and after the tickling, showing Complainant 1 smiling and laughing. (App. 43; R. Doc. 57 at 29). Even the pictures of Complainant 1 and Doe were an issue for Frost. Rather than addressing their content, Frost castigated Doe for taking the photos. (App. 681; R. Doc. 179-2 at 38). All evidence showed that

Complainant 1 was aware they were being taken and even posed for them. (App. 749-756; R. Doc. 179-7 at 2-9).

Frost concluded that Doe held a leadership role at the Lab. This assertion directly contradicted Stevenson Earl's report. (App. 458; R. Doc. 179-4 at 254). Unlike Frost, Stevenson Earl referenced the sexual harassment policy for "unequal positions of power." (App. 427-428; R. Doc. 179-4 at 223-224). Stevenson Earl then provided her analysis: "The evidence does not indicate that [Doe's] role in the lab was in the instructional context. Information received from Professor Lovaglia does not indicate that [Doe] instructed, evaluated, or supervised directly or indirectly, Complainant's, or any other lab members', research. The evidence indicates that any lab member can run the meetings and conduct research at any time in the lab." (App. 458; R. Doc. 179-4 at 254). Conflicting decisions by UI's own employees are clearly irregular and cast doubt on the outcome. Doe was not provided notice that Frost would consider this, and he did not prepare a defense for it.[4]

The Dean of Students, Redington, expelled Doe and provided no rationale for her decision. (App. 51; R. Doc. 57 at 37).

c. Keller's and Braun's Appeals

In his appeal to Keller, Doe alleged sex discrimination. (App. 107; R. Doc. 115 at 37); (App. 757-773; R. Doc. 179-3 at 83-99). Keller affirmed the decision, providing no analysis. (App. 50; R. Doc. 57 at 36). He went against university training by making his decision before he received the hearing transcripts. (App. 167; R. Doc. 185-2 at 15).

Keller testified that he did not know that Stevenson Earl had excluded information about D.L. not mentioning anything about the alleged breast touching during the first interview, and that he could not defend Stevenson Earl's decision to allow D.L. to change his story. (App. 244; R. Doc. 179-6 at 12). But, he testified, he did not address it because if it was not an "overriding issue" for Stevenson Earl, it was not

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[4] *See infra* for argument on lack of notice.

an "overriding issue" for him. *Id.* Thus, rather than reviewing Stevenson Earl's investigation, he applied his rubberstamp, despite his admitted duty to decide whether Doe had a fair disciplinary proceeding (App. 242; R. Doc. 179-6 at 10) and review procedural irregularities. (App. 243; R. Doc. 179-6 at 11).

Keller also testified that Lovaglia's testimony was "important information." *Id.* Even though Doe informed him of Frost excluding Lovaglia's testimony from her report (App. 760-761; R. Doc. 179-3 at 86-87), Keller testified that he would "certainly consider" remanding the case had he known Frost excluded this information from her report. (App. 243; R. Doc. 179-6 at 11). That Keller appeared to discover key evidence from Doe's appeal only in his deposition for this lawsuit suggests that Keller did not carefully consider Doe's appeal.

Keller also applied personal, arbitrary, and unwritten standards of consent. He said that consent does not mean approval. (App. 241; R. Doc. 179-6 at 9).

Doe appealed to Braun of the Board of Regents, who also affirmed without discussion or addressing Doe's many allegations of sex discrimination. (App. 51-53; R. Doc. 57 at 37-39); (App. 775-809; R. Doc. 179-2 at 73-107).

d. The District Court's Errors

For Stevenson Earl, the District Court did not address the multiple issues about excluding exculpatory evidence related to Complainant 1 being clearly irregular. See (App. 141; R. Doc. 129-1 at 9); (App. 243; R. Doc. 187-1 at 5-7).

For Frost, the Court addressed only the argument that she wrongly excluded Lovaglia's testimony—finding Doe's argument unpersuasive because Lovaglia "qualified" his testimony as being his "recollection." (R. Doc. 192 at 18). But saying that his testimony was his "recollection" is not a qualification. The testimony of *every* witness at the hearing, including those that Frost found credible, was based on their recollection. Ultimately, that is what testimony is. The Court noted that Lovaglia hoped he did not misunderstand Complainant 1 as to whether the kissing was consensual and

speculated that she may have stated it was consensual because she did not want to "cause trouble." *Id.* If Lovaglia speculated that Complainant 1 admitted consent because she did not want to cause trouble, that means she did, in fact, admit consent. Why she may have so admitted was mere speculation by Lovaglia (and the Court). Lovaglia's testimony—the testimony, again, of a neutral witness who was a UI employee—was that Complainant 1 told him the kissing was consensual, and that she conveyed that all sexual activity was consensual. It was unreasonable for Frost to exclude this entire section of Lovaglia's testimony because it was based on his recollection; it could not be based on anything else.

While Frost was free to find Lovaglia non-credible, *entirely* excluding this testimony from her report was clearly irregular. Extraordinarily, Frost concluded that Lovaglia's testimony was reliable and credible, yet she discounted his testimony about consent, the crux of this entire case. (App. 41; R. Doc. 57 at 27) (App. 724; R. Doc. 179-2 at 122). Thus, Frost's decision to exclude Lovaglia's testimony from her report, a witness she found otherwise credible, was "unexplained and against the substantial weight of the evidence as detailed in the complaint." *Univ. of Ark.* 974 F.3d at 864.

Citing Frost's report, the District Court wrote that Frost found Complainant 1 to be "confused" and "shaken." (R. Doc. 192 at 10). But Doe provided the Court with evidence that Frost intentionally misrepresented this testimony in her report. (App. 159-160; R. Doc. 185-2 at 7-8). The Court did not address the disputed fact on whether such a misrepresentation showed clearly irregular procedures.

The Court found that Keller thoroughly considered all the processes that resulted in Doe being expelled (R. Doc. 192 at 19-20). But Keller went against his training and made his decision before he received the hearing transcript. (App. 237; R. Doc. 179-6 at 5). He testified that, had he known that Frost excluded Lovaglia's testimony from her report, he would have considered remanding the case. (App. 243; R. Doc. 179-6 at 11). When shown the transcript of Lovaglia's

testimony during his deposition, Keller admitted that Lovaglia "clearly testified that, based upon what Complainant 1 had conveyed to him, he believed the sexual behavior between the two was consensual." (App. 240; R. Doc. 179-6 at 8). The Court did not address Keller's personal, arbitrary, and unwritten standards as to consent. (App. 241; R. Doc. 179-6 at 9).

2. Complainant 2's Complaint

After Complainant 1 filed a claim against Doe, she spoke with Complainant 2. (App. 363; R. Doc. 179-7 at 119). The conversation led Complainant 2 to believe that Doe had "crossed the line" with her based on Doe's "position" at the Lab. *Id.* She then filed a complaint against Doe.

a. Stevenson Earl's Investigation

Complainant 2 made conflicting claims about the alleged incidents that were not addressed. In her initial complaint, Complainant 2 stated that she and Doe left the Lab on the night of the alleged assault to "'get a drink from the store down the street.'" (App. 86; R. Doc. 115 at 16). Yet, in her interview with Stevenson Earl, she changed the story to say that Doe left and came back with beer, which she did not want. (App. 462; R. Doc. 179-4 at 258). Doe's interview with Stevenson Earl corroborated Complainant 2's original, exculpatory, account. (App. 464-465; R. Doc. 179-4 at 260-261).

Complainant 2 alleged that Doe "pushed" alcohol to her "face" and made her drink it on the night of the alleged event. In her first interview, Complainant 2 stated that she did not want to drink beer with Doe at the Lab because she did not like beer. (App. 462; R. Doc. 179-4 at 258). Yet in his interview, Doe recounted that, three weeks after the alleged assault, the two of them left the Lab to get dinner at a restaurant, and Complainant 2 bought multiple beers for herself with a fake ID. (App. 467; R. Doc. 179-4 at 263). Then, in her second interview, Complainant 2 admitted that this account was true. (App. 471; R. Doc. 179-4 at 267).

Complainant 2 claimed that Doe asked her inappropriate questions and tried to kiss her. (App. 470; R. Doc. 179-4 at

266). She alleged that this made her uncomfortable, and so she texted T.M. to pick her up—the reason she said she left the Lab that night. (App. 462; R. Doc. 179-4 at 258). Doe said she left Lab because she had art homework due the next day, and that either T.M. or Doe himself always walked her home since she lived far away and did not feel safe walking alone. (App. 466-467; R. Doc. 179-4 at 262-263). Complainant 2 said she also told Doe that T.M. was coming to pick her up. *Id.* She then alleged that, although Doe knew someone was coming to pick her up, he proceeded to sexually assault her by touching her breast. *Id.* She admitted that she later texted him a picture of her art homework. (App. 470; R. Doc. 179-4 at 266).

On multiple occasions after the alleged assault, Doe walked Complainant 2 home after working late at the Lab, typically around 2:00 a.m. (App. 30; R. Doc. 57 at 16). Doe also provided Stevenson Earl with friendly text conversations between Complainant 2 and him from November 2016 to January 2017, after the alleged assault. (App. 467; R. Doc. 179-4 at 263).

Complainant 2 stated that Doe would tell her to come to the Lab late at night, making her uncomfortable. But, again, evidence contradicted her claims, through text messages produced by Doe showing Complainant 2 continually inviting *him* to the Lab late at night, many of which invitations Doe declined. (App. 373; R. Doc. 179-3 at 58).

At first, Complainant 2 claimed that Complainant 1 told her that Doe had "crossed the line" as to his alleged "student-instructor" relationship with her. (App. 363; R. Doc. 179-7 at 119). But Doe was not an instructor, and Stevenson Earl confirmed that Doe had no instructional or supervisory role directly or indirectly at the Lab, dropping these charges soon after the investigation. *Id.*

Although Complainant 2's stories were inconsistent, Stevenson Earl concluded that she had no basis to conclude that Complainant 2 was not truthful in her account. (App. 478; R. Doc. 179-4 at 274). Thus, she shifted the burden of proof to Doe. Stevenson Earl's given reason for rejecting Doe's

account was that it differed from Complainant 2's (*Id.*), which, of course, is expected in cases involving allegations of sexual assault. Stevenson Earl's reasoning was circular. She believed Complainant 2's story because she had no basis not to (she had many reasons not to). But because she had already decided to believe Complainant 2, as she had no reason not to, she rejected Doe's story because it differed from Complainant 2's.

b. The Frost Hearing

The hearing for Complainant 1 and Complainant 2 was consolidated into one. Complainant 2 testified that she had "no evidence" and only her "words." (App. 524; R. Doc. 179-1 at 44). Doe, on the other hand, not only had his words, but Appellees admitted that Doe provided evidence of friendly interactions between Complainant 2 and him after the alleged assault, including text messages initiated by Complainant 2, emails, pictures, and even a video that shows Complainant 2 laughing with Doe. (App. 89; R. Doc. 115 at 19). Doe took the video at the Lab at night while she was alone with him, a month after the alleged assault. (App. 29; R. Doc. 57 at 15). Based on the evidence alone, a reasonable jury could find that Frost ruled against the weight of the evidence.

Complainant 2 testified that she did not know the incident was sexual assault until she met DiCarlo. (App. 524; R. Doc. 179-1 at 44). Appellees admitted that the testimony of Complainant 2's only witness, T.M., confirmed Doe's version of events that he and Complainant 2 left the Lab to get beer from a nearby store, contradicting Complainant 2's testimony. (App. 219; R. Doc. 187-1 at 17). Complainant 2 testified that she did not introduce Doe to T.M., but that Doe introduced himself, which "felt weird" to Complainant 2. But here, too, T.M. corroborated Doe's version of events that Complainant 2 introduced the two men. (App. 219-220; R. Doc. 187-1 at 17-18).

Complainant 2's testimony was that "T.M. thought she acted hysterically because she was 'walking fast, crying, and kept looking back over her shoulder.'" (App. 463; R. Doc. 179-

4 at 259). But T.M. also testified that "'at first, she said that she liked [the Lab]," even though the alleged assault occurred on her first night there. (App. 591; R. Doc. 179-1 at 112). T.M. also testified that she said nothing about Doe touching "'her breast or body in any way,'" and only that Complainant 2 told her that Doe "tried" to kiss her. (App. 593; R. Doc. 179-1 at 114). Frost mentioned no inconsistencies, showing a clearly irregular adjudicative process. *Univ. of Denver*, 1 F.4th at 833 ("The Final Report does not mention any of [the] inconsistencies [the complainant told the adjudicator].")

Frost failed to explain contradictory credibility determinations. For example, she credited Doe's testimony over Complainant 2's when it supported the allegations against him but discredited his testimony when it contradicted them. (App. 725-727; R. Doc. 179-2 at 123-125). Complainant 2 did not even allege that they kissed; Doe said they did. (App. 470; R. Doc. 179-4 at 266). Frost believed Doe over Complainant 2 to find that he kissed her, thus believing Doe only when it allowed further violations. Outrageously, Frost cherry-picked Doe's testimony because she excluded from her report his testimony that the kissing was consensual. (App. 654; R. Doc. 179-2 at 11). "[A]t some point an accumulation of procedural irregularities all disfavoring a male respondent begins to look like a biased proceeding despite the Regents' protests otherwise." *Doe v. Regents of Univ. of Cal.*, No. 20-55831, at *25-26 (9th Cir. Jan. 11, 2022).

In her interview with Stevenson Earl, Complainant 2 admitted that she knew about the video, but at the hearing, she denied it. (App. 29; R. Doc. 57 at 15). Rather than asking probative questions about the video, Frost instead rebuked Doe for "secretly" taking the video, even though Complainant 2 knew he was taking it. (App. 728; R. Doc. 179-2 at 126).

As with Complainant 1, Doe requested that Frost ask several material questions addressing Complainant 2's credibility. For example, her motivation to file a complaint against Doe and her eagerness to meet up with him at the Lab alone *after* the alleged assault. He entered these text

messages in his exhibits. Frost's decision not to ask them was clearly irregular. Examples of these material questions include:

> On December 15th, you texted [Doe] asking if he could meet after 9 pm. On December 17th, you texted [Doe] stating, "lol but I am free Monday later...is eight too late for you?"
>
> On January 20th, you texted [Doe] saying, "Come to lab!"
>
> On January 26, you texted [Doe] saying, "Going to lab btw!!!"
> If you are uncomfortable with him, why are you constantly telling him to come to Lab, especially late at night?

(App. 158-159; R. Doc. 185-2 at 6-7)

December 15, 2016, the date of one of the text messages above, was three months after the alleged incident. Complainant 2 asked him, "lol but I am free Monday later...is eight too late for you?" *Id.* January 20, 2017, was about a month before Complainant 2 filed her complaint. She texted him, "Come to lab!" *Id.* The text messages contradicted the finding that Complainant 2 was apparently fearful and disgusted by Doe and that Doe was telling her to come to Lab late at night. *See Doe v. Quinnipiac Univ.*, 404 F. Supp. 3d 643, 659 (D. Conn. 2019) (denying university's motion for summary judgment, in part, because "In order to determine whether a person was establishing power and control over another through fear and intimidation, evidence showing a complainant's degree of fear or lack of fear of the respondent is undoubtedly relevant"); *Doe v. Colgate Univ.*, 457 F. Supp. 3d 164, 172 (N.D.N.Y. 2020) (denying university's motion for summary judgment, in part, because "the evidence shows that [adjudicator] failed to probe [the accuser] regarding various internal inconsistencies raised in her accounts of what happened and countered by available, objective evidence").

Frost also overlooked evidence of Complainant 2's ulterior motives. Complainant 2 herself testified that

Complainant 1 told her there were "rumors going around" and that she did not want to be seen "that way" before she filed a complaint against Doe. (App. 523; R. Doc. 179-1 at 43). Frost found Doe guilty of sexual assault and sexual harassment. Again, this finding was against the substantial weight of the evidence.

c. Keller's and Braun's Appeals

The procedurally irregular process continued when Doe appealed. Even though Doe was found responsible for something he was not given notice of, Keller failed to correct procedural irregularities. (App. 758; R. Doc. 179-3 at 84). For example, UI had a specific charge under sexual harassment based on a power differential, which Stevenson Earl had considered and dismissed. (App. 458; R. Doc. 179-4 at 254). Keller, like Frost, did not refer to the policy, yet found there to be a power differential.[5] (App. 241; R. Doc. 179-6 at 9). Thus, Keller provided more evidence that he did not carefully consider the record, as discussed below.

Braun, again, addressed none of the many allegations Doe made of violations of Title IX. (App. 53; R. Doc. 57 at 39).

d. The District Court's Errors

For Stevenson Earl's investigation, the District Court only opined about her refusal to interview two of Doe's witnesses. (R. Doc. 192 at 16). The Court addressed none of the substantial evidence against Stevenson Earl's conclusions and analysis.

The Court credited Doe's characterization of Complainant 2 as shy. (R. Doc. 192 at 16). Neither Appellees nor Doe said that this fact was material. Although the Court had access to the entire hearing transcript, it did not cite Doe's

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[5] Citing Doe's TAC, Appellees incorrectly stated that Doe was a graduate student of sociology. (R. Doc. 128-1 at 1). He was pursuing a Master's degree in Mental Health Counseling and Rehabilitation beginning at the end of Summer 2016. The alleged non-consensual touching occurred in September 2016. The allegations were filed around February 2017. Doe was expelled in October 2017, two months before he would have completed his in-class requirements for graduation.

testimony. Instead, the Court relied on Frost's report (citing R. Doc. 136), which Doe argued was discriminatory and riddled with errors. Reviewing the transcript would have shown that Doe testified that Complainant 2 was "shy in the beginning of the interaction. As time went on, she became more comfortable with me." (App. 655; R. Doc. 179-2 at 12) (emphasis added). Clearly, Doe did not find Complainant 2's shyness incompatible with her sexual conduct towards him. Yet the Court credited Doe's description of Complainant 2 as shy and discredited his description of her conduct towards him, thus crediting only the part of Doe's testimony it believed supported Frost's conclusion and discrediting the rest. This weighing of testimony was for a jury and was improper on summary judgment. Text messages that Complainant 2 sent Doe after she was comfortable with him, demanding him to "Come to lab!" at night, show no shyness either. (R. Doc. 133 at 12).

The District Court did not address Frost not explaining how she resolved the unlikelihood of Doe apparently pushing alcohol to Complainant 2's face before allegedly sexually assaulting her, and Complainant 2 admitting that she went to a restaurant with Doe on a night just three weeks after the alleged encounter, purchasing two alcoholic beverages with her fake ID. All these, when taken together, show unexplained contradictions.

Frost found T.M., Complainant 2's boyfriend and her only witness, credible (App. 726; R. Doc. 179-2 at 124) yet excluded his testimony from her report that he knew nothing about Doe touching Complainant 2's body in any way. (App. 89; R. Doc. 115 at 19). The Court did not address this. Nor did the Court address Appellees' admission that T.M. contradicted Complainant 2's testimony. (App. 162; R. Doc. 185-2 at 10).

The Court did not address Doe's citations to the record showing that Frost, without explanation, credited part of Doe's testimony over Complainant 2's where it allowed further violation to be found. (App. 183; R. Doc. 178-1 at 11).

In short, Doe provided more than enough evidence to satisfy the first two prongs of a Title IX claim as identified by *Univ. of Ark.*: he showed that UI findings were against the substantial weight of the evidence; and he showed that procedural irregularities were rife throughout the UI process. *Regents of Univ. of Cal.,* at *28-9 ("Although the Regents contends that these allegations of procedural irregularities do not suggest that gender was the reason for the supposed errors, this Circuit, as well as the Seventh and Sixth Circuits, have found similar irregularities support an inference of gender bias, particularly when considered in combination with allegations of other specific instances of bias and background indicia of sex discrimination").

B. The Pressure on UI to Investigate and Adjudicate Title IX Complaints by Females Surpasses *Univ. of Ark.*

Doe presented significant evidence to satisfy the third factor considered in *Univ. of Ark.*: that sex bias infected UI's process. (App. 54-63; R. Doc. 57 at 40-49).

Evidence that a university has faced federal investigations for sex discrimination, public backlash, student outcry, or lawsuits based on sex discrimination allows a reasonable fact finder to infer discriminatory intent underlying procedural irregularities or other inconsistencies in processes. *Doe v. Baum*, 903 F.3d 575, 591 (6th Cir. 2018). The Eighth Circuit considers such external pressure on universities related to sexual misconduct relevant. *See Rossley*, 979 F.3d at 1196; *Univ. of Ark.*, 974 F.3d at 865.

Doe provided evidence that UI had been under substantial pressure from multiple sources to find males responsible for Title IX cases brought by females. (App. 167-173; R. Doc. 185-2 at 15-21). For example, in 2014, UI's then-President said that completely eliminating sexual assault was "'probably not a realistic goal . . . ." *Id.* This single statement led to considerable negative press coverage and on-campus protesting of UI's sexual assault record. Appellees admitted that the *Star Tribune* published: "Controversy over Iowa college president's remark shows pressure to curb campus sexual

assaults." DiCarlo publicly aligned herself with the protesters. *Id.*

UI responded to these pressures by: 1) updating its policies (*Id.*); 2) creating various services for women (*Id.*); 3) adding a van for Nite Ride, an evening transportation service. Nite Ride was later found by the Iowa Civil Rights Commission to have engaged in sex discrimination by prohibiting men from using it (*Id.*); 4) instituting a "Six Point Plan" for addressing sexual assault, prompting the first expulsion of a male student in over a decade (*Id.*); and 5) sponsoring a "sex-assault summit," focusing just on "men," where Redington was one of the speakers. (App. 58; R. Doc. 57 at 44). UI's Rape Victim Advocacy Program ("RVAP"), Administrators, and students then rallied around women's cries to action focused on "men," "masculinity," and the need for "healthy masculinity," all while talking about sexual assault. (App. 58; R. Doc. 57 at 44).

As in *Univ. of Ark*, OCR initiated investigations of UI, which were ongoing during the adjudication of Doe's case. (App. 170; R. Doc. 185-2 at 18). With the media's negative publicity, Appellees admitted that UI even issued honors and awards to female students filing these OCR complaints against the university. (App. 229; R. Doc. 187-1 at 27). This Court found it entirely plausible "that the specter of another federal investigation of potential Title IX violations could motivate the University to discriminate against male athletes accused of sexual misconduct *to demonstrate ongoing compliance* with Title IX." *Regents of Univ. of Minn.*, 999 F.3d at 578 (citing *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 948 (9th Cir. 2020)) (emphasis added).

While the investigation against Doe was ongoing, UI settled two sex discrimination lawsuits brought against it by women for $6.5 million. Stevenson Earl was criticized in one of them. Appellees state that the media misrepresented what happened, but that does not mean that the media attention did not create pressure. (App. 171; R. Doc. 185-2 at 19).

While Doe was appealing his expulsion to Keller, both UI and Keller himself faced criticism from the media for their

handling of women broadly and their failings relating to sexual misconduct. As a result, two more lawsuits were filed, alleging gender discrimination. (App. 54; R. Doc. 57 at 40); (App. 172; R. Doc. 185-2 at 20); (App. 147; R. Doc. 129-1 at 20). Before Doe's appeal to the Board of Regents, the media reported that the Board had settled a gender discrimination lawsuit from a former female employee. (App. 172; R. Doc. 185-2 at 20). Thus, during Doe's investigation, adjudication, and appeal, the media reported *five* Title IX and/or gender discrimination lawsuits.

Of all the pressures cited, the Court addressed only Doe's evidence of the lawsuits against UI, and even then, only addressed three of the five. (R. Doc. 192 at 20-21). The Court addressed none of the remaining substantial evidence related to external pressure on the university over its handling of sex discrimination cases, even though it acknowledged that Doe's argument was only "in part" based on the lawsuits. (R. Doc. 192 at 20-21).

While addressing the lawsuits, the Court noted that they involved employment and athletic discrimination, casting Doe's argument as an attempt "to make a connection between discrimination suits writ large and Title IX sexual assault complaints by females against males." (R. Doc. 192 at 21). But the Court did not credit these facts that Doe provided:

i. On October 17, 2017, when Doe was appealing his expulsion to the provost, UI faced criticism from the media for its handling of women broadly and for its failings relating to sexual misconduct. Two lawsuits were filed alleging gender discrimination. (App. 172; R. Doc. 185-2 at 20).

ii. According to the media, the Dean of the Graduate College at UI, Keller, initially suspended the male until the female accuser graduated, but later reduced to a one-year suspension so he could graduate. This motivated the lawsuit. . . . The *Iowa City Press-Citizen* reported that sex/gender was clearly a motivating

> factor, as the lawsuit argued that UI's response did not address "biases that can lead to institutional hostility against female accusers and support for perpetrators." (App. 54; R. Doc. 57 at 40)

Doe re-alleged these facts and provided the citations.[6] (App. 172; R. Doc. 185-2 at 20). The District Court did not address these lawsuits, even though the Magistrate Judge ruled in the case while granting Doe's motion to compel. (App. 17-19; R. Doc. 163 at 12-14). Nor did the Court address that, in response to Doe's allegation of Keller being under pressure, Appellees argued that Keller testified that this lawsuit in no way affected his decision-making before he decided Doe's appeal. (App. 147; R. Doc. 129-1 at 20). Doe replied, saying that a jury should address the veracity of such a self-serving statement. (App. 177; R. Doc. 178-1 at 5). Appellees also argued that this was dismissed in 2020 (App. 147; R. Doc. 129-1 at 20), but this resolution years later does not mean that there was no pressure when they were filed in 2017, when Doe was expelled. Unlike *Univ. of Ark.*, Doe showed a particularized connection of the pressure UI faced to specific officials during the disciplinary process, showed why they were under pressure, and provided the specific sequence of events leading to the challenged decision.

The District Court's artificial distinction between the lawsuits and Doe's case also ignores that the females in the lawsuits sued for sex discrimination and Title IX violations, alleging "biases that can lead to institutional hostility against female accusers." (App. 54; R. Doc. 57 at 40); (App. 139; R. Doc. 102 at 100).

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[6] See e.g., Ryan J. Foley, *Lawsuits seek changes to University of Iowa sexual assault policies*, IOWA CITY PRESS-CITIZEN, https://www.press-citizen.com/story/news/education/university-of-iowa/2017/10/16/lawsuits-seek-changesuniversity-iowa-sexual-assault-policies/769292001/ (last visited Apr 29, 2021)

C. Sex Was a Motivating Factor in Disciplining Doe

Doe presented substantial evidence to show that sex was a motivating factor in expelling him. "[W]here there is a one-sided investigation plus *some* evidence that sex may have played a role in a school's disciplinary decision, it should be up to a jury to determine whether the school's bias was based on a protected trait or merely a non-protected trait that breaks down across gender lines." *Univ. of Denver*, 1 F.4th at 836 (emphasis in original).

1. DiCarlo's and Redington's Undue and Biased Influence

At first, Stevenson Earl recommended that Doe only be reprimanded, UI's lowest-level sanction. (App. 211; R. Doc. 187-1 at 9). But in the face of all the pressure on UI and DiCarlo over mishandling Title IX investigations, DiCarlo emailed Stevenson Earl and Redington to schedule a conference about modifying the initial recommended sanction. (App. 156-157; R. Doc. 185-2 at 4-5). After the meeting, Stevenson Earl updated the sanctions and recommended a hearing. *Id.*

To understand this connection, Doe emphasized DiCarlo's position and influence. (App. 153-154; R. Doc. 185-2 at 1-2). As Sexual Misconduct Response Coordinator, DiCarlo functioned as an initial advocate for complainants, convincing them that they had been sexually assaulted even before an investigation occurred. As Complainant 2 testified, "I didn't know it was sexual assault until I met Monique [DiCarlo]." (App. 27; R. Doc. 57 at 13). DiCarlo is also the Title IX Coordinator and bore responsibility for UI's Title IX training and compliance. (App. 21; R. Doc. 57 at 4). *See Doe v. Purdue Univ.*, 928 F.3d 652, 668 (7th Cir. 2019) ("That pressure may have been particularly acute for Sermersheim, who, as a Title IX coordinator, bore some responsibility for Purdue's compliance"); *Columbia Univ.*, 831 F.3d at 58 (the complaint plausibly alleged that the Title IX investigator's "report advocating discipline influenced the University's decision to sanction John Doe"); *Schwake*, 967 F.3d at 950 ("In

modifying the punishment, the inference may be drawn that the University sought to show that it took sexual misconduct complaints seriously . . .").

In March 2017, while Doe's investigation was ongoing, DiCarlo handled discussions, petitions, and meetings hoping to quell students' concerns on inadequate responses to sexual misconduct and institutional issues failings. (App. 170; R. Doc. 185-2 at 18). In May 2017, while Doe's investigation was ongoing, UI settled two gender discrimination cases for $6.5 million. (App. 171; R. Doc. 185-2 at 19). One month later, while Doe's investigation was still ongoing, UI announced that it would spend significant funds to reform and avoid further lawsuits brought by women in response to civil rights violations. DiCarlo was announced as a member of a 14-person committee tasked with this reform. *Id.*

Two weeks later, DiCarlo communicated with Stevenson Earl via email about setting up a call with Redington and her to discuss modifying the sanctions originally proposed by Stevenson Earl. *Id.* A week later, Stevenson Earl issued the investigation report with the updated sanctions and recommended a hearing, which would allow UI to dismiss a student. (App. 172; R. Doc. 185-2 at 20). Thus, a reasonable jury could find that DiCarlo's influence demonstrated sex bias.

After the hearing, DiCarlo became further involved by advising Redington to expel Doe. "[C]ourts have interpreted Title IX by looking to . . . the case law interpreting Title VII." *Columbia Univ.*, 831 F.3d at 55 (quoting *Yusuf*, 35 F.3d at 714). DiCarlo, who was biased, and "who lacks decision making power, use[d] the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory [disciplinary] action." *Qamhiyah v. Iowa State Univ. of Sci. and Tech.*, 566 F.3d 733, 742 (8th Cir. 2009) (internal quotation omitted). Redington and Stevenson Earl served merely as a conduit for the desires of UI's Title IX Coordinator. *Id.* at 743. A reasonable jury could "conclude that the [expulsion] was the result of intentional gender discrimination." *Id.* Notably, DiCarlo was shown UI's policy and was asked why she recommended expulsion, and she could not give a reasonable response

reflected by UI's policy. (R. Doc. 178-1 at 24); (R. Doc. 179-6 at 76).

2. Frost's Sex Bias at the Hearing

a. Complainant 1

Frost did not report that Complainant 1 decided to join the improv comedy group Doe had started about two months after the alleged incident. Doe disapproved of her joining and expressly questioned her motivations, eventually telling her, "leave me alone." Based on her biased assumptions of gender and sexuality, Frost asked Doe why he would not be "pleased" by her joining his group. (App. 182; R. Doc. 178-1 at 10) *See Doe v. Wash. & Lee Univ.,* No. 6:19-cv-00023, at *26 (W.D. Va. Apr. 17, 2021) (denying university's motion for summary judgment, in part, because the plaintiff "presented sufficient evidence from which a reasonable jury could conclude that the . . . responsibility was predicated on biased assumptions regarding the sexual preferences of men and women").

b. Complainant 2

Frost asked Complainant 2 if she feared Doe would "punch" or "hit" her, even though there was no suggestion that Doe was violent in any way. (App. 164; R. Doc. 185-2 at 12). The notice of charges related to sexual assault only included whether Doe engaged in sexual activity without consent. (App. 223; R. Doc. 187-1 at 21). It is difficult to think of a worse male stereotype. In no case would this have happened if the sex of the Complainants and Doe were reversed. *See Regents of Univ. of Cal.*, No. 20-55831 at *20.

Frost concluded that Doe's account sounded like "fantasy." (App. 164; R. Doc. 185-2 at 12). This conclusion is strikingly similar to a conclusion Frost came to in a subsequent case involving a different accused male student, in which she found that his account sounded like a "young man's fantasy." *Id.* OCR began to investigate Frost for this statement as potential sex discrimination. *Id.* Until 2017, OCR had rarely conducted investigations into the rights of accused men; yet Frost's conduct was found to merit such an investigation.

Frost's statements about sexual assault being Doe's "fantasy" is more evidence of intentional and consequential sex discrimination. Such "gender-based stereotyping allows a reasonable inference that [Frost] acted with a nefarious discriminatory purpose and discriminated against [Doe] based on his membership in a definable class.'" *Doe v. Purdue Univ.*, 464 F. Supp. 3d 989, 1008 (N.D. Ind. 2020).

3. Sex Biased Appellate Review

As Doe had provided both Keller and Braun with specific examples of how UI discriminated against him based on sex, they had actual knowledge of such discrimination on campus. (App. 49-53; R. Doc. 57 at 39). With such knowledge, they deliberately chose to take no action. *Id.* Instead, Keller furthered the discrimination as he admitted that sex was a motivating factor in his decision. (App. 165-167; R. Doc. 185-2 at 13-15); (App. 242; R. Doc. 179-6 at 10).

Keller admitted that he had to follow UI's policy in making his decision. (App. 241; R. Doc. 179-6 at 9). Under UI policy, Keller had to show that he decided against reversal because: (a) the decision was supported by substantial evidence; (b) the decision was not arbitrary, capricious, unreasonable, and did not constitute an abuse of discretion; and/or (c) the sanction was not unreasonably harsh in light of the circumstances. (App. 177; R. Doc. 178-1 at 5). Keller made no such showings. (App. 774; R. Doc. 179-2 at 147). He admitted that he had the power to reverse the findings or remand for further hearing. He then testified that he did not consider doing so because of Doe's sex, age, and his own analysis of consent. (App. 242; R. Doc. 179-6 at 10).

Keller's testimony is direct evidence of discrimination. (App. 4). His testimony shows "a specific link between the alleged discriminatory animus and the challenged [disciplinary] decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated [the disciplinary] decision." *Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64, 66 (8th Cir. 1997) (internal quotations omitted). Keller had to decide the appeal on its merits. Using

biased attitudes about sex is an illegitimate factor and violates Title IX. *Rowles*, 983 F.3d at 359.

Keller testified, remarkably, that a woman's consent given during sexual contact may be withdrawn after the fact. (App. 165-166; R. Doc. 185-2 at 13-14). The result is that Complainant 1 told others that she had consented and then changed her mind about their relationship five months later. This is based on Keller's *admitted and outdated* view that young women are "vulnerable and impressionable." *Id.* Can a young man not be just as vulnerable and impressionable?

4. Appellees Made Statements and Showed Patterns of Decision-Making That Show the Influence of Sex

Appellees admitted that in referring to 2017 sexual misconduct statistics, the year Doe was expelled, DiCarlo, in a faculty senate meeting, commented that one of the "common misperceptions" is that alleged perpetrators are "railroaded" and denied due process rights. (App. 232; R. Doc. 187-1 at 30). Under this context, she expressed that one of their responsibilities is expanding "programming" on "healthy masculinity," yet not mentioning anything about "healthy femininity." (App. 172; R. Doc. 185-2 at 20). Similarly, UCLA's Coordinator said that "no female has ever fabricated allegations against an ex-boyfriend in a Title IX setting," which was found to support an inference of sex bias. *Regents of Univ. of Cal.*, No. 20-55831, at *21.

Appellees admitted that in February 2018, while Doe was appealing the decision to the Board, UI held a program called "What About Me(n) Summit." (App. 232-233; R. Doc. 187-1 at 30-31). UI's RVAP, who were involved in the program, described the program on social media as an opportunity for men to consider how masculinity "impact[s] rape culture and perpetuates an overall culture of violence." *Id.* Appellees admitted that UI's RVAP training defines "rape culture" as "a complex set of beliefs that encourages male sexual aggression and supports violence, especially against women and children." *Id.* UI's RVAP was also involved in

UI's training of decision-makers in 2017. (App. 79; R. Doc. 115 at 9).

Relatedly, during the same month that Purdue Univ. disciplined a student, Purdue Univ.'s CARE, similar to UI's RVAP, posted on its Facebook page an article from *The Washington Post* titled "Alcohol isn't the cause of campus sexual assault. Men are." *Purdue Univ.*, 928 F.3d at 669. Then-7th Circuit Judge, Amy Coney Barrett, found that such language "could be understood to blame men as a class for the problem of campus sexual assault rather than the individuals who commit sexual assault." *Id.*

5. District Court's Errors

For Frost, the only finding the District Court addressed for sex bias was that Doe's account sounded like "fantasy." (R. Doc. 192 at 17). The Court found that such a characterization did not rise to the level of sex bias. *Id.* The same sex-biased decision-making that OCR believes is present in her subsequent adjudication was also present here, notwithstanding Frost's omission of the descriptor "young man's" in describing the account of Doe, a young man, as "fantasy." The effects of the causal bias need not be limited to the plaintiff's own case. *Oberlin Coll.*, 963 F.3d at 586. "To the contrary, for example, we have held that '*patterns* of decision-making' in the university's cases can show the requisite connection between outcome and sex." *Id.*

The Court justified its conclusion for Frost's statement by finding that Frost considered Doe's account "fantastical in the sense it exceeded realistic expectations of an encounter between two individuals that just met." (R. Doc. 192 at 16). But this ignores Doe's argument that the facts surrounding the incident in his case and the subsequent case were "comically similar," which Appellees did not deny. (App. 182; R. Doc. 178-1 at 10). The District Court erred in viewing through such a lens because "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Doe's evidence "is to be believed, and all justifiable

inferences are to be drawn in his favor." *Id.* The common denominator here was that both Doe and the subsequent male student said the female initiated the encounter, straddled them, and invited them to touch their breast. (App. 810-811; R. Doc. 179-5 at 92, 130).

Had Appellees attempted a defense to this argument, (App. 222; R. Doc. 187-1 at 20), Doe could have further argued that the response was pretextual and that the real reason Frost used such language was that she holds "outdated and discriminatory views of gender and sexuality." *Doe v. Grinnell Coll.,* 473 F. Supp. 3d 909, 927 (S.D. Iowa 2019). Doe would have also made additional citations to the record. Appellees knew that after Frost used discriminatory language, Doe informed UI that:

> In her report, Ms. Frost does not mention the number of months after which the complaints were filled, or the incidents that led up to the filing of complaints. She also wrote in her report how she views my version of what happened with Complainant 2 and me as a "fantasy," yet believed portrayal of me as this monstrous sexual predator with no regards to people's feelings. By believing so, she is succumbing to gender stereotypes that women cannot or are not aggressive during sexual encounters as I have described Complainant 2 to be...Under the United States Department of Education's (DOE) Office for Civil Rights (OCR), this is unlawful. Their website states: "Training materials or investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially."

(App. 806; R. Doc. 179-2 at 104).

Even though Doe gave UI and Frost notice that OCR could find such language discriminatory, Frost decided to use

similar language again in another case involving similar conduct, resulting in the OCR investigation. (App. 810-811; R. Doc. 179-5 at 92, 130).

Stevenson Earl concluded that there was no evidence presented to suggest Doe used force, intimidation, or coercion at any time. (App. 31; R. Doc. 57 at 17); (App. 431; R. Doc. 179-4 at 227). Thus, Frost's usage of punching or hitting in a hearing about lack of consent also shows that she holds outdated and discriminatory views of gender and sexuality. Appellees did not dispute that this was based on male stereotypes, but they pointed to Frost's response during her deposition. (App. 223; R. Doc. 187-1 at 22). When asked why she used such language, Frost said she was trying to follow UI's policy, but she could not remember which policy. (App. 262; R. Doc. 179-6 at 36). Thus, Frost's response has no basis in fact. The Court did not address this issue during summary judgment.

The Court discounted Keller's *explicit* admission that Doe's sex played a role in his decision, calling it "incidental to his primary focus on age and resulting power differentials." (R. Doc. 192 at 19). First, Keller's outright admission of considering sex in his decision is enough to constitute "some evidence that sex may have played a role in [UI's] disciplinary decision," *Univ. of Denver*, 1 F.4th at 836, even if it were combined with considerations of age and "power differential." Second, it was improper for the Court to tip the balance of Keller's testimony one way or the other in ruling on a motion for summary judgment. A jury should decide whether Keller's "primary focus" was on age and power differential or sex. Third, even assuming that his "primary focus" was on age and power differential, sex was a motivating factor in his decision, which Title IX prohibits. *Rowles*, 983 F.3d at 359.

The Court found that even if "Keller's observations constitute sex bias, they are insufficient to demonstrate Doe was expelled on the basis of sex." (R. Doc. 192 at 20). The Court minimized the importance of Keller's consideration of sex as a factor, and Lovaglia's testimony, by concluding that "[a]

reasonable jury could not find Keller's narrow statement about why he did not consider the testimony of one witness as sufficient evidence that sex bias motivated the university to expel Doe." (R. Doc. 192 at 20).

First, the standard is not whether a reasonable jury could or could not find in favor of Keller based on his "narrow statement," but whether a reasonable jury could find that sex was a motivating factor in expelling Doe. *See*, e.g., *Moore v. Indehar*, 514 F.3d 756, 758 (8th Cir. 2008) ("courts are obligated to construe the record in the light most favorable to the non-moving party . . . and . . . afford him all reasonable inferences to be drawn from that record"). If a reasonable jury could find for either party, the case should go to trial. *Redmond v. Kosinski*, 999 F.3d 1116, 1120 (8th Cir. 2021).

Second, Keller's "narrow statement" was an outright admission that he considered Doe's sex in his findings; the District Court essentially conceded that sex was a motivating factor in the decision. Also, the "one witness" whose testimony Keller refused to consider was the only neutral witness who testified. (App. 45; R. Doc. 57 at 31). This witness confirmed that all of Doe's and Complainant 1's conduct was consensual—the very crux of the entire case. Keller admitted that Lovaglia's testimony was important (App. 243; R. Doc. 179-6 at 11), and that had he accepted it, it might have changed the outcome of his decision on Complainant 1. (App. 240-241; R. Doc. 179-6 at 8-9). *See Oberlin Coll.*, 963 F.3d at 587 (finding it "remarkable" that the appeals officer failed to acknowledge the importance of impeachment evidence against the accuser). Also, it was not just "one witness" because no witnesses knew about this alleged conduct. (App. 45; R. Doc. 57 at 31).

Third, the case law supports Doe. In *Oberlin Coll.*, the Court held: "Any number of federal constitutional and statutory provisions reflect the proposition that, in this country, we determine guilt or innocence individually—rather than collectively, based on one's identification with some demographic group." 963 F.3d at 580. The Court in *Univ. of Denver* held: "Title IX plaintiffs challenging the outcome of a sexual-

misconduct proceeding will rarely have direct evidence or even strong circumstantial evidenc[e]." 1 F.4th 835-36.

The Court did not address Keller's peculiar, seemingly sex-biased definition of consent he used to decide Doe's case.

Nor did The Court address DiCarlo's comment about increasing the "programming" of "healthy masculinity" when talking about 2017 statistics of sexual assault, yet not mentioning anything about "programming" of "healthy femininity." (App. 172; R. Doc. 185-2 at 20). Doe argued that UI could have resolved this issue by having the programs teach "healthy sexuality." (Motion Hearing Transcript at 37). Nor did the Court address anything about UI's RVAP. (App. 232-233; R. Doc. 187-1 at 30-31).

D. UI's Failure to Follow its Own Policies Show Clearly Irregular Investigative and Adjudicative Processes

There are several examples of UI not following its own policies in handling the case against Doe. "A university's decision may be arbitrary if the university violates its own procedures." *Doe v. Univ. of St. Thomas*, 972 F.3d 1014, 1018 (8th Cir. 2020). "It is well-settled law that departures from established practices may evince discriminatory intent." *Nabozny v. Podlesny*, 92 F.3d 446, 455 (7th Cir. 1996). *See also Oberlin Coll.*, 963 F.3d at 586-87 (reviewing in detail the university's departures from its own policies in finding that plaintiff had stated a valid claim for sex discrimination under Title IX).

First, "Cervantes entered new evidence towards the end of the hearing, even though UI policies state that Doe should be provided any new evidence at least two days before the hearing." (App. 164; R. Doc. 185-2 at 12).

Second, Frost found Doe responsible for a charge he was not given notice of. (App. 220; R. Doc. 187-1 at 18). *See Regents of Univ. of Cal.*, No. 20-55831, at *21.

Third, after DiCarlo interfered with the recommended sanction, "Redington failed to provide a rationale why she expelled Doe. [UI] policies stated that 'The Dean's sanction letter shall include a rationale explaining why the chosen

status sanction was selected over an alternative.'" (App. 165; R. Doc. 185-2 at 13); (App. 51; R. Doc. 57 at 37).

The District Court did not address the first two procedural irregularities under Title IX discriminatory intent. And the Court did not address the third point at all. The Court erred because such substantive departures from the normal procedural sequence show discriminatory intent.

THE DISTRICT COURT ERRED BY DISMISSING DOE'S 42 U.S.C. § 1983 PROCEDURAL DUE PROCESS CLAIMS AGAINST INDIVIDUAL APPELLEES BASED ON QUALIFIED IMMUNITY

The Court dismissed Doe's claims for procedural due process against the individual Appellees based on qualified immunity. (App. 9-11; R. Doc. 106 at 27-29). This ruling was erroneous.

A. Qualified Immunity Standard

"Qualified immunity is an affirmative defense for which the defendant carries the burden of proof." *Wagner v. Jones*, 664 F.3d 259, 273 (8th Cir. 2011). It can "be upheld in a motion to dismiss only when the immunity can be established on the face of the complaint." *Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996). A qualified immunity defense applies to claims for damage but not to claims for declaratory or injunctive relief. *See, e.g.*, *Wood v. Strickland*, 420 U.S. 308, 314 n.6 (1975); *Hopkins v. Saunders*, 199 F.3d 968, 977 (8th Cir. 1999) (qualified immunity "does not shield a defendant from claims for equitable relief"). When government officials abuse their authority, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Indeed, damages offer a remedy for students subjected to intentional or otherwise inexcusable deprivations. *Wood*, 420 U.S. at 320.

To decide whether an official is entitled to qualified immunity, this Court asks two questions:

> (1) whether, after viewing the facts in the light most favorable to the party asserting the injury, there was a deprivation of a constitutional or statutory right; and, if so, (2) whether the right was clearly established at the time of the deprivation such that a reasonable official would understand [their] conduct was unlawful in the situation [they] confronted.

Henderson v. Munn, 439 F.3d 497, 501-02 (8th Cir. 2006).

"A right is clearly established when the contours of the right are sufficiently clear that a reasonable official would understand that what [they are] doing violates that right." *Mathers v. Wright*, 636 F.3d 396, 399 (8th Cir. 2011) (cleaned up). "A general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *Winslow v. Smith*, 696 F.3d 716, 738 (8th Cir. 2012) (cleaned up). "To be established clearly, however, there is no need that "the very action in question [have] previously been held unlawful." *Safford Unified Sch. Dist. # 1 v. Redding*, 557 U.S. 364, 377 (2009) (cleaned up). "The unlawfulness must merely be apparent in light of preexisting law, and officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Nelson v. Correctional Med. Services*, 583 F.3d 522, 531 (8th Cir. 2009) (cleaned up).

"[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citations omitted). School officials who have time to make deliberate choices should be held to a higher standard than police officers. *See Intervarsity v. Univ. of Iowa*, 5 F.4th 855, 867 (8th Cir. 2021) (quoting *Hoggard v. Rhodes*, 141 S.Ct. 2421, 2422 (2021) (Thomas, J., statement regarding denial of certiorari)).

Notably, this Court denied qualified immunity to Redington and another school official for unconstitutional conduct that happened during the same timeframe as Doe's case, stating that the university officials were "either plainly incompetent or they knowingly violated the Constitution." *BLinC v. Univ. of Iowa*, No. 19-1696, at *32 (8th Cir. 2021).

B. Procedural Due Process Standard

"Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests" covered by the Constitution. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (cleaned up); *Univ. of Ark.*, 974 F.3d at 866 (assuming that the university's decision implicated "a protected liberty or property interest of Doe"). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "A 10-day suspension warrants fewer procedural safeguards than a longer one, and universities are subject to more rigorous requirements than high schools . . . ." *Purdue Univ.*, 928 F.3d at 663 (citing *Goss v. Lopez*, 419 U.S. 565, 584 (1975)). Also, "In a case where a graduate student faced expulsion [in a disciplinary proceeding] . . . his private interest was exceptionally robust." *Neal v. Colo. State Univ.-Pueblo*, Civil Action No. 16-cv-873-RM-CBS, *36 (D. Colo. Feb. 16, 2017). Thus, "[t]he more serious the deprivation, the more demanding the process." *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400 (6th Cir. 2017).

C. Doe Alleged a Violation of His Due Process Rights

1. Doe Has a Valid Property and Liberty Interest

The relationship between a university and a student is ordinarily contractual. *Corso v. Creighton Univ.*, 731 F.2d 529 (8th Cir. 1984). Doe admitted to having a contractual relationship with UI to secure his Constitutional property interest in his education. (App. 51; R. Doc. 57 at 3). Doe also has a constitutionally protected liberty interest in his good name, reputation, honor, and integrity. *Goss*, 419 U.S. at 574

(citing *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971); *Bd. of Regents v. Roth,* 408 U.S. 564, 577 (1972)); *Kyles v. E. Neb. Hum. Servs. Agency*, 632 F.2d 57, 61 (8th Cir. 1980); *Flaim*, 418 F.3d at 638. Courts must consider "the seriousness and the lifelong impact that expulsion can have," (*Id.*), and the "immediate and lasting impact on a student's life" that follows a label of a "sex offender." *Baum*, 903 F.3d at 582.

Even though Doe's advisor, Dr. Wadsworth, on behalf of all his professors in the counseling department, submitted a letter that showed support for Doe's character, Frost wrote: "It should be noted that Doe continues to work with students/clients with disabilities, a vulnerable population, as part of his counseling duties in the UI Department of Education." (App. 189; R. Doc. 178-1 at 17). Thus, Doe's permanent record also contains this inherent suggestion that he is unfit to be a counselor. *See Greenhill v. Bailey*, 519 F.2d 5, 8 (8th Cir. 1975).

Doe testified that his advisor, an expert in the field of counseling, told him that his expulsion ended his career in counseling, as he would have trouble with government licensing agencies. (App. 165; R. Doc. 185-2 at 13).

2. Doe's Rights Were Clearly Established

a. Right to Adequate Notice and Definite Charges

"No principle of procedural due process is more clearly established than that notice of the *specific* charge, and a chance to be heard...It is as much a violation of due process on which he was never tried as it would be to convict him upon a charge that was never made." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) (citation omitted). This Court has clearly established that "procedural due process must be afforded on the college campus by way of adequate notice, *definite* charge, and a hearing with an opportunity to present one's own side of the case and with all necessary protective measures." *Jones v. Snead*, 431 F.2d 1115, 1117 (8th Cir. 1970). *See also Doe v. Rector & Visitors of George Mason*

Univ., 149 F. Supp. 3d 602, 615 (E.D. Va. 2016). Thus, when a student is "[i]gnorant of the scope of the matter under consideration, [their] opportunity to present their side of the case [is] rendered meaningless." *Strickland v. Inlow*, 519 F.2d 744, 747 (8th Cir. 1975).

3. UI Failed to Provide Due Process

a. UI Failed to Give Notice and a Definite Charge

The District Court found that Doe had alleged no deprivation of due process. (App. 9-11; R. Doc. 106 at 27-29). But Doe alleged: "Frost falsely and arbitrarily found Doe responsible for an 'educational leadership role,' even though the investigation concluded that he had no such role in the Lab either *directly or indirectly*. In making such determinations, she raised additional claims not included in the original notice of the hearing." (App. 44; R. Doc. 57 at 30). He alleged further: "Cervantes' notice fails to mention that Doe will be held responsible for the 'educational mission' of Complainants." (App. 67; R. Doc. 57 at 53). These are clear allegations that Doe was not given notice of all the claims against him.

Doe sued both Frost and Cervantes for lack of notice and definite charge. Doe alleged that Frost arbitrarily found Doe responsible for having a leadership role at the Lab, even though Stevenson Earl's finding was contrary. (App. 44; R. Doc. 57 at 30). Frost knew that Stevenson Earl had dismissed this charge, that Cervantes did not provide Doe with notice that this charge would be considered (App. 220; R. Doc. 187-1 at 18), and that finding Doe responsible for something he did not have notice of would cause a deprivation of his constitutional rights. Indeed, Doe was ignorant of the scope of the matter under consideration. Considering that Frost read the charges out loud at the beginning of the hearing, (App. 489-490; R. Doc. 179-1 at 9-10), and that the law was clearly established at the time, her actions cannot reasonably be characterized as being in good faith. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982) ("If the law was clearly established, the immunity defense ordinarily should

fail") Appellees "[c]oncede[d] that Doe has alleged sufficient 'facts'" against Frost "to maintain his § 1983 claims against [her] at this time." (R. Doc. 89-1 at 12). Because Appellees conceded that Doe alleged sufficient facts to sue Frost in her individual capacity at the time, the Court erred in granting Frost qualified immunity.

Doe also held Cervantes responsible for this conduct. He alleged: "Cervantes' notice fails to mention that Doe will be held responsible for the 'educational mission' of Complainants" (App. 67; R. Doc. 57 at 53), a clear allegation "on the face of the Complaint" that Doe was not given notice of the charges against him. *Hafley*, 90 F.3d at 266. Doe did not prepare a defense for allegations not in the notice.

The District Court conceded that "if Schriver Cervantes failed to notify Doe of the specific charges against him, she might not be entitled to qualified immunity." (Doc. 106 at 28). The Court then found, erroneously, that Doe had not so alleged. The Court noted Doe's allegation of the charge holding him responsible for the "educational mission of the Complainants" and then found that this did not allege lack of notice because the Court did not know what it meant. (*Id.*). The term "educational mission of the Complainants" comes directly from Frost's report. (App. 741; R. Doc. 179-2 at 139). If the Court and defense counsel do not know what that means, it is not Doe's responsibility; Frost found Doe responsible for something no one can even identify. Whatever the "educational mission" of the Complainants' is, Doe was not given notice that he would be held responsible for it. As the right to notice and a definite charge are well-established by this Court in *Jones*, the District Court erred in granting qualified immunity to Frost and Cervantes.

THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT ON DOE'S PROCEDURAL DUE PROCESS CLAIM

A. The District Court Did Not Address Doe's Right to Adequate Notice and Definite Charges

For summary judgment, Appellees admitted again that Frost found Doe responsible for a charge he did not receive notice of, one that was already dismissed. (App. 220; R. Doc. 187-1 at 18). The District Court did not address Doe's lack of notice and definite charges, finding that it had already denied that claim. (R. Doc. 192 at 28). But the Court only dismissed these claims based on qualified immunity. *Id.* Because the Court erred in that finding, it should have addressed the claims on summary judgment.

Accordingly, at the very least, this Court should remand these claims to be addressed on its merits and also reconsider the declaratory and injunctive relief.

B. Doe Provided Substantial Evidence That the Method of Questioning at the Hearing Was Fundamentally Unfair

"Questioning by the panel could be insufficient in a given cas[e]" *Univ. of Ark.*, 974 F.3d at 868. This Court found for the *Univ. of Ark.* because the accused student identified no cross-examination questions that he wanted the panel to ask. By contrast, Doe alleged *material flaws* in the questioning. *Id.* He listed examples of material questions not asked. (App. 157-159; R. Doc. 185-2 at 5-7). Appellees admitted that Frost did not ask such questions and provided no defense. (App. 215; R. Doc. 187-1 at 13). This record alone was enough to satisfy the standard laid out in *Univ. of Ark.*

Frost promised to ask all questions given to her before the hearing. (App. 157; R. Doc. 185-2 at 5). But she reneged on this promise, choosing to ignore material questions that would show contradictions in the Complainants' stories. *Id.* It was objectively unreasonable for a factfinder to exclude questions about the playful text messages Complainant 1 sent to Doe at 1:47 a.m., three days after the alleged assault,

before concluding that she was distressed. (App. 158; R. Doc. 185-2 at 6). Or the several text messages that Complainant 2 sent to Doe telling him to come to the Lab at night before finding her to avoid Doe or be disgusted by him. *Id.* In *Purdue Univ.*, the Court held that the decisionmakers' failure to question witnesses about specific impeachment evidence identified by the accused was "fundamentally unfair" to the accused. 928 F.3d at 664. Indeed, Doe argued in his Board appeal that the "limiting of crucial questions, in this case, curtailed the fundamental rights crucial to any definition of a fair hearing." (App. 192; R. Doc. 178-1 at 20).

Due process needed "'rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.'" *Doe v. Univ. of Scis.*, 961 F.3d 203, 215 (3d Cir. 2020) (quoting *Goss* 419 U.S. at 581). Here, Doe showed that the questions were *insufficient* and that the *material flaws* in UI's questioning did not allow him to probe the Complainants' credibility and clear his name.

The Court found that while Frost said that she would ask all questions at the beginning of the hearing, she had the discretion to exclude unduly repetitive questions. (Doc. 192 at 8). But Appellees never made this argument. (App. 215; R. Doc. 187-1 at 13). Had they tried to do so, Doe could have responded to this argument, including arguing that they provide no citations to the record to show that Frost asked such questions even once. Also, the Court's reasoning ignores that Frost *falsely* reported that she excluded only two questions. (App. 717; R. Doc. 179-2 at 115). Frost did provide reasons for those two questions (*Id.*), but she refused to ask material questions, providing no rationale.

Doe also argued that treating parties substantially differently regarding questioning was fundamentally unfair. (App. 192; R. Doc. 178-1 at 20). The Court did not address this issue Doe raised. Doe alleged that Frost's questioning was aligned with UI's "therapeutic process" for the Complainants. (App. 36; R. Doc. 57 at 22). In his Board appeal, Doe wrote that "Ms. Frost purposefully chose questions for complainants that shows them in a positive light while

leaving out many of the crucial questions that I provided that would have cast doubt or show inconsistencies in their stories." (App. 41; R. Doc. 57 at 27). Doe continued, "[a]lthough I had an issue with [Frost] heavily paraphrasing questions in favor of complainants, I have more of an issue with her not asking questions at all." *Id.* Doe alleged that Frost then shifted gears from asking softball questions of the Complainants to cross-examining Doe as a hardened prosecutor. (App. 42; R. Doc. 57 at 28). Doe criticized Frost, arguing that "her questioning towards me was designed to elicit a confession, rather than an attempt to reconstruct an event factually."[7] *Id. See, e.g., Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 70 (1st Cir. 2019) ("Efforts of this type [of questioning] to put a witness 'at ease,' when applied only to a complaining witness, helped render potentially unfair the proceedings in another recent case we decided." (cleaned up)).

While the conduct mentioned above could overcome the presumption of non-responsibility given to public officials, Doe's allegations did not end there. Both during the Board appeal and in his TAC, Doe alleged that Frost's "questions (or lack thereof when she questioned the complainants) and comments were designed to deflate my credibility while inflating the complainants' credibility." (App. 67; R. Doc. 57 at 53). *Miami Univ.,* 882 F.3d at 601; And that "[b]ias in the process made it possible for [Frost] to influence and even *predetermine* the outcome." (App. 41; R. Doc. 57 at 27). The District Court did not address these issues either.

In a hearing where the standard of proof is only a preponderance of the evidence, universities must make reasonable attempts to be fair under all other contexts, especially when the stakes are this high. As shown above, Frost intentionally attempted to create a fundamentally unfair hearing for Doe. Thus, a reasonable jury could find that this hearing was a sham or pretense, violating Doe's due process rights. *Purdue Univ.*, 928 F.3d 652, 663.

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[7] In their Summary Judgment brief, Appellees said that Frost asked Doe "pointed" questions. (App. 146; R. Doc. 129-1 at 17).

CONCLUSION

For the forgoing reasons, the District Court erred in granting summary judgment to Appellees on Doe's Title IX claims. Doe presented evidence that Appellees' findings were against the substantial weight of the evidence. Appellees were under significant external pressure to find against Doe. And "clearly irregular investigative and adjudicative processes" show that sex was a motivating factor in the decision to expel Doe. A reasonable jury could have found for Doe.

The District Court also erred in dismissing Doe's claims for procedural due process against Frost and Cervantes based on qualified immunity. Appellees violated Doe's procedural due process rights by failing to give him adequate notice and definite charges. These rights were clearly established at the time of the violations.

To the extent that Doe's procedural due process claims survived dismissal, the District Court erred by granting summary judgment on those claims. The District Court erroneously failed to address Doe's claims for lack of notice and definite charges. Finally, the method of questioning had material flaws, resulting in it being fundamentally unfair. Accordingly, this Court should reverse the District Court's rulings or, at the very least, vacate and remand for further proceedings.

Respectfully Submitted,
/s/ Rockne Cole

ROCKNE O. COLE
Cole Law Firm, PC
209 E. Washington, Ste. 304
Iowa City, IA 52240
(319) 519-2540
(319) 359-4009 Fax
rocknecole@gmail.com
Attorney for Appellant

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 21-3340

John Doe

Appellant / Plaintiff

v.

University of Iowa, et al.

Appellees / Defendants

Stop Abusive and Violent Environments
Amicus on Behalf of Appellant / Plaintiff

Appeal from U.S. District Court for the Southern District of Iowa - Eastern (3:19-cv-00047-RGE)

Appellant Reply Brief

Rockne O. Cole
Cole Law Firm, PC
209 E. Washington, Ste. 304
Iowa City, IA 52240
(319) 519-2540
(319) 359-4009 Fax
rocknecole@gmail.com
Iowa Pin AT1675
Attorney for Appellant

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS ____ II

II. TABLE OF AUTHORITIES ____ III

III. FACTS RAISED FOR THE FIRST TIME ON APPEAL ____ 1

IV. THE DISTRICT COURT ERRED IN GRANTING SJ ON DOE'S TITLE IX CLAIMS ____ 4

A. There are Genuine Issues of Material Fact as to Whether the Outcome of Doe's Case was Against the Substantial Weight of Evidence ____ 4

B. There are Genuine Issues of Material Fact as to Whether External Pressure on UI Influenced the Sex Discrimination ____ 10

C. There are Genuine Issues of Material Fact as to Whether Sex was a Motivating Factor in Disciplining Doe ____ 12

D. UI's Failure to Follow its Own Policies Show Clearly Irregular Investigative and Adjudicative Processes ____ 17

V. THE DISTRICT COURT ERRED IN DISMISSING DOE'S PROCEDURAL DUE PROCESS CLAIM ____ 17

A. Frost and Cervantes Are Not Entitled to Qualified Immunity ____ 17

B. Frost Conducted Fundamentally Unfair Questioning ____ 23

CONCLUSION ____ 26

II. TABLE OF AUTHORITIES

CASES

Bevan v. Honeywell, Inc.,
118 F.3d 603 (8th Cir. 1997) ---- 15
Bickerstaff v. Vassar Coll.,
196 F.3d 435 (2d Cir. 1999) ---- 4
Breeding v. Gallagher and Co.,
164 F.3d 1151 (8th Cir. 1999) ---- 14
Brine v. Univ. of Iowa,
90 F.3d 271 (8th Cir. 1996) ---- 5
Cokeley v. Lockhart,
951 F.2d 916 (8th Cir. 1991) ---- 19
Dixon v. Alabama State Bd. of Educ.,
294 F.2d 150 (5th Cir. 1961) ---- 20
Doe v. Baum,
903 F.3d 575 (6th Cir. 2018) ---- 11, 25
Doe v. Marymount Univ.,
297 F.Supp.3d 573 (E.D. Va. 2018) ---- 14
Doe v. Oberlin Coll.,
963 F.3d 580 (6th Cir. 2020) ---- 8
Doe v. Texas Christian Univ.,
No. 4:22-cv-00297 (N.D. Texas, Apr. 29, 2022) ---- 4
Doe v. Univ. of Ark.,
974 F.3d 858 (8th Cir. 2020) ---- 8, 14, 25
Doe v. Univ. of Denver,
1 F.4th 822 (10th Cir. 2021) ---- 5, 13
Doe v. Wash. & Lee Univ.,
No. 6:19-cv-00023 (W.D. Va. 2021) ---- 14
Du Bois v. Bd. of Regents of Univ. of Minn.,
987 F.3d 1199 (8th Cir. 2021) ---- 5
Flaim v. Medical Coll. of Ohio,
418 F.3d 629 (6th Cir. 2005) ---- 20
Gaworski v. ITT Com. Fin. Corp.,
17 F.3d 1104 (8th Cir. 1994) ---- 16
Goldberg v. Kelly,
397 U.S. 254 (1970) ---- 21
Griffith v. City of Des Moines,
387 F.3d 733 (8th Cir. 2004) ---- 15

Hutson v. McDonnell Douglas Corp.,
63 F.3d 771 (8th Cir. 1995) ---- 14
Jones v. Snead,
431 F.2d 1115 (8th Cir. 1970) ---- 19
Keathley v. Ameritech Corp.,
187 F.3d 915 (8th Cir. 1999) ---- 5, 8
Kegel v. Runnels,
793 F.2d 924 (8th Cir. 1986) ---- 26
Lam v. Curators of the Univ. of Missouri,
122 F.3d 654 (8th Cir. 1997) ---- 22
Lawrence v. Texas,
539 U.S. 558 (2003) ---- 23
McCurry v. Tesch,
824 F.2d 638 (8th Cir. 1987) ---- 1
McGhee v. Dram,
564 F.2d 902 (10th Cir. 1977) ---- 20
Navato v. Sletten,
560 F.2d 340 (8th Cir. 1977) ---- 20
Rossley v. Drake Univ.,
979 F.3d 1184 (8th Cir. 2020) ---- 5
Roth v. G.D. Searle Co.,
27 F.3d 1303 (8th Cir. 1994) ---- 1, 18
Rowinsky v. Bryan Indep. Sch. Dist,
80 F.3d 1006 (5th Cir. 1996) ---- 22
Scoggin v. Lincoln Univ.,
291 F. Supp. 161 (W.D. Mo. 1968) ---- 20
Strickland v. Inlow,
519 F.2d 744 (8th Cir. 1975) ---- 21, 22
U.S. v. Schafrick,
871 F.2d 300 (2d Cir. 1989) ---- 15
Wagner v. Jones,
664 F.3d 259 (8th Cir. 2012) ---- 16
Wood v. Strickland,
420 U.S. 308 (1975) ---- 21

REGULATIONS

34 C.F.R. § 106.30 ---- 18, 19

III. FACTS RAISED FOR THE FIRST TIME ON APPEAL

Doe's facts came from his verified Third Amended Complaint ("TAC") (R. Doc 57), his statement of additional material facts ("SAMF") (R. Doc 185-2), and the appeals he filed with Keller and Braun, which Doe summarized in his TAC and cited the full documents in his SAMF. (App. 165-167; R. Doc. 185-2 at 13-15). UI[1] had an opportunity to respond to every fact, as they were numbered, and filed an answer to the TAC. (App. 71-128; R. Doc. 115 at 1-61). UI also submitted a 14-page SAMF at Summary Judgment ("SJ"). (Appellees' App. 338-351; R. Doc. 128-1 at 1-14). Thus, UI had enough opportunity to develop the facts. But now, on appeal, UI has completely re-written the facts. (Answer Brief at 7-33).

UI filed an extensive record below containing several hundred pages, but UI's newly cited facts are not undisputed facts. They were not brought to the District Court's or Doe's attention, and UI did not argue that they showed the absence of an issue of material fact. This Court has held that "[i]f a party fails to raise an issue for resolution by the district court . . . that issue may not be raised before this court." *Roth v. G.D. Searle Co.*, 27 F.3d 1303, 1307 (8th Cir. 1994). In *Roth*, the appellants challenged some of the District Court's undisputed facts for the first time on appeal. *Id.* This Court held: "'The district courts cannot be expected to consider matters that the parties have not expressly called to their attention, even when such matters arguably are within the scope of the issues that the parties have raised.'" *Id.* (quotation omitted). This Court concluded that "[a] contrary result 'could encourage a party to "sandbag" at the district court level, only then to play his "ace in the hole" before the appellate Court.'" *Id.* (quotation omitted). This Court should consider only the facts brought to the District Court's attention and construe them in the light most favorable to Doe. *McCurry v. Tesch*, 824 F.2d 638, 640-41 (8th Cir. 1987).

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[1] For ease of reference, the Appellees shall be collectively referred to as "UI."

Offering purported facts for the first time on appeal also increases likelihood of error. From Page 24 to Page 26, perhaps to explain away Complainant 2's inconsistencies, UI selectively merged Complainant 2's sexual harassment allegations with Complainant 1's, thus conflating the allegations against Doe. (Answer Brief at 24-26). For example, UI would have needed to explain the inconsistency of how in her first interview, Complainant 2 explained that her reasoning for coming forward was that Doe was supposedly continuing to act like this with new members. (App. 462; R. Doc 179-4 at 258.) Yet she could not identify a single person in her own Lab when asked who these members were, and as Doe explained, he was not even part of the Lab at that time. (App. 783; R. Doc 179-2 at 81). When asked the same question in her following interview, she changed her answer to say that after speaking to Complainant 1, she realized that Doe had "crossed the line" with her based on Doe's alleged "position" at the Lab. (Initial Brief at 24). Stevenson Earl did not note this inconsistency and only provided the first response in her report, making it difficult for Doe to find the real motive. (App. 156; R. Doc. 185-2 at 4).

UI continually cites Frost's report for their newly raised facts. (Answer Brief at 13-28). But Doe not only alleged that Frost misrepresented the evidence in her report; he also alleged that she *falsified* evidence. So much so that Doe said he came to the United States based on American universities' "commitment to the pursuit of truth." (App. 51; R. Doc. 57 at 37). Disappointed by Frost's behavior, he alleged that she falsified evidence: "This never happened [Frost wrote that Complainant 2 brought friends in Lab to never have to be alone, despite sending texts to Plaintiff to come to Lab alone], was not in her or her witness testimony, and is something Ms. Frost made up to make me look bad. UI is defending an investigation where the adjudicator has no issues making up facts." (App. 195; Doc. 178-1 at 23). UI has not responded to this in SJ.

It is impossible to respond to each new fact in a reply brief, and Doe can only respond to a couple of egregious ones.

For instance, UI cites that Frost wrote a statement about "Lovaglia's expectations for professionalism—especially given Doe's status as a graduate-student member." (Answer Brief at 13). Lovaglia testified that he realized that he had failed to inform Doe of any change in position (App. 356; R. Doc 179-3 at 18), testified that Doe even told him that he was confused about his role in this Lab, and this was "clear" to him. (App. 601, R. Doc 179-1 at 122). Lovaglia spoke about Doe becoming a new graduate student (in a different department) and Doe's "career aspirations and his desire to be a professional" in the future. (App. 608; R. Doc 179-1 at 129). UI does not point to where Lovaglia said anything about his "expectations for professionalism" of Doe. They simply point to Frost's report.

Also, Lovaglia was Doe's undergraduate professor. (Initial Brief at 3). He was not Doe's professor in graduate college, as Doe joined a different department. *Id.* The people who can offer evidence of Doe's professionalism are the professors in the Counseling Department, the graduate college that Doe had joined. Doe's advisor (and head of the Counseling Department at the time), Dr. Wadsworth, submitted a letter before the hearing supporting Doe's character in a professional setting based on his and all of Doe's professors' observance of him in two years. (*Id.* at 51)

For Complainant 1 sexual harassment claims, UI states that Doe "continually harassed and pursued her." (Answer Brief at 14). The conduct in question is Doe saying one time that he found it attractive that she has a sense of purpose. (App. 449; R. Doc. 179-4 at 245). She went and told Lovaglia about this. *Id.* Doe spoke about it in his deposition. (App. 336). The second incident was four months later, when Doe tickled Complainant 1 back on her side after she tickled him first; and she could not remember if she tickled him first. (Initial Brief at 20). After she failed to submit a lab project on time, and had an argument with Doe, she went and complained to Lovaglia about this tickle. Doe provided pictures before and after the incident. *Id.* At the hearing, she would

try to bring up Doe's humor at the end despite choosing to join Doe's improv comedy group. (Initial Brief at 47).

IV. THE DISTRICT COURT ERRED IN GRANTING SJ ON DOE'S TITLE IX CLAIMS

A. There are Genuine Issues of Material Fact as to Whether the Outcome of Doe's Case was Against the Substantial Weight of Evidence

UI argues that the TAC cannot support Doe's claims, despite being verified, citing case law that conclusory, non-specific allegations contradicting the evidentiary record should not be relied on. (Answer Brief at 45-46). Yet UI provides no example of such an allegation. And Doe built upon those allegations with 21 pages of facts he submitted during SJ. (App. 153-173; R. Doc. 185-2 at 1-21).

Complainant 1

Doe highlighted Lovaglia's testimony—omitted from Stevenson Earl's report—about the "mutual attraction" between Doe and Complainant 1, that Complainant 1 was initially OK but changed her mind later. (Initial Brief at 15). UI's response is that there is no evidence that Stevenson Earl did not consider these items in her investigation. (Answer Brief at 47). That is not the standard. During SJ, Doe cited *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 450 (2d Cir. 1999), to argue that the impermissible bias of a single individual with adequate influence may taint the entire process. (App. 176; R. Doc. 178-1 at 4). When DiCarlo and Redington recommended a harsher sanction, moving for a hearing, they only had the benefit of Stevenson Earl's report. (Initial Brief 36-38).

UI offers no meaningful explanation for important omissions from Stevenson Earl's report, other than saying that the reports were not dispositive. (Answer Brief at 48). Courts have rejected similar arguments that only decision-maker bias can support a Title IX violation. *Doe v. Texas Christian Univ.*, No. 4:22-cv-00297, ECF No. 40 (N.D. Texas, Apr. 29, 2022). Excluding exculpatory evidence from the report, on which the decision to proceed to a hearing was based, is

enough to create an issue of fact as to a clearly irregular investigative process. *See Rossley v. Drake Univ.*, 979 F.3d 1184, 1196 (8th Cir. 2020) ("[C]learly irregular *investigative* and adjudicative processes" may support a *prima facie* claim of sex discrimination (citation omitted) (emphasis added)); *Doe v. Univ. of Denver*, 1 F.4th 822, 836 (10th Cir. 2021) ("[W]here there is a one-sided *investigation* plus some evidence that sex may have played a role...it should be up to a jury to determine...") (emphasis in original)).

The District Court addressed none of the disputed facts about Stevenson Earl's exclusion of exculpatory evidence. UI tries to resolve this by stating that "there is no indication" that the Court did not review the arguments. (Answer Brief at 48-49). First, that is not the standard as these are disputed issues of material fact. The Court did not address them, and UI does not address them on appeal. UI essentially asks this Court to presume the District Court got it right as to several disputed issues of fact, with nothing from the Court to review and no argument from UI on appeal. Second, as shown below, to the extent the Court considered this disputed evidence, without addressing it, it improperly weighed the evidence.

The above discussion and volume of the record reveal the fact-intensive nature of discrimination cases. In Title VII cases, which are similarly fact-intensive, Courts have held that SJ is generally inappropriate. See *Keathley v. Ameritech Corp.*, 187 F.3d 915, 919 (8th Cir. 1999) ("This court has repeatedly cautioned that summary judgment should seldom be granted in the context of employment actions, as such actions are inherently fact-based."'). Courts apply Title VII standards in addressing Title IX cases. *Du Bois v. Bd. of Regents of Univ. of Minn.*, 987 F.3d 1199, 1203 (8th Cir. 2021); *Brine v. Univ. of Iowa*, 90 F.3d 271, 276 (8th Cir. 1996).

UI contends that Doe "repeatedly" mischaracterized testimony from the hearing and, as an example, discusses the testimony of R.C. (Answer Brief at 49-50). But what UI finds mischaracterization is a dispute over facts, inappropriate for resolution at SJ. Doe argued that R.C. testified that he did

not remember Complainant 1 telling him about the alleged breast-touching, and he "testified that it that probably would have stood out to him as a dramatic event if she had." (Initial Brief at 16-17).

Frost:	Did she specifically tell you that he touched her breast?
R.C.:	I can't remember, to be completely honest. That sounds like something that might have happened, and I feel like that sounds familiar, *but to be completely honest, I don't remember if that's what she said.*
Frost:	Do you think if she told you that it might have stood out in your mind as dramatic?
R.C.:	Probably.

(App. 587; R. Doc. 179-1 at 108)

UI's argument of Doe "repeatedly" mischaracterizing the evidence is that R.C testified that the breast touch "'sound[ed] like something that *might* have happened.'" (Answer Brief at 50). UI excludes what he says after that to explain away Frost's crediting R.C.'s testimony as supporting Complainant 1's allegations.

Neither the District Court nor UI on appeal addressed the rest of R.C.'s testimony, including his descriptors of Complainant 1 after the alleged incident: "calm," "tranquil," "not tense," "normal," and "looked fine" (Initial Brief at 17). Yet Frost excluded all this testimony from her report to find her "freaked," "shaken," and "confused." Neither the Court nor UI addressed that Complainant 1's roommate and best friend knew nothing about the kissing and alleged breast touch. (*Id.* at 18).

Doe also noted that Frost illogically excluded Lovaglia's testimony that the kiss between Doe and Complainant 1 was consensual because it was based on his "recollection." (*Id.* at 22-23). UI responds: "The District Court found this

explanation to be *reasonable*, given the *specifics* of Dr. Lovaglia's testimony, including his concession that Complainant #1 *may have indicated* it was consensual because she did not want to cause trouble within the SURG lab." (Answer Brief at 53) (emphasis added). First, Lovaglia explicitly testified that Complainant 1 told him the kissing was consensual.

Frost:	Did Complainant 1 during her meeting with you tell you that Doe had kissed her?
Lovaglia:	Yes.
Frost:	Did she tell you that it was a consensual kiss?
Lovaglia:	Yes.
Frost:	Did she tell you that he touched her breast?
Lovaglia:	I do not remember that.

(App. 602-603; R. Doc. 179-1 at 123-124)

Second, even as Frost would continually try to undermine this testimony, Lovaglia took the initiative by himself to "clarify" this issue:

Lovaglia:	First I'd like to clarify something.
Frost:	Thank you.
Lovaglia:	My recollection is -- and I really hope that I did not misunderstand her -- is that -- my recollection is that she conveyed the idea that *all* of that sexual behavior that occurred in Doe's apartment was consensual...

(*Id.*)

Frost nonetheless found Doe responsible for sexual assault – nonconsensual kissing,[2] and also for touching

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[2] Rather than using ordinary language, UI referred to kissing as "sexual touching" in their brief. (Answer Brief at 17). In 2020, the Dept. of

Complainant 1's breast without consent. (Initial Brief at 19). Frost excluded both parts of Lovaglia's testimony above based on the alleged "qualification" that it was based on his "recollection." (*Id.* at 22-23). The Complainants' testimony that Frost found credible was also based on *their* recollection. (*Id.*) Not addressing direct contradiction is clearly irregular, giving rise to inferences of discrimination. *Doe v. Oberlin Coll.*, 963 F.3d 580, 587 (6th Cir. 2020). UI had to articulate a legitimate, nondiscriminatory reason for not addressing such a contradiction. Frost's reasoning in her deposition that she excluded Lovaglia's testimony based on his recollection, even as she credited testimony based on Complainants' recollection, creates an issue of fact as to whether the outcome was "unexplained and against the substantial weight of the evidence as detailed in the complaint." *Doe v. Univ. of Ark.*, 974 F.3d 858, 864 (8th Cir. 2020). The District Court erred by weighing the evidence and, as UI argues, found Frost's rationale "reasonable." (Answer Brief at 53).

Doe addressed several other evidentiary issues that the District Court did not address (Initial Brief at 19-20), and UI does not address on appeal. UI sweeps these issues under a rug by arguing that the District Court did not err by failing to address "each and every one of [Doe's] allegations regarding Frost" because the Court made a general statement that it reviewed everything. (Answer Brief at 53 n.7). But the Court granted UI's motion for SJ, finding no issues of material fact. And all questions or inferences are to be reviewed in the light most favorable to the non-movant. It is not sufficient for the Court to address a couple of issues and simply say it had reviewed everything in making its ruling. UI does the same thing on appeal, unpersuasively addressing only a handful of them as "examples." A grant of SJ in a highly fact-intensive case such as this one requires far more than broad strokes, generalities, and blanket statements. *See Ameritech Corp.*, 187 F.3d 915, 919.

Education's new regulations have excluded kissing from the definition of sexual assault.

Doe argued that Keller went against his training by making his decision without reviewing the hearing transcript. (Initial Brief at 21). UI responds by saying that Doe "misstates" what Keller testified. (Answer Brief at 54).

> Question: Did you have access to the actual hearing transcript at the time you considered the appeal of Doe's disciplinary sanction?
>
> Keller: I don't believe I had access to the -- you know, the transcripts themselves. I had records -- access to records that were presented to me from the Adjudicator and from the investigator and from the dean of students.

(App. 237; R. Doc 179-6 at 5.)

The Court did not cite the allegations Doe made in his appeal to Keller (and Braun), or what Keller needed to consider, before concluding that Keller performed a "thorough review of the investigation and the Adjudication Decision" (R. Doc. 192 at 19). UI, however, explains the significant issues in the appeal as Keller: 1) not recalling receiving the hearing transcript (Answer Brief at 54), 2) not recalling Doe's allegation of Stevenson Earl changing the testimony of a witness 3 months later. (*Id.*) 3) not recalling Lovaglia's testimony of consent, although he found it to be "important information" during deposition. (*Id.* at 55).

On one hand UI states that Keller spent eight to ten hours reviewing the appeal (*Id.* at 29), yet also argues that he cannot remember Doe's most prominent allegations. A reasonable jury can find that he rubberstamped Doe's appeal, especially after he reviewed it within days of the media reporting how his actions led to a female filing a lawsuit against UI for sex discrimination. (Initial Brief at 35).

Complainant 2

Doe raised several issues about Stevenson Earl's investigation of Complainant 2's complaint, and the Court

addressed none. (Initial Brief at 24-26). Again, UI responds by saying that "there is no indication in the record that the District Court did not review and consider the arguments on those claims." (Answer Brief at 48-49).

Similarly, Doe set forth several issues about Frost's treatment of Complainant 2's complaint. (Initial Brief at 26-29). The Court addressed none. The only one addressed by UI is that Frost only credited Doe's account about Complainant 2 and him kissing when it allowed further violations. (Answer Brief at 52.) UI states that Doe did not cite the record on appeal, but he did. (Initial Brief at 32). UI did not provide a defense for this argument during SJ, but now argues that Frost found that Doe still violated UI policy because he did not ask permission before kissing Complainant 2. (Answer Brief at 52). Doe addresses this exact issue in his TAC. (App. 42; R. Doc 57 at 28). First, verbal consent is not the only requirement. (*Id.*) Second, Complainant 2 did not allege that they kissed. Thus, Frost accepted Doe's testimony over Complainant 2's only when it supported the allegations against him.

Finally, Doe provided a chart of the entire hearing in his TAC to show that the finding was against the weight of the evidence. (*Id.* at 45; *Id.* at 31). UI only seemed to object to is whether RC's testimony was accurately summarized, and Doe addressed that issue above.

D.L. did not know about the incident when asked about it first, and Stevenson Earl allowed him to change what he said three months later without mentioning it. (Initial Brief at 16).

B. There are Genuine Issues of Material Fact as to Whether External Pressure on UI Influenced the Sex Discrimination

UI makes the blanket statement that the policy changes at UI sought to address sexual violence regardless of sex. (Answer Brief at 58). This argument ignores the many sex-specific policies implemented by UI. (Initial Brief at 33). The list includes: (1) creating various services for women; (2) adding a van for Nite Ride, an evening transportation service,

later found by the Iowa Civil Rights Commission to have engaged in sex discrimination by prohibiting men from using it; and (3) sponsoring a "sex-assault summit," focusing just on "men," where Redington was one of the speakers. (*Id.*) Doe also addressed that (4) UI's Rape Victim Advocacy Program ("RVAP"), Administrators, and students rallied around women's cries for action focused on "men," "masculinity," and the need for "healthy masculinity," all while talking about sexual assault. (*Id.*). UI then (5) sponsored programs about how masculinity "impact[s] rape culture and perpetuates an overall culture of violence. RVAP (*Id.* at 42) (6) defined "rape culture" as "a complex set of beliefs that encourages male sexual aggression and supports violence, especially against women and children." (*Id.*) These are six sex-specific policies and discussions that provide the backdrop against which Doe's investigation, adjudication, and appeals were held.

UI argues that *some* OCR investigations and lawsuits against UI did not involve sexual misconduct. (Answer Brief at 58-59). But investigations and lawsuits involving sex discrimination *against women* allow a reasonable factfinder to infer discriminatory intent underlying procedural irregularities or other inconsistencies in processes. *Doe v. Baum*, 903 F.3d 575, 591 (6th Cir. 2018). When the OCR put the universities' federal funding on the line, it did not distinguish between the types of sex discrimination it would allow or not allow. The media did not distinguish it either – grouping all sex discrimination lawsuits against UI at the time to show UI's alleged mistreatment of women (App. 138-139; R. Doc 102 at 99-10.)(Initial Brief at 35) Whether this pressure created an issue of fact as to external pressure on UI is for a jury to decide.

UI does not address that while Doe was appealing his expulsion to Keller, the media reported that his handling of a sexual assault claim against a male graduate student led to a lawsuit. (Initial Brief at 35). The lawsuit alleged that UI's response did not address "biases that can lead to institutional hostility against *female* accusers and support for perpetrators." (*Id.*) (App. 54; R. Doc. 57 at 40) (emphasis

added). Within days of the report, Keller would review Doe's appeal. (App. 172; R. Doc. 185-2 at 20). The District Court addressed none of this except the lawsuits not involving sexual assault. (R. Doc. 192 at 20-21).

C. There are Genuine Issues of Material Fact as to Whether Sex was a Motivating Factor in Disciplining Doe

1. DiCarlo and Redington

UI argues that DiCarlo and Redington's *only* substantive input was the sanction. (Answer Brief at 61). Yet that one "recommendation" elevated this case from UI's lowest sanction recommended by Stevenson Earl to Doe being expelled, the most severe sanction, without explanation. Redington provided no explanation even though UI policies required her to do so (Initial Brief at 48), and DiCarlo failed to give an explanation based on UI policies during her deposition. (*Id.* at 38).

DiCarlo held discussions and meetings hoping to quell students' concerns on inadequate responses to sexual misconduct while Doe's investigation was ongoing. (*Id.* at 37). Within two weeks of being named as a member of a 14-person committee tasked with avoiding further lawsuits brought by *women* in response to civil rights violations (*Id.* at 38), DiCarlo would send a message to Stevenson Earl, an investigator of 15 years, to meet with her about changing her recommended sanction. Stevenson Earl then updated the sanctions. (*Id.*) UI does not respond to this. Thus, DiCarlo's "recommendations" were made against the backdrop of lawsuits against UI. There is enough evidence for a jury to find that this recommendation was biased and influenced the outcome. Also, after the hearing, DiCarlo became further involved by advising Redington to expel Doe. (*Id.*) That Redington then failed to explain why she chose expulsion when required by UI policies only provides more evidence of this biased influence. (*Id.*) UI addresses none of this.

2. Frost

Doe argued that Frost asking Complainant 2 if she feared Doe punching and hitting her constituted sexual stereotyping. (Initial Brief at 39). UI counters that Frost wanted to be sure Complainant 2 had no "physical concern" because "physical violence or intimidation" are factors to consider under UI's policies. (Answer Brief at 64). This argument amplifies Doe's argument. Physical violence comes under a *different* UI policy, under which Doe was not charged. There was no suggestion from either Complainant of any physical violence or intimidation. Yet Frost found it necessary to question Doe about it, just to "make sure." Would Frost also ask questions about other UI policies such as cyberstalking? Just to be sure? The District Court did not address this. Whether this, when taken as a whole, with other instances of sex bias, shows discrimination, is a question for a jury to resolve.

The Court and UI explain that, in a subsequent case, Frost used the term "young man's fantasy" rather than merely "fantasy." (Answer Brief at 65). This distinction does not render the material fact undisputed. Doe emphasized that the subsequent case was remarkably similar to his case. (Initial Brief at 43). And Doe is a young man. To call a young man's account "fantasy" while crediting the woman's account, despite the litany of inconsistencies and misrepresentations by Frost, reeks of sex discrimination. In SJ, UI never provided a defense for this, and only said that their lawyer's admission to the OCR of this language being "concerning" was not an admission of Frost's pattern of discrimination. *Id.* In his Board appeal, Doe warned Frost that such language of "fantasy" is stereotypical and could violate OCR standards. (*Id.* at 44). In a similar situation in the subsequent hearing, she used it again, calling it a "young man's fantasy." OCR then initiated the subsequent investigation. (*Id.*) There is at least "some evidence that sex may have played a role in a school's disciplinary decision, [as such] it should be up to a jury to determine whether the school's bias was based on a

protected trait or merely a non-protected trait that breaks down across gender lines." *Univ. of Denver*, 1 F.4th at 836.

UI argues that the Court was not making a credibility determination but simply determined that the "fantasy" language was Frost's credibility determination. (Answer Brief at 65 n.11). But the Court had to decide that the credibility determination was not only reasonable, but that when all evidence Doe provided of sex discrimination against UI is taken in its entirety and viewed in the light most favorable to Doe, "the evidence could not support any reasonable inference of discrimination." *Breeding v. Gallagher and Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999) (citations and quotations omitted). *See also Univ. of Ark.*, 974 F.3d 858, 864 ("Federal courts are not a forum for general appellate review of university disciplinary proceedings. *But Title IX places a specific limitation on the authority of educational institutions that receive federal funds*"); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995).

UI spills much ink distinguishing *Doe v. Wash. & Lee Univ.*, No. 6:19-cv-00023, at *26 (W.D. Va. 2021), based on its facts. (Answer Brief at 63). But the holding is relevant: Courts consider biased assumptions about sex to be evidence of a motivating factor. UI argues that Frost's questioning was "plainly aimed at assessing Doe's claim that he maintained friendships with both Complainants." (*Id.*). First, UI did not argue this below, where they simply stated that the facts did not rise to the discrimination found in *Doe v. Marymount Univ.*, 297 F.Supp.3d 573 (E.D. Va. 2018).

Second, the point is not that Doe maintained a friendship with the Complainants; Doe was not the one alleging sexual misconduct. While alleging unwanted attention from Doe that made them uncomfortable, both Complainants continued to pursue a friendship with *him* after he allegedly assaulted them. Complainant 1 even joined *his* improv group after this alleged sexual assault and *after* Doe sent her a text to "leave me alone." (Initial Brief at 39). Frost should have resolved the contradictory evidence. Yet she does not even mention it in her report. (*Id.*). A reasonable jury could find

that Frost's assumption that Doe would be pleased with Complainant 1 joining his improv group, despite evidence pointing to the contrary, constituted a biased assumption of gender. It is also "surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, thus providing additional threads of evidence that are relevant to the jury." *Bevan v. Honeywell, Inc.*, 118 F.3d 603, 610 (8th Cir. 1997) (citations and quotations omitted).

UI also states that Doe accused Frost of sexism. (Answer Brief at 32). But Frost first asked Doe's friend, S.B., whether Doe makes sexist comments (App. 47; R. Doc 57 at 33) – an odd, stereotypical, question since she refused to ask questions about Complainants' character. Doe responded to Frost's question in his appeal, finding it ironic she would ask such a question, given her "view" of males. (App. 42; R. Doc 57 at 28). He never called Frost, as a person, sexist.

3. Keller

UI argues that Doe mischaracterized Keller's testimony by emphasizing gendered language while, in *context*, Keller's "focus" was on age and experience. (Answer Brief at 66). First, even in quoting Keller, UI includes the gendered language of "younger women" (*Id.*) and not just "younger student." Second, "context is a proper consideration for the jury." *U.S. v. Schafrick*, 871 F.2d 300, 304-05 (2d Cir. 1989). Third, even assuming Keller's focus was on age and his own analysis of consent (which was the third factor he used), "evidence of additional motives, and the question whether the presence of mixed motives defeats all or some part of plaintiff's claim, are trial issues, not summary judgment issues." *Griffith v. City of Des Moines*, 387 F.3d 733, 735 (8th Cir. 2004).

UI did not respond to another aspect of Keller's sex bias: his testimony that a woman may consent to sexual conduct and then withdraw that consent after the fact. (Initial Brief at 41). Here, Complainant 1 consented to sexual conduct with Doe and then withdrew that consent *five months later*, resulting in, under Keller's logic, a sexual assault. (*Id.*).

UI repeats the Court's argument that Keller's discussion of sex was prompted by Doe's counsel. (Answer Brief at 66). Before the deposition, Doe already knew that Keller's decision in a case involving sexual assault allegations against a male graduate student led to a lawsuit filed by a female student. Thus, Doe wanted to know whether sex was a motivating factor when deciding his case. Keller gave no rationale for why he denied Doe's appeal. Thus, his answers in deposition are particularly important since "[t]here will seldom be 'eyewitness' testimony as to the [appeal officer's] mental processes." *Gaworski v. ITT Com. Fin. Corp.*, 17 F.3d 1104, 1108 (8th Cir. 1994). Keller was given a chance to "correct" his testimony and "add anything else to that factor" of sex to provide context. (App. 242, R. Doc 179-6 at 10). He declined. *Id.* Thus, sex played a part in Keller's decision. *Wagner v. Jones*, 664 F.3d 259, 271 (8th Cir. 2012). In fact, it was direct evidence of discrimination.

The District Court found that "A reasonable jury could not find Keller's narrow statement about why he did not consider the testimony of one witness as sufficient evidence that sex bias motivated the University to expel Doe." (R. Doc. 192 at 20) Doe argued that this was the wrong standard. (Initial Brief at 45). UI did not respond. This Court has found that under the motivating factor standard, a "plaintiff need only prove that the [appeal officer's] discriminatory motive *played a part* in the adverse [disciplinary] action." *Wagner*, 664 F.3d 259, 271.

4. UI's Statements and Patterns of Decision-making

UI repeats some of DiCarlo's statements that show sex bias, arguing that "[t]his is but one part of the University's overall effort to address the issue of sexual violence on campus." (Answer Brief at 68). First, DiCarlo refers to sexual assault statistics before stating that her office needed to provide "programming" for "healthy masculinity." (Initial Brief at 47). Second, UI has already shown a pattern of discriminatory attitudes toward male survivors of sexual assault. After protests, they added a van, which the Iowa Civil Rights

Commission found to have engaged in sex discrimination by prohibiting men from using it. (*Id.* at 33) A reasonable jury could find that allegations of UI's institutional bias against females pressured them to then have an institutional bias against males.

Remarkably, UI replaced facts Doe cited in this section with facts they appear comfortable arguing against. (Answer Brief 68-69). They replaced Doe's arguments about UI's RVAP's programs and their definition of "rape culture," which rely heavily on gendered language, with facts Doe cited at the motion to dismiss stage, where he only needed to show pressure from the Dear Colleague Letter along with specific bias.

D. UI's Failure to Follow its Own Policies Show Clearly Irregular Investigative and Adjudicative Processes

UI addressed none of these arguments on appeal (Initial Brief at 47-48), nor did the District Court address them.

V. THE DISTRICT COURT ERRED IN DISMISSING DOE'S PROCEDURAL DUE PROCESS CLAIM

A. Frost and Cervantes Are Not Entitled to Qualified Immunity

Doe alleged: "Frost falsely and arbitrarily found Doe responsible for an 'educational leadership role,' even though the investigation concluded that he had no such role in the Lab either directly or indirectly. In making such determinations, she raised additional claims not included in the original notice of the hearing." (App. 44; R. Doc. 57 at 30). Doe repeated and re-alleged the allegation under § 1983 procedural due process. (*Id.* at 64; *Id.* at 50). UI then decided against moving to dismiss the claims against Frost. Doe argued this in his resistance. (Appellees' App. 190; R. Doc. 87 at 16), and UI responded, in their reply, that they concede Doe has alleged sufficient 'facts' against Frost to maintain his § 1983 claims against her then. (Appellant Supp. Appx. At 12; R. Doc 89-1 at 12). UI's concession conveyed that there were at least factual issues to be addressed as to this claim,

and that the District Court should resolve this in the SJ stage. But the Court erred when it wrote that UI moved to dismiss claims against all Defendants. (R. Doc 106 at 6). It did not include the citation of Appellees concession. (*Id.*)

In their reply brief, UI stated that they did not understand what Doe meant by "educational mission" despite not arguing this in their motion to dismiss. (Appellant. Supp. Appx. at 16; R. Doc 89-1 at 16). UI's new argument in their reply brief misled the Court since that language came directly from Frost's report. (Initial Brief at 54).

On appeal, UI attempted to dismiss this part of Doe's appeal, which this Court denied. (Entry ID 5131840). UI now argues that "*If* the District Court had engaged in additional analysis of Doe's adequate notice claim" it would have dismissed it. (Answer Brief at 72). Doe disagrees, but UI argues almost the entire section for the first time. *Roth*, 27 F.3d 1303, 1307 ("If a party fails to raise an issue for resolution by the district court . . . that issue may not be raised before this court."). UI also argues that Doe cannot challenge the charge adjudicated against him because it was nonsensical and incomprehensible. (Answer Brief at 69). As seen below, that argument, which is itself nonsensical and incomprehensible, cannot prevail.

UI's policies for sexual misconduct track 34 C.F.R. § 106.30: 1) Quid Pro Quo ("Submission or consent to the behavior is believed to carry consequences for another person's education, employment, on-campus living environment, or participation in a University program or activity"); 2) Unwanted conduct ("The behavior has the effect of limiting or denying another person's work or educational performance or creating an intimidating, hostile, or demeaning environment for employment, education, on-campus living, or participation in a University program or activity. Examples of this type of sexual harassment can include persistent unwelcomed efforts to develop a romantic or sexual relationship"); 3) Sexual assault. (Appellees' Appx. 5-6)

Like 34 C.F.R. § 106.30, each is a separate and distinct category. Quid Pro Quo or impermissible power difference is

analyzed under the "Consensual Relationship Involving Students" Policy, ("CRISP") which provides the elements of that charge. CRISP states that "any romantic and/or sexual relationship between an *instructor* and a student in an instructional context is prohibited at The University of Iowa . . . . [A]n *instructor* who is currently *instructing*, *evaluating*, or *supervising*, directly or indirectly, a student's academic work or participation in a University program will not propose or enter into a romantic and/or sexual relationship with the student." (emphasis added). *See* Consensual Relationships Involving Students | Operations Manual, uiowa.edu, https://opsmanual.uiowa.edu/community-policies/consensual-relationships-involving-students (last visited May 2, 2022).[3] (App. 427-428; R. Doc 179-4 at 223-224). Whether there is an impermissible power difference in a relationship is a conclusion to be reached upon finding he conduct satisfies the elements of the CRISP charge. (*Id.*).

Doe is entitled to "adequate notice, *definite* charge, and a hearing..." *Jones v. Snead*,431 F.2d 1115, 1117 (8th Cir. 1970). This notice of charges allows him (and all parties) to know the elements of a charge. *See Cokeley v. Lockhart*, 951 F.2d 916, 920 (8th Cir. 1991) (describing two distinct and separate sexual activity charges require different proof for each element); *Scoggin v. Lincoln Univ.*, 291 F. Supp. 161, 163 (W.D. Mo. 1968) ("planning and/or participating in a demonstration which led to destruction of University property on Wednesday, October 18, 1967, at the Student Union Building" was held to be inadequate because it failed to distinguish between those acts of planning and participation).

Knowing the charges and its elements provides Doe an opportunity to prepare for the hearing. *See Navato v. Sletten*, 560 F.2d 340, 346 n.9 (8th Cir. 1977) ("the fair opportunity to be heard required by procedural due process contemplates that the student be given adequate time to respond to *any* matters in issue..."); *Flaim v. Medical Coll. of Ohio*, 418 F.3d

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[3] UI provided a website link to all their policies in their brief, except CRISP – the policy in question.

629, 638 (6th Cir. 2005) ("meaningful opportunity to prepare for the hearing."); *McGhee v. Dram*, 564 F.2d 902, 911 (10th Cir. 1977) ("A hearing where the plaintiff was faced with such a blast of complaints, and not knowing which incidents she needed to discuss, did not satisfy due process.").

Doe did not sue Redington here, who provided him with the charges for the investigation. But he sues Cervantes, who provided him with the charges for the hearing. Redington charged Doe under Rule 13 of the Code of Student Life, which merely states that it requires that students observe all University policies. (Appellees Appx. At 49-50). But Redington then provided Doe with the *specific* charges under Rule 13. *See Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961). These included sexual assault, sexual harassment, and CRISP. (*Id.*) Stevenson Earl then *dismissed* the CRISP charge based on this alleged educational leadership role. (Initial Brief at 52-53). For the hearing, Cervantes also charged Doe under Rule 13, but only included sexual assault and sexual harassment. Notably, she does not mention CRISP. (*Id.* at 52-53)

At the hearing, Frost recited the charges: "Sexual harassment is a form of discrimination . . . that the behavior is unwelcome and meets either of the following criteria. *The appropriate criteria here appears to be that the behavior has the effect of limiting or denying another person's work or educational performance by creating an intimidating, hostile, or demeaning environment for employment, education, on-campus living, or participation in a university program or activity."* (App.487; R. Doc 179-1 at 7) (emphasis added). Frost expressly mentioned the second criterion under UI's sexual misconduct policies and excluded the first criterion – quid pro quo – the one based on power difference and the one Stevenson Earl dismissed. Thus, Frost, understood what the scope of the charges were. And the hearing must be confined in scope to the charges as clarified in the notice. *Strickland v. Inlow,* 519 F.2d 744, 717 (8th Cir. 1975) on remand from *Wood v. Strickland*, 420 U.S. 308 (1975) ([i]gnorant of the scope of the matter under consideration, [the students']

opportunity to present their side of the case was rendered meaningless").

Frost's conclusion must rest solely on the legal rules adduced at the hearing. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). But she found Doe responsible for an educational leadership role, one which affects the educational mission of Complainants. (Initial Brief 53-54). Frost used the alleged role of an educational leadership position, which Doe did not have, as a base for the argument that there was a power difference. (Answer Brief at 27)

Frost's intentional and reckless application of CRISP without mentioning its name made this confusing. (*Cf.* Frost's usage of the language of "educational mission" in her report *with* CRISP: "The integrity of the University's *educational mission* is promoted by professionalism that derives from mutual trust and respect in *instructor-student* relationships."). UI would then exploit this confusion by stating below that they do not understand what Doe meant, when Doe was using Frost's language in her report. Still, UI confirmed that Doe's allegations were sufficient at the motion to dismiss stage, and further development of the record was needed to address this complicated issue.

In SJ, UI confirms that Frost's finding was based on the charge that Stevenson Earl dismissed. (Initial Brief at 54). UI argued below that the lack of notice was acceptable because Frost provided reasoning for why she found Doe responsible. (App. 144; R. Doc. 129-1 at 15). That reasoning is baseless; Doe denied it in his appeal, and Stevenson Earl's report agrees. But even assuming the reasoning was sufficient, 1) Doe was ignorant that Frost, by herself, expanded the scope under consideration. *Inlow,* 519 F.2d 744, 717; and 2) Sustaining a conviction claiming that the evidence supports a charge not made undermines the purpose of providing definite charges and is a sheer denial of due process.

CRISP, which prohibits impermissible power difference, provides explicit examples, none of which Doe fits into. Under CRISP, a *professor* can even be in a sexual relationship with a *student*, and it still would not be considered an

impermissible power difference sufficient to find "coercion," as Frost found here, unless that professor is grading them in that or a future term.

Frost could not find Doe responsible for impermissible power difference as Doe was not an instructor, and he provided evidence to the District Court that he lacked the authority over the Complainants grades, exams, or course work and that Complainants even knew that. *Lam v. Curators of the Univ. of Missouri*, 122 F.3d 654, 657 (8th Cir. 1997); (Initial Brief at 19). *See also Rowinsky v. Bryan Indep. Sch. Dist*, 80 F.3d 1006, 1011 n.11 (5th Cir. 1996) ("In the context of two students, however, there is no power relationship, and a theory of respondeat superior has no precedential or logical support."). Said differently, for there to be an impermissible power difference, Doe would have to have some power over the Complainants, which he did not have, and promise the benefit of better grades based on sexual advances, which he could not do.

The power difference finding from Doe's supposed educational leadership role was prejudicial to Doe. When Keller was asked about facts relating to consent, he did not address those questions on their merits. Instead, he brought up power difference, finding this a factor against reversing or remanding Frost's decision.[4] (App. 224; R. Doc 187-1 at 22).

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[4] CRISP is Constitutional because it allows sexual autonomy among adults. But after Keller's responses of age being a power difference, his own unheard-of definition of affirmative consent, Doe cited *Lawrence v. Texas*, 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) arguing that neither Keller nor UI had the power to create a government "approved method of sexual intimacy." (Appellees' Appx. At 454). UI now states that Doe was 26 years old. But the Complainants were adults, and studies show that globally, there is an age difference in relationships. *See* Jacob Ausubel, *Globally, women are younger than their male partners, more likely to age alone*, Pew Research (2020), https://www.pewresearch.org/fact-tank/2020/01/03/globally-women-are-younger-than-their-male-partners-more-likely-to-age-alone/ (last visited Apr 30, 2022). The South Asian culture that Doe grew up in has an average age difference of 8 years. *Id.* Doe is not appealing the District Court's

UI is treating this as they would have had Doe been given notice of the CRISP charge, and Frost then found that it satisfies all the elements of that charge. Such is Kafkaesque and is exactly what procedural due process protects against. Since the Court dismissed this at the motion to dismiss stage, it refused to review it in SJ. (Initial Brief at 54).

B. Frost Conducted Fundamentally Unfair Questioning

On the questions Frost refused to ask, UI makes the blanket statement that "[v]arious of these questions are confusing, objectionable, or completely irrelevant." (Answer Brief at 76). First, UI references only one line of questions and does not explain how it is "confusing, objectionable, or completely irrelevant." UI references none of the other questions, nor show how the specific questions Doe presented were irrelevant or immaterial. Second, even the question UI references, the height differential between Doe and Complainant 1, was relevant. (Answer Brief at 50). Complainant 1 is taller than Doe and had to bend down to kiss him, which is pertinent to consent and how that played out during the incident.

UI argues that Frost addressed the "thrust" of Doe's clearly relevant questions in other ways. (Answer Brief at 76-77). Doe presented Frost with friendly text messages between Doe and Complainant 1. One of the requested questions was about text messages Complainant 1 sent Doe *three days* after the alleged assault, being friendly and playful. (Initial Brief at 18). The example UI gives of Frost addressing the "thrust" of Doe's questions is her asking Complainant 1 if she sought to remain "lighthearted" with Doe after the alleged incident, and if she "tr[ied] to pretend nothing had

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dismissal of his substantive due process claim - the issues here were caused by a lack of notice of the specific charges and knowingly violating Doe's rights under procedural due process, which he appeals.

happened."[5] (Answer Brief at 51). This is a far cry from *initiating* friendly banter with Doe at 1 a.m. right after the alleged assault, considering Frost found her "freaked" and "shaken" then. Doe's questions are more probative of the charges than simply asking if she tried to remain "lighthearted" in a five-month period, during which she also joined Doe's improv comedy group. Doe also requested questions related to specific text messages Complainant 2 sent to Doe demanding *him* to come to Lab at night (*Id.*), and UI does not respond to whether this addressed the "thrust" of Doe's requested questions. Even so, this is a determination for the jury.

UI argues: "Doe rests on his erroneous assumption that the Adjudicator was required to ask all of the questions he wanted her to ask in exactly the way that he wanted her to ask them." (Answer Brief). This is a straw man argument; Doe never made such an argument. Frost's questioning was insufficient as she refused to ask material questions and pertinent follow-up questions (whether they were or were not material was a question for the jury). Frost promised to ask all questions given to her before the hearing, and she falsely wrote in her report that she asked all questions except two. (App. 157; R. Doc. 185-2 at 5).

UI then presumes that refusing to ask Doe's questions did not violate his rights because Frost had discretion under UI's SJP. (Answer Brief at 77). First, discretion can be abused, which violates due process. "Questioning by the panel could be insufficient in a given cas[e]." *Univ. of Ark.*, 974 F.3d at 868. Second, that UI's policy grants discretion does not make it constitutional.

Citing *Baum*, 903 F.3d 575, 581, UI then, inexplicably, claims that federal courts "have generally approved the practice of questioning complainants in student misconduct hearings via an adjudicator or hearing panel rather than a

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[5] Frost asked the compound question: "Did you laugh with him? Did you joke with him? Did you try to pretend nothing had happened?" Complainant 1 responded only to the last question, and Frost did not follow up on the first two.

courtroom-style cross-examination by an attorney or the accused student." (Answer Brief at 77-78). But in *Baum*, 903 F.3d 575, the Court, in the first paragraph of the opinion, said that "if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder." Doe requested the District Court to conduct a fact-based inquiry on adequate process (App.190-191; R. Doc 178-1 at 18-19), much like what the Dept. of Education had done before releasing the final regulations in 2020. He never requested cross-examining the Complainants himself or for it to be "courtroom-style."

Questioning through an attorney or advisor, would allow all relevant questions to be asked, improving the accuracy of the proceeding, and reducing erroneous deprivations. It would also not cost UI anything since Doe retained his attorney. Doe also did not object to UI putting a room divider so that the Complainants did not see him to reduce any possible discomfort. But the purpose of a hearing is truth-finding, not therapy as UI's publicly announced, and relevant questions need to be asked. Along with other universities in the country, UI has since provided such protections since 2020.

In arguing that there are no examples of Frost treating Doe unfairly, UI cited Frost's deposition, where she noted that she had "found for an accused student in at least one of the three or four cases she had heard for the University at the time." (Answer Brief at 79). But one of them resulted in a lawsuit and another in an OCR investigation. Both involved claims of discrimination against males. This example says nothing about Frost treating Doe fairly.

Doe's citation in his initial brief shows how she treated parties substantially differently regarding questioning. (Initial Brief at 57). Frost cross-examined Doe on kissing allegations not made and found him responsible for it. (App.42; R. Doc 57 at 28). UI admits that Frost asked Doe "pointed" questions. (Initial Brief at 57). Yet she refused to ask

Complainants relevant questions related to the charges made against Doe that would clear his name.

CONCLUSION

Summary judgment is "an extreme remedy and should not be entered unless the movant has established its right to a judgment with such clarity as to leave no room for controversy and unless the other party is not entitled to recover under any discernible circumstances." *Kegel v. Runnels*, 793 F.2d 924, 927 (8th Cir. 1986). Based on the discussion above, it cannot be said that UI has reached this burden. The District Court erred by granting SJ on Doe's Title IX claims. It also erred by dismissing Doe's § 1983 procedural due process claims against Frost and Cervantes, and other Appellees in their official capacities. Thus, this Court should reverse the District Court's rulings or, at the very least, vacate and remand for further proceedings.

Respectfully Submitted,
/s/ Rockne Cole
ROCKNE O. COLE
Cole Law Firm, PC
209 E. Washington, Ste. 304
Iowa City, IA 52240
(319) 519-2540
(319) 359-4009 Fax
rocknecole@gmail.com
Attorney for Appellant

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

John Doe, Plaintiff; v. **University of Iowa et al.** Defendants.	Case No. 3:19-CV-00047-RGE-HC **Plaintiff's Amended Statement of Additional Material Facts** **(Summary Judgment)**

Plaintiff respectfully submits the following amended additional material facts along with admissions Defendants made in their reply to Plaintiff's brief. *See* Pl. Appx. Vol. 7, p. 82.

Flaws in the Investigatory Process

1. Training materials state that the Sexual Misconduct Response Coordinator and Title IX Coordinator, Defendant DiCarlo, plays as a matter of UI policy, two conflicting roles in providing support to alleged victims and to recommend sanctions. Pl. Appx. Vol. 5, p. 35, 37; Defendant's Summary Judgment Appendix. As this is from UI's training materials, this information was not part of the UI Student Judicial Process documents provided to Plaintiff before the hearing.

2. Training materials state that the Dean of Students, Defendant Redington, is to consult with Sexual Misconduct Response Coordinator as needed to assess potential threats to campus or individual safety to determine course of action. In this role of consulting with Sexual Misconduct Re-

sponse Coordinator and determining a course of action, the Dean of Students determines the final sanction after adjudication in the first instance and has *de facto* unilateral power to alter an investigator's report and suggested sanctions. The Dean of Students particularly: "[a]ppoints the adjudicator and charging officer; [h]olds pre-hearing meetings with each party to describe the hearing process and determine the need for a partition; [and i]f the responding party is found responsible, imposes sanctions[.]" Pl. Appx. Vol. 5, p. 40.

3. Stevenson Earl was assisted in the Investigation by Schriver Cervantes; deposition testimony is contradictory as to Schriver Cervantes's role was. Pl. Appx. Vol. 6, p. 89; Pl. Appx. Volume 6, p. 139.

4. Plaintiff maintains that both Stevenson Earl and Schriver Cervantes participated actively in questioning him. *See* Third Amended Complaint ¶ 139.

5. Stevenson Earl was copied in the notice of allegations for both Complainants. She had evidence that what Complainant 2 shared during her initial meeting, as stated in the notice of allegations and the narrative by the end of her second interview, were inconsistent. Pl. Appx. Vol. 2, p. 110.

6. Stevenson Earl exercised complete discretion in her duties and could interview or not interview whomever she chose and omit or include any evidence proffered by the witnesses. Pl. Appx. Vol. 5, p. 37.29

7. Stevenson Earl chose not to interview the only potential firsthand witness of the events relating to Complainant 2 besides Plaintiff and Complainant 2. Plaintiff provided the witness's name, a UI custodian, so that she can interview him but chose not to do so without explanation. Pl. Appx. Vol. 7, p. 15-16. Complainant 2 did not tell Stevenson Earl to contact him. This witness could have proven critical in determining credibility as Complainant 2 and Plaintiff 's version of events differ as to where they were and what they were doing when the UI custodian walked in.

8. Stevenson Earl further chose not to interview a waiter, who could have provided testimony that would have went to the rapport that existed-and the friendly relations-of Complainant 2 and Plaintiff. Her own notes show that she was provided with his phone number. Pl. Appx. Vol. 3, p. 99. Such would have contradicted testimony that Complainant 2 was exceedingly uncomfortable being alone with Plaintiff.

9. Stevenson Earl chose not to interview any students with firsthand knowledge of the relationships between Plaintiff and Complainants-EC, and other lab members-could have testified both to Plaintiff 's authority, or lack thereof, and the friendly relations of Plaintiff and Complainants. Pl. Appx. Volume 6, p. 181.

10. Had Plaintiff known the nature of the investigation and its flaws, Plaintiff would have cross-examined Stevenson Earl. Pl. Appx. Volume 6, p. 175.

11. In her report, Stevenson Earl omitted that Complainant 2 stated, "I think we ended up joking about it because I didn't , take it so seriously at the time[,]" when describing the incident to a friend, immediately after the alleged incident. Pl. Appx. Vol. 3, Page 24.

12. In her report, Stevenson Earl omitted disinterested third-party testimony relating to consent. Specifically, Dr. Lovaglia mentioned during the investigation that what occurred between Plaintiff and Complainant 1 was "mutual" and she only "changed her mind about the relationship" later. Pl. Appx. Vol. 3, p. 9.

13. In her report, Stevenson Earl omitted facts that could show an ulterior motive for reporting sexual misconduct: Complainant 1 and Plaintiff had a disagreement immediately prior to Complainant 1 complaining to Dr. Lovaglia in February relating to her signing in for "lab" hours improperly and failing to complete data entry for a study Plaintiff was conducting. *See e.g.,* Pl. Appx. Vol. 3, p. 48.

14. Evidence shows that Complainant 1 repeatedly failed to submit Lab group work on time. This resulted in heated email exchanges and texts immediately prior to the

February complaint, and Stevenson Earl ignored this information in her analysis. *Id.*

15. Plaintiff told Stevenson Earl that he believed that the above information was critical in presenting an alternative motivation for filing the complaint; however, Stevenson Earl summarily did not give weight to this information and fails to note it in her report concluding: she has "no basis to conclude that Complainant was not truthful in her account of her interactions with Respondent." Pl. Appx. Vol. 4, p. 249.

16. Complainant 1 had admitted to Stevenson Earl that she both received credit for hours she purported to work in the Lab and that Plaintiff 's questioning her work ethic upset her. Pl. Appx. Vol. 3, p. 30.

17. Stevenson Earl excluded information from her report that Complainant 1's boyfriend did not report Doe touching Complainant 1's breast during his initial interview when he provided information on what he knew. He only purported to recall this in a short phone call interview with Stevenson Earl three months later. Pl. Appx. Vol. 3, p. 3.

18. Plaintiff clarified both in his appeal and deposition that how the boyfriend of Complainant 1's facts was written was highly suspicious and said that when Plaintiff 's friend provided further details later, Stevenson Earl wrote about it in her report. Pl. Appx. Vol. 3, p. 88.

19. Stevenson Earl made the following note and then omitted it from her final findings: "The Investigator asked Complainant 2 in this interview why she came forward, and during this time she replied, "Came forward b/c *after talking to Complainant 1*, Doe was crossing line b/c of lab/student relationship." Pl. Appx. Vol. 7, p. 119.

20. Stevenson Earl ignored multiple inconsistencies in Complainant 2's accounts and concluded that she had "no basis to conclude that Complainant was not truthful in her account." She discredited Doe because his account "was extremely different from [Complainant 2's] account." Pl. Appx. Vol. 4, p. 249.

21. Plaintiff in deposition stated that he found this style of credibility determination arbitrary and ultimately damning: if he were to be found credible, his account would have needed to have been consistent with Complainant 2's, i.e., he would have been found responsible; if his account were different, it would be less than credible, and he would be found responsible. Pl. Appx. Volume 6, p. 202

Dean of Students and Title IX Coordinator Interfered with the Investigatory Report

22. Defendant DiCarlo, UI's Title IX Coordinator, and Sexual Misconduct Response Coordinator, supervised training and had responsibilities to "strengthen response readiness to dating/domestic violence reports through review of UI policies, procedures, and to response protocols and provide recommendations to the president." She also made decisions regarding how UI policies would be implemented, including making statements with UI President Harreld, about UI Title IX policies. See https://osmrc.uiowa.edu/sites/osmrc.uiowa.edu/files/wysiwyg_uploads/AVC%20Booklet%20final%20%28digital%20version%29.pdf

23. Defendants DiCarlo and Redington influenced defendant Stevenson Earl's ultimate findings of fact. *See generally* Pl. Appx. Vol. 3, p. 185; Pl. Appx. Vol. 4, p. 1, 32, 60, 107, 131, 163.

24. But for the interference of both DiCarlo and Redington, Stevenson Earl's original recommendation for only a reprimand, the lowest possible sanction a student can receive for sexual misconduct, despite her erroneous report, would have stayed in place, and Plaintiff would have never moved on to a formal hearing— he would have never faced expulsion as a possible sanction. *Id.*

25. The record demonstrates that Stevenson Earl gave in to the pressure of DiCarlo and Redington and ultimately changed her recommended sanctions to reflect their desire to pursue dismissal from college. *Id.*

26. Until Redington and DiCarlo interfered with this

"neutral" investigation, none of Stevenson Earl's drafts or emails reflects a desire to pursue a formal hearing. *See, e.g.*, Pl. Appx. Vol. 3, p. 185 to Pl. Appx. Vol. 4, p. 163 (various draft versions of findings and emails relating to it).

27. Stevenson Earl testified that she had been conducting such investigations since 2005. Pl. Appx. Vol. 36, p. 86.

The Adjudicator Abused Her Discretion

28. At the beginning of the hearing, Frost said that UI bore the burden of showing that Plaintiff violated the policies. Pl. Appx. Vol. 1, p. 7.

29. Towards the beginning of the hearing, Defendant Frost also said she would ask all questions. Pl. Appx. Vol. 1, p. 5.

30. Defendant Frost refrained from asking in any form the following submitted questions or chose not to ask the connected follow up questions.

To Complainant 1:

a) How tall are you? How tall is [Plaintiff]? Isn't [Plaintiff] shorter than you?

b) On the night of your first encounter, didn't you have to bring your head down to kiss [Plaintiff]?

c) Why did you do that if you didn't want to/consent to kissing [Plaintiff]?[1]

d) Is it true that you initiated and engaged in frequent conversations with him after the incident? If yes, why did you do that?[2]

e) Did you tell the EOD investigator that "I think we ended up joking about it because I didn't take it so seriously at the time."? If that's what you said, what made you decide it was more "serious" later?[3]

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[1] Frost wrote that these first three questions were "immaterial" without any adequate rationale. Pl. Appx. Vol. 2, p. 131.

[2] Frost asked about a single text message and in a follow up question suggested that she might wish to know if Plaintiff was at a lab; she never asked why Complainant 1 initiated conversations with Plaintiff. Pl. Appx. Vol. 1, p. 47.

[3] Frost asked the initial question and followed up by asking "And so

f) About three days after the incident, [Plaintiff] has provided a text conversation apparently between the two of you in which you texted [Plaintiff] at 1:47 am, which he says you initiated, stating that Citrix is taking "so looong to install." [See Ex A-1] The conversation seems friendly and playful. Could you please explain why you were initiating and engaging in a friendly and playful conversation with him after this incident?

g) Please describe your time with [Plaintiff] in the Lab on October 7, 2016. If you were harassed and assaulted by [Plaintiff], why did you decide to spend time with him alone after lab meeting got over?[4]

h) If you were harassed and assaulted by [Plaintiff], why did you decide to spend time with him alone on January 20th?

i) [Plaintiff] claims that you filed your complaint shortly after he had questioned you about not handing projects on time, and writing in lab hours when you were not directly doing lab work, which led to an argument. [See Ex 11-13] Is that true?[5]

To Complainant 2:

a) Were you aware of Complainant 1 filing a complaint against [Plaintiff]? If so, did it influence you in filing your complaint?

b) In your first meeting and interview with Ms. Stevenson Earl, you stated that [Plaintiff] left Lab to get his books and beer. Is that correct? In your follow-up meeting and interview with Ms. Stevenson Earl, you

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you were trying to make the situation lighter with Plaintiff?" Pl. Appx. Vol. 1, p. 85-86.

[4] The closest analogous question asked was "After the events of August 31st, 19 2016, did you continue to be in the lab alone with [Plaintiff] in the evening hours?" Pl. Appx. Vol. 1, p. 29.

[5] The question was not completely asked; however, at times the subject of failing to sign in was broached by Frost. *See, e.g.*, Pl. Appx. Vol. 1, p. 78-84.

stated, when you came back to Lab the incident happened, which indicates that you did leave the Lab. Where did you go? These stories seem to be inconsistent. Can you please explain?

c) Is it true that you sketched a picture of a foot and sent it to [Plaintiff] the night of the encounter, and you texted later that night "Nice to meet you."

d) On December 15th, you texted [Plaintiff] asking if he could meet after 9 pm. On December 17th, you texted [Plaintiff] stating "lol but I am free Monday later...is eight too late for you?" On January 20th, you texted [Plaintiff] saying "Come to lab!" On January 26, you texted [Plaintiff] saying "Going to lab btw!!!" If you are uncomfortable with him, why are you constantly telling him to come to Lab, especially late at night?[6]

To Witness DL:

a) When did Complainant 1 tell you that she was filing a complaint against [Plaintiff]? What did she say the reason for it was? What was your reaction? *See generally* Def. Volume 4, Appx. 371.

31. During the hearing, within transcripts, and in the final findings of Frost, there is no explanation of why these questions were omitted.

32. The vast majority of the questions above could have spoken to consent or actions, behaviors, or attitudes which would not be in line with Complainants 1 or 2 being uncomfortable or afraid of Plaintiff. The questions would have diminished the Complainants' credibility and bolstered Plaintiff 's credibility in a case decided by credibility.

33. Frost does not mention in her report that Complainant 1 testified how Doe's displeasure with her tardiness in completing her tasks concerned her because of how it might affect her relationship with Dr. Lovaglia. Pl. Appx. Vol. 1, p. 73-74.

34. Frost does not mention in her report that Com-

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[6] Plaintiff believes these are some of the most important questions regarding [Complainant 2].

plainant 1 testified that Doe did not really affect her schoolwork and that even if he was displeased with Complainant 1's work being late, he could not have affected her GPA. *Id.* Instead, Frost wrote that Doe "stymied" Complainant 1's educational performance. Pl. Appx. Vol. 2, p. 138.

35. R.C. saw and spoke to Complainant 1 after Doe dropped Complainant 1 off from his apartment on September 2, 2016. In response to Frost's questions about Complainant 1's demeanor that night, R.C. testified the following: Pl. Appx. Vol. 1, p. 104-109.

a) There wasn't very much of a tone in her voice.
b) She definitely was like kind of calm.
c) Her appearance was more or less like tranquil...
d) Her voice was not tense...
e) She sounded normal... .
f) She lived a couple of doors down; she wasn't far from where I lived. She looked fine.. .
g) Conversation started pretty normal, just catching up and then she started talking about this "interesting encounter" that she had . . .
h) He [Doe] was interested in her, "she did not know how she felt about him.. . .
i) She did not smell like alcohol at the moment at all.. .
j) She did not act or talk or smell in any way that she had a drink. If she had, I would have noticed. She did not appear to be impaired in any way.. .. .
k) She said at one point he started making like moves on her, he started putting his arm around her and leaning in to kiss her, and she would pull away, but I think she told me she was okay. I don't think she told me he was forcing anything.

36. Despite R.C. testifying several times that Complainant 1 was calm and tranquil, Frost continued to try to manipulate the outcome by attempting to provoke inculpating testimony:

Frost: Did she specifically tell you that he touched her breast?

R.C.: I can't remember to be completely honest, that sounds like something that might have happened, and I feel like that sounds familiar but to be completely honest, I don't remember.

Frost: Do you think if she told you it might have stood out in your mind as dramatic?

R.C.: Probably.

Frost: At any time during the conversation in the stairwell, did you find Complainant 1 to be upset, crying, shaken?

R.C.: She was much more shaken upon telling me what happened than she was when she walked into the bottom of the dorm. So, I would say she was a little confused, a little freaked out maybe

Pl. Appx. Vol. 1, p. 106-107.

37. In her report, Frost excluded all the things R.C. said about Complainant 1's calm demeanor. Frost also excluded R.C.'s statements about not knowing about the alleged touching of Complainant 1's breast and that Doe was not forcing anything. *See generally*, Pl. Appx. Vol. 2, p 114-142.

38. Frost instead wrote Complainant 1 was "confused, freaked and shaken," and that Complainant 1's responses, such as talking to a friend after this alleged incident, according to Frost, prove Complainant 1's distress. Meanwhile, Frost left out that Doe also spoke to his friend that night and provided phone record of that conversation. She also excluded from her report that Complainant 1 admitted to saying, "I think we ended up joking about it because I didn't , take it so seriously at the time[,]" during the investigation writing no rationale in her report why. Pl. Appx. Vol. 2, p. 132

39. Frost did not write in her report that Complainant 1's roommate and close friend, E.J., testified that she "knew intimate parts of her relationship and stuff like that" and

that when asked if Complainant 1 told her if Doe kissed her, she said no. When asked if Complainant 1 told her if Doe touched her breast, she again testified no. Pl. Appx. Vol. 1, p. 100.

40. Frost does not write in her report that when she asked Complainant 1 if she told her witness R.C. about Doe allegedly touching her breast, Complainant 1 said, "yes." Pl. Appx. Vol. 1, p. 62. However, R.C. testified that he does not remember this, and it would have stuck out as dramatic if she said such a thing. Pl. Appx. Vol. 1, p. 107.

41. Frost used a conflicting method for dealing with Plaintiff failing to tell good friends of events, to wit, Frost considered it damaging to Plaintiff 's credibility that he never reported to his friend S.B. in detail that he had felt Complainant 1's breast. Pl. Appx. Vol. 1, p. 102; Pl. Appx. Vol. 1, p. 155.

42. Frost applied different standards-which resulted in opposite credibility determinations-for similar conduct, not telling a close friend of part of an encounter. *Cf.* Pl. Appx. Vol. 1, p. 102 with *Id.* at p. 55.

43. When Frost asked the question, "Did [Complainant 1] *tell* you that it was a consensual kiss?" Dr. Lovaglia testified, "yes." Pl. Appx. Vol. 1, p. 122.

44. During deposition, when Frost was asked about the kiss between Plaintiff and Complainant 1 and it not being included in her report, she responded by saying that was just [Dr. Lovaglia's] recollection. Pl. Appx. Vol. 6, p. 33.

45. Dr. Lovaglia further testified that Complainant 1 conveyed that *all* of that sexual behavior that occurred in Plaintiff 's apartment was consensual. Pl. Appx. Vol. 1, p. 123.

46. In her report, Frost omitted Dr. Lovaglia's testimony of Complainant 1 telling him the kiss was consensual and his impression that *all* of the behavior that occurred in Plaintiff 's apartment was consensual.

47. Frost found Plaintiff responsible for both kissing and touching Complainant 1's breast. Pl. Appx. Vol. 2, p. 140.

48. During the UI appeal, Doe brought up Dr. Lovaglia's testimony of what Complainant 1 told him regarding consent, and Complainant 1 did not know what Doe was talking about since Frost did not mention it in her report. To that extent, the hearing and the report were unfair to Complainant 1 as well.

49. Frost did not note in her report the inconsistency where at the hearing, Complainant 2 testified that she did not introduce Doe and T.M., but that Doe introduced himself when he arrived, and it felt weird. Pl. Appx. Vol. 1, Page 23. She said she did not speak during T.M.'s and Doe's introduction. But T.M., her only witness, testified that Complainant 2 introduced them, corroborating Doe. Complainant 2 never mentioned that they spoke about music bands. Pl. Appx. Vol. 1, p. 112.

50. Frost did not note in her report the inconsistency where Complainant 2's boyfriend testified that she "doesn't even drink beer even if she does drink," that "she never drinks it" Pl. Appx. Vol. 1, p. 113, but Complainant 2 testifying that she went to a restaurant with Plaintiff about three weeks after the alleged touching of her breast, purchasing two beers with her fake ID and drinking them by herself. Pl. Appx. Vol. 1, p. 31.

51. Frost did not note in her report the inconsistency where Complainant 2's boyfriend testified that Plaintiff and she went to purchase beer together, which corroborates Plaintiff 's version of events and contradicts Complainant 2's. Complainant 2 stated that Plaintiff went to get his books, brought beer to the Lab, and apparently pushed it to her face. Pl. Appx. Vol. 1, p. 18.

52. Frost did not write in her report that T.M. testified that Complainant 2 told him nothing about Doe touching her "breast or body in any way." Pl. Appx. Vol. 1, p. 113.

53. Frost did not write in her report that Doe provided multiple text messages initiated by Complainant 2, emails, pictures, and even a video showing the two interacting after the alleged assault, while Complainant 2 testified that she has no evidence and only her words, which contradicts

Plaintiff 's testimony. Pl. Appx. Vol. 3, p. 51-80; Pl. Appx. Vol. 7, p. 5-8, 10, 11.

54. Frost does not write in her report the inconsistency where Complainant 2 said she knew about the video Doe provided during the interview as evidenced by Stevenson Earl's report, which she had access to, but then claimed she did not know about it in her sworn testimony at the hearing.

55. Frost does not write in her report the inconsistency where Complainant 2 alleged that Doe would always text her to come to the Lab late, making her uncomfortable, and Doe providing evidence that it was in fact Complainant 2 who continually texted him to come to Lab late at night. See generally, Pl. Appx. Vol. 3, p. 51-80.

56. Frost does not write in her report Complainant 2 notably revealed a motive for falsely accusing Doe, including "rumors" about her following Doe's departure from the Lab. Complainant 2 said, "Complainant 1 told me there are rumors going around," and Complainant 2 said, "I didn't want them to see me that way." Pl. Appx. Vol. 1, p. 42.

57. The Investigator confirmed that Doe did not act in an instructional or supervisory capacity directly or indirectly in the Lab based on information from Dr. Lovaglia and dismissed such concerns. Pl. Appx. Vol. 4, p. 276.

58. The notice of charges did not include whether any instructional or educational leadership role would be considered. Pl. Appx. Vol. 7, p. 11-14. Thus, Doe did not prepare a defense for such an allegation.

59. Despite this, Frost found Doe responsible for an "educational leadership role." Pl. Appx. Vol. 2, p. 121.

60. Frost was not presented any evidence of Doe in a counseling environment. Frost also read a letter before the hearing from his advisor on behalf of his professors from the counseling department, which showed support for his character. Pl. Appx. Vol. 3, p. 2. Doe also testified that he was doing an "internship" where he had two supervisors. Pl. Appx. Vol. 2, p. 5.

61. Despite this, Frost made the following conclusory

statement: "It should be noted that John Doe continues to work with students/clients with disabilities, a vulnerable population, as part of his counseling duties in the UI Department of Education." Pl. Appx. Vol. 2, p. 136.

62. During deposition, when Frost was asked if she had any evidence if the Complainants had any disabilities, or if she had any information regarding Doe's activities in his internship position, she said no.

63. During deposition, when Frost was asked how commenting about his role as a counselor had anything to do with the allegations of this case, she responded by saying that "The connection was simply that Doe continued to work with students." Pl. Appx. Vol. 6, p. 29.

64. In his appeal, Doe criticized Frost for this comment, saying that "Ms. Frost was given the job of a factfinder, not someone who determines what I mean to the entire society at large based on her biased investigation. That is the responsibility of others, typically people higher up than her, to make. She was not given this power. The UI's Student Judicial Procedure (2016-2017 academic year) states the following for Adjudicator Decision: *The written decision shall summarize the findings of fact, identify rules violated, and determine whether the accused student is responsible for violating University policies.* ... Without knowing any of my past, my experience with seeing a family member grow up with mental illness...one should not make such insensitive comments. In a counseling environment, I know what my roles and duties are, and what the ethical and state laws are concretely...In this Lab, none of that is present." Pl. Appx. Vol. 2, p. 91.

65. Frost is not an "expert" on psychological trauma. Pl. Appx. Vol. 5, p. 73-77.

66. Yet her handwritten notes show that Frost used trauma in her decision-making process in determining credibility.

67. Schriver Cervantes entered new evidence towards the end of the hearing, even though UI policies state that he should be provided any new evidence at least two days

before the hearing. Pl. Appx. Vol. 3, p. 42

The Adjudicator Displayed a Pattern of Utilizing Gender Stereotypes in Her Credibility Determinations

68. Defendant Frost has repeatedly described versions of events where females are the aggressors in sexual encounters as being more akin to fantasy than reality. Pl. Appx. Vol. 2, p. 123; *See also* Pl. Appx. Vol. 5, p. 91.

69. In almost identical circumstances, Defendant Frost found a male's testimony incredible and the product of the fantasy of a man, where he reported that a female straddled him, kissed him, and then removed her shirt. Pl. Appx. Vol. 5, p. 78-99.

70. This is a credibility judgment that the university itself has admitted to the Office of Civil Rights, in a different case involving her, that it may be troubling were it not to occur in isolation. Pl. Appx. Vol. 5, p. 129.

71. Defendant Frost used almost identical male fantasy language in her credibility judgment relating to Plaintiff. Pl. Appx. Vol. 2, p. 123.

72. Frost asked Complainant 2 if she feared Doe would "punch" or "hit" her even though there was no evidence that Doe was violent. Even though the notice of charges related to sexual misconduct only included whether Plaintiff engaged in sexual activity without consent. Pl. Appx. Vol. 1, Page 43.

The Appeal Officer Used Unstated Criteria to Determine Appeal

73. UI's Campus Security Report of 2017 states that "The list of sanctions available to the Dean of Students for sexual assault violations includes, from least serious to most harsh: Disciplinary Reprimand, Disciplinary Probation, one-semester semester from the University, one-year suspension, three-semester suspension, two-year suspension, five-semester suspension, three-year suspension, seven-semester suspension, four-year suspension, and expulsion (permanent suspension)."

74. Defendant Redington failed to provide a rationale why she expelled Doe. University policies stated that "The Dean's sanction letter shall include a rationale explaining why the chosen status sanction was selected over an alternative." Pl. Appx. Vol. 3, p. 44.

75. Plaintiff testified that his advisor told him that the expulsion would end his career in counseling, and Doe provided economic damages assessment through an expert witness. Pl. Appx. Vol. 6, p. 163.

76. On October 24, 2017, Plaintiff timely filed his appeal. *See generally,* Pl. Appx. Vol. 3, p. 82-98.

77. During the appeal, Doe said that it was his "first proper opportunity where [he is] truly getting to express [his] side of the story." He alleged "gender and/or other forms of discrimination" and "bias" from Stevenson Earl and Frost, that Frost had not allowed him to ask questions; how she "devalued" his answers.

78. In deposition Defendant Keller admitted to using unwritten standards to judge the merits of Plaintiff 's university-level appeal. *See, e.g.*, Pl. Appx. Vol. 6, p. 9 (discussing the *only* three factors he considered as age, sex, and an erroneous standard of consent that involved retroactive disapproval.

79. Keller specifically stated that both the sex of the accuser and accused played a role in his decision and that his experience and knowledge of young women being vulnerable and impressionable played a role in his ultimate affirmation. *Id.* at 9.

80. Keller knowingly applied factors not contained in University policy and was independent of it. *Id.* at 8 (stating that age differential is not contained in the policy).

81. Keller further applied an erroneous standard of consent which is at odds with University Policy. Keller's position is best summarized as a "victim's" later disapproval can act as a withdrawal of consent after the fact and create a violation of university policy:

> Q. So in terms of your statement about consent doesn't mean approval, is that -- is that some-

thing that -- consent doesn't mean approval, does that -- is that a specified criteria that you were to consider in terms of determining whether someone has violated the Sexual Misconduct Policy?

A. It's something that I consider, yes, involved in these kinds of cases, yes.

. . .

Q. -- is there such a policy in which someone can manifest consent to sexual behavior and yet still possibly violate University policy if they didn't approve of it after the fact?

A. Yeah, I believe that to be the case; yes.

Id.

82. Keller admits that each of these factors weighed in his ultimate decision and his rejection of Dr. Lovaglia's testimony that the interaction with Complainant 1 was consensual. *See Id.* at 8,.9.

The Appeal Officer Admitted to Considering Sex in His Decision

83. Keller states that he considered sex in his determination of a violation of university policy. *Id.*. ("Because young -- young -- young female undergraduate students in my experience of having one, having a daughter that age previously and having a lot of young women working in my office over the years that are young undergraduate women, you know, my observation of them is that they tend to be more vulnerable and impressionable . . .").

84. He further states that it has always been a male accused and a female accuser in his experience, and that played a part in his calculus, *i.e.*, that men are perpetrators and that women are victims. *Id.*

The Appeal Officer Used a Completely Erroneous Standard of Consent

85. As stated, *supra*, Defendant Keller utilized an erroneous standard of consent in deciding on an appeal. *Id.* at 8.

86. Defendant Keller further noted that he considered

his own unstated and unsupported version of consent to judge Plaintiff 's appeal and that even if he accepted as true Dr. Lovaglia's testimony that the interaction with Complainant 1 was consensual at the time, which would not have met his approval standard of consent. *Id.* at 9.

87. Further, Defendant Keller recognized that it was quite possible that had he applied Dr. Lovaglia's standard of consent and accepted Dr. Lovaglia's testimony that the behavior between Complainant 1 and Plaintiff had been consensual it is "possible" that he would have reversed his findings as to violation of the sexual misconduct policy regarding Complainant 1. *See Id.* at 8.

The Appeal Officer Likely Relied on Only the Investigatory Findings and Adjudicator's Decision

88. Contrary to university training, Defendant Keller recalled only receiving the appellate briefs, investigatory findings, adjudicator's decision, and exhibits. *See, e.g.*, Keller Depo at 4.

89. Further, it appears that Keller spent an inadequate time to review even that truncated record. He estimated that he took two to three hours to review roughly 200 single-spaced pages of documents and the voluminous exhibits. *Id.* at 12.

90. Keller performed a perfunctory approval of the underlying case based on his own opinions and an Adjudicator's decision and investigatory findings, which contained significant omissions. *See generally* ¶¶ 13-22; [omissions paragraphs].

91. On February 20, 2018, Plaintiff timely filed his Board of Regents appeal alleging discrimination and a lack of due process throughout his appeal. *See generally,* Pl. Appx. Vol. 2, Page 72-106.

Significant External Pressures Existed on UI Prior to Plaintiff 's Hearing

92. Starting in 2014, UI's President at the time, Sally Mason, misspoke on the topic of sexual assault by saying that "I'm not pleased that we have sexual assaults, obvious-

ly. *The goal would be to end that, to never have another sexual assault. That's probably not a realistic goal just given human nature,* and that's unfortunate, but the more we understand about it, the better we are at trying to handle it and help people get through these difficult situation[s]" It appears from the reports that the comment initially led to a student group on campus and a columnist on the *Des Moines Register* decontextualizing the statement by focusing on the *"probably not a realistic goal just given human nature"* part, which then led to further outcry over UI's handling of sexual misconduct.[7]

93. DiCarlo, "a longtime...activist in Iowa City, whom protesters like but feel she hasn't been given enough independent power," sided with the protesters against the comments made by Mason and recognized that violence, "coupled with the challenging comments that got made" by Mason, made the protesters feel "they've had enough." *Id.* Mason's comment resulted in protests across UI and strong criticism from students: "Mason's comments show how pervasive the culture of rape is at the University of Iowa and reveals the university's reactive stance toward sexual assault," according to information on the group's website, which gets its name from Mason's comments about human nature.[8]

94. There was outcry among the broad community in

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[7] Rekha Basu, *Basu: Does Mason really "get it" on campus rapes*, DES MOINES REGISTER, https://www.desmoinesregister.com/story/opinion/columnists/rekha-basu/2014/02/25/basu-does-mason-really-get-it-on-campus-rapes/5823673/ (last visited Apr 29, 2021).

[8] *See, e.g.*, Rebecca Morin, Daniel Seidl & Brent Griffiths, *Protesters interrupt Mason's speech* 10 (2014) ("That's our biggest problem with President Mason making a public statement, saying that rape is human nature, which she is basically saying that men can't help themselves for being rapists, and so women are going to be raped,' said Jeannette Gabriel, a UI Ph.D. student in education. "That's why we have the victim-blaming, that's why we have the complete lack of seriousness of dealing with violence at this university because at the very top ... she believes that rape is inevitable'").

response to Mason's comments and the belief that UI was not doing enough to help women.[9] According to the media, the Board of Regents "scolded" her.[10]

95. The *Star Tribune* published an article named "Controversy over Iowa college president's remark shows pressure to curb campus sexual assaults"[11] In response to the outcry, UI revamped policies creating services to cater to and protect female students, including providing an additional van for Nite Ride. The plan also calls for administrators to meet regularly with a student advisory group, change language in the UI's timely warning emails, revamp online tools and information around sexual violence on campus, and crack down on offenders.[12]

96. Soon after attempting to revamp policies UI instituted a "Six Point plan." UI expelled a student for the first time in over a decade for sexual misconduct; the expulsion can be directly tied to UI President Complainant 1 Mason's Six Point Plan to Combat Sexual Assault.[13, 14]

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[9] Vanessa Miller, *University of Iowa students protest, say sexual violence is "not in my nature,"* THE GAZETTE, https://www.thegazette.com/news/university-of-iowa-students-protest-say-sexual-violence-is-not-in-my-nature/ (last visited Apr 29, 2021).

[10] Vanessa Miller, *Regents scold University of Iowa president Mason for poor communication*, THE GAZETTE, https://www.thegazette.com/state-government/regents-scold-university-of-iowa-president-mason-for-poor-communication/ (last visited Apr 30, 2021).

[11] Alan Scher Zagier, Associated Press, *Controversy over Iowa college president's remark shows pressure to curb campus sexual assaults*, STAR TRIBUNE, https://www.startribune.com/campus-protest-shows-pressure-for-action-on-rape/249846791/ (last visited Apr 30, 2021).

[12] Vanessa Miller, *UI debuts second Nite Ride van following sex assault concerns*, THE GAZETTE, https://www.thegazette.com/news/ui-debuts-second-nite-ride-van-following-sex-assault-concerns/ (last visited Apr 29, 2021).

[13] Mitchell Schmidt, *UI expels student for sex assault*, IOWA CITY PRESS-CITIZEN, https://www.press-citizen.com/story/news/education/university-of-iowa/2014/04/11/ui-expels-student-for-sex-assault-/7629429/ (last visited Apr 29, 2021).

[14] Stacey Murray, *'Sexual misconduct' leads to expulsion*, THE DAILY IOWAN, https://dailyiowan.com/2014/04/11/sexual- misconduct-leads-

97. There was considerable and stated support for harsher penalties against mostly male "offenders" on campus, and officials and advocates cheered congressional proposals.[15,16]

98. DiCarlo had played an outsize role in both OSMRC and the Women's Resource Action Center.[17]

99. UI funneled money into various women's programs such as Nite Ride and the Women's Resource and Action Center. This all fell under the auspices of the Six Point Plan, and the services specifically catered to women.[18,19]

100. The Nite Ride service led to controversy and "negotiations," as males have raised concerns about not being able to use the service. This eventually led UI to settle a case with the Iowa Civil Rights Commission for discriminating against males on the basis of sex.[20]

101. While the above was occurring locally, UI was facing wide-ranging civil rights violation allegations relat-

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to-expulsion/ (last visited Apr 29, 2021).

[15] Jason Noble, *Bill aims to combat campus sexual assaults*, IOWA CITY PRESS-CITIZEN, https://www.press-citizen.com/story/news/local/2014/07/30/bill-aims-combat-campus-sexual-assaults/13394855/ (last visited Apr 29, 2021).

[16] Vanessa Miller, *Changing the 'rape culture,'* THE GAZETTE, https://www.thegazette.com/news/changing-the-rape-culture/ (last visited Apr 29, 2021).

[17] Jeff Charis-Carlson and Jeff Charis-Carlson, *University of Iowa names new Title IX coordinator, interim chief diversity officer*, IOWA CITY PRESS-CITIZEN, https://www.press-citizen.com/story/news/2017/07/20/university-iowa-names-new-title-ix-coordinator-interim-chief-diversity-officer/495509001/ (last visited Apr 29, 2021).

[18] Vanessa Miller, *UI to fund new sex assault prevention positions*, THE GAZETTE, https://www.thegazette.com/education/ui-to-fund-new-sex-assault-prevention-positions/ (last visited Apr 29, 2021).

[19] DI Staff, *Mason moves on sexual misconduct*, THE DAILY IOWAN, https://dailyiowan.com/2014/10/07/mason-moves- on-sexual-misconduct/ (last visited Apr 29, 2021).

[20] Iowa Civil Rights Commission, *Logan Allee v. University of Iowa, et al.*, https://icrc.iowa.gov/document/logan-allee-v-university-iowa-et-al (last visited Apr 30, 2021).

ing to disparate and negative, treatment of women.[21,22,23] The Office of Civil Rights (OCR) began investigating UI, and this investigation was ongoing when UI investigated and adjudicated Plaintiff 's hearing.

102. All the while, students and the media cheered on those filing complaints against UI for its perceived mistreatment of women, going so far as to issue honors and awards to female students filing complaints against the university. The OCR eventually dismissed the complaint.[24]

103. UI's RVAP, Administrators, and students rallied around women's cries to action focused on "men," "masculinity," and the need for "health masculinity," all while talking about sexual assault. [25, 26, 27]

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[21] Ryan J. Foley, *Feds open bias probe into Hawks*, THE DAILY IOWAN, https://dailyiowan.com/2016/02/15/feds-open-bias-probe-into-hawks/ (last visited Apr 29, 2021).

[22] Vanessa Miller, *Iowa senators back new sex assault-prevention bill*, THE GAZETTE, https://www.thegazette.com/higher-education/iowa-senators-back-new-sex-assault-prevention-bill/ (last visited Apr 29, 2021).

[23] Jeff Charis-Carlson, *Feds visit campus to investigate University of Iowa athletics*, IOWA CITY PRESS-CITIZEN, https://www.press-citizen.com/story/news/education/university-of-iowa/2016/04/10/university-of-iowa-athletics-title-ix-investigation-female-athletics/82770898/ (last visited Apr 29, 2021).

[24] Jeff Charis-Carlson, *Title IX complaint leads to honors for UI field hockey players*, IOWA CITY PRESS-CITIZEN, https://www.press-citizen.com/story/news/education/university-of-iowa/2016/03/31/ui-field-hockey-players-earn-womens-rights-honoe/82481780/ (last visited Apr 29, 2021).

[25] Anna Onstad-Hargrave, *Sex-assault summit focuses on men*, THE DAILY IOWAN, https://dailyiowan.com/2016/04/20/sex-assault-summit-focuses-on-men/ (last visited Apr 29, 2021).

[26] Stephen Gruber-Miller, *With "Me too" campaign, survivors flood social media with stories of sexual assault*, IOWA CITY PRESS- CITIZEN, https://www.press-citizen.com/story/news/2017/10/17/me-too-campaign-survivors-flood-social-media-stories-sexual-assault/771231001/ (last visited Apr 29, 2021).

[27] Aimee Breaux, *Freshmen, LGBTQ University of Iowa students experience more sexual violence, survey shows*, IOWA CITY PRESS- CITIZEN, https://www.press-citizen.com/story/news/education/university-of-iowa/2018/04/26/university-iowa-campus-sexual-assault-survey-

104. During deposition, DiCarlo admits that there was no such program for females or femininity.

105. In March 2017, while Plaintiff 's investigation was ongoing, UI and its administrators, including DiCarlo, handled discussions, petitions and held meetings hoping to quell student's concerns on what students believed were inadequate responses to sexual misconduct and institutional failings. DiCarlo said the students' suggestion in the petition to reference the sexual misconduct policy explicitly would be good. [28]

106. In April 2017, while Plaintiff 's investigation was ongoing, the media reported about how Stevenson Earl coauthored a UI investigative report, apparently providing an unnecessary opinion and advice, separate from the findings of no guilt, which ultimately got a UI female staff fired. Both the female staff and her female partner sued UI alleging gender discrimination.[29]

107. In May 2017, while Plaintiff 's investigation was ongoing, the Student Advisory Committee sent a letter to the Editor of the *Daily Iowan*, saying how UI's next VP for student life must make sexual violence a top priority, saying that "Any candidate who is considered for the job must see eradicating sexual violence as a pressing campus issue."[30]

108. In May 2017, while Plaintiff 's investigation was ongoing, UI settled these two gender discrimination cases

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freshmen-lgbtq/553617002/ (last visited Apr 29, 2021).

[28] Marissa Payne, *Students want action on sexual misconduct*, THE DAILY IOWAN, https://dailyiowan.com/2017/03/23/students-want-action-on-sexual-misconduct/ (last visited Apr 29, 2021).

[29] Jeremiah Davis, *Jane Meyer trial turns focus to firing of Hawkeye field hockey coach*, THE GAZETTE, https://www.thegazette.com/football/jane-meyer-trial-turns-focus-to-firing-of-hawkeye-field-hockey-coach/ (last visited Apr 30, 2021).

[30] Letter to Editor: Next UI VP for Student Life Must Make Sexual Violence a Top Priority, THE DAILY IOWAN, https://dailyiowan.com/2017/05/01/letter-to-editor-next-ui-vp-for-student-life-must-make-sexual-violence-a-top-priority/ (last visited Apr 29, 2021).

for $6.5 million.[31]

109. On June 1, 2017, while Plaintiff 's investigation was still ongoing, UI announced that it would spend significant funds to reform and avoid further lawsuits brought by women in response to civil rights violations. DiCarlo was a member of a 14-person committee tasked with picking "one or more outside consulting firms to conduct an external review of university employment practices as defined by the Iowa Civil Rights Act." [32]

110. On June 15, 2017, DiCarlo communicated with Stevenson Earl via email about setting up a phone call with her and Defendant Redington to discuss modifying the sanctions originally proposed by Stevenson Earl. Pl. Appx. Vol. 4, p. 32

111. On June 23, 2017, Stevenson Earl issued the investigation report with the updated sanctions and recommending a hearing. Pl. Appx. Vol. 4, p. 199.

112. On October 17, 2017, when Plaintiff was appealing his expulsion to the Provost, UI faced criticism from the media for their handling of women broadly and for their failings relating to sexual misconduct. Two lawsuits were filed alleging gender discrimination.[33, 34]

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[31] Erin Jordan, *University of Iowa pays $6.5 million in Meyer, Griesbaum cases*, THE GAZETTE, https://www.thegazette.com/sports/university-of-iowa-pays-6-5-million-in-meyer-griesbaum-cases/ (last visited Apr 30, 2021).

[32] Vanessa Miller, *University of Iowa names members to employment practices review committee*, THE GAZETTE, https://www.thegazette.com/news/university-of-iowa-names-members-to-employment-practices-review-committee/ (last visited Apr 29, 2021).

[33] Ryan J. Foley, *Lawsuits seek changes to University of Iowa sexual assault policies*, IOWA CITY PRESS-CITIZEN, https://www.press-citizen.com/story/news/education/university-of-iowa/2017/10/16/lawsuits-seek-changes-university-iowa-sexual-assault-policies/769292001/ (last visited Apr 29, 2021).

[34] Erin Jordan, *Lawsuits allege University of Iowa mishandled sexual assault, harassment complaints*, THE GAZETTE, https://www.thegazette.com/higher-education/lawsuits-allege-university-of-iowa-mishandled-sexual-assault-harassment-complaints/ (last visited Apr 29, 2021).

113. On October 25, 2017, before Plaintiff appealed to the Board of Regents, the media reported that the Board of Regents has agreed to pay $195,000 to settle a gender discrimination lawsuit from a former female employee.[35]

114. DiCarlo and UI opposed increased due process protections promulgated by the federal government. [36,37,38]

115. In 2018, DiCarlo, while talking about sexual assault in a faculty senate meeting, said that it is a "myth" that alleged perpetrators are "railroaded" and denied due process rights, and said that one of the "priorities" in Fall 2018 was expanding "programming" on "healthy masculinity." See https://faculty- senate.uiowa.edu/sites/faculty-senate.uiowa.edu/files/2019-12/minutes.faculty_senate.09.11.18_0.pdf (last visited Apr 29, 2021)

116. RAINN authored a report detailing recommendations to the White House on combating campus rape. The report identified serious issues with colleges' emphasis on linking the concept of "rape culture"[39] with traits "common

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[35] Erin Jordan, *Iowa Board of Regents settles gender discrimination suit with former employee*, THE GAZETTE, https://www.thegazette.com/higher-education/iowa-board-of-regents-settles-gender-discrimination-suit-with-former-employee/ (last visited Apr 29, 2021).

[36] Sarah Watson, *Campus organizations disappointed by DeVos' intent to change campus sexual assault guidelines*, THE DAILY IOWAN, https://www.thegazette.com/higher-education/iowa-board-of-regents-settles-gender-discrimination-suit-with-former-employee/ (last visited Apr 29, 2021).

[37] Isabella Senno, *DeVos' Title IX changes won't lead to major changes at Iowa schools*, THE DAILY IOWAN, https://dailyiowan.com/2017/09/18/devos-title-ix-changes-wont-lead-to-major-changes-at-iowa-schools/ (last visited Apr 29, 2021).

[38] Vanessa Miller, *Iowa campuses fight sexual violence amid uncertainty*, THE GAZETTE, https://www.thegazette.com/higher-education/iowa-campuses-fight-sexual-violence-amid-uncertainty/ (last visited Apr 29, 2021).

[39] *See* "White House Task Force to Protect Students from Sexual Assault." *United States Department of Justice Office* (PDF). *rainn.org*. https://tinyurl.com/jfqbbw5

in many millions of law-abiding Americans" such as "masculinity." It recommended that the focus should be on individuals.

117. In 2018, UI's What About Me(n) Summit program, which involved RVAP, was described as an opportunity for men to consider how masculinity "impact rape culture and perpetuates an overall culture of violence." See https://twitter.com/RVAPiowa/status/968489656798105601 (last visited May 2, 2021).

118. RVAP defines "rape culture" as "a complex set of beliefs that encourages male sexual aggression and supports violence, especially against women and children." See https://rvap.uiowa.edu/assets/Uploads/152c885f06/CH-2-Rape-Culture.pdf (last visited May 2, 2021).

119. UI has two programs for survivors of sexual assault, Flip the Script and Rape Aggression Defense (R.A.D). https://endingviolence.uiowa.edu/workshops-and-training/workshop-8/ (last visited May 2, 2021).

120. One of the investigations by the OCR is because of UI's Flip the Script Program, "is a sexual assault resistance course for women, regardless of sexual orientation and inclusive of trans women, but focused on violence committed by men." *Id.*

121. As of February 2021, the OCR is investigating UI for four investigations. Three are due to discrimination against males. See: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/tix.html?queries%5Bstate%5D=IA (last visited May 2, 2021).

122. UI's attorneys have told the OCR that Flip the Script program has a male version but provided just the name of a class called "Self-Defense." Pl. Appx. Vol. 5, p. 161. The case remains under investigation by the OCR.

APPENDIX J

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution

U.S. Const. amend. XIV, § 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681(a))

Section 1681(a). No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) **Classes of admission to educational institutions subject to sexual discrimination prohibitions.** This section shall not apply to any educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.

(2) **Separate living facilities.** This section shall not apply to any educational institution which admits only students of one sex.

(3) **Educational institutions with religious tenets.** This section shall not apply to any educational institution the primary purpose of which is the training of individuals

for the military services of the United States or for the merchant marine.

(4) **Public institutions of undergraduate higher education.** In regard to admission of students, this section shall not apply to a public institution of undergraduate higher education which traditionally and continually from its establishment had a policy of admitting only students of one sex.

(5) **Educational institutions providing secondary education.** In regard to admission of students, this section shall not apply to an educational institution which normally and customarily admits students of only one sex and does not admit students of the opposite sex within such time as is reasonably necessary to carry out its educational mission, except that nothing in this section shall be construed to prohibit any educational institution from admitting students of one sex only to any educational program or activity receiving Federal financial assistance.

(6) **Institutions of vocational education.** This section shall not apply to an institution which normally admits only students of one sex and which, on the basis of a finding of the Secretary of Health, Education, and Welfare, as applicable, of the need for such institution to provide instruction of students of one sex, has been granted a specific exemption by the Secretary.

(7) **Remedial or affirmative action.** This section shall not apply to any program or activity of any educational institution, school district, or other education entity receiving Federal financial assistance if such program or activity is designed to remedy the effects of past discrimination against persons on the basis of sex or to overcome conditions which resulted in limited participation by persons of a particular sex in such program or activity.