No. 20-

In the Supreme Court of the United States

PRIANKA BOSE, PETITIONER

v.

RHODES COLLEGE AND ROBERTO DE LA SALUD BEA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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." 20 U.S.C. § 1681(a) (emphasis added).

Prianka Bose's chemistry professor falsely accused her of cheating in his class because she rejected his romantic advances. A disciplinary body of Rhodes College—despite being warned about the professor's discriminatory motive—then expelled her based on evidence that he fabricated. The question presented is:

Whether a school that expels a student based on charges and evidence motivated by sex bias denies that student educational opportunities "on the basis of sex."

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Bose* v. *Bea*, No. 18-5936 (6th Cir.), judgment entered on January 28, 2020; and
- *Bose* v. *Bea*, No. 2:16-cv-02308 (W.D. Tenn.), judgment entered on February 27, 2018.

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PETITION FOR A WRIT OF CERTIORARI

A professor falsely accuses a student of cheating because she rejected his romantic advances, and he succeeds in having her expelled based on fabricated evidence. Is the dismissal "on the basis of" sex? Under any normal understanding of the term, the answer is yes. The professor's sex-based retaliation is an obvious and direct reason for the school's expulsion. In the language of Title IX: "[O]n the basis of" the student's sex, she was "excluded from" and "denied the benefits of" educational opportunities and was "subjected to discrimination." 20 U.S.C. § 1681(a).

That perfectly describes what happened here. Because Prianka Bose rebuffed the inappropriate overtures of her chemistry professor, Roberto de la Salud Bea, he filed false charges against her and fabricated evidence of her supposed cheating. Despite repeated warnings about Bea's motivations, Rhodes College relied on his false charges and evidence to expel her anyway. None of this would have happened if Bose had been male. As this Court recently put it, "changing [her] sex would have yielded a different" outcome. *Bostock* v. *Clayton County*, 140 S. Ct. 1731, 1741 (2020).

The Sixth Circuit nevertheless held that Title IX provides no recourse in those circumstances, on the theory that Rhodes's own lack of "discriminatory motive" severed the "required connection" between an undeniably sex-based act of retaliation and the school's decision. Pet. App. 9a. That conclusion cannot be squared with the statute's plain language, which the Sixth Circuit did not even bother to interpret. It ignores "axiomatic" principles of causation, under which "the exercise of judgment by [a] decisionmaker does not prevent" a subordinate's discriminatory actions "from being the proximate cause of the harm." *Staub* v. *Proctor Hosp.*, 562

U.S. 411, 419 (2011). It contravenes the basic purposes of a statute designed to prevent federal-funding recipients from closing their doors to students of one sex, if students of the other would have access. And it contradicts guidance from the U.S. Department of Education, which prohibits teachers and other school officials from weaponizing codes of conduct against students who rebuff or report sexual harassment.

The ruling below also directly conflicts with decisions from other courts of appeals, which have held educational institutions responsible under Title IX for giving effect to charges and evidence motivated by sex-based animus. The Sixth Circuit acknowledged the contrary authority but "decline[d] to follow it." Pet. App. 14a.

Perhaps worst of all, the Sixth Circuit's decision creates a blueprint for schools to shield themselves from liability for sex-based decisions, even where those schools have actual knowledge that they are effectuating an employee's discriminatory agenda. This Court has dismissed as "implausible" the notion that Congress would outlaw discrimination, yet allow entities to skirt that prohibition by "isolat[ing]" the ultimate decisionmaker from "discriminatory acts and recommendations of [employees] that were designed and intended to produce the adverse action." *Staub*, 562 U.S. at 420. Yet that is precisely what the Sixth Circuit's decision, if allowed to stand, would mean: A school can launder even the most blatant discrimination through the expedient of an additional layer of decision-making—even if it uncritically rubber-stamps a decision it knows was based on a prohibited consideration.

This Court's intervention is necessary to resolve a circuit conflict on a frequent and recurring issue, and to overturn an atextual causation standard that relegates Title IX claims to second-class status.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 947 F.3d 983. The opinion of the district court (Pet. App. 24a-58a) is unreported but available at 2018 WL 8919932.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2020. Pet. App. 1a. The court of appeals denied a timely petition for rehearing on March 23, 2020. *Id.* at 59a. By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1681(a) of Title 20, United States Code, provides in relevant part: "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."

STATEMENT OF THE CASE

Prianka Bose was excelling at Rhodes College, where her academic and extracurricular success earned her early admission to medical school. But less than two weeks after she rejected the romantic advances of her chemistry professor, Roberto de la Salud Bea, she found herself facing false allegations of cheating. Based on a fake answer key that Bea created—and despite Bose's repeated warnings that Bea was framing her for sex-based reasons—Rhodes expelled her.

A. Bose Rebuffs Her Professor's Romantic Advances

Prianka Bose enrolled at Rhodes College in the fall of 2013. Pet. App. 2a. During her time there, she played varsity tennis and studied history and neuroscience, earning a cumulative GPA of 3.7. Her stellar performance gained her admission to medical school through George Washington University's early selection program. C.A. Rec. 1016-17.[1]

In the spring of 2015, Bose enrolled in Roberto de la Salud Bea's Organic Chemistry I course. She did well, and signed up for Bea's Organic Chemistry II class the next semester. C.A. Rec. 1234-35. Bea considered her a "fantastic" student; he even chose her as a reference for his upcoming tenure review. C.A. App'x 19.

Over the summer, though, Bea's behavior started to cross a line. In July, he approached Bose alone in a parking lot, standing a little too close. After some small talk, the conversation took a turn. Bea asked how she spent her evenings—do you "'hangout with your boyfriend?'" C.A. Rec. 1329-30. This made Bose "uncomfortable"; she'd never mentioned a boyfriend. *Id.* at 1330. Then, as Bose was about to leave, Bea reached his hand towards her and asked, "'would you like to go out to dinner with me just to catch up[?]'" *Id.* at 1331. She politely declined. *Ibid.*

Bea's inappropriate behavior escalated throughout the fall of 2015. He regularly complimented Bose's clothing and appearance, calling her "'pretty'" and "'beautiful.'" C.A. Rec. 1127, 1342. He visited her other classes just to speak with her; arranged special meetings; and asked personal questions about her family, social life, and dating. *Id.* at 1333, 1368, 1373-76; see C.A.

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[1] Citations to "C.A. Rec." refer to the Sixth Circuit's "Page ID" convention. Citations to "C.A. App'x" refer to the appendix filed in the court of appeals. See 6th Cir. R. 28(a).

App'x 106 ("He was really interested in my sorority, and whether I go to parties on campus."). Bose became well-practiced at sidestepping these uncomfortable encounters. See C.A. App'x 106 ("I said I, you know, do what typical college kids do and then I told him that I needed to leave because I had a meeting."). Bea invited Bose to be his research assistant, but she declined. *Id.* at 106-07.

Things came to a head on November 19. That day, Bea approached Bose from behind in the cafeteria, leaned over her shoulder, and asked if she was "'texting [her] boyfriend.'" *Id.* at 107; C.A. Rec. 1334-35. Bose was too startled to respond; Bea just smiled and walked away, seeming "pretty happy with himself." C.A. App'x 107.

A friend who witnessed the cafeteria interaction encouraged Bose to report it to the school. C.A. Rec. 1335. Instead, accompanied by the same friend, she approached Bea outside the chemistry building and raised the issue directly with him:

> [L]ook, Dr. Bea, I don't know if you mean it this way, but I feel really uncomfortable when you ask me questions about my boyfriend, when you ask me anything about my family, I don't want personal questions, I want to keep our relationship strictly professional.

Id. at 1336-37. Bose expected Bea to agree. Instead, he became "furious" and walked away silently, eyes on the floor. *Id.* at 1077, 1337.

B. Bea Fabricates Evidence Against Bose and Accuses Her of Cheating

Following the November 19 confrontation, Bea's behavior changed markedly. The next day, Bose took a midterm exam in his office. *Id.* at 1051, 1337-38. (Taking exams early in Bea's office was common and was encouraged by the course syllabus. *Id.* at 1049, 1374-75.) Bose could immediately tell something was different: Unlike

his normal habit of chatting with her whenever possible, this time Bea just tossed the exam on the desk and "didn't say anything" to her. *Id.* at 1338-39. Bose scored a 74 on the exam, near the class average, but Bea recorded her score as a 47. *Id.* at 1406, 1409-10.

Bea's cold and silent treatment became the new norm. *Id.* at 1339-41. Bose sought to ask him about practice problems before class, but Bea didn't respond; he "just shrugged his shoulders." C.A. App'x 108. He also stopped calling on Bose when she raised her hand in class. *Id.* at 109. Feeling uneasy about the situation, Bose followed him to his office after class and asked to speak with him, but he wouldn't even look at—much less respond to—her. So she spoke: "Dr. Bea, I feel like it's been really weird and there's been a lot of tension between us, and I just wanted you to know that it's not like I'm going to report you or anything. I just want to come to class and finish off the semester." *Ibid.* Again, only silence. *Ibid.*

On December 2, less than two weeks after the cafeteria incident and subsequent confrontation, Bose arranged to take the final quiz in Bea's course early, so she could travel home for a family event. C.A. Rec. 1108. Bose had previously taken tests early when necessary to accommodate her travel schedule with the tennis team. *Id.* at 1049, 1091-1100. For the final quiz, Bose arrived as usual at his office at 7:45 a.m. and finished in the allotted time. *Id.* at 1422.

Approximately two hours after Bose finished, Bea modified a document on his computer titled "Quiz 5 Amswers.docx." *Id.* at 1415, 1425. Bea said it was a decoy answer key, which he created to catch her cheating. He later asserted (without corroboration) that he had long suspected Bose of looking at his computer when taking tests in his office. *Id.* at 1401. Bea said the decoy included some deliberately false answers; since Bose's

quiz matched the supposed decoy word-for-word, she must have copied it. In fact, the opposite was true: Bea had *changed* the fake answer key to match Bose's genuine quiz answers. *Id.* at 1382, 1414, 1425, 1430, 1435-36.[2]

Bea took this fake proof, along with other unsupported allegations, to the dean of students. *Id.* at 1246, 1248. Bea's charges triggered an investigation by the Honor Council, a student-elected, student-run body invested by Rhodes College with authority to judge alleged honor code violations. *Id.* at 1250. On December 4—just fifteen days after confronting Bea about his inappropriate behavior—Bose was told that she faced potential expulsion for having "cheated on multiple assignments" in his class. *Id.* at 1109, 1142.

C. Rhodes College Expels Bose Based on Bea's False Accusations and Fabricated Evidence

The Honor Council hearing took place before a panel of twelve students, one of whom was Bea's teaching assistant. *Id.* at 4; C.A. Rec. 1081. Bose was not allowed representation. C.A. App'x 138.

The hearing's main witness was Bea, who leveled various accusations against Bose, several of which were later shown to be lies. For example, he insisted that when Bose was forced to take her midterm exam alongside other students—rather than in his office, where she could access the answer key on his computer—she "failed the exam," receiving the "second worst" score in the class. *Id.* at 21. In reality, as noted above, Bea had mismarked her score. C.A. Rec. 1406. Bea also claimed that she used his laptop to alter her grades on four tests,

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[2] Because Bose had averaged over 100% (including bonus points) on the other quizzes, and since the class policy was to drop each student's lowest quiz score, she had no incentive to cheat on the final quiz. *Id.* at 1006-07, 1048, 1310.

another accusation later proven false. *Id.* at 1028-29, 1045-46, 1310; C.A. App'x 21-22.

But the linchpin of Bea's accusation was the doctored answer key for the final quiz. How could her quiz have matched the key unless she cheated? Bea insisted, repeatedly, that the key was last "modified two days before [Bose] took that quiz." C.A. Rec. 1398. Yet another lie: All parties' forensic experts later agreed that the document was modified approximately *two hours afterwards*. *Id.* at 1414, 1425, 1430, 1435-36.

Bose also testified at the hearing, denying that she had cheated and explaining her view that "Dr. Bea's fake key matches my answers," not the other way around. C.A. App'x 72. During Bea's testimony against her, Bose realized why Bea had leveled these allegations: He was wounded by her rejection and worried she would report his inappropriate conduct, putting his tenure chances at risk. See *id.* at 66 (Bea: "Do you think I'm going to put in jeopardy my tenure because of you?"). Bose explained to the Honor Council her understanding that the cafeteria incident and the ensuing confrontation were the "reason . . . why this is happening." *Id.* at 72. As she summarized, "[t]his is not the first time that an ego-hurt professor would harm a student." *Ibid.*

The Honor Council, however, would not allow Bose to ask witnesses to testify about the facts underlying Bea's retaliation. C.A. Rec. 1082, 1178. And when she asked Bea directly about his inappropriate behavior—the cafeteria incident, questions about her boyfriend—Bea simply feigned ignorance. C.A. App'x 72 ("I don't remember the—anything. I have many students. I talk to them. . . . Sometimes we talk, oh, we have today exam. Very simple things. I cannot recall any of these things."). Notably, in deposition testimony months later, Bea admitted remembering the cafeteria incident and inquiring about Bose's boyfriend. C.A. Rec. 1423 ("I didn't ask if

she had a boyfriend. I just said, oh, is this your boyfriend?").

The Honor Council voted to expel Bose. *Id.* at 1052. Bose appealed to the Faculty Appeals Committee. She submitted a statement describing Bea's sexual harassment and retaliation, and pointing out that he alone had created all of the evidence against her. *Id.* at 1180-1221. The Committee, however, did "not attempt to determine" whether Bose's allegations of retaliation were accurate, limiting review solely to whether there was "sufficient evidence to reach the decision that [the] Honor Council did." *Id.* at 1019. Finding sufficient evidence, the Committee upheld the violation. *Id.* at 1133-34. Bose was dismissed from Rhodes College; as a consequence, her early admission to medical school was rescinded. *Id.* at 14.

In February 2016, Bose submitted an administrative Title IX complaint to Rhodes College alleging sexual harassment and retaliation. *Id.* at 1135. Rhodes hired outside counsel to investigate and prepare a report. *Id.* at 1135-36. Though the Honor Council proceeding and the allegations that led to it formed the entire basis of Bose's retaliation complaint, the report discussed neither Bea's retaliation nor the Honor Council proceedings that he had initiated. *Id.* at 2223-37. Bose never received a hearing on her complaint. *Id.* at 1387. Instead, Rhodes sent her a one-paragraph form letter stating that "the allegations of sexual harassment and retaliation in violation of the College's policy cannot be sustained." *Id.* at 1231.

D. Proceedings Below

Bose filed suit against Rhodes College and Bea, asserting (as relevant here) a Title IX claim against Rhodes. The district court granted summary judgment for Rhodes on the claim. Pet. App. 57a.

The Sixth Circuit affirmed the grant of summary judgment on Bose's Title IX claim. *Id.* at 7a-18a. It accepted as true that Bea had fabricated evidence against Bose in retaliation for rejecting what the court called his "unwelcome attention." *Id.* at 9a. But the Sixth Circuit nonetheless held that Bose could not establish "causation"—that is, "the required connection between Bose's opposition to Bea's unwelcome conduct and Rhodes' act of expelling her." *Ibid.* In so ruling, the Sixth Circuit relied on this Court's decision in *Gebser* v. *Lago Vista Independent School District*, 524 U.S. 274 (1998). Under *Gebser*, the Sixth Circuit explained, schools are not liable for the actions of their employees via *respondeat superior* principles; a "recipient of federal funds may be liable in damages under Title IX only for its own misconduct." Pet. App. 11a (citation omitted).

In the Sixth Circuit's view, that principle precluded Bose's Title IX claim. Rhodes College chose to expel her, the court acknowledged, but "that decision only violated Title IX if it was made 'on the basis of sex,'" and "Bose has no evidence of any discriminatory motive on Rhodes' part." *Id.* at 13a. To connect Bose's expulsion to Bea's "retaliatory animus," the Sixth Circuit stated, "would be to hold Rhodes liable for its employees' independent actions—precisely what *Gebser* forbids." *Ibid.* (quotation marks omitted).

The Sixth Circuit noted that Bose "asks us to follow the Second Circuit's decision" in *Papelino* v. *Albany College of Pharmacy of Union University*, 633 F.3d 81 (2011). Pet. App. 13a. There, a student was expelled for cheating based on evidence fabricated by his professor in retaliation for reporting the professor's sexual harassment. *Id.* at 14a. The district court granted summary judgment for the school on the student's Title IX claim, but the Second Circuit reversed, finding a sufficient "causa[l]" link between professor's accusations and the

expulsion. *Ibid.* The Sixth Circuit deemed *Papelino* to be inconsistent with *Gebser*, however, and "decline[d] to follow it." *Ibid.*

REASONS THE PETITION SHOULD BE GRANTED

When a federal-funding recipient expels a student based on sex-biased charges and evidence—despite being warned about the unlawful motive behind them—it denies that student an educational opportunity "on the basis of sex," in violation of Title IX. The Sixth Circuit's contrary conclusion reflects the untenable position that, so long as the ultimate decisionmaker was unbiased, sex plays no impermissible role in the expulsion. But Prianka Bose repeatedly warned Rhodes College that Roberto de la Salud Bea was framing her for rejecting his romantic advances, and the school gave effect to his discriminatory agenda anyway. Had Bose been male, she would have graduated from Rhodes by now.

The decision below is based not on Title IX's text, but instead on a misreading of this Court's case law. The Sixth Circuit's opinion cannot be squared with the statute's plain language, with common-law principles of causation, or with the reasoning of *Staub* v. *Proctor Hospital*, 562 U.S. 411 (2011), which held that an employer discriminates "on the basis" of a protected characteristic when it carries out the biased agenda of a supervisor who directly influenced, but did not make, the ultimate employment decision. Taking a similar view of Title IX, the U.S. Department of Education has noted that teachers often charge students with code of conduct violations to retaliate when their romantic advances are spurned or reported, and its regulations make clear that weaponizing the school's disciplinary process that way violates the statute.

The ruling below directly conflicts with decisions from other courts of appeals, which have upheld identical

student claims. These courts find adequate causation where a professor's sex-based charges and evidence have their intended effect of leading the university to punish a student. Had Bose's suit arisen in any of those circuits, her claim would have survived summary judgment.

The question presented in this case is of tremendous practical significance. Today, schools increasingly employ multi-layer processes like the one used by Rhodes College here: Charges are submitted by teachers and other school officials, evaluated by a disciplinary committee, and then appealed to the ultimate decisionmaker. Under the Sixth Circuit's ruling, a school can give effect to even the most blatantly biased and fraudulent accusations and evidence, despite being warned about the bias, so long as there is no evidence of animus at the final step. The decision below thus provides a roadmap for harassment and retaliation with impunity—precisely what happened here. Indeed, it is hard to imagine a more clear-cut case in which a student was denied an educational opportunity "on the basis of sex."

I. A School That Expels a Student Based on False Charges and Evidence Motivated by Sex-Based Animus Acts "on the Basis of Sex"

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." 20 U.S.C. § 1681(a). As this Court has explained, statutory phrases like "on the basis of" and "because of" impose a causation requirement: A violation occurs "if changing the [plaintiff's] sex would have yielded a different" outcome, contravening Congress's command that sex should "not [be] relevant." *Bostock* v. *Clayton County*, 140 S. Ct. 1731, 1741 (2020).

A case in which the bias originates with someone other than the ultimate decisionmaker is sometimes called a "cat's paw" case, after Aesop's fable. *Staub*, 561 U.S. at 415 n.1. The Sixth Circuit here ruled that, as a matter of law, such cases are *never* actionable under Title IX. That holding is inconsistent with the statute's text and purposes, with basic common-law principles, with this Court's construction of analogous antidiscrimination statutes, and with interpretive guidance from the U.S. Department of Education.

A. The Statute's Text Prohibits a School from Giving Effect to an Employee's Biased Agenda

In plain English, something occurs "on the basis of" a particular factor that plays a direct causal role in the result. The causation inquiry "directs our attention to the counterfactual—what would have happened if the plaintiff had been" of a different status? *Comcast Corp.* v. *Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020). Thus, when a school takes some action that leaves its educational benefits less available to a female student than to a male one, or vice versa, the school has denied an opportunity "on the basis of sex." See *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 346 (2013) (The "simple test" is "whether the evidence shows treatment of a person in a manner which but for that person's sex would be different.") (citation omitted).

Under this commonsense definition, a university that expels a student based on evidence fabricated by a professor in retaliation for turning down his romantic advances has excluded that student "on the basis of" her sex. Factual (but for) causation undoubtedly exists in such a scenario: Neither the retaliation nor the expulsion would have occurred had the student been male instead of female.

Proximate causation—that is, "some direct relation between the injury asserted and the [bias] alleged,"

Bank of Am. v. *City of Miami*, 137 S. Ct. 1296, 1306 (citation omitted)—exists there too. Under common-law principles, "all intended consequences" of an intentional act "are proximate." Harper & James, *Law of Torts* § 7.13, p. 584 (1956); see *Staub*, 562 U.S. at 417 ("[W]hen Congress creates a federal tort it adopts the background of general tort law."). Retaliation that is intended to produce a student's expulsion, and does produce that result, meets this test. To be sure, the ultimate "decisionmaker's exercise of judgment is *also* a proximate cause of the [expulsion], but it is common for injuries to have multiple proximate causes." *Staub*, 562 U.S. at 420.

Staub is directly on point. In that case, the plaintiff was a member of the Army Reserve who was falsely accused by his supervisor of a disciplinary violation due to hostility towards his military service. *Id.* at 414-15. The company's human resources vice president then "relied on [the false] accusation" and fired the plaintiff. *Id.* at 415. The question was whether the company was liable under the Uniformed Services Employment and Reemployment Rights Act, which prohibits the denial of employment "on the basis of" military service. *Id.* at 416 (quoting 38 U.S.C. § 4311(a)).

In answering that question, this Court observed, "the requirement that the biased supervisor's action be a causal factor of the ultimate employment action incorporates the traditional tort-law concept of proximate cause." *Id.* at 420. "And it is axiomatic under tort law that the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm." *Id.* at 419. The Court thus rejected the defendant's argument "that the employer is not liable unless the *de facto* decisionmaker (the technical decisionmaker or the agent for whom he is the 'cat's paw') is motivated by discriminatory animus." *Ibid.* In-

stead, the Court held, the company could be liable for its *own* role in making the biased report a "causal factor" in the plaintiff's firing. *Id.* at 421.

That plain-language conclusion was also necessary to avoid "an unlikely meaning [for] a provision designed to prevent employer discrimination." *Id.* at 420. In the employment context, the Court explained, "[t]he one who makes the ultimate decision does so on the basis of performance assessments by other supervisors," from whom the ultimate decisionmaker is often "isolate[d]." *Ibid.* Denying liability under those circumstances would mean "the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were *designed and intended* to produce the adverse action." *Ibid.* The Court declined to endorse such "an implausible meaning of the text." *Ibid.*

The same reasoning applies here. Federal-funding recipients often incorporate the feedback of supervisors (*e.g.*, professors) into disciplinary decisions made on the recipient's behalf by a separate body, such as Rhodes's Honor Council and Faculty Appeals Committee. Moreover, given "Title IX's 'unmistakable focus on the benefited class,' rather than the perpetrator," it makes particular sense to hold schools accountable when they rely on the biased accusations of faculty to deny educational opportunities to students. *Davis* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 639 (1999) (quoting *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 691 (1979)). It also serves Title IX's primary "objectives": "avoid[ing] the use of federal resources to support discriminatory practices," and "provid[ing] individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 704. Neither of those objectives would be satisfied by allowing a university—through the simple expedient of "isolat[ing]" the ultimate decisionmaker—to give effect to a professor's discriminatory agenda. *Staub*, 462 U.S. at 420.

Finally, the Executive Branch similarly interprets Title IX to prohibit a school from giving effect to the discriminatory agenda of its teachers and officials. The U.S. Department of Education, which administers the statute, see 20 U.S.C. § 1682, has issued guidance "to effectuate Title IX's prohibition against sex discrimination." *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020). The Department's guidance includes regulations that prohibit retaliation against a student for engaging in protected conduct under Title IX. 34 C.F.R. § 106.71. Notably, the anti-retaliation prohibition expressly covers the scenario at issue in this case: where a student's complaints about a teacher's sexual misconduct lead to retaliatory accusations that are designed to elicit punishment from a neutral decisionmaker.[3]

The Department's regulations thus recognize that a Title IX violation occurs if a teacher files "charges against an individual for code of conduct violations . . . for the purpose of interfering with any right or privilege secured by title IX." 34 C.F.R. § 106.71(a). In its rulemaking, the Department explained that this provision responds to real-world instances in which "perpetrators explicitly told victims not to report or they would get the victim in trouble for collateral offenses, such as underage drinking." 85 Fed. Reg. at 30,536. What happened in this case, of course, is even more egregious: Unlike the underage-drinking example, the charges at issue here are entirely false. And false allegations of *cheating* are

[3] The Department drafted this provision after "hear[ing] from individuals who faced retaliation for filing complaints. These individuals faced continued harassment by respondents, received lower grades from professors reported as harassers, or *lost scholarships due to rebuffing sexual advances from teachers*." 85 Fed. Reg. at 30,057 (emphasis added).

particularly pernicious, because they can cloud a student's academic record even after she graduates or otherwise leaves the school. Under the Department's view of Title IX, what Rhodes did to Bose violates the statute.

B. The Sixth Circuit's Atextual Reasoning Was Flawed

In rejecting Bose's Title IX claim, the Sixth Circuit did not dispute that Bose's sex played a determinative role in her expulsion (but-for causation), or that Bea's false charges and fabricated evidence had precisely their intended effect (proximate causation). Nor did the Sixth Circuit offer an alternative construction of "on the basis of sex." Indeed, the court did not even purport to interpret the text of Title IX at all. Instead, the Sixth Circuit offered a variety of doctrinal and policy-based arguments, none of which justifies ignoring the statute's plain meaning.

1. The Sixth Circuit's primary rationale was that holding Rhodes College liable for expelling Bose would be inconsistent with this Court's decision in *Gebser* v. *Lago Vista Independent School District*, 524 U.S. 274 (1998). There, a student attempted to hold her school district liable for sexual harassment committed by one of her teachers. *Id.* at 278-79. Because the student "did not report the [misconduct] to school officials," this Court explained, the student could recover from the school only under one of two theories: (1) *respondeat superior*, also known as "vicarious" liability; or (2) "constructive notice," meaning the school district would be liable because it "'should have known' about [the] harassment." *Id.* at 278, 282.

Exercising its "latitude to shape a sensible remedial scheme that best comports with the statute," the Court concluded that neither theory was adequate. *Id.* at 284. In the Court's view, Congress would not have wanted to authorize "a damages recovery against a school district for a teacher's sexual harassment of a student based on

principles of *respondeat superior* or constructive notice, *i.e.*, without actual notice to a school district official." *Id.* at 285. The Court accordingly held that "a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the [federal-funding] recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Id.* at 290.

Gebser does not support the Sixth Circuit's decision here. As a primary matter, *Gebser* did not interpret the phrase "on the basis of sex." It is not a case about causation at all; neither the word nor the concept appears in the decision. Indeed, there was no dispute about whether sex discrimination had caused the school district's adverse action because the district *did not act at all*. The question instead was solely whether a private damages remedy was available against the school district for its "failure" to act. *Id.* at 291. At issue in this case, of course, is not a school's failure to act but its affirmative decision to expel a student, which all sides agree is an adverse action for purposes of Title IX.

The concerns that animated *Gebser* are similarly inapplicable here. Both theories of recovery that *Gebser* rejected—*respondeat superior* and constructive notice—were theories "under which [the school district] would be liable for [the teacher's] conduct." *Id.* at 282. The Court thus declined the plaintiff's attempt to hold a federal-funding recipient liable "not for its own official decision but instead for its employees' independent actions." *Id.* at 290-91. But that principle has no application to this case, where Bose seeks to hold Rhodes College responsible for its *own* decision to expel her. *Gebser* says nothing about the propriety of relief under those circumstances. See *Davis*, 526 U.S. at 642 (*Gebser* reaffirmed availability of "a private damages action under Title IX

where the funding recipient engages in intentional conduct that violates the clear terms of the statute").

2. The Sixth Circuit also asserted that "[c]at's paw liability" is incompatible with Title IX because it "does not require either actual notice to the funding recipient or any 'official decision' by it." Pet. App. 12a (quoting *Gebser*, 524 U.S. at 291). Both parts of that assertion are incorrect. Without an "official decision" by the ultimate decisionmaker (*e.g.*, the human resources vice president in *Staub*, or Rhodes College here), a supervisor's biased accusations would not have their intended effect. In such a scenario—unlike in this case—the victim would not have been excluded from any educational benefit *at all*, much less "on the basis of" her sex.

Nor would the causation theory advocated here dispense with any "actual notice" requirement. Under *Gebser*, a plaintiff who alleges that a school was deliberately indifferent to harassment will be unable to recover damages unless a school official with "authority to address the alleged discrimination" received actual notice of it, yet failed to institute "corrective measures." 524 U.S. at 290. But even assuming that such an actual-notice limitation applies to other types of Title IX claims,[4] it provides no reason to deny relief where actual notice in fact exists. In this case, for instance, Bose repeatedly told the school that Bea was framing her in retaliation for rejecting his romantic advances. *E.g.*, C.A. App'x 72; C.A. Rec. 1182-83. As Rhodes itself acknowledged, "[b]oth the Honor Council and the Faculty Ap-

[4] As the Department of Education has explained, "the Supreme Court has not applied an actual knowledge requirement to a claim of retaliation," nor to any Title IX claim other than deliberate indifference. 85 Fed. Reg. at 30,537. The Department has expressed its view that "the actual knowledge requirement . . . does not apply to a claim of retaliation." *Ibid.*

peals Committee . . . were acutely aware that [Bose] believed Dr. Bea had a retaliatory motive to accuse her of cheating." C.A. Rec. 1557. Having decided to expel her anyway on the basis of Bea's accusations and evidence, Rhodes certainly cannot now complain that it lacked "actual notice."

3. Finally, the Sixth Circuit asserted that Title IX applies only where a federal-funding recipient's "decision was taken for a discriminatory reason." Pet. App. 13a; see *ibid.* ("Bose has no evidence of any discriminatory motive on Rhodes' part."). The Sixth Circuit cited no authority for that proposition, which cannot be reconciled either with the language of the statute or with controlling precedent.

As an initial matter, Title IX is not limited to circumstances involving "discrimination"; it also applies where a student is "excluded from participation in" or is "denied the benefits of" an educational opportunity on the basis of sex. 20 U.S.C. § 1681(a). The statute forbids a federal-funding recipient from engaging in any of those three activities, which are linked disjunctively ("or"). And there can be little doubt that, because of her expulsion, Bose was "excluded from participation in" and "denied the benefits of" an education at Rhodes.

But even when a student alleges that she was "subjected to discrimination," the statute does not require proof that the school *itself* harbored sex-based animus. In *Davis*, for instance, this Court affirmed liability for a school district that was deliberately indifferent to severe sexual harassment inflicted on a student by her classmate. Although such "student-on-student harassment" was a manifestation of *the harasser's* bias, 526 U.S. at 639, there was no allegation that the school district or any of its officials had a discriminatory mindset—or indeed any particular mental state, other than actual knowledge of the misconduct.

Instead, the Court explained that the phrase "subjected to discrimination" merely requires a showing that some school policy has "'cause[d] students to undergo' harassment or 'ma[d]e them liable or vulnerable' to it." *Id.* at 645 (quoting *Random House Dictionary of the English Language* 1415 (1966) (brackets omitted)). In a case of deliberate indifference, therefore, the plaintiff would have to show that the school district's failure to act "'expose[d]' its students to harassment or 'cause[d]' them to undergo it." *Ibid.* But she would not have to prove that school officials themselves were biased.[5]

In this case, Rhodes College plainly "exposed" Bose to discrimination, and rendered her "liable or vulnerable to it," by expelling her on the basis of Bea's sex-based charges and evidence. Indeed, Rhodes's conduct here is far more active and direct than the school district's failure to act was in *Davis*. Bose was accordingly "on the basis of sex . . . subjected to discrimination." 20 U.S.C. § 1681(a).

II. The Decision Below Conflicts with Decisions from Other Circuits

The Sixth Circuit's ruling conflicts with decisions from other courts of appeals, which have recognized that Title IX applies where a federal-funding recipient gives effect to a teacher's discriminatory agenda. Had Bose's suit arisen in any of those circuits, her claim would have survived summary judgment.

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[5] Requiring proof of a federal-funding recipient's discriminatory mindset would also foreclose most retaliation claims, because school officials typically retaliate in order to avoid controversy or liability, not out of sex-based animus. Indeed, in the very case confirming that Title IX forbids retaliation, *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), the plaintiff was a *male* physical education teacher who was penalized for complaining "that the girls' team was not receiving equal funding and equal access to athletic equipment and facilities." *Id.* at 171.

The parallels with *Papelino* v. *Albany College of Pharmac*y, 633 F.3d 81 (2d Cir. 2011), are uncanny. Daniel Papelino faced the repeated "sexual advances" of his medicinal chemistry professor, whom he rebuffed and later reported to the associate dean. *Id.* at 86. Papelino then immediately "noticed a change in [the professor's] behavior, as she started to act cold and unfriendly toward him." *Ibid.* A month later, she accused him and two classmates of cheating together on exams in various courses, and as evidence presented "'statistical' charts that she had prepared." *Id.* at 86-87. The school's Student Honor Code Panel found them guilty, and the Appellate Board declined to overturn the ruling. *Id.* at 87. All three flunked their courses, and Papelino and one of the others "were expelled." *Ibid.*

The district court granted summary judgment for the college on Papelino's Title IX claim, finding an insufficient "causal relationship" between the professor's sex-based conduct and the expulsion, but the Second Circuit reversed. *Id.* at 92. It explained that Papelino "need only establish that impermissible retaliation was one motive behind the *initiation* of the Honor Code charges against him," rather than a motive for "any of the Panel members . . . to find him guilty of cheating." *Id.* at 93 (emphasis added). Indeed, the Second Circuit explained that "even if the Panel members were themselves unaware that Papelino had engaged in protected activity" (namely, his reporting of the professor's misconduct), it sufficed that "they were acting on [the professor's] explicit encouragement." *Id.* at 92-93. The Sixth Circuit here acknowledged that its ruling conflicted with *Papelino* but simply "decline[d] to follow it." Pet. App. 14a.[6]

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[6] The Sixth Circuit suggested that *Papelino* might rest on "a different theory" of causation, but it pointed (Pet. App. 14a-15a) only to parts of the decision addressing knowledge, which played no

The Second Circuit relied on the same theory of causation in its widely cited decision in *Doe* v. *Columbia University*, 831 F.3d 46 (2d Cir. 2016). There, a male student (Doe) alleged that he was unjustly punished by the university for sexual assault as a result of anti-male bias. Doe alleged that numerous individuals involved in the disciplinary process harbored such bias, including the university's "Title IX investigator (who influenced the panel and the Dean by her report and recommendation)." *Id.* at 56. The university argued that because the investigator "did not sit on the panel that found [Doe] responsible for sexual misconduct," her bias could not support his Title IX claim. *Id.* at 58 (citation omitted). The Second Circuit rejected that argument as "not persuasive. Although [the investigator] was not the decisionmaker, she allegedly had significant influence, perhaps even determinative influence, over the University's decision." *Ibid.* Citing *Staub*, the court explained that an educational institution violates Title IX where it takes action based on the biased accusations of "an employee endowed by the institution with supervisory authority or institutional influence in recommending and thus influencing the adverse action by a non-biased decisionmaker." *Id.* at 59.

Other courts of appeals have employed similar reasoning to reach results incompatible with the decision below. The plaintiff in *Gossett* v. *Oklahoma ex rel.*

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role in *Papelino*'s causation analysis, see 633 F.3d at 92-93. Nor can the decisions be distinguished factually on the basis of the schools' knowledge: Bose gave Rhodes College precisely the same warning about retaliation that Papelino gave his school. Compare C.A. Rec. 1557 ("Both the Honor Council and the Faculty Appeals Committee . . . were acutely aware that [Bose] believed Dr. Bea had a retaliatory motive to accuse her of cheating."), with 633 F.3d at 92 ("[M]embers of the College faculty discussed Papelino's allegations of sexual harassment during and after the Honor Code appeals process.").

Board of Regents for Langston University, 245 F.3d 1172 (10th Cir. 2001), was a nursing student who alleged that his instructors were biased against male students and "as a result he was not given the same help, counseling, and opportunities to improve his performance as provided to women nursing students." *Id.* at 1176. The plaintiff "ultimately received a D in the class, which under Nursing School policy required his dismissal from the nursing program." *Ibid.* To prove that his dismissal resulted from his instructors' sex bias, the plaintiff pointed to a female nursing student whose instructor permitted her an opportunity to improve her D through "seven additional weeks of work," which she used to pull her grade up to a C (and thus avoid dismissal). *Id.* at 1177. The Tenth Circuit found the plaintiff's showing sufficient to survive summary judgment—without requiring him to prove that the school itself, or any school officials other than his instructors, were also biased. *Ibid.*

The plaintiff in *Emeldi* v. *University of Oregon*, 698 F.3d 715 (9th Cir. 2012), alleged that she had complained about her dissertation chair's anti-female bias to one of his colleagues, and the chair retaliated by resigning as her advisor, which forced her to drop out of her Ph.D. program. *Id.* at 722-23. The Ninth Circuit determined that the plaintiff had established a sufficient "causal link" between the advisor's "gender-based animus" and the plaintiff's exclusion from the program. *Id.* at 726-27. Chief Judge Kozinski and several others dissented from denial of rehearing, faulting the panel for indulging in "speculation" that the plaintiff's complaints to the colleague were in fact conveyed to the advisor. *Id.* at 719. No judge, however, doubted that *if* the plaintiff could show that her advisor had resigned for sex-based reasons, the university would be liable under Title IX for forcing her to withdraw from the Ph.D. program.

Finally, the decision below conflicts with the reasoning of *Theidon* v. *Harvard University*, 948 F.3d 477 (1st Cir. 2020). There, the plaintiff was allegedly denied tenure because of her department chair's "increasingly negative feedback on [her] tenure case," which was incorporated into a recommendation by the university's ad hoc committee, which was "forwarded to and reviewed by Harvard's president [Faust], who then render[ed] a final decision." *Id.* at 507, 485. Because the plaintiff alleged gender bias on the part of her department chair—but not the ad hoc committee or the president—the court evaluated her Title IX claim under a "'cat's paw' theory of liability." *Id.* at 507 (citing *Staub*). The court rejected the plaintiff's claim, though not because of any doubts about the theory. Instead, the court found insufficient evidence of causation "on this record," because the biased department chair was merely "one of many voices in a chorus cautioning President Faust against promoting [her]," and so it "cannot be plausibly inferred that the final decision to deny [her] tenure was tainted by retaliatory animus." *Id.* at 508. But had the chair's presentation been the *only* basis for the school's adverse action, as Bea's allegations were here, there is little doubt that the First Circuit would have allowed the claim to proceed.

III. This Case Warrants the Court's Review

1. The decision below severely undermines Title IX enforcement. Although it purported to ground its ruling in *Gebser*—which solely addressed "[t]he scope of private damages relief," 524 U.S. at 289—the Sixth Circuit in fact construed the "element [of] causation," Pet. App. 9a, which determines whether a statutory violation has occurred in the first place. As a result, the ruling below will not only foreclose private plaintiffs from filing suit in a case like this one, it will likely also limit the investigative and remedial authority of the U.S. Department of

Education. See 20 U.S.C. § 1682 (granting authority "to effectuate" the prohibition in § 1681).

2. The need for Title IX's protection in cases like this one is acute. A recent study of the Association of American Universities revealed that almost one in five college students reported experiencing sexual harassment so severe that it "interfered with their academic or professional performance, limited their ability to participate in an academic program[,] or created an intimidating, hostile or offensive social, academic or work environment." David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* at xiii (2020) (AAU Report) (quotation marks omitted).[7] Harassment by faculty is particularly damaging to students, and has been linked to "decreased academic identification," "more negative perceptions about how their professor viewed them," and "lower self-esteem." Alexandra Laird & Emily Pronin, *Professors' Romantic Advances Undermine Students' Academic Interest, Confidence, and Identification*, 83 Sex Roles 1 (2020). Yet many students refrain from reporting professor misconduct for fear of "retaliation" or other "negative academic, social, or professional consequences." AAU Report at A7-92.

When a student like Prianka Bose *is* brave enough to rebuff or report an unwanted advance, she must be confident that her harasser will not be able to use other, putatively neutral university officials to retaliate against her. Students are uniquely vulnerable to allegations of rule breaking because the university has such broad-ranging authority to regulate their personal, educational, and social interactions. And students face a large power differential with faculty that makes it particularly easy to weaponize charges of misconduct. The case law re-

[7] https://bit.ly/3iynMAL.

flects that such retaliation is an all-too-common phenomenon. See, *e.g.*, *Irrera* v. *Humpherys*, 859 F.3d 196, 198 (2d Cir. 2017) (professor gave student negative reference in retaliation for declining his sexual advances); *Videckis* v. *Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1155 (C.D. Cal. 2015) (coach falsely accused student-athletes of cheating in retaliation for discrimination complaint); *Abramova* v. *Albert Einstein Coll. of Med. of Yeshiva Univ.*, No. 06-cv-116, 2006 WL 8445809, at *4 (S.D.N.Y. July 26, 2006) (professor falsely accused student in retaliation for declining his sexual advances); see also *supra* pp. 22, 24 (discussing *Papelino* and *Emeldi*).

3. In light of multi-layer disciplinary processes used by modern educational institutions, the Sixth Circuit's decision also creates an obvious roadmap for avoiding liability in even the most egregious cases of discriminatory treatment.

The petitioner in *Staub*, in seeking certiorari, explained that "where a potential dismissal is involved, most major employers today utilize a personnel process in which several different officials are involved in initiating the disciplinary process, providing information, offering recommendations, and making the formal, ultimate decision." *Staub* Pet. at 33 (No. 09-400). As a result, an anti-discrimination test that looks only at the motives of the ultimate decisionmaker "effectively legalizes unlawful action in all phases of such a decision-making process except the very last stage." *Ibid.*

The same is true for universities and colleges. When students face serious discipline—up to and including expulsion—several different officials and layers of review are often involved. Here, Bea initiated the process by filing charges against Bose; the student-led Honor Council voted to expel her; and the Faculty Appeal Committee found "sufficient evidence to reach the decision that [the] Honor Council did." C.A. Rec. 1019. This kind of multi-

layer process is typical, as the appellate decisions on the other side of the circuit split illustrate. See, *e.g.*, *Doe*, 831 F.3d at 51-52 (student accused of misconduct meets with assistant director of student services, is interviewed by Title IX investigator, receives hearing in front of disciplinary panel, and then appeals any punishment to dean of students).

The Sixth Circuit's ruling thus "has the unfortunate potential to create a safe harbor for . . . discrimination by any prejudiced supervisor who can fairly be described as not being the final decisionmaker." *Staub* Pet. at 34 (citation omitted). It accordingly offers a roadmap for federal-funding recipients to insulate themselves from Title IX liability: Create a layer of ostensibly neutral review to carry out the ultimate punishment, and biased decisions come out clean on the other side. This roadmap invites bad actors to retaliate with impunity, and punishes students for standing up to harassment. Both of Title IX's principal objectives are undermined: Students will be excluded from educational opportunities "on the basis of sex"; and federal resources will be used to support discriminatory practices.

4. This case is an ideal vehicle for resolution of the question presented.

First, there is no dispute about the relevant facts. In light of the summary judgment posture, the Sixth Circuit accepted that Bea had accused Bose of cheating in retaliation for declining his romantic advances, and that his fabricated evidence was the sole cause of her expulsion by Rhodes. This clarity regarding cause and effect tees up the purely legal question whether a federal-funding recipient can *ever* violate Title IX by giving effect to a teacher's discriminatory agenda.

Second, because Bose indisputably warned Rhodes about Bea's discriminatory agenda, there is no need to decide whether or how *Gebser*'s actual notice require-

ment applies to a case like this. This Court "has not applied an actual knowledge requirement" outside the deliberate-indifference context, and the Department of Education recently expressed its view that "the actual knowledge requirement . . . does not apply to a claim of retaliation." 85 Fed. Reg. at 30,537. But that issue need not be resolved here, given the parties' agreement that "[b]oth the Honor Council and the Faculty Appeals Committee . . . were acutely aware that [Bose] believed Dr. Bea had a retaliatory motive to accuse her of cheating." C.A. Rec. 1557.

Third, the question presented will be outcome-determinative. As the Sixth Circuit noted, the only element of her Title IX claim that (in its view) Bose "cannot make out [is] the fourth element—causation." Pet. App. 9a. Rejecting the Sixth Circuit's reasoning thus would necessarily overturn the grant of summary judgment in Rhodes's favor.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2020

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-5936

PRIANKA BOSE

v.

ROBERTO DE LA SALUD BEA; RHODES COLLEGE

Appeal from the United States District Court
for the Western District of Tennessee at Memphis
No. 2:16-cv-02308—John Thomas Fowlkes, Jr.,
District Judge

Argued May 9, 2019

Decided and Filed: January 28, 2020

Before: SILER, LARSON, and NALBANDIAN,
Circuit Judges.

COUNSEL

ARGUED: Adam W. Hansen, APOLLO LAW LLC, Minneapolis, Minnesota, for Appellant. Lisa A. Krupicka, BURCH, PORTER & JOHNSON, PLLC, Memphis, Tennessee, for Appellees.

ON BRIEF: Adam W. Hansen, Eleanor E. Frisch, APOLLO LAW LLC, Minneapolis, Minnesota, Bryce Ashby, DONATI LAW, PLLC, Memphis, Tennessee, for Appellant. Lisa A. Krupicka, Gary S. Peeples, Sarah E. Smith, BURCH, PORTER & JOHNSON, PLLC, Memphis, Tennessee, for Appellees.

OPINION

LARSEN, *Circuit Judge*: Rhodes College expelled Prianka Bose after her organic chemistry professor, Dr. Roberto de la Salud Bea, accused her of cheating on tests and quizzes. Bose says that Bea fabricated these charges after she confronted Bea regarding inappropriate comments and questions Bea had posed to her. Bose brought numerous claims against both Rhodes and Bea, including a Title IX claim against Rhodes and a state law defamation claim against Bea. We agree with the district court that Bose's Title IX claim cannot succeed, but with respect to the defamation claim, we conclude that the district court erred by holding that Bea's statements were subject to absolute privilege under Tennessee law. Accordingly, we AFFIRM in part and REVERSE in part.

I.

We recite the facts in the light most favorable to Bose. Rhodes College is a liberal arts institution in Memphis, Tennessee that receives federal funds. In the fall of 2013, Bose enrolled as a freshman at Rhodes. During her sophomore year, she was accepted into the early selection program for George Washington University's medical school. The program guaranteed Bose admission, without taking the MCAT, if she met certain requirements, including maintaining a 3.6 GPA and receiving at least a B- in required science courses.

In the spring semester of her sophomore year, Bose successfully completed Bea's course, Organic Chemistry I. The following summer, Bea approached Bose in a parking lot on campus, where the two struck up a conversation. After exchanging pleasantries, Bea began asking more

personal questions: he asked Bose how she liked to spend her evenings and free time, whether she spent time with friends, and whether she spent time with her boyfriend. As he asked her questions, Bea moved closer to Bose, who eventually stepped backward to create space between them. Bose, who had never mentioned having a boyfriend to Bea, said she had to leave. Bea then asked her whether she would like to have dinner and catch up. Bose later testified that she believed Bea was asking her out on a date, which made her uncomfortable. Bose declined the dinner invitation and left.

Bose took Bea's Organic Chemistry II class the following fall semester as she had planned. Throughout the term, Bea called Bose "pretty" or "beautiful" and would compliment her clothing. During this same semester, Bose took a corresponding lab course with a different professor. Bea regularly visited the lab, starting conversations with Bose and offering to help her; he did not give the same attention to other students. Once, Bea called Bose to his office after class and asked her whether she would like to be his research assistant; Bose said she would think about it. Bea then asked Bose if she liked to party on campus. When Bose left, Bea followed her and said he would walk her wherever she needed to go. Although Bose said that was not necessary, Bea walked her out anyway.

Throughout the semester, Bea gave all of his students the option to take tests and quizzes early. Bose often used this option. She would arrive at Bea's office around 7:30 or 7:45 a.m.; Bea would give her the test and leave shortly before 8:00 a.m. to teach another class. When he left, Bea would leave his laptop running without logging off, which meant the laptop could be accessed without his password.

In early November 2015, Bose took a quiz in Bea's office. Bose testified that Bea was in the office with her nearly the entire time she took the quiz, leaving only

momentarily to collect class evaluations. Bea testified that when he returned to his office, he noticed that the answer key was open on his laptop in a larger view or "zoom" level than he typically uses. Bea explained that he then began to suspect Bose was cheating.

On November 19, 2015, Bose was sitting with a friend in the school cafeteria when Bea approached. Bea leaned over Bose's shoulder and asked sternly whether she was texting her boyfriend. Bose did not answer; Bea smiled and walked away. Later that same day, Bose and her friend approached Bea. Bea seemed happy to see Bose, but that changed when Bose confronted him, saying: "[L]ook, Dr. Bea, I don't know if you mean it this way, but I feel really uncomfortable when you ask me questions about my boyfriend, when you ask me anything about my family, I don't want personal questions, I want to keep our relationship strictly professional." Bea said nothing, looked at the ground, and walked away.

An Organic Chemistry exam was scheduled for the next day (Exam 3). Bose, who woke with a cough and fever, asked to take the exam in Bea's office to avoid disturbing the other students. Bea printed out the exam and tossed it on the desk without saying anything to Bose, which was out of character for him. Bea also logged out of his laptop before leaving the office.

When Bea returned, he found his office door shut, which caused it to lock automatically, though the door was usually left ajar when a student took a test in the office. Bea used his key to open the door and found Bose standing beside his desk. Bose testified that she had risen to open the door when she heard Bea trying to come in. Bea asked Bose whether she needed scratch paper; she said no, and Bea left. Distracted by maintenance noise near Bea's office, Bose finished the exam with the rest of the class. Bose scored 74 points out of 100, approximately 20

points lower than her score on any other quiz or test in Organic Chemistry II, but Bea recorded her score as 47.

The next week, Bose attempted to ask Bea about some practice problems before class began, but he refused to respond to her; when he eventually acknowledged her, he just shrugged his shoulders. Bose had regularly asked for help with practice problems in the past, and Bea had never refused to respond. Feeling uneasy with his changed behavior, Bose went to Bea's office after class; but Bea was again unresponsive. Eventually, Bose broke the silence by relaying her impression that Bea had seemed disinterested in teaching or helping her since she had spoken to him about the cafeteria incident. Bea still said nothing, so Bose left.

Around this time, Bea told a colleague that he suspected a student of cheating. The colleague advised Bea to create a fake answer key and stay logged in on his computer to see whether the student used it. Bea testified that he took this advice, creating a document entitled "Answer Key," with credible, though incorrect, answers to an upcoming quiz (Quiz 5). Shortly thereafter, Bose took Quiz 5 in Bea's office. Her answers matched the fake answer key precisely. Later that day, Bea emailed several administrators and accused Bose of cheating and of changing her grades in his grade roster. Bose would later deny these claims, maintaining that Bea must have matched his "fake answer key" to her actual answers, rather than the other way around.

Rhodes College Proceedings. Student academic conduct at Rhodes is governed by an Honor Code, administered by students elected to serve on an Honor Council. Two days after Bose took Quiz 5, the Honor Council president emailed Bose to tell her she was under investigation for cheating "on multiple assignments in Organic Chemistry II." After an investigation and hearing, the Honor Council determined that Bose had violated the Honor

Code. Among other things, the Honor Council "found clear and convincing evidence that [Bose] had stolen answers, most convincingly on Quiz 5, from Dr. Bea's computer and used them to cheat." Because of the "nature and severity" of the underlying offense, as well as what the Council deemed Bose's "egregious lies" during the hearing, the Honor Council voted to expel her.

Bose appealed her expulsion to the Faculty Appeals Committee. The Appeals Committee upheld the Honor Council's finding but remanded for reconsideration of the penalty, in light of new evidence in the form of tests and quizzes that Bose had previously lost.[1] On remand, the Honor Council upheld Bose's expulsion.

In February 2016, Bose filed an internal Title IX complaint alleging sexual harassment by Bea. A Title IX investigator determined that the allegations of sexual harassment could not be sustained.

The Lawsuit. In May 2016, Bose filed this lawsuit against Rhodes and Bea. Against Rhodes she alleged, among other claims, breach of contract for failing to investigate pursuant to Rhodes' Title IX handbook, and retaliation in violation of Title IX, 20 U.S.C. §§ 1681–88. Against Bea she alleged, among other claims, defamation under Tennessee law for Bea's statements that Bose had violated the Honor Code.

Rhodes and Bea filed a motion to dismiss. Bea argued that his accusations of cheating and the documentary evidence submitted to the Honor Council were made as part of "quasi-judicial proceedings" and were therefore subject to an absolute privilege under Tennessee defamation

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[1] Bea had testified before the Honor Council that Bose had received a 47 on Exam 3 (though Bose actually received a 74). Bose could not dispute this, as she had lost the graded exam in an airport. Sometime after the hearing, the person who had found her exam mailed it back to her.

law. The district court agreed and dismissed the defamation claim against Bea. But the district court allowed the Title IX and breach of contract claims to proceed to discovery.

After discovery, Rhodes moved for summary judgment on the breach of contract and Title IX claims. The court denied the motion on the breach of contract claim. The court granted summary judgment to Rhodes on the Title IX claim, however. Bose's Title IX theory was that Bea had reported her to the Honor Council in retaliation for her opposing his advances. But Title IX does not provide for individual liability; only "a recipient of federal funds may be liable in damages under Title IX" and "only for its own misconduct." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640 (1999); *see also Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999). Accordingly, Bose asked the court to impute Bea's retaliatory motive to Rhodes using a "cat's paw" theory of causation, which links the discriminatory motive of one actor to the adverse action of another.[2] The district court declined to do so, reasoning that the cat's paw theory depends on principles of respondeat superior and constructive notice that do not apply to Title IX claims. Bose later voluntarily dismissed her breach of contract claim with prejudice. She appeals only the district court's decisions dismissing her Title IX and defamation claims.

II.

We first address the district court's grant of summary judgment to Rhodes on Bose's Title IX claim. We review de novo, viewing the facts in the light most

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[2] According to the Supreme Court, "[t]he term 'cat's paw' derives from a fable conceived by Aesop. . . . In the fable, a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing." *Staub v. Proctor Hosp.*, 562 U.S. 411, 415 n.1 (2011).

favorable to the non-moving party. *Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 532, 534 (6th Cir. 2008).

A.

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). Though the statute contains no express private right of action, the Supreme Court has held that individuals may sue funding recipients for violating Title IX. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979); *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 76 (1992). And the Court has held that this implied right of action includes retaliation claims, explaining that "when a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional 'discrimination' 'on the basis of sex,' in violation of Title IX." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005).

The Supreme Court's decision in Jackson did not spell out the elements of a Title IX retaliation claim, and no published case in this circuit has decided the question. In unpublished authority, however, we have analogized to Title VII retaliation claims, stating that a Title IX plaintiff must show "that (1) [s]he engaged in protected activity, (2) [the funding recipient] knew of the protected activity, (3) [s]he suffered an adverse school-related action, and (4) a causal connection exists between the protected activity and the adverse action." *Gordon v. Traverse City Area Pub. Schs.*, 686 F. App'x 315, 320 (6th Cir. 2017). Our sister circuits apply similar tests. *See, e.g.*, *Emeldi v. Univ. of Or.*, 698 F.3d 715, 724 (9th Cir. 2012); *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 89 (2d Cir. 2011); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d

52, 67 (1st Cir. 2002). And the parties have litigated this case under that framework, which we apply here.

In this case, Bose cannot make out the fourth element—causation. Bose's theory is that after she opposed Bea's unwelcome attention by confronting him in the cafeteria and asking him to "keep things professional,"[3] he retaliated by taking her to the Honor Council on false allegations of cheating. But there is no individual liability under Title IX, so Bose cannot use Title IX to sue Bea directly for his alleged retaliatory act. *See Soper*, 195 F.3d at 854. Moreover, the "adverse school-related action" she alleges is her expulsion, and Rhodes itself did that, not Bea. Yet there is no evidence that Rhodes itself (or the Honor Council or the Faculty Advisory Committee) harbored any discriminatory motive against Bose. To draw the required connection between Bose's opposition to Bea's unwelcome conduct and Rhodes' act of expelling her, Bose seeks to impute Bea's retaliatory motive to Rhodes using a cat's paw theory.

We have explained the cat's paw theory this way:

> "[T]he term 'cat's-paw' refers to 'one used by another to accomplish his purposes.' In the employment discrimination context, 'cat's paw' refers to a situation in which a biased subordinate, who lacks

[3] In the Title VII context, we have held that under that statute's "opposition clause," 42 U.S.C. § 2000e-3(a), an employee's "demand that a supervisor cease his/her harassing conduct constitutes protected activity covered by Title VII." *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1067 (6th Cir. 2015). Noting that "the language of the opposition clause does not specify to whom protected activity must be directed," we rejected the suggestion that "communication directed solely to a harassing supervisor does not constitute protected activity." *Id.* at 1068 (noting disagreement with *Frank v. Harris County*, 118 F. App'x 799, 804 (5th Cir. 2004)). The parties have not questioned whether this view of protected activity also applies to claims brought under Title IX, and we express no position on that question here.

> decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 484 (10th Cir. 2006) (citations omitted). A plaintiff alleging liability under the cat's paw theory seeks "to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision." *Staub v. Proctor Hosp.*, 562 U.S. 411, 415 (2011).

Marshall v. The Rawlings Co., 854 F.3d 368, 377 (6th Cir. 2017) (alteration in original). This court has applied the cat's paw theory to a variety of claims, including a Family Medical Leave Act discrimination claim, a Title VII race discrimination claim, and an Age Discrimination in Employment Act claim. See *id.* (collecting cases). Our question today is whether the cat's paw theory can apply in Title IX cases. We hold that it cannot.

Our conclusion follows from the Supreme Court's decision in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998). In Gebser, the Court considered whether a school district could be held liable under Title IX for failing to stop a teacher's sexual harassment of a high school student. *Id.* at 277. Though the school had been unaware of the harassment, Gebser argued that Title IX imposed liability on the school under either a respondeat superior or constructive notice theory. *Id.* at 282. The Court disagreed, concluding that Title IX imposed liability only for a funding recipient's "own official decision[s]" and not "for its employees' independent actions." *Id.* at 290–91. Accordingly, the Court held, "a damages remedy will not lie under Title IX unless an official who at a minimum has the authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination" and responds with "deliberate indifference." *Id.* at 290.

The Court gave several reasons for its holding. First, it noted that while "agency principles guide the liability inquiry under Title VII," that conclusion derives from Title VII's text, which "explicitly defines" a liable "'employer' to include 'any agent.'" *Id.* at 283 (quoting 42 U.S.C. § 2000e(b)). By contrast, "Title IX contains no comparable reference to an educational institution's 'agents,' and so does not expressly call for application of agency principles." *Id.* Moreover, the Court concluded, "[I]t would frustrate the purposes of Title IX to permit a damages recovery against a school district . . . based on principles of respondeat superior or constructive notice." *Id.* at 285 (emphasis and quotation marks omitted).

The Court noted that, under Title IX's express means of enforcement, through administrative action, "an agency may not initiate enforcement proceedings until it 'has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.'" *Id.* at 288 (quoting 20 U.S.C. § 1682). The Court concluded that "[i]t would be unsound . . . for a statute's express system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially implied system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice." *Id.* at 289. "Congress," the Court held, "did not envision a recipient's liability in damages in that situation." *Id.* at 287–88.

Cases since *Gebser* have reinforced its message: a "recipient of federal funds may be liable in damages under Title IX only for its own misconduct." Davis, 526 U.S. at 640. Accordingly, it is inappropriate to use "agency principles to impute liability to [a school] for the misconduct of its teachers," *id.* at 642; liability instead requires that the institution itself be "deliberately indifferent to known acts of . . . discrimination," *id.* at 643. *See also Jackson*,

544 U.S. at 181 ("Title IX's enforcement scheme also depends on individual reporting because individuals and agencies may not bring suit under the statute unless the recipient has received 'actual notice' of the discrimination." (quoting *Gebser*, 524 U.S. at 288)). Cat's paw liability, therefore, has no place in Title IX actions.

Under a cat's paw theory, the decisionmaker need not have notice of the subordinate's discriminatory purpose. The cat's paw theory, rather, imputes knowledge and discriminatory intent—the cat's paw is the "unwitting tool" of those with the retaliatory motive. *Seoane-Vazquez v. Ohio State Univ.*, 577 F. App'x 418, 427 (6th Cir. 2014); *see also Henderson v. Chrysler Grp., LLC*, 610 F. App'x 488, 496 (6th Cir. 2015); *Shazor v. Prof. Transit Mgmt.*, Ltd., 744 F.3d 948, 955–56 (6th Cir. 2014) (explaining that a cat's paw theory requires proof only that the subordinates intended to cause the discriminatory employment action and that those actions proximately caused the ultimate action). Indeed, we have referred to cat's paw as an application of "agency principles," *Marshall*, 854 F.3d at 378; *see also Volz v. Erie County*, 617 F. App'x 417, 423 (6th Cir. 2015), and have even called it the "rubber-stamp" theory. *Bishop v. Ohio Dep't of Rehab. and Corr.*, 529 F. App'x 685, 696 (6th Cir. 2013); *see also Goodsite v. Norfolk S. Ry. Co.*, 573 F. App'x 572, 586 (6th Cir. 2014). Cat's paw liability does not require either actual notice to the funding recipient or any "official decision" by it; to hold a cat's paw theory applicable to Title IX claims then would be inconsistent with the Supreme Court's decisions in Gebser, Davis, and Jackson. *See also M.D. ex rel. Deweese v. Bowling Green Ind. Sch. Dist.*, 709 F. App'x 775, 779 (6th Cir. 2017) (recognizing that a plaintiff raising a Title IX retaliation claim cannot use agency principles to impute liability to a funding recipient for the misconduct of its employees).

Bose suggests that the cat's paw theory does not require the application of respondeat superior principles.

Rather, says Bose, "the cat's paw theory is a doctrine of causation; it simply draws a causal link between the discriminatory animus of one individual and the adverse action of another." According to Bose, cat's paw does not impute liability; it is merely a "conduit theory." *See Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 878 (6th Cir. 2001). We fail to see the distinction. The Supreme Court in Gebser held that an educational institution is responsible under Title IX only for its "own official decision[s]." 524 U.S. at 290–91. Bose argues that she seeks to hold Rhodes liable for its own decision—expelling her. But that decision only violated Title IX if it was made "on the basis of sex"—that is, if the decision was taken for a discriminatory reason. Bose has no evidence of any discriminatory motive on Rhodes' part; she, therefore, asks us to hold Rhodes responsible for Bea's retaliatory animus. But that would be to hold Rhodes liable "for its employees' independent actions"—precisely what Gebser forbids.[4]

Bose asks us to follow the Second Circuit's decision in *Papelino v. Albany College of Pharmacy of Union University*, 633 F.3d 81 (2d Cir. 2011), which she reads as

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[4] Bose argues that this court has permitted liability under a cat's paw theory for claims brought under 42 U.S.C. § 1983, despite the fact that respondeat superior liability does not apply to such claims. Although Bose offers two cases in support, neither case held, in a binding, considered opinion, that the cat's paw theory applies to § 1983 claims. In *DeNoma v. Hamilton County Court of Common Pleas*, 626 F. App'x 101 (6th Cir. 2015), a panel of this court applied a cat's paw theory to the plaintiff's § 1983 claim. The opinion, however, is unpublished, and it does not appear that the court had occasion to consider whether a cat's paw theory was appropriate for § 1983 claims, given that the lower court and the parties had proceeded as if it were. See id. at 105. Likewise, in *Arendale v. City of Memphis*, 519 F.3d 587 (6th Cir. 2008), this court seemed to assume the applicability of the cat's paw theory to § 1983 claims. *See id.* at 604 n.13. But the court resolved the case on other grounds—that the plaintiff "has not demonstrated that he was treated differently than similarly situated non-white employees." *Id.* at 604.

applying a cat's paw theory to a Title IX retaliation claim. There, a college's Honor Code Panel expelled Papelino after concluding that he had cheated on an exam. *Id.* at 87. Papelino claimed that a professor had initiated the Honor Code proceedings in retaliation for his having reported the professor's sexual harassment to the College's Associate Dean for Student Affairs, Albert White. Papelino brought a Title IX retaliation suit against the College. *Id.* at 88. The Second Circuit allowed the retaliation claim to proceed to trial. *Id.* at 92.

Some aspects of the Second Circuit's decision can indeed be read as invoking a cat's paw theory, though the court never uses the term. The court concluded, for example, that, "even if the [Honor Code] Panel members were themselves unaware that Papelino had engaged in protected activity," a reasonable jury could find that "they were acting on [the professor's] explicit encouragement, or that they acted without information that White should have imparted to them." *Id.* at 92–93. Read this way, the Second Circuit may have seen the Honor Code Panel as the cat's paw, unwittingly manipulated by the retaliatory animus of either the professor or Dean White, or both. To the extent *Papelino* embraces the cat's paw theory of causation for Title IX claims, we find it inconsistent with *Gebser*, *Davis*, and *Jackson* and decline to follow it.

Yet other aspects of *Papelino* suggest a different theory of Title IX liability—that the College was on notice of, and was deliberately indifferent to, the professor's retaliation. There, the student had reported his professor's sexual harassment to Dean White.[5] The court considered this

[5] The court, in another part of the opinion, expressed its view that reporting to the Dean satisfied *Gebser*'s requirement that notice be given to an "appropriate person"—"a school official with 'authority to address the alleged discrimination and to institute corrective measures.'" *Papelino*, 633 F.3d at 89; see also id. (finding that Papelino's complaint to Dean White put the College on "actual notice" of

act of reporting to be both the "protected activity," and evidence that the College knew that Papelino had engaged in protected activity. *Id.* at 92. There was also evidence that the Dean had informed the professor of Papelino's complaint against her and that the Dean knew that the professor had initiated the Honor Code proceedings against Papelino shortly after she learned of Papelino's complaint. Yet despite the fact that Dean White was "a high-ranking member of the College's administration who was 'responsible for the administration of the Student Code,'" *id.* at 89, he "did nothing even after the cheating charges were lodged against Papelino," *id.* at 92; *see also id.* at 93 (suggesting that Dean White—perhaps because of his supervisory role with respect to the Honor Code—had a duty to "impart[]" his knowledge of the professor's retaliatory act to the Honor Code panel). Read this way, it was the College's own behavior—its deliberate indifference to the professor's known retaliatory act—that subjected the College to Title IX liability in *Papelino*.

In her reply brief on appeal, Bose attempts to raise a similar theory: that Rhodes had actual notice of Bea's retaliation against her for opposing his unwanted advances but was deliberately indifferent to it. According to Bose, she told the Honor Council in her closing statement about possible retaliation by Bea and repeated her claim to the Faculty Appeals Committee and the Title IX investigator; yet none took any action. But if she ever previously presented such a theory of Title IX liability in this litigation, she has since abandoned it.

In its motion for summary judgment, Rhodes asked the district court to dismiss Bose's Title IX claim in full. In response, Bose raised the cat's paw theory of liability

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the harassment because "White was a high-ranking member of the College's administration who was 'responsible for the administration of the Student Code'").

but made no mention of any deliberate indifference by Rhodes to Bea's retaliation. In its reply, Rhodes stated that Bose had abandoned any deliberate indifference claim she might have pled. The district court's order dismissing Bose's Title IX claim in full did discuss, and dismiss, Bose's claim that Rhodes had been deliberately indifferent to Bea's *sexual harassment*; Bose did not appeal that decision. The district court did not, however, discuss any theory whereby Rhodes would be liable for its own deliberate indifference to Bea's *retaliation*. With respect to the retaliation claim, the district court discussed the cat's paw theory, which it rejected.[6] If Bose believed she had an outstanding theory of Title IX liability that the district court had failed to consider, then would have been the time to raise it, given that the district court had just dismissed her Title IX claim in full. Yet, Bose did not file a motion for reconsideration, alerting the district court that it had failed to consider an alternate theory of liability. Nor did she make any mention of a deliberate-indifference-to-retaliation theory in her opening brief in this court; her opening brief advanced only the cat's paw theory. Only after Rhodes again noted, in its responsive brief on appeal, that Bose had "forfeited" any deliberate indifference claim did Bose make any attempt to develop the theory that Rhodes should be held liable for its own deliberate indifference to Bea's retaliation. That was too late. And even then, at oral argument, Bose's counsel seemed to retreat, arguing that the cat's paw theory is "the only theory of causation there could be in this case." We conclude, therefore, that Bose has forfeited any argument that Rhodes had actual notice of Bea's retaliation but was

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[6] The district court also rejected Bose's argument that the court was bound by its causation ruling at the preliminary injunction stage, correctly noting that "the findings of a district court in the context of a preliminary injunction do not bind th[e] court in subsequent proceedings.

deliberately indifferent to it. *See Am. Trim, LLC v Oracle Corp.*, 383 F.3d 462, 477 (6th Cir. 2004) ("This argument was raised for the first time in [appellant's] reply brief, and this court has consistently held that we will not consider such arguments."); *Coach Servs., Inc. v. Source II, Inc.*, 728 F. App'x 416, 417–18 (6th Cir. 2018) (finding that the defendants forfeited arguments where they failed to raise them both in response to a motion for summary judgment and in their motion for reconsideration of the district court's summary judgment ruling).

We do not speculate whether the outcome would have been different had Bose pursued a theory that Rhodes was deliberately indifferent to Bea's known retaliation. But had Bose pursued such a theory in the district court, we imagine that a number of questions would have been joined. For example: was the Honor Council, the Faculty Advisory Committee, or the Title IX investigator an "appropriate person" to notify, within the meaning of Title IX? *See Gebser*, 524 U.S. at 289. Assuming so, did Bose adequately inform those entities of the alleged retaliation? And, if so, was Rhodes' response "clearly unreasonable" in light of what Rhodes knew? *Williams ex rel Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 367–68 (6th Cir. 2005). And, for that matter, is deliberate indifference to retaliation even actionable under Title IX? See *M.D. ex rel. Deweese*, 709 F. App'x at 779 ("M.D. has failed to cite any authority applying the . . . deliberate indifference framework to a Title IX retaliation claim."); but see *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 695 (4th Cir. 2018) ("[W]e are satisfied that an educational institution can be liable for acting with deliberate indifference toward known instances of student-on-student retaliatory harassment."). Bose's failure to advance a deliberate-indifference-to-retaliation theory below deprives us of the ability to review these questions on appeal.

Throughout this litigation, Bose chose to argue that the cat's paw theory applies to Title IX claims. We conclude that it does not. The cat's paw theory, which imputes the discriminatory animus of another to the funding recipient, is inconsistent with Title IX principles requiring that a funding recipient be held liable "only for its own misconduct." *Davis*, 526 U.S. at 640. As a result, we affirm the district court's order granting summary judgment to Rhodes on the Title IX claim.

III.

We next turn to the district court's dismissal of Bose's defamation claim for failure to state a claim. We review such decisions de novo, accepting all factual allegations as true and construing the complaint in the light most favorable to the plaintiff. *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 785 (6th Cir. 2016).

The district court granted Bea's Rule 12(b)(6) motion on the ground that Bea's statements were absolutely privileged under Tennessee defamation law because they were made in a quasi-judicial proceeding. We cannot agree. Tennessee does recognize an absolute privilege for statements made in quasi-judicial proceedings. *See Lambdin Funeral Serv. Inc. v. Griffith, 559 S.W.2d 791, 792 (Tenn. 1978); Logan's Super Mkts., Inc. v. McCalla*, 343 S.W.2d 892, 894–95 (Tenn. 1961). But the Tennessee cases have applied this privilege only to statements made before public bodies. In *Evans v. Nashville Banner Public Co.*, for example, the court clarified that Tennessee had expanded the quasi-judicial absolute privilege to "proceedings conducted by state departments and agencies." No. 87-164-II, 1988 WL 105718, at *3 (Tenn. Ct. App. Oct. 12, 1988) (emphasis added). And in *Jones v. Trice*, the Tennessee Supreme Court approvingly cited the English rule, which specified that the absolute privilege is "limited to

legislative and judicial proceedings and other acts of state." 360 S.W.2d 48, 51 (Tenn. 1962) (emphasis added).

The rationale underlying the Tennessee decisions supports limiting this privilege to statements made to public entities. Time and again, the Tennessee courts have emphasized that a benefit to the public is what drives the privilege. In *Independent Life Insurance Co. v. Rodgers*, 55 S.W.2d 767 (Tenn. 1933), the Tennessee Supreme Court concluded that statements made in a letter to the state insurance commissioner were absolutely privileged as part of a quasi-judicial license revocation proceeding. *Id.* at 768. According to the Court, the insurance commissioner had been clothed by statute "with attributes similar to those of a court"; the statute had thereby made "of him a court to determine this matter of revocation." *Id.* at 769. The Court recognized that "absolute privilege . . . has been extended to many inquiries that are not conducted before courts of justice or courts of record," including "to statements made in a court martial; to statements made in an extradition proceeding before the Governor; to proceedings before the interstate commerce commission; to affidavits for a search warrant made before a justice of the peace; to preliminary statements of a witness made to counsel before trial; and . . . to statements made upon the hearing of applications for pardon to the Governor." *Id.* (internal citations omitted). Common to all these proceedings is that they were public.

In *Lambdin*, the Tennessee Supreme Court extended an absolute privilege to statements made to the Tennessee Board of Funeral Directors and Embalmers, which concerned "the occupation for which [the plaintiffs] had been licensed by the Board." 559 S.W.2d at 792. As in Rodgers, the Court in *Lambdin* emphasized that the basis of this privilege was public need. *Id.* And in Evans, the Tennessee Court of Appeals emphasized the benefit of free dialogue in statements before zoning boards. 1988

WL 105718 at *4. The court explained that "[t]he policy underlying the privilege is to encourage the public to speak freely at public, governmental hearings," as "[l]ocal boards of zoning appeals take actions which affect not only homes and neighborhoods but also the quality of people's lives" and "[w]hen these boards hold hearings, all interested persons should feel free to express their views without fear of a recriminating lawsuit." *Id.*

A common theme emerges from the cases in which Tennessee has recognized an absolute privilege—a strong benefit to the public, often tied to a statute or to powers which the Tennessee legislature had specifically granted to the tribunal at issue. *See id.*; *see also Rodgers*, 55 S.W.2d at 770 ("The design of [the statute at issue] will be obstructed if those instituting or participating in proceedings to bring about the revocation of the license of an unworthy agent may be subjected by reason of their statements to a suit for libel or a suit for slander."); *Logan's Super Mkts., Inc.*, 343 S.W.2d at 894 ("The privilege belongs to the public, not to the individual, and the public should not stand to lose the benefit it derives . . . .").

Bea cannot point to a similar public benefit to Rhodes' disciplinary proceedings. While Bea claims that the public has an interest in a college's academic misconduct proceedings, and that private colleges have an interest in encouraging faculty members and students to report allegations of academic misconduct, whether a student is disciplined by a private college does not affect the citizens of the state in the same fashion as, for example, revoking a business's publicly conferred license, passing zoning laws, or drafting legislation in response to public testimony.

Bea discusses at length the procedural safeguards required in an Honor Council proceeding, but we see nothing in the Tennessee cases that would suggest that procedural safeguards alone are enough to cloak participants in a private proceeding with an absolute privilege under

Tennessee law. Bea refers us to *Brundage v. Cumberland County*, 357 S.W.3d 361, 370 (Tenn. 2011), in which the Tennessee Supreme Court declared that "[t]he application of pre-defined standards, the requirement of a hearing, and the requirement of a record are earmarks of quasi-judicial proceedings." But the proceedings at issue in *Brundage* were plainly public—"a local legislative body's land use decision." *Id.* at 363. Moreover, the question in *Brundage* had nothing to do with whether an absolute privilege applied to statements made in such proceedings. *Brundage* instead concerned the standards for seeking judicial review of such decisions under a particular Tennessee statute. *Id.* at 371. Along the way, the Court noted that the proceedings at issue were a "hybrid" between "essentially 'legislative'" and "'quasi-judicial' decisions," and discussed the characteristics of each. *Id.* at 370. But as the question there concerned the procedures for obtaining judicial review of plainly public proceedings, and did not concern the availability of an absolute privilege in any kind of proceeding, we cannot find in Brundage any indication that Tennessee would extend its absolute privilege beyond the realm of public proceedings where it has previously resided.

Finally, Bea notes that in *Myers v. Pickering Firm, Inc.*, 959 S.W.2d 152, 161 (Tenn. Ct. App. 1997), the Tennessee Court of Appeals said that "our Supreme Court [has] strongly endorsed a liberal application of the absolute privilege accorded to publication of defamatory matters in connection with judicial proceedings." But the key word there is "judicial." In *Myers*, the court discussed whether an expert report made "in anticipation of" the defendant's role as an expert witness in state court litigation was absolutely privileged. *Id.* The court repeated the policy underlying absolute privilege for statements made in a judicial proceeding:

> Underlying this general doctrine of absolute immunity from liability in libel and slander for statements made in the course of a judicial proceeding is a policy decision by the courts that access to the judicial process, freedom to institute an action, or defend, or participate therein without fear of the burden of being sued for defamation is so vital and necessary to the integrity of our judicial system that it must be made paramount to the right of an individual to a legal remedy where he has been wronged thereby.

Id. (quoting *Jones*, 360 S.W.2d at 51). Thus, "liberal application" means only that courts should liberally apply the absolute privilege when a statement is connected to a judicial or quasi-judicial proceeding, not that courts should be generous in deciding what proceedings fit that definition.

To our knowledge, Tennessee has never cloaked defamatory statements made to private entities with an absolute privilege, and we see in the Tennessee cases no indication that its rationale for maintaining the privilege would compel an extension. Of course, the Tennessee legislature or the Tennessee courts might, in the future, choose another path. But "[o]ur respect for the role of the state courts as the principal expositors of state law counsels restraint by the federal court in announcing new state-law principles." *Angelotta v. Am. Broad. Corp.*, 820 F.2d 806, 809 (6th Cir. 1987). We conclude that Bea has failed to show that Tennessee would provide absolute immunity to statements made in Rhodes' Honor Council proceedings.[7]Accordingly, we reverse the district court's

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[7] Bea argues, for the first time on appeal, that Bose's defamation claim fails because she cannot show publication, an element of defamation under Tennessee law. But because the defamation claim was dismissed at the Rule 12(b)(6) stage, it was never subject to discovery. Counsel for Bea admitted at argument that publication is a fact-

decision dismissing Bose's defamation claim on this ground.

* * *

We AFFIRM the district court's grant of summary judgment as to Bose's Title IX claim but REVERSE and REMAND regarding Bose's defamation claim.

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specific issue, and there has been little factual development of this claim. We decline to address this issue for the first time on appeal

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

PRIANKA BOSE, Plaintiff, v. ROBERTO DE LA SALUD BEA and RHODES COLLEGE, Defendants.	)	Case No. 2:16-CV-02308-JTF-tmp

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendants' Motion for Summary Judgment. Defendants Roberto De La Salud Bea and Rhodes College filed their Motion for Summary Judgment on December 1, 2017. (ECF Nos. 115 & 116.) Plaintiff Prianka Bose filed her Response in opposition to Defendants' Motion on January 4, 2018, to which Defendants submitted their Reply Brief on January 18, 2018. (ECF Nos. 60 & 67.) For the following reasons, the Court finds that Defendants' Motion for Summary Judgment should be GRANTED IN PART AND DENIED IN PART.

FACTUAL BACKGROUND

This case arises out of allegations lodged between a student and teacher of a private university and the events initiated in response to those allegations. Plaintiff Prianka

Bose is an adult presently residing in DeKalb County, Georgia. (ECF No. 1, 1:1.) Defendant Rhodes College is a Tennessee Public Benefit Corporation with its principal place of business in Memphis, Tennessee. (*Id.* at 1:3.) Defendant Roberto De La Salud Bea is an adult resident of Shelby County, Tennessee, who worked for Defendant Rhodes at the time of the events giving rise to this action. (ECF No. 1, 1:3–4.)

Plaintiff was a student at Rhodes College from the 2013 Fall Semester until the end of the 2015 Fall Semester. (ECF No. 120, 1:1–2.) In her sophomore year, Plaintiff applied for and was accepted into the Rhodes College George Washington University Early Selection Program ("GW Program"). (*Id.* at 2:4.) Students selected to the GW Program are offered a contract with George Washington University, that, upon their satisfaction of it terms, allows them to gain automatic admission to its medical school without taking the Medical College Admission Test. (*Id.* at 2:5.) The requirements include maintaining a 3.6 grade point average throughout their matriculation at Rhodes, achieving grades in the required science courses of not less than a B minus, and reporting any allegations of substantiated academic misconduct that arise while they attend Rhodes. (*Id.* at 2:6.) According to the parties, the GW Program is governed by two contracts—a 2012 Agreement and a 2012 Memorandum of Understanding ("2012 MOU"). (*Id.* at 2:7.) Under the 2012 Agreement, Defendant Rhodes is responsible for reviewing student materials relating to the above terms and submitting them to the George Washington University School of Medicine & Health Sciences ("GWSMHS") Committee for additional review. (ECF No. 44, 128:18–25; ECF No. 116-4, 46.)

In the 2015 Spring Semester, Plaintiff took Organic Chemistry I, taught by Defendant Bea. (ECF No. 120, 3:8.) A couple of weeks after starting the course, Plaintiff

was involved in a car accident that resulted in a concussion protocol being established for her by Rhodes. (*Id.* at 3:9.) The protocol gave her extra time to take tests and quizzes outside of her regular classroom. (*Id.)* At the end of the semester, Plaintiff earned an A minus in Organic Chemistry I and had a cumulative GPA of 3.71. (*Id.* at 3:8.) In the 2015 Fall Semester, Plaintiff took Organic Chemistry II, which included a lecture and laboratory component. (ECF No. 120, 3:10.) Defendant Bea taught only the lecture component. (*Id.* at 3:10.) By this time, Plaintiff was no longer on a concussion protocol. (*Id.* at 4:11.) Nonetheless, Plaintiff arranged with Defendant Bea to take some tests and quizzes in his office at a time and/or on a date earlier than the class. (*Id.* at 4:11.)

Of primary relevance here is Quiz 5. (*Id.* at 4:14–5:14.) Plaintiff took Quiz 5 two days early, on December 2, 2015, in Defendant Bea's office. (*Id.* at 6:22.) At 11:03 a.m. of the same day, Defendant Bea sent an email to two Associate Deans of Students of Rhodes College, stating that he suspected Plaintiff of cheating. (*Id.* at 7:24–8:24.) Specifically, he alleged that he drafted a fake answer key to Quiz 5 and made it accessible to Plaintiff through his office computer while she took the Quiz. (*Id.* at 7:23.) He further stated that when he checked Plaintiff's answers, he found that she submitted the same fake answers he prepared. (*Id.)* One of the Deans replied within the hour, stating the need for the Rhodes College Honor Council ("HC") to address the issue and that he could make that happen. (*Id.* at 7:24–8:24.)

The HC is composed entirely of students elected by their peers. (*Id.* at 8:25.) Rhodes provides training to the HC members at the beginning of each academic year. (*Id.* at 8:25.) On December 4, 2015, Plaintiff received an email from President of the HC, Regan Adolph, informing her that she was under investigation for cheating on multiple assignments in Organic Chemistry II. (*Id.* at 8:26.) On the

same date, Plaintiff also received an email from Mitchell Trychta, the HC member assigned to investigate the allegations against Plaintiff, asking to set up a time to interview her. (*Id.* at 8:27.) Plaintiff met with Mr. Trychta on three occasions late in 2015—December 7, December 10, and December 13. (*Id.* at 8:28.)

A day after their first meeting, Mr. Trychta sent Plaintiff a statement summarizing the results of the interview, for review and correction, which Plaintiff verified as correct. (ECF No. 120, at 9:29–30.) After the second and third interviews, Plaintiff approved an addendum to her statement in which she was asked about Quiz 5, shown the false answer key she is alleged to have copied from, and is given an opportunity to explain her answers on Quiz 5 in detail. (*Id.* at 9:31.) Although Plaintiff told Mr. Trychta that the allegations did not make sense to her, she did not tell him that Defendant Bea made inappropriate remarks to her or otherwise suggest that he had an ulterior motive for accusing her of cheating. (*Id.* at 9:32.)

On December 14, 2015, prior to the HC hearing, Ms. Adolph emailed Plaintiff a hearing packet containing the following documents: Defendant Bea's statement and addendum to his statement; Plaintiff's statement and addendum to her statement; Quiz 5; Quiz 5 notes; the false answer key; the correct answer key, Defendant Bea's handwritten grade roster; Defendant Bea's electronic grade roster; a screen shot of Defendant Bea's computer desk top; and Defendant Bea's course syllabus for Organic Chemistry II. (*Id.* at 10:33.) The HC hearing was held on December 17, 2015, and lasted approximately five hours. (*Id.* at 10:34.) At the hearing, Plaintiff called the following witnesses: Chelsea Dezfuli (a classmate); Matthew Chapman (represented to the HC by Plaintiff as her chemistry tutor without disclosing that he was also her boyfriend); Vinay Bose (her father); and two

chemistry professors found through an online chemistry tutoring service. (*Id.* at 11:35.)

All of the witnesses Plaintiff called at the HC hearing were there to address the issue of how Plaintiff could have arrived at the answers to Quiz 5 without cheating. (*Id.* at 12:36.) None were aware that there was a fake answer key until the hearing. (*Id.* at 12:36.) During her closing argument, Plaintiff made the following statement:

> I have a witness for a specific incident in the Rat where Dr. Bea came up to me and looked at my phone, which is a very personal item, and says, oh, is that your boyfriend, and proceeded to ask me a question about my boyfriend and then he just walked away . . . . Right after this incident happened, I walked up to Dr. Bea and I told him, I feel uncomfortable with you asking questions about my boyfriend. Please, let's not talk about any personal stuff anymore. And then he got angry and walked away . . . . This is not the first time that an ego-hurt professor would harm a student. And there are many instances in—at other colleges where something like this has happened.

(ECF No. 116-3, 96.)

After Plaintiff finished her closing remarks, Ms. Adolph concluded the hearing and asked Plaintiff and Defendant Bea to follow her outside. (*See* ECF No. 120, 12:37.) At that time, Plaintiff asked Ms. Adolph if she could recall Ms. Dezfuli. (*Id.* at 12:38.) She was prevented from doing so, however, because it was too late in the proceeding. (ECF No. 40, 87:11–88:10; ECF No. 116-2, 67.)

Ultimately, the HC found Plaintiff in violation of the Honor Code with respect to cheating and stealing and imposed the penalty of expulsion. (ECF No. 120, 12:39.) Plaintiff decided to appeal the HC's decision to the Faculty Appeals Committee ("FAC"). (*Id.* at 12:38.) An

appeal packet, which included the HC's written response to Plaintiff's allegations, was provided to both Plaintiff and the FAC. (*Id.* at 14:41.) In early January 2016, prior to Plaintiff's FAC hearing, Plaintiff and her parents met with Ms. Shapiro, Rhodes College's Title IX Coordinator, to talk about Plaintiff's allegations against Defendant Bea. (*Id.* at 15:47.) Ms. Shapiro instructed Plaintiff to fill out a Title IX complaint form online. (*Id.* at 15:48.)

On January 16, 2016, before filing a Title IX complaint form, Plaintiff, through her counsel, submitted an appeal statement for consideration by the FAC. (*Id.* at 12:39.) This submission described Plaintiff's sexual harassment allegations against Dr. Bea as follows:

> (a) In July 2015, Plaintiff and Dr. Bea had a conversation in which he asked her "many personal questions, including where she was staying on campus, how she was spending her evenings, whether she had friends staying with her during the summer, and how her relationship with her boyfriend was. Bea then invited [Plaintiff] to dinner with him. Ms. Bose declined his invitation, and the conversation ended."
>
> (b) "Bea would show up in [Plaintiff's] lab course every week. Without being solicited by [Plaintiff], Bea would make it a point to stop by [Plaintiff's] desk, look at her work, correct any lab mistakes without being asked and speak to her prior to leaving."
>
> (c) "Around the third week of November 2015 . . . , [Plaintiff] was sitting with a classmate in the Catherine Burrow Refectory texting on her cell phone. Dr. Bea approached [Plaintiff] from behind, leaned over her shoulder, and abruptly asked her, 'Are you texting your boyfriend?' before leaving the Refectory."

(ECF No. 120, 12:39–14:40.)

Furthermore, her submission explicitly lodged allegations of retaliation by Defendant Bea as a result of Plaintiff confronting him about the above-referenced conduct. (*Id.* at 99–106.)

On January 28, 2016, before Plaintiff filed a Title IX complaint form, the FAC held a hearing on the matter. (*Id.* at 14:42.) Present were members of the FAC, Plaintiff, Plaintiff's attorneys, Rhodes College's attorney, and Dean Blaisdell. (*Id.)* The FAC upheld the finding of "In Violation" of the Honor Code, and remanded the case to the HC for reconsideration of the penalty only in light of new evidence Plaintiff presented at the hearing concerning lost copies of her tests in Organic Chemistry II. (*Id.* at 14:44.) The FAC further concluded that, even if the allegations of inappropriate behavior by Defendant Bea were valid, the evidence was adequate enough for the HC to conclude Plaintiff violated the Honor Code. (*Id.* at 14:45.)

Shortly after the FAC Hearing, in early February 2016, Plaintiff filled out a Title IX complaint form online per Ms. Shapiro's instructions. (*Id.* at 15:48.) As a result, Rhodes College retained Attorney Whitney Harmon to conduct an investigation of Plaintiff's Title IX complaint. (*Id.* at 15:49.) Ms. Harmon interviewed Plaintiff and all of the witnesses that Plaintiff requested, including Chelsea Dezfuli, Lauren Sylwester, and Emma Barr. Ms. Harmon also interviewed Defendant Bea and Dr. Brien (an Assistant Professor of Chemistry at Rhodes).

(ECF No. 120, 16:50.) On April 6, 2016, Ms. Shapiro informed Plaintiff, without any form of a hearing, that "[a]fter careful review of the facts, the allegations of sexual harassment and retaliation in violation of the College's policy cannot be sustained." (*Id.* at 16:51.)

Plaintiff was later provisionally admitted to Oglethorpe University in Atlanta, Georgia, where she graduated on May 13, 2017, with a Bachelor of Arts

degree in History. (ECF No. 40, 100:16–21; ECF No. 120, 17:55.) She currently lacks all of the prerequisites needed to apply to medical school, has not taken the MCAT, and has not applied to medical school. (ECF No. 120, 17:55.) She currently works as an administrative assistant for a law firm. (*Id.* at 17:55–56.)

LEGAL STANDARD

In evaluating a motion for summary judgment, federal courts are guided by Federal Rule of Civil Procedure 56, which provides that summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (*per curiam).* A fact is "material" if it is capable of affecting the outcome of the litigation, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and a dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Scott v. Harris*, 550 U.S. 372, 380 (2007). Thus, summary judgment will not be granted if the nonmoving party presents specific facts, both supported by the record and admissible at trial, that would allow a reasonable jury to find in its favor. *See* Fed. R. Civ. P. 56(c)(1); *Liberty Lobby, Inc.*, 477 U.S. at 256.

To support or oppose a motion for summary judgment, a party may rely on materials in the record, including affidavits, declarations, or other competent evidence, setting forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The district court does not have the duty to search the record for such evidence when not explicitly cited by the parties but may, on its own accord, consider other materials in the record. *See* Fed. R. Civ. P. 56(c)(3). In assessing the merits of a summary judgment motion, courts must remain mindful that "'[c]redibility determinations, the weighing of the

evidence, and the drawing of legitimate inference from the facts . . . are jury functions, not those of a judge.'" *Reeves v. Sanderson Plumbing Prods.,* 530 U.S. 133, 150 (2000) (quoting *Liberty Lobby, Inc.,* 477 U.S. at 255)). Indeed, if the evidence presented, alone cannot "reasonably support a jury verdict in favor of the nonmoving party, the motion for summary judgment will be granted." *Cox v. Kentucky DOT,* 53 F.3d 146, 150 (6th Cir. 1995).

ANALYSIS

Title IX Claims

The Court finds that Defendants are entitled to summary judgment on Plaintiff's Title IX claims. In her Complaint, Plaintiff alleges that Defendant Rhodes acted with deliberate indifference to her claim of sexual harassment against Defendant Bea, and that as a result of confronting Defendant Bea, she suffered a retaliatory expulsion. (ECF No. 1, 8:41–44.) The Court's analysis considers her allegations as both deliberate indifference and retaliation claims.

Title IX prohibits discrimination and retaliation against those who complain of discrimination by educational institutions receiving federal education funding. 20 U.S.C. § 1681; *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 173–74 (2005). The two primary objectives of Title IX are to "avoid the use of federal resources to support discriminatory practices" and "provide individual citizens effective protection against those practices." *Cannon v. Univ. of Chicago,* 441 U.S. 677, 704 (1979).

Deliberate Indifference

The Court finds that Plaintiff's does not sufficiently state a Title IX claim for deliberate indifference. "Under the deliberate-indifference theory, a plaintiff must '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.'" *Doe v. Miami Univ.,* No. 17-3396, 2018 U.S. App. LEXIS 3075, at *17 (6th Cir. Feb. 9, 2018) (quoting *Mallory v. Ohio Univ.,* 76 F. App'x 634, 638 (6th Cir. 2003)). Moreover, "[t]he deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it." *Thomas v. Meharry Med. Coll.,* 1 F. Supp. 3d 816, 827 (M.D. Tenn. 2014); *see also M.D. v. Bowling Green Indep. Sch. Dist.,* No. 1:15-CV-00014-GNS-HBB, 2017 U.S. Dist. LEXIS 11504, at *25 n.4 (W.D. Ky. Jan. 27, 2017), *aff'd*, 2017 U.S. App. LEXIS 19651 (6th Cir. Oct. 6, 2017).

Here, the record shows that Plaintiff did not notify Defendant Rhodes of the alleged sexual harassment until the conclusion of the hearing before the HC. As Defendants contend, Plaintiff does not provide evidence that she suffered any further sexual harassment, or risk of the same, by Defendant Bea after notifying Defendant Rhodes of Bea's alleged conduct. Moreover, the record also fails to show that, prior to the alleged conduct, Rhodes was otherwise aware that Defendant Bea had engaged in the same or similar conduct. Accordingly, Plaintiff fails to state a prima facie case for deliberate indifference under Title IX.

Retaliation

The Court additionally finds that Plaintiff fails to sufficiently state a Title IX claim for retaliation. To establish a prima facie case of retaliation under Title IX, Plaintiff must show that (1) she engaged in statutorily protected activity; (2) her exercise of rights was known to Rhodes; (3) she was subjected to the adverse action contemporaneously with, or subsequent to, the protected activity; and (4) there is a causal connection between the protected activity and the adverse educational action. *See Thomas,* 1 F. Supp. 3d at 827. Additionally, as noted by

the Supreme Court, "Congress did not intend to allow recovery in damages under Title IX where liability rests solely on principles of vicarious liability or constructive notice." *Gebser v. Lago Vista Indep. Sch. Dist.,* 524 U.S. 274, 287–288 (1998) ("Title IX's express means of enforcement—by administrative agencies—operates on an assumption of actual notice to officials of the funding recipient[,]" but "[i]f a school district's liability for a teacher's sexual harassment rests on principles of constructive notice or *respondeat superior,* it will likewise be the case that the recipient of funds was unaware of the discrimination.").

Here, the Court agrees with Defendants' assertion that Plaintiff cannot demonstrate the requisite causal connection needed to show a prima facie case of retaliation. (ECF No. 116, 4; ECF No. 123, 1–2.) According to Plaintiff, a prima facie case of retaliation is present here because (1) the Court previously determined that Plaintiff has offered sufficient evidence to establish such in it its Order on Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction; (2) under the "Cat's paw" theory of liability, Rhodes College is liable for its actions that served as a conduit for Defendant Bea's retaliatory motive in causing Plaintiff's expulsion; and (3) the evidence presented is sufficient to find pretext for discrimination. (ECF No. 119, 6–8, 11–13.) As Defendants note, the findings of a district court in the context of a preliminary injunction do not bind this court in subsequent proceedings. *Ford Motor Co. v. Lloyd Design Corp.,* 22 F. App'x 464, 469 (6th Cir. 2001). Thus, Plaintiff's first argument—that the Court's findings in its Order on Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction now bind this Court on the present matter—is of no avail.

In addition, Defendant Bea's alleged retaliatory motive cannot be imputed to the HC because the "cat's

paw" theory of liability used by Plaintiff is, in essence, based on principles of *respondeat superior* and/or constructive notice not applicable in the Title IX context. (ECF No. 116, 11.) Under the cat's paw theory, the discriminatory or retaliatory animus of a non-decisionmaker is imputed to a decisionmaker where the non-decisionmaker uses the decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory or retaliatory action. *Marshall v. Rawlings Co. LLC,* 854 F.3d 368, 377 (6th Cir. 2017). In essence, the theory is an attempt to hold a decisionmaker liable, through principles of vicarious liability or constructive notice, for a decision tainted by the animus of a non-decisionmaker. *Crews v. Paine,* 686 F. App'x 540, 546 (10th Cir. 2017); *see Waters v. City of Chicago,* 580 F.3d 575, 587 n.2 (7th Cir. 2009) ("Imputing a non-decisionmaker's motive to a[n] employer sounds a lot like *respondeat superior* liability.). The Supreme Court, in *Gebser v. Lago Vista Indep. Sch. Dist.,* held that Title IX does not allow recovery for harms based on principles of constructive notice or *respondeat superior.* 524 U.S. at 287–288. Here, liability for Defendant Bea's actions cannot be imputed to Defendant Rhodes because the record does not reflect that Rhodes retained actual knowledge of Bea's alleged retaliatory animus, and as the Court held in *Gebser,* theories based on constructive notice or *respondeat superior* are not available under Title IX.

Plaintiff, however, attempts to distinguish *Gebser* from this case by noting that it dealt with sexual harassment as opposed to retaliation. (ECF No. 119, 8.) In *Gebser's* stead, Plaintiff cites *Moresi v. Potter,* No. 07-2758-JPM, 2012 U.S. Dist LEXIS 46363, at *58 (W.D. Tenn. Mar. 9, 2012) to argue that she brings a "conduit theory of liability" that allows for application of the cat's paw theory of liability, as opposed to one of *respondeat superior* or vicarious liability. (ECF No. 119, 8.) In other

words, according to Plaintiff, "Defendant Rhodes would not be held liable for the actions of Defendant Bea, but instead held liable for its own actions that channeled or served as conduit for Defendant Bea's retaliatory motive in causing [Plaintiff] to be expelled." (*Id.* at 8.) The proffered distinction, however, is unavailing.

In *Moresi,* an employee held liable their employer for its management personnel's actions, on a retaliatory discrimination allegation under Title VII. *See Moresi,* 2012 U.S. Dist LEXIS 46363, at *41. Although the case supports the proposition that courts look to Title VII to frame and inform their analyses under Title IX, this analogous treatment does not extend to agency principles, given textual difference between the two Titles. *See Franklin v. Gwinnett Cnty. Pub. Schs.,* 503 U.S. 60, 74–75 (1992). As noted by the Supreme Court, "Title VII, in which the prohibition against employment discrimination runs against 'an employer,' explicitly defines 'employer' to include 'any agent,'" whereas "Title IX contains no comparable reference to an educational institution's 'agents,' and so does not expressly call for application of agency principles." *Gebser,* 524 U.S. at 283 (citations omitted). Even more, the caselaw relied upon by the Court in *Moresi,* admittedly held that the "conduit theory of liability" it employed "is in accord with the agency principles and policies underlying Title VII." *See e.g., Roberts v. Principi,* 283 F. App'x 325, 333 (6th Cir. 2008); *Lyle v. Cato Corp.,* 730 F. Supp. 2d 768, 782 (M.D. Tenn. 2010).

Plaintiff also cites *DeNoma v. Hamilton Cnty. Court of Common Pleas,* 626 F. App'x 101 (6th Cir. 2015) to argue that the expansive treatment of the cat's paw theory of liability in the context of § 1983 claims should result in the principle's extension to Title IX. (ECF No. 119, 9–10.) Specifically, Plaintiff notes that in *DeNoma,* despite the Supreme Court's express rejection of

respondeat superior liability in § 1983 claims against the government, the Sixth Circuit held that the cat's paw liability theory was applicable to a claim brought under the Equal Protection Clause pursuant to § 1983 because the Sixth Circuit interprets such claims consistent with those brought under Title VII. (ECF No. 119, 9–10 (quoting *DeNoma,* 626 F. App'x at 107–08).) According to Plaintiff, this Court should extend the same treatment to her Title IX retaliation claim. Plaintiff's contention, however, is misguided. The findings of the court in *DeNoma,* do not overcome the actual notice requirement and textual differences between Title IX as compared to Title VII—the reasons for which courts do not apply constructive notice or *respondeat superior* theories in the Title IX context. *Gebser,* 524 U.S. at 283; *Franklin,* 503 U.S. at 74–75. Thus, the courts' expansive application of the cat's paw theory of liability in certain § 1983 claims does not provide sufficient grounds for allowing the theory in the Title IX context. (ECF No. 119, 9.) As a result of the above determinations, the Court finds that Plaintiff fails to sufficiently state a claim under Title IX, and accordingly, Defendants are entitled to summary judgment on the matter.

A. Breach of Contract

Choice-of-Law

This case presents a threshold choice-of-law question. A federal court sitting in diversity applies "state substantive law and federal procedural law[,]" *Gasperini v. Ctr. for Humanities,* 518 U.S. 415, 427 (1996), as well as the choice-of-law rules of the forum state. *Andersons, Inc. v. Consol, Inc.,* 348 F.3d 496, 501 (6th Cir. 2003); *see also Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496 (1941). The present matter is before the Court on federal question and diversity grounds, and this Court sits in the forum state of Tennessee. Thus, Tennessee's choice-of-law rules apply. *See Klaxon Co.,* 313 U.S. at 496–97. For

claims based in contract law, "Tennessee follows the rule of *lex loci contractus,* meaning it presumes that the claims are governed by the jurisdiction in which [the contract] was executed absent a contrary intent."

Town of Smyrna v. Mun. Gas Auth. of Ga., 723 F.3d 640, 645 (6th Cir. 2013). A review of the record reveals that the relevant contracts here—Rhodes College's Title IX and Nondiscrimination Handbook ("Title IX Handbook"), 2012 Agreement, 2012 MOU, and HC Constitution—do not contain choice-of-law provisions. (ECF No. 59, 17:32.) Nonetheless, as the parties concede in their arguments, the contracts were issued and delivered in Tennessee. *Id.* Thus, for purposes of this analysis, Tennessee substantive law applies.

Contract Interpretation Under Tennessee Law

"The Tennessee Supreme Court 'has not . . . enunciated the standard which should be applied in a dispute arising out of the university-student relationship.'" *Anderson v. Vanderbilt Univ.,* 450 F. App'x 500, 502 (6th Cir. 2011) (quoting *Doherty v. S. Coll. of Optometry,* 862 F.2d 570, 577 (6th Cir. 1988)). Generally, though, the relationship between a student and a private university is contractual in nature. *Id.* "Accordingly, a student may raise breach of contract claims arising from a university's alleged failure to comply with its rules governing disciplinary proceedings." *Anderson,* 450 F. App'x at 502. "In construing the terms of the implied contract, however, the Sixth Circuit assumes that Tennessee courts 'would adopt the deferential standard of reasonable expectation—what meaning the party making the manifestation, the university, should reasonably expect the other party to give it.'" *Id.* (quoting *Doherty v. S. Coll. of Optometry,* 862 F.2d 570, 577 (6th Cir. 1988)). Ultimately, the existence of a breach is determined by whether an educational institution "substantially complied" with its own

procedures or rules. *See Anderson v. Vanderbilt Univ.*, No. 3-09-0095, 2010 U.S. Dist. LEXIS 52381, at *37 (M.D. Tenn, May 27, 2010), *aff'd*, 480 F. App'x 500 (6th Cir. 2011) (per curiam). Courts must additionally remain mindful that a college or university's disciplinary committee is entitled to a presumption of honesty and integrity. *See Anderson,* 2010 WL 2196599, at *38.

Furthermore, just as for any breach of contract claim in Tennessee, a plaintiff must offer evidence of (1) the existence of an enforceable contract, (2) nonperformance amounting to a breach, and (3) damages proximately resulting from the breach. *See id.* at *29.

Article IV, Section 3(A)(2)—Failure to Recuse

Plaintiff asserts that Defendant Rhodes breached Article IV, Section 3(A)(2) of the HC Constitution when HC member Zain Virk failed to recuse himself from the HC Hearing, given his position as Defendant Bea's research assistant. (ECF No. 1, 9:53.) Article IV, Section 3(A)(2) states as follows:

> The Council must act with complete impartiality. Any Council member who believes that his or her participation in any aspect of the investigation or hearing process constitutes a conflict of interest must report the potential conflict of interest to the HC President, who shall decide whether that member should recuse himself or herself.

HC Constitution, Article IV, Section 3(A)(2).

Under the provision, the decision of whether a particular HC member must recuse themselves from an HC hearing is left to the sound discretion of the President. (HC Constitution, Article IV, Section 3(A)(2); *see also* ECF No. 44, 28:17–20.) Here, the HC President is Ms. Adolph. (ECF No. 116-4, 26.) According to the record, Ms. Adolph asked Mr. Virk before and during the hearing if he could be impartial despite working in Defendant Bea's

lab, and he told her that he believed he could be. (ECF No. 44, 46:16–47:12.) In her discretion, Ms. Adolph did not order his recusal. Nothing in the record indicates that Ms. Adolph in any way abused her discretion. Thus, Defendants are entitled to a summary judgment ruling on Plaintiff's breach of contract claim pursuant to Article IV, Section 3(A)(2).

Article IV, Section 2(F)—Hearing Process Confidentiality

Plaintiff also asserts that Defendant Rhodes breached Article IV, Section 2(F) of the HC Constitution when Defendant Bea admitted that he spoke with other chemistry professors about his allegations of Plaintiff cheating and stealing. (ECF No. 1, 10:53.) Article IV, Section 2(F) states, "All participants in the hearing process should keep the matter under consideration confidential." HC Constitution, Article IV, Section 2(F). The record reflects that before the HC Hearing, Defendant Bea discussed the circumstances surrounding Plaintiff's alleged cheating with other chemistry professors. (ECF No. 44, 122:9–123:12.) Specifically, Bea told Dr. Kim Brien and another professor that he believed Plaintiff was cheating and discussed with them ways to catch Plaintiff in the alleged act. (*Id.)* It does not reflect, however, when these conversations took place, making it unclear whether the conversations occurred prior to or during the hearing process." Nonetheless, during the FAC Hearing, Ms. Adolph stated that Defendant Bea "was not under the oath read aloud during the hearing to keep those matters confidential" and that "[s]uch conversations between professors during a case, but not a hearing, are discouraged but do occur." (ECF No. 116-2, 67.) The evidence presented supports these facts. (ECF No. 44, 122:1–123:15.) Additionally, Plaintiff neither argues nor does the record reflect that Defendant Bea took any other similarly binding affirmation of

confidentiality, before asking his colleagues about their academic public folders. Lastly, Plaintiff does not provide how the above conversations, even if in violation of Article IV, Section 2(F), caused her injury—a necessary element of a breach of contract claim. Accordingly, Defendants are entitled to a summary judgment ruling on Plaintiff's breach of contract claim under Article IV, Section 2(F).

Article IV, Section 3(A)(4)—Disruptive Behavior

Additionally, Plaintiff asserts that Defendant Rhodes breached Article IV, Section 3(A)(4) of the HC Constitution by allowing Defendant Bea to act aggressively throughout the HC Hearing, ultimately, inhibiting Plaintiff and her witnesses from fully testifying. Article IV, Section 3(A)(4) states, "Disruptive behavior on the part of anyone present shall result in immediate and permanent removal from the hearing." HC Constitution, Article IV, Section 3(A)(4). The President of the HC, as Defendants note, presides over its hearings in accordance with Article IV, Section 3(A)(1) of the HC Constitution. Accordingly, the question of whether to remove someone from a hearing for "disruptive behavior" is reasonably understood to be in the discretion of the President. A reading of the HC Transcript reveals that President Adolph was aware that Defendant "Bea did get animated at times" and that she addressed his behavior by reminding him at every such instance of the need to uphold the procedures required throughout the hearing. (ECF No. 116-4, 29.) Ultimately, President Adolph, in her discretion, decided that removal of Defendant Bea was not warranted. Furthermore, the HC Hearing transcript does not clearly demonstrate that Defendant Bea acted so inappropriately during the hearing that his continued presence in the proceeding was so disruptive, as to warrant removal. Accordingly, Defendants are entitled to a summary judgment ruling on Plaintiff's breach of contract claim under Article IV, Section 3(A)(4).

Article II, Section 4—President's Impartial Participation

Next, Plaintiff asserts that Defendant Rhodes breached Article II, Section 4 of the HC Constitution when President Adolph asked questions and made comments in the hearing. (ECF No. 1, 53.) Specifically, Plaintiff takes issue with President Adolph's repeated question to her of whether Plaintiff believed that Defendant Bea was telling the truth throughout the hearing process. (*Id.)* Plaintiff's argument is not well-taken. Article II, Section 4 states that, [t]he President shall decide questions of procedure and interpretations arising under the Constitution[;] the President's role in the hearing and in deliberations shall be one of impartial participation, and the President shall not vote." HC Constitution, Article II, Section 4. Upon review of the record, the Court finds that nothing in the HC Constitution expressly prohibited the HC President from asking questions in an HC hearing. Moreover, President Adolph's questions and comments, if not aimed at clarifying arguments and testimony or preserving the procedural integrity of the proceedings, do not demonstrate a level of impartiality or unreasonableness warranting this Court's intervention. Accordingly, Defendants are entitled to a summary judgment ruling on Plaintiff's breach of contract claim under Article II, Section 4.

Article IV, Section 2(G)—Clear and Convincing Evidence

Plaintiff also argues that Defendant Rhodes breached Article IV, Section 2(G) of the HC Constitution when it found Plaintiff in violation of the Honor Code, by clear and convincing evidence, based only on Defendant Bea's testimony and the "fake" answer key created. Plaintiff further takes issue with Ms. Adolph's refusal to allow Plaintiff to present evidence concerning Defendant

Bea's alleged inappropriate conduct towards the end of the HC Hearing. The Court finds Plaintiff's arguments unpersuasive.

Article IV, Section 2(G) states, "The Council may find the Accused 'In Violation' of the Honor Code only upon clear and convincing evidence. 'Clear and convincing evidence' is an intermediate standard of proof, greater than 'by a preponderance of evidence,' but less than 'beyond a reasonable doubt.'" HC Constitution, Article IV, Section 2(G). Moreover, Article IV, Section 3(A)(10) states, "The Council's findings of 'In Violation' or 'Not in Violation' shall be based only on the merits and facts of the case at hand." HC Constitution, Article IV, Section 3(A)(10). Here, the HC made a determination on the evidence presented before it when it credited Defendant Bea's proof over Plaintiff's and found that Defendant Bea's testimony and the "fake" answer key matching Plaintiff's answers necessitated a finding that Plaintiff violated the Honor Code by cheating and stealing. (*See* ECF No. 44, 52:22–53:5.) As to Ms. Adolph preventing Plaintiff from presenting evidence on Defendant Bea's alleged conduct, the Honor Council Constitution states that "the president shall decide questions concerning the relevance or admissibility of witnesses and/or evidence." Thus, the violation by clear and convincing evidence is not so inappropriate or unreasonable as to warrant this Court's intervention. After viewing the facts in the light most favorable to Plaintiff, the Court finds Defendants are entitled to summary judgment on Plaintiff's breach of contract claim pursuant to Article IV, Section 2(G).

Failure to Investigate

Plaintiff also asserts claims for breach of the Title IX Handbook. Specifically, Plaintiff makes two primary arguments: (1) that Defendant Rhodes failed to investigate her claim of retaliation; and (2) that Defendant Rhodes did not afford Plaintiff the type of investigatory

process contemplated by the Title IX Handbook when it precluded her from having a Formal Resolution Hearing on her retaliation claim. (ECF No. 119, 14; *see also* ECF No. 1, 11:55–14:56.) The Title IX Handbook states:

> Rhodes College will address allegations of sexual misconduct or harassment in a timely and effective way, provide resources as needed for affected persons . . . and not tolerate retaliation against any person who reports sex/gender discrimination or sexual misconduct.

(ECF No. 124, 4.)

The Title IX Handbook indicates that all claims will be investigated by an "investigator" and that "[d]epending on how the Claim proceeds, the investigation report(s) and the parties' responses may be presented at a Formal Resolution Hearing and/or may be presented an Informal Resolution Conference." (*See id.* at 4:73.) Furthermore, the Title IX Handbook reads, "Once the Title IX Coordinator learns of any incident of alleged sex/gender discrimination or sexual misconduct from a Mandatory Reporter, they will initiate an investigation into the alleged incident." (ECF No. 120-1, 121.) Thus, under the plain language of the contract, Defendant Rhodes should reasonably expect students to interpret the above provisions to mean that Rhodes has a contractual obligation to investigate all Title IX allegations it receives.

Defendants first contend that Plaintiff waived her breach of contract claim alleging a failure to investigate because she failed to properly plead her claim. (ECF No. 123, 4.) The Court cannot agree. It is not proper for this Court to assume facts Plaintiff has not pleaded. *Assoc. Gen. Contractors v. Cal. State Council of Carpenters,* 459 U.S. 519, 526 (1983). Thus, Plaintiff's "[C]omplaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some

viable legal theory." *In re DeLorean Motor Co.,* 991 F.2d 1236, 1240 (6th Cir. 1993). Here, Defendant Rhodes has a contractual obligation to investigate all Title IX allegations it receives, including those concerning retaliation. In her Complaint, Plaintiff alleges that Defendant Rhodes failed to follow the proper methodology for addressing her Title IX allegations, citing various provisions of the Title IX Handbook, including one that states, "A Claim investigation will be conducted by an Investigator . . . ." (ECF No. 1, 12:55.) As it relates to this provision, Plaintiff cites facts tending to show that a Title IX investigation never occurred because Plaintiff was prevented from presenting witness testimony or allegations of retaliation to the HC and FAC and that her allegations were never investigated by the HC, FAC, or Ms. Harmon. (*Id.* at 6:27–7:39, 9:53–14:56.) Thus, Plaintiff's Complaint, at least by inference, sufficiently states a claim for breach of contract under the Title IX Handbook for Defendant Rhode's failure to investigate her retaliation claim.

Defendants next contend that even if Plaintiff did not waive her "failure to investigate" claim, the allegation cannot survive summary judgment because Defendants substantially complied with the relevant contract(s). (ECF No. 116, 19.) Specifically, Defendants contend that Plaintiff cannot escape the fact that she received two full and fair opportunities in front of the HC and the FAC to allege that Defendant Bea's conduct was retaliatory, opportunities of which she took full advantage of. (*Id.* at 18–19.) The Court cannot agree.

The Court finds that summary judgment in favor of Defendants is not appropriate on Plaintiff's failure to investigate claim due to material disputes of fact in the record. For purposes of this analysis, the Court again notes that the Title IX Handbook reasonably reads that Defendant Rhodes will investigate a student's Title IX

allegation of retaliation. Thus, the point at which Plaintiff made a Title IX retaliation claim, if at all, is relevant to a summary judgment determination on the issue. Here, the record reflects that Plaintiff's Title IX complaint form, which explicitly triggers Defendant Rhodes contractual obligation to complete a Title IX Investigation, was not filed at the time of the HC Hearing. (ECF No. 120, 11:34, 15:48.)

It was not until her closing statement before the HC that Plaintiff first made Defendant Rhodes aware of alleged inappropriate occurrences between Defendant Bea and herself and attempted to present proof on the matter as it relates to allegations of retaliation. (ECF No. 116-2, 67; ECF No. 116-4, 31.) However, she was prevented from doing so because it was too late in the proceeding. (ECF No. 116-2, 67.) Despite this, Defendants contend that Plaintiff could have presented her retaliation claim to the HC, and thus, the HC Hearing satisfied Rhodes contractual obligation to conduct a Title IX Investigation. (ECF No. 123, 4.) That argument, however, is of no avail because Defendant Rhodes has a contractual obligation to investigate all Title IX retaliation claims when made. The opportunity to present a claim and the implementation and sufficiency of an investigation brought upon the submission of such a claim, are not the same inquiries. Here, by the HC's own admission, it did not consider Plaintiff's allegation of Defendant Bea's inappropriate conduct, which serves as the basis of her retaliation claim, as evidence in making its determination. (ECF No. 44, 52:2–18.) Thus, summary judgment on Plaintiff's failure to investigate claim, as a result of the HC Hearing, is not appropriate.

Moreover, the Court finds that summary judgment in favor of Defendants, on Plaintiff's failure to investigate claim, is not appropriate based on the FAC Hearing. To be certain, Plaintiff presented her retaliation claim to the

FAC in writing and attempted to do so at the FAC Hearing. (ECF No. 116-3, 40–47, 96–97). The FAC, by its own admission however, simply addressed the "In Violation" determination by the HC, without determining the validity or effect of Plaintiff's allegations regarding Defendant Bea. (ECF No. 40, 178:18–180:1; ECF No. 120, 14:44.) Specifically, the FAC concluded that, even if the allegations of inappropriate behavior by Defendant Bea were valid, the evidence was adequate enough for the HC to conclude Plaintiff violated the Honor Code. (ECF No. 120, 14:45.) Thus, the FAC concluded that even if Defendant Bea retained a retaliatory motive in reporting Plaintiff to the HC, the evidence still showed that Plaintiff violated the Honor Code by cheating and stealing. Defendants contend that such constitutes substantial compliance with their contractual obligations. The Court disagrees.

As the FAC and Plaintiff submit, the above-referenced finding by the FAC focuses purely on whether Plaintiff violated the Honor Code, not whether Defendant Bea retaliated against Plaintiff. (ECF No. 1, 6:33.) At no time did the FAC discuss the substance of Plaintiff's Title IX retaliation claims with her but merely discussed why she did not present proof on the allegations during the HC Hearing. (*See e.g.,* ECF No. 116-4, 31.) This conclusion is bolstered by the FAC's determination that the only new evidence presented to it concerned Plaintiff's lost copies of her Organic Chemistry II tests. Perhaps more importantly, Plaintiff's retaliation claim, as pleaded, requires consideration of the inappropriate occurrences allegedly committed by Defendant Bea. The Court finds this significant in that the retaliatory motive allegedly held by Defendant Bea, under Plaintiff's theory of the case, would tend to negate the likelihood that Plaintiff cheated, in direct opposition to the HC's findings. Thus, for the reasons above, a reasonable jury could conclude

that Defendant Rhodes did not investigate Plaintiff's Title IX retaliation allegation or substantially comply with it investigatory obligations through the FAC.

A summary judgment finding in favor of Defendants, based on Ms. Harmon's investigation, is also not appropriate. After Plaintiff filed her Title IX complaint form, Ms. Harmon was hired to investigate Plaintiff's allegations therein. (ECF No. 120, 15:49.) There is a discrepancy, however, as to whether Plaintiff actually presented her Title IX retaliation claim to Ms. Harmon, despite Defendant Rhodes' knowledge of the allegations at the commencement of her investigation. Indeed, Defendants dispute whether Plaintiff ever presented the retaliation claim to Ms. Harmon, despite Harmon's finding that Plaintiff's retaliation claim was unsubstantiated, (*id.* at 15:49–16:52), while Plaintiff contends that Harmon, though presented with both Plaintiff's harassment and retaliation claim, only investigated Plaintiff's harassment claim. (*Id.* at 16:52–17:53.) Although Harmon's investigation and determinations were allegedly transcribed or otherwise documented the record is void of any such material. Whether Plaintiff presented her retaliation claim to Harmon, whether Harmon's investigation included consideration of Plaintiff's retaliation allegations, and the extent of the investigation as it relates to the allegations, are all material facts necessary to the determination of whether Defendant Rhodes breached its obligation to investigate Plaintiff's Title IX retaliation claim. Since the answers to these inquiries are disputed and not otherwise evident from the record, the Court cannot find that Defendants, through Ms. Harmon, satisfied or substantially complied with its obligation to investigate all Title IX claims.

To the extent Defendants allege that Plaintiff's breach of contract claim for failure to investigate is

lacking because Plaintiff did not adequately allege damages, the Court disagrees. Specifically, Defendants argue that Plaintiff's alleged damages as a result of her expulsion from Rhodes fails because she was already expelled from Rhodes College at the time the above-referenced "investigations" occurred. (ECF No. 116, 20.) However, this line of reasoning fails to consider the inverse relationship alleged by Plaintiff concerning the Honor Code violation found by Rhodes and Plaintiff's theory for her retaliation claim. If Defendant Bea retaliated against Plaintiff, that retaliation may include the fabrication of evidence tending to show Plaintiff cheated, which would tend to negate the validity of the evidence used to find Plaintiff guilty of cheating and stealing in violation of the Honor Code. Thus, if no "investigation" occurred, then the validity of Plaintiff's Honor Code violation, and resulting expulsion, is questionable. *Poynter v. GMC,* No.: 3:06-CV-226, 2007 U.S. Dist. LEXIS 83542, at *8–9 (E.D. Tenn. Nov. 9, 2007); *Kindred v. Nat'l College of Bus. & Tech., Inc.*, 2015 Tenn. App. LEXIS 124, at * 19–20 (Tenn. Ct. App. Mar. 19, 2015). That, after all, is Plaintiff's theory of liability. Accordingly, under Plaintiff's theory of the case, the existence of damages is not speculative here. *Poynter v. GMC,* 2007 U.S. Dist. LEXIS 83542, at *9. For these reasons, this Court denies Defendants' summary judgment request on Plaintiff's breach of contract claim for failure to investigate her Title IX allegation.

Failure to Hold Formal Resolution Hearing

Plaintiff also claims that Defendant Rhodes breached the Title IX Handbook when it did not permit her "to present her claims within the context of a Formal Resolution Hearing. (ECF No. 1, 13:55; ECF No. 119, 14–15.) The Title IX Handbook states, "A Claim investigation will be conducted by an Investigator . . . . Depending on how the Claim proceeds, the investigation report(s) and

the parties' responses may be presented at a Formal Resolution Hearing and/or may be presented at an Informal Resolution Conference." (ECF No. 120-1, 129–30.)

Under the plain language of the Title IX Handbook, Defendant Rhodes should not reasonably expect its students to conclude that a Formal Resolution Hearing and/or Informal Resolution Hearing is guaranteed by the filing and investigation of a Claim. Indeed, such a hearing depends on how the Claim proceeds. Thus, Defendant Rhodes' failure to provide Plaintiff a Title IX Hearing does not constitute a breach of the Title IX Handbook. Defendants are accordingly entitled to summary judgment on the issue.

Intentional Interference with Business Relations

Defendants argue that summary judgment should be granted in their favor on Plaintiff's claim that each Defendant here tortuously interfered with business relations. Specifically, Plaintiff alleges that Defendant Bea interfered with the contractual and business relations between Rhodes and Plaintiff, negatively affecting her ability to pursue her education, (ECF No. 1, 18:92–18:96; ECF No. 119, 16), and that Defendant Rhodes interfered with Plaintiff's contractual relationship with GWSMHS. (ECF No. 1, 15:65–71.) To establish a claim for intentional interference with a business relationship, Plaintiff must show the following:

> (1) an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons; (2) the defendant's knowledge of that relationship and not a mere awareness of the plaintiff's business dealings with others in general; (3) the defendant's intent to cause the breach or termination of the business relationship; (4) the defendant's improper motive or

> improper means; and finally, (5) damages resulting from the tortious interference.

Trau-Med of Amer., Inc. v. Allstate Ins. Co., 71 S.W.3d 691, 701 (Tenn. 2002) (citations omitted); *see also Lick Branch Unit, LLC v. Reed,* No. 3:13-cv-203, 2014 U.S. Dist. LEXIS 16259, at *43–44 (E.D. Tenn. Feb. 10, 2014.)

As noted by the Sixth Circuit, this tort is limited to business relations that are not the product of an existing contract. *See Crouch v. Pepperidge Farm, Inc.,* 424 F. App'x 456, 461 (6th Cir. 2011). Moreover, a claim for tortious interference, generally, cannot proceed when the purportedly tortious conduct involves the exercise of a contractual right by the alleged tortfeasor. *Franklin Tractor Sales v. New Holland N. Am.,* 106 F. App'x 342, 347 (6th Cir. 2004).

Here, Defendants argue that the Court should grant summary judgment in their favor on Plaintiff's claim that Defendant Bea interfered with Plaintiff's business relationship with Rhodes because the relationship between Plaintiff and Rhodes was contractual in nature. (ECF No. 116, 22.) Defendants also contend that summary judgment should be granted on Plaintiff's claim that Defendant Rhodes interfered with Plaintiff's business relationship with GWSMHS because (1) the conduct of Defendants that Plaintiff takes issue with was in accordance with Defendant Rhodes' contractual rights, and (2) as a party to the GW Contract and MOU agreement, GWSMHS is not capable of tortuously interfering with its own contract or business relationships. (ECF No. 116, 23–24.) Plaintiff responds that Defendants are misguided, citing *Trau-Med of Amer., Inc.,* 71 S.W.3d at 701 and *Tennison Bros. v. Thomas,* No. W2016-00795-COA-R3-CV, 2017 Tenn. App. LEXIS 802 at *28–29 (Tenn. Ct. App. Dec. 15, 2017) to argue, in part, that Tennessee law allows the claim to

proceed on the existence of a prospective contractual relationship.

Plaintiff and Defendant Rhodes

As to the alleged interference by Defendant Bea, the Court finds that Defendants are entitled to summary judgment on the issue. Plaintiff asserts the existence of contractual and business relations between Defendant Rhodes and herself. Generally, under Tennessee law, the relationship between a university and its student is contractual in nature. *Doherty v. S. Coll. of Optometry,* 862 F.2d 570, 577 (6th Cir. 1988); *see also Corso v. Creighton Univ.,* 731 F.2d 529, 531 (8th Cir. 1984). As noted by Defendants, the tort of intentional interference with business relations protects non-contractual business relationships. Here, however, Plaintiff does not reference any particular business relations with Defendant Rhodes that is not governed by an existing contract. Thus, Plaintiff's intentional interference with business relations claim against Defendant Bea fails to sufficiently state a claim, entitling Defendants to summary judgment on the claim.

Plaintiff and GWSMHS

As to Plaintiff's allegation that Defendant Rhodes intentionally interfered with Plaintiff's prospective contractual relationship with GWSMHS, the Court finds that Defendants are not entitled to summary judgment on the claim. In her Complaint, Plaintiff states that she "was accepted on an early admission basis to [GWSMHS] and had an ongoing contractual relationship with [GWSMHS]" that Defendant Rhodes interfered with by publicizing to GWSMHS that Plaintiff was involuntarily withdrawn from Rhodes. (ECF No. 1, 15:66–71.) To be certain, however, Plaintiff's relationship with GWSMHS also concerned prospective contractual or business relations because Plaintiff had not yet accepted her admission to GWSMHS by matriculating as a student.

(ECF No. 120, 2:5 (noting that satisfaction of the GW contract terms allows Plaintiff to gain admission to its medical school—a wholly separate prospective business relationship).) To the extent Defendant Rhodes contends that it is incapable of tortuously interfering with its own contract or business relations, the above determination renders the argument moot. Here, Plaintiff does not allege interference with a contract Defendant Rhodes is a party to but rather alleges interference with her prospective relations with GWSMHS as a matriculated medical student. Thus, contrary to Defendants' contention, Plaintiff does not bring the tort based solely on a formally-existing contract but a prospective one. *See Clear Water Partners, LLC v. Benson,* No. E2016-00442-COA-R3-CV, 2017 Tenn. App. LEXIS 4, at *21–22 (Tenn. Ct. App. May 12, 2016).

Defendant Rhodes additionally submits that it is entitled to summary judgment because it is incapable of committing the instant tort as a result of fulfilling its contractual obligation under the GW Contract to submit certain information to GWSMHS. Although it is true that conduct allowed for under a contract may be privileged, and thus not subject to the tort of intentional interference with business relations, such may not be the case where, as here, the plaintiff alleges that the contract forbade such actions. *Franklin Tractor Sales,* 106 F. App'x at 347. Here, Plaintiff takes issue with Defendant Rhodes publicizing the Honor Code findings without first investigating Plaintiff's allegations against Defendant Bea, as a matter of its contractual obligations. (*See* ECF No. 1, 15:68.) Thus, Defendants' instant argument fails.

As to the other elements of an intentional interference with business relations claim, the Court finds that Plaintiff's pleadings sufficiently satisfy each. Here, Defendant Rhodes retained knowledge of Plaintiff's prospective relationship with GWSMHS by virtue of the

GW contract. (ECF No. 120, 2:5 (noting that satisfaction of the GW contract terms allows Plaintiff to gain admission to its medical school).) As to the third element, Plaintiff sufficiently pleaded that Rhodes intended to terminate her prospective contractual/business relationship with GWSMHS by reporting the HC's findings because it knew, by virtue of the GW Contract, that such would result in termination of any such relations. Moreover, Plaintiff sufficiently pleaded an improper motive or means on Defendant Rhode's part. "Improper interference", for purposes of an intentional interference with business relations claim, may occur through a breach of a fiduciary relationship, methods that violate an established standard of a trade or profession, or otherwise unethical conduct. *See Trau-Med of America, Inc. v. Allstate Ins. Co.,* 71 S.W.3d 691, 701 (Tenn. 2002). Here, in the least, Plaintiff sufficiently alleges that Defendant Rhodes' failure to investigate Defendant Bea's alleged conduct before reporting the Honor Code violation constituted a breach of Rhodes duty to investigate her retaliation allegations. Lastly, contrary to Defendants' assertions, Plaintiff's alleged damages are not impermissibly speculative for the same reasons articulated in the Court's consideration of Plaintiff's breach of contract claim for failure to investigate. See *Poynter v. GMC,* 2007 U.S. Dist. LEXIS 83542, at *9. For these reasons, Defendants are not entitled to summary judgment on Plaintiff's intentional interference with business relations claim against Defendant Rhodes.

Negligent Failure to Train or Supervise

In her Complaint, Plaintiff contends that Defendant Rhodes "failed to adequately train and/or supervise its employees and agents with regard to and in accordance with its own internal policies and procedures and applicable state and federal law." (ECF No. 1, 16:75.) Defendants submit, however, that this Court should grant

summary judgment in their favor on the claim because Plaintiff has abandoned it. "A plaintiff in Tennessee may recover for negligent hiring, supervision or retention of an employee if he or she establishes, in addition to the elements of a negligence claim, that the employer had knowledge of the employee's unfitness for the job." *Brown v. Christian Bros. Univ.,* 428 S.W.3d 38, 56 (Tenn. Ct. App. 2013). A negligence claim requires that the following elements are met: "(1) a duty of care owed by defendant to plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause." *Freeman v. Wal-Mart Stores E., LP,* 781 F. Supp. 2d 661, 669 (E.D. Tenn. 2011).

In the instant matter, Plaintiff has failed to identify any agent or employee whom Defendant Rhodes allegedly failed to properly train or supervise, or that Rhodes had knowledge of any particular employee's unfitness for the job. *Brown*, 428 S.W.3d at 56. The record is void of evidence tending to show that Defendant Rhodes should have foreseen that Defendant Bea, the HC, the FAC, or Ms. Harmon, were unfit for their jobs. Plaintiff also fails to allege how any particular agent or employee's training was deficient. *See Freeman v. Wal-Mart Stores East, LP,* 781 F. Supp. 2d 661, 670 (E.D. Tenn. 2011). As a result, Defendants are entitled to summary judgment on Plaintiff's negligent failure to train or supervise claim.

Tennessee Consumer Protection Act

Lastly, Plaintiff brings a claim against Defendant Rhodes for false and misleading representations in violation of the Tennessee Consumer Protection Act ("TCPA"). The specific representation Plaintiff takes issue with reads as follows:

> Rhodes College is committed to providing a working, educational, social, and residential environment for all members of our College community, including all

> faculty, staff, and students, that is free from any form of sexual misconduct including harassment and assault. Sexually abusive behavior is harmful to both the learning environment and the sense of community the college is trying to foster among students, faculty, staff, and administrators. This policy aims to maintain a consistent, compassionate, campus-wide mechanism for assisting Rhodes students who have been sexually assaulted or harassed by a Rhodes student or employee regardless of where or when the incident occurred.

(ECF No. 1, 16:78–17:81.)

In order to recover under the TCPA, a plaintiff must show "(1) that the defendant engaged in an unfair or deceptive act or practice declared unlawful by the TCPA and (2) that the defendant's conduct caused an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated." *Humphreys v. Bank of Am.,* No. 11-2514-STA-tmp, 2013 U.S. Dist. LEXIS 67451, at *39–40 (W.D. Tenn. May 10, 2013) (quoting *Pagliara v. Johnston Barton Proctor & Rose, LLP,* 708 F.3d 813, 819 (6th Cir. 2013)). The Tennessee Supreme Court has recognized that a deceptive act or practice is a material representation, practice or omission likely to mislead a reasonable consumer. *Id.* at *40 (quotation omitted). An unfair practice is one that causes or is likely to cause a substantial injury to consumers which is neither reasonably avoidable by consumers themselves nor outweighed by countervailing benefits to consumers or to competition. *Id.*

The Court finds, as Defendants contend, that the advertisement referenced by Plaintiff concerning the general character and quality of commitment by Defendant Rhodes' regarding its premises is opinion set forth generally, more like "puffing" or an aspirational

statement that does not give rise to liability under the TCPA. Maverick Group Mktg. v. Worx Envtl. Prods., 659 F. App'x 301, 303 (6th Cir. 2012); *see Wendy's of Bowling Green, Inc. v. Marsh USA, Inc.,* No. 3-10-1043, 2012 U.S. Dist. LEXIS 13075, at *15 (M.D. Tenn. Feb. 3, 2012); *see also Leonard v. Abbott Labs., Inc.,* 10-CV-4676(ADS)(WDW), 2012 U.S. Dist. LEXIS 30608, at *58–61 (E.D.N.Y. Mar. 5, 2012). Indeed, the statements that Defendant Rhodes' is "committed" to providing environments free from any sexual misconduct and "aims" to provide a campus-wide mechanism for assisting those sexually assaulted or harassed, are akin to loose general statements made by a seller in commending their products or services. *Wendy's of Bowling Green, Inc.,* 2012 U.S. Dist. LEXIS 13075, at *15 n.11. Thus, Defendants are entitled to summary judgment on Plaintiff's TCPA claim.

CONCLUSION

For the foregoing reasons, the Court finds that Defendants' Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART.** Summary judgment is **GRANTED** as to Plaintiff's Title IX claims, **GRANTED** as to Plaintiff's Breach of Contract claims under the HC Constitution, **DENIED** as to Plaintiff's Breach of Contract claim under the Title IX Handbook for failure to investigate her retaliation claim, **GRANTED** as to Plaintiff's Breach of Contract claim under the Title IX Handbook for failure to provide a Formal Resolution Hearing, **GRANTED** as to Plaintiff's Intentional Interference with Business Relations claim against Defendant Bea, **DENIED** as to Plaintiff's Intentional Interference with Business Relations claim against Defendant Rhodes, and **GRANTED** as to Plaintiff's TCPA claim.

IT IS SO ORDERED this 27th day of February 2018.

[Signature]
JOHN T. FOWLKES, JR.
United States District Judge

APPENDIX C

No. 18-5936

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PRIANKA BOSE, Plaintiff-Appellant, v. ROBERTO DE LA SALUD BEA; RHODES COLLEGE, Defendants-Appellees.	)	ORDER

BEFORE: SILER, LARSEN, and NALBANDIAN, Circuit Judges.

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

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

[Signature]
Deborah S. Hunt, Clerk