IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

ALYSSA REID, **Plaintiff,** **v.** **JAMES MADISON UNIVERSITY, et. al.** **Defendants.**	**Case No. 5:21-cv-00032**

MEMORANDUM IN SUPPORT OF DEFENDANTS JAMES MADISON UNIVERSITY, JONATHAN R. ALGER, HEATHER COLTMAN, ROBERT AGUIRRE, AND AMY M. SIROCKY-MECK'S MOTION TO DISMISS PURSUANT TO RULES 12(b)(1) and 12(b)(6)

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, defendants, James Madison University ("JMU"), JMU President Jonathan R. Alger ("Alger"), Provost Heather Coltman ("Coltman"), Dean Robert Aguirre ("Aguirre"), and Title IX Coordinator, Amy M. Sirocky-Meck ("Sirocky-Meck") (collectively "JMU Defendants"), through undersigned counsel, respectfully submit this Memorandum of Law in Support of their Motion to Dismiss the Complaint.

I. INTRODUCTION

This is a meritless lawsuit brought by a disgruntled ex-employee for time-barred claims. Plaintiff Alyssa Reid ("Reid") was a faculty member at JMU until her resignation. On January 3, 2019, Reid was placed on paid administrative leave after Reid's ex-girlfriend, Jane Doe ("Doe"), filed a Title IX Complaint against her, alleging a non-consensual relationship.[1] Compl. ¶ 361; Pl.'s Ex. 5; Pl.'s Ex. 9 at ¶ 6. Doe and Reid's intimate relationship spanned from November

[1] Reid's ex-girlfriend is referred to herein as "Jane Doe" in accordance with JMU's policies.

2015 to February 2018, during which Doe was first a graduate student and later a faculty member at JMU. Compl. ¶¶ 250, 271, 279; Pl.'s Ex. 8 at p. 2. After providing Reid with notice of the allegations against her and conducting a hearing on March 28, 2019, in which Reid was present, presented evidence, and testified, on April 1, 2019 the hearing panel found Reid responsible for sexual misconduct, a non-consensual relationship and recommended a sanction of a reprimand. *Id.* ¶¶ 382, 417; Pl's Ex. 8.

Reid alleges that she appealed the hearing panel's decision to Aguirre on or about April 6, 2019, and on April 30, 2019, Aguirre confirmed the panel's decision. *Id.* ¶ 430-32; Pl.'s Ex. 9 ¶ 11(b). On May 5, 2019, Reid appealed Aguirre's decision to Coltman, who upheld Aguirre's finding. *Id.* ¶¶ 438-39; Pl.'s Ex. 1-9. Reid alleges that because of the Title IX investigation her reputation was damaged, and she had no choice but to resign. *See* Compl. ¶ 540. More than two years after the panel found her responsible, Reid filed this lawsuit.

The crux of Reid's Complaint is three-fold. First, she claims she was allegedly denied due process pursuant to Section 1983 when the JMU Defendants: 1) allegedly refused to enforce the correct university policy (Count I), 2) failed to allow confrontation and cross-examination of Doe and her witnesses (Count II), and 3) retroactively applied university policy at the Title IX hearing (Count III). Second, Reid claims the Title IX process and hearing violated her rights under Title IX (Count IV). And finally, she alleges a breach of contract claim (Count XII) against JMU because of the Title IX hearing and finding of misconduct. *See* Compl. ¶ 752.

Reid's Complaint, which is factually inaccurate and without legal merit, must be dismissed because this Court lacks jurisdiction over it. Reid's due process and Title IX claims center on the notice she was given before and the process she was given during the Title IX hearing on March 28, 2019. On April 1, 2019, the hearing panel issued a written decision,

finding Reid responsible for a non-consensual relationship. Compl. ¶ 417. Reid alleges that she appealed the hearing panel's decision on or about April 6, 2019 to Aguirre, who reviewed the matter and upheld the panel's ruling on April 30, 2019. *Id.* ¶¶ 430-432; Pl.'s Ex. 9 ¶ 11(b). On May 5, 2019, Reid appealed Aguirre's decision to Coltman, who upheld Aguirre's decision. Compl. ¶ 438; Pl.'s Ex. 9. The hearing panel's decision to find Reid responsible of sexual misconduct was communicated to Reid by April 6, 2019 at the latest, and Aguirre issued his finding on April 30, 2019. Reid did not file this lawsuit until May 3, 2021, more than two-years after the alleged harm occurred, and thus, her due process and Title IX claims are time-barred.

Moreover, the Complaint fails to state a due process claim because Reid fails to allege a recognized property or liberty interest, and even if she could show a protected interest, the Complaint shows that Reid received notice of the allegations against her and had an opportunity to be heard. For the Title IX claim, Reid relies on conclusory allegations that she was discriminated against on the basis of her sex, which are insufficient as a matter of law. Likewise, Reid's breach of contract claim fails because she failed to comply with the notice requirements under Virginia Code § 2.2-814, and she fails to identify a contract. In addition, the Section 1983 claims against JMU and Alger, Coltman, Aguirre, and Sirocky-Meck in their official capacities are barred by the Eleventh Amendment, and the individual defendants are entitled to qualified immunity. For the foregoing reasons, the barred claims should be dismissed with prejudice.

II. FACTUAL ALLEGATIONS

A. Reid's Employment at JMU

In the summer of 2012, Reid joined the faculty of JMU in the School of Communication Studies and served as Assistant Director of Individual Events.[2] Compl. ¶¶ 241-42. As Assistant Director, Reid worked with JMU's Forensics Team by organizing travel logistics, administering finances, mentoring, editing speeches, and working with students. *Id*. ¶ 243.

B. Reid's Relationship with Doe

Reid first met Doe in spring of 2012, when Doe was an undergraduate student in SCOM 242, a presentation speaking class, in which Reid was the professor. *Id*. ¶ 249. Over the next two years, Reid and Doe spent a substantial amount of time together personally and professionally although Reid denies any romantic or sexual relationship during this time. *Id*. ¶ 251. In spring of 2014, Doe graduated with a bachelor's degree from JMU. *Id*. ¶ 250.

In fall of 2014, Doe started graduate school at JMU and was a student teaching assistant for the Individual Events Team, for which Reid was still Assistant Director. *Id*. ¶ 252. In October of 2015, while on an Individual Events tournament trip, Reid and Doe drank alcohol together in a hotel room and discussed Doe's sexuality as lesbian and her romantic interest in Reid. *Id*. ¶¶ 265-66. In November 2015, Reid and Doe engaged in sexual conduct while attending a school-related conference in Las Vegas. *Id*. ¶ 271. Following this sexual encounter, they began dating each other exclusively. *Id*. ¶ 274. In May 2016, Doe completed her graduate degree at JMU, and in June 2016, she was hired by JMU as a full-time employee. *Id*. ¶ 278. In

[2] Reid claims a protectable contract interest in her employment at JMU, but, notably, she does not allege that she was tenured or attach any employment contract to the Complaint. *Id*. ¶ 247.

summer of 2017, Doe moved in with Reid, and they remained in a romantic relationship until February 2018. *Id*. ¶¶ 279, 286.

C. Doe's Title IX Complaint

On December 4, 2018, Doe filed a Title IX Complaint against Reid. *Id*. ¶ 299; Pl.'s Ex. 5. She complained that Reid, previously her supervisor, pursued her romantically while she was a graduate student, and in fall 2015 they had a sexual encounter during a school-sponsored event, which marked the start of their romantic and sexual relationship. *Id*. ¶¶ 301(e), (g). Doe further alleged that Reid insisted on keeping their relationship a secret so Reid would not incur negative professional consequences due to the problematic power dynamics of a faculty-student relationship. *Id*. ¶¶ 301(f), 301(i).

D. JMU Notifies Reid of Doe's Title IX Complaint

On December 13, 2018, Sirocky-Meck, JMU's Title IX Coordinator, notified Reid of the Title IX Complaint against her. Pl.'s Ex. 6 at p. 2. Specifically, Sirocky-Meck informed Reid that Doe had alleged a violation of Policy 1340.5.6, based on allegations that they were in a romantic, sexual relationship in fall 2015 when Doe was a graduate teaching assistant with the Individual Events Team and Reid was Assistant Director. *Id.* Sirocky-Meck told Reid an investigation was being opened and she referred to her to JMU Policy 1340.6.6.8 for sexual misconduct complaints against faculty. *Id.* at p. 3. Sirocky-Meck asked to meet with Reid to "explain [her] rights, the process, provide information about resources, answer questions [. . .], and discuss any interim measures . . .." *Id.* Sirocky-Meck reiterated that the purpose of this initial meeting was to explain Reid's rights and the process, and she could provide a statement at a future date, if she elected. *Id.*

E. Title IX Hearing and Decision

On March 13, 2019, Sirocky-Meck notified Reid of the date, time and location for the Title IX hearing and that she could participate in the hearing with a support person present. *Id.* ¶ 344-45, 350. Reid's request that a member of the LGBTQ community be appointed to the hearing panel to consider her case was denied. *Id.* ¶ 356. On March 28, 2019, at the Title IX hearing, Reid presented live testimony and documentary evidence. *Id.* ¶ 382. Prior to the hearing, JMU investigated the Title IX Complaint by interviewing witnesses identified by Doe and Reid, and these witness statements were considered by the hearing panel in lieu of live testimony. Compl. ¶¶ 338, 406. On April 1, 2019, the hearing panel issued its written decision, finding Reid responsible for sexual misconduct, a non-consensual relationship in violation of Policy 1340. Compl. ¶¶ 417-18; Pl.'s Ex. 8.

F. Aguirre's Decision and Reid's Appeal to the Provost

On or about April 6, 2019, Reid alleges that she appealed the hearing panel's finding to Aguirre, and on April 30, 2019, he upheld the hearing panel's finding and recommendation. Compl. ¶¶ 430-32; Pl.'s Ex. 9 ¶ 11(b). On May 5, 2019, Reid appealed Aguirre's decision to Coltman, who upheld Aguirre's decision. Compl. ¶ 438; Pl.'s Ex. 9. In addition, Coltman responded to Reid's allegations of due process violations with the Title IX hearing, reiterating she was provided notice of the charge against her and in multiple conversations Sirocky-Meck provided her with the charge directly from the relevant university policy. Pl.'s Ex. 9. Coltman also noted Reid had an opportunity to review and respond in writing or orally to all the statements considered by the hearing panel. *Id.*

G. JMU Prohibits Sexual Misconduct in Faculty-Student Relationships

Reid was prohibited from engaging in harassment, including sexual harassment, under JMU's policies during her employment, from 2012 until her resignation. *See* Pl.'s Ex. 2; Pl.'s Ex. 3, Pl's 4. In August 2012, JMU updated Policy 1324, which prohibits discrimination and harassment and provides procedures for bringing a complaint. Pl.'s Ex. 2. Policy 1324's purpose is to provide "a workplace and learning environment free from illegal discrimination and harassment." *Id.* Harassment is defined to include unwelcome or offensive conduct that shows hostility based on age, sex, and sexual orientation in the following circumstances: 1) "[w]hen submitting to or rejecting the conduct is made the basis for . . . an action or a recommendation for an action affecting a student . . .," essentially a quid pro quo, 2) "[w]hen the conduct has the purpose or effect of unreasonably interfering with the performance of an employee or student," and 3) "[w]hen the conduct creates a hostile, intimidating or offensive learning or working environment." *Id.* Policy 1324 was in effect in 2015 when Reid began a sexual relationship with Doe, a graduate student. Compl. ¶ 271; Pl.'s Ex. 2.

In August 2016, a couple months after Doe graduated from graduate school at JMU, JMU implemented Policy 1340, which prohibits sexual harassment and sexual misconduct. Compl. ¶ 277; Pl.'s Ex. 3. Policy 1340 states that "[o]ne form of sex discrimination is sexual harassment, which includes sexual misconduct." Pl.'s Ex. 3. Policy 1340 further provides that in conjunction with Policy 1324, together they address all forms of sex discrimination, harassment, and misconduct. *Id.* Policy 1340 prohibits sexual harassment as a term or condition of employment or education, a quid pro quo, and in the context of a hostile environment. *Id.*

Policy 1340 also indicates that a sexual relationship between individuals where a power deferential would imply or raise the inference of exploitation or raise the inference that an

educational or employment decision will be based on whether or not there is submission to sexual conduct is prohibited as a non-consensual relationship. *Id.* Policy 1340 gives examples of non-consensual relationships to include an instructional faculty member and a student enrolled in her class or under her supervision, employees who are supervisor and a subordinate, a coach and a member of the team she coaches, or any other relationship where one party has the opportunity to pressure or force the relationship on the other. *Id.*

H. Reid's Claims and Relief Requested

Reid files three due process claims pursuant to 42 U.S.C. § 1983 and Article 1 §§ 11, 15 of the Virginia Constitution and a Title IX claim against JMU and four school officials in their official and individual capacities. The Complaint makes no allegations as to Alger, JMU's President. Reid alleges that Aguirre and Coltman responded to Reid's appeals, and Sirocky-Meck was the Title IX coordinator. Reid also sues JMU for breach of contract.

Reid seeks unspecified monetary damages, plus prejudgment interest, attorney's fees, expenses and costs. Compl. at p. 111. She also asks for declaratory judgment and injunctive relief declaring and ordering that the outcome of the hearing panel be reversed, that her disciplinary record be expunged, that the record of her reprimand be removed from her file, and Doe's Title IX statement destroyed. *Id.* at p. 111-12.

III. LEGAL STANDARD

A. Federal Rule of Civil Procedure 12(b)(1)

Rule 12(b)(1) of the Federal Rules of Civil Procedure enables a party to move for dismissal by challenging a court's jurisdiction over a subject matter. Fed. R. Civ. P. 12(b)(1); *see Nelson v. United States Postal Serv.*, 189 F. Supp. 2d 450, 454 (W.D. Va. 2002). A court must dismiss a case where the court finds subject matter jurisdiction lacking. *Arbaugh v. Y & H*

Corp., 546 U.S. 500, 514 (2006*)*. A plaintiff bears the burden of proof for establishing that federal subject matter jurisdiction is proper. *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347 (4th Cir. 2009). A court may dismiss a complaint which fails to allege facts to demonstrate subject matter jurisdiction. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

B. Federal Rule of Civil Procedure 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The function of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the complaint." *Allen v. College of William & Mary,* 245 F. Supp. 2d 777, 783 (E.D. Va. 2003). In considering the complaint in the light most favorable to the non-moving party, a court must grant a motion to dismiss if the plaintiff fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While detailed factual allegations are unnecessary, a plaintiff is obligated to provide the "grounds" of his "entitlement to relief," and this requires more than labels and conclusions and a formulaic recitation of the elements of a cause of action in the form of allegations that raise a right to relief above the speculative level. *Id*. at 555. The plaintiff must show that there is more than a mere possibility that a defendant acted unlawfully. *Id*. at 556.

Moreover, in *Ashcroft v. Iqbal*, the United States Supreme Court explained: "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. 662, 678 (2009). First, not only are legal conclusions not to be accepted as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (quoting *Twombly*, 550 U.S. at 555). Second, the task is "context-specific," meaning that the

Court is allowed to impose on the analysis its "judicial experience and common sense." *Iqbal*, 556 U.S. at 679 (internal citations omitted). In sum, not all allegations, namely legal conclusions and factually implausible ones, are entitled to an assumption of truth. *Iqbal*, 556 U.S. at 678. And "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not 'show[n]'--that the pleader is entitled to relief." *Id*., 556 U.S. at 679.

C. Documents Referenced in the Complaint

This court may consider Reid's employment contract, the Faculty Handbooks, and notice of Aguirre's decision in deciding this motion to dismiss. Generally, a court is limited to considering the sufficiency of the allegations in the Complaint and the documents attached or incorporated into the Complaint on a motion under Rule 12(b)(6). *Zak v. Chelsea Therapeutics Int'l, Ltd.*, 780 F.3d 597, 606 (4th Cir. 2015). But a court may consider a document attached to a motion to dismiss when the document is "integral to and explicitly relied on in the complaint" and when there is no challenge to its authenticity. *Zak*, 780 F.3d at 606-607; *see e.g. Doe v. Va. Polytechnic Inst. & State Univ.*, 400 F. Supp. 3d 479, 488 (W.D. Va. 2019) (finding defendants' attachments of notice to the plaintiff of the discipline against him and his right to appeal to their motion to dismiss in a due process and Title IX case are properly considered).

In addition, "a court may consider official public records, documents central to plaintiff's claim, and documents sufficiently referred to in the complaint so long as the authenticity of these documents is not disputed." *Witthohn v. Fed. Ins. Co*., 164 Fed. App'x. 395, 396-97 (4th Cir. 2006); *see Gasner v. Dinwiddie*, 162 F.R.D. 280, 282 (E.D. Va. 1995) (permitting court to take judicial notice of public documents, even when the documents are neither referenced by nor integral to plaintiff's complaint).

Here, Reid alleges an employment contract with JMU, which is a public record pursuant to Virginia Code § 2.2-3705.1. Compl. ¶ 749. Reid also references the Faculty Handbook in the Complaint and largely premises her claims on the allegation that JMU's policies were not violated by her conduct. *Id.* ¶ 127; Pl.'s Ex. 8. Reid also alleges that Aguirre did not timely respond to her appeal. *Id.* ¶¶ 430-31. Reid fails, however, to attach any contract, the Faculty Handbook, or her notice of Aguirre's decision, which are integral to and relied on in the Complaint. Thus, this Court may consider these documents without converting this motion into a motion for summary judgment.

IV. ARGUMENT

A. The Statute of Limitations Bars Reid's Due Process and Title IX Claims

Reid's Due Process and Title IX claims are time-barred and should be dismissed. When all facts necessary to show the time bar clearly appear "on the face of the complaint," a limitations defense appears on the face of the complaint and may be addressed on a motion to dismiss. *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007); *see also Doe v. Va. Polytechnic Inst. & State Univ.* (hereafter "*Doe v. Virginia Tech*"), 400 F. Supp. 3d 479, 489 (W.D. Va. 2019).

Due process claims are subject to a two-year statute of limitations because Section 1983 borrows from Virginia's personal injury limitations period, which is two years. *See Owens v. Balt. City States' Attys. Office*, 767 F.3d 379, 388 (4th Cir. 2014); Va. Code § 8.01-243(A). Likewise, Virginia's two-year personal injury statute of limitations is employed for Title IX claims. *See Wilmink v. Kanawha County Bd. Of Educ.*, 214 Fed. Appx. 294, 295 n.3 (4th Cir. 2007).

The time of accrual for due process and Title IX claims is governed by federal law. *Nasim v. Warden, Md. House of Corr.*, 64 F.3d 951, 955 (4th Cir. 1995); *see Doe v. Virginia Tech*, 400 F. Supp. 3d. at 490. "Under federal law a cause of action accrues when the plaintiff possesses

sufficient facts about the harm done to him that a reasonable inquiry will reveal his cause of action." *Nasim*, 64 F.3d at 955.

For instance, in *Delaware State College v. Ricks*, a Title VII case, the United States Supreme Court held that the limitations period for a professor who was denied tenure began running from the date the tenure was denied and not when the professor's terminal contract expired a year later. 449 U.S. 250, 258-59 (1980), *superseded on other grounds by statute*. The Court explained that "[the] proper focus is upon the time of the *disciplinary acts*, not upon the time at which the *consequences* of the acts became most painful." *Id.* at 258. (emphasis in original); *see Smith v. Univ. of Md. Balt.*, 770 Fed. Appx. 50, 50-51 (4th Cir. 2019); *see also Mezu v. Morgan State Univ.*, 367 Fed. Appx. 385, 388-89 (4th Cir. 2010). Specifically, the Court rejected the argument that the cause of action accrued when the professor's grievance was denied, explaining that a grievance procedure does not suggest an earlier decision is tentative, and by its nature, a grievance procedure is a remedy for a prior decision not an opportunity to remedy a decision before it is made. *Id.* at 261.

In *Doe v. Virginia Tech*, the Western District analyzed the application of *Ricks* in a due process and Title IX lawsuit against a public university, where the plaintiffs alleged that they were wrongfully accused and disciplined for sexual misconduct. 400 F. Supp. at 484, 490. There, in reliance on *Ricks*, the court rejected the plaintiffs' arguments that the claims accrued at the conclusion of the appeals process, even though plaintiffs argued that their notices not only advised of their right to appeal but indicated that Virginia Tech would await the outcome of any appeal before sanctions would take effect. *Id.* at 492-494. The court stated that "the mere fact that there is an administrative appeal process does not negate the fact that the initial decision gives the plaintiff notice of his claim." *Id.* at 491. Moreover, the court stated that the question is when each

plaintiff had notice of the due process violations against him. *Id.* at 492. Thus, the court held that the plaintiffs "had notice of any due process violations in the initial hearing and any injury occurred when plaintiff was notified of the initial decision." *Id*. at 492-93. And because plaintiffs filed their Complaint more than two years after the initial decision, the court held that the due process and Title IX claims based on the disciplinary process were time-barred. *Id.* at 493-494.

In the instant case, all the facts necessary to show the time bar appear on the face of the Complaint and the attached exhibits. Reid alleges that on December 13, 2018 she was notified by Sirocky-Meck of Doe's Title IX Complaint as well as the applicable university policy, Policy 1340. *Id.* ¶¶ 314, 324, 344. On March 28, 2019, Reid's Title IX hearing was conducted, and Reid presented live testimony and evidence in her defense. *Id.* ¶¶ 372, 382. On April 1, 2019, the hearing panel found Reid responsible for sexual misconduct, a non-consensual relationship, and recommended a sanction of reprimand. *Id.* ¶ 417; Pl's Ex. 1-8. On or about April 6, 2019, Reid alleges that she appealed the hearing panel's decision to Aguirre.[3] *Id.* ¶¶ 430-32; Pl.'s Ex. 9 ¶ 11(b). On April 30, 2019, Reid was notified that Aguirre finalized his decision and he upheld the panel's findings and recommendation.[4] *Id.* ¶¶ 430-32; Pl.'s Ex. 9 ¶ 11(b); Notice of Aguirre's decision attached hereto as "**Exhibit A**"). On May 5, 2019, Reid appealed Aguirre's decision to Coltman, who upheld Aguirre's decision, stating: "after a thorough review of the record, including the hearing panel's findings and recommendations and the dean's final decision, and applying a

[3] Reid alleges that Aguirre had 10 days to issue his decision, but Reid alleges that he took an additional two weeks and issued his decision on April 30, 2019. Thus, based on her allegations, the latest date upon which Reid could have been notified of and appealed the hearing panel's decision is April 6, 2019.

[4] Reid alleges that she appealed the hearing panel's decision to Aguirre. Under JMU's policies, however, the hearing panel's decision was sent automatically to Aguirre to make a final determination, which he made on April 30, 2019. Whether April 6, 2019 or April 30, 2019 is the date of accrual is of no consequence since under either date, Reid's claims are time-barred.

preponderance of the evidence standard, I uphold the decision of the dean to find you responsible and to place a letter of reprimand in your personnel file." *Id.* ¶¶ 438-39; Pl.'s Ex. 1-9.

Reid filed this lawsuit on May 3, 2021. In the Complaint, she alleges due process violations because the JMU Defendants allegedly refused to enforce the correct university policy at the disciplinary hearing (Count I), failed to allow confrontation and cross-examination of Doe and her witnesses at the disciplinary hearing (Count II), and retroactively applied university policy at the Title IX hearing (Count III). Compl. pp. 68, 80, 82. Reid also claims that the Title IX investigation process and hearing violated her rights under Title IX (Count IV). Compl. ¶ 647(a)-(w). Reid's cause of action accrued when she possessed sufficient facts about the harm done, which she knew at the disciplinary hearing and when the hearing panel's decision was communicated to her. Because the hearing took place on March 28, 2019, the hearing panel issued its decision on April 1, 2019, the hearing panel's decision was communicated to Reid on or before April 6, 2019, and Aguirre's decision was communicated to her on April 30, 2019, it is unequivocal that her due process and Title IX claims are barred by the statute of limitations. For these reasons, the due process and Title IX claims should be dismissed with prejudice.

B. The Section 1983 Claims against JMU and Alger, Coltman, Aguirre, and Sirocky-Meck in their Official Capacities are Barred by the Eleventh Amendment

The Section 1983 official capacity claims against JMU and Alger, Coltman, Aguirre, and Sirocky-Meck are barred by the Eleventh Amendment. Under the Eleventh Amendment, "an unconsenting State is immune from suit brought in federal court by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). This protection also extends to state agencies and instrumentalities, *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997), and to state officials in their official capacities. *See Will v. Mich. Dep't of State*

Police, 491 U.S. 58, 71 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the state itself." (citations omitted)); *Herron v. Va. Commonwealth Univ.*, 366 F. Supp. 2d 355, 364 (E.D. Va. 2004) (Eleventh Amendment immunity extends to employees of public universities sued in their official capacities). The Eleventh Amendment immunity affords full protection to states and state agencies from claims for injunctive or monetary relief. *McCray v. Md. Dep't of Transp.*, 741 F.3d 480, 483 (4th Cir. 2014). State officials sued in their official capacities are immune from claims for monetary damages. *See Ballenger v. Owens*, 352 F.3d 842, 845 (4th Cir. 2003).

JMU is a public institution of higher education. Va. Code § 23.1-100. This Court has already held that JMU is an instrumentality of the Commonwealth of Virginia entitled to Eleventh Amendment protection. *Armstrong v. James Madison Univ.*, No. 5:16-cv-00053, 2017 U.S. LEXIS 25014, *12 (W.D. Va. Feb. 23, 2017). There is no waiver of sovereign immunity in this case. *In re Sec'y of Dep't of Crime Control & Pub. Safety*, 7 F.3d 1140, 1149 (4th Cir. 1993) (Section 1983 does not abrogate a state's Eleventh Amendment immunity). Thus, the due process claims brought pursuant to Section 1983 and the Virginia Constitution against JMU and the claims seeking monetary damages against Alger, Coltman, Aguirre, and Sirocky-Meck in their official capacities should be dismissed with prejudice pursuant to Rule 12(b)(1).

C. Reid Fails to State a Due Process Claim Pursuant to 42 U.S.C. § 1983

Even if Reid's due process claims are not barred by the statute of limitations, the Complaint fails to state a due process claim. To allege a procedural due process claim, a plaintiff must show 1) that she had a property or liberty interest, 2) of which a state actor deprived her, 3) without due process of law. *See Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 172 (4th

Cir. 1998); *Charlottesville Div. v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673, 698 (W.D. Va. 2015). Reid's due process claims should be dismissed because she fails to allege a property or liberty interest, or that she was deprived of any constitutionally protected interest without due process of law.[5]

1. The Complaint Fails to Allege a Protected Property or Liberty Interest

a. Reid Does Not Allege a Protected Property Interest

Reid fails to allege a constitutionally protected property interest. A protected property interest cannot be created by the Fourteenth Amendment but rather it is created by or defined by an independent source. *Equity in Ath. Inc. v. Dep't of Educ.*, 639 F.3d 91, 109 (4th Cir. 2011). To have a property interest, a plaintiff must have more than a mere "unilateral expectation of it" or "abstract need or desire for it." *Id.* (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). Instead, a plaintiff must have a legitimate claim of entitlement to it. *Roth*, 408 U.S. at 577.

"A state employee may or may not have a property interest in her employment depending on the terms of that employment." *Rockville Cars, LLC v. City of Rockville*, 891 F.3d 141, 146 (4th Cir. 2018) (citing *Roth*, 408 U.S. at 578); *see, e.g. Royster v. Board of Trustees*, 774 F.2d 618, 620-21 (4th Cir. 1985) ("In the context of employment in public education, the independent source for the property interest has been said to be a contract which provides for continued employment, and which can be terminated only for good cause" and "only where the employee has a legitimate entitlement to continued employment do the requirements of due process

[5] Reid makes the same allegations in support of her due process claims under the Virginia Constitution as she does in support of her Section 1983 claims. "Federal and Virginia due process protections are coterminous." *Mandel v. Allen*, 81 F.3d 478, 479 (4th Cir. 1996). Accordingly, for the reasons explained *infra*, the due claims brought pursuant to the Virginia Constitution should also be dismissed.

attach.") In *Roth*, for example, the United States Supreme Court held that a non-tenured professor, who was hired for a fixed term of one academic year, did not have a property interest sufficient to require that the university give him a hearing when they declined to renew his contract of employment. 408 U.S. at 578.

In Virginia, an employee who is terminable at-will has no protected property interest in continued employment. *Cominelli v. Rector & Univ. of Va.*, 589 F.Supp. 2d 706, 713 (W.D. Va. 2008); *see also Socol v. Albemarle Cty. Sch. Bd.*, 399 F.Supp. 3d 523 (W.D. Va. 2019). Virginia also applies a presumption that an employment relationship is at-will, but this presumption can be rebutted "if sufficient evidence is produced to show that the employment is for a definite, rather than indefinite, term." *Cominelli*, 589 F. Supp. at 713 (quoting *County of Giles v. Wines*, 262 Va. 68, 72 (2001).

Here, Reid alleges that she "had a protectable property interest in her continued employment with JMU, being a full-time faculty member, and entitled to the protections afforded by JMU's disciplinary procedures." Compl. ¶ 247. Reid indicates that her property interest derives from a protectable "contract interest in her continued employment."[6] *Id.* ¶ 248. Reid, however, was not a tenured member of the JMU faculty. *See* Ex. A. Similar to the professor in *Roth*, who was found not to have a protected property interest in his continued employment, Reid had a renewable term appointment, which ran one academic year unless it was renewed subject to the terms of the Employment Contract. Ex. A at 1.1-1.2. Furthermore, under the Employment Contract, JMU could terminate the agreement before the end date for a myriad of reasons and, likewise, Reid could resign upon timely providing notice prior to the contract end

[6] Reid's Employment Contract with JMU ("Employment Contract") is attached as "**Exhibit B**."

date. *Id.* at 6.1-6.2. Reid does not have a property interest in continued employment at JMU based on the Employment Contract.

Even if this Court does not consider the Employment Contract, Reid's conclusory allegation that she has protected property right to continued employment at JMU is insufficient. Reid fails to overcome the presumption of at-will employment in Virginia, which does not create a protected property interest. To the extent Reid relies on her continued employment at JMU to demonstrate a constitutionally protected property interest, she fails to state a due process claim.[7]

The only other allegations in the Complaint pertaining to a property interest are the following: In Count I, Reid alleges that she had a "constitutionally protected property interest in being able to rely upon JMU's policies and procedures" as well as the JMU Defendant's adherence and compliance with these policies and procedures. Compl. ¶¶ 473-74. In Count I and III, she also alleges that she had a property interest in not being subjected to disciplinary procedures so long as she complied with university policies.[8] *Id.* at ¶¶ 475, 611. Reid identifies no statute, express contractual language or policy entitling her to a property interest in reliance on JMU's policies and procedures, JMU's adherence and compliance with policies and procedures, or a property interest in not being subjected to disciplinary procedures as long as she complied with university policies. Reid shows no entitlement to these alleged property interests. Reid fails to allege a property interest and Counts I-III should be dismissed.

[7] Reid does not make a specific allegation that she has a protected property interest for continued employment in Counts I, II, or III, but to the extent, she relies on Compl. ¶¶ 247-248, to establish the element of a property interest, these counts should be dismissed.

[8] Count II contains no allegations of a protected property interest. Compl. ¶¶ 549-566.

b. Reid Fails to Allege a Protected Liberty Interest

Similarly, the Complaint does not allege a protected liberty interest. Employees have a constitutionally protected liberty interest in their "good name, reputation, honor or integrity" and this liberty interest is implicated by public announcement of reasons for an employee's discharge. *Johnson v. Morris*, 903 F.2d 996, 999 (4th Cir. 1990); *see Echtenkamp v. Loudon County Pub. Schs.*, 263 F. Supp. 2d 1043, 1056 (E.D. Va. 2003). To state a claim for a violation of a liberty interest in good name and reputation, a plaintiff must allege facts sufficient to show: 1) "[her] superiors made charges against her that 'might seriously damage [her] standing and associations in [her] community' or otherwise 'imposed on [her] a stigma or other disability that foreclosed [her] freedom to take advantage of other employment opportunities,'" 2) the charges were made public by the employer, 3) the charges were false, and 4) the stigmatizing remarks were "made in the context of a discharge or significant demotion." *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 172 n.5 (4th Cir. 1988) (citing *Roth,* 408 U.S. at 573-75; *Bishop v. Wood,* 426 U.S. 341, 348-49 (1976); *Codd v. Velger,* 429 U.S. 624, 627 (1977); *Paul v. Davis,* 424 U.S. 693, 710-11 (1976)).

Here, Reid does not allege that the charges were made public by the JMU Defendants. The Complaint states that Reid suffered an injury because the findings "have been communicated to other parties, including to prospective employers." Compl. ¶ 544. The allegations do not aver that the JMU Defendants communicated the findings to others or made the findings public. *See* Compl. ¶ 545, 616-18. Thus, Reid fails to state a violation of a protected liberty interest.

Likewise, the Complaint does not allege that stigmatizing remarks were made in the context of a discharge or significant demotion. *Stone*, 855 F.2d at 172, n.5 (stating "[o]ur finding

that Stone was not discharged from his public employment but resigned voluntarily thus effectively disposes of any liberty interest claim he might assert."); *Hibbitts v. Buchanan County Sch. Bd.*, No. 1:09CV00073, 2010 U.S. Dist. LEXIS 62422, *12-13 (W.D. Va. June 23, 2010) (finding for purposes of constitutional analysis, without termination, predictions about future career problems do not constitute deprivation of a protected liberty interest). As discussed *infra* at Section IV.C.2., Reid voluntarily resigned from JMU. Compl. p. 4. Accordingly, no statement was made in the context of a discharge or significant demotion. Thus, the Complaint fails to allege a protected liberty interest.

2. The Complaint Fails to Allege a Deprivation by a State Actor

The Complaint also fails to state a due process claim because it does not allege a deprivation of a constitutionally protected interest within the meaning of Section 1983. When an employee voluntarily resigns even though prompted to do so by events set in motion by his employer, the property interest is relinquished, and therefore, cannot establish that the state "deprived" her within the meaning of the due process clause. *Stone*, 855 F.2d at 173 (holding former professor who brought § 1983 action against former employer-university resigned of his own free will, relinquishing his property right voluntarily and thus could not establish that the state deprived him within the meaning of due process). The courts look to the circumstances of the resignation to determine if the employee was denied the opportunity to make a free choice to resign. *Id*. at 174. Resignations have been found involuntary when obtained by the employer's misrepresentation or deception or where forced by the employer's duress and coercion. *Id.*

Here, Reid alleges that she was forced to give up her dream job at JMU, explaining that it was "simply not possible to continue her employment with the University considering that Doe was a full-time faculty member there." Compl. p. 4. Plainly, this shows that the JMU

Defendants had nothing to do with Reid's decision to resign. She resigned because she decided she did not want to work at JMU because Doe was there. Consequently, she voluntarily relinquished any property right that she allegedly had.

Reid, however, alleges that she was constructively discharged because she was found responsible of sexual misconduct. *See* Compl. ¶¶ 540, 547. She states that JMU's wrongful adjudication carried a powerful stigma making it impossible for her to continue her employment with JMU. Compl. ¶ 460. Reid claims that she was embarrassed, and the hearing panel's finding created intolerable working conditions. *Id.* at ¶ 461. These allegations fail to show constructive discharge and fail to allege a deprivation. There are no allegations pleaded that suggest Reid was forced to resign other than her conclusory allegations. For these additional reasons, the due process claims should be dismissed.[9]

3. Reid Received All the Process She Was Due

Even if the Complaint sufficiently alleges a constitutionally protected property interest, Reid fails to allege a due process violation. Due process requires fair notice and an opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Beyond these minimum requirements, due process is flexible and calls for the procedural protections as the particular situation requires. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "Affording the public employee the full panoply of rights that a criminal defendant is entitled to is not required."

[9] To the extent, Reid intends to allege a deprivation because she was put on paid, administrative leave prior to the hearing panel's finding, this, likewise, fails to state a deprivation within the meaning of due process. *See* Compl. ¶ 361; Pl.'s Ex. 9 at ¶¶ 6-7. There is no deprivation if the employee continues to be paid while suspended or on probation. *Earley v. Marion*, 540 F. Supp. 2d 680, 688 (W.D. Va. 2008) (citing *Huang v. Bd. of Governors*, 902 F.2d 1134, 1141 (4th Cir. 1990)); *Echtenkamp*, 263 F. Supp. 2d at 1053-54 (A property right is not infringed upon if the employee faces a threat of termination while receiving full payment of her salary.)

Scruggs v. Keen, 900 F. Supp. 821, 825 (W.D. Va. 1995) (citing *Ricco v. County of Fairfax*, 907 F.2d 1459, 1465 (4th Cir. 1990). "Trial-like proceedings" are not required to pass constitutional muster in a disciplinary or misconduct case. *Butler v. Rector & Bd. of Visitors of Coll. of Wm. & Mary*, 121 F. App'x 515, 520 (4th Cir. 2005); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961) (holding that a hearing which gives the university the opportunity to hear both sides in considerable detail for a disciplinary charge sufficiently protects due process rights and a full-dress judicial hearing with the right to cross-examine witnesses is not required); *Henson v. Honor Comm. of U. Va.*, 719 F.2d 69, 74 (4th Cir. 1983) (adopting standard set forth in *Dixon*). Moreover, a claim that policies or regulations have not been adhered to does not sustain an action for redress of procedural due process violations. *See Goodrich v. Newport News Sch. Bd.*, 743 F.2d 225, 227 (4th Cir. 1984) (internal citations omitted); *Hibbitts v. Buchanan County Sch. Bd.*, No. 1:09CV00073, 2010 U.S. Dist. LEXIS 62422, *8 (W.D. Va. June 23, 2010).

Here, Reid was provided with written notice of the allegations against her, including the charge directly from Policy 1340 several months before the Title IX hearing. Pl.'s Ex. 6. She was given an opportunity to identify witnesses, who were subsequently interviewed. Pl.'s Ex. 9. Reid also was given an opportunity to provide written and verbal responses to witness statements. *Id.* She was given an opportunity to present testimony and evidence at a hearing, with her witnesses, and with the assistance of her support person. *See* Compl. ¶¶ 340, 350, 375, 382. Reid received all the process she was due. For these reasons, the due process claims should be dismissed with prejudice.

4. JMU and the School Officials in their Official Capacities are Not Persons against Whom a Section 1983 Claim Can Be Asserted

Reid brings due process claims against JMU and Alger, Coltman, Aguirre, and Sirocky-Meck in their official capacities under 42 U.S.C. § 1983. Compl. pp. 68, 80, 82, Counts I-III.

Claims brought pursuant to 42 U.S.C. § 1983 require the deprivation of a civil right by a "person" acting under color of state law. *See Will*, 491 U.S. 58 at 70–71. In *Will*, the Court recognized that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." 491 U.S. at 71. Thus, Reid fails to state a claim under Section 1983 against JMU and Alger, Coltman, Aguirre and Sirocky-Meck in their official capacities because they are not "persons." Accordingly, these claims should be dismissed.

5. The Complaint Fails to State a Claim against Alger, Coltman, Aguirre, and Sirocky-Meck in their Individual Capacities under Section 1983

The Complaint fails to allege liability under 42 U.S.C. § 1983 against Alger, Coltman, Aguirre, and Sirocky-Meck. To allege a claim under Section 1983 against an individual, "it must be 'affirmatively shown that the official charged acted personally in the deprivation of the plaintiff's rights.'" *Wright v. Collins*, 766 F.2d 841, 850 (4th Cir. 1985) (quoting *Vinnedge v. Gibbs*, 550 F.2d 926, 928 (4th Cir. 1977)). The doctrine of respondeat superior does not apply to Section 1983 actions. *Id.* (citing *Vinnedge*, 550 F.2d at 928). "[S]upervisors . . . cannot be held liable under § 1983 without some predicate 'constitutional injury at the hands of the individual [state] officer.'" *Waybright v. Frederick Cty.*, 528 F.3d 199, 203 (4th Cir. 2008) (quoting *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)) (alteration in original).

Reid fails to state a Section 1983 claim against Alger, Coltman, Aguirre, and Sirocky-Meck because these claims are premised on their supervisory roles at JMU and/or show no personal deprivation of Reid's rights. Most notably, Reid files suit under Section 1983 against Alger, JMU's President, but the Complaint is devoid of any allegations against him in any capacity. Of the 754 paragraphs in the Complaint, Alger is mentioned three times – twice defining him as a party, (Compl. ¶¶ 7, 11) and once under the jurisdiction and venue section (Compl. ¶ 20). No factual allegations exist as to Alger. Reid also asserts individual liability

against Coltman and Aguirre, the Provost and Dean, respectively, because she disagrees with their findings. *See* Compl. ¶¶ 431-436, 438-453. These allegations are insufficient to allege that Coltman or Aguirre acted personally in depriving Reid's rights.

Finally, the allegations as to Sirocky-Meck, the Title IX Coordinator, principally concern her supervisory role as the Title IX coordinator and her management of the Title IX investigation against Reid. The allegations against Sirocky-Meck do not show a deprivation of a right, or are in direct conflict, factually, with the exhibits attached to the Complaint, which prevail.[10] Reid claims that Sirocky-Meck falsified the allegations in Doe's Complaint (Compl. ¶ 522), but it is apparent that the Title IX Complaint, which was considered by the hearing panel, was written by Doe. *See* Pl.'s Ex. 5; Pl.'s Ex. 9. Reid also complains that Sirocky-Meck did not provide her with Doe's Title IX statement on December 13, 2018 when she first notified her of the complaint, but Reid admits that she received Doe's Title IX Complaint in February 2019 prior to the March 28, 2019 disciplinary hearing. Compl. ¶¶ 322, 323, 372. Sirocky-Meck also was not on the hearing panel that found Reid responsible for sexual misconduct. Pl.'s Ex. 9 at ¶ 4. Thus, the Complaint fails to allege a claim under Section 1983 against Alger, Coltman, Aguirre, and Sirocky-Meck in their individual capacities. These claims should be dismissed.

6. Alger, Coltman, Aguirre, and Sirocky-Meck are Entitled to Qualified Immunity

Alger, Coltman, Aguirre, and Sirocky-Meck are also entitled to qualified immunity because "[t]he law is well settled that a public official or employee is entitled to qualified immunity for civil damages unless his conduct violates clearly established statutory or

[10] *See United States ex rel. Constructors, Inc. v. Gulf Ins. Co*., 313 F. Supp. 2d 593, 597 (E.D. Va. 2004) (citing *Fayetteville Investors v. Commercial Builders, Inc*., 936 F.2d 1462, 1465 (4th Cir. 1991) (Where a conflict exists between "the bare allegations of the complaint and any attached exhibit, the exhibit prevails")).

constitutional rights of which a reasonable person would have known." *Simmons v. Poe*, 47 F.3d 1370, 1385 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Further, state officials are entitled to immunity where a state actor's conduct is objectively reasonable under the circumstances. *Doe v. Bd. of Visitors of Va. Military Inst.*, 494 F. Supp. 363, 380 (W.D. Va. 2020) (citing *Raub v. Campbell*, 785 F.3d 876, 881 (4th Cir. 2015).

For the reasons articulated *supra*, Reid fails to allege that the school officials violated Reid's constitutional right. Moreover, Reid's allegations fail to demonstrate that Alger, Coltman, Aguirre, and Sirocky-Meck's actions were not objectively reasonable under the circumstances. Therefore, the claims against Alger, Coltman, Aguirre, and Sirocky-Meck should be dismissed as they are protected from liability by qualified immunity.

D. Reid Fails to State a Claim Pursuant to Title IX

1. The Complaint Fails to Allege a Claim under Title IX

Reid fails to plausibly allege that the disciplinary hearing and her reprimand were the result of sexual orientation or other sex based discrimination.[11] Title IX is a federal law that prohibits discrimination on the basis of sex in federally funded educational programs. Title IX

[11] Reid states in conclusory form that she was discriminated against on the basis of her sex and sexual orientation. *See* Compl. ¶¶ 643, 645. Her Complaint, however, only contains allegations concerning her sexual orientation. *Id.* ¶¶ 356, 641, 643, 647(w). Whether sexual orientation currently creates a cognizable claim under Title IX remains unclear. *See Kirby v. N.C. State Univ.*, No. 5:13-cv-850, 2015 U.S. Dist. LEXIS 30135, at *11-12 (E.D.N.C. Mar. 10, 2015), *aff'd*, 615 F. App'x 136 (4th Cir. 2015) (unpublished); *Mayes v. Bd. of Educ.*, No. 13-cv-3086, 2013 U.S. Dist. LEXIS 168513, at *1-2 (D. Md. Nov. 26, 2013); *M.D. v. Sch. Bd. of Richmond*, No. 3:13-cv-329, 2013 U.S. Dist. LEXIS 76936, at *9-10 (E.D. Va. May 30, 2013), *vacated*, 560 F. App'x 199 (4th Cir. 2014); *But see Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020). Regardless, Reid's allegations fail to state a cause of action under Title IX based on sex or sexual orientation, *infra* Section IV.D.1.a-b, and this Court should dismiss the Title IX claim in its entirety.

states: "[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 Complaint appears to allege an erroneous outcome claim. Compl. ¶ 629. Erroneous outcome is one of two theories by which a plaintiff may attack a university's disciplinary procedures under Title IX. *See Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2nd Cir. 1994); *Sheppard v. Visitors of Va. State Univ.*, 993 F. 3d 230, 235 (4th Cir. 2021). The erroneous outcome framework is typically applied when a plaintiff alleges that a university disciplinary proceeding resulted in an incorrect result. *Yusuf*, 35 F.3d at 715; *Doe v. Va. Polytechnic Inst. & State Univ.*, No. 7:19-cv-249, 2021 U.S. Dist. LEXIS 34550 (W.D. Va. Feb. 24, 2021).

To allege an erroneous outcome claim under Title IX, a plaintiff must allege sufficient facts to establish: 1) the plaintiff was subjected to a "'procedurally flawed or otherwise flawed proceeding'; 2) which 'led to an adverse and erroneous outcome'; and 3) involved 'particular circumstances' that suggest 'gender bias was a motivating factor behind the erroneous finding.'" *Doe v. Loh*, 767 Fed. Appx. 489, 491 (4th Cir. 2019) (citing *Yusuf*, 35 F.3d at 715). "Allegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination [are] not sufficient to survive a motion to dismiss." *Yusuf*, 35 F.3d at 715; *see e.g. Leitner v. Liberty*, Inc., No. 6:19-cv-00029, 2020 U.S. Dist. LEXIS 228143, at *28-31 (W.D. Va. Dec. 4, 2020) (dismissing plaintiff's Title IX gender discrimination claim with prejudice, where the allegations do little more than combine allegations of an allegedly flawed proceeding with a conclusory allegation of gender discrimination).

To satisfy the first two elements, a plaintiff "must allege particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding." *Yusuf*, 35 F.3d at 715. To satisfy this, a complaint may allege "particular evidentiary weaknesses behind the finding of an offense such as a motive to lie on the part of the complainant or witnesses, particularized strengths of the defense, or other reason to doubt the veracity of the charge," or a complaint may "allege particular procedural flaws affecting the proof." *Yusuf*, 35 F.3d at 715. For example, in *Sigma Lamba Upsilon/Señoritas Latinas Unidas Sorority, Inc. v. Rector & Visitors of the Univ. of Va.*, the court granted the defendant's motion to dismiss, holding that the plaintiff did not allege facts sufficient to establish that the challenged proceedings were flawed or that they resulted in an erroneous outcome but instead showed that the plaintiff disagreed with the university policy and its application. No. 3:18CV00085, 2020 U.S. Dist. LEXIS 223165, at *29-30 (W.D. Va. Nov. 30, 2020).

And to allege the third element of erroneous outcome—particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding—a plaintiff must adequately plead a causal link between the student's sex and the university's challenged disciplinary proceeding, and not just any causal link will suffice because the language in Title IX—"on the basis of sex"—is significant and requires "but-for" causation. *Sheppard*, 993 F. 3d at 235-37; *Doe v. Loh*, 767 Fed. Appx. at 491 (citing *Yusuf*, 35 F.3d at 715). For instance, a plaintiff may emphasize the existence of "'statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender' or 'statements reflecting bias by members of the tribunal.'" *Doe v. Washington & Lee Univ.*, No. 6:14-cv-00052, 2015 U.S. Dist. LEXIS 102426, *26 (W.D. Va. Aug. 5, 2015) (quoting *Yusuf*, 35 F.3d at 715).

a. Reid Fails to Allege Particular Circumstances Suggesting that Gender Bias was a Motivating Factor

Taking the final element first, the Complaint fails to allege any particular circumstances that suggest gender bias was a motivating factor behind an erroneous finding. Instead, Reid provides only conclusory allegations to satisfy this element. *See* Compl. ¶¶ 629, 643, 645, 647w. Reid avers that because no LBGTQ community member was on the hearing panel, that this contributed to the bias of the panel. *Id.* at ¶ 647w. The Complaint, however, does not explain how this contributed to the bias of the panel nor does it contain any allegations that any panel member exhibited any bias against Reid for any reason, including her sexual orientation. Reid fails to allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous outcome. Thus, the Title IX claim should be dismissed.

b. Reid Fails to Cast Articulable Doubts on the Accuracy of the Proceeding and Outcome

Likewise, the erroneous outcome claim should be dismissed because Reid fails to make allegations sufficient to cast articulable doubts on the accuracy of the hearing panel's decision. Principally, Reid alleges that JMU's procedures were flawed. Reid avers that Policy 1340, the policy that she was found in violation of, had not been implemented in 2015 when she began a sexual relationship with Doe, a graduate student and graduate teaching assistant in the Individual Events Team of which she was the Assistant Director. Pl.'s Ex. 6; Pl.'s Ex. 8. Reid claims that only Policy 1324 was in place during the portion of their relationship when Doe was a graduate student.[12] While Policy 1340 was not in effect when Reid began a sexual relationship with Doe

[12] Reid's behavior also violated III.A.6 of the Faculty Handbook, which provides that "[t]he university prohibits intimate relationships between faculty members and students in their classes or under their supervision, e.g. teaching or graduate assistants. Such relationships raise the specter of exploitation and/or sexual harassment. A faculty member has a responsibility to avoid any apparent or actual conflict between their professional responsibilities and personal interests

in 2015, she still fails to show a procedurally flawed or otherwise flawed proceeding that led to an adverse and erroneous outcome. Simply put, under either Policy 1340 or Policy 1324, Reid violated JMU policy by having a sexual relationship with a graduate student, who she supervised, and the outcome under either policy would have been the same.

For instance, Reid alleges that the deadline had passed for Doe to lodge a complaint under Policy 1324. Compl. ¶¶ 502-505. Policy 1324 provides 180 days to file a complaint after the last date of the discriminatory or harassing behavior. *Id.* at ¶ 146. But Policy 1324 states that the Title IX officer, among others, may make exceptions to time deadlines, provided that any exception is intended to bring about a just outcome. Pl.'s Ex. 2 at 6.3.1.

Here, the faculty-student sexual relationship began in 2015, and the relationship did not end until February 2018. Moreover, Doe alleged that she kept her relationship with Reid a secret for several years because Reid told her not to tell anyone, even post-graduation, and when she did mention the relationship, she experienced verbal abuse and retaliation from Reid. Thus, in the interest of bringing about a just outcome, per Policy 1324, it is reasonable that the time for filing a complaint would be extended, particularly in light of the allegations that Reid used the faculty-student relationship power dynamics to keep Doe quiet about their relationship. Accordingly, Reid's allegations on the time for filing fail to show a procedural flaw that affected the proof and led to an erroneous outcome.

Reid also alleges that she would have been found innocent if JMU applied Doe's Title IX Complaint under Policy 1324. This argument, too, fails. While it is certainly true that the hearing panel found Reid violated Policy 1340 for Sexual Misconduct, non-consensual

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in dealings or relationships with students." Every Faculty Handbook from 2012 to Reid's resignation in 2019 contains this provision at III.A.6. The Faculty Handbooks from 2012 to 2019 are attached collectively as "**Exhibit C**."

relationship, it is as likely that Reid would have been found in violation of Policy 1324 for sexual harassment and given a similar if not identical reprimand.

Even though the term non-consensual relationship does not appear in Policy 1324, it is apparent, especially given that the Faculty Handbook explicitly prohibits this type of relationship, that Policy 1324, prior to implementation of 1340, was interpreted more widely to include sexual harassment and misconduct. The purpose of Policy 1324 is to provide "a workplace and learning environment free from illegal discrimination and harassment." Pl.'s Ex. 2. And harassment is defined as unwelcome or offensive conduct that shows hostility based on age, sex, and sexual orientation "when the conduct creates a hostile, intimidating or offensive learning or working environment" or when submitting to or rejecting the conduct is made the basis for an "action or a recommendation for an action affecting a student." *Id.* Policy 1324 prohibited sexual relationships between faculty and their students.

Here, Doe specifically alleged "I was often treated differently than the other graduate assistant and engaged in sexual behavior with [Reid] during school-sponsored travel and on campus." Pl.'s Ex. 5. If a hearing panel applied Policy 1324 and found those facts to be true, Reid would have been found in violation of Policy 1324. Reid's argument that the wrong policy was used to adjudicate the Title IX Complaint fails to show a procedural flaw, affecting the proof, that resulted in an incorrect outcome.

As to the other procedural issues Reid raises, such as a right to cross examine and right to confront her accuser, these arguments fail to show a procedural flaw and certainly do not lend to the conclusion that the outcome was erroneous. *See* Compl. ¶¶ 647o-r, 648. It is well settled that process used in the criminal law setting is not required for university disciplinary hearings.

Butler v. Rector & Bd. of Visitors of Coll. of Wm. & Mary, 121 F. App'x 515, 520 (4th Cir. 2005); *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 159 (5th Cir. 1961).

Reid also contends that JMU failed to give her sufficient details about the identities of the parties involved, specific sections of the code of conduct that she violated, and the precise conduct at issue or provide her with an advisor. *See* Compl. ¶¶ 637, 648. These allegations, however, conflict with Reid's exhibits, which show that on December 13, 2018, Sirocky-Meck notified Reid in writing that Doe filed a Complaint for Sexual Misconduct against her based on her romantic and sexual relationship beginning in fall 2015 when Doe was a graduate student with the Individual Events Team and Reid was the Assistant Director. Pl.'s Ex. 6. Additionally, Sirocky-Meck told Reid that the specific incident of sexual misconduct is JMU Policy 1340.5.6 Non-Consensual Relationship. *Id.* Also, Reid was told she could have a support person at the hearing. Pl.'s Ex. 6; *Compl.* ¶ 350. Thus, Reid's argument on these points also fails to show any procedural flaw affecting proof that resulted in an incorrect outcome.

Lastly, in terms of any bias on behalf of Doe, she readily admitted in her Title IX Complaint that her relationship with Reid ended poorly. *See* Pl.'s Ex. 5, Pl.'s Ex. 8. This alone, especially since the hearing panel knew this fact, and because the hearing panel's decision was not based only on Doe's account but included statements from numerous witnesses, fails to cast articulable doubt on the accuracy of the proceeding. *See*, Pl.'s Ex. 5, Pl.'s Ex. 8, Pl.'s Ex. 9. Reid's contention that the hearing panel was wrong to believe Doe and her witnesses fails to show any procedural flaw or an incorrect outcome. *See Sigma Lamba,* 2020 U.S. Dist. LEXIS at *29-30. For these reasons, Reid fails to allege an erroneous outcome claim.

2. The Title IX Claim Fails against Alger, Coltman, Aguirre, and Sirocky-Meck in their Individual Capacities

Reid fails to state a Title IX claim against Alger, Coltman, Aguirre, and Sirocky-Meck in their individual capacities. Only an entity requiring federal funding can be held liable under 20 U.S.C. § 1681. The statute provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ..

20 U.S.C. § 1681(a). Title IX applies to "institutions and programs that receive federal funds, 20 U.S.C. § 1681(a) . . . but it has consistently been interpreted as not authorizing suit against school officials, teachers, and other individuals." *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009); *See e.g.*, *Bracey v. Buchanan*, 55 F.Supp. 2d 416, 419 (E.D. Va. 1999); *Armstrong v. James Madison Univ.*, No. 5:16-cv-53, 2017 U.S. Dist. LEXIS 84191, *7, 9 (W.D. Va. June 1, 2017). Here, Reid files a Title IX claim against the four-named school officials in their individual and official capacities. *Compl.* ¶¶ 7-11, p. 90. As a matter of law, Reid cannot state a Title IX claim against them in their individual capacities as school officials. For these reasons, these claims should be dismissed.

3. The Title IX Claims against Alger, Coltman, Aguirre, and Sirocky-Meck in their Official Capacities are Duplicative

The Title IX claims against Alger, Coltman, Aguirre, and Sirocky-Meck in their official capacities should be dismissed as duplicative. A public official in his or her official capacity equates to a claim against the government entity that the official represents. *See Ky. v. Graham*, 473 159, 165 (1985). *Monell v. New York City. Dept. of Social Services*, 436 U.S. 658, 690, n.55. Here, Reid asserts a Title IX claim against JMU as well as Alger, Coltman, Aguirre, and Sirocky-Meck, in their official capacities. Because the Title IX claims against these defendants

in their official capacities are merely duplicative claims, these claims should be dismissed. *See Z.G. v. Pamlico County Pub. Schs. Bd. Of Educ.*, 744 Fed. Appx. 769, 780 (4th Cir. 2018); *see also Love-Lane v. Martin*, 355 F.3d 766, 783 (4th Cir. 2004).

E. The Complaint Fails to State a Breach of Contract Claim

The Complaint fails to state a breach of contract claim because Reid failed to follow the required steps for making a pecuniary claim against the Commonwealth under Virginia Code Section 2.2-814, which requires that a claimant present his claim to "the head of the department, division, institution, or agency responsible for the alleged act or omission which, if proved, gives rise to the claim." Only after a claim is denied, does a claimant's cause of action accrue permitting him to seek redress in a circuit court. Va. Code § 8.01-192. Here, the President of JMU is the head of the institution responsible for the alleged act giving rise to Reid's claim. As such, Reid was required by statute to present her claim to JMU's President prior to filing this lawsuit. *See Cominelli v. Rector & Visitors of the Univ. of Va.*, 589 F. Supp. 2d 706, 719 (W.D. Va. 2008) (holding plaintiff cannot state a claim for wrongful termination or breach of contract because he never presented his pecuniary claim to the President of UVA).

Additionally, to state a breach of contract claim, a plaintiff must allege: 1) a legally enforceable obligation of a defendant to a plaintiff; 2) the defendant's violation or breach of that obligation; and 3) injury or damage to the plaintiff caused by the breach of obligation. *Filak v. George*, 267 Va. 612, 594 S.E.2d 610, 614 (Va. 2004). Reid fails to allege a legally enforceable obligation. There is a presumption of at-will employment in Virginia, and her contract was only a term contract. *See* Ex. A. Furthermore, she fails to allege a breach or an injury caused by a breach because she resigned of her own volition, as discussed more thoroughly *supra*. For these reasons, the breach of contract claim has not been sufficiently pleaded and should be dismissed.

V. CONCLUSION

For the foregoing reasons, defendants, James Madison University, Jonathan R. Alger, Heather Coltman, Robert Aguirre, and Amy M. Sirocky-Meck, respectfully request that this Court Grant the Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6), dismiss this case with prejudice, and strike it from the docket.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd of June, 2021, I filed a copy of the foregoing document using the Court's ECM/ECF filing system, which will send an electronic notification of the same (NEF) to counsel of record for the plaintiff.

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