IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN DOE	)	
	)	Case No.
Plaintiff,	)	
	)	JUDGE
v.	)	
	)	JURY TRIAL DEMANDED
UNIVERSITY OF DAYTON, JANE ROE, NATIONAL CENTER FOR HIGHER EDUCATION RISK MANAGEMENT, and DR. DANIEL C. SWINTON	)	
Defendants.	)	

COMPLAINT

Plaintiff John Doe ("Doe"),[1] by and through his attorneys, complains as follows against Defendants University of Dayton ("Dayton"), Jane Roe ('Roe"), The NCHHERM Group, LLC ("NCHERM") and Dr. Daniel C. Swinton ("Swinton"); collectively ("Defendants").

Nature of this Action

1. Roe made false allegations of sexual misconduct against Doe after they engaged in consensual sexual activity on September 4, 2016. Swinton conducted a biased and unfair investigation into those allegations; and, as a result, Dayton improperly and unlawfully disciplined Doe for Sexual Harassment by suspending him from Dayton for the 2016-2017 and 2017-2018 academic years.

2. Dayton's unlawful discipline of Doe based on his gender is part of a troubling trend among American universities which force male students to pursue litigation to clear their

[1]*See generally*, *John Doe's Motion to Allow the Parties to Use Pseudonyms* (containing the basis for Doe's request for using pseudonyms in this proceeding).

names and continue to pursue their educational and life goals.[2] Although some females making false allegations of sexual assault are criminally prosecuted,[3]America's university's rarely discipline females who bring these types of false allegations.

3. Lawsuits seeking to remedy a university's gender-biased application of Title IX policies sometimes come too late. For example, the parents of a male student who committed suicide recently filed suit against the university their son attended for mishandling a Title IX proceeding. *See,* Ashe Schow, *Texas student commits suicide after Title IX Kangaroo Court,* Texas BureauWatchdog.org,http://watchdog.org/292821/maleaccusedstudentcommitssuicideschoolrailroading/(accessed 4/14/17).

4. The lawsuits filed by male students often trigger hostile reactions which *Brown Univ.* discussed by noting:

> " . . . . the Court is an independent body . . . [that] cannot be swayed by emotion or public opinion. After issuing the preliminary injunction this Court was deluged with emails resulting from an organized campaign to influence the outcome. These tactics, while perhaps appropriate and effective in influencing legislators or officials in the executive branch, have no place in the judicial process. This is basic civics, and one would think students and others affiliated with a prestigious Ivy League institution would know this. Moreover, having read a few of the emails, it is abundantly clear that the writers, while passionate, were woefully ignorant about the issues before the Court. Hopefully, they will read this decision and be educated." *Doe v. Brown Univ.*, Case No. 16–017 S, 2016 WL 5409241 (D.R.I. Sept. 28, 2016).

[2]*See generally, Stop Abusive and Violent Environments' Oct. 2016 Special Report: Victim-Centered Investigations: New Liability Risk for Colleges and Universities* (detailing how thirty lawsuits filed by plaintiffs accused of sexual misconduct resulted in judicial decisions which at least partially favored the plaintiffs in claims against their universities). Available at http://www.saveservices.org/wp-content/uploads/Victim-Centered-Investigations-and-Liability-Risk.pdf. (assessed 4/12/17).

[3]*See e.g.,* Joshua Miller, *Teen Charged with Lying about being raped by college football player,* New York Post, http://nypost.com/2017/02/22/teenchargedwithlyingaboutbeingrapedbycollegefootballplayers/ (accessed 4/12.17).

5. Like the male students who came before him, Dayton has left Doe no other option but to seek damages and declaratory relief to remedy emotional, mental and economic harm caused by Dayton and Swinton. Doe's causes of action include: defamation; breach of contract; promissory estoppel, violations of Title IX of the Educational Amendments of 1972, violations of 20 U.S.C. Section 1681, *et seq.*, declaratory judgment, intentional infliction of emotional distress, and negligent infliction of emotional distress.

6. Dayton violated Title IX by creating a gender biased hostile environment against males, like Doe, based in part on Dayton's pattern and practice of disciplining male students who engage in consensual sexual activity with female students.

7. Dayton also violated Dayton's policies and procedures, as outlined in its official publications, including, but not limited to, its Student Handbook, its Non-Discrimination and Anti-Harassment Policy, and other relevant policies, including those not specifically mentioned in this Complaint (collectively referred to as "Dayton Policies"),[4] by improperly and unlawfully applying and/or breaching Dayton Policies and/or the implied covenant of good faith and fair dealing inherent in Dayton Policies.

8. In finding Doe responsible for sexual harassment, Dayton ignored or dismissed evidence which established Roe voluntarily initiated and/or consented to all physical contact with Doe when Roe was not incapacitated by alcohol. This evidence included, but was not limited to:

a. The results of Doe's polygraph test, in which he truthfully answered as follows:

Did [Roe] take her own pants off for sex? Yes

[4]*See e.g., Exhibit 1* (containing Dayton's 2016-17 Student Handbook)("DSH").

Did you in any way force [Roe] to have sex of any kind? No

Did [Roe] in any way object to engaging in any sex act with you? No. *See, Exhibit 2,* p.34-35 (containing Doe's polygraph).

b. Prior to engaging in this consensual sexual activity, Roe and Doe spent time with Roe's roommates in Roe's apartment. During this time, Roe never: (i) used the "safe word" she and her roommates agreed to use if they wanted to alert one another that they felt uncomfortable around a male that they were with, or (ii) in any way called out for help or indicated to Doe or anyone else that she was uncomfortable or objected to Doe's presence in her apartment;

c. After taking off her pants and having consensual intercourse with Doe, Roe got out of bed and exposed her breasts to Doe by removing her shirt. She then tossed her shirt to Doe and allowed him to use it to wipe himself with;

d. After the sexual encounter, Roe and Doe cuddled and talked with one another for a period of time while in bed;

e. When Doe had to leave, Doe hugged and kissed him goodbye and asked him to text her later in the night; and

f. Doe's testimony about his consensual sexual interactions with Roe has been consistent and truthful beginning with his first statement to Dayton's law enforcement officers whom he spoke to after voluntarily waiving his right to counsel.

9. Although Roe's false allegations against Doe were presented to law enforcement, both the Montgomery County Prosecutor's Office and the City of Dayton's Prosecutor's Office refused to prosecute Doe. *See e.g., Exhibit 2,* p.28 (containing Nov. 2, 2017 letter from Doe's

then attorney Reid Yoder ("Yoder") to City of Dayton Law Director detailing Montgomery County Prosecutor's Office's refusal to charge Doe).

10. Nevertheless, Dayton and Swinton ignored overwhelming evidence of Doe's innocence in favor of conducting a gender-biased investigation in violation of Dayton Policies to establish Dayton's pre-determined goal of finding male students like Doe guilty of misconduct.

11. Upon information and belief,[5] Roe falsely told Dayton that Doe engaged in sexual contact to avoid discipline related to her work as an Athletic Trainer at Dayton. Evidence supporting this belief includes, but is not limited to, the fact that Doe worked as an Athletic Trainer at Dayton and Doe was a member of Dayton's varsity football team. Athletic Trainers such as Roe were prohibited by Dayton from engaging in sexual contact with student athletes with whom they had a professional working relationship.

12. Roe discussed this rule with Doe while walking with Doe to Roe's apartment. Specifically, Roe explaining how she did not honor Dayton's rule prohibiting Athletic Trainers from engaging in sexual contact with student athletes because she believed she could "hook up with whoever [she] want[ed] to." *Exhibit 2,* p.44.

13. Similarly, after having consensual sex with Doe, Roe admitted her participation in sexual activity with Doe was "probably unprofessional." *Id.,* p.46. Therefore, upon information and belief, Roe had legitimate concerns that she might lose her job as a Dayton trainer - or face other discipline - because she had violated Dayton's rule by engaging in sexual intercourse with a male student athlete.

[5] It should be noted, the "information and belief" allegations in the Complaint are based on at least the following two factors: (1) the evidence referenced and/or exhibits attached to the Complaint which provide a plausible basis for Doe's "information and belief" allegations; and (2) Doe believes Defendants are in possession and/or control of additional evidence supporting Doe's "information and belief" allegations and Doe believes he will obtain this evidence in discovery.

14. It should be noted, Dayton's legitimate goal of preventing sexual assault is *not* the issue in, nor is it the basis for, this Complaint. Rather, this Complaint addresses how Dayton's unlawful discipline of Doe was motivated by the anti-male gender bias detailed in herein.

The Parties, Venue and Jurisdiction

15. Doe is a male residing in Ohio. He attended Dayton prior to his suspension.

16. Roe, upon information and belief, is currently a student at Dayton and a resident of Ohio.

17. Dayton, upon information and belief, is an Ohio corporation with a principal place of operation in Dayton, Ohio.

18. NCHERM is a consulting firm, with its principal place of business located at 1109 Lancaster Avenue, Berwyn, PA 19312. NCHERM, upon information and belief, is an organization Dayton retained to conduct the investigation into Roe's claims against Doe. NCHERM is subject to jurisdiction in Ohio because, *inter alia*, NCHERM directed its employee, Swinton, to travel to Ohio to conduct the investigation into Roe's claims against Doe. Upon information and belief, NCHERM and/or Swinton entered into an oral or written contract with Dayton that addresses issued related to this case ("DAYTON/NCHERM Contract").[6]

19. Swinton, upon information and belief, is employed by NCHERM and is currently residing in Pennsylvania. He is subject to jurisdiction in Ohio because, *inter alia*, he travelled to Ohio to conduct an investigation into Roe's allegations against Doe, which investigation, upon information and belief, was undertaken pursuant to a DAYTON/NCHERM Contract.

[6] Doe cannot explicitly detail the terms of the written or oral contract between Dayton and NCHERM and/or Swinton because he was not present when the contract was agreed to. As a result, Doe will request leave to amend this Complaint to include the terms of this contract after he obtains these terms in discovery.

20. This action arises under Ohio common law and under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, *et seq*. This Court has jurisdiction over this action by virtue of federal question jurisdiction pursuant to 28 U.S.C. § 1331 because the claims herein arise under the laws of the United States. The Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) for any non-federal claims alleged herein.

21. This Court has personal jurisdiction over Defendants because they reside and/or conducted business in Ohio.

22. Venue rests with this Court pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to Doe's claims occurred in Dayton, Ohio.

Roe's Consensual Sexual Encounter with Doe

23. On September 4, 2016, Doe was at a friend's house when Roe arrived. She said to him, "Hey [Doe], you're the freshman quarterback" and put her arm around him. *Exhibit 2*, p.44. Roe asked Doe to be her partner in a game of corn hole, which he did. After the game, she invited Doe to go with her to one of her friend's houses, which he did.

24. As Roe and Doe walked to the friend's house, Roe put her arm around Doe. When they arrived, Roe sat on a couch on the porch and motioned for Doe to sit next to her, which he did.

25. When Doe stated he was going to return to the house they had left, Roe asked if she could go with him, and he said yes. On the walk, Roe told Doe that her employer prohibited her from hanging out with or engaging in sexual activity with members of the football team, but that she ignored them because she should get to hang out with and hook up with whomever she chooses. Roe also communicated to Doe that she would like to hook up with him.

26. After leaving that house, Doe and Roe went to get food. Doe bought Roe's meal. Roe then suggested they take their food back to Roe's apartment.

27. At Roe's apartment, they ate the food while sitting at the kitchen table with Roe's two roommates and one of the roommate's boyfriends. After finishing their meal, Roe invited Doe to her bedroom. Doe had never been to Roe's place before, but followed her into the bedroom and asked if he could use the restroom; which was attached to the bedroom. Roe closed the bedroom door as soon as they entered the bedroom and Doe went in to the bathroom.

28. When Doe returned, Roe was at the side of the bed leaning over it. Doe approached Roe and both began kissing one another. After a short period of kissing, both Doe and Roe climbed into her bed and got under the covers, facing each other. They continued to kiss one another. Roe grabbed Doe's penis, and Doe rubbed Roe's vaginal area over her shorts. After a short period of time, Roe grabbed her phone off the night stand and went to the clock/alarm app, and asked Doe, "How long are we doing this?" *Id.* p.45. Doe was not certain what she meant, so he said, "I don't know." *Id.*

29. Roe and Doe then continued kissing and touching each other after which Roe voluntarily decided to remove her pants and threw them on the floor. She also grabbed Doe's shorts and began pulling on them indicating to him that she wanted him to take his shorts off. Doe helped Roe remove his shorts.

30. Then, Doe and Roe got back under the covers and they began kissing again. Roe was digitally stimulating Doe's penis, while Doe was fingering her. Roe rolled on to her back and opened her legs wider, and Doe got on top of her. They began having consensual sexual intercourse while continuing to kiss. Doe asked her a couple of times whether she liked it, and she replied that she did. Roe's non-verbal actions and responses were consistent with her verbal

response of pleasure. Before ejaculating, Doe pulled out and ejaculated on Doe's bed. Roe then exited the bed and removed her shirt and cleaned herself. Roe then gave her shirt to Doe, which he used to clean himself off. He then threw her shirt on the floor.

31. Roe then announced, "that was probably unprofessional." *Id.*, p.46. After they dressed, they got back into bed and cuddled for a couple of minutes.

32. When Doe got ready to leave, Roe walked him to the front door. They saw Roe's roommate's boyfriend in the kitchen and exchanged pleasantries. Roe hugged and kissed Doe, and told him she would text him to meet up later that night. Doe said he would let her know his plans.

33. As a result, Doe was completely shocked when two University of Dayton police officers showed up at his door later that night, and asked him to go to the police station. He fully cooperated with the police, and there were no charges brought against him.

Anti-Male Gender Bias Triggered Violations of Doe's Rights Under Dayton's Policies and Title IX

34. Swinton and Dayton's violations of Doe's rights under Dayton's Policies and Title IX was motivated by animus towards male students like Doe which is detailed in part in the direct and Indirect Evidence of Gender Bias[7] detailed in this Complaint.

35. Upon information and belief, widespread anti-male bias exists at Dayton in part because of an April 11, 2011 "Dear Colleague" letter issued by the United States Department of Education's ("DOE") Office of Civil Rights ("OCR") which instructed how colleges and

[7] The term "Indirect Evidence of Gender Bias" as used in this Complaint refers to statements from which at least the following inferences can be drawn: (1) a primary advocacy on behalf of females who allege males engaged in sexual misconduct; (2) minimal or no advocacy on behalf of males who are alleged to have engaged in sexual misconduct towards females; (3) minimal or no advocacy for protecting females from sexual misconduct perpetrated by other females; and/or (4) minimal or no advocacy for protecting males from sexual misconduct perpetrated by females.

universities must investigate and resolve complaints of sexual misconduct under Title IX. ("2011 Dear Colleague Letter") (available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html accessed 4/3/17). This letter manifests Indirect Evidence of Gender Bias in part by equating complainants in sexual misconduct proceedings as being females who must receive preferential treatment. For instance, the 2011 Dear Colleague Letter:

a) Incorrectly[8] states: "'1 in 5 *women* are victims of completed or attempted sexual assault while in college' . . . [t]he Department is deeply concerned about this problem . . . ." *2011 Dear Colleague Letter*, p.2 (emphasis added);

b) Warns that "the majority of campus sexual assaults occur when *women* are incapacitated, primarily by alcohol." *Id.*, (emphasis added);

c) Suggests educational institutions seek grants from the U.S. Department of Justice's Office on Violence against *Women* which require institutions "develop victim service

[8] As discussed in this Complaint, Dayton, OCR, and President Obama's administration's often-repeated allegation that "1 in 4" or "1 in 5" female college students are sexually assaulted is unsupported. For example, a report issued by The American Association of University Women noted that over 90% of the colleges and universities in the United States reported *none* of their students were raped in 2014. *See*, American Association of University Women, *91 Percent of Colleges Reported Zero Incidents of Rape in 2014*, (Nov. 23, 2015). Similarly, a "special report from the Bureau of Justice Statistics titled 'Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013' . . . found . . . female college . . are less likely to be victims of sexual assault than their peers who are not enrolled in college. The report found . . . the incidence [of sexual assault] . . . was far lower than anything approaching 1 in 5: 0.76 percent for nonstudents and 0.61 percent for students." Emily Yoffe, The Problem with Campus Sexual Assault Surveys, SLATE, Sept. 24, 2015. *http://www.slate.com/articles/double_x/doublex/2015/09/aau_campus_sexual_assault_survey_why_such_surveys_don_t_paint_an_accurate.html*(accessed 4/3/17). In addition, academics conducting a research study found approximately 50% of sexual assault allegations at two Midwestern American colleges were false. *See*, Eugene J. Kanin, *False Rape Allegations* Archives of Sexual Behavior, Vol. 23 No.1 (1994) available https://archive.org/details/FalseRapeAllegations) (accessed 4/3/17). Another academic paper exposed the lack of objective proof behind a "consensus among legal academics that only two percent" of sexual assault allegations are false. *See*, Edward Greer, *The Truth behind Legal Dominance Feminism's Two-Percent False Rape Claim Figure*, 33 Loy. L.A.L. Rev. 947(2000); available http; digitialcommon.Imu.edu/llr/vol33/iss 3/3). Issues such as these are addressed in detail in Stuart Taylor Jr. and KC Johnson's recent book *The Campus Rape Frenzy: The Attack on Due Process at America's Universities.* The rationale behind some of the false allegations is detailed in an academic research paper which reviewed multiple academic studies. *See*, Reggie D. Yager, *What's Missing From Sexual Assault Prevention and Response*, (April 22, 2015) http: ssrn.com/abstract=2697788 (accessed 4/3/17). This paper determined a high percentage of sexual assault allegations are false and based on the alleged victims': (1) need for a cover story or alibi; (2) retribution for a real or perceived wrong, rejection or betrayal; and/or (3) desire to gain sympathy or attention. *Id.*

programs and campus policies that ensure victim safety, [and] offender accountability. . . ." *Id.*, p.19 (emphasis added);

d) Warns education institutions that they must "never" view the "victim at fault for sexual violence" if she has been using "alcohol or drugs." In fact, OCR asks "schools to consider" providing students who violate alcohol or drug policies with amnesty if they allege they were sexually assaulted while consuming alcohol or drugs. *Id.* p.15.; and

e) Requires educational institutions "minimize the burden on the complainant." p.15-16.

36. The 2011 Dear Colleague Letter also manifests Indirect Evidence of Gender Bias by making it more difficult for males accused of sexual misconduct to defend themselves. For example, the 2011 Dear Colleague Letter required schools to adopt the lowest burden of proof - "more likely than not" - in cases involving sexual misconduct. Several colleges had been using "clear and convincing" and some, like Stanford, applied the criminal standard - "beyond a reasonable doubt."

37. Similarly, on April 29, 2014, OCR published a document signed by OCR's then Asst. Sec. of Ed. Catherine E. Lhamon ("Sec. Lhamon") titled "Questions and Answers on Title IX and Sexual Violence" ("OCR's 2014 Q&A")(available at http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (accessed 4/3/17). This OCR directive manifest Indirect Evidence of Gender Bias in part because it hampered the accused student's ability to defend himself by reducing or eliminating the ability to expose credibility flaws in the allegations made against him. For example, OCR's 2014 Q&A states schools:

a) "[M]ust not require a complainant to be present" at sexual misconduct disciplinary hearings. *OCR's 2014 Q&A*, p.30;

b) May decide to eliminate all opportunities for "cross-examination." *Id.*, p.31; and

c) Must avoid "revictimization" by minimizing the number of times a victim is interviewed so "complainants are not unnecessarily required to give multiple statements about a traumatic event." *Id.*, pp.30, 38.

38. Neither OCR's 2014 Q&A nor the 2011 Dear Colleague Letter were subject to notice-and-comment rulemaking, and therefore their validity as binding law is at best questionable. Thus, Senator James Lankford wrote to the DOE on January 7, 2016 to express his concerns that the DOE's Dear Colleague letters are not interpretive, but are unlawfully altering the regulatory and legal landscape of Title IX and the U.S. Constitution. *See, Exhibit 3* (containing Senator Lankford's Jan. 7, 2016 letter to ODE Acting Secretary John King).

39. Following Senator Lankford's letter, Representative Earl Ehrhart from Georgia filed a lawsuit against the DOE on April 21, 2016 in federal court alleging that DOE's implementation of the 2011 Dear Colleague letter was unconstitutional and unlawful. *See* http://www.saveservices.org/wp-content/uploads/Ehrhart-v.-DOE-2016.pdf (accessed 4/3/17).

40. Similar allegations were made against DOE in the federal lawsuit *Doe v. Lhamon et al.*, which was filed in United States District Court for the District of Columbia. *See, Exhibit 4* (containing *Doe v. Lhamon et al.,* Complaint). This Complaint details OCR's Indirect Evidence of Gender Bias which includes, but is not limited to, evidence of OCR pressuring colleges around the county to make it more difficult for male students accused of sexual misconduct to defend themselves.

41. Upon information and belief, Dayton institutionalized OCR's Indirect Evidence of Gender Bias into Dayton's implementation of Dayton Policies. Evidence supporting this allegation includes, but is not limited, to threats made by Sec. Lhamon in February 2014 when she told college officials attending a conference at the University of Virginia that schools need to make "radical" change. According to the Chronicle of Higher Education, college presidents

suggested afterward that there were "crisp marching orders from Washington." *See, Colleges Are Reminded of Federal Eye on Handling of Sexual-Assault Cases, Chronicles of Higher Education,* February 11, 2014, located at http://chronicle.com/article/Colleges-Are-Reminded-of/144703/ (accessed 4/3/17).

42. Many academics, authors, and organizations have raised alarms that DOE/OCR's worthwhile goal of protecting college students from sexual misconduct has evolved into an unlawful example of federal governmental overreach that violates the rights of male students who never engaged in misconduct. *See e.g.*, Emily D. Safko, *Are Campus Sexual Assault Tribunals Fair?: The Need For Judicial Review and Additional Due Process Protections In Light of New Case Law,* 84 Fordham L. Rev. 2289 (2016), pgs. 2304-5 (discussing universities' concerns regarding OCR enforcement actions that commentators believe "incentivizes schools to hold accused students accountable by implementing and conducting proceedings that are unfairly stacked against the accused."). *Id.*, pgs. 2320-24 (addressing same); *Exhibit 5* (containing *Open Letter From Sixteen Members of Penn Law School Faculty* (Feb. 17. 2014)(stating in part: "[a]lthough we appreciate the efforts of Penn and other universities to implement fair procedures, particularly in light of the financial sanctions threatened by OCR, we believe that OCR's approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness."); Barclay Sutton Hendrix, *A Feather On One Side, A Brick On The Other: Tilting The Scale Against Males Accused of Sexual Assault In Campus Disciplinary Proceedings*, 47 Ga. L. Rev. 591, (2013); Stephen Henrick, *A Hostile Environment for Student Defendants*: *Title IX and Sexual Assault on College Campuses,* 40 N. Ky. L. Rev. 49 (2013); *Exhibit 6* (containing *Rethink Harvard's Sexual Harassment Policy,* LETTER TO EDITOR, BOSTON GLOBE, Oct. 15, 2015); Janet Halley, *Trading the Megaphone for the Gravel in Title IX*

Enforcement, HARV. L. REV. F. 103, 103-17, (2014); Samantha Harris, *Campus Judiciaries on Trial: An Update from the Court,* HERITAGE FOUNDATION, Oct. 6. 2015; http://www.heritage.org/research/reports/2015/10/campus-judiciaries-on-trial-an-update-from-the-courts (accessed 4/3/17); Janet Napolitano, *"Only Yes Means Yes": An Essay on University Policies Regarding Sexual Violence and Sexual Assault,* Yale Law and Policy Review Volume 33; Issue 2 (2015); Robin Wilson, *Presumed Guilty,* CHRONICLE OF HIGHER EDUCATION (Sept. 3. 2014) http://chronicle.com/article/Presumed-Guilty/148529/?cid=a&utm_medium=en (accessed 4/3/17) (noting: "Under current interpretations of colleges' legal responsibilities, if a female student alleges sexual assault by a male student after heavy drinking, he may be suspended or expelled, even if she appeared to be a willing participant and never said no. That is because in heterosexual cases, colleges typically see the male student as the one physically able to initiate sex, and therefore responsible for gaining the woman's consent."); *Dershowitz and Other Professors Decry 'Pervasive and Severe Infringement' of Student Rights,* Jacob Gershman (May 18, 2016), http://blogs.wsj.com/law/2016/05/18/dershowitz-and-other-professors-decry-pervasive-and-severe-infringement-of-student-rights/ (accessed 4/3/17).

43. As detailed in many of the publications cited above, OCR's investigations put millions of dollars in federal student aid at risk. This is because DOE/OCR can impose civil penalties and/or suspend institutions from participating in federal student financial aid programs if DOE/OCR finds a university, such as Dayton, did not do enough to discipline males alleged to have engaged in sexual misconduct with female students. Sec. Lhamon confirmed this risk of losing federal funds at a national conference at Dartmouth in the summer of 2014 when she said, "I will go to enforcement, and I am prepared to withhold federal funds." *See, How Campus Sexual Assaults Came to Command New Attention,* NPR, August 12, 2014 located at

http://www.npr.org/2014/08/12/339822696/how-campus-sexual-assaults-came-to-command-new-attention (accessed 4/3/17).

44. Similarly, in June 2014, Sec. Lhamon told a Senate Committee, "[t]his Administration is committed to using all its tools to ensure that all schools comply with Title IX . . . ." In addition, Sec. Lhamon noted:

> "If OCR cannot secure voluntary compliance from the recipient, OCR may initiate an administrative action to terminate and/or refuse to grant federal funds or refer the case to the DOJ to file a lawsuit against the school. To revoke federal funds—the ultimate penalty—is a powerful tool because institutions receive billions of dollars a year from the federal government for student financial aid, academic resources and many other functions of higher education. OCR has not had to impose this severe penalty on any institution recently because our enforcement has consistently resulted in institutions agreeing to take the steps necessary to come into compliance and ensure that students can learn in safe, nondiscriminatory environments."

45. Upon information and belief, for Dayton, the withdrawal of federal funding would be catastrophic, in part, because, in academic year 2014-15 Dayton undergraduate students received Pell Grants of approximately $3,838,924 and Federal Student Loans of over $27,000,000.

https://nces.ed.gov/collegenavigator/?q=university+of+dayton&s=all&id=202480(accessed 4/3/17).

46. In 2016, the American Association of University Professors severely criticized OCR's mandates as undermining student's rights to fair and impartial adjudications in cases of alleged sexual misconduct. *Exhibit 7* (containing AAUP's March 24, 2016 publication entitled: *Executive Summary: The History, Uses, and Abuses of Title IX*).

47. Similarly, in 2017, The American College of Trial Attorneys' ("ACTA") *White Paper On Campus Sexual Assault Investigations* noted: "OCR has established investigative and disciplinary procedures that, in application, are in many cases fundamentally unfair to students

accused of sexual misconduct." *Exhibit 8*, p.3 (containing American College of Trial Attorneys' March 2017 *White Paper On Campus Sexual Assault Investigations*). To remedy this unfairness, ACTA made the following recommendations:

1. Sexual misconduct investigations and hearings should be conducted with due consideration for any appearance of partiality, including that which might arise from the fact finder's other responsibilities or affiliations.

2. The subject of a sexual misconduct investigation should promptly be provided with the details of the allegations and advised of his/her right to consult legal counsel.

3. The subject of a sexual misconduct investigation has the right to be advised and accompanied by legal counsel at all stages of the investigation.

4. The parties to a sexual misconduct investigation should be permitted to conduct some form of cross-examination of witnesses, in a manner deemed appropriate by the institution, in order to test the veracity of witnesses and documents.

5. The subject of a sexual misconduct investigation should be provided with access to all evidence at a meaningful time and in a meaningful manner so that he/she can adequately respond to it.

6. The standard of proof for "responsibility" should be clear and convincing evidence.

7. Fact finders in sexual misconduct investigations and hearings should produce written findings of fact and conclusions sufficiently detailed to permit meaningful appellate review. *Id.*, p.2.

48. As detailed below, Dayton afforded Doe none of the traditional cornerstones of American justice articulated by ACTA. Instead, upon information and belief, Dayton allowed gender bias to motivate its decision to ignore the exculpatory evidence establishing Doe's innocence. This occurred in part because Dayton incorporated the Obama Administration's "It's on us" campaign. *Exhibit 9* (containing Obama Administration's press release discussing Dayton's participation in said campaign). This campaign manifest Indirect Evidence of Gender Bias in part because it portrays male students as sexual predators by distributing promotional materials that state:

a) "It's on us to make sure *guys* know that if *she* doesn't or can't consent to sex, it's sexual assault." *See generally* ,http://itsonus.org/index.html#pledge(accessed 4/3/17);https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCMQFjABahUKEwjW2vihqpbJAhUI02MKHeaeC94&url=http%3A%2F%2Fitsonus.org%2Fassets%2Ffiles%2FIt%27s_On_Us_Organizing_Guide_Fall_2015.pdf&usg=AFQjCNGy24MM2vn7-N7HwwUnshc6d6q0gQ&sig2=nlpOPMfxwODg7eSMWYrbxA&cad=rja (accessed 4/3/17)(emphasis added);

b) Suggesting individuals videotape themselves "[s]ay[ing] to a camera…it's on us to recognize that if a *woman* doesn't or can't consent to sex, it's rape." *Id.,* (emphasis added); and

c) Stating: "*Never* blame the victim," "*always* be on the side of the survivor," and "*trust* the survivor." *Id.*,(emphasis added).

49. The Obama Administration's Indirect Evidence of Gender Bias also includes its often repeated allegation that: "[a]n estimated one in five women has been sexually assaulted during her college years. . . ." *See, e.g.*, https://www.whitehouse.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus (accessed 4/3/17); https://www.whitehouse.gov/the-press-office/2014/04/29/fact-sheet-not-alone-protecting-students-sexual-assault (accessed 4/3/17).

50. However, as detailed in part in footnote 8, allegations that 20% of America's female college students are being sexually assaulted by their male counterparts has been thoroughly refuted by organizations such as the Bureau of Justice Statistics which determined only 0.61% of female college students are sexually assaulted.

51. Similarly, Emily Yoffe's 2014 article in *Slate* refutes the "1 in 5" allegation. Emily Yoffe, *The College Rape Overcorrection*, SLATE, Dec. 7, 2014,http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html (accessed 4/3/17). Specifically, Ms. Yoffe asked Christopher Krebs - the lead author of the study cited by President Obama - whether his

study represented the experience of the approximately 12 million female students in America. *Id.* Mr. Krebs stated those involved in the study, "don't think one in five is a nationally representative statistic." *Id.* This was because Mr. Krebs stated his sampling of only two schools "[i]n no way . . . make[s] our results nationally representative." *Id. See also,* Heather MacDonald, *An Assault on Common Sense*, The Weekly Standard, Nov. 2, 2105, http://www.weeklystandard.com/an-assault-on-common-sense/article/1051200 (accessed 4/3/17) (detailing why a recent survey conducted by Association of American Universities has been improperly distorted to falsely suggest large percentages of female college students are being sexually assaulted on America's college campuses).

52. Ms. Yoffe also noted that if the "one-fifth to one-quarter assertion [regarding sexual assaults on college campuses were true that] would mean that young American college women are raped at a rate similar to women in Congo, where rape has been used as a weapon of war." Emily Yoffe, *The College Rape Overcorrection*, SLATE, December 7, 2014, http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html (accessed 4/3/17).

53. Nevertheless, then V.P. Joe Biden repeatedly presented Indirect Evidence of Gender Bias in promoting the "It's On Us" campaign as a tool to protect female students from male students. *See e.g.*, https://www.osu.edu/buckeyesact/vpbidenvideo.html (accessed 4/3/17). V.P. Biden also made it clear the Obama Administration and DOE used Title IX investigations and potential loss of federal funding to encourage university presidents to join the campaign. *Id.* In addition, V.P. Biden manifest Indirect Evidence of Gender Bias by encouraging "*guys*" to take the "It's On Us" pledge to combat the fact that 1 in 5 college *women* are the victim of sexual assault while attending college. *Id.*

54. Upon information and belief, Dayton's erroneous discipline of Doe was caused in part by Dayton's fears that if it did not show preferential treatment to females who allege sexual misconduct by males, Dayton would become involved in a second OCR investigation. Evidence supporting this belief includes, but is not limited to, a December 2014 "resolution agreement" that Dayton entered into with OCR regarding four Title IX complaints. *See generally, Exhibit 10* (containing December 27, 2014 article from the Dayton Daily News discussing same). These complaints alleged Dayton "did not properly investigate sex discrimination and harassment claims" relating to Dayton's decision not to discipline a male dean whom females alleged engaged in sexually inappropriate conduct. *Id.* Therefore, upon information and belief, Dayton's erroneous discipline of Doe was motivated in part to avoid an OCR investigation and/or additional negative publicity that Dayton did not adequately handle sexual assault investigations.

55. OCR, the Obama Administration, and/or Dayton's legitimate goal of preventing sexual assault is *not* the issue in, nor is it the basis for, this Complaint. Rather, this Complaint addresses how Dayton's unlawful discipline of Doe was motivated by direct and Indirect Evidence of Gender Bias designed to: (a) afford females like Roe preferential treatment regarding Title IX and/or Dayton Policies; (b) severely discipline male students like Doe who are alleged to have engaged in sexual misconduct regardless of their innocence, and (c) equate "victim/complainants" in sexual misconduct proceedings as being females who receive preferential treatment over the males they accuse of sexual misconduct.

56. Items a-c in the preceding paragraph occurred in part because Dayton allowing Doe's disciplinary proceeding to be tainted by the following two organizations that manifest direct or Indirect Evidence of Gender Bias: (1) NCHERM; and (2) the Association of Title IX Administrators ("ATIXA"). These two interconnected organizations' manifestations of direct

and/or Indirect Evidence of Gender Bias includes, but is not limited to, equating victim/complainants in sexual misconduct proceedings as being females who must receive preferential treatment by:

a) Using *feminine pronouns* when referring to the "*victim*" of alleged sexual misconduct.

b) Applying *masculine pronouns* when referring to the student "*accused*" of perpetrating allegations of sexual misconduct [and] referring to them as "*the usual suspects*".

c) Alleging, the burden of proof regarding whether a female student consented to sexual contact should be placed on the male student because: "[t]he core of consent is the right of the victim to be unmolested until *she* gives clear permission for sexual activity to take place-what I call sexual sovereignty."

d) Publishing a whitepaper stating: (a) "victims have historically been accorded 3/5 of the rights of an accused . . . *victims are typically women*, equity may require institutions to *recalibrate the pendulum to right the historical imbalance*. An *equitable process . . . will force a victim focus, but only as a casualty of history;*" and (b) criticizing how in the past accused males were "afforded presumptions of innocence, rights to attorneys, rights to remain silent. Rights, rights, rights. But, *we forgot about victims along the way" . . . [therefore Universities] must deconstruct . . . the due process castle* . . . ." and;

e) Manifesting bias in favor of female victims via an Open Letter . . . which states: ". . . *our experience suggests victims tell the truth*.'" *Exhibit 11* (containing documents issued by NCHERM and/or ATIXA)(emphasis added).

57. Upon information and belief, Dayton selected Dayton employee Kimberly Bokota ("Bokota") to be involved in Doe's disciplinary procedure because Dayton knew Bokota embraced NCHERM's biased views against male students addressed in the preceding paragraph. Evidence supporting this belief includes, but is not limited the fact that Bokota markets herself as an ATIXA Civil Rights Investigator and an ATIXA Title IX Coordinator. *Exhibit 12* (containing Bokota's Linkedin page).

58. Upon information and belief, Dayton selected NCHERM and Swinton to be involved in Doe's disciplinary procedure because Dayton knew about and embraced NCHERM's biased views against male students discussed above. Evidence supporting this belief includes, but

is not limited to Dayton's decision to "engage[] ATIXA to help determine best practices for a holistic process that offers ease, clarity and fairness to all constituents." *Exhibit 13* (containing Dayton's *Timeline of Significant Recent Initiatives To Comply with Title IX*).

59. Upon information and belief, Dayton's unlawful discipline of Doe occurred in part because of Dayton's Associate Dean of Students & Director of Community Standards & Civility Debra P. Monk's ("Monk") bias against male students like Doe who are alleged to have engaged in sexual misconduct. Information supporting this belief includes, but is not limited to, Indirect Evidence of Gender Bias contained in testimony Mock gave on or about November 3, 2015 in *Pierre v. University of Dayton* No.3:15-cv-362 (W.D.S.D.OH. March 27, 2017). For example, Monk stated Dayton's "perspective" on the definition of "sexual harassment" includes prohibiting ". . . violence relating to ***gender*** . . . ." (emphasis added). And, the direct and Indirect Evidence Gender Bias detailed in this Complaint proves females are the "gender" group that Dayton is concerned about protecting from "violence" by male students.

60. Upon information and belief, Dayton's erroneous discipline of Doe was motivated by anti-male bias stemming in part from Dayton's involvement in *The Red Flag Campaign*. *See e.g., Exhibit 14* (detailing Dayton's connections to *The Red Flag Campaign*). Evidence supporting this belief includes, but is not limited to direct and/or Indirect Gender Bias Evidence associated with the "Red Flag Campaign" which advocates Dayton distribute promotional materials "wherever ***men*** hang out" and encourage "prizes" for "***men*** who participate in *Red Flag Campaign* programming." *Exhibit 15* (containing information from Red Flag Campaign's website)(emphasis added). This promotional material includes statements such as: (i) "***He*** said if I really loved ***him***, I would have sex with ***him***;" (b) "If I want to get some, I just need to get ***her*** wasted;" (c) "***She*** gets pissed when I hang out with my friends – ***She*** says ***she*** should be enough;"

and (d) "Say Something – Another *guy* kept cornering my friend at a party. So, I checked in with *her*." *Id.*, (emphasis added).

61. Upon information and belief, Dayton's erroneous discipline of Doe was motivated by anti-male bias stemming in part from Dayton's involvement in *Take Back the Night* rallies. *See e.g., Exhibit 16* (containing Dayton's "Get Involved" advocacy which discusses Dayton's yearly *Take Back the Night* rallies). Evidence supporting this belief includes, but is not limited to direct and/or Indirect Gender Bias Evidence associated with prominent feminist Christina Hoff Sommers' determination that "'Take Back The Night' marches" are regularly "driving home the point" to male college students "that women are from Venus and men are from Hell." *Exhibit 17,* (containing May 30, 2013 essay entitled *Why Men Are Avoiding College*.) In addition, takebackthenight.org's website details the organization's "history" of organizing females to engage in advocacy on behalf of females subjected to sexual assault, domestic violence, and other crimes. *Exhibit 18* (containing pages from takebackthenight.org's website).

62. Upon information and belief, Dayton's erroneous discipline of Doe was motivated by anti-male bias stemming in part from Dayton's involvement in the *Green Dot Program. See e.g., Exhibit 19* (containing Dayton's "Get Involved" advocacy which discusses Dayton's affiliation with the *Green Dot Program*). Evidence supporting this belief includes, but is not limited to direct and/or Indirect Gender Bias Evidence associated with the *Green Dot Program* which embraces anti-male agenda of *Take Back the Night* rallies detailed in the previous paragraph. *Exhibit 20* (containing *Green Dot Program's* "Toolkit" which recommends colleges host *Take Back the Night* rallies).

63. Upon information and belief, Dayton's erroneous discipline of Doe was motivated by anti-male bias stemming from Dayton's embrace of *The Clothesline Project* which is part of

the *Green Dot Program. Id.* Evidence supporting this belief includes, but is not limited to direct and/or Indirect Gender Bias Evidence associated with *The Clothesline Project* such as the following statements on the project's website:

a) Clothesline Project's events are designed to develop "provocative 'in-your face' educational and healing tool[s]" that "break the silence and bear witness to *one issue – violence against women*;"

b) Defines a "[s]urvivor" as "a *woman* who has survived intimate personal violence such as a rape; battering, incest, child sexual abuse." and;

c) Defines "[v]ictim" as "a *woman* who has died at the hands of her abuser. *Id., Exhibit 21* (containing information from *The Clothesline Project's* website)(emphasis added).

64. Upon information and belief, Dayton's erroneous discipline of Doe was motivated by anti-male bias stemming in part from Dayton's showing of the film *The Mask You Live In. See e.g., Exhibit 22* (containing Dayton's 2016 UD Campus Security Report, Education and Prevention Programs which discuss *The Mask You Live In* screening). Evidence supporting this belief includes, but is not limited to direct and/or Indirect Gender Bias Evidence associated with *The Mask You Live In* which Stanford University's Clayman Institute of Gender Research described as a film that "shows how . . . masculinity [is] at the root of sexism. . . [because] boys learn to devalue anything related to femininity, it's not surprising when they go on to degrade women." *Exhibit 23* (containing Stanford University's Clayman Institute of Gender Research's review of *The Mask You Live In*).

65. Upon information and belief, Dayton's erroneous discipline of Doe was motivated by anti-male bias stemming in part from having Dayton students participate in a sexual misconduct training program called "Haven" created by Ever Fi Inc. *Exhibit 24* (containing Ever Fi. news release discussing same). Evidence supporting this belief includes, but is not limited to, the fact that this training incorporates the direct and/or Indirect Gender Bias Evidence

detailed above relating to Obama Administration's "It's on Us" program. *Id.* Upon information and belief, the Haven training and/or other training provided to Dayton students incorporates the direct and Indirect Evidence of Gender Bias of this "It's on Us" program detailed in this Complaint. Evidence supporting this belief includes, but is not limited to, a press release issued by the Obama Administration praising Dayton's embrace of the "It's on Us" campaign. *Exhibit 8* (containing Obama Administration's press release praising Dayton).

66. Dayton's direct and Indirect Evidence of Gender Bias includes a YouTube video it distributes which perpetuates the myth that male Dayton students subject 1 in 5 of their female counterparts to sexual assault. *Exhibit 24A* (discussing Dayton's "Sexual Violence Prevention Education" YouTube video which contains the allegation that 1 in 5 of females are sexually assaulted in college). Dayton perpetuates this myth even though it knows male Dayton students are <u>not</u> subjecting 1 in 5 of their female counterparts to sexual assault. This is because in 2015, Dayton's student population reported a total of 6 allegations of domestic violence, dating violence, statutory rape, fondling, and rape. *See, Exhibit 22,* p.40-41 (containing Dayton's 2016 UD Campus Security Report). In 2016, approximately 5,198 females were enrolled at Dayton. *Exhibit 25* (containing Dayton's 2016 enrollment statistics). Provided 2015 enrollment figures were similar to 2016 figures, only .001% of Dayton's females students reported sexual misconduct allegations to Dayton in 2015– a far cry from Dayton's allegation that 1 in 5 of their female students are sexually assaulted.

67. Upon information and belief, direct and Indirect Evidence of Gender Bias motivated individuals serving on Doe's disciplinary panel ("Board Member(s)") and Dayton's Judicial Review Committee ("JRC")[9] to violate Doe's rights under Dayton Policies and Title IX

[9] It should be noted, Doe does not currently know the names of individuals who served on the JRC because Dayton never provided Doe this information.

by erroneously finding Doe responsible for Doe's false allegations. Evidence supporting this belief includes, but is not limited to:

a) Board Member Amy Zavaldi's ("Zavaldi") Ph.D thesis which included allegations such as :"[s]exual harassment is prevalent on college campuses . . . as many as half of all women experience sexual harassment in some form during college . . . research over the past two decades has reported that between one in four and one in five college women report experiencing attempted or completed sexual assault while in college . . . harassing behavior often framed as "just joking" makes it difficult for victims to name the behavior as harassment and re victimization is high for those who have already experienced sexual harassment." *Exhibit 26* (containing Amy Zavaldi, *Xploring The Predictive Value of Intrapersonal, and Institutional Factors on College Women's Intention To Help In Sexual Harassment Prevention* (citations omitted), and;

b) Zavaldi 2011 publication entitled *Hooking Up and Identity Development of Female College Students* which addressed adverse identity development in female students from a "feminist developmental perspective." Exhibit 27 (discussing Zavaldi's *Hooking Up and Identity Development of Female College Students* article).

68. Board Members Rebecca Krakowski ("Krakowski") and Brett Slaughterhaupt's ("Slaughterhaupt") manifestations of direct and Indirect Evidence of Gender Bias include, but is not limited to, their embrace of the film *The Hunting Ground*. *See e.g., Exhibit 28* (containing Slaughterhaupt's social media post regarding *The Hunting Ground*). For instance, Krakowski described the film as "[m]ust see" film "documenting the issue of sexual assault on college campuses . . . [i]t is not ok that a ***frat*** is know[n] as the 'roofie frat' under any circumstances." *Exhibit 29* (containing Krakowski's social media post regarding *The Hunting Ground*) (emphasis added). In response, Krakowski's friend notes: " . . . . if these ***guys*** are going to have sex with unconscious women, why don't they just introduce themselves to their right hand??? Good grief." *Id.*(emphasis added).To which Krakowski responds "***True***." *Id.* (emphasis added).

69. Krakowski and Slaughterhaupt's embrace of *The Hunting Ground* manifests anti-male gender bias in part because – as detailed in the bullets below - the film has been widely criticized:

- Nineteen Harvard University professors denounced the film as "*propaganda*" that paints "a seriously false picture of general sexual assault phenomenon at universities and or our student Branon Winston in part because "Harvard University School Faculty concluded after extensive review of the facts that there was insufficient evidence to support the [sexual assault] charges made against him" by the female profiled in the Hunting Ground. *See, Exhibit 30 (containing Harvard University Law School's Nov. 11, 2015 Press Release);*

- The National Review noted the film was "highly misleading if not dishonest" in its portrayal of sexual assaults of female students by their male counterparts. In discussing this anti-male bias, the article states: *"[w]e don't operate the same way as journalists — this is a film project very much in the corner of advocacy for victims, so there would be no insensitive questions or the need to get the perpetrator's side." See, The Hunting Ground co-producer Amy Herdy;* http://www.nationalreview.com/article/427166/hunting-ground-smoking-gun-e-mail-exposes-filmmaker-bias-against-accused (accessed 1/4/17);

- Numerous news outlets detailed in part how the file features three women, whose claims of sexual assault were later largely discredited, including in one case fabricating evidence (a bloody condom that when eventually tested contained DNA of another male who was not the alleged assailant); *See*, http://www.slate.com/articles/news_and_politics/doublex/2015/06/the_hunting_ground_a_closer_look_at_the_influential_documentary_reveals.html (accessed 1/4/17); http://www.nationalreview.com/article/415269/cinematic-railroading-jameis-winston-stuart-taylor-jr (accessed 1/4/17), and http://www.thedailybeast.com/articles/2015/02/03/columbia-student-i-didn-t-rape-her.html (accessed 1/4/17); and

- The film repeats the false claim that one in five college women are sexually assaulted in college even though the U.S. Department of Justice reports a woman's risk is less than one percent (0.61%) each year. *Infra,* ¶127 (discussing the U.S. Department of Justice's finding that only .61% of female college students are sexually assaulted during their college years).

Nevertheless, Dayton sponsored a showing of *The Hunting Ground* on campus on April 4, 2016 in a press release that: (a) described the film as a documentary "about rape and its connection to college campuses," which would be followed up with a panel discussion about how Dayton "goes about managing sexual assault." *Exhibit 31* (containing Dayton press release about *The Hunting Ground* screening).

70. Moreover, based on the information detailed in this Complaint and upon information and belief, Dayton's unlawful discipline of Doe occurred in part because of Dayton's archaic assumptions that female students do not sexually assault fellow male students because females are less sexually promiscuous than males. Evidence supporting this belief, includes, but is not limited to, Dayton's: (a) unlawful rejection of the preponderance of evidence which proved Roe voluntarily initiated and/or consented to all physical contact with Doe when Roe was not incapacitated by alcohol; (b) decision to ignore testimony that established Doe's innocence in part because that testimony proved Roe's allegations were internally inconsistent and lacking in credibility; (c) prohibiting Doe from challenging the credibility of Roe or her witnesses; and (d) unlawful discipline of Doe for accepting Roe's offer to engage in sexual activity that Roe initiated and/or consented to.

71. Dayton's direct and Indirect Evidence of Gender Bias has created a hostile environment which in turn creates an adverse educational setting in violation of Title IX in part because Dayton engages in sex stereotyping discrimination based on unlawful notions of masculinity and femininity. This hostile environment causes innocent males on Dayton's campus to be unlawfully disciplined and interferes with males' ability to participate in or benefit from various activities including learning on campus.

72. Although Dayton may contend Dayton Policies are gender neutral, this is a pretext for the direct and Indirect Evidence of Gender Bias detailed in this Complaint which motivates Dayton to discipline innocent male students like Doe via sexual misconduct proceedings that afford females preferential treatment in violation of Title IX and/or Dayton Policies.

73. Altogether, this Complaint manifests Dayton's pattern and practice of: (a) providing preferential treatment to females – like Roe – who falsely allege they were sexually assaulted by male students like Doe; (b) imposing presumptions against male students – like Doe – who are falsely accused of sexual misconduct; (c) creating an unlawful hostile environment for male students like Doe based on their gender and/or (d) discriminating against male students to appease pressure from the federal government, Dayton's female student body, and/or the general public to discipline males students like Doe even though the preponderance of the evidence proves these male students did not engage in sexual misconduct.

Dayton and Swinton's Gender-Biased Disciplinary Proceeding

74. Dayton's 2016 – 2017 Student Handbook outlines the process by which a complaint alleging sexual assault is handled. *See e.g., Exhibit 2,* p,73-82. Once a complaint is filed, Dayton conducts a preliminary investigation. *Id* at 79. Here, Swinton and Bokota were charged with conducting this investigation. *Exhibit 2*, p.3.

75. On or about September 14, 2016, Dayton's Deputy Title IX Coordinator Christine Schramm ("Schramm") sent Doe a "Notice of Investigation" letter which identified Schramm as "the primary Title IX Coordinator" regarding Roe's allegations against Doe. *Id.,* p.3-5 (containing Christine Schramm's September 14, 2016 *Notice of Investigation* letter). As detailed in this Complaint, Dayton violated promises in Schramm's letter to conduct a "fair," "impartial," "thorough and neutral" investigation of Roe's false allegations. *Id.*

76. Schramm's "Notice of Investigation" letter promised Doe that prior to Dayton taking any further action against Doe, Swinton and Bokota would first "conclude[] that the facts and information in the record establish probable cause. . . ." *Id.*, p.4.

77. Prior to Swinton and Bokota conducting their initial interview of Doe, Swinton communicated repeatedly with Doe's then attorney Yoder. During these conversations, Swinton's comments to Yoder included, but were not limited to:

a) If Swinton and Bokota did not find probable cause – as viewed in the light most favorable to Roe – they would not recommend the case proceed to disciplinary hearing;

b) Swinton and Bokota's role did not involve rendering evaluations of the type of evidence presented. Rather, their role was to gather the facts and determine whether probable cause existed;

c) If Swinton and Bokota found a lack of probable cause, Doe would be likely be reinstated to Dayton's football team;

d) Swinton rejected Doe's request to see the rape kit that Roe alleged was performed even though Roe alleged this rape kit substantiated her allegations against Doe; and

e) Swinton told Yoder that he could submit a packet of information and provide his thoughts on the case. Swinton provided this information in response to questions raised by Yoder about whether all communications had to come from Doe directly.

78. Swinton and Bokota conducted their initial interview of Doe on September 27, 2016. *See, Exhibit 2*, p.48-52 containing Swinton and Bokota's notes of interviews of Doe with Doe's redline changes correcting errors in Swinton and Bokota's notes).

79. Doe also voluntarily subjected himself to a polygraph examination on September 13, 2017 and submitted the results of this polygraph to Dayton on September 30, 2017. *See generally, Exhibit 2*, p.31-53 (containing Yoder's September 30, 2017 letter to Bokota and Swinton).

80. In addition to the polygraph, Doe's evidentiary submission included: (a) Doe's September 28, 2017 written statement; (b) witness statements from M.H., D.S., and A.D.;[10](c)

[10] This complaint used students and character witnesses' initials in order to protect their identities and the identifies of Roe and Doe. Doe uses the last initial "X" as a place holder for the last name of students that Dayton failed to identify by last name. *See generally, John Doe's Motion to Allow the Parties to Use*

Doe's redline word document correcting errors in Swinton and Bokota's notes from Doe's interview; (d) photos of the house where Roe and Doe interacted; (e) a supplemental letter from Yoder to Swinton and Bokota detailing evidence proving Roe's allegations against Doe were false; and(f) letters attesting to Doe's upstanding character from: (i) Doe's priest - Father P.C. who has known Doe all his life and commented on Doe's involvement in Christian organizations and activities; (ii) K.S. who interacted with Doe in activities related to the church related activities; (iii) L.M. a professor from a college in Pennsylvania who had known Doe since he was a child; and (iv) M.S. and J.C. who coached Doe in high school and spoke about Doe's leadership and 3.7 high school GPA. *Id.*

81. On or about November 7, 2016, Swinton and Bokota completed their Investigative Report ("Investigation Report"). *See, Exhibit 33* (containing Investigation Report).

82. After reviewing the Investigation Report, Yoder put Dayton on notice of the report's errors. *Exhibit 34* (*Yoder's* November 21, 2016 letter to Monk and Schramm). In pertinent part, Yoder noted:

> " . . . . we object to the description of the polygraph test which is included in the case packet. The included description by the Investigators completely discredits the results of the test before they are presented. The description of the test would have the reader believe that it is impossible for the results of the test to accurately reflect the true outcome of the events that transpired on September 4, 2016.
>
> Contrary to the Investigator's opinion, polygraph results are often included in judicial proceedings and in most criminal investigation, if stipulated by the parties, are dispositive of the case. As such, we believe that the results of the polygraph examination are vital to understand what transpired between [Doe] and [Roe]. Further, we believe if the description of the polygraph results included in the Investigator's report is not revised to correctly and accurately reflect the value of the report the Committee will not be able to independently assess the weight to be given to the polygraph results and reach their own independent conclusion. The Investigators should be precluded from interfering with the Committee's process and potentially tainting the outcome of this proceeding. If this occurs [Doe] will be denied a valuable piece of evidence that establishes his innocence in this matter . . . we believe there are facts contained within the case packet that are worthy

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Pseudonyms (containing the basis for Doe's request for using pseudonyms in this proceeding).

of objection. The case packet would have the Committee believe that no flirtation occurred between [Doe] and [Roe]; however, multiple interviews confirm [Roe's] flirtatious behavior; from [Doe's] statement and multiple individuals at the party, one describing her as "acting loose".

Furthermore, the Investigator's make no mention of the highly unlikely sequence of events that [Roe] proposes regarding the sexual encounter. She states to the Investigators the following:

> *[Doe] went to my room and I followed. [Doe] got in my bed first and said "Let's take a nap". It was an awkward situation but I sat on my bed. I was fully clothed. He started coming on to me and I said "I don't think I want to do this" as he pulled of [sic] my shorts and started having sex with me. I was saying, "I don't think I want to do this." He didn't stop and replied "just real quick." I said again "I don't think I want to do this" but almost immediately he ejaculated on my stomach and laughed. I quickly took off my shirt and wiped my stomach off and threw the shirt on the ground. He said "you don't mind if I leave, do you?" I said "no". I stood there as he hugged me and left at 7:30 PM.*

It is undisputed that [Doe] had never visited [Roe's] residence prior to September 4, 2016. A significant point which demonstrates [Doe] would have no idea which bedroom belonged to [Roe]. Even more problematic for [Roe] is [Doe] would have absolutely no idea which bed to lie on as [Roe] alleges.

Finally, [Roe] alleges that [Doe] led her to her room at 7:00 PM. [Roe] states [Doe] hugged her "and left (her apartment) at 7:30 PM". This time sequence is of some import as it shows [Roe] and [Doe] in her bedroom for 30 minutes. [Roe] references numerous times in her interview that she neither kissed [Doe] nor entered into any consensual sexual relationship with him. She also describes the sexual act as occurring and being over with almost immediately. Clearly, this evidence shows [Roe's] testimony is not plausible due to the time lapse that [Roe] fails to acknowledge. If the events transpired as [Roe] would have this Committee to believe the incident itself would have been over within a matter of minutes; not 30 minutes. We have reviewed the exact same evidence gathered by the Investigators; however, for reasons unknown to us they fail to include these important facts in their analysis.

The University has failed in its attempt to conduct a fair and impartial investigation. The Investigators fall far short in conducting an investigation and including facts that would be relevant to a Committee. We are not asking that the investigators draw conclusions to the evidence that has been gathered. We are asking that they present the evidence in an unprejudicial and unbiased manner. Throughout our investigation we have learned that [Roe's] pre and post incident sexual activity reveals a completely different picture which we have shared with the Investigators; however, they have chosen not to include this information in their packet.

> Because of the delicate nature of this investigation and the connected proceedings it is our only hope to resolve this matter as quickly as possible. The purpose of this letter is not to request a new investigation, but rather to draw your attention to problem areas in the existing case packet and to offer a means of correcting such problems. We hope that after reading this letter, and keeping in mind that every student is entitled to a fair investigation conducted in good faith, you will consider providing [Doe] with some means of addressing the aforementioned concerns. Without addressing these objections, we are afraid that [Doe] will be denied a fair investigation and disciplinary hearing and may be subjected to a penalty that is not in line with his behavior." *Id.*

83. Since neither Swinton nor Bokota addressed Yoder's requests that the aforementioned errors be addressed, Doe was left to his own devices in attempting to undo the prejudice in the Investigation Report. So, Doe provided Dayton the following written questions he wanted to have asked at his disciplinary hearing ("Doe's Hearing Questions"). *Exhibit 35* (containing Doe's Hearing Questions).

> **Witness 1 [Roe] Questions**:
> 1. How much did you drink on the day/evening in question?
> a) At brunch?
> b) At your apartment?
> c) At each party?
> d) How many bottles of champagne did you purchase at the store?
> e) When did you purchase the case of Platinum Bud Light?
> f) Why did you leave out in every statement you have made that you had been drinking all day?
>
> 2. Do you believe your memory was affected by the amount you had to drink that day?
>
> 3. Are there any periods of time you are unable to recall with great detail?
>
> 4. When you went to the hospital did they do a blood draw?
> a) Did they check your level of intoxication?
> b) Did the hospital staff share with you your level of intoxication?
>
> 5. Do you know individuals who live at 44 Stonemill?
> a) Have you ever been to 44 Stonemill before?
> b) Do you recall sitting on a red couch with [Doe] at Stonemill and attempting to hold his hand?
>
> 6. At the party on Evanston, do you recall speaking with [D.S] and [M.H.] (members of the football team)?
> a) Do you remember speaking with them about your tattoos?

b) Do you remember lifting up your shirt and describing the significance of your tattoo on your side?
c) Do you remember telling [D.S] that you can hook up with who you want?
d) Why did you indicate in your statement that your cornhole game with [Doe] lasted for an hour and half?

7. Do you recall who suggested going to Brown St. to get lunch?
a) Do you remember holding [Doe]'s hand while walking to Panera Bread?
b) On the night in question did you remember who walked with you to Brown St.
c) Who was it?
d) Do you remember the conversation you had with [Doe] while walking to Brown St.?

8. When you arrived at your apartment do you remember what [C.K.] and [C.X.] were doing?
a) Where were they located?
b) Did you and [Doe] have to close the door to give them time to get ready?
9. Could you describe the layout of your apartment?
a) Where are your roommates' bedrooms relative to your own?
b) In what chair did everyone sit at the table for lunch/dinner?
c) Do you recall when [H.X.] came in?
d) When [H.X.] arrived was there a shuffling of chairs?
e) Did [Doe] get up and give his chair to [H.X.]?
f) Did he sit at the lounge chair directly to the side of the table?
g) Can you hear your roommates in their room from your room?
h) Can you hear your roommates in their room from the common areas?

10. Can you see inside your room from the bathroom?
a) Can you hear someone talking in the bathroom? Could you hear someone talking in your room?
b) Can you see your bedroom from the kitchen?
c) Can you see your bedroom from where [Doe] was sitting at the table?
d) Did [Doe] ask you to go to the bathroom?
e) Did he go into the bathroom before entering your room?

11. Did you have your cell phone with you that day?
a) Was your cell phone working that day?
b) Did you ever text your roommates or other friends that you needed help?
c) Why did you not use your "Safe Word" with your roommates?

12. Did you close your door when you entered your room?

13. Were there two beds in the room?

14. Did you tell [Doe] where the bathroom was located?

15. Did you take your shoes off before you sat down on the bed?

16. Could you tell us how long you were kissing?
a) How long were you in the room before [Doe] kissed you?
b) Where were [Doe]'s hands when you were kissing?
c) Where were your hands?
d) How did your bodies get into the bed?
e) Why did you lay down after kissing if you had no desire for continued contact?
f) Did [Doe] ever force you to kiss him?
g) Did [Doe] ever force you to take your shorts off?
h) Did you assist [Doe] in taking your shorts off?
i) How long did intercourse take?
j) Prior to intercourse did you ask [Doe] how long this is going to take?
k) Did you lean over and set your alarm on your phone?
l) When you were setting your alarm did you have time to text your roommates for assistance?
m) Did you set an alarm on your phone?
n) Did you resist when taking off your pants?
o) Why didn't you sit up when [Doe] took his pants off?
p) During sexual intercourse did you grab the back of [Doe]'s head to pull in closer?
q) After sexual intercourse why did you feel comfortable taking off your shirt and revealing yourself to a man who you claim raped you?
r) Did you provide [Doe] your shirt to clean up the bed?

17. After intercourse did you say that this was "unprofessional"?

18. After intercourse did you and [Doe] get back in bed and "snuggle"?

19. Did you walk [Doe] to the door and hug and kiss him?

20. Did you make tentative plans for later in the evening?

21. In your statement you indicate that there was "no fondling at this point". Why state "at this point" if it is your statement that it never occurred?

22. What was the reason for texting [Doe] at 8:51 on the night in question?

23. What does your roommate contract consist of?

24. What are your Safe words?
a) When are you supposed to use these words?
b) Have you ever had to use them?

25. In your interview with the Investigators you state you either don't recall or cannot remember 10 separate times. Why do you have such a difficult time remembering?

26. In your report you indicate you called your mom. [R.X.] states she called your mom? Who in fact called your mom?

27. When the Investigators asked whether you called or texted anyone else within a few days of the incident why did you not tell them about your text to [E.B.]?

Witness 2 [E.B.]:

1. How much did [Roe] drink on the day in question?
   a) Mimosas? At your residence
   b) At her apartment?

c) How much did she drink at Evanston house?

d) How many bottles of champagne did you [Roe] or you buy?

2. Describe level of [Roe's] intoxication
   a) How could you tell she was "very intoxicated"?
   b) Please describe any physical contact you witnessed between [Roe] and [Doe]?

3. Did you see [Roe] show off her tattoos at the Evanston party?

4. How intoxicated were you that day?

5. [Roe] purchased a case of Bud Light Platinum. Were you with her when she did?
   a) Do you know how many beers she drank?
   b) Do you know how many "beer bongs she did"?

6. When you went to Stonemill please tell us what was on the porch?
   a) Do you recall seeing a couch on the porch?
   b) What did you do at the Stonemill party?
   c) How long did you stay at Stonemill?

7. Describe for us [Roe's] personality?
   a) Is she outgoing?
   b) Talkative?
   c) A person who you would consider to be a leader?
   d) Aggressive?

8. What did you mean when you said "[Roe] has been through a lot with her family"?

Witness 3 [M.H.]:

1. Did [Roe] ever talk about "hooking up" while at the party that you heard?

2. When [Roe] first saw [Doe] at the party what did she do?

3. Did you find her to be outgoing?

4. Did [Roe] show off her tattoos while at the Evanston house party?
   a) What did she explain these tattoos to be?

5. Please describe [Roe's] level of intoxication and how much physical contact she had with [Doe].
   a) Specifically, while on Brown Street how much contact did she have with [Doe]?
   b) What did you mean when you said [Roe] was "acting loosely"?
   6. What made you say that [Roe] was being "really flirtatious"?

Witness 4 [C.K]:
1. What does your roommate contract consist of?
   a) Safe words? What are they?
   b) When are you supposed to use these words?

2. Are you able to hear one of your roommates should they call out a safe word while in the apartment?
   a) Have you or your roommates ever had to use safe words?

3. Who walked back to the bedroom first?
   a) Did you see whether [Roe] led [Doe] back?
   b) Did you hear [Doe] say he needed to use the bathroom?

4. Where was everyone sitting around the dinner table?
   a) Could [Doe] have seen directly into [Roe]'s room?
   b) Did [Doe] offer his seat to [H.X.] when she came home?
   c) You said you didn't think that anything was going to happen. Why did you say that? What facts would you point to?

5. When [Roe] and [Doe] arrived at the apartment were you and [C.X.] fooling around in the kitchen?

6. In your statement you mention that [Roe] would talk to you and [C.X.] about hooking up. Why would she talk to you about this?

7. Does [Roe] and [R.X.] keep their door shut to their bedroom generally?

8. Describe for us [Roe's] personality?
   a) Is she outgoing?
   b) Talkative?
   c) A person who you would consider to be a leader?
   d) Aggressive?

9. How much had you been drinking that day?
   a) Would you consider yourself to be intoxicated?

Witness 5 [H.X.]:

1. What does your roommate contract consist of?
   a) Safe words? What are they?
   b) When are you supposed to use these words?
   c) Are you able to hear one of your roommates should they call out a safe word while located in the apartment?
   d) Has [Roe] ever called out a safe word before?

2. During lunch/dinner did you hear anything that would have concerned you?

3. Where was everyone sitting when you walked in?
   a) Did [Doe] get up and offer his chair?
   b) Could [Doe] had seen inside the bedrooms from where he was sitting?
   c) Do you recall whether [Doe] asked to go back and use the bathroom?
   d) Who got up first from the table?
   e) Did you see who walked back first to the bedroom, [Doe] or [Roe]?

4. Did you speak with [Roe] about this matter?
   a) What did she tell you?

5. Describe for us [Roe's] personality?
   a) Is she outgoing?
   b) Talkative?
   c) A person who you would consider to be a leader?
   d) Aggressive?

Witness 6 [C.X.]:

1. During your conversation with [Doe] did you find anything to be peculiar?

2. What was [Doe]'s attitude like?
   a) Was he soft spoken, nervous? Act like the quintessential freshman?
   b) Who did most of the talking at the table?

3. Had you ever seen [Roe] drunk?

4. Describe for us [Roe's] personality?
   a) Is she outgoing?
   b) Talkative?
   c) A person who you would consider to be a leader?
   d) Aggressive?

5. When you got up for a glass of water could you hear anything?
   a) Did you see anything?

6. Did you see [Roe] walk [Doe] to the door?
   a) You indicated that you thought you were interrupting a intimate moment. Why?

b) Was the couple holding hands? Kissing? Hugging?

7. Were you and [C.K.] involved in a romantic situation when [Doe] and [Roe] opened the door to the apartment?

Witness 7 R.X.:
1. Has [Roe] had past problems with men?

2. Was she having other issues that you know of?

3. How much does [Roe] drink?
a) Does she drink every weekend, every day, every other day?
b) Did she go out the week after this event and drink?
c) Has she taken home or gone to the home of other men after the incident?

4. What does your roommate contract consist of?
a) Safe words? What are they?
b) When are you supposed to use these words?
c) Are you able to hear one of your roommates should they call out a safe word?
d) Have you or your roommates ever had to use safe words? Please explain.

5. How much did you see [Roe] drink that day?

6. In your statement to the Investigators you mention that "[Roe] is not a therapy person". What does that mean?

7. Does [Roe] always discuss "hooking up" with you?

Witness 8-Corporal Huffman
1. What made you come to the conclusion that [Roe] was not being completely forthcoming?

2. When you and your partner interviewed her did you perform Field sobriety tests or breathalyzer test on her?

3. Did you ask her how much she had to drink?

4. Did it appear after interviewing [Doe] 3 times that his story changed?

5. Did you believe what [Doe] was telling you?

6. Did you offer [Doe] the opportunity to speak to an attorney? Did he waive his right to an attorney and speak with you?

7. Did you follow up with [Doe regarding] his statement?

8. After reviewing your report and to your recollection did [Roe] ever tell you that she told [Doe] "No"?

9. After reviewing your report and to your recollection did [Roe] ever tell you that she told [Doe] "Stop"?

10. Why was [Roe] concerned about her job when you interviewed her?
a) Was her job the only concern that she expressed to you that evening?

11. You stated in your interview with the Title IX Investigators that you felt [Doe] was more open and forthcoming. Who were you referring him to and why did you feel that way?

12. Are you aware that [Doe] took a polygraph test?
a) Do you have any feelings on whether polygraph test are accurate?
b) Are you aware of the result of the polygraph test?

84. Regarding these questions and other evidence Doe requested be submitted at his hearing, Monk sent Doe an email on or about, December 7, 2016 that stated:

> "Your requested questions are being reviewed for use at the hearing. However, we do not allow the submission of new documents or exhibits at the hearing. If you want the content of your exhibit to be part of the hearing you should include it in your opening and closing comments (orally). Also, the photos should have been submitted to the investigators during the investigation if you wanted them considered. Did you share them with one of the investigators? If so, please alert me to to [sic] this." *Exhibit 2*, p.63 (containing Monk's December 7, 2016 email to Doe).

85. In response, Yoder sent Monk an email on December 8, 2016 which stated in pertinent part:

> "[Doe] forwarded your email denying our request to use enlarged copies of his closing remarks for the Boards review. The denial of these documents amounts to an egregious infringement of [Doe's] rights to have a fair and impartial hearing. I would like to direct your attention to the University of Dayton Student Handbook which sets forth the rules for a UHB facility Accountability Hearing. Specifically on page 43 it reads in part: UHB members are provided a copy of the original report, any witness statements or supplemental materials collected by CS&C as well as the student's written account, witness statements and supplemental material. These documents are gathered in what becomes the 'case packet.'
>
> In order to have their perspective represented in the case packet, the student must submit their materials to CS&C within three business days following their Behavioral Hearing.

> In accordance with the rules of the University of Dayton Handbook [Doe] submitted all material within the appropriate period of time directed by your office. [Doe] was not required to provide his closing remarks; however, when I spoke with Amanda she informed me to submit the documents that [Doe] would use to assist him in his closing remarks. Furthermore, the information included in the documents for his closing remarks is exactly the same information that is included in the investigative packet. [Doe] is not attempting to introduce any additional documentation not already included. The Student Handbook allows the student to submit any "supplemental material". Clearly, the material that is being provided is part of his closing remarks and would be used as an outline to assist him in this process. He is a freshman with no prior public speaking experience. The outlined is absolutely permitted under the rules as set forth in the Student Handbook.
>
> Finally, the photographs that were submitted also are permitted under the rules of the Student Handbook as supplemental material. I would like to bring to your attention that the investigators requested [R.X.] draw a diagram of her apartment. It is referenced in the report but we did not receive any such diagram. The diagram that is submitted would assist the Board in understanding the layout of the apartment and the location of each individual sitting. Again, this is extremely relevant information and any attempt on your part to deny the admission of this evidence would be viewed as an obstructive act to conceal the truth of the events that transpired on the night in question.
>
> I personally feel very strongly that [Doe] has complied with the Student Handbook and has submitted all documentation in accordance with its rules. I find it difficult to understand why the submission of these documents would be precluded?" *Id.*, p.60-61 (containing Yoder's December 7, 2016 email to Monk).

86. Monk did not provide Doe or Yoder answers to their questions about what evidence would be permitted at Doe's December 9, 2016 hearing. Instead, during that hearing, Board Members violated Doe's rights under Dayton Policies and/or Title IX by among other things:

(a) Determining none of Doe's Hearing Questions would be asked at his disciplinary hearing;

(b) Allowing Roe's testimony about the content of alleged medical records while prohibiting Doe's access to these medical records which – upon information and belief – would have disproven Roe's allegations about: (i) the content of the records, and/or (ii) Roe's allegations against Doe;

(c) Prohibiting Doe from establishing his innocence via poster boards he created with excerpts of the Investigative Packet ("Bulletin Boards");[11]

(d) Prohibiting Doe from presenting Dayton's stock photographs of the interiors of apartments such as Roe's apartment;[12] and

(e) Prohibiting Doe from having [C.X.] testify at the hearing.

87. After engaging in this conduct, The Board Members: (a) erroneously found Doe responsible for sexual harassment; (b) suspended Doe for the 2016-2017 and 2017-2018 academic years; and (c) imposed additional stipulations and pre-conditions on Doe if he sought reenrollment at Dayton. *See*, *Exhibit 36* (containing Board's December 12, 2016 findings).

88. DSH gave Doe the right to appeal the Board's erroneous findings to the Complaint Review Committee ("CRC") within five (5) business days of the Board's decision. *Exhibit 2*, p.80. The CRC is empowered to take "corrective action" and its decisions are final and not appealable. *Id.*

89. As a result, Doe filed a timely appeal on December 14, 2016. In this appeal, Doe stated in pertinent part:

> I [Doe] appeal the decision of the University Hearing Board dated December 12, 2016 in the above-referenced matter. Please allow this communication to serve as my appeal.
>
> [I]. **Errors in Student Conduct Procedures:**
>
> Errors occurred in the student conduct procedures which I feel have affected the final outcome of the Board's decision as follows:
>
> **1. Inappropriate submission of Polygraph Comments by Investigators to the Board and Board handling of Polygraph Results**
>
> I requested that the Investigators redact the statements they made in the Investigative Packet regarding their personal opinions of polygraph examinations prior to submitting

[11] *Exhibit 38*, p.2-3 (containing information on Bulletin Boards).

[12] *Id*, p.1 (containing Dayton's stock photographs).

the Investigative Packet to the Board. I made this request directly to the Dean of Students, Chris Schramm and the Associate Dean of students, Debra Monk. I received no communication from either administrator but rather received a response from the General Counsel of the University denying my request.

My request was made regarding the following statements [in Investigators' Report]:

> *"Before briefly reviewing the results of the polygraph examination, it may be helpful to provide some context as to its reliability and efficacy… The American Psychological Association encourages people to view them skeptically. Additionally, most courts do not allow their use in proceedings given their lack of reliability and efficacy. Polygraph examinations often are only able to test whether a person believes they are telling the truth, not whether they are actually telling the truth. As such, using polygraphs for probative purposes is problematic."*

First, the Investigators discredit the polygraph and request the Board to only *briefly* review the results. The time and level of importance that a Board Member should place on evidence is completely at their discretion. The Investigators role is not to attempt to persuade a Board Member on how much time or emphasis they place on a piece of evidence. Furthermore, the Investigators site the American Psychological Association as authority on the reliability of polygraph examinations. There are numerous recognized and notable associations which place great weight on polygraph examinations if performed properly. The Investigators also indicate to the Board the polygraph examinations are not permitted to be used in court. In my objection, I indicated that courts throughout the country use polygraph examinations to resolve cases on a daily basis if stipulated to by the prosecutor's office and the defense. To imply that courts do not permit polygraph testing is a substantial misrepresentation of our criminal justice system and again discredits the importance of polygraph results.

Finally, the Investigators report to the Board that "polygraph examinations often are only able to test whether persons believe they are telling the truth not whether they are actually telling the truth." The Investigators cite no specific authority for this opinion nor do they support the opinion with any substantive analysis. To suggest that polygraph tests are not used for probative purposes is counterintuitive and goes against the underlying purpose why individuals take polygraph tests. Polygraph testing is used throughout the entire world to indicate truthfulness or dishonesty. Anyone applying for a federal law enforcement position submits to a polygraph examination during the application process. Also, during the course of employment federal law enforcement officers are consistently polygraphed to determine their truthfulness. Courts around the world use polygraph results for disposition of cases. The Investigators erred in the presentation of their statements and allowing the Board to review the false statements made. As a result of this error the Board did not place sufficient weight on the polygraph results and ruled incorrectly. The procedures of the hearing were not followed and I did not receive a fair and impartial Board.

2. Investigators Report re: Level of Intoxication of [Roe]

The Investigators failed to include any observations on the level of intoxication of [Roe]. Further in the Investigative Packet under Incapacitation Analysis the Investigators opine that …"her ([Roe's]) memory of events does not seem to suffer from any major gaps."

During the interview process multiple statements were made to the Investigators regarding the amount of alcohol [Roe] had consumed throughout the day. [Roe's] sorority sister and friend, [E.B.], specifically stated that [Roe] started drinking at 10 AM. [Roe] drank a mimosa. [Roe] then went to the deli on Lowe Street and picked up more champagne and orange juice. [E.B.] also states that she and [Roe] went to [Roe's] apartment and continued to drink.[Roe] and [E.B.] then went back to [E.B.]'s house and "drank a few more drinks". Finally, [Roe] went to the party at 4 PM [with] a case of Bud Light Platinum and was beer bonging beers in the multi-person beer bong.

For the Investigators to indicate to the Board that [Roe's] memory does not suffer from any major gaps is completely erroneous based on statements they received in their investigation. [E.B.] describes [Roe's] behavior as extremely intoxicated.[M.H] describes [Roe] as intoxicated and acting loosely. The Investigators learned throughout the course of the investigation that [Roe] was not able to recall events throughout the evening; for example, when we went to the party on Stonemill.[Roe] does not remember holding hands with me or acting flirtatious. [Roe] does not remember who we walked up to Brown Street with to get food at Panera as evidenced by her text messages to [E.B.] the following day.

Obviously, the [Roe's] memory was affected and she suffered from major memory gaps. To advocate to the Board that intoxication did not play a significant part of [Roe's] memory is completely incorrect. [Roe] stated that the incident in her bedroom lasted for 5 to 8 minutes. However, her roommates provide statements to the Investigators showing that it lasted for 40 minutes. Again, this shows a lack of ability to recall certain events accurately. The Investigators lack of presentation of these facts and analysis is clearly erroneous and violated the procedures of fair and impartial dealings in the Board.

3. Investigators Findings Are Not Sufficient For The Matter To Proceed To The University Hearing Board

In the Investigative Packet the Investigators on page 4 provide their findings. Specifically, the Investigators state:

*This investigation finds, when reviewing the facts in light most favorable to [Roe], that probable cause exists to believe that each of the three policies **may** have been violated.*

May as defined in the Webster dictionary is to express possibility. Past tense is might.

The Investigators' responsibility is to make a preliminary determination of whether probable cause exists in their opinion. By the use of the word "may" they have fallen short and expressed doubt in their determination to determine probable cause. By the use

of the word "may" it is just as likely that probable cause may not be found. In a court of law if a judge was to determine that there **may** be probable cause for a police officer to make a traffic stop then the court is ultimately making a determination that the officer did not have probable cause because the state failed to meet their burden of probable cause. The Investigator's role is to determine probable cause. They were unable to do so and therefore by the rules of the University of Dayton in the Student Handbook this matter should never have been referred to the UHB for further hearing. This is a violation of the procedures and policies of the University.

4. Denied Right To Use Bulletin Boards In Presentation To The Board

On November 29, 2016 [Doe] met with Max Sullivan to review the procedures of the hearing. At that meeting he informed me that I was required to submit my questions and any information I would like the Board to consider within three business days of November 29. (I was later informed that Mr. Sullivan was not correct and I had 5 days). I began working on information I wanted to present. Part of that information was excerpts of the Investigative Packet that I received from the University. I compiled those excerpts and attempted to use them as talking points during my presentation to the Board. I submitted the documents that I planned to use to the University within the allotted time. I was informed by the University's General Counsel that I was not permitted to use my bulletin boards to assist in the presentation of my opening and closing statement. I informed the General Counsel that there is no new evidence that I am attempting to introduce. Again, I was refused the right to use these boards to assist in my presentation. I complied with the rules set forth in the Student Handbook and was denied access to use of documents I received from the Investigators. I am a freshman in college and have had no formal public speaking training or have given any public speeches. I had asked to use these boards to help me present the facts to the hearing Board. This decision was against the rules set forth in the Student Handbook and the procedures permitted in the hearing.

5. Denied Access to Correct the Record After [Roe] Lied to the Board

During the hearing [Roe] informed the Board that she received a report from Detective Sweigart, the investigative detective. [Roe] stated that the report indicated that I never told Detective Sweigert that we had groped one another prior to sexual intercourse. The interview [Roe] was referring to was recorded and also witnessed by my attorney, Reid Yoder.

I informed the Associate Dean who conducted the hearing that [Roe] had perpetrated a fraud on the Board and had intentionally lied regarding the absence of any groping to Detective Sweigart. When a Board is presented with clear evidence that a witness has lied it is incumbent upon the person overseeing the board to correct the record. I requested that the Board allow my Attorney to testify to the statement I made to Detective Sweigart and also present his notes showing the statement of groping I made. It is impermissible for a [Roe] to first make reference to a document that I had not received in the Investigative Packet and then lie about the information included in the document. I have no recourse and do not have the tools necessary to prove to the board that [Roe] was

lying. My only recourse was to ask permission to allow my Attorney to testify that he was present during the hearing, present his notes which clearly indicate that I stated that groping had occurred. The Hearing Officer and counsel of the University refused to allow me to correct the incorrect statement made by [Roe].

6. Questions I Submitted to the Board Were Not Asked

None of the questions that [Doe] submitted were asked of any of the witnesses, including questions directed to [Roe]. I realize that in the Student Handbook the Board has discretion on what questions are to be asked. The questions must be approved by the Board and in collaboration with the Title IX Investigators. I do not believe that the Title IX Investigators were permitted to provide input on the questions to be asked. The Board is required to consider the relevance of the content, the need for the information in order to make a decision in the appropriateness of the question. The Board asked very few questions to any of the witnesses that were present. The only pattern of question that was asked to the witnesses was the witnesses level of intoxication. I compiled a list of over 100 questions with subparts to the witnesses. All of the questions I compiled I find to be relevant, would assist the board in making their decision and had not been asked previously by the Investigators or Board Members. The lack of questions to [Roe] and myself clearly show the Board had a predisposition to render a decision in favor of [Roe] prior to the hearing starting.

7. I Was Denied the Right to Submit Additional Questions to Witnesses

I was not permitted to ask any additional questions once the witnesses had testified. In accordance with the University of Dayton Student Handbook under Sexual Harassment and Harassment Code (a) cases:

During the course of the hearing, the Board will allow both parties to submit questions they would like to have asked of the other or to key witnesses… Further under subsection (b)… *I was required to be prepared to submit any questions addressing information that occurred during the hearing to the UH be after 10 to 15-minute break.*

At the conclusion of each witness testifying the University Hearing Board Chair excused each of the witnesses and informed them they are free to leave. The Hearing Board Chair prevented me from my rights that I would have to submit additional questions to the witnesses. I was prevented from exercising my rights under the Student Handbook to ask follow-up questions and submit to the Board.

8. I Requested Permission to Introduce Photographs of [Roe's] Apartment and Was Denied Access to Renderings Presented to the Investigators.

In the Investigative Packet, [R.X.] indicated that she provided [a drawing] of the apartment where [Roe] resided. That drawing was never provided in the Investigative

Packet. In order to aid the Board in providing a visual of the apartment I requested that the University allow me to use stock photographs of the apartment. I provided the stock photographs within the time allotted prior to the hearing. I was informed by University General Counsel that my photographs were not permitted. I believe this to be a violation of the Student Handbook as I was precluded from being able to share with the Board an exact rendering of the layout of the apartment and where the individual witnesses were located prior to sexual intercourse and post.

9. The Investigative Packet Made Reference to A Rape Kit Test Performed On [Roe] Which Was Not Made Available To Me

[Roe] in the Investigative Packet makes reference that she was informed that there is a slight vaginal tear at the base of her vagina. This information was shared with the Board and I was not provided an opportunity to either review the rape kit packet or permitted to question the validity of her statements. The information she presented was extremely prejudicial and should not have been permitted to go to the Board. The Investigators chose to include or exclude information as they saw fit. They did not conduct the investigation in an unbiased manner and presented a skewed version of the facts of the case. The presentation of this statement by the Investigators and decision by [Dayton] created an inherently unfair and prejudicial hearing.

10. I Requested [C.X] To Appear And Testify

I requested [C.X.] be required to testify at the hearing because I found him to be an instrumental part of the hearing. In the Investigative Packet [C.X.] stated to the Investigators that he believed that he was interrupting something between [Roe] and I. He indicated that we were standing close to one another and it did not appear that there was anything wrong. I believe this information is extremely relevant information for the Board to consider. I had requested [C.X.] to appear to provide additional clarification on what kind of moment he thought he was interrupting. Was it intimate, how close were we standing, were we embracing one another? All questions that were extremely relevant for the Board to consider. [Dayton unilaterally] making a decision not to have [C.X.] testify shows a latent bias in this matter.

11. Lack of Notification of Board Members and Whether [Roe] Would Appear in the Room

I was notified two days prior to the hearing that [Roe] would be present in the room. I also was required to request for a second time the names of the Board Members from Max Sullivan. He provided me the names on December 6, just three days before the Hearing. I was not afforded ample time to research the individual Board Members to determine whether there were any conflicts. When I requested my counsel to reach out to

Debra Monk to determine whether any Board Members knew [Roe] or Witnesses we received the below response:

> Mr. Yoder,
> Our board is trained to remove themselves if there is any conflict of interest. They have been notified of the names involved in the case and have indicated that they are prepared to serve. However, if [Doe] believes there to be any conflict with any of the board members he should contact me as soon as possible and illustrate his concern.
> Debra Monk

My question was not answered and instead I received a response from Ms. Monk indicating that if there was a conflict the Board Members have been trained to remove themselves. It appears that Ms. Monk places the onerous on me to determine whether there is a conflict and bring it to her attention instead of asking each Board Member directly if there was a conflict. I was not provided with ample time to determine whether there was a conflict. I believe I should have been provided the Board Members names prior to three days from the hearing.

12. The Board Lost Their Way and Did Not Follow Procedures of the University During the Hearing

The written opinion of the Board discussing the reason for their findings stated that the kissing was consistent with the two individual statements ([Roe's] and mine). **This was completely incorrect**. The statements of [Roe] both during her interview with the Investigators and statement at the Hearing were completely contradictory to my statement. [Roe] testified that it was nonconsensual kissing and I "came on to her". I have always testified that both [Roe] and I began kissing each other at the same time and that it was consensual. The Board was evidently lost and did not follow or understand the evidence that was presented during the hearing. This is obvious based on their decision. The Board chose to make their own decisions without applying the actual evidence of the case.

13. Letter of Recommendation and References

I submitted letters of references and recommendations to the Investigators during the course of their investigation. To my knowledge the Board did not consider these references or read any of them. When we asked how long the Board deliberated to Ms. Monk stated she I do not know. "I did not have my watch on me". Again, this shows a deliberate disregard for my rights to have a fair and impartial hearing. I was not requesting a specific period of time of the deliberations but wanted to obtain an idea of how much time the Board put into their decision. I was refused even that simple request. I know that a University of Dayton basketball player who was accused of nonconsensual sexual intercourse received a one-month suspension. The Board never considered my references or the recommendations that I received. This is a violation of my rights and the contract I have with [Dayton].

II. Newly discovered evidence:[13]

I have discovered that two of the Board Members have watched and publicly supported the CNN documentary, "The Hunting Ground." "The Hunting Ground" is a documentary showcasing the rape culture of fraternities in America. There have been numerous articles written about the documentary disputing the statistics used and the sensationalism demonstrated. I believe their public support and passion for this topic biased them in favor of [Roe] before any evidence was ever presented. Furthermore, the advocacy and support they have shown for the Hunting Ground clearly demonstrates their biased predisposition. As evidenced by Becky Krakowski's acknowledgment of Claire Schlauch Pacifico's comment referencing masturbation in the alternative of sexual assault. *See, Exhibit 37* (containing Doe's Appeal).

90. On January 11, 2017, Monk acknowledged Doe's Appeal while rejecting his request that a "new board [to] be convened." *Exhibit 2*, p.64 (containing Monk's Jan. 11. 2017 email to Doe). Moreover, instead of submitting Doe's appeal to Dayton's CRC, Monk told Doe his appeal would be handled by the JRC. *Id.* And, Monk told Doe that he could listen to the audio recording on his disciplinary hearing and draft questions he would like to be asked of various witnesses. *Id.* Monk gave Doe until 4:30 pm on January 17, 2017 to listen to the audio. *Id.* In response, Doe sent Monk an email to Monk which stated in part:

> " . . . .[m]y schedule precludes me from being on campus prior to Monday January 16. I would like to listen to the recordings on January 20, at 10:30 AM and submit my questions on January 23. Thank you." *Exhibit 2*, p.69 (containing Doe's January 12, 2017 email to Monk).

91. Monk responded to Doe's January 12, 2017 by stating:

> "*You will only be permitted to have one hour after listening to the witness recordings to submit your questions*. *That will occur live here in our office as it would have during the hearing*. Your deadline was set for January 17, 2017 and I indicated I would allow for an extension if there was good reason as to why you would not be able to take (sic) of it by then. Can you share with me your reason for not being able to schedule to listen and submit on Tuesday December (sic) 17, 2017 (sic). If so, please indicate as much as that I can consider the extension." *Exhibit 2*, p.66-67 (containing Yoder's Jan. 13, 2017 email to Dayton's attorney with excerpts from Monk's Jan. 12, 2017 email to Doe)(emphasis added).

[13]*See generally, Supra*¶68 (discussing Krakowski and Pacifico's referenced anti-male bias posts).

92. In response to Monk's arbitrary and capricious deadline and time limitation, Yoder contacted Dayton's attorney to notify her of the inaccuracies in Monk's communication and to inquire about why Dayton was violating Doe's rights by imposing arbitrary rules and deadlines. Specifically, Doe's attorney wrote in part:

> ". . . . Please advise why my client has one hour after listening to the witnesses' recordings to submit questions. I have thoroughly reviewed the Student Handbook and have failed to find any rule establishing a one-hour parameter. I was planning on listening to the recordings with [Doe] and comparing them to the notes that I took during the hearing. To limit a student to one hour is unreasonable, not to mention there was never a time restriction mentioned prior to this communication. Furthermore, Ms. Monk indicates she 'would allow for an extension if there good reason as to why [Doe] would not be able to take (sic) of it by then.' . . . Ms. Monk fails to mention my client being required to show 'good reason.' This is another example of the Administration conducting this hearing not in accordance with the rules of the University and not in good faith. You can understand my client's reluctance to provide any personal information to the Administration after the way he has been treated. The inconsistent requests from Ms. Monk continue to demonstrate a lack of fair and impartial handling of this matter. I am requesting that [Doe's] original request to listen to the recordings on January 20, 2017 and submit questions on January 23, 2017, be honored." *Id.*, p.66-68.

93. Dayton rejected Yoder and Doe's requests to remedy the violations of Dayton's Policies. Nevertheless, on January 17, 2017, Doe submitted the following questions for Dayton's JRC to ask of Swinton, D.S., E.B., M.H., R.X., R.S., and C.K.:

[Questions for D.S.]

1. Did [Roe] appear intoxicated? if so to what level? Was she having any problems walking, talking?
2. Did it appear to you that [Roe] was coming on to him?
3. Have you been out with [Roe] before?
4. What is her general demeanor?
5. If you have been out and saw [Roe] would you describe her as an aggressive woman?
6. Did it appear to you that [Doe] was coming on to [Roe]?
7. Did it appear to you that [Doe] was intoxicated?

[Questions for E.B.]

1. When [Doe] and [Roe] were on the couch at Stonemill did you notice whether [Roe] was holding [Doe]'s hand?
2. Did you notice whether [Roe] appeared to be interested in [Doe]?

3. Do you know any reason why [Roe] would have not remembered that she went to Stonemill with [Doe]?
4. Can you please tell us how much [Roe] had to drink in your presence that day?
5. Were you with [Roe] when she bought champagne? How many bottles did she buy?
6. Were you with [Roe] when she bought a case of bud light platinum? If so when did she buy it? How much of the case did she consume?
7. Did you ever witness [Roe] beer bonging bud light platinum or any other alcohol that day or evening?
8. Did you communicate with [Roe] regarding why she texted you about your presence on Brown street? If so why did she need to find out if you were with her?
9. Have you and [Roe] spoke about the incident after you testified at the hearing? If so, what did she tell you?
10. When walking to Brown Street you indicate [Roe] might have been holding [Doe]'s hand do you know who initiated that contact?
11. Did it appear [Roe] was interested in [Doe] while walking to Brown street?
12. Did you hear [Roe] asking [Roe] to go back to her house to eat their food?
13. How would you describe [Roe]'s demeanor? Quiet? Reserved? Or aggressive? Loud? In control?
14. You mentioned that you have known [Roe] for a while, you describe her as being friendly and talkative. Based on your relationship, have you known [Roe] to take men home and have sex with them?
15. Did you ever receive any text communication from [Roe] that evening? If so what was the content of those messages?

[**Questions for M.H.**]

1. You indicate that [Roe] had "a lot to drink and was acting loosely" how many drinks did you see her consume? And over what period of time?
2. Describe for us what you mean by "acting loosely" was she stumbling, slurring words, using profanity? Being loud? Laughing hysterically?
3. You mention that [Roe] showed her tattoos, did you or someone in the party ask for her to do so? Can you please elaborate on the significance and location of the tattoos?
4. When [Roe] revealed her tattoos did she remove or lift up items of clothing? If so, did she reveal any private parts?

[**Questions for R.X**]

1. Have you spoken with [Roe] after your testimony at the hearing regarding this matter? If so, what did she tell you?
2. Had you been drinking throughout the day?
3. Did you smoke any marijuana that day?
4. Do you believe you were intoxicated at the time of the incident?
5. Please tell us exactly what [Roe] told you that evening in detail.
6. Did you ever hear [Roe] say that she felt that she had been raped?
7. Did you suggest that [Roe] call her mother?
8. Did [Roe] appear to be intoxicated when she was telling you her story?

9. Did [Roe]'s alarm on her phone ever go off after [Doe] left?
10. Has [Roe] ever claimed someone raped her before to your knowledge?
11. Did you ever receive any text communication from [Roe] that evening? If so what was the content of those messages?

[**Questions for R.S.**]-

1. After your girlfriend had left, did you talk to [Doe] about what happened?

[**Questions for C.K.**]-

1. How much direct communication did you have with [Roe] when she returned to the apartment? You indicate she seemed sober to you, why do you think that?
2. Were you at the apartment earlier in the day when [Roe] was drinking with [Witness] and others? If so, how much did you see her drink?
3. Did you ever receive any text communication from [Roe] that evening? If so what was the content of those messages?
4. What period of time did you consume the six beers? Did you also consume marijuana?
5. Did it appear to you that [Roe] was interested in [Doe]?
6. Did it appear to you that [Roe] was not comfortable with [Doe]?
7. Did you ever hear [Roe]'s alarm on her phone go off after [Doe] left?
8. Describe in detail what exactly you recall [Roe] told you in regards to the incident.
9. Who suggested going to the hospital that evening?
10. Who suggested calling the police that evening?
11. Have you spoke with [Roe] about this incident? If so, how many times?
12. How many people has [Roe] told her story to?
13. Do you know the names of the people [Roe] has spoken with about the incident?
14. Can you hear talking in [Roe]'s room when you are in your room?

[**Questions for Swinton**]

1. After hearing your testimony of the witnesses does it change your opinion about [Roe]'s level of intoxication and the effect it had on her memory?
2. During the course of your investigation did you attempt to determine how many alcoholic beverages [Roe] had consumed that evening?
3. When making you determination that there may be probably cause did you take into consideration [Roe]'s recall over large periods of time as well as her conversations?
4. Did you ever follow up with [Witness] regarding the text that she received from [Roe] the next day?
5. During the course of your investigation did you ask to view electronically stored information in [Roe]'s phone?
6. In your investigation, what weight did you give [Doe]'s polygraph results?
7. During the course of your questioning of [Roe] did you inquire how [Doe] was physically able to remove her clothes without consent?
8. During the course of your investigation did you review timelines of the parties to see accuracy in the provided statements. *Id.*, p.73-77.

94. Two days later, on January 19, 2017, Monk provided Doe with the JRC decision which stated:

> "Wednesday, January 18, 2017 the [JRC] convened the original University Hearing Board (UHB) members in your case to review the questions submitted for their consideration.
>
> The UHB carefully reviewed all questions submitted and determined that none of those questions would provide additional information that could alter the determinations already made with regards to a code violation of sexual harassment for based on non-consensual sexual intercourse. This conclusion was presented back to the JRC who then indicated that the original decision by the University Hearing Board in this case stands.
>
> This concludes the appeal process . . . you are not permitted on University property or to attend any University event without prior permission from the Dean of Students office . . . ."*Id.*, p.78-79 (containing Monk's January 19, 2017 email to Doe which included the JRC's rejection of Doe's appeal).

Violations of Doe's Rights under Dayton Policies and/or Title IX Rights

95. As detailed in part Doe's appeal in ¶89, the conduct of Swinton and the Dayton employees involved in Doe's erroneous discipline violated Doe's rights under Dayton Policies and Title IX. This conduct also violated OCR's guidance regarding the credibility of the parties and the presence of corroborating evidence. *See e.g., OCR's Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* ("OCR's Sexual Harassment Guide") (January 2001). *https://www.federalregister.gov/documents/2001/01/19/01-1606/revised-sexual-harassment-guidance-harassment-of-students-by-school-employees-other-students-or.* (accessed 4/3/17).[14] For example, OCR's Sexual Harassment Guide recommends evaluating the "relative credibility" of evidence by looking at the level of detail and consistency of each person's account . . . in an

[14] This Court acknowledged the appropriateness of Dayton incorporating OCR directives into Dayton's adjudication of allegations of sexual misconduct. *See, Exhibit XX*, pageid.694 (containing *Pierre v. University of Dayton* No.3:15-cv-362, Docket 30 (W.D.S.D.OH. March 27, 2017) (rejecting a plaintiff's breach of contract claim in part because Dayton's "use of the "preponderance of evidence standard of proof is directed by" OCR).

attempt to determine who is telling the truth. Another way to assess credibility is to see if corroborative evidence is lacking where it should logically exist." *Id.,* p. 9. Dayton's conduct detailed in this Complaint details how Dayton failed to follow these recommendations.

96. As detailed in this Complaint, Swinton and Dayton also violated at least the following OCR's mandates requiring Dayton:

a) " . . . . provide due process to the alleged perpetrator "*U.S. Dep*'t Of Education Office of Civil Rights, *Dear Colleague Letter,* (Apr. 4. 2011); http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html

b) Employ "[*p]rocedures* that . . . will lead to sound and supportable decisions." *U.S. Dep*'t Of Education Office of Civil Rights. *OCR's Sexual Harassment Guide* (emphasis added).

c) Provide "[a]dequate, reliable, and impartial *investigation* of complaints, including the opportunity to present witnesses and other evidence"; and

d) Implement "adequate training as to what conduct constitutes sexual harassment, which includes "alleged sexual assaults." *Id.,* 20-21 (emphasis added).

97. Dayton and Swinton also violated Dayton Policies by allowing Hearing Board Members to receive an Investigation Report tainted with Swinton and Bokota's credibility determinations. *See e.g., Supra,* ¶90 (discussing same). This occurred even though Swinton and Bokota's report stated their "investigation is tasked *not* with rendering credibility determinations or a final finding, rather with rendering a probable cause determination as to whether the case should be referred to the Office of Community Standards and Civility for an Accountability Hearing or whether the case should be closed with no further disciplinary action taken." *See, Exhibit 33,* p.33 (containing Investigation Report). Therefore, upon information and belief, Dayton's erroneous discipline of Doe was caused in part by Dayton's reliance on credibility determinations contained in the Investigation Report.

98. Swinton and Bokota's Investigation Report also stated they would "determine whether probable cause exists to believe that the Nondiscrimination and Anti-Harassment policy may have been violated." *Id.* But, as detailed in detailed in ¶90 above, the Investigation Report did not determine whether probable cause existed. Rather, Swinton and Bokota merely determined probable cause "may" have existed with regard to whether Doe violated Dayton Policies. *Id.* p.33.

99. As a result, Dayton violated Dayton Policies in part because these policies required a definitive "probable cause" finding *prior* to the scheduling of Doe's disciplinary hearing. *Exhibit 2,* p.75 (stating: ". . . .Title IX/504 Coordinator and Equity Compliance Officer will initiate a prompt, thorough and impartial investigation by trained Title IX investigators to determine *whether probable cause exists* to believe that the Sexual Harassment Policy may have been violated.") (emphasis added).

100. As detailed in part in ¶90 above, Doe repeatedly put Dayton on notice that Dayton's investigation and disciplinary proceeding violated Dayton Policies and Title IX. Yet, as detailed in this Complaint, Dayton allowed its anti-male bias to motivate the violation of Dayton Policies, and Title IX.

101. In rejecting a male student's breach of contract claim against Dayton, this Court's *Pierre* decision relied in part on constitutional due process decisions addressing the rights of a male student to engage in cross-examination. *See e.g., Exhibit 32,* pageid.695 (dismissing male student's breach of contract claim allegations related to an alleged inability to cross-examine witnesses during his disciplinary proceeding in part because plaintiff "did not even attempt to ask questions of the Complainant or any other witnesses" during his disciplinary proceeding). For

example, *Pierre* relied on the Sixth Circuit's *Cummins* decision. *See, e.g., Id.,* pageid.689 (discussing *Doe v. Cummins*, 662 F. App'x 437, 451 (6th Cir. 2016).

102. But, Dayton's decision not to ask any of Doe's questions detailed above violated Dayton Policies and Title IX because this decision was motivated in part by the gender-bias detailed in this Complaint. *See, e.g., Doe v. Cummins*, No. 16-3334, 2016 WL 7093996, *10 (6th Cir. Dec. 6, 2016) (determining the complete denial of a college student's rights to cross examination could trigger a valid due process claim if the student's potential disciplinary penalties involved "[l]ong[] suspensions or expulsions.") (discussing *Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987*) (quoting *Goss v. Lopez*, 419 U.S. 565, 584 (1975); *Doe v. The Ohio State Univ.*, Case No. 2:15-cv-2830 2016 WL 6581843, *11 (S.D. Ohio Nov. 7, 2016) (noting where a disciplinary proceeding depends on 'a choice between believing an accuser and an accused . . . cross-examination is not only beneficial, but essential to due process.") quoting *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005)).

103. In evaluating a breach of contract claim, this Court's Pierre decision also noted: "[t]he proper focus in analyzing whether a private university provided fundamental fairness is whether the University adhered to its misconduct procedure. . . is whether the proceedings fell within the range of reasonable expectations of one reading the relevant rules, an objective reasonableness standard. See e.g., Exhibit 32, pageid.690 (discussing Doe v. Amherst College, 3:15-cv-30097, Doc. 38 at 23 (D. Mass. Oct. 5, 2015) and Walker v. President & Fellows of Harvard Coll., 82 F.Supp. 3d 524, 530 (D. Mass. 2014)).

104. Upon information and belief, a reasonable student at Dayton would expect Dayton's Policies allowed Doe to receive responses to the questions he sought to ask of Roe and various witnesses. Evidence supporting this belief includes, but is not limited to, this Court's

Pierre decision which suggests that a plaintiff's complaint would not have been dismissed if: (a) that plaintiff presented Dayton with written questions he wanted asked during his disciplinary proceeding, and (b) Dayton refused to ask these questions.

105. With regard to Doe's letters of character detailed in ¶82, DSH states: ". . . . letters of character may be submitted to the board for review upon deliberation of consequences. Character letters will only be accepted when they address the character of the student submitting the letter." Exhibit 2, p.54. Here, upon information and belief, the direct and Indirect Gender Bias evidence detailed in this Complaint caused Dayton employees to disregard Doe's letters of character in violation of Doe's rights under Dayton's Policies and Title IX.

106. As detailed herein, the procedural violations that permeated Doe's disciplinary process, combined with a discriminatory bias against males and the underlying motive to protect Dayton's reputation and financial wellbeing led to an erroneous finding of sexual misconduct against John Doe. This occurred even though to ensure a fair and impartial proceeding, "[e]ach case must be decided on its own merits, according to its own facts. If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to *defend himself and an impartial arbiter to make that decision." Doe* v. *Brandeis Univ.*, 177 F. Supp. 3d 561 (D.Mass. 2016) (emphasis added).

107. Based on the facts detailed in this Complaint, anti-male gender bias motivated Swinton and the Dayton employees involved in Doe's disciplinary proceeding to engage in a procedurally flawed and superficial adjudication which was neither independent nor impartial.

108. Swinton and Dayton allowed anti-male bias to improperly place the burden of proof on Doe, in part by: (a) accepting at face value Roe's allegations, notwithstanding her inconsistent statements and contradictory evidence; (b) intentionally overlooking any evidence

tending to diminish Roe's credibility and/or exculpate Doe; and (c) rejecting third-party witness testimony of Doe's innocence even though this testimony disproved Roe's false allegations against Doe.

109. Based on the facts detailed in this Complaint, Swinton and Dayton manifest conduct that presumed John Doe was presumed guilty while characterizing Jane Doe as the "victim". However, "whether someone is a "victim" is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning." *Doe v. Brandeis* Univ., 177 F. Supp. 3d 561 (D. Mass. 2016).

Damages Caused by Defendants

110. Because of Defendants' conduct detailed in this Complaint, Doe has been diagnosed with PTSD by a medical professional whom Doe is currently seeing on a regular basis. The symptoms of Doe's PTSD include, but are not limited to, flashbacks related to Defendants' conduct, depression, and difficulty sleeping and interacting socially. Doe has been prescribed medications to address anxiety and depression caused by Defendants.

111. Dayton's erroneous discipline and Swinton's conduct detailed above caused Doe's application for admission to University of Mississippi to be denied.

112. Dayton's erroneous discipline and Swinton's conduct detailed above caused a college football coach to terminate his interest in recruiting Doe after initially wanting to recruit him based on game files of Doe playing football.

113. As a direct and proximate result of Defendants' conduct detailed in this Complaint, Doe has suffered and will continue to suffer mental anguish, personal humiliation, and a great loss of reputation, loss of employment opportunities and/or wages, reduced future earning capacity, attorneys' fees, and other direct and consequential damages.

114. As a direct and proximate result of Dayton and Swinton's conduct detailed in this Complaint, Doe has suffered and will continue to suffer loss of educational opportunities and difficulty in gaining entrance to another university comparable to Dayton.

Count 1 – Defamation Per Se
(Against Roe)

115. Doe hereby incorporates by reference the aforementioned allegations contained in this Complaint as though fully set forth herein.

116. Roe knew and intended Roe's Non-Privileged Defamation to be heard and/or read by persons in the City of Dayton, and the State of Ohio and intended Roe's Non-Privileged Defamation to damage Doe's personal and professional reputation.

117. Roe made Roe's Non-Privileged Defamation with actual malice and reckless disregard of their falsity, or with knowledge of their falsity.

118. Roe's Non-Privileged Defamation related to this count were not made by Roe in support of any complaint she filed against Doe with Dayton or any governmental or quasi-governmental body. Rather, Roe's Non-Privileged Defamation related to this count are: (a) completely unrelated to any complaint Roe made about Doe to Dayton or any governmental or quasi-governmental body; and (b) were not made in the presence of Dayton employees or any other governmental or quasi-governmental body involved in an action against Doe.

119. As a direct and proximate result of Roe's Non-Privileged Defamation, Doe suffered and will continue to suffer the damages detailed above.

Count 2 – Defamation *Per Quod*
(Against Roe)

120. Doe hereby incorporates by reference the aforementioned allegations contained in this Complaint as though fully set forth herein.

121. Roe knew and intended Roe's Non-Privileged Defamation to be heard and/or read by persons in the City of Dayton, and the State of Ohio and intended Roe's Non-Privileged Defamation to damage Doe's personal and professional reputation.

122. Roe made Roe's Non-Privileged Defamation with actual malice and reckless disregard of their falsity, or with knowledge of their falsity.

123. Roe's Non-Privileged Defamation related to this count were not made by Roe in support of any complaint she filed against Doe with Dayton or any governmental or quasi-governmental body. Rather, Roe's Non-Privileged Defamation related to this count are: (a) completely unrelated to any complaint Roe made about Doe to Dayton or any governmental or quasi-governmental body; and (b) were not made in the presence of Dayton employees or any other governmental or quasi-governmental body involved in an action against Doe.

124. As a direct and proximate result of Roe's Non-Privileged Defamation, Doe suffered and will continue to the damages detailed above.

WHEREFORE, with regard to Counts 1-2, Doe demands judgment against Roe as follows:

(a) For actual, special, and compensatory damages, including Doe's legal fees, in an amount to be determined at trial but in no event less than $75,000.00;

(b) For punitive damages in an amount sufficient to deter Roe from conducting similar future conduct but in no event less than $100,000;

(c) Judgment for attorneys' fees, pursuant any applicable statute;

(d) Judgment for all other reasonable and customary costs and expenses that were incurred in pursuit of this action;

(e) Pre-judgment interest and post judgment interest as may be permitted by law and statute; and/or

(f) Such other and further relief as this Court finds just and equitable.

Count 3 -Breach of Contract
(Against Dayton)

125. Doe hereby incorporates by reference the aforementioned allegations contained in this Complaint as though fully set forth herein.

126. Doe applied for and enrolled at Dayton and, with the assistance of his parents, paid tuition and other fees and expenses. Doe did so in reliance on the understanding, and with the reasonable expectations, among others, that: (a) Dayton would implement and enforce Dayton Policies, and (b) Dayton Policies would comply with the requirements of applicable law, including Due Process and Title IX.

127. Dayton Policies create an express contract, or, alternatively, a contract implied in law or in fact between Doe and Dayton.

128. As set forth in this Complaint, Dayton repeatedly and materially breached Dayton Policies and Doe's rights under Title IX incorporated into Dayton's Policies.

129. During all times relevant to this Complaint, Doe did all, or substantially all, of the significant things Dayton Policies required he do. All of the foregoing breaches of contract were wrongful, without lawful justification or excuse, prejudicial, and were part of an effort to achieve a predetermined result in Doe's case: a finding of Responsible for sexual misconduct. As a direct and foreseeable result of these breaches of contract, Doe has sustained, and will continue to sustain, the damages detailed above.

WHEREFORE, with regard to Count 3, Doe demands judgment against Dayton as follows:

(a) For actual, special, and compensatory damages, including Doe's legal fees, in an amount to be determined at trial but in no event less than $75,000.00;

(b) For punitive damages in an amount sufficient to deter Roe from conducting similar future conduct but in no event less than $100,000;

(c) Judgment for attorneys' fees, pursuant any applicable statute;

(d) Judgment for all other reasonable and customary costs and expenses that were incurred in pursuit of this action;

(e) Pre-judgment interest and post judgment interest as may be permitted by law and statute; and/or

(f) Such other and further relief as this Court finds just and equitable.

Count 4 -
Violation of Title IX –Hostile environment sexual harassment and/or discrimination
(Against Dayton)

130. Doe hereby incorporates by reference the aforementioned allegations contained in this Complaint as though fully set forth herein.

131. Pursuant to 20 U.S.C. § 1681, Title IX is a federal statute designed to prevent sexual discrimination and/or harassment in educational institutions receiving federal funding.

132. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, applies to all public and private educational institutions that receive federal funds, including colleges and universities. The statute prohibits discrimination based on sex in a school's "education program or activity," which includes all of the school's operations. Title IX provides in pertinent part: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The United States Supreme Court has held that Title IX authorizes private suits for damages in certain circumstances.

133. Dayton receives federal financial assistance and is thus subject to Title IX.

134. Title IX includes an implied private right of action, without any requirement that administrative remedies, if any, be exhausted. An aggrieved plaintiff may seek money damages and other relief.

135. Both the DOE and the DOJ have promulgated regulations under Title IX that require a school to "adopt and publish grievance procedures providing for the prompt and equitable resolution of student…complaints alleging any action which would be prohibited by" Title IX or its regulations. 34 C.F.R. § 106.8(b) (Department of Education); 28 C.F.R. § 54.135(b) (Department of Justice).

136. Title IX mandates Dayton afford equitable procedures and due process to Doe which includes, but is not limited to those detailed in this Complaint.

137. Dayton knew, or in the exercise of due care should have known, that Dayton lacked jurisdiction under Dayton Policies to investigate and/or discipline Doe after there was no finding of probable cause to investigation, only an insufficient finding that there "may" be probable cause.

138. Upon information and belief, Dayton knew, or in the exercise of due care should have known, that Dayton employees involved in adjudicating Roe's complaint against Doe received gender biased training regarding Title IX which caused them to violate Doe's rights under Title IX and/or Dayton Policies as detailed in this Complaint.

139. Dayton's policies fail to meet the standards required by Title IX and/or Constitutional safeguards as interpreted by United States Courts regarding how institutions of higher education conduct disciplinary proceedings.

140. Upon information and belief, in virtually all cases of campus sexual misconduct by Dayton, the accused student is male and the accusing student is female.

141. Dayton created an environment in which male students accused of sexual assault, such as Doe, are fundamentally denied their rights under Title IX and/or Dayton Policies so as to be virtually assured of a finding of Responsible. Such a biased and one-sided process deprives male Dayton students like Doe of educational opportunities based on their gender.

142. Upon information and belief, Dayton's investigation and/or discipline of Doe was taken to demonstrate to DOE, DOJ, OCR, President Obama's Administration, and/or the general public that Dayton: (a) is aggressively disciplining male students accused of sexual assault, and (b) providing females involved in sexual misconduct proceedings with preferential treatment not provided to males.

143. Dayton had actual or constructive knowledge that its investigation and/or discipline of Doe posed a persuasive and unreasonable risk of gender discrimination with regard to Doe.

144. Dayton's actions and inactions detailed above and below set in motion a series of events that Dayton knew, or reasonably should have known, would cause Dayton's male students, such as Doe, to suffer unlawful gender discrimination.

145. Dayton's investigation and/or discipline of Doe is discriminatory and based upon or motivated by Doe's male gender.

146. Dayton's employees unlawfully failed to exercise the authority to institute corrective measures to remedy: (a) Dayton's violations of Doe's rights under Dayton Policies, Title IX, and/or guidance promulgated by OCR; and/or (b) Dayton's unlawful determination that Doe violated Dayton Policies which Dayton adopted pursuant to federal laws and regulations related to Title IX.

147. Dayton's employees exhibited deliberate indifference by refusing to remedy: (a) Dayton's violations of Doe's rights under Dayton Policies, Title IX, and/or guidance promulgated by OCR, and/or (b) Dayton's erroneous determination that Doe violated Dayton Policies which Dayton adopted pursuant to federal laws and regulations related to Title IX.

148. Dayton's deliberate indifference caused Doe to suffer sexual harassment and/or discrimination so severe, pervasive or objectively offensive that it deprived Doe of access to educational opportunities or benefits and caused other harms detailed in this Complaint.

149. Upon information and belief, Dayton possesses additional documentation evidencing its unlawful pattern of gender-biased decision making which provides preferential treatment to female students who falsely accused male students like Doe of sexual misconduct.

150. Upon information and belief, Dayton possesses additional documentation evidencing their refusal to discipline female students who were alleged to have sexually assaulted male students.

151. As a direct result of Dayton's violations of Doe's rights under Title IX and/or Dayton Policies, Doe has suffered and will continue to suffer the damages detailed above.

152. Dayton's hostile environment, sexual harassment and/or discrimination caused Doe to be damaged in an amount to be determined at trial.

Count 5 -Violation of Title IX – Deliberate Indifference
(Against Dayton)

153. Doe hereby incorporates by reference the aforementioned allegations contained in this Complaint as though fully set forth herein.

154. Dayton's employees acted with deliberate indifference towards Doe because of his male gender.

155. Dayton's employees unlawfully failed to exercise the authority to institute corrective measures to remedy: (a) Dayton's violations of Doe's rights under Dayton Policies, Title IX, and/or guidance promulgated by OCR, and/or (b) Dayton's erroneous determination that Doe violated Dayton policies which Dayton adopted pursuant to federal laws and regulations related to Title IX.

156. Dayton's employees exhibited deliberate indifference by refusing to remedy: (a) Dayton's violations of Doe's rights under Dayton Policies, Title IX, and/or guidance promulgated by OCR, and/or (b) Dayton's erroneous determination that Doe violated Dayton Policies which Dayton adopted pursuant to federal laws and regulations related to Title IX.

157. Upon information and belief, Dayton possesses additional documentation evidencing their gender based deliberate indifference towards Doe and/or other similarly situated male students.

158. Dayton's deliberate indifference caused Doe to suffer and continue to suffer the damages detailed above.

Count 6 -Violation of Title IX – Erroneous Outcome
(Against Dayton)

159. Doe hereby incorporates by reference the aforementioned allegations contained in this Complaint as though fully set forth herein.

160. Dayton's employees unlawfully disciplined Doe because of his male gender.

161. By erroneously disciplining Doe, Dayton violated Dayton Policies, Title IX, and/or guidance promulgated by OCR regarding Title IX.

162. Dayton's employees unlawfully failed to exercise the authority to institute corrective measures to remedy: (a) Dayton's violations of Doe's rights under Dayton Policies, Title IX, and/or guidance promulgated by OCR, and/or (b) Dayton's erroneous determination that Doe violated Dayton Policies which Dayton adopted pursuant to federal laws and regulations related to Title IX.

163. Dayton's employees exhibited deliberate indifference by refusing to remedy: (a) Dayton's violations of Doe's rights under Dayton Policies, Title IX, and/or guidance promulgated by OCR, and/or (b) Dayton's erroneous determination that Doe violated Dayton Policies which Dayton adopted pursuant to federal laws and regulations related to Title IX.

164. Dayton's conduct detailed in this Complaint involved arbitrary and capricious violations of Ohio law.

165. Upon information and belief, Dayton possesses additional communications evidencing Dayton's erroneous discipline of Doe based on his gender.

166. Dayton's erroneous discipline of Doe caused Doe to suffer and continue to suffer the damages detailed above.

167. Dayton's erroneous discipline of Doe entitles Doe to injunctive relief in part because Dayton's discipline of Doe is unlawful and violates Doe's rights under Dayton Policies, federal and/or state laws. For, as detailed in this Complaint, Dayton's erroneous discipline of Doe will cause irreparable harm that may be uncertain, great, actual and not theoretical. Moreover, Dayton's discipline may not be able to be remedied by an award of monetary

damages because of difficulty or uncertainty in proof or calculation. Therefore, Doe may be entitled to injunctive relief which includes, but is not limited to an Order requiring Dayton: (a) expunge Doe's official Dayton student file of all information related his encounter with Roe; (b) be barred from disclosing Dayton's aforementioned discipline of Doe to third parties in the future; and/or (c) allow Doe to immediately re-enroll at Dayton.

Count 7 -Violation of Title IX – Selective Enforcement
(Against Dayton)

168. Doe hereby incorporates by reference the aforementioned allegations contained in this Complaint as though fully set forth herein.

169. As detailed in this Complaint, Dayton violates Title IX's prohibitions against engaging in the "selective enforcement" of Dayton Policies on the basis of gender. *See e.g., Marshall v. Indiana Univ.*, Case No. 1:15-cv-00726, 2016 U.S. Lexis 32999, *19 (S.D. Ind. Mar. 15, 2016) (emphasis in original) (citing *Routh v. Univ. of Rochester*, 981 F. Supp. 2d 184, 211-12 (W.D.N.Y. 2013) (stating that "selective enforcement" liability under Title IX occurs when a plaintiff "allege[s] facts sufficient to give rise to the inference that the school intentionally discriminated against the plaintiff *because of* his or her sex"). In addressing a selective enforcement claim raised by a male student in a similar situation to Doe, the Second Circuit noted "selective enforcement" theory requires that the school's "decision to initiate the proceeding" or the "severity of the penalty" "was affected by the student's gender" without regard to guilt. *Yusuf v. Vassar College*, 35 F. 3d 709, 715 (2d Cir. 1994).

170. The facts detailed in this Complaint establish that Dayton's decision to initiate the proceeding against Doe and/or or the severity of the penalty imposed on Doe was affected by the Doe's male gender - without regard to his guilt.

171. Dayton's Title IX liability to Doe caused Doe to suffer and continue to suffer the damages detailed above.

WHEREFORE, regarding Counts 4-7, Doe demands judgment and relief against Dayton as follows:

a. Damages in an amount in excess of Seventy-Five Thousand Dollars ($75,000.00) to compensate Doe's past and future pecuniary and/or non-pecuniary damages caused by Dayton's conduct;

b. Order(s) requiring Dayton to expunge Doe's official Dayton student files of all information related to his interactions with Roe;

c. Order(s) requiring Doe's reinstatement to Dayton;

d. Judgment for attorneys' fees, pursuant to any applicable statute, including Title IX;

e. Judgment for all other reasonable and customary costs and expenses that were incurred in pursuit of this action;

f. Pre-judgment interest and post judgment interest as may be permitted by law and statute; and/or

g. Such other and further relief as this court may deem just, proper, equitable, and appropriate.

Count 8 – Declaratory Judgment
(Against Dayton)

172. Doe hereby incorporates by reference the aforementioned allegations contained in this Complaint as though fully set forth herein.

173. As detailed in this Complaint, Doe has a legal tangible interest in requiring Dayton to administer Dayton Policies, Title IX, and/or OCR guidelines in a lawful manner.

174. As detailed in this Complaint, Dayton is opposing Doe's aforementioned legal tangible interest in part because of Dayton's violations of Doe's rights under Title IX and/or Dayton Policies.

175. Therefore, an actual controversy exists between Doe and Dayton concerning said legal tangible interests.

176. Judicial intervention is required because unless Dayton is enjoined, Dayton's unlawful acts will cause irreparable harm to Doe which includes, but is not limited to: (a) denying Doe the benefits of his education at Dayton; (b) damage to Doe's academic and professional reputation; and/or (c) Doe's inability to enroll at other institutions of higher education and to pursue his chosen career.

WHEREFORE, regarding Count 8, Doe demands a Declaratory Judgment that Dayton violated Doe's rights under Dayton Policies, Title IX and/or OCR regulations.

Count 9 – Breach of Contract as Third Party Beneficiary
(against NCHERM and/or Swinton)

177. Doe hereby incorporates by reference the aforementioned allegations contained in this Complaint as though fully set forth herein.

178. Doe applied for and enrolled at Dayton and, with the assistance of his parents, paid tuition and other fees and expenses. Doe did so in reliance on the understanding, and with the reasonable expectations, among others, that: (a) Dayton would implement and enforce Dayton Policies in a gender-neutral fashion; (b) Dayton Policies would comply with the requirements of applicable law, including, but not limited to Title IX; and (c) that if Doe were alleged to have violated Dayton's Policies that any contract - such as the DAYTON/NCHERM Contract - would be implemented so as to honor Doe's rights under Dayton Policies and applicable law, including, but not limited to, Title IX.

179. Upon information and belief, the parties to the DAYTON/NCHERM Contract contemplated Doe being a Third-Party Beneficiary to the Contract.

180. The DAYTON/NCHERM Contract contains an implied covenant of good faith and fair dealing. NCHERM and Swinton violated those covenants by, among other things, allowing anti-male bias to motivate Swinton's mishandling of components of Dayton's disciplinary proceeding against Doe.

181. During all times relevant to this Complaint, Doe did all, or substantially all, of the significant things the DAYTON/NCHERM Contract required he do.

182. All of the foregoing breaches of the DAYTON/NCHERM Contract were wrongful, without lawful justification or excuse, prejudicial, and were part of an effort to achieve predetermined result in Doe's case - a finding of responsible for sexual misconduct. As a direct and foreseeable result of these breaches of contract, Doe has sustained, and will continue the damages detailed above.

WHEREFORE, with regard to Count 9, Doe demands judgment against NCHERM and/or Swinton as follows:

(a) For actual, special, and compensatory damages, including Doe's legal fees, in an amount to be determined at trial but in no event less than $75,000.00;

(b) Judgment for attorneys' fees, pursuant any applicable statute;

(c) Judgment for all other reasonable and customary costs and expenses that were incurred in pursuit of this action;

(d) Pre-judgment interest and post judgment interest as may be permitted by law and statute; and/or

(e) Such other and further relief as this Court may deem just, proper, equitable, and appropriate.

Count 10 - Promissory Estoppel
(Against Dayton, NCHERM and Swinton in the alternative to
Doe's Breach of Contract and/or Negligence Claims)

183. Doe hereby incorporates by reference the aforementioned allegations contained in this Complaint as though fully set forth herein.

184. As described in this Complaint: (a) Doe detrimentally relied on Dayton's promises to adjudicate Roe's false allegations of sexual misconduct in accordance with Dayton Policies and applicable law including, but not limited to, Title IX; (b) Doe detrimentally relied on promises contained in the DAYTON/NCHERM Contract to which he was a Third-Party Beneficiary; (c) Doe's detrimental reliance on these promises and subsequent damages detailed in this Complaint for Dayton, Swinton, and/or NCHERM's breaches of these promises were foreseeable to Dayton, Swinton, and/or NCHERM.

185. Dayton, NCHERM and/or Swinton's breaches caused Doe the damages detailed above in an amount to be determined at trial.

Count 11 - Negligence
(Against Dayton, NCHERM and Swinton in the alternative to
Doe's Breach of Contract and/or Promissory Estoppel Claims)

186. Doe hereby incorporates by reference the aforementioned allegations contained in this Complaint as though fully set forth herein.

187. As described in this Complaint: (a)Dayton, NCHERM, and/or Swinton owed Doe a duty to honor the provisions of Dayton Policies and/or the DAYTON/NCHERM Contract; (b) Dayton, NCHERM, and/or Swinton breached those duties by, among other things: conducting disciplinary proceedings that violated Doe's rights under Dayton Policies and/or the DAYTON/NCHERM Contract; and (c) Dayton, NCHERM, and/or Swinton's breaches of these duties is the cause in fact and legal cause of Doe's injuries detailed above.

188. Dayton, NCHERM, and/or Swinton's negligence caused Doe to suffer and continue to suffer the damages detailed above.

WHEREFORE, with regard to Counts 10-11, Doe demands judgment against Dayton, NCHERM and/or Swinton as follows:

(a) For actual, special, and compensatory damages, including Doe's legal fees, in an amount to be determined at trial but in no event less than $75,000.00;

(b) Order(s) requiring Dayton to expunge Doe's official Dayton student files of all information related to his interactions with Roe;

(c) Order(s) requiring Doe's reinstatement to Dayton;

(d) Judgment for attorneys' fees, pursuant to any applicable statute;

(e) Judgment for all other reasonable and customary costs and expenses that were incurred in pursuit of this action;

(f) Pre-judgment interest and post judgment interest as may be permitted by law and statute; and/or

(g) Such other and further relief as this court may deem just, proper, equitable, and appropriate.

Count 12 – Intentional Infliction of Emotional Distress
(Against Roe, Dayton, NCHERM and Investigator Swinton)

189. Doe hereby incorporates by reference the aforementioned allegations contained in this Complaint as though fully set forth herein.

190. As detailed in this Complaint, Roe, Dayton, NCHERM and/or Swinton's conduct was truly extreme and outrageous.

191. Roe intended her conduct to inflict severe emotional distress, or knew there was at least a high probability that her conduct would cause severe emotional distress to Doe detailed above.

192. Dayton intended its conduct to inflict severe emotional distress, or knew there was at least a high probability that Dayton's conduct would cause severe emotional distress to Doe detailed above.

193. NCHERM and/or Swinton intended their conduct to inflict severe emotional distress, or knew there was at least a high probability that their conduct would cause severe emotional distress to Doe detailed above

194. Roe's conduct caused Doe severe emotional distress and other damages detailed in this Complaint.

195. Dayton's conduct caused Doe severe emotional distress and other damages detailed in this Complaint.

196. Swinton's conduct caused Doe severe emotion distress and other damages detailed in this Complaint.

197. Roe's, Dayton's and Swinton's aforementioned conduct caused Doe to suffer the damages detailed above in an amount to be determined at trial.

Count 13 – Negligent Infliction of Emotional Distress
(Against Roe, Dayton, NCHERM and Swinton)

198. Doe hereby incorporates by reference the aforementioned allegations contained in this Complaint as though fully set forth herein.

199. Roe owed Doe a duty to not engage in the conduct alleged in this Complaint.

200. Dayton owed Doe a duty to not engage in the conduct alleged in this Complaint.

201. NCHERM and/or Swinton owed Doe a duty to not engage in the conduct alleged in this Complaint.

202. Roe breached the duties she owed Doe to not engage in the conduct detailed in this Complaint and this breach was the proximate cause of Doe's severe emotional distress and other damages detailed in this Complaint.

203. Dayton breached the duties it owed Doe to not engage in the conduct detailed in this Complaint and this breach was the proximate cause of Doe's severe emotional distress and other damages detailed in this Complaint.

204. NCHERM and/or Swinton breached the duties they owed Doe to not engage in the conduct detailed in this Complaint and this breach was the proximate cause of Doe's severe emotional distress and other damages detailed in this Complaint.

205. Roe's, Dayton's, NCHERM's and Swinton's aforementioned conduct caused Doe to suffer the damages detailed above in an amount to be determined at trial.

Count 14 - Breach of the Covenant of Good Faith and Fair Dealing
(Against Roe, Dayton, NCHERM and Swinton)

206. Doe repeats and re-alleges each and every allegation hereinabove as if fully set forth herein.

207. Based on the aforementioned facts and circumstances, NCHERM, Swinton and/or Dayton acted in bad faith in causing the erroneous discipline of Doe and/or the disproportionate sanction imposed on Doe.

208. Based on the aforementioned facts and circumstances, NCHERM, Swinton and/or Dayton breached and violated a covenant of good faith and fair dealing implied in their agreement(s) with Doe.

209. As a direct and foreseeable consequence of these breaches, Plaintiff suffered the damages detailed above.

210. Doe is entitled to recover damages for Swinton and/or Dayton breach of the express and/or implied contractual obligations described above.

211. As a direct and proximate result of the above conduct, Doe sustained the damages detailed above.

WHEREFORE, with regard to Counts 12-14, Doe demands judgment against Roe, Dayton, NCHERM and/or Swinton as follows:

(a) For actual, special, and compensatory damages, including Doe's medical fees and legal fees, in an amount to be determined at trial but in no event less than $75,000.00;

(b) For punitive damages in an amount sufficient to deter Roe, Dayton and/or Swinton from conducting similar future conduct but in no event less than $100,000;

(c) Order(s) requiring Dayton to expunge Doe's official Dayton student files of all information related to his interactions with Roe;

(d) Order(s) requiring Doe's reinstatement to Dayton;

(e) Judgment for attorneys' fees, pursuant to any applicable statute;

(f) Judgment for all other reasonable and customary costs and expenses that were incurred in pursuit of this action;

(g) Pre-judgment interest and post judgment interest as may be permitted by law and statute; and/or

(h) Such other and further relief as this court may deem just, proper, equitable, and appropriate.

Respectfully submitted,
Attorney for Doe

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