

APPENDIX A

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PUBLICATION**

File Name: 17a0554n.06
Case No. 17-3212

**UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

**OLAOLUWA FAPARUSI,
Plaintiff-Appellant,**

v.

**CASE WESTERN RESERVE UNIVERSITY, et al.,
Defendants-Appellees.**

**ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO**

O P I N I O N

**BEFORE: KEITH, ROGERS, McKEAGUE, Circuit
Judges.**

McKEAGUE, Circuit Judge. Case Western

Reserve University suspended sophomore student Olaoluwa Faparusi after it found he had violated the school's code of conduct by entering a women's restroom and taking photos under the stall walls. Believing the disciplinary procedures employed by the school to be constitutionally insufficient and in breach of the school handbook, Faparusi brought suit alleging Fourteenth Amendment due process violations and a state law breach of contract claim. The district court granted the defendants' motion to dismiss all of Faparusi's claims. Finding that Faparusi's claims suffer from the fatal defects identified by the district court, we affirm.

I

Factual Background. On March 1, 2016, Olaoluwa Faparusi, a male sophomore student at Case Western Reserve University ("CWRU"), was studying for his physics final at the Raymond House on the CWRU campus. R. 1, Complaint, at 4, PID 4. Taking a break from his studies, Faparusi decided to use the women's restroom. *Id.* While in one of the stalls, two female students, SV and JG-P, asked Faparusi what he was doing in the women's restroom. *Id.* Eventually, SV began accusing Faparusi of taking pictures, and requested that he delete them. *Id.* SV and JG-P left the restroom soon after this confrontation, and Faparusi followed shortly thereafter. *Id.*

Later that same day, CWRU police questioned Faparusi about the incident. *Id.* at 5, PID 5. Faparusi denied having taken any pictures, and the police found

none on his phone. *Id.* Sometime after the interview, still on March 1, CWRU's Associate Vice President for Affairs and Title IX Coordinator Darnell T. Parker informed Faparusi that it was conducting an investigation in response to an incident report they received. *Id.*

On March 3, Faparusi's housing contract was terminated and Faparusi was forced to find alternative, off-campus housing. *Id.* That same day, Faparusi met with Parker regarding the incident. *Id.* at 6, PID 6. Faparusi had several similar meetings with other officials, including investigator Kimberly Scott, over the next several days. *Id.* at 6, PID 6. During that same time, CWRU officials, notably Scott, met with the complainants, SV and CP, and witness, JG-P. *Id.*

On March 15, Faparusi was informed that he would have to attend a hearing on March 18, and that the subject of the hearing was a charge of sexual exploitation. *Id.* at 8, PID 8. Faparusi claims that he was given the evidence against him less than 24 hours before the hearing was held. *Id.* The hearing was presided over by George O'Connell. *Id.* On March 21, the University informed Faparusi that he was held liable for both sexual exploitation and disorderly conduct. *Id.* at 9, PID 9.

Faparusi appealed the decision to Louis Stark, CWRU's Vice President for Student Affairs, on March 23. *Id.* Faparusi argued that he was the victim of mistaken identification, pointing to inconsistencies in

the witness accounts and investigative reports. *Id.* He also alleged that the University had wrongfully deviated from its hearing procedures, had provided inadequate notice of the disorderly conduct charge, and had not conducted an impartial investigation. *Id.* at 10, PID 10. Faparusi's appeal was denied on April 6. *Id.* As a sanction for his violations, Faparusi was suspended from school. Faparusi's lawsuit followed.

Procedural Background. On June 23, 2016, Faparusi, proceeding pro se, filed suit alleging due process violations under the Fourteenth Amendment and breach of contract claims under Ohio state law. He named as defendants CWRU, the hearing administrator George O'Connell, and investigator Kimberly Scott. *Id.* at 2, PID 2. He then moved for a temporary restraining order and a preliminary injunction on July 6, 2016. The matter was referred to a magistrate judge, who issued a Report and Recommendation ("R & R") recommending that Faparusi's motion be denied. R. 12, Report and Recommendation, at 2, PID 173. On November 10, 2016, the district court adopted the magistrate judge's R & R and denied Faparusi's motion. 17, Op. and Order, at 1, PID 268.

While Faparusi's prayer for injunctive relief was pending, on August 2, the defendants filed a motion to dismiss for failure to state a claim. R. 5, Mot. to Dismiss, at 1, PID 74. The magistrate judge also handled this motion initially, and recommended that the motion to dismiss be granted as to all claims. R. 18, Report and Recommendation, at 2, PID 273. The

district court again adopted the R & R, thereby dismissing all of Faparusi's claims, on February 28, 2017. R. 24, Op. and Order, at 1, PID 345. This appeal followed.

II

A. Jurisdiction

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. This court has appellate jurisdiction under 28 U.S.C. § 1291, based on the district court's February 28, 2017 order granting CWRU's motion to dismiss. Faparusi timely filed a notice of appeal on March 1, 2017.

B. Standard of Review

We review a district court's grant of a motion to dismiss de novo. *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012). We will construe all facts "in the light most favorable to the plaintiff and accept all allegations as true." *Id.* To state a claim sufficient to survive a motion to dismiss, the plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level" and must state a claim that is "plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). Put another way, a plaintiff must plead facts that permit a court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

C. Analysis

Faparusi objects to the district court's judgment on four grounds. First, he argues that the district court failed to engage in a proper de novo review of the objected-to portions of the magistrate judge's R & R. Second, Faparusi claims the district court erred in classifying some of his claims under Title IX rather than as standalone due process claims. Third, he argues that the district court improperly dismissed his due process claims by concluding CWRU was not a state actor. Fourth, and finally, Faparusi alleges the district court was wrong to dismiss his breach of contract claim. Finding each of these arguments without merit, we affirm.

1. Review of the Factual Record

Faparusi assigns error in the district court's failure to "to make a de novo determination of those portions of the [magistrate judge's] report to which objection is made." Appellant Br. at 17. While Faparusi is correct that the district court is required to review de novo portions of a magistrate judge's report to which an objection is made, 28 U.S.C. § 636, there is no reason to believe the district court abdicated its duty to do so here.¹

¹ It is unclear from Faparusi's brief whether the argument is that we must reverse the district court *only* for its failure to independently review the factual record after objections were made to the magistrate's report—or if the argument is that reversal is necessary because these factual errors led to analytical

Faparusi appears to identify three “material errors in facts and omission” in the R & R “that showed a partial review of the records” by the district court. *Id.* First, he claims the district court should have corrected the R & R’s statement that Faparusi was suspended for using the women’s restroom, when in fact he was suspended for allegedly taking pictures therein. *Id.* Second, Faparusi complains that the district court failed to take note of the R & R’s finding that Faparusi had alleged sufficient facts to support his mistaken identity claim. *Id.* And third, Faparusi argues that the district court wrongly relied on the R & R to conclude that Faparusi knew the charges against him and had an opportunity to be heard when Faparusi was found liable for disorderly conduct without first being notified of that charge. *Id.* at 18. The district court committed no such errors.

Faparusi’s first argument—that the district court failed to correct the R & R’s misstatement on why Faparusi was suspended—is a pedantic one. It is true that the R & R contains a sentence that reads in part: “Plaintiff was suspended from Case Western Reserve University for using a women’s restroom at a facility” R. 18, R & R, PID 273. But in the *very next sentence*, the magistrate judge clarified: “While in a restroom stall, he was verbally confronted by two female students who accused plaintiff of taking pictures in the restroom.” *Id.* As the district court

ones in applying the law. In any event, because we find no underlying error in the district court’s review of the record, neither claim succeeds.

found in reviewing Faparusi's objection to this portion of the R & R, that statement showed the magistrate judge "clearly considered the disciplinary action was based on the accusation that Plaintiff was taking pictures of women in the women's restroom." R. 24, Op. and Order, PID 351. Because the magistrate judge did not err in the first instance, the district court did not err by failing to clean up confusion that never existed.

Faparusi's second argument fares no better. While the argument is unclear, Faparusi seems to argue that the district court failed to give due weight to the R & R's conclusion that Faparusi had alleged facts sufficient to show he was innocent of the charges against him. *See* R. 18, R & R, PID 280. That finding in the R & R, Faparusi asserts, stands in "stark contradiction" to the district court order granting defendants' motion to dismiss for failure to state a claim. It does not. A complaint must do more than paint a plausible factual picture; it must connect those facts to a "right to relief." *Twombly*, 550 U.S. at 555. And right after the R & R states that Faparusi pleaded facts to show he was a victim of mistaken identity, the R & R concluded that those facts alone were insufficient for relief under Title IX. *See* R. 18, R & R, PID 280-83. That portion of the R & R and the district court's ultimate dismissal of Faparusi's claims were therefore consistent, not contradictory.

Finally, Faparusi claims that the district court must have haphazardly reviewed the factual record because it accepted the R & R's conclusion that

Faparusi knew of the charges against him and had ample opportunity to contest them. That conclusion, Faparusi argues, cannot be right since “the records clearly show [Faparusi] was found liable for disorderly conduct despite the fact that he was never charged with the offense.” Appellant Br. at 18. The argument fails to establish reversible error.

As an initial matter, Faparusi was on notice that he was being investigated for sexual exploitation, and the factual basis for that complaint was the same basis on which the disorderly conduct charge was predicated. Furthermore, CWRU provided Faparusi with the evidence against him in advance of his hearing. These facts preclude any claim by Faparusi that he was ambushed by the subject of the hearing. And finally, it is significant that the factual predicate for the disorderly conduct finding was precisely the same as that for the sexual exploitation finding. *See* R. 3-9, CWRU Hearing Report, at 1, PID 63 (supporting both charges with fact that Faparausi used phone in the restroom to observe women in other stalls). These details combine to distinguish this case from one relied on by Faparusi, *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 604 (D. Mass. 2016), where the school “refus[ed] to provide [the student] with the specific factual conduct alleged to have given rise to the charge.” That lapse by the school made it impossible for the student to defend himself—not so here.

Moreover, even if we agreed that Faparusi was treated unfairly and that the district court was wrong to conclude otherwise, there is no legal basis on which

the district court could grant relief. Faparusi does not allege that inadequate notice breached any contract he had with the school, *see* Appellant Br. at 25, and a due process challenge will not lie because CWRU is not a state actor subject to due process minimums, *see infra* C.3. That is why *Fellheimer v. Middlebury Coll.*, rather than offering support for Faparusi's argument, instead confirms his claim is a fish out of water. 869 F. Supp. 238 (D. Vt. 1994). The court in *Fellheimer* said it was "fundamentally unfair" that a student was not informed by the school of one charge against him—but only because that was such a stark "deviation from the procedures established by the College" in its own handbook. *Id.* at 246. Faparusi does not allege the same here, instead arguing that notice was *constitutionally* deficient under the due process clause.

Accordingly, we reject Faparusi's claims that the district judge improperly relied on—or failed to correct—the magistrate's recitation of the factual record.

2. Characterizing Faparusi's Claims

Faparusi objected to the magistrate judge's conclusion that his due process claims were in effect Title IX claims. Faparusi renews that objection on appeal, in spite of the district court's thorough analysis confirming the magistrate's reasoning. For the reasons set forth in the district court opinion, *see* R. 24, Op. and Order, at 7–9, PID 351–53, we agree that Faparusi's claims were better considered as pleaded under Title IX.

But because we find that Faparusi's claims are foreclosed no matter which law governs, we need not, and do not, belabor the dispute. Instead, as the district court did, we assume Faparusi pleaded "straight Fourteenth Amendment Due Process Violation claims," as he now argues on appeal, and hold that "dismissal would still be appropriate for a number of reasons." *Id.* at 9, PID 353.

3. Due Process Claims

The district court held that Faparusi's due process claims (Counts One, Two, Three, and Five) would fail for either of two reasons: first, Faparusi failed to bring them under 42 U.S.C. § 1983; and second, CWRU was not a state actor constrained by constitutional due process minimums. *Id.* We review the district court's determination de novo, taking Faparusi's allegations as true. *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012). In light of the requirement to liberally construe Faparusi's pro se complaint, we assume that his due process claims were properly brought under § 1983. Yet we nevertheless affirm for Faparusi's failure to show that CWRU was a state actor susceptible to due process challenges.

The Fourteenth Amendment's due process guarantees are "triggered only in the presence of state action." *Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 2000). While this typically forecloses constitutional claims against private actors, "a private entity can be held to constitutional standards when its actions so approximate state action that they may be

fairly attributed to the state.” *Id.* We have used three tests in determining whether private action can be fairly attributed to the state: “(1) the public function test; (2) the state compulsion test; and (3) the symbiotic relationship or nexus test.” *Id.*

No matter the test, the result is the same: Faparusi’s claim fails. That is because Faparusi does not bother to allege *any* facts that would establish CWRU as a state actor in this case. The district court’s review of Faparusi’s complaint found that Faparusi “asserted no facts supporting his allegation that Case Western acted under color of state law other than simply reciting the legal conclusion that Case Western acted under color of law.” R. 24, Op. and Order, at 11, PID 355. Our review of the complaint—and Faparusi’s arguments on appeal—compels the same conclusion.

We start with the complaint. Faparusi asserts, “At all time[s] relevant, Defendants acted under color of state law to enforce the requirements of Title IX.” R. 1, Complaint, at 3, PID 3. Beyond this conclusory statement, we can find no other facts alleged in the complaint that might be read to suggest state action under the public function, state compulsion, or nexus tests. Perhaps we could forgive the complaint for these shortcomings, given that it was filed without the assistance of counsel. But we cannot so easily excuse the same omissions in Faparusi’s brief on appeal. Even after the district court highlighted this failure, *see* R. 24, Op. and Order, at 11, PID 355, nowhere in Faparusi’s brief does he explain why this court should find CWRU acted under the color of state law.

That leaves only Faparusi's allegation that CWRU acted under the color of state law by enforcing Title IX. This by itself would ordinarily be insufficient under *Iqbal-Twombly* pleading standards to establish CWRU as a state actor. But even if we did Faparusi's work for him, it is hard to imagine how the argument would work. Faparusi must first contend with the oddity that, according to him, his claim for relief has nothing to do with Title IX—and yet he urges us to find that CWRU is a state actor because its investigation of Faparusi was pursuant to Title IX. That anomaly aside, a second hurdle emerges: a private entity taking action pursuant to a federal law does not thereby automatically become a state actor.

A recent federal court decision involving a separate lawsuit alleging due process violations against CWRU is instructive on this point. *See Doe v. Case W. Reserve Univ.*, No. 1:17 CV 414, 2017 WL 3840418, at *9 (N.D. Ohio Sept. 1, 2017). In *Doe*, the plaintiff did flesh out a state action argument—a creative one under the nexus test—and the court still rejected it. *Id.* The argument was that CWRU's actions with regard to the plaintiff were coerced by the federal government because CWRU feared that its failure to take action would risk de-funding penalties. *Id.* The court rejected the argument because there was no evidence that “the federal government participated in the proceedings against the plaintiff, or dictated the specific finding of responsibility in this case. Federal regulation and receipt of federal funds alone, does not convert private conduct to government or state action.” *Id.* *Doe's* Title IX-state action analysis is consonant

with other federal courts facing similar questions. *Id.* at *10 (N.D. Ohio Sept. 1, 2017) (“Despite extensive research, the Court has not found a single case in which a court has determined that a private school’s compliance with Title IX’s regulations make that entity a state actor for purposes of a Fourteenth Amendment due process claim, nor has Plaintiff cited any such decision.”). *Doe*’s analysis is persuasive. Therefore, even with dramatically more artful pleading, Faparusi would fail to defeat defendants’ state action argument.

With no showing that CWRU was a state actor, Faparusi’s due process challenge must fail. This fatal flaw in Faparusi’s due process argument is made clear by the very cases he relies on: they either considered private law contract challenges, not constitutional ones, based on the schools’ deviation from its own disciplinary procedures, *see* Appellant Br. at 23 (citing *Fellheimer*, discussed above), or disciplinary actions by *state* universities, *see* Appellant Br. at 24 (citing *Doe v. The Rector & Visitors of George Mason Univ.*, 179 F. Supp. 3d 583 (E.D. Va. 2016)). Faparusi may have his reasons to be indignant about CWRU’s treatment of him. But a perception of mistreatment, even a well-founded one, does not automatically mean Faparusi has suffered a deprivation of his rights under the Constitution. We therefore affirm the district court’s dismissal of Faparusi’s Fourteenth Amendment due process claims in Counts One, Two, Three, and Five.

4. Breach of Contract Claim

The district court dismissed Faparusi's state law breach of contract claim (Count Four) after finding that Faparusi could not establish that CWRU breached any portion of the university handbook. R. 24, Op. and Order, at 13, PID 357. Specifically, the court said that the handbook provision Faparusi pointed to conferred a right only on the complainant in the underlying investigation, not the respondent. *Id.* While the district court was correct with respect to Page 20, paragraph 2's notice requirement, it did not dispose of Faparusi's other contractual complaint—that CWRU violated the handbook by holding *two* hearings rather than one. *See* R. 6, Opp. Mot. to Dismiss, at 11, PID 140; Appellant Br. at 26. On de novo review, we affirm the district court's dismissal of the contract claim, but we supplement the district court's reasoning to account for this latter argument.

Ohio contract law governs this dispute. "Generally it may be stated that when a student enrolls in a college or university, pays his or her tuition and fees, and attends such school, the resulting relationship may reasonably be construed as being contractual in nature." *Behrend v. State*, 379 N.E.2d 617, 620 (Ohio Ct. App. 1977). "Yet, at the same time, '[c]ontracts for private education have unique qualities and must be construed to allow the institution's governing body to meet its educational and doctrinal responsibilities.'" *Valente v. Univ. of Dayton*, 438 F. App'x 381, 384 (6th Cir. 2011) (quoting *Ray v. Wilmington Coll.*, 667 N.E.2d 39, 42 (Ohio Ct. App. 1995)). Accordingly, is it "well established that courts

will not interfere in these matters in the absence of a clear abuse of discretion.” *Schoppelrei v. Franklin Univ.*, 228 N.E.2d 334, 336 (Ohio Ct. App. 1967). In confronting challenges to private school disciplinary proceedings, the appropriate question is thus “whether the proceedings fell within the range of reasonable expectations of one reading the relevant rules, an objective reasonableness standard.” *Pierre v. Univ. of Dayton*, 143 F. Supp. 3d 703, 713 (S.D. Ohio 2015).

The answer to that question is yes. It is true enough that the handbook provisions for the Administrative Hearing Procedure discuss “the hearing,” R. 6, Opp. Mot. to Dismiss, at 11, PID 140, and Faparusi has a colorable argument that such language means “only one hearing was to be held,” Appellant Br. at 26. But Faparusi’s argument fails on closer inspection. For one thing, it is question-begging. It assumes without good reason that *any* contact between CWRU officials and the complainants constitutes a hearing, triggering requirements like notice to the respondent and the right of the respondent to attend. But why should we view CWRU’s decision to interview the complainant in this case as a hearing within the meaning of these handbook provisions? To the contrary, an equally (if not more) plausible interpretation of the University’s meeting with complainants would be that it was part of the school’s *investigation*. If that is the case, then the provisions Faparusi points to are not even applicable in the first instance.

What’s more, even assuming the contact with

complainants was subject to the hearing provisions, the process afforded to Faparusi as a whole was largely consistent with that outlined in the handbook. In the end, Faparusi was given notice of his hearing, provided the evidence to be used against him at the hearing, was given an opportunity to respond at the hearing, and was able to appeal the adverse decision against him. Those “proceedings fell within the range of reasonable expectations of one reading the relevant rules” in CWRU’s handbook. *Pierre*, 143 F. Supp. 3d at 713. Accordingly, Faparusi’s breach of contract claim cannot succeed.

III

For the reasons set forth above, we affirm the district court’s dismissal of all five of Faparusi’s claims.

APPENDIX B

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**OLAOLUWA FAPARUSI,
Plaintiff,**

vs.

**CASE WESTERN RESERVE UNIV., ET AL.,
Defendant.**

**CASE NO.1:16CV1586
JUDGE CHRISTOPHER A. BOYKO
OPINION AND ORDER**

CHRISTOPHER A. BOYKO, J:

This matter is before the Court on the Report and Recommendation of the Magistrate Judge that the Court grant Defendants' Motion to Dismiss (ECF # 5) and all Plaintiff's claims be dismissed with prejudice. Having reviewed the Motion, Response, Report and Recommendation and Objections, the Court adopts the Magistrate Judge's Report and Recommendation and dismisses with prejudice Plaintiff's claims.

Plaintiff is an African-American male who was enrolled as a student at Defendant Case Western

Reserve University in 2014 ("Case Western"). During the 2015-2016 academic year, Plaintiff was a sophomore in Case Western's Biomedical Engineering department. Plaintiff is a resident of Tennessee. Defendant George O'Connell is the director of Student Conduct & Community Standards at Case Western and in 2016 was the Administrative Hearing Officer in Plaintiff's sexual misconduct administrative hearing. Defendant Kimberly Scott is the Title IX investigator at Case Western and investigated the allegations against Plaintiff that form the bases for the administrative action.

According to Plaintiff's Complaint, on March 1, 2016, Plaintiff went to Raymond House on the campus of Case Western, intending to meet his lab partner to study for a physics final. Plaintiff was carrying his iPhone because it contained his study materials. Plaintiff went to the fourth floor of Raymond House and began studying. After some time he went down to the third floor, hoping to run into his lab partner in order to continue studying. Once on the third floor Plaintiff needed to use the restroom urgently and decided to use the women's restroom. According to Plaintiff, although the third floor restroom was a women's restroom, it was common practice for both sexes to use it.

While Plaintiff was using a stall, two female students entered the restroom. Plaintiff recognized the voice of one of the females as a fellow student in one of his classes. This female student asked Plaintiff why he was in the women's restroom. Her companion became

visibly upset with Plaintiff, accusing him of using his iPhone to take pictures of her in the women's restroom. She demanded Plaintiff delete the photos on his phone. The two females left the restroom and Plaintiff departed shortly thereafter. Later that same day, campus police arrived at Plaintiff's dorm room and informed him that they received a complaint that he was taking pictures in the women's restroom. The officers asked to see Plaintiff's iPhone. Plaintiff allowed the officers to inspect his phone and, finding no incriminating photos, the officers left. That same day Plaintiff received a letter from Darnell T. Parker, Associate Vice President for Affairs and Title IX Coordinator at Case Western, informing Plaintiff that the Title IX office on campus was going to conduct an investigation of the Raymond House incident.

On March 3, 2016, Plaintiff's housing agreement was terminated, forcing him to seek off-campus housing. That same day, Plaintiff was questioned about the incident by Parker. Over the next few days Plaintiff met with school administrators and investigators. During these meetings Plaintiff denied taking pictures in the women's restroom.

Plaintiff describes a number of issues with the investigation conducted by Kimberly Scott and Case Western. He points to inconsistencies in the witness statements, including disparate descriptions of Plaintiff's hair length, the color of his sweat pants and the color of his iPhone. Plaintiff further alleges he was only given notice of a single charge of Sexual Exploitation prior to his hearing and he was only

permitted to review the hearing binder of evidence twenty-four hours before the hearing. During the administrative hearing, O'Connell made statements indicating he had ex parte communications with the complainants prior to the hearing without the Plaintiff being notified or being present. Plaintiff was ultimately found liable for Sexual Exploitation and Disorderly Conduct even though he had never been informed of the Disorderly Conduct charge prior to the hearing. Plaintiff subsequently appealed the finding, which was upheld by an Appeal Panel.

Plaintiff's Complaint alleges violations of his Due Process rights under the Fourteenth Amendment of Mistaken Identification, Lack of Notice of the Charge of Disorderly Conduct and Ex Parte Hearing against all Defendants. He also alleges Breach of Contract for deviations from the Administrative Process Hearing against Case Western and O'Connell. He further alleges a violation of his Due Process rights under the Fourteenth Amendment for Bad Faith and Malicious Investigation against Case Western and Scott.

On August 2, 2016, Defendants filed their Motion to Dismiss for Failure to State a Claim, contending Due Process claims do not apply to student policies and procedures brought against a private university. Defendants further allege that Plaintiff's Breach of Contract claim fails because Plaintiff's Complaint admits Defendants followed all policies and procedures applicable to Plaintiff.

The matter was referred to the Magistrate Judge for a Report and Recommendation in August of 2016 and on November 30, 2016, the Magistrate Judge issued his Report recommending that all Plaintiff's claims be dismissed with prejudice. The Magistrate Judge determined that Plaintiff's federal Due Process claims were brought under Title IX. Because Title IX does not apply to individuals, the Magistrate Judge recommended dismissal of all federal claims against individually named Defendants O'Connell and Scott. Turning to the claims against Case Western, the Magistrate Judge determined that Plaintiff failed to state any claim upon which relief may be granted under Title IX because his Complaint failed to sufficiently allege that Case Western's actions were the result of sexual bias against Plaintiff due to his gender and did not allege a pattern of decision-making improperly motivated by sexual bias or indifference due to sexual bias.

The Magistrate Judge then considered whether Plaintiff's claims supported a Due Process violation under the Fourteenth Amendment. Because Case Western is a private entity, the Magistrate Judge determined that under applicable law, courts may not interfere with the right of a private university to enforce disciplinary rules unless that entity has clearly abused its discretion. However, because Plaintiff's Complaint implicates Title IX, the Magistrate Judge recommended dismissal based on his analysis of Title IX.

Lastly, the Magistrate Judge determined that

Plaintiff's Breach of Contract claim fails as a matter of law because Sixth Circuit precedent does not require strict adherence to administrative procedures, rather, courts must consider whether the university abused its discretion in applying the disciplinary grievance procedure. Finding it did not, the Magistrate Judge recommends dismissing all of Plaintiff's claims.

Plaintiff timely filed a number of objections. First, Plaintiff alleges the Report and Recommendation contains factual errors. According to the Report, Plaintiff was suspended for using a women's restroom when in fact he was suspended for taking pictures of women using the restroom. He further alleges mistaken identity as a defense, contending Scott had ample evidence from which to conclude Plaintiff was actually innocent, but instead, Scott altered her own reports to ensure Plaintiff was found liable. Plaintiff alleges O'Connell improperly relied on ex parte evidence and ignored other evidence. Plaintiff argues that unlike the caselaw relied on by the Magistrate Judge, this case presents a serious issue of mistaken identity. Plaintiff further objects to the Magistrate Judge's analysis of Counts I, II, III and V of his Complaint under Title IX. According to Plaintiff, Counts I and II of his Complaint are not premised on Title IX. In fact, according to Plaintiff, Counts I, II, III and V are all general Due Process claims. He further objects to the Magistrate Judge's Recommendation finding no abuse of discretion.

Plaintiff argues that the incongruity of complainants descriptions of the perpetrator combined

with the flaws in Case Western's disciplinary procedures provides ample evidence of an abuse of discretion.

Lastly, Plaintiff contends he has stated a Breach of Contract claim under Ohio law by showing the above abuse of discretion, particularly as it relates to Defendants *ex parte* communications with complainants.

LAW AND ANALYSIS

Standard of Review

Under Fed. R. Civ. P. 72(b) and 28 U.S.C. § 636, the District Court is required to review *de novo* any portion of the Magistrate Judge's Report to which a specific objection is made. A party who fails to file an objection waives the right to appeal. *U.S. v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981). The District Court need only review the Magistrate Judge's factual or legal conclusions that are specifically objected to by either party. *Thomas v. Arn* 474 U.S. 140, 150 (1985).

Local Rule 72.3(b) recites in pertinent part:

The District Judge to whom the case was assigned shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or

recommendations made by the Magistrate Judge. The District Judge need conduct a new hearing only in such District Judge's discretion or where required by law, and may consider the record developed before the Magistrate Judge, making a determination on the basis of the record. The District Judge may also receive further evidence, recall witnesses or recommit the matter to the Magistrate Judge with instructions.

Incorrect Recitation of the Facts

Plaintiff alleges the Magistrate Judge's Recommendation relies on the incorrect assertion that Plaintiff was disciplined for using a women's restroom when, in fact, he was disciplined for allegedly taking pictures of women in the restroom. Plaintiff is incorrect in that the Magistrate Judge's Recommendation clearly considered the disciplinary action was based on the accusation that Plaintiff was taking pictures of women in the women's restroom. (See R & R pg. 2). Thus, Plaintiff's objection on the applicable facts has no merit.

Title IX

According to Plaintiff, the Magistrate Judge incorrectly analyzed his Due Process claims under Title IX. While the Court may agree that the wording of the Complaint leaves some doubt whether Plaintiff's claims at Counts I, II, III and V plead Title IX or

general Due Process violations, Plaintiff's Opposition to Defendants' Motion to Dismiss erased all doubts as to Plaintiff's intent. On page 7 of his Response to Defendants' Motion to Dismiss, Plaintiff captions his argument, "The Cause of Action is based on the enforcement of the requirements of Title IX and lack of compliance with the non-administrative requirements of Title IX." Furthermore, in the body of his argument, he states "Therefore, Plaintiff has brought his cause of action based on Defendants' enforcement of Title IX, a federal law. The relevant policies and procedures used by CWRU in this cause of action were to comply with Title IX and are not solely administrative in nature." Plaintiff then spends the next few pages describing how Defendants handbook and guidance letter are governed by and demonstrate compliance with Title IX requirements. Next, under the caption "Plaintiff has Stated a Due Process Claim under the Fourteenth Amendment," Plaintiff states, "Fourteenth Amendment due process applies to policies and procedures used by CWRU to comply with the Title IX mandate..." In his conclusion, Plaintiff writes "the core of this case is CWRU's enforcement of a federal law, Title IX."

This is consistent with the allegations in Plaintiff's Complaint wherein he alleges "This case arises under the United States Constitution and Title IX." (Complaint 2). Plaintiff's Complaint further alleges "At all time relevant, Defendants acted under color of state law to enforce the requirements of Title IX." (Complaint 8). These allegations and representations contained in the Complaint and in

Plaintiff's Response demonstrate Plaintiff's Due Process claims were brought under Title IX. This conclusion is further supported by the fact that Plaintiff does not allege his Due Process claims are brought under 42 U.S.C. §1983. As the Magistrate Judge accurately concluded, due process claims under the Fourteenth Amendment to the Constitution are not self-enforcing but are enforced through Congressional legislation. *City of Boerne v. Flores*, 521 U.S. 507, 518-19 (1997). Nowhere in his Complaint does Plaintiff plead any other statutory scheme under which his Fourteenth Amendment Due Process claims are brought other than Title IX.¹ Thus, the Court agrees with the Magistrate Judge that Plaintiff's

¹ While courts are expected to liberally construe a pro se plaintiff's complaint the posture of this case is somewhat different in that Plaintiff initially filed his Complaint pro se but an attorney entered an appearance on behalf of Plaintiff prior to the filing of his Objections to the R & R of the Magistrate Judge. Plaintiff did not seek to amend his Complaint to clarify his claims. Principles requiring generous construction of *pro se* pleadings are not without limits. See *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989); *Beaudett v. City of Hampton*, 775 F.2d 1274, 1277 (4th Cir. 1985). A complaint must contain either direct or inferential allegations respecting all the material elements of some viable legal theory to satisfy federal notice pleading requirements. See *Schied v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 437 (6th Cir. 1988). District courts are not required to conjure up questions never squarely presented to them or to construct full blown claims from sentence fragments. *Beaudett*, 775 F.2d at 1278. To do so would "require ...[the courts] to explore exhaustively all potential claims of a *pro se* plaintiff, ... [and] would...transform the district court from its legitimate advisory role to the improper role of an advocate seeking out the strongest arguments and most successful strategies for a party." *Id.* at 1278.

Fourteenth Amendment Due Process claims must be analyzed under Title IX.

The Court adopts the Magistrate Judge's Recommendation that all Plaintiff's Title IX claims be dismissed for failure to state a claim under the four standards of relief articulated under Title IX. In fact, Plaintiff does not challenge this portion of the Magistrate Judge's analysis and raises no objections to his Title IX analysis. Therefore, the Court adopts the well-reasoned recommendation and dismisses Counts I, II, III and V of Plaintiff's Complaint. Furthermore, as the Magistrate Judge correctly determined, Title IX applies only to institutions and programs and not to individuals, therefore, he recommends dismissal of Counts I, II, III and V as relates to O'Connell and Scott. The Court agrees and adopts the Recommendation that these claims also be dismissed as to the individually named Defendants.

Fourteenth Amendment Due Process

Even if this Court were to construe Plaintiff's claims as straight Fourteenth Amendment Due Process violation claims, dismissal would still be appropriate for a number of reasons. First, Plaintiff never brought the claims under 42 U.S.C. § 1983 as required to assert such violations on his own behalf. Second, even if the Court were to construe them as having been brought under § 1983, such an action may only be brought against a state actor or one acting under color of state law. "[T]he Fourteenth Amendment, which prohibits the states from denying

federal constitutional rights and which guarantees due process, applies to acts of the states, not to acts of private persons or entities.” *Rendell Baker v. Kohn*, 457 U.S. 830, 837–38, 102 S. Ct. 2764, 2769–70, 73 L. Ed. 2d 418 (1982). “§ 1983, which was enacted pursuant to the authority of Congress to enforce the Fourteenth Amendment, prohibits interference with federal rights under color of state law.” *Id.* “The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights ‘fairly attributable to the State?’” *Id.*, quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482. “The core issue presented in this case is not whether petitioners were discharged because of their speech or without adequate procedural protections, but whether the school’s action in discharging them can fairly be seen as state action. If the action of the respondent school is not state action, our inquiry ends.” *Rendell Baker* at 838.

Plaintiff fails to allege any plausible facts supporting his assertion that Case Western is a state actor or acted under color of state law. Plaintiff does not dispute that Case Western is a private university. Therefore, his Complaint must assert facts making his claim that Case Western acted under color of state law plausible. In deciding a motion to dismiss under Fed. Civ. P. 12(b)(6), the court must accept as true all of the factual allegations contained in the complaint. *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007). The court need not, however, accept conclusions of law as

true:

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” As the Court held in [*Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 [(2007)]]], the pleading standard Rule 8 announces does not require “detailed factual allegations,” but it demands more than an unadorned, the-Defendant-unlawfully-harmed-me accusation. *Id.* at 555. A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 555. Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.” *Id.* at 557.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Id.* at 570. A claim has facial plausibility when the Plaintiff pleads factual content that allows the court to draw the reasonable inference that the Defendant is liable for the misconduct alleged. *Id.* at 556. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility

that a Defendant has acted unlawfully. *Id.* Where a complaint pleads facts that are “merely consistent with” a Defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.* at 557.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

According to the Sixth Circuit, the standard described in *Twombly* and *Iqbal* “obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.” *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 541 (6th Cir. 2007) (quoting *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2nd Cir. 2007)). That is, “*Iqbal* interpreted *Twombly* to require more concrete allegations only in those instances in which the complaint, on its face, does not otherwise set forth a plausible claim for relief.” *Weisbarth*, 499 F.3d at 542. A complaint should be dismissed when it fails to allege “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570.

Plaintiff has asserted no facts supporting his allegation that Case Western acted under color of state law other than simply reciting the legal conclusion that Case Western acted under color of law. Therefore, insofar as his Complaint alleges a Fourteenth Amendment Due Process claim under §1983, it fails to state a claim upon which relief may be granted.

Lastly, in spite of all these flaws in Plaintiff's Complaint, the Magistrate Judge engaged in a thorough examination of the process accorded Plaintiff arising from the charges brought against him for Sexual Misconduct. The Magistrate Judge found that the process was fundamentally fair in that Plaintiff had an opportunity to know the charges brought against him and had an opportunity to be heard. Plaintiff also had an appeal before the Appeal Panel at Case Western, where he asserted all the issues presented here. This Court agrees with the Magistrate Judge that there was no abuse of discretion by Case Western or the individually named Defendants and the Court adopts the Magistrate Judge's Recommendation that Plaintiff's claims at Counts I, II, III and V be dismissed with prejudice.

Breach of Contract

Plaintiff's Breach of Contract claim alleges that Case Western's Sexual Misconduct Policy manual constitutes a contract between Plaintiff and Case Western. According to Plaintiff's Complaint, Defendants Case Western and O'Connell breached the manual when O'Connell conducted an ex parte hearing with complainants. Specifically, Plaintiff alleges Defendants breached page 20, paragraph 2 of the Administrative Hearing Process wherein the last sentence reads, "The complainant will be notified of the option to attend the hearing if the complainant wishes to do so." Plaintiff contends that O'Connell's alleged ex parte conversation with complainants prior to the hearing was a material breach of page 20,

paragraph 2, demonstrates bias in favor of complainants and calls into question O'Connell's impartiality. Plaintiff's Complaint alleges "Defendants breached its (sic) contract with Mr. Faparusi's (sic) by having an ex parte hearing, a material deviation from the CWRU Sexual Misconduct Policy." (Complaint ¶94). Assuming for purposes of this ruling that the Sexual Misconduct Policy imposes contractual obligations on Defendants, the Magistrate Judge determined that Plaintiff's Breach of Contract claim should be dismissed because nothing alleged by Plaintiff supports a finding of a breach, the entire process was fundamentally fair and Case Western's actions did not involve an abuse of discretion.

While the Court agrees with the Magistrate Judge's conclusion, the Court finds Plaintiff's claim fails as a matter of law because, on its face, there is no plausible claim for breach as alleged by Plaintiff. Plaintiff cites one provision of the manual as having been breached. The plain language of page 20, paragraph 2 of the manual only confers upon the complainant a right to be notified of the hearing and the option of attending. Plaintiff was not the complainant in the hearing; he was the respondent. Thus, page 20, paragraph 2 of the manual confers no rights upon Plaintiff in the context of the hearing and Plaintiff cannot assert a breach of that section. Only a complainant may assert a breach based on the plain language of page 20, paragraph 2. Thus, for this reason alone, Plaintiff fails to state a claim for Breach of Contract and his claim must be dismissed against both Case Western and O'Connell. Furthermore,

nothing in Plaintiff's Complaint alleges a plausible claim that there exists a contract between O'Connell individually and Plaintiff arising out of the Sexual Misconduct Policy manual. For this reason also, the breach of contract action must be dismissed against O'Connell.

Therefore, for the foregoing reasons, the Court accepts and adopts the Report and Recommendation that the Court grant Defendants' Motion to Dismiss and the Court dismisses all claims against Defendants with prejudice.

IT IS SO ORDERED.

s/ Christopher A. Boyko
CHRISTOPHER A. BOYKO
United States District Judge

APPENDIX C

Case No. 17-3212

**UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

ORDER

OLAOLUWA FAPARUSI

Plaintiff - Appellant

v.

**CASE WESTERN RESERVE UNIVERSITY; GEORGE
O'CONNELL, Administrative Hearing Officer;
KIMBERLY SCOTT, Title IX Investigator**
Defendants - Appellees

**BEFORE: KEITH, ROGERS and MCKEAGUE, Circuit
Judges;**

Upon consideration of the petition for rehearing
filed by the appellant,

It is **ORDERED** that the petition for rehearing
be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

Issued: October 18, 2017 /s/

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

OLAOLUWA FAPARUSI,
Plaintiff,

v.

CASE WESTERN RESERVE
UNIVERSITY, *et al.*,
Defendants.

CASE NO. 1:16 CV 1586
JUDGE CHRISTOPHER A. BOYKO
MAGISTRATE JUDGE
WILLIAM H. BAUGHMAN, JR.

REPORT & RECOMMENDATION

Introduction

Before me by referral¹ in this action by Olaoluwa Faparusi against Case Western Reserve University (CWRU), and others, alleging violations of the Due Process Clause of the Fourteenth Amendment and a breach of contract claim arising under state law,² is a

¹ ECF # 10.

² ECF # 1.

motion by all defendants to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted.³ Faparusi has responded in opposition to the motion,⁴ and the defendants have replied to that opposition.⁵

For the reasons that follow, I will recommend that the motion to dismiss be granted as to all claims and that Faparusi's claims be dismissed with prejudice.

Facts

The underlying facts of the complaint were summarized by the District Court in its opinion and order⁶ adopting my report and recommendation⁷ to deny Faparusi's motion for a temporary restraining order and a preliminary injunction.⁸

Plaintiff was suspended from Case Western Reserve University ("CWRU") for using a women's restroom at a facility while pressed for time during the

³ ECF # 5.

⁴ ECF # 6.

⁵ ECF # 14.

⁶ ECF # 17.

⁷ ECF # 12.

⁸ ECF # 3.

period he was studying for an examination during his sophomore year on March 1, 2016. While in a restroom stall, he was verbally confronted by two female students who accused plaintiff of taking pictures in the restroom. Following receipt of an incident report, CWRU began an investigation and terminated his on-campus housing agreement. Plaintiff was found to be liable on two charges of Sexual Exploitation and Disorderly Conduct. Plaintiff appealed the decision within the University hearing process. His appeal was denied.

Plaintiff . . . argues that CWRU's hearing and decision to suspend him were done in violation of his rights under the Due Process Clause of the Fourteenth Amendment. Plaintiff further alleges that CWRU and the individual employee defendants breached CWRU's contract with plaintiff in the way the hearing was conducted.⁹

Analysis

A. Standard of review

1. 12(b)(6) motion to dismiss

In adjudicating a motion to dismiss for failure to state a claim upon which relief may be granted the court is required to "accept all well-pleaded allegations of the complaint as true and construe the complaint in

⁹ ECF # 17 at 1-2.

the light most favorable to the plaintiff.”¹⁰ Although the complaint need not contain “detailed factual allegations,” it does require more than “labels and conclusions” or “a formulaic recitation of the elements of a cause of action.”¹¹ Thus, a complaint survives a motion to dismiss if it “contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”¹² In that regard, “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”¹³

B. Applications of standard

1. Title IX - federal law

In his complaint and in his response to the motion to dismiss, Faparusi asserts that the federal law claims are based on “the enforcement of the requirements of Title IX and the lack of compliance with the non-administrative requirements of Title IX.”¹⁴ Specifically, Faparusi maintains that because

¹⁰ *Dubay v. Wells*, 506 F.3d 422, 426 (6th Cir. 2007).

¹¹ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

¹² *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

¹³ *Id.*

¹⁴ ECF # 6 at 7; *see also*, ECF # 1 at ¶ 8 (“At all time [sic] relevant, Defendants acted under color of state law to enforce the

CWRU's investigation of the incident at issue was mandated by the requirements of Title IX, and was conducted by CWRU's "Title IX Coordinator," the "controlling authority here is Title IX and this cause of action arises from the application of Title IX."¹⁵

This Court has previously set forth the relevant portion of Title IX as follows:

Title IX states, in relevant part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The Department of Education and the Department of Justice have also adopted regulations that require schools to "adopt and publish grievance procedures providing for the prompt and equitable resolution of student [...] complaints alleging any action that would be prohibited by" Title IX regulations. 34 C.F.R. § 106.8 (b); 28 C.F.R. § 54.135(b).¹⁶

In addressing the application of Title IX, the

requirements of Title IX.").

¹⁵ ECF # 6 at 8.

¹⁶ *Doe v. Case Western Reserve University, et al.*, No.1:14-CV-2044, 2015 WL 5522001 at * 3 (N.D. Ohio Sept. 16, 2015).

United States Supreme Court has held that Title IX applies to institutions and programs receiving federal funds, and so does not reach individuals, such as school administrators.¹⁷ Accordingly, any claims premised on violations of Title IX asserted against the individual defendants George O'Connell and Kimberly Scott do not state grounds on which relief may be granted and so should be dismissed.¹⁸

As to claims against CWRU based on violations of Title IX, this Court in *Doe*, stated that “the Sixth Circuit has recognized a private right of action where the plaintiff alleges that an educational institution implemented disciplinary actions that discriminated against the plaintiff based on sex.”¹⁹ To that end, this Court has stated the analytical framework for considering Title IX claims arising from a disciplinary action:

“Title IX claims [...] arising from disciplinary hearings are analyzed under the ‘erroneous outcome’ standard, ‘selective enforcement’ standard, ‘deliberate indifference’ standard, and ‘archaic assumptions’ standard.” *Doe v. Univ. of the S.*, 687 F.Supp.2d 744, 756 (E.D.

¹⁷ *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246, 257 (2009).

¹⁸ *Marshall v. Ohio University*, No. 2:15-CV-775, 2015 WL 7254213, at * 4 (S.D. Ohio Nov. 17, 2015)(citation omitted),

¹⁹ *Doe v. CWRU*, 2015 WL 5522001, at *4 (citing *Mallory v. Ohio Univ.*, 76 F. App'x 634, 638-39 (6th Cir. 2003)).

Tenn. 2009), citing *Mallory*, 76 F. App'x at 638. Under the erroneous outcome standard, a plaintiff attempts to demonstrate that he was innocent of the charges presented and wrongly found to have committed an offense in an educational institution's disciplinary proceedings. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994). Under the selective enforcement standard, a plaintiff attempts to show that, "regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender." *Id.* A showing of deliberate indifference "requires the plaintiff to demonstrate that an official of the institution who had authority to institute corrective measures had actual notice of, and was deliberately indifferent to, the misconduct." *Mallory*, 76 F. App'x at 638, citing *Gebser*, 524 U.S. 274, 118 S. Ct. 1989, 141 L.Ed.2d 277. A showing of archaic assumptions requires the plaintiff to demonstrate "discriminatory intent in actions resulting from classifications based upon archaic assumptions." *Id.* at 638-39 (internal citations omitted). Under each of these standards, a plaintiff must demonstrate that the educational institution's challenged misconduct was motivated by sexbased discrimination. *Id.* at 639.²⁰

²⁰ *Id.*

Here, in considering the claims that may raise an issue of compliance with Title IX, the substance of the individual counts of the complaint are as follows:

- Count One states that Faparusi was the victim of “mistaken identification” in the investigation of the sexual misconduct complaint,²¹ and in the decision to “intentionally” disregard the evidence of misidentification and then proceed to charge Faparusi for the conduct in question.²²
- Count Two alleges that Faparusi was injured because he was found guilty of “disorderly conduct,” despite the fact that he was never charged with that offense, but only charged with “sexual exploitation.”²³
- Count Three contends that defendant O’Connell, who conducted the relevant administrative hearing at CWRU, had an *ex parte* communication prior to the hearing with the complainants that purportedly violated the rules for such hearing contained in CWRU’s policy manual,²⁴ and that O’Connell improperly relied on information from the complainants not otherwise in the record as a

²¹ ECF # 1 at 10.

²² *Id.* at 12 (¶¶ 59, 60).

²³ *Id.* at 12-13 (¶¶ 65, 66).

²⁴ *Id.* at 13-14 (¶¶ 72-74).

basis for the decision.²⁵

- Count Four is a state-law claim that CWRU and O'Connell breached the contract with Faparusi by O'Connell's *ex parte* communication with the complainants.²⁶
- Count Five maintains that CWRU and investigator Kimberly Scott conducted a "biased and malicious" investigation of Faparusi that "intentionally introduced irrelevant and prejudicial information but omitted material information that would have greatly helped the plaintiff's defense."²⁷

Before considering these allegations in the complaint under the rubric of Rule 12(b)(6) and the four standards for relief under Title IX that are cited above, I note that Faparusi has not cited to the four standards by which an alleged Title IX violation may be analyzed by a reviewing court, and note further that the defendants also do not cite or apply these standards, but appear to have misread this Court's holding in *Doe* as totally precluding all private actions arising under Title IX involving disciplinary procedures.²⁸ That said, I will analyze the individual

²⁵*Id.* at 14-15 (¶¶ 75-79). ²⁶*Id.* at 16-18 (*see*, ¶ 94).

²⁷*Id.* at 18-21 (*see*, ¶ 102).

²⁸ ECF # 14 at 2. The error seems to arise by misunderstanding this Court's holding in *CWRU* that "allegations that an educational institution failed to ... comply with Title IX

counts of the complaint under the erroneous outcome and the deliberate indifference standards, and in so doing recommend finding that the complaint in its entirety does not allege a violation under the selective enforcement or archaic assumption standards

a. Erroneous outcome

As discussed above, the erroneous outcome standard requires that a plaintiff demonstrate that he is innocent of the charges against him and was wrongly found to have committed the offense in the disciplinary proceeding. Moreover, in the context of a motion to dismiss, the plaintiff must “plausibly allege that [the educational institution’s] actions ‘were motivated by sexual bias’ or that its ‘disciplinary hearing process constitutes a pattern of decision-making whereby the ... disciplinary procedures governing sexual assault claims is discriminatorily applied or motivated by a chauvinistic view of the sexes’ to meet the ‘erroneous outcome’

administrative requirements ... do[es] not give rise to a private cause of action.” 2015 WL 5522001, at *4 (emphasis added). That holding, which is concerned with instances where the university failed to institute a grievance procedure or otherwise exhibited non-compliance with Title IX administrative requirements, states in its very next sentence that is not directed to cases, such as here, “where the plaintiff alleges that an educational institution implemented disciplinary *actions* that discriminated against the plaintiff based on sex.” *Id.* (emphasis added).

standard.”²⁹ To that end, a plaintiff may answer “the predominant question”³⁰ of whether the result of the disciplinary hearing was motivated by gender bias, or that the disciplinary procedures themselves establish a pattern of decision making that applies a chauvinistic view of the sexes, through “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.”³¹

In that regard, “a single case by an individual who was displeased by the result of a disciplinary proceeding cannot constitute a pattern of decision-making” such as would satisfy the erroneous outcome standard.³² Moreover, “a plaintiff’s subjective belief that he was the victim of discrimination - however strongly felt - is insufficient to satisfy his burden [under the erroneous outcome standard] to satisfy his burden at the pleading stage.”³³

²⁹ *Doe v. CWRU*, 2015 WL 5522001, at *5 (internal citations omitted).

³⁰ *Doe v. Trustees of Boston College*, No.15-CV-10790, 2016 WL 5799297, at * 24 (D. Mass. Oct. 4, 2016).

³¹ *Doe v. CWRU*, 2015 WL 5522001, at *6 (quoting *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2nd Cir. 1994)).

³² *Doe v. Univ. of the South*, 687 F.Supp.2d 744, 756 (E.D. Tenn. 2009)(citing *Mallory*, 76 F. App’x at 640).

³³ *Doe v. CWRU*, 2015 WL 5522001, at *6 (internal quotation and citation omitted).

Here, the complaint plausibly alleges in sufficient factual detail that Faparusi was innocent of the charges against him and that CWRU wrongly found grounds for Faparusi's suspension. Specifically, as noted above, the complaint alleges, with supporting factual detail, a plausible basis to conclude that Faparusi was the victim of mistaken identity and/or that there was sufficient incongruity in the witness descriptions of the alleged perpetrator and in the details of the offense itself "to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding."³⁴

But, as stated, Faparusi's complaint must also plausibly allege that CWRU's actions were motivated by "sexual bias" or that its disciplinary hearing process constitutes a "pattern of decision-making" whereby the procedures are "discriminatorily applied" or "motivated by a chauvinistic view of the sexes." In this case, I recommend finding that Faparusi's complaint does not make factual allegations to support such conclusions.

While, as noted above, the complaint does make conclusory allegations in Count One that CWRU "intentionally" disregarded exculpatory evidence, and further asserts in Count Three, with some greater specificity, that the hearing officer relied on *ex parte* communications and evidence outside the record, and also makes the conclusory allegation in Count Five that the investigator was "biased" against Faparusi, I

³⁴ *Yusuf*, 35 F.3d at 715.

recommend finding that these assertions are insufficient to support a claim that any procedural flaw in the hearing process or perceived hostility toward Faparusi was motivated by sexual bias.³⁵

Indeed, as this Court found in similar circumstances, the complete absence of any factual allegations that include statements by members of the disciplinary tribunal itself, statements from pertinent university officials or patterns of decision-making from past decisions that show the influence of gender bias, reduce the current complaint to single case of an aggrieved individual who was displeased with the result in his case. As such, and as discussed above, the case authority is clear that a single instance cannot constitute a pattern of gender-biased decision-making. Further, the case authority is also clear that even a passionate subjective belief that the plaintiff was the victim of discrimination will not be sufficient at the pleading stage to survive a motion to dismiss.

Accordingly, to the extent that Counts One, Three and Five are understood as claiming a violation of Title IX under the erroneous outcome test, I recommend finding that these counts do not satisfy the requirements of that standard mandated at the pleading stage, and thus that these claims be dismissed for failure to state a claim upon which relief can be granted.

b. Deliberate indifference

³⁵ *Doe v. CWRU*, 5522001, at *5.

As was the case with the erroneous outcome standard, Faparusi's complaint contains sufficient factual allegations to create a plausible inference that CWRU's disciplinary procedure was flawed and that administrators within that procedure were indifferent to flaws such as reliance on *ex parte* communications - that may have worked to the detriment of Faparusi's defense.³⁶ But, the case authority is clear that to establish deliberate indifference, the claimant must show that an official with authority to address the alleged discrimination against the plaintiff had actual knowledge of the misconduct and failed to respond.³⁷

Further, courts have questioned whether deliberate indifference claims can be brought in the case of a disciplined student, such as here.³⁸ They

³⁶ Having noted this, I further note that the exact due process guarantees afforded to criminal defendants or civil litigants are not *per se* transferrable to suspension hearings at private universities, and are not constitutionally mandated in that context. *Flaim v. Medical College of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005)(neither rules of evidence nor the rules of civil or criminal procedure need be applied); *Doe v. Trustees of Boston College*, 2016 WL 5799297, at *15 (citations omitted). Further, students at a private institution have no right to require that officials at that institution institute one particular set of remedies and procedures, and courts are cautioned not to second-guess administrative decision-making in disciplinary matters. *Univ. of the South*, 687 F.Supp. 2d at 757 (quotation omitted).

³⁷ *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 290 (1988).

³⁸ *Marshall*, 2015 WL 1179955, at *8.

have found that this claim is usually “asserted by a victim against a school or university official who *failed* to protect him or her from harassment or otherwise address the alleged misconduct - actions that [university] officials undisputably took, to protect the alleged victim from [the accused].”³⁹

That said, and assuming *arguendo* that this case may be viewed as being similar to *Wells* such that deliberate indifference applies here to a disciplinary proceeding, I nonetheless recommend that Faparusi’s complaint be dismissed for failing to state a claim upon which relief may be granted. Specifically, even if Counts One, Two, Three and Five can be read as alleging deliberate indifference to Faparusi’s complaints, these claims must nonetheless be dismissed because the counts do not also contain factual allegations that plausibly suggest that any indifference toward Faparusi was because of bias by

³⁹ *Id.*; but see, *Wells v. Xavier Univ.*, 7 F.Supp.3d 746, 751-52 (S.D. Ohio 2014)(allowing plaintiff’s deliberate indifference claim to survive motion to dismiss where the complaint alleged that the president of the university permitted the disciplinary action against the plaintiff to proceed despite receiving a “warning” from the prosecutor that the “allegations were unfounded” because the university president wanted to make a demonstration to the United States Dept. Of Education Office of Civil Rights that the university was taking sexual assault allegations seriously). This set of circumstances and evidence in *Wells* has been described as “anomalous in its application of deliberate indifference to a challenge to a disciplinary proceeding” rather than to cases of victims alleging indifference to their complaints of inaction. *Doe v. Brown Univ.*, 166 F.Supp.3d 177, 191 (D. R.I. 2016).

CWRU against Faparusi due to his gender.⁴⁰

In sum, and for the reasons stated, I recommend that all the federal law claims asserted- Counts One, Two, Three and Five - be dismissed with prejudice as failing to state a claim upon which relief may be granted.

2. General Fourteenth Amendment Analysis

Although Faparusi contends that the federal claims here arise under the Fourteenth Amendment to the Constitution as applied through Title IX,⁴¹ which has been discussed above, the defendants have cited numerous state law decisions for the general proposition that the Fourteenth Amendment's Due Process Clause does not apply to the policies and practices of private universities.⁴² Whatever the applicability of that law outside the context of Title IX, the federal claims here, as noted, have been pled as arising under Title IX and, as this Court's analysis in *CWRU* makes plain, the necessary standards for resolution of this matter are the four tests for claimed

⁴⁰ *Boston College*, 2016 WL 5799297, at 27 (context of summary judgment); *CWRU*, 2015 WL 5522001, at *5 (dismissing claim on deliberate indifference standard because it "did not contain factual allegations that plausibly suggest that [procedural] flaws were based upon bias against Plaintiff's gender"); *Univ. of the South*, 687 F.Supp. 2d at 758.

⁴¹ ECF #1 at ¶¶ 2, 3.

⁴² ECF # 5 at 2-4.

violations of Title IX set forth above.

I note further that the Fourteenth Amendment, of itself, “is not self-enforcing. Rather, § 5 of the Fourteenth Amendment grants Congress the power to enact legislation with the purpose of enforcing the Fourteenth Amendment.”⁴³ Here, to the extent the complaint asserts claims arising from alleged violations of Due Process rights of the Fourteenth Amendment, it does so by bringing those claims as purported violations of Title IX, and those allegations are treated above.

That said, I also note that despite the fact that Title IX claims of discrimination based on gender, as stated earlier, may be asserted against a private university, the rule is that courts will not interfere with a private universities right to enforce disciplinary rules in matters alleging a general denial of due process “absent a clear abuse of discretion.”⁴⁴

Thus, unlike the clear authority which holds that a Section 1983 claim involving a denial of due process may be readily brought against a public university,⁴⁵ such claims are more difficult to assert and prove

⁴³ *Johnson v. Sutter Delta Medical Center*, No. C 11-03628 SI, 2011 WL 5444319, at * 2 (N.D. California Nov. 9, 2011)(citing *City of Boerne v. Flores*, 521 U.S. 507, 518-19 (1997)).

⁴⁴ *Pierre*, 143 F.Supp. 3d at 712 (citation omitted).

⁴⁵ *Flaim*, 418 F.3d at 633 (“the Due Process Clause is implicated by higher education disciplinary decisions”)(citation omitted).

against a private university. A general claim against CWRU for violating due process in the disciplinary proceeding would not be a claim that CWRU could have provided Faparusi with a better hearing or that the hearing that was conducted failed to met the requirements of a formal trial, but would necessarily be only whether CWRU abused its discretion in conducting the hearing it did; *i.e.*, whether it acted arbitrarily or “whether the proceedings fell within the reasonable range of expectations of one reading the relevant rules, an objective reasonableness standard.”⁴⁶

Here, although the jurisdictional bases for the claims is somewhat imprecisely stated, there is no doubt that Faparusi has made his federal claims under Title IX, and not as general due process claims. Section One of the complaint states that it is a civil action against the defendants for “committing acts, under the color of law, with the intent and for the purpose of depriving Plaintiff of rights secured under the Constitution and laws of the United States.” But then Section Two clarifies the allegation of Section One by stating that “[t]his case arises under the United States Constitution and Title IX.” Moreover, Section Eight is even more explicit in stating that “[a]t all time[] relevant, Defendants acted under the color of state law to enforce the requirements of Title IX.”⁴⁷

⁴⁶ *Pierre*, 143 F.Supp. 3d at 713 (citations omitted).

⁴⁷ In his response to the motion to dismiss, Faparusi again specifically states that “this “this cause of action is based on

Finally, as noted above, and in the preceding footnote, Faparusi makes it plain in his response to the motion to dismiss that his complaint “is based on the enforcement of the requirements of Title IX and lack of compliance with the non-administrative requirements of Title IX.”⁴⁸

Thus, although Faparusi is entitled as a *pro se* plaintiff to have his pleadings read with leniency, I recommend that there is no reading of his pleadings that will justify seeing in them a claim for federal relief under anything other than Title IX grounds.

3. Breach of Contract - Ohio law - Count Four

Prior to considering the state law breach of contract claim in count four of the complaint, it is initially noted that Faparusi has alleged that this Court’s jurisdiction may be found in both a federal question and diversity of citizenship, in as much as he alleges that he is a citizen of Tennessee and that CWRU has its principal place of business in Ohio.⁴⁹ For this reason, CWRU’s assertion that this Court may decline to exercise jurisdiction over the state law

CWRU’s implementation of Title IX;” and further that “Fourteenth Amendment due process applies to the policies and procedures used by CWRU to comply with the Title IX mandate” ECF # 6 at 9.

⁴⁸*Id.* at 7.

⁴⁹ ECF # 1 at ¶¶ 1, 2.

breach of contract claim⁵⁰ is inapposite, because independent jurisdiction exists over that claim because of diversity of citizenship.

In *Valente v. University of Dayton*⁵¹ the Sixth Circuit recognized that the relationship between an enrolled student who has paid his tuition and the school he attends “may reasonably be construed as being contractual in nature.”⁵² Yet, at the same time *Valente* further noted that “[c]ontracts for private education have unique qualities and must be construed to allow the institutions governing body to meet its educational and doctrinal responsibilities.”⁵³

As the district court in *Valente* observed, Ohio contract law requires only “substantial compliance” with a contract and does not permit a finding of breach for nominal or technical departures.⁵⁴ But, as the district judge also noted, Ohio courts in the context of a private university student discipline case would go further than simply allowing the defense of substantial compliance, and would “uphold discipline which had

⁵⁰ ECF # 5 at 6.

⁵¹ *Valente v. University of Dayton*, 438 Fed. App’x 381 (6th Cir. 2011).

⁵² *Id.* at 384 (internal quotation and citation omitted).

⁵³ *Id.* (internal quotation and citation omitted).

⁵⁴ *Valente v. Univ. of Dayton*, 689 F.Supp.2d 910, 918 (S.D. Ohio 2010)(citations omitted).

been imposed in a fundamentally fair manner even if it did not substantially comply with the university's adopted procedure."⁵⁵

On appeal, the Sixth Circuit squarely adopted the view that Ohio law, as relates to a contract between a student and the attended university in the context of a disciplinary proceeding, would hold that the issue is not whether the university "strictly adhered" to "each of the procedural rules" set out in a student handbook, or whether "it could have provided a better hearing," but rather "whether it had abused its discretion - whether it acted unreasonably, arbitrarily, or unconscionably."⁵⁶ In that same vein, and as noted above, the *Pierre* court considered the alleged Ohio law breach of contract claim under the rubric of whether the proceedings "fell within the range of reasonable expectations of one reading the relevant rules, an objective reasonableness standard."⁵⁷

Here, Faparusi asserts that CWRU breached its contract with him as set forth in the Administrative Hearing Procedure.⁵⁸ Specifically, he contends that any *ex parte* communication between the hearing officer and the complainant/ witness:

⁵⁵ *Id.*

⁵⁶ *Valente*, 438 Fed. App'x at 385 (citation omitted).

⁵⁷ *Pierre*, 143 F.Supp. 3d at 713 (citations omitted).

⁵⁸ ECF # 6 at 11.

- constituted a “hearing” of which Faparusi should have been notified;
- that the Title IX investigator - not the hearing officer - should have the investigative responsibilities;
- that the *ex parte* communication was inconsistent with Faparusi being allowed to review the evidence.⁵⁹

As CWRU observes, even in the written administrative hearing policy:

- nothing bars the hearing officer from asking questions;
- nothing gives the respondent the absolute right to participate in every interaction the complainant has with an investigator or the hearing officer;
- nothing bars an investigator or the hearing officer from having contact with the complainant prior to the hearing, with or without the participation of the respondent; and
- nothing in the policy - which permits the hearing officer to consider “any relevant information” - eliminates an *ex parte* conversation from the category of relevant information that must be

⁵⁹ *Id.* at 11-12.

considered.⁶⁰

When Faparusi's allegations are considered not as posing the question of whether CWRU "strictly adhered" to every procedural rule, but in the context of whether the proceeding as it occurred fell within the range of "reasonable expectations of one reading the relevant rules," I recommend that CWRU's motion to dismiss under Rule 12(b)(6) be granted. In that respect, I recommend finding that nothing alleged by Faparusi under the Ohio law breach of contract claim, and reviewed together with the applicable sections of the CWRU Administrative Hearing Procedure, states a claim upon which relief may be granted since the actions of CWRU, while perhaps not perfect, show that the entire process was "fundamentally fair"⁶¹ and provide no evidence that the defendants clearly abused their discretion.

Conclusion

For the reasons stated above, I recommend granting defendants' motion to dismiss Faparusi's complaint under Rule 12(b)(6) for failure to state a claim upon which relief may be granted, and so further recommend that all counts of the complaint be dismissed with prejudice.

Dated: November 30, 2016

⁶⁰ ECF # 14 at 4-5.

⁶¹ *Pierre*, 143 F.Supp. 3d at 713.

s/ William H. Baughman, Jr.
United States Magistrate Judge

Objections

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within fourteen (14) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.⁶²

⁶²See, *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). See also, *Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986).