IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

ALYSSA REID,

Plaintiff,

v.

JAMES MADISON UNIVERSITY, A Public University, and JONATHAN R. ALGER, sued in his official and Individual capacities; HEATHER COLTMAN, sued in her official and individual capacities; ROBERT AGUIRRE, sued in his official and individual capacities; and AMY M. SIROCKY-MECK, sued in her official and individual capacities, and JANE or JOHN DOES 1-5, sued in their official and individual capacities,

&

U.S. DEPARTMENT OF EDUCATION

&

MIGUEL CARDONA, SECRETARY OF EDUCATION U.S. DEPARTMENT OF EDUCATION, sued in his official capacity,

Defendants.

CIVIL ACTION NO.: **5:21cv00032**

PLAINTIFF ALYSSA REID'S BRIEF IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Alyssa Reid began her professional career in June 2012 when James Madison University ("JMU" or "University") hired her as the Assistant Director of the "Individual Events Team" in the School of Communication. Defendants effectively ended Reid's promising JMU career in June 2019 when they issued a decision finding her responsible for engaging in a "nonconsensual relationship" with her long-term girlfriend three years earlier. Defendants reached the erroneous decision only after trampling Plaintiff's due process rights and utterly disregarding their own policies and procedures.

Plaintiff Reid was a nationally recognized debater during her own college career and had much to offer the Forensics Team members and her students in training and guidance to assure their success. Being an educator extended beyond a mere vocation for Alyssa and was instead an intrinsic aspect of her identity. She was passionate about education and teaching and felt especially compelled to help her students develop and hone their own voices in order to advocate for what was important to them. She has long been a staunch advocate for survivors of harassment and abuse and used her debating and other communications skills to give voice to their experiences. Compl. Introduction at 1-2.

The University Defendants have now changed Alyssa's life forever, destroying her reputation and ability to continue working at JMU. These Defendants were complicit in aiding Alyssa's ex-girlfriend (Kathryn "Katie" Lese, whom Defendants refer to as "Jane Doe")[1] to co-opt the University's Title IX Office and adjudicatory proceedings to exact revenge for a bad breakup. By accepting, pursuing, and essentially drafting Lese's "complaint" against Reid, these University Defendants ignored and misapplied their own policies and procedures, weaponized Title IX to destroy Alyssa's life, and shielded Lese from having to make even the most rudimentary effort to support her claims, present any evidence to defend them, or to be subject to cross-examination. *Id.* at 2.

[1] Plaintiff named Lese in her Complaint and Defendants have not moved to seal her identity.

These University Defendants used Title IX to punish Alyssa by branding her, without evidence, as a sexual abuser, thereby hindering her ability to continue working in her chosen career. This reputational destruction was compounded by the Defendants' refusal to provide her with the due process to which she was entitled in order to clear her name and expose the falsity of the accusations made. The Defendants' treatment of Alyssa is especially egregious in light of JMU's own written policies for intaking, investigating, and resolving Title IX complaints. These Defendants morphed not only into being soft advocates for Lese, they rewrote her "complaint" in order to create an actionable claim against Alyssa under a policy that did not exist at the time of the alleged conduct. Because Lese had not filed a self-crafted valid or viable Title IX complaint against Alyssa, these Defendants (specifically Amy Sirocky-Meck), redesigned one that would do service out of whole cloth. *Id.* at 2-3.

The University Defendants' approach ensured that Alyssa did not have fair notice of the accusations against her, prevented her from fully defending herself, prohibited her from exposing the fact that Lese's complaint was false, and violated every tenant of fair play. *Id.* They deprived her of her constitutional rights to due process and violated her rights under Title IX. She has been devastated personally, emotionally, and professionally as a result. Defendants must be held accountable. *Id.* at 4.

STATEMENT OF FACTS

I. PLAINTIFF REID'S HISTORY WITH JMU

Plaintiff Reid graduated from Minnesota State University, Mankato, in 2012 with a Masters Degree in Fine Arts in Communication. By letter dated June 21, 2012 JMU offered her the position of Assistant Director of Individual Events in the School of Communication Studies. She began working for JMU in the summer of 2012. Her responsibilities involved assisting with coaching, tournament travel and logistics, community outreach, administering finances, mentoring, working with students on their performance skills, and lecturing. She received the JMU "Dolley Award" in 2017, which is a student-nominated award for Best Campus Advisor. Plaintiff Reid was a dedicated teacher and student advocate. Compl. ¶¶ 240-246. Her JMU future was bright indeed.

Plaintiff Reid first met Lese in 2012, when Lese was an undergraduate. Lese graduated from JMU with a Bachelor's Degree in the spring of 2014, and took a graduate teaching position with the James Madison Forensics Team. Plaintiff Reid and Lese were "best friends" by Lese's graduation in 2014, spending time together both personally and professionally, but had not yet begun a romantic relationship. Compl. ¶¶ 249-251.

In the fall of 2014 Lese was assigned as a graduate student to the "Individual Events Team." Neither Plaintiff Reid nor Lee Mayfield (Director of the Individual Events Team) had any supervisory responsibilities or authority over Lese while she was a graduate student, as those duties fell under the purview of the Director of the Graduate Program for Communication Studies. Plaintiff Reid and Lese, in their respective roles with the "Individual Events Team," were colleagues and co-coaches with largely similar responsibilities. Plaintiff Reid was not a member of the Graduate Department and had no supervisory responsibilities or authority over Lese in her graduate program. Plaintiff Reid was not on any thesis committee, nor did she teach any graduate courses while Lese was in the graduate program. Plaintiff Reid had no decision-making authority over graduate-student travel (including Lese's), over graduate-student compensation (including what Lese was paid), whether Lese did or did not receive any scholarships, or which graduate assistants would be assigned to the Communication department. Plaintiff Reid had no faculty involvement with the graduate program and had no influence over academic matters. There was no "power differential" between Plaintiff Reid (in her role as Assistant Director) and Lese (in her role as a graduate student). Compl. ¶¶ 252-263.

In October 2015, while attending a forensics tournament in New Jersey with the JMU team, Lese invited Plaintiff Reid to her hotel room. It was at this time that Lese informed Plaintiff Reid that she was a lesbian (although she was then in a long-term relationship with a man). Lese also informed Plaintiff Reid that she was in love with her, had been for over a year, and had been attempting to figure out how to pursue her for months. Lese continued these discussions with Plaintiff Reid over the following month, initiating discussions about sex and describing other intimate details about her

sexual attraction to Plaintiff Reid. Plaintiff Reid resisted Lese, expressing caution and voicing concern about her efforts to move their friendship into a different type of relationship. Compl. ¶¶ 264-270.

Plaintiff Reid and Lese had their first sexual encounter (initiated by Lese) in November 2015 while they attended a national conference in Las Vegas. Lese later bragged to Plaintiff and others about the fact that she was the one who had "made the first move." She told Plaintiff Reid that she hoped what had happened between them in Vegas "didn't stay in Vegas," making clear that she wanted to continue their relationship after they returned to Virginia. Plaintiff Reid and Lese later mutually agreed to break up with their respective partners and enter into a monogamous relationship with each other. They also mutually agreed to keep their relationship private, so as to avoid impacting the team or sparking interdepartmental gossip. Compl. ¶¶ 271-275.

Lese completed her graduate program and obtained her graduate degree in May 2016. JMU hired her as a full-time employee beginning in June 2016. Plaintiff Reid and Lese moved in together in Plaintiff's house in the summer of 2017. Plaintiff Reid and Lese continued their consensual relationship over twenty-seven (27) months, through January 2018. Compl. ¶¶ 276-279, 285.

In May 2016 someone lodged an anonymous Title IX allegation against Plaintiff Reid with regard to her relationship with Lese (which, as noted above, had begun in November 2015). No one from the University, including the Title IX Department, notified Plaintiff Reid of such allegation at that time. Plaintiff Reid's Department Chair later informed her that the Title IX office had investigated the allegation and concluded that the environment on the team was not problematic.[2] He also informed her that there were no problems associated with her personal relationship with Lese because

[2] It is important to note that this investigation would have been conducted pursuant to JMU's 2012 Policy #1324 (discussed in more detail below), with the Title IX office finding that Plaintiff's relationship with Lese from November 2015 to May 2016 did not violate University policy. In what can only be described as a form of double jeopardy, and at Lese's behest, the University Defendants subsequently relied upon a later-adopted policy to reinvestigate that relationship and conclude that it did in fact violate a policy that never existed during the relevant time-period. Those are the actions that are the subject of this lawsuit.

she *was not* Lese's direct supervisor. Lese was actually upset that someone had challenged the propriety of their relationship, stating that it was none of the University's business. Compl. ¶¶ 280-284.

Plaintiff Reid and Lese ended their relationship in February 2018. Lese did not take the break-up well, thereafter stalking Plaintiff Reid, sending her abusive and threatening text messages, policing Plaintiff Reid's social media, and harassing her. Plaintiff Reid reported Lese's harassment and irrational behavior to the University Defendants during the course of the Title IX investigation and proceeding that is the subject of this lawsuit. She provided the University Defendants with numerous examples of Lese's misconduct, aggressiveness, manipulation, control, hostility, viciousness, jealousy, and threats to ruin her. As one example, and prior to Lese filing her Title IX allegations, Plaintiff Reid reported to a JMU colleague that Lese was trying to ruin her. At no point did the Title IX Office or Coordinator provide advice about or assist Plaintiff Reid with pursuing a Title IX complaint against Lese or otherwise help her to file a Title IX complaint. Compl. ¶¶ 286-291.

Lese's filing of a Title IX action against Plaintiff Reid was one step in her ongoing crusade to destroy Plaintiff's life and career. The Defendants knew or should have known that Lese's Title IX action against Plaintiff Reid was retaliatory, baseless, filed for improper reasons, and that it failed to state a valid Title IX claim against Plaintiff Reid. The University Defendants knew or should have known that Lese's allegations did not comply with or meet the requirements of JMU's policies and procedures and were inadequate for lodging a Title IX complaint. They knew or should have known that Lese's complaint was not timely filed, and they failed to protect Plaintiff Reid from Lese's retaliatory, aggressive and improper harassment. Compl. ¶¶ 292-298.

II. James Madison University Policies and Procedures

a. 2012 Policy # 1324 Governed Plaintiff Reid's Relationship with Lese

In August 2012 JMU adopted a revised Policy #1324 governing claims of "Discrimination and Harassment" ("2012 Policy #1324") and laying out the procedure for addressing the same. *See*

ECF 1-2. The principles enforced by the 2012 Policy #1324 (e.g., that which was allegedly violated by a particular respondent) were defined as follows:

> The university is committed to providing a work and learning environment that is free from discrimination or harassment based on protected criteria. Conduct that constitutes discrimination or harassment is a violation of university policy and is sanctionable.
>
> This policy prohibits discrimination against an individual on the basis of … sex, [or] sexual orientation…. It applies in the employment relationship.

ECF 1-2 at 5.[3] The 2012 Policy #1324 provided that "[a]ny member of the university community or visitor who is subjected to discrimination or harassment by an employee, affiliate or visitor may bring a complaint under this policy to attempt to redress the situation." *Id.*

The 2012 Policy #1324 defined "discrimination" in relevant part as: "To take an adverse action or provide unequal treatment based on a person's … sex [or] sexual orientation … when such action deprives a person of a privilege or right (such as a benefit, an equitable evaluation, a grade, a position or a promotion), or otherwise adversely affects the person." *Id.* at 3. The 2012 Policy #1324 defined "harassment" in relevant part as:

> A form of discrimination consisting of unwelcome or offensive physical, verbal or written conduct that shows aversion or hostility toward a person on the basis of … sex [or] sexual orientation … in the following situations:
>
> 1. When submitting to or rejecting the conduct is made the basis for a personnel action or the recommendation for a personnel action (such as hiring, promoting or salary adjustment), or an action or a recommendation for an action affecting a student (such as admission or retention), or evaluation (such as promotion, tenure, compensation or work condition adjustment of an employee or grading of a student).
>
> 2. When the conduct has the purpose or effect of unreasonably interfering with the performance of an employee or a student.
>
> *3.* When the conduct creates a hostile, intimidating or offensive learning or working environment.

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[3] When citing electronic filings throughout this Brief, we use the ECF page number, not the page number of the filed document.

Id. at 3-4.

The 2012 Policy #1324 required a complainant to file a "signed and written document" with the Title IX Office in order to pursue a "formal complaint." *Id.* at 6-7. The Policy prohibited the filing of anonymous complaints or the filing of a complaint on behalf of another person. *Id.* at 7. The "Complaint Commencement Date" was defined as "[t]he date on which the complainant provides the Title IX Officer with the written and signed complaint." *Id.* at 3. The 2012 Policy #1324 provided for a formal complaint process, including deadlines and the steps to be followed. The 2012 Policy #1324 recommended the complainant to contact the Title IX Office no later than 30 days "after the last behavior date," (*id.* at 6). According to the Policy:

> Failure to make ***a timely report*** to the Title IX Officer may impede the university's ability to effectively investigate the charge, but such failure will not prohibit the complainant from filing a formal complaint, ***as long as such complaint is timely filed under 6.2.1***. (Emphasis added).

Id. Section 6.2.1. provided the deadlines for filing a formal complaint:

> The formal complaint ***must be filed*** by the complainant ***not later than 180 days after the last date of discriminatory or harassing behavior*** by providing the Title IX Officer with a signed, written document detailing the allegations, naming the respondent and providing as much detail as possible about the charges. (Emphasis added).

Id. at 6-7. The 2012 Policy #1324 required the Title IX Officer to confirm the "complaint commencement date with the complainant in writing and … notify the respondent and [Director of Equal Opportunity], supplying both with a copy of the complaint." *Id.* at 7.

The 2012 Policy #1324 required the Title IX Officer to first make a determination as to "whether this policy applies" before proceeding further, and to "dismiss a complaint if the policy does not apply…." *Id.* Any such dismissal was deemed final/not subject to appeal. *Id.* Policy #1324 identified several circumstances under which it did not apply, including, but not limited to, "[t]hat even if the complainant's allegations are true, the respondent's conduct would not constitute harassment or discrimination ***as defined in this policy***"; or "[t]hat the alleged conduct did not occur

on university-owned, university-leased or university-controlled property or did not otherwise have a significant connection to the activities of the university or the working or learning environment for the complainant;" or ***"[t]hat the complaint was not timely filed***[.]" (Emphasis added). *Id.*

The 2012 Policy #1324 identified the Title IX Officer as the person initially responsible for conducting an investigation of the complaint, but only if the Officer first determined that the policy applied to the allegations. The 2012 Policy #1324 required the Title IX Officer to provide a "confidential written report" of recommendations and findings to the respondent's supervisor "[n]ot later than 60 days after the complaint commencement date…." *Id.* Policy #1324 provided that "[s]anctions will be commensurate with the severity and/or frequency of the offense and may include termination of employment, removal of affiliate status, exclusion from future learning or working opportunities at the university and/or issuance of a no-trespass notice." *Id.* at 10.

JMU's 2012 Policy #1324 governed faculty conduct for that period of time from August 2012 to August/September 2016 (when it was replaced by Policy #1340). *See* ECF1-2 and 1-3. JMU's 2012 Policy #1324 was thus the policy applicable to Plaintiff Reid's and Lese's relationship from November 2015 to May 2016—the time frame addressed by Lese's complaint. ECF 1-2.

JMU's 2012 Policy #1324 provided that "[c]onduct that constitutes discrimination or harassment is a violation of university policy and is sanctionable." *Id.* at 5. Being focusing upon the "conduct" of the accused, the "Procedures" of the 2012 Policy #1324 were designed to determine whether such conduct violated the JMU "policy" as defined. By focusing upon an accused's "conduct," any accusation that they engaged in discrimination or harassment was governed by the policy in effect at that time—in this case the one adopted in 2012—as it provided the only definitional framework for determining what violated University "policy." ECF 1-2.

That the 2012 policy was conduct-determinative is further confirmed by the reference to specific dates, details, and deadlines as being dispositive of whether a complaint could proceed: (1) the formal complaint had to be filed within 180 days "after the last date of discriminatory or harassing

behavior…"; (2) the complainant was required to provide "as much detail as possible about the charges"; (3) the Title IX officer was required to first determine whether the "conduct" constituted harassment or discrimination "as defined in this policy"; and (4) the Title IX officer was mandated to dismiss the complaint if she determined "[t]hat the complaint was not timely filed." *Id.* at 6-7.

Lese's complaint against Plaintiff Reid was based on the implication that there was something inappropriate about their relationship during that six-month period from November 2015 to May 2016 while she was a graduate student. ECF 1-5 at 4. Lese's complaint against Plaintiff Reid, being filed in December 2018, was thus untimely pursuant to JMU's 2012 Policy #1324 as it was not filed within 180 days "after the last date of discriminatory or harassing behavior." ECF-1-5 and 1-6. It was in fact filed ***over two years after*** the 180-day deadline had lapsed. JMU's own policies thus required immediate dismissal of Lese's complaint from the outset. Defendants failed and refused to dismiss it, however, thereby violating not only their own policies, but Plaintiff's rights and entitlements under the 2012 Policy #1324. To make matters worse, and rather than dismiss Lese's complaint as their policies required, Defendants retroactively applied a non-existent concept to Plaintiff's and Lese's relationship to redefine it as being "non-consensual" and subject to punishment three years later.

b. To Pursue a Title IX Action Against Plaintiff Reid, Defendants Improperly Relied upon JMU's 2016/2018 Policy#1340

In August/September 2016, after Lese had graduated from JMU, the University adopted an entirely new Policy #1340 entitled "Sexual Harassment and Sexual Misconduct" ("Policy #1340"). ECF 1-3. ***In January 2018,***[4] JMU issued a newly-revised version of Policy #1340 governing "Sexual Misconduct." ECF 1-4. The adoption of Policy #1340 was the first time that JMU sought to equate the definition of a "nonconsensual" relationship with "sexual misconduct," and to incorporate such

[4] The 2016 and 2018 versions of Policy #1340 are largely the same and any relevant differences between them are noted below.

concepts into its Title IX policies and procedures. Policy #1340 defined a "consensual relationship" as "[a] relationship between adult members of the university community which is freely and mutually entered into and continued, and is not coerced, influenced by an unfair power differential or the subject of any type of inappropriate or undue pressure or force." ECF 1-4 at 3. Section 5.6 of Policy #1340 introduced concepts of "consensual" and "nonconsensual" relationships, providing the first notice to faculty of how their conduct would be judged pursuant thereto:

> Genuinely consensual relationships which are not coerced, influenced by an unfair power differential or the subject of any type of inappropriate or undue pressure or force between adult members of the university community are not prohibited. … A sexual relationship between members of the university community is prohibited if it is influenced by any form of fear or coercion, such that it causes one party to believe that he/she must submit to the unwelcome sexual conduct in order to accept or continue employment, achieve an employment or educational benefit, or participate in a program or activity or to remain safe and secure. In a sexual relationship between individuals where a power differential 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 coerced sexual conduct, the relationship is prohibited. Examples would include an instructional faculty member and a student enrolled in his/her class or under his/her supervision; employees who are a supervisor and a subordinate; a coach and a member of the team he/she coaches; or any other relationship where one party has the opportunity to pressure or force the relationship on the other.

Policy #1340 defined a "formal complaint" as "[t]he signed and written document used to file a formal complaint of sexual misconduct under this policy. A report may be communicated orally, but a formal complaint must be in writing and signed by the reporter." ECF 1-4 at 4. Policy #1340 abolished all deadlines by which formal complaints had to be filed. According to the 2016 version of Policy #1340: "The formal complaint should be filed as soon as possible after the last date of discriminatory or harassing behavior. ***There is no time limit for filing a formal complaint under this policy***, but the university must be able to **investigate** and address the allegations." ECF 1-3 at 11. (Emphasis added). According to the 2018 version of Policy #1340: "The formal complaint should be filed as soon as possible after the last date of discriminatory or harassing behavior. ***There is no time limit for filing a formal complaint under this policy***, but the university must be able to

collect statements and address the allegations." ECF 1-4 at 16 (emphasis added). The University's role thus changed from *investigating* complaints to merely *collecting statements*.

Policy #1340 mandated the Title IX Officer to first make a determination "[u]pon receipt of a report" as to "whether this policy applies and [to] inform the reporter … if the policy does not apply." The Title IX Officer was required to dismiss the complaint if the policy did not apply. "A decision that the policy does not apply is final, and is not appealable." *Id.* at 13.

Policy #1340 did not require the accuser/reporter to attend the hearing, to be subject to questioning by the hearing panel, or to be subject to cross-examination by the respondent. *Id.* at 18; Compl. ¶¶ 219-221. Policy #1340 did not allow the accused/respondent (Plaintiff Reid in this instance) to question the accuser/reporter (Lese) about the allegations that she made:

> In the hearing, neither party is required to be present. If a party is not present, he/she may submit a written statement. If the parties are present and testify, neither the reporter nor the respondent shall be allowed to cross-examine the other party directly, but shall propose questions through the chair of the hearing panel. Either party may opt to participate via remote access to the hearing, through audio or video conferencing options.

ECF 1-4 at 18. Section 6.6.8.6 of Policy #1340 provided that "[b]oth the reporter and respondent shall have timely access to documents and information considered by the hearing panel." *Id.* Policy #1340 ostensibly placed the burden of proof on the accuser/reporter, not the accused/respondent. "The respondent is presumed to be not responsible unless ***sufficient evidence*** is presented to prove a violation ***of the policy*** has occurred." *Id.* at 19 (emphasis added).

Policy #1340 was not in effect between November 2015 and May 2016, the only relevant time period at issue in Lese's complaint.

III. TITLE IX PROCEEDINGS AGAINST REID

On December 4, 2018 Lese sent an email message to Defendant Sirocky-Meck, JMU's Title IX Coordinator, with an attached "Title IX Statement" that was both unsigned and undated. (ECF 1-5). Lese's email message and attached "Title IX Statement" were filed with JMU over 3 years after

Plaintiff Reid and Lese began their relationship, 2 ½ years after Lese finished her graduate degree, 18 months after they voluntarily moved in together, and over 10 months (approximately 300 days) after they ended their relationship. Compl. ¶¶ 299-300.

Lese's Statement did not allege that Plaintiff Reid had violated a JMU policy, engaged in "sexual misconduct," violated her rights under Title IX, sexually harassed her, discriminated against her, or engaged in wrongful behavior. Lese did not allege that her relationship with Plaintiff Reid was "nonconsensual." The focus of Lese's "Title IX Statement" was the November 2015 to May 2016 time frame, stating that the end of their relationship (around January 2018) was not relevant to her claims. Lese's allegations against Plaintiff Reid should have been governed by the 2012 Policy #1324, which was the one in effect during the relevant period. Compl. ¶¶ 302-312.

Defendant Sirocky-Meck appointed herself as the "Title IX Officer" for Lese's Complaint, choosing to play a dual role (as she was JMU's Title IX Coordinator as well). On December 13, 2018, nine days after Lese filed her "Title IX Statement," Defendant Sirocky-Meck sent an email message to Plaintiff Reid informing her that she had been named as a "***Respondent in a Formal Complaint of Sexual Misconduct***" filed by Lese "***on December 12, 2018*** through Title IX." *See* ECF 1-6 at 2. (Emphasis added). Sirocky-Meck misled Plaintiff Reid as to the "complaint commencement date," (*e.g.,* the date on which Lese filed her allegations with the Title IX office) and misled her regarding the nature of Lese's document, referring to it as a "Formal Complaint." The document filed by Lese did not meet the University's requirements for being a "Formal Complaint." Defendant Sirocky-Meck informed Plaintiff Reid that "Title IX has opened the case to look into ***the incident*** that lead [sic] to the formal complaint," (emphasis added), although she did not identify the alleged "incident" to which she was referring in her email message. Sirocky-Meck explained that "[t]he purpose" of "the [Title IX] case" was "to collect incident statements from the Reporter, Respondent and possible incident witnesses." She did not provide Plaintiff Reid with a copy of Lese's "Title IX Statement" at the time, instead withholding it for approximately two more months, until February 2019. Compl. ¶¶ 313-323.

Defendant Sirocky-Meck claimed in her December 13 email that ***"[t]he specific incident of sexual misconduct named by the reporter*** **in the *Formal Complaint*** is JMU Policy 1340.5.6 Non-Consensual Relationship, *specifically* that you and Lese were involved in a romantic and sexual relationship beginning Fall 2015 during the time when Lese was a graduate assistant with the Individual events team that you served as Assistant Director for." (Emphasis added). Defendant Sirocky-Meck's December 13 email message falsely described Lese's document, as well as the allegations that Lese made, in at least five respects: (1) Lese did not describe a "specific incident of sexual misconduct"; (2) Lese did not file a "Formal Complaint"; (3) Lese never referenced or described a violation of JMU Policy 1340.5.6; (4) Lese did not claim that Plaintiff Reid violated any University policy; and (5) Lese never alleged that her relationship with Plaintiff Reid was "non-consensual. Compl. ¶¶ 324-326

Defendant Sirocky-Meck informed Plaintiff Reid in her December 13, 2018 email that the Title IX office "does not adjudicate sexual misconduct cases for the university" but instead serves as a resource for the JMU employees involved in sexual misconduct complaints. She further explained:

> Formal complaints of sexual misconduct against instructional Faculty with and without tenure and A&P faculty with tenure are heard through the Sexual Misconduct Accountability Process laid out in JMU Policy 1340.6.6.8 Sexual Misconduct Complaint process against faculty member.

Sirocky-Meck's December 13, 2018 email message (which was sent at approximately 1:00 PM) was entitled "Notification of Title IX Formal complaint [*sic*]: Response needed by Friday Dec. 14 3:00 PM." Despite having sat on Lese's statement for nine days, Defendant Sirocky-Meck demanded that Plaintiff Reid provide an initial response to her email message within a little over twenty-four hours: "It is important that you respond via email by tomorrow, **Friday December 14 at 3:00 PM** to inform Dr. Fife and me of when you are available during that time period for a meeting." (Bold in original). She also instructed Plaintiff Reid that they needed to schedule a meeting on the following Monday (three days later): "Your direct supervisor, Dr Eric Fife and I are requesting that you meet with us on Monday, December 17, 2018…." Sirocky-Meck's December 13 email message was sent at the

beginning of JMU's Christmas break, and Plaintiff Reid had already left for the holiday. Defendant Sirocky-Meck's failure to immediately notify Plaintiff Reid of Lese's "Title IX Statement" (withholding it for nine days) deprived her of the ability to respond before leaving campus. She also threatened Plaintiff Reid that if she "fail[ed] to respond to the request in this notice or any of the terms of the notice, you may face additional action in accordance with university policy pertaining to employment." Sirocky-Meck attached to her December 13, email a copy of the "Outline of the Sexual Misconduct Accountability Process for Complaints against Faculty Policy 1340-Sexual Misconduct," and a copy of the "Overview of the Procedures." She neither referenced nor provided Plaintiff Reid with the 2012 Policy #1324, the JMU policy in effect from November 2015 to May 2016. Compl. ¶¶ 329-337.

The University conducted an investigation of Lese's "Title IX Statement" up through March, 2019, including taking "witness statements" from certain individuals identified by Lese and Plaintiff Reid. The University Defendants did not provide Plaintiff Reid with a copy of Lese's "Title IX Statement," until *after* they interviewed Plaintiff Reid's supporting witnesses, thereby forcing them to participate in the process without knowing what the specific allegations were. By withholding Lese's actual "Title IX Statement" Defendant Sirocky-Meck hindered Plaintiff Reid and her witnesses from being able to address, respond to or refute Lese's allegations. In stark contrast, and upon information and belief, Lese's witnesses were aware of the claims she made in her "Title IX Statement." The University Defendants were biased in treating Plaintiff differently than Lese. Compl. ¶¶ 338-343.

Lese's "Title IX Statement," the basis for the Title IX proceedings against Plaintiff Reid, was approximately two pages long, redacted and did not accuse Plaintiff Reid of engaging in a "nonconsensual" relationship. The University Defendants did not provide Plaintiff Reid with the factual or legal support for Sirocky-Meck's determination that Lese's allegations somehow constituted accused Plaintiff Reid of having engaged in a "non-consensual relationship." They allowed Lese to pursue a Title IX claim against Plaintiff Reid despite the fact that there was no basis within the University's internal disciplinary procedures for doing so. Compl. ¶¶ 357-360.

On March 13, 2019, Defendant Sirocky-Meck sent Plaintiff an email regarding the "Hearing Date, Time, and Location," as well as substantive information about how the hearing would be conducted. She informed Plaintiff Reid that the "Reporting and Responding Parties can choose if they would like to participate in the hearing or not." She later reiterated Defendants' policy that Lese was not required to attend and participate in the hearing: "I want to reiterate that for the reporting … part[y], participating in the hearing itself is a choice that each individual must make for themselves." She declared that if Lese did appear, Plaintiff Reid was prohibited from asking her direct questions, being instead required to filter such questions through the "hearing chair," who would vet each one and, if approved, repeat it to Lese. JMU's hearing rules thus deprived Plaintiff Reid of the twin rights to confront and cross-examine her accuser. Compl. ¶¶ 344-349.

Defendant Sirocky-Meck's March 13 email identified the University staff appointed to the hearing panel. Although Plaintiff Reid requested the appointment of someone from the LGBTQ community, the University Defendants refused. Compl. ¶¶ 353-356

The faculty hearing related to Lese's Title IX Statement took place on March 28, 2019. The Defendants conducted that pursuant to those rules, procedures, standards, and definitions laid out in JMUs 2018 Policy #1340. They did not follow or apply the 2012 Policy #1324, despite the fact that it governed the Plaintiff's relationship with Lese from November, 2015 to May, 2016. Plaintiff Reid attended in person; Lese refused, instead submitting a letter to be read to the hearing panel. JMU's policies (both 2012 Policy #1324 and Policy #1340) required the Defendants to provide Plaintiff Reid with Lese's letter prior to the hearing to ensure that she had an equal opportunity to defend herself. The Defendants neither provided Lese's letter to Plaintiff Reid, nor allowed her to review it prior to the hearing. Plaintiff Reid requested a copy of Lese's letter both before and after the hearing. The Defendants rejected her request, thereby violating their own policies. Compl. ¶¶ 372-381.

Defendants allowed Lese to pursue her allegations against Plaintiff Reid, while also shielding her from attending the hearing. They thus prevented Plaintiff Reid from being able to defend herself

by cross-examining Lese or otherwise questioning her (and her witnesses). They also violated Plaintiff Reid's right to confront her accuser. Their approach effectively switched the burden of proof from Lese onto Plaintiff Reid. While Defendants did not require Lese to present ***any actual evidence*** to support of her allegations, Plaintiff Reid was forced to refute them—to prove a negative. The panel had no ability to observe, assess, or determine Lese's credibility. The very outcome of the hearing shows that the University Defendants and the hearing panel violated Plaintiff Reid's rights by presuming that Lese's allegations were true. They simply assumed that her unsupported allegations represented "sufficient evidence" to show that Plaintiff Reid had violated Policy #1340. The University Defendants' decision to pursue a Title IX claim without the accuser's participation ultimately made it impossible for Plaintiff to defend herself or for the hearing panel or the University Defendants to make any findings of fact in a non-arbitrary manner. Compl. ¶¶ 382-389.

By allowing Lese to avoid appearing at the hearing, Defendants deprived Plaintiff Reid of calling the most important witness that she needed to refute the claims made—Lese herself. Defendants prohibited Plaintiff Reid from cross-examining Lese on a wide variety of relevant topics, with such prohibition being in clear violation of Plaintiff Reid's right to confront her accuser and due process. Obtaining answers to Plaintiff Reid's questions would have shown that Lese's "Title IX Statement" was not a legitimate claim of sexual misconduct but was instead designed to "get even" for a failed romantic relationship. Compl. ¶¶ 390-398.

Lese submitted the unsworn and unsigned "witness incident statements" of four individuals, none of whom supported the allegation that Plaintiff's relationship with Lese was nonconsensual, that Plaintiff had harassed or discriminated against her, or that Plaintiff Reid had violated University policy. All of the witnesses knew Plaintiff Reid and Lese were in a romantic relationship, thereby contradicting Lese's claim that Plaintiff Reid prohibited her from telling anyone. None of Lese's witnesses attended the hearing and, as such, were not subjected to cross-examination. Defendants' decision to allow Lese

to present written statements rather than requiring the live testimony of such witnesses violated Plaintiff Reid's right to confront and cross-examine them. Compl. ¶¶ 399-407.

Lese presented no evidence that Plaintiff had violated University policy, that Plaintiff Reid was a faculty member from whom she was taking a class during the November 2015 to May 2016 time period, that her relationship with Plaintiff Reid was not freely and mutually entered into and continued, or that it was coerced. She presented no evidence that her relationship was influenced by an unfair power differential, that her relationship with Plaintiff Reid was the subject of inappropriate or undue pressure or force, or that Plaintiff Reid harassed her or discriminated against her. Compl. ¶¶ 408-416.

The hearing panel issued its "Findings and Recommendations Report" on April 1, 2019, finding that Plaintiff Reid was "responsible" for violating "Policy 1340 Sexual Misconduct 5.6 Non-consensual relationships." *See* ECF 1-8 at 2. The hearing panel recommended that Plaintiff Reid be reprimanded. *Id.* at 3. The hearing panel's focus was upon Plaintiff's relationship with Lese during the November 2015 to May 2016 time frame. Policy #1340 prohibiting "sexual misconduct," including "non-consensual relationships," however, did not exist during November 2015 to May 2016. Plaintiff Reid's *conduct* from November 2015 to May 2016 could not have violated a policy that did not come into existence until August/September 2016. Compl. ¶¶ 420-422. The hearing panel reached no conclusion and made no finding as to what constituted the "non-consensual" aspect of the relationship between Plaintiff Reid and Lese. The hearing panel did not find that Plaintiff Reid violated University Policy #1324, that she had discriminated against Lese under the 2012 Policy #1324, or that she harassed Lese as defined by 2012 Policy #1324. Compl. ¶¶ 423-426. The hearing panel relied upon statements and documents that were not properly admitted. The hearing panel's decision was not based upon actual admissible evidence, but upon hearsay and allegations that had never been subject to confrontation or cross-examination. The hearing panel made credibility determinations without the ability to judge the credibility of the Lese or her witnesses. Compl. ¶¶427-429.

The panel's Recommendations Report was just the first step in the University process: "The AVP, Dean or VP over the Responding Party will determine the final outcome of the case. The respondent's AVP, Dean or VP may adopt the recommendations of the hearing panel, reject them and make a different decision on the case, or modify them as he/she deems appropriate." ECF 1-8 at 3. The form used by the hearing panel to report its findings reiterated the preliminary or tentative nature of the decision several more times: "Sanction ***Recommendations***" (*id.*) (emphasis added); "[t]he AVP, Dean and/or VP over the Responding Party will make the specific determination about the nature and detail of any sanctions imposed"; (*id.* at 3-4); "The AVP, Dean or VP may adopt the recommendations of the hearing panel, reject them and impose a different sanction, or modify them as he/she deems appropriate." *Id.* at 4.

As per the University's "Decision and Appeal Process and Procedures," Dean Aguirre reviewed the hearing panel's findings and recommendation. ECF 1-8 at 5. Dean Aguirre did not timely respond to Plaintiff's appeal, instead taking more than two additional weeks to issue his decision (beyond what was provided for in the rules: "Within ten days of receipt of the panel's recommendations, the respondent's associate or assistant vice president or dean will send a written decision in the case…." *Id.*). He found Plaintiff Reid to be "responsible" for engaging in a "non-consensual relationship" in violation of JMU Policy # 1340.5.6. He also opined that Plaintiff Reid's relationship was "inappropriate" (without defining what that meant), and that Plaintiff had violated JMU policy (without identifying the policy or time frame). ECF 10-1 at 3. Dean Aguirre never addressed the fact that Policy #1340 did not exist during November 2015 to May 2016 and, as such, could not have governed Plaintiff Reid's conduct. He ignored the due process problems inherent in the proceedings, including Plaintiff being unable to confront and cross-examine Lese and her witnesses, and that she was accused of doing something at a time when such a "thing" did not exist.

Defendant Aguirre based his decision on Lese's written statement and the witness statements that she submitted. He also found that Lese had been subjected to "verbal abuse and retaliation" by

Plaintiff Reid after their relationship "went sour," at which time Lese had not been a student at JMU for approximately two years. There was no evidence in the record that Plaintiff Reid had verbally abused or retaliated against Lese at any time. ECF 10-1; Compl. ¶¶ 435-437. Aguirre "*recommended*" and "*suggested*" that a letter of reprimand be issued against Plaintiff Reid. ECF-10-1 at 4.

Plaintiff Reid exercised her rights under the University's policies and procedures (*see* ECF 10-1 at 2, 6) and appealed to Vice-President/Provost Heather Coltman to review the case, the hearing panel's actions and Dean Aguirre's decision. She requested Provost Coltman to issue a final decision that she was not a "responsible" party nor subject to being sanctioned. Plaintiff's appeal was focused squarely on the fact that she did not receive the due process to which she was entitled, and that the decisions of the hearing panel and Dean Aguirre finding her to be "responsible" for engaging in sexual misconduct should be reversed. Defendant Coltman reviewed the underlying proceedings and issued her decision on June 19, 2019. It likewise was based on Plaintiff's alleged violation of Policy #1340 (non-consensual relationship). *See* ECF-1-9.

Defendant Coltman acknowledged receiving Plaintiff Reid's appeal on May 5, 2019. ECF 1-9 at 2. She justified taking approximately six weeks to issue her decision (with JMU's appeal process requiring a five-day turnaround), by stating that she had conducted a "thorough review" of the "voluminous" materials. She then stated that the additional time was necessary "in the interest of bringing about a just outcome," confirming that it was her decision that represented the final "outcome" of the proceedings against Plaintiff Reid. ECF 1-9 at 2; Compl. ¶ 440.

Defendant Coltman rejected Plaintiff Reid's claim that she was denied due process. She wrongfully concluded that Plaintiff Reid had been informed of the charge of a "non-consensual relationship" under Policy #1340, ignoring the fact that no such policy existed during the November 2015 to May 2016 interval and, as a result, Plaintiff Reid's conduct could not have violated it. She wrongfully concluded that Lese had made an accusation of "non-consensual relationship," when her "Title IX Statement" included no such allegation. She disregarded the fact that Plaintiff Reid was not

provided with a copy of Lese's "Title IX Statement" before being required to identify witnesses, but was instead only informed of Defendant Sirocky-Meck's interpretation of Lese's allegations. She disregarded the fact that Plaintiff Reid was not provided with a copy of Lese's letter prior to the Title IX hearing. Plaintiff Reid instead heard someone else read Lese's letter for the first time during the course of the hearing. Defendant Coltman disregarded the fact that Plaintiff Reid was not allowed to confront or cross-examine Lese or her witnesses and the fact that the hearing panel could not have made any credibility determinations for Lese or her witnesses. Compl. ¶¶ 441-450. Defendant Coltman upheld Dean Aguirre's decision to find Plaintiff Reid "responsible" and adopted his recommendation to place a letter of reprimand in her personnel file. ECF 1-9 at 4.

All of the University Defendants disregarded the fact that they had previously investigated Plaintiff Reid's November 2015 to May 2016 relationship with Lese and concluded that it was neither prohibited nor otherwise considered inappropriate under JMU policy. Having previously concluded that Reid had not violated JMU policy ***for the very same relationship, during the very same time period, and related to the very same actions that were at issue in Lese's complaint***, the Defendants had no basis for pursuing a *second* Title IX investigation against her, nor for punishing her in any way. Plaintiff Reid reasonably relied upon the Defendants' previous conclusion that her relationship with Lese did not violate University policy. By conducting a second Title IX investigation under later-adopted policies, these Defendants violated Reid's due process rights. Compl. ¶¶ 454-455.

CLAIMS FOR RELIEF

Plaintiff Reid filed suit against Defendants JMU, Alger (President of the University), Coltman (Provost), Aguirre (Dean) and Sirocky-Meck (Title IX Coordinator), with the administrators being sued in their official and individual capacities, pursuing the following four causes of action:

- Count I: Violation of Due Process (42 U.S.C. § 1983 and Va. Const. Art 1 §§ 11 and 15) – Refusal to Enforce the Correct University Policy;
- Count II: Violation of Due Process (42 U.S.C. § 1983 and Va. Const. Art 1 §§ 11 and 15) – Refusal to Allow Confrontation and Cross-Examination;

- Count III: Violation of Due Process (42 U.S.C. § 1983 and Va. Const. Art 1 §§ 11 and 15) – Retroactive Application of University Policy; and

- Count IV: Violation of Title IX.

Plaintiff is seeking a declaratory judgment, injunctive relief, and damages.

Defendants have filed their Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6). They argue that Plaintiff Reid filed her Complaint in this Court after the statute of limitations had lapsed; that Plaintiff's Section 1983 claims against Defendants Algers, Coltman, Aguirre, and Sirocky-Meck are barred by the Eleventh Amendment; that Plaintiff Reid has failed to state a due process claim under Section 1983; that Plaintiff Reid has failed to state a Title IX claim; and that the Complaint fails to state a breach of contract action.[5] Plaintiff Reid addresses each of these arguments below.

STANDARD OF REVIEW

In *Doe v. Virginia Polytechnic Institute and State University*, 400 F.Supp.3d 479 (W.D. Va. 2019) (referred to below as "*Doe v. Virginia Tech*"), this Court summarized the standard of review for motions filed pursuant to both Fed.R.Civ.P. 12(b)(1) and 12(b)(6). In deciding a Rule 12(b)(1) motion, "the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.'" *Id.* at 487 (quoting *Evans v. F.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999)). "It must, however, 'view[] the alleged facts in the light most favorable to the plaintiff, similar to an evaluation pursuant to Rule 12(b)((6).'" *Id.* (quoting *Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999)). "Dismissal under Rule 12(b)(1) is proper 'only if the material jurisdictional questions ***are not in dispute*** and the moving party is entitled to prevail as a matter of law.'" *Id.* (quoting *Evans*, 166 F.3d at 645). (Emphasis added).

"To survive a Rule 12(b)(6) motion to dismiss, a plaintiff's allegations must 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "This

[5] Plaintiff, however, has opted not to pursue her breach of contract claim.

standard 'requires the plaintiff to articulate facts, when accepted as true, that '"show"' that the plaintiff has stated a claim entitling him to relief, *i.e.*, the '"plausibility of entitlement to relief."" *Id.* (quoting *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009)). "The plausibility standard requires more than 'a sheer possibility that a defendant has acted unlawfully.'" *Id.* at 488 (quoting *Iqbal*, 556 U.S. at 678). "'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.'" *Watson v. Shenandoah University*, 2015WL5674887 at *8 (W.D. Va. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. at 678).

"In determining whether the plaintiff has met this plausibility standard, the court must accept as true all well-pleaded facts in the complaint and any documents incorporated into or attached to it." *Doe v. Virginia Tech*, 400 F.Supp.3d at 488. The court must also "draw[] all reasonable factual inferences from those facts in the plaintiff's favor…." *Id.* (internal quotations omitted). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Keith v. Commonwealth of Virginia Dept. of Corrections*, 2010WL2555110 at *2 (W.D. Va. 2010). "'The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *Id.* at *1 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

"'A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.'" *Jones v. Sun Pharmaceutical Industries, Inc.*, 2020WL2501439 at *2 (E.D. Va. 2020) (quoting *Republican Party of N.C. v. Marti*, 980 F.2d 943, 952 (4th Cir. 1992)). "To survive a 12(b)(6) motion to dismiss, [the plaintiff] need not plead facts that constitute a prima facie case…." *Watson v. Shenandoah University*, 2015WL5674887 at *9. "Furthermore, when as here, a Rule 12(b)(6) motion is testing the sufficiency of a civil rights complaint, we must be especially solicitous of the wrongs alleged, and must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief ***under any legal theory which might plausibly be suggested by the facts alleged***." *Newberry v. Wolfe*,

2019WL2407758 at *3 (S.D. West Va. 2019) (quoting *Edwards v. City of Goldboro*, 178 F.3d 231, 244 (4th Cir. 1999) (internal quotation marks omitted). (Emphasis in original).

ARGUMENT

I. THE STATUTE OF LIMITATIONS DOES NOT BAR PLAINTIFF REID'S CLAIMS

The University Defendants first contend that Plaintiff's Complaint is untimely, arguing that the two-year statute of limitations began to run no later than April 30, 2019, when Defendant Aguirre issued his written decision and sanction recommendations related to the proceeding instituted against Plaintiff. In making that argument, however, the Defendants ignore the history of the underlying proceedings, as well as their own documents, policies and procedures showing that this matter did not accrue until June 19, 2019, when the decision finding Plaintiff "responsible" was actually issued and at which time the University's "official position" was conveyed to Reid.

There are three cases that are critical to the question before the Court, all of which support Plaintiff's position. First, is the Supreme Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the second is this Court's decision in *Doe v. Virginia Tech*, and the third case is *Endres v. Northeast Ohio Medical University*, 938 F.3d 281 (6th Cir. 2019). None of the decisions support the relief that Defendants seek; they instead confirm that the Complaint was timely filed.

In *Ricks*, the Court held that the limitations period for a professor denied tenure began to run at the time tenure was ***officially*** denied, and not when his contract expired the following year. In reaching that conclusion, and in identifying the specific date when the plaintiff's claim accrued for statute of limitations purposes, the Court made several findings that are important here. The Court first discussed the procedural steps and time-line that led to the decision to deny Mr. Ricks tenure: (1) February, 1973, Faculty Committee on Promotions and Tenure ("Tenure Committee") ***recommended*** that Mr. Ricks not receive a tenured position, but agreed to reconsider such decision the following year; (2) February, 1974, Tenure Committee again ***recommends*** against tenure; (3) March, 1974, Faculty Senate ***voted*** to support the Tenure Committee's negative recommendation; (4)

March, 1974, College Board of Trustees ***voted*** to deny tenure; (5) June 26, 1974, the Board of Trustees informed Mr. Ricks of its "official position"[6] and offered him a one-year "terminal" contract that would expire on June 30, 1975. 449 U.S. at 252-253. The Court concluded that "[i]n light of this ***unbroken array of negative decisions***, the District Court was justified in concluding that the College had established ***its official position—and made that position apparent to Ricks***—no later than June 26, 1974." *Id.* at 262. (Emphasis added).

The Court established June 26th as the accrual date rejecting plaintiff's claim that the statute of limitations did not begin to run until resolution of his "grievance, or some other method of ***collateral review*** of an employment decision." *Id.* at 261. (Emphasis added). The Court explained that "entertaining a grievance complaining of the tenure decision does not suggest that the earlier decision ***was in any respect tentative***." *Id.* (Emphasis added). Instead, "[t]he grievance procedure, by its nature is a *remedy* for a prior decision not an opportunity **to *influence*** that decision before it is made." *Id.* (Emphasis in original).

The Supreme Court's instructions are clear: when dealing with an "unbroken array of negative decisions" the "official position" of the deciding body comes ***at the end*** of the proceedings, not at the beginning or somewhere in the middle. It is only at that point that a claim has accrued for statute of limitations purposes. This is so ***even if*** the employee has a "grievance[] or some other method of collateral review" pending at the time such final decision is made. The Court's focus is thus on when the ***official decision*** is made in the extant proceeding involved, with that decision being the point in time "of the discriminatory acts." *Id.* at 258.

The Court intentionally distinguished between those proceedings that were part and parcel of the tenure decision itself (which played out between February 1973 and the end of June 1974) and the collateral review represented by the grievance process. The Court in fact drew a straight line that

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[6] 449 U.S. at 261 ("The June 26 letter itself characterized that as the Board's 'official position.'").

connected the Tenure Committee's initial recommendation in 1973 through each subsequent step up to the Trustee's decision to formally reject Ricks' tenure bid—defining that process as the "unbroken array of negative decisions." *Id.* at 262. Ricks' grievance, in contrast, was "collateral" to or outside of that tenure decision-making process itself. That is not the situation with the proceedings against Plaintiff Reid—there was no separate or "collateral" proceeding involved. We instead have an "unbroken array of decisions" from the initial decision to pursue Lese's "complaint" against Plaintiff Reid up through the Provost's final and unappealable decision affirming the prior actions and steps, her refusal to remedy the glaring due process problems inherent in the University's actions, and her acceptance of Dean Aguirre's "recommendation" or "suggestion."

Contrary to what the *Ricks* decision instructs, Defendants here urge the Court to rule that Plaintiff's claims accrued prior to when the University "established its official position" on what process she was due, which policy governed Lese's complaint, whether Plaintiff should be found to be "responsible," and what sanction was appropriate. *See Ricks* at 262. Using the *Ricks* timeline as an example, Defendants' theory would be that his claim accrued as early as February, 1973, and no later than February, 1974, which are the dates on which he was notified that the Tenure Committee ***recommended*** against tenure, thereby (according to Defendants) providing him with sufficient facts about the nature of the harm done—that he was not going to be tenured. The defendants would have this Court rule that the later proceedings involving the question of Mr. Ricks' tenure were superfluous in terms of determining when his claim accrued. That, however, is not what the Supreme Court held in *Ricks*, which instead recognized that the University provided a step-wise process culminating on June 26, 1974 when the Trustees "made [their official] position apparent to Ricks" that they were denying tenure and offering a one-year "terminal" contract. The Court then concluded that once the "official position" of the University was "made . . . apparent to Ricks," the existence of a grievance or another method of collateral review did not delay accrual of the statute of limitations.

This Court has recognized the importance of the *Ricks* analysis and relied upon it to support its conclusion that the statute of limitations had run for three of the plaintiffs in the case of *Doe v. Virginia Tech*. Contrary to Defendants' arguments asking for the same decision here, however, *Doe v. Virginia Tech* (like *Ricks* before it) actually supports Plaintiff's position as to when her claim accrued.

This Court in *Doe v. Virginia Tech* made several important observations about the *Ricks* decision, first quoting one of its dispositive findings, that the finality of a university decision will be tested by whether it is "'in any respect tentative.'" 400 F.Supp.3d at 490 (quoting *Ricks*, 449 U.S. at 261). This Court also emphasized that a "'grievance, or some other method of ***collateral review*** of an employment decision, does not toll the running of the limitations period.'" *Id.* (Emphasis added). This Court then drilled into how *Ricks* applied to the Virginia Tech Plaintiffs, focusing specifically on the fact that while the "sanctions" in those particular situations were not "immediately implemented," the decisions finding three of the students[7] responsible gave them notice of the claim. *Id.* at 490-491.

This Court supported its decision regarding the applicable accrual dates in *Doe v. Virginia Tech* by describing the "finality" of the notices that University provided to each of the three plaintiffs whose cases were dismissed. As for John Doe, his notice informed him that he had been found responsible and that "'the following sanctions ***are*** imposed,' using the present tense." 400 F.Supp.3d at 492. (Emphasis in original). John Doe was also informed that "'[t]his is a notice that you are permanently separated from the University[,]'" with the dismissal being effective January 24, 2016. *Id.* While the Court acknowledged that John Doe could appeal his decision "nothing about that letter suggests that the decision was tentative." *Id.* The Court found that "[t]he other letters [for James Doe and Jack Doe] are similar in content and form." *Id.* In contrast to the notices at issue in *Doe v. Virginia Tech*, and as will be discussed in greater detail below, all of the decisions and recommendations related to

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[7] This Court reached a contrary decision with regard to the fourth student, "Joseph Doe."

Plaintiff Reid made prior to the Provost's June 19, 2019, letter were the very definition of "tentative" and "equivocal," a fact obvious on their face and the instructions conveyed to Plaintiff Reid.

This Court cited to four other cases (in addition to *Ricks*) to support its decision regarding when the statute of limitations began to run in *Doe v. Virginia Tech*, including the decision in *Endres v. Northeast Ohio Medical University*, 2018WL4002613 (N.D. Ohio 2018), in which the district court held that the claim of a student who was expelled for cheating on an exam accrued on October 22, 2015, when he was notified of such expulsion. That case is especially important here, as that particular holding has since been overturned, with the Sixth Circuit Court of Appeals ruling in *Endres v. Northeast Ohio Medical University*, 938 F.3d 281 (6th Cir. 2019), that the two-year limitations period only began to run once the student learned that the second panel convened to determine whether he had cheated on a test issued ***its final, non-appealable decision***.[8] In reaching that conclusion the court outright rejected the University's argument that the October 22nd letter "plac[ed] him on notice of his impending dismissal and triggering the limitations period." *Id.* at 293. The court correctly held that "for that argument to hold any weight, we would have to ignore the existence of NEOMED's appeals procedure." *Id.* The court refused to do so, finding instead that when the University reached its ***final*** decision and communicated it to the student was the point in time when he had "exhausted the appeals process" and the statute began to run. *Id.* at 294.

Endres also addressed the important differences between a collateral challenge and a direct appeal. Noting that the Supreme Court in *Ricks* had resolved that issue (as discussed above), the Sixth Circuit again explained that the former may provide a "remedy" for a prior decision, whereas the latter provides the opportunity to "influence" a decision before it is made. *Id.*

> Although Defendants are correct that a collateral challenge to a final decision will not toll the statute of limitations, their argument misses the mark because **Endres's appeal was not collateral**. A collateral challenge necessarily implies the existence of a *final* decision, but **NEOMED's own procedures tell us that the appeals process postpones the finality of a CAPP decision**. For one, **the student has four working**

[8] The Sixth Circuit's decision was issued mere weeks after this Court's decision in *Doe v. Virginia Tech*.

> **days to appeal an adverse CAPP decision to the ERC**. Failure to file an appeal within that timeline amounts to a 'waiver of the right to appeal, and the decision becomes final.' (R. 25, Mot. to Dismiss Appx. at PageID #691.) **That of course implies that CAPP's decision does not become final until—at the earliest—four working days after its issuance**. Second, NEOMED's procedures explain that if the ERC refuses to grant the student's appeal, the CAPP decision becomes final. Again, that implies that **the CAPP decision is not final while an appeal request is pending before the ERC or after the ERC grants the appeal and remands the matter to CAPP for reconsideration, as it did here**. And when the ERC remands the matter for reconsideration, it effectively gives the accused student another shot at proving his innocence. That is, the student gets another 'opportunity to *influence* [CAPP's] decision before it is made.' *Ricks*, 449 U.S. at 261, 101 S.Ct. 498 (italics in original; bold emphasis added).

Id. at 294-295.

The *Endres* decision is important for many reasons, including the fact that, like the student in that case, Plaintiff Reid did not pursue relief through a collateral process, but instead took advantage of and followed the University's procedure ***for perfecting a direct appeal*** from and review of Dean Aguirre's decision to Provost Coltman, It was pursuant to this University-defined and mandated procedure that Plaintiff was continuing to seek **to *influence*** the decision before it was finally made, and to be granted the process that she was due (including but not limited to being allowed to cross-examine Lese), so that she could prove that she had not engaged in an improper relationship.

The appeal process at issue in *Endres* (quoted above) is remarkably similar to JMU's procedure—the one that Defendants instructed Plaintiff Reid to use—following Dean Aguirre's decision. *See* ECF 10-1 at 2, 6. The following quotes from the JMU "Appeal Process and Procedures" brings this fact home:

- "**Deadline for Reporting and Responding Party to submit an appeal of the Dean/AVP's Decision to the Vice President**: 05/05/19"
- "Either party may appeal the decision of the respondent's **associate or assistant vice president or dean** by submitting a written appeal to the **vice president** over the associate or assistant vice president or dean **within five days of the decision**."
- "In the absence of a timely written appeal, the decision of the respondent's **associate or assistant vice president or dean** is final."

- "If an appeal is filed, the **vice president** will make a decision on the appeal within 5 days of the final submission, based on the written record and a preponderance of the evidence."

- The **vice president** shall make a decision within 5 days after any hearing, or if no hearing is granted, within 5 days after the review of the case on the record. The **vice president** may uphold the decision below, reject it, or modify it."

- "The decision of the **vice president** is final, and may not be appealed." (Bold in original)

ECF 10-1 at 6.

As in *Endres*, and pursuant to Defendants' appeal procedure, Dean Aguirre's decision did not become final (*e.g.,* it remained tentative) until—at the earliest—five days after it was issued (05/05/2019). *Id.* Further mirroring the *Endres* situation, Dean Aguirre's decision only became "final" if there was no timely written appeal (*id.*), meaning that it was not final during the pendency of the appeal and, as such, was "tentative" or "equivocal" and did not represent the "official position" of the University as conveyed to Plaintiff.

Defendants here argue that the statute of limitations began to run no later than the date on which Dean Aguirre made his recommendation (April 30, 2019). For all of the reasons discussed above, however, that argument has no merit. Further, and as per the University's own Appeal Procedure (similar to the one at issue in *Endres*), Dean Aguirre's decision did not become "final" until the five-day appeal period ran out, which was May 5, 2019. His decision, in other words, was "tentative" at least until the appeal period lapsed. Plaintiff filed her Complaint on May 3, 2021.

As noted above, this Court in *Doe v. Virginia Tech* relied on the finality of the language in the notices to the students ("the following sanctions ***are*** imposed," and you "are permanently separated from the University") to reach its decision regarding the accrual date. Dean Aguirre did not use similar language, instead speaking in the future tense and proposing that "[a] letter of reprimand ***should* be** placed in the respondent's file." ECF 10-1 at 3. (Emphasis added). That this was a recommendation rather than the "official position" of the University is confirmed on page 2 of Dean Aguirre's decision,

titled "Sanction ***Recommendations,***" setting forth the following language: "…the Dean/AVP also ***recommends*** sanctions…," and "[a] letter of reprimand **is *suggested*….**" (Emphasis added).

Defendants' Appeal Procedures confirm that the purpose of an appeal to the vice president was to allow Plaintiff Reid to "***influence***" the decision before it was made: "The **vice president** may uphold the decision below, reject it, or modify it." *Id.* at 6 (bold in original). Neither the notices at issue in *Doe v. Virginia Tech*, nor the cases cited therein, included language similar to what Defendants here provided for in their notice to Plaintiff following Dean Aguirre's decision.

The University's emphasis on Plaintiff's right to appeal to Provost Coltman further counters Defendants' claim that Plaintiff Reid was placed on notice of the University's "official position" no later than when Aguirre issued his decision. The email sent to Plaintiff Reid providing her with Aguirre's decision mentions the word "appeal" three times in a three-line message. ECF 10-1 at 2. There is nothing about the six-page document (ECF 10-1) that represents "finality," with Plaintiff's right to appeal and seek relief from Provost Coltman being stated in absolute terms. The "Appeal Process and Procedures" informed Plaintiff that Provost Coltman could reject or modify Dean Aguirre's decision, with her pronouncement being the University's "final" decision on the matter.

Plaintiff Reid followed Defendants' instructions and process and filed a "timely written appeal" within five days after Aguirre's decision. Provost Coltman issued her decision on June 19, 2019 (ECF 1-9). Provost Coltman reported in her letter that she took additional time to review the case file "in the interest of bringing about a just outcome[,]" (*id.* at 2), thereby again unequivocally confirming that her decision represented the "outcome" of the matter. She closed by upholding Dean Aguirre's decision and recommendation "to place a letter of reprimand in your personnel file," thereby conveying the "official position" of the University to Plaintiff Reid at that time.[9]

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[9] Defendants largely conceded the timeliness of Plaintiff's Complaint, as there is simply no other way to explain their decision to ignore their own procedures; the effective date of Aguirre's decision (being five days after it was issued, and only then if no appeal was taken); their instructions to Plaintiff; the words that they used to signify the tentative nature of the hearing panel's recommendation and Dean

The Sixth Circuit's decision in *Endres* emphasizes the importance of the underlying facts and the university procedures when assessing the question of accrual. Plaintiff Reid's situation and JMU's hearing/appeal notice and procedure is closely aligned with that at issue in the *Endres* case in terms of the tentative nature of the preliminary decisions issued prior to the schools making their "final" or "official" pronouncement. In contrast, the notices and procedures at issue in *Doe v. Virginia Tech* are substantially different than the notice to Plaintiff Reid, with this Court citing to the specific nature of those notices as being one of the primary bases for its decision in that case.

This Court cited to three other cases in its *Doe v. Virginia* Tech decision, including *Tolliver v. Prairie View A&M University*, 2018 WL 4701571 (S.D. Tex. 2018), in which the plaintiff had been charged with violating a variety of the University's policies. That case, however, has no applicability here. The plaintiff there did not attend the June 2015 disciplinary hearing. The University proceeded with the hearing, found that he had committed the charged activities, and made the decision to expel him. "In June 2015, the University advised Tolliver of his right to appeal, including providing him the form and procedures required to appeal. ***Tolliver did not appeal under the University's procedure.***" *id.* at *1 (emphasis added). He filed suit against the University in April 2018, almost three years after the decision was entered, and almost one year after the statute of limitations had lapsed. The *Tolliver* decision is thus uniquely narrow in scope and has no relevance to the issues at hand.

This Court cited to *Datto v. Harrison*, 664 F.Supp.2d 472 (E.D. Pa. 2009), in *Doe v. Virginia Tech* as well. The court there correctly focused upon the language of the termination letter, finding that it was "not equivocal": "It describes a completed decision to dismiss the plaintiff and describes his current status as 'officially dismissed.' With the letter Jefferson 'made and communicated' the decision and started the statute of limitations running on all the plaintiff's claims concerning it." *Id.* at 485. The court in *Siblerud v. Colorado State Board of Agriculture*, 896 F.Supp. 1506, 1511 (D. Colo. 1995),

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Aguirre's action; the purpose of Provost Coltman's review (to provide the final decision ("official position") in the matter), and the date on which Provost Coltman issued her decision (June 19, 2019).

similarly relied upon the fact that the letter dismissing the student was "clear and absolute; Amann expelled Siblerud." Defendants' actions and procedures in this case are substantially different than those involved in both *Datto* and *Siblerud*, being instead aligned with *Ricks* and *Endres* in terms of when the University's "official position" was established and conveyed to Plaintiff Reid.

All of the forgoing cases confirm that the Complaint was timely filed. They also expose the superficiality of Defendants' argument, having never bothered to address the critical question identified by the courts—which is at what point has the University's "official position" in a disciplinary action been made and conveyed to the accused (in this case Plaintiff Reid).

II. Plaintiff's Claims Are Not Barred by the Eleventh Amendment

a. Plaintiff's Claims for Prospective Relief Against the Official-Capacity Defendants Are Not Barred by the Eleventh Amendment

Defendants next mount what is ultimately a throw-away Eleventh Amendment defense to Plaintiff's claims for prospective relief. They are trying to whistle right on past the controlling rule of law, which is the *Ex parte Young* doctrine (sometimes referred to, the "*Ex parte Young* exception"). *Ex parte Young* is clearly the constitutional elephant in the room and it cannot be ignored. Simply put, pursuant to *Ex parte Young*, "suits against state officials who violate federal law ***are not*** suits against the state." *Biggs v. North Carolina Dep't of Public Safety*, 953 F.3d 236, 242 (4th Cir. 2020) (emphasis added). *See also Manion v. North Carolina Med. Bd.*, 693 Fed. App'x 178, 181 (4th Cir. 2017) (claims seeking to remedy continuing violations of federal constitutional rights fall into the *Ex parte Young* exception), *citing Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011).

To put a finer point on it, under *Ex parte Young*, "[t]he Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (*citing Ex parte Young*, 209 U.S. 123 (1908)). Plaintiff Reid's Complaint pleads in great detail a wide range of official-capacity claims against JMU officials (and thus against state officials). Defendants Alger, Coltman, Aguirre, Sirocky-Meck, as well as against Jane or

John Doe officials ## 1-5, thus all properly stand in the dock of this suit under *Ex parte Young*. *See* Compl. at 1, 4 (¶¶ 7-10) (noting suit brought against the Defendants in their official capacity, *inter alia*).

Specifically, Plaintiff Reid has clearly sought ***prospective injunctive relief*** (and related future-oriented declaratory relief) against this same group of state defendants to redress ongoing prejudice to her legal rights. *See id.*, Prayer for Relief iii-iv.[10] Those two elements of the Prayer all embrace multiple forms of indisputably future-oriented relief. *See also Dixon v. Gravely*, No. 4:17-cv-00079, 2018 WL 1733988, *2 (W.D. Va. Apr. 10, 2018) ("For the *Ex parte Young* exception to apply, the "suit must be brought against individual persons in their official capacities as agents of the state ***and the relief sought must be declaratory or injunctive*** in nature and prospective in effect." *Saltz v. Tenn. Dep't of Emp't Sec.*, 976 F.2d 966, 968 (5th Cir. 1992)."). (Emphasis added) (dismissing certain claims because the specific declaratory relief sought was ***not prospective*** in nature, unlike the relief Reid seeks here).

The foregoing has been black-letter sovereign immunity law at the Supreme Court level for more than a century. These applicable legal principles are not dimming with age—instead, *Ex parte Young* retains its full vitality even now that we are two decades into the twenty-first century.

This Court has regularly acknowledged and applied the *Ex parte Young* doctrine. *See, e.g., Cobb v. Rector and Visitors of the Univ. of Va.*, 69 F. Supp. 2d 815, 824 (W.D. Va. 1999). Just last year this Court reiterated the doctrine in *Doe v. Virginia Polytechnic Institute and State University,* 2020 WL 1309461 at *4 (W.D. Va. 2020) (paragraph break added) finding that relief such as what Plaintiff Reid is requesting here falls squarely within the doctrinal framework:

> [Virginia Tech] acknowledge[s] that the *Ex parte Young* exception to sovereign immunity permits suits for prospective injunctive relief against state officials in their official capacities[, so] defendants argue that Doe seeks only to rectify harm done in the past such that the exception does not apply. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

[10] In particular, these portions of the Prayer for Relief seek (a) restoration of reputation, (b) expungement of Reid's JMU disciplinary record together with expungement of any record of the Title IX complaint or complaint against Reid, (c) removal of Reid's reprimand from her employment file at JMU, and (d) complete destruction of any record of a Title IX statement or complaint against Reid.

> ***But in addition to money damages, Doe seeks to expunge and clear his academic record, among other injunctive relief, which courts have noted is a request for prospective relief.*** *See, e.g., Doe v. Cummins*, 662 F. App'x 437, 444 (6th Cir. 2016) (holding that the Eleventh Amendment did not bar the expunging of a record of sexual assault discipline from a university's files); *Shepard v. Irving*, 77 F. App'x 615, 620 (4th Cir. 2003) (explaining that a request to expunge a grade from an academic record is not barred by the Eleventh Amendment); *Johnson v. W. State Colo. Univ.*, 71 F. Supp. 3d 1217, 1230 (D. Colo. 2014) ("[A] request to expunge an academic record is a request for prospective relief.").
>
> Thus, the court concludes that Doe's claims for injunctive relief against the individual defendants in their official capacities fall within the *Ex parte Young* exception to the Eleventh Amendment and survive the Rule 12(b)(1) motion. (Emphasis added).

See also Doe v. Virginia Tech., 400 F.Supp.3d at 488-489.

Accordingly, Reid's claims against the individual defendants for the various types of expungement relief sought fit comfortably within the *Ex parte Young* exception and cannot be dismissed.[11] Plaintiff's claims for the following types of relief are similarly prospective in nature: (1) restoration of her reputation[12]; (2) destruction of the record of any Title IX statement or complaint against Reid held anywhere by Defendants, even outside of Reid's personnel file; (3) declaratory relief that JMU's policies violate the Bill of Rights by denying Confrontation Clause and cross-examination rights to those accused of wrong-doing (like Plaintiff here); and (4) injunctive relief against JMU's Title IX officer and the other Defendants to preclude them from enforcing the unconstitutional aspects of

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[11] In light of the Defendants invoking their Eleventh Amendment rights, Plaintiff now agrees that her claims for prospective injunctive relief ***against JMU*** (not against the other Defendants) should be dismissed. *See Doe v. Virginia Tech*, 2020 WL 1309461, at *4 ("Notably, the *Ex parte Young* exception 'has no application in suits against the States and their agencies, which are barred regardless of the relief sought.' *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 146.").

Plaintiff Reid was entitled at the time of filing suit to test whether JMU would voluntarily waive sovereign immunity as to some or all of her claims. States may waive sovereign immunity based on litigation conduct. *See, e.g., Strawser v. Atkins*, 290 F.3d 720, 729-30 (4th Cir. 2002) (State's preference for a merits ruling waived Eleventh Amendment immunity, allowing the Fourth Circuit to reach the merits); *Moreno v. University of Md.*, 645 F.2d 217, 220 (4th Cir. 1981) (university waived immunity when it agreed to pay certain funds to obtain a stay in court).

[12] Consider, for instance, this Court eventually issuing an order designed to restore Reid's reputation, requiring one or more Defendants to halt ongoing constitutional and other federal law violations of Reid's rights by placing a new document into the Plaintiff's personnel file vindicating Plaintiff, which Plaintiff could then reference when seeking employment elsewhere.

those policies that they used against Plaintiff Reid. The fact is that Plaintiff Reid wishes to prevent what happened to her from happening to anyone else. By obtaining declaratory and injunctive relief that clearly establishes the scope of the constitutional rights these official-capacity Defendants have violated, Plaintiff Reid can ensure that they will not enjoy qualified immunity—even from money damages—for any future violations of constitutional rights that they perpetrate in the context of enforcing their own policies and Title IX.

In summary, Plaintiff's claims are governed by the same logic as in *Doe v. Virginia Polytechnic Institute and State University,* 2020 WL 1309461, and the precedent on which that decision stands.

It is curious that Defendants seek to secure a sweeping Eleventh Amendment-based dismissal of this suit without acknowledging the hurdles they face under *Ex parte Young*. This is especially so considering the fact that the Supreme Court case that they rely upon to argue (seemingly without qualification, *see* Defendants' Brief at 14-15), that Eleventh Amendment immunity extends to "state officials in their official capacities," is none other than *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). But to protect the rights of those wronged by abused state power, *Will* ***specifically acknowledges*** *Ex parte Young*'s long-established guardrails on sovereign immunity. Indeed, the Supreme Court makes this point at the end of the ***very same paragraph*** in *Will* upon which Defendants premise their argument:

> Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official-capacity actions for prospective relief are not treated as actions against the State." *Kentucky v. Graham*, 473 U.S. [159,] 167, n.14 [(1985)]; *Ex parte Young* …. This distinction is "commonplace in sovereign immunity doctrine," L. Tribe, AMERICAN CONSTITUTIONAL LAW § 3–27, p. 190, n. 3 (2d ed. 1988), and would not have been foreign to the 19th–century Congress that enacted § 1983 ….

Will, 491 U.S. at 71 n.10.[13]

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[13] Compounding the error of overlooking *Will* footnote 10, the Defendants attempt to rehash their Eleventh Amendment defense as if it were also a federal statutory defense (several pages after invoking the Constitution). *See* Defendants Brief at 22-23 (Section IV.C.4, entitled "JMU and the School Officials in their Official Capacities are Not Persons against Whom a Section 1983 Claim Can Be

Try as they might, Defendants cannot wish away footnote 10 of *Will*, and this District, in particular, is well aware of that footnote. *See Calloway v. Virginia*, No. 5:16-cv-00081, 2017 WL 4171393, *7 (W.D. Va. Sept. 20, 2017) (citing *Will* footnote 10 and *Gray v. Laws*, 51 F.3d 426, 430 [n.1] (4th Cir. 1995) (applying *Ex parte Young*)).As a result, all claims for prospective injunctive or declaratory relief that Reid seeks against all official-capacity Defendants should survive the motion to dismiss.

By ignoring the obvious applicability of *Ex parte Young* to Plaintiff Reid's claims, Defendants have forfeited and waived any argument contrary thereto in their quest for dismissal of her declaratory and injunctive relief sought. Defendants should not be permitted to file a reply brief pretending that *Ex parte Young* is a surprising defense of the validity of the Complaint, and only then attempt to address the *Ex parte Young* exception to Eleventh Amendment immunity. They strategically side-stepped that issue in their opening brief, and should be barred from raising it later.

b. The Eleventh Amendment Does Not Bar Individual-Capacity Suits Against State Actors for Money Damages Under Section 1983

Defendants appear to argue that the Eleventh Amendment bars all claims under Section 1983 against Alger, Coltman, Aguirre, Sirocky-Meck, and the Doe defendants. *See* Defendants' Brief at 14-15. Not only does this argument fail with regard to Plaintiff Reid's prospective declaratory/injunctive relief against those Defendants in their official capacities (as discussed above). It is also wrong as to Plaintiff's claims against them in their individual capacities.

Hafer v. Melo, 502 U.S. 21, 30-31 (1991), plainly holds that "the Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials under § 1983."

Asserted."). This argument relies ***exclusively on*** *Will*, which we have rebutted above. But it is worse still because *Will*'s footnote 10 specifically rejects Defendants' argument ***even as restated using Section 1983's text***, as just this snippet from the block quotation above reveals: "Of course a state official in his or her official capacity, when sued for injunctive relief, ***would be a person under § 1983*** because 'official-capacity actions for prospective relief are not treated as actions against the State.' *Kentucky v. Graham*, 473 U.S., at 167, n.14…." *Will*, 491 U.S. 71 n.10 (emphasis added). In reality, Defendants' constitutional and statutory points are one and the same and are equally defective.

That Court also stated that "[w]e hold that state officials, sued in their individual capacities, are 'persons' within the meaning of § 1983." *Id.* at 31. Section 1983 thus authorizes damages as a remedy against state actors sued in their individual capacities. "While the doctrine of *Ex parte Young* does not apply where a plaintiff seeks damages from a public treasury, damages awards against individual defendants in federal courts 'are a permissible remedy in some circumstances notwithstanding the fact that they hold public office.'" *Id.* at 30 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974)). The only issue as to damages relief against the Defendants in their individual capacity here is whether they are entitled to prevail on a defense of qualified immunity.[14]

Defendants invoke qualified immunity, effectively waiving any logically prior defenses. *See* Defendants' Brief at 3, 24-25. Logically prior defenses exist because the Fourth Circuit has recognized that immunity would still lie against an individual-capacity suit if it "effectively states a claim against the Commonwealth itself." *Martin v. Wood*, 772 F.3d 192, 195-96 (4th Cir. 2014). Invoking that functional analysis, however, requires the Defendants to make specific arguments to that effect under one or more of the five relevant lines of inquiry, being "(1) were the allegedly unlawful actions of the state officials tied inextricably to their official duties, (2) if the state officials had authorized the desired relief at the outset, would the burden have been borne by the State; (3) would a judgment against the state officials be institutional and official in character, such that it would operate against the State; (4) were the actions of the state officials taken to further personal interests distinct from the State's interests; and (5) were the state officials' actions *ultra vires*." *Martin*, 772 F.3d at 196 (cleaned up).

Similar to the situation with the *Ex parte Young* exception, Defendants failed to make arguments under any of the five inquiries the Fourth Circuit has identified, thereby forfeiting their ability to raise such issues for the first time in their reply brief. "Indeed, the principle that parties forfeit an argument if they fail to timely raise it encourages each side to actively participate in all stages

[14] We rebut Defendants' claim of qualified immunity below.

of the litigation. When the court raises a forfeited issue sua sponte, it undermines the principle of party presentation and risks becoming a third advocate. *See Arizona v. California*, 530 U.S. 392, 412–13 (2000)." *United States v. Oliver*, 878 F.3d 120, 127 (4th Cir. 2017).

Despite Defendants' failure to address the Fourth Circuit's "five inquiries," we will do so briefly to further demonstrate why their arguments for dismissal fail.[15] *First*, the actions pleaded in the Complaint were not inextricably tied to official duties under state law. Defendants could have—and should have—provided additional procedural protections to Plaintiff consistent with federal law, yet they opted not to do so. For instance, they could have—and should have—followed the 2012 Policy #1324 instead of the 2016/2018 Policy #1340, yet they opted not to do so.

Second, providing additional procedural protections would have imposed only minimal costs on Virginia, especially when set against the benefits such procedures would have produced in leading to more accurate and just adjudications that are less prone to reversal or to triggering the need to make recompense to those injured. Indeed, Plaintiff has adequately pleaded that Defendant Sirocky-Meck departed from the role of being a neutral official and instead essentially rewrote Lese's "Title IX Statement" to fit within the Policy #1340 framework, transforming her into an advocate for Lese and placing a weighty thumb on the scale against Plaintiff Reid. The unlawful burdens that Sirocky-Meck imposed on Plaintiff were wholly of her making. Following the proper University procedure, in contrast, would have relieved the state from the burden of rectifying a denial of due process.

Third, nothing would prevent a judgment in this case from apportioning the damages against each Defendant who caused Plaintiff's injuries, with the damages awards varying by relative degree of culpability. The State could opt to pay or reimburse such Defendants, but that would be the State's own choice; it would not be as an inexorable result of a judicial command.

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[15] Defendants should be barred from addressing the five inquiries in their reply brief; if they are nevertheless allowed to do so, Plaintiff should be granted a short sur-reply to respond.

Fourth, it is entirely possible (if not probable) that through discovery facts will be uncovered revealing that one or more Defendant acted for personal reasons, showing that that they were not perfect representatives of the Commonwealth of Virginia's interests. For instance, as the Title IX Coordinator, Sirocky-Meck, may have succumbed to a temptation to find a salacious Title IX violation to adjudicate so that she could justify her salary and office's expenses to JMU. Plaintiff should be permitted to explore Sirocky-Meek's motivations and all documents she prepared. At a minimum, Plaintiff must be allowed to conduct the discovery necessary to find out Defendants' motivations and what involvement they had in publicly disclosing the outcome of the proceedings against her.

Fifth, Plaintiff's case is built on the fact that Defendants took numerous *ultra vires* actions, including as just one example, their decision to apply the wrong version of JMU's sexual harassment policy to the alleged conduct. Defendants knew or should have known that their actions were contrary to the University's policies and procedures, and that their actions in that regard would violated Plaintiff's constitutional rights.

All of the five inquiries the Fourth Circuit identified in *Martin* support imposition of individual-capacity liability; the inquiries would not support a conclusion that Defendants are being sued in their individual capacity on a purely formalistic basis. In short, the real party in interest for monetary damages is and should be the individual Defendants, not Virginia itself. This means that *Hafer v. Melo* is fully applicable, and Defendants have no Eleventh Amendment defense to being ordered to pay monetary damages if Plaintiff prevails.

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In sum, Defendants' Eleventh Amendment arguments are without merit and should be rejected. Plaintiff is entitled to pursue prospective declaratory/injunctive relief against the administrative defendants in their ***official capacity***. Plaintiff is also entitled to seek retrospective damages relief against the administrative defendants in their ***individual capacity***. The only remaining

question as to the availability of damages against the individual-capacity defendants is whether they are entitled to qualified immunity, which issue is addressed in the next section.

III. THE CLAIMS AGAINST DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES SHOULD NOT BE DIMISSED ON GROUNDS OF QUALIFIED IMMUNITY, PARTICULARLY PRIOR TO DISCOVERY

Similar to their formulaic Eleventh Amendment argument, Defendants have also advanced a gossamer-thin, two-paragraph claim of qualified immunity on behalf of Alger, Coltman, Aguirre, and Sirocky-Meck. *See* Defendants' Brief at 24-25. Their decision to forgo presenting a coherent argument on this issue dooms it to failure. Stated simply, undeveloped arguments are waived. *See, e.g., Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 727 (4th Cir. 2021) (it's "not the obligation of this court to research and construct arguments open to parties, especially when they are represented by counsel"); *Russell v. Absolute Collision Servs., Inc.*, 763 F.3d 385, 396 n.* (4th Cir. 2014) (perfunctory and undeveloped arguments are forfeit); *Mays v. Berryhill*, No. 2:17-cv-02084, 2018 WL 4494162, at *3, n.1 (S.D.W. Va. Aug. 29, 2018) (rejecting undeveloped argument as waived).

At the very least, resolving an argument barely whispered in a few sentences should be postponed to later stages of the case to protect Plaintiff's right to seek judicial redress and to allow for the completion of discovery. Judge Moon just recently described the purpose and wisdom of resolving important questions of qualified immunity only after there has been more factual development:

> In *Tobey* [706 F.3d 379 (4th Cir. 2013)], the Fourth Circuit affirmed the denial of qualified immunity on a motion to dismiss. The court concluded that "[t]he question whether Mr. Tobey's conduct was so 'bizarre' and 'disruptive' that Appellant's reaction was reasonable" in "jump[ing] straight to arrest" Tobey could not "be decided at the 12(b)(6) stage." *Id.* at 393.
>
> Here, the ultimate question whether Individual Defendants in fact violated Bhattacharya's First Amendment rights by retaliating against him because of his protected speech—and accordingly, whether the First Amendment right violated was clearly established—requires a more developed record. Indeed, **"[*o*]*rdinarily, the question of qualified immunity should be decided at the summary judgment stage.*"** *Willingham v. Crooke*, 412 F.3d 553, 558 (4th Cir. 2005). Thus, while the Court reviews this issue based on the allegations in the complaint now, "[i]t may be that

> discovery will reveal there is no genuine issue of material fact," and Peterson, Kern, and Rasmussen "can move for summary judgment" on qualified immunity grounds. *See Tobey*, 706 F.3d at 393.
>
> ***At this stage of the litigation***, the Court finds that Peterson, Kern, and Rasmussen are not entitled to qualified immunity on the First Amendment retaliation claim.
>
> Accordingly, the Court will deny Defendants' motion to dismiss Count I of the amended complaint. (Emphasis and one paragraph break added).

Bhattacharya v. Murray, --- F. Supp. 3d, 2021 1229952, *14 (W.D. Va. Mar. 31, 2021). *See also Robinson v. Farley*, 264 F. Supp. 3d 154, 162 (D.D.C. 2017) (denying motion to dismiss) ("Notably, to the extent that the MPD [Metropolitan Police Department] Defendants could have asserted qualified immunity in the traditional sense and developed substantive arguments with respect to that defense, they have failed to do so, notwithstanding this Court's express willingness to consider such arguments …. This Court need not, and will not, address undeveloped arguments for dismissal on this or any other ground.") (citation omitted); *Adamo v. Dillon*, 900 F. Supp 2d 499, 503 (M.D. Pa. 2012) ("At trial, Plaintiffs … did not directly address the qualified immunity issue. In light of the undeveloped record on this issue, the court withheld judgment regarding the … qualified immunity defense, but granted the motion as to Plaintiffs' equal protection claims. Defendants renewed their Rule 50 motions at the close of trial, but presented scant additional argument as to qualified immunity. Once again, the court deferred ruling on the motion.").

The need to postpone consideration of a purported qualified immunity defense is especially important where discovery has yet to occur since discovery may reveal more information about the knowledge and motivations of the individual Defendants. *Cf.* Fed. R. Civ. P. 56(d)(2) (allowing courts even at the summary judgment stage to "allow time to obtain affidavits or declarations or to take discovery"). While we expect Defendants to argue that qualified immunity is designed in part to save them the burdens of discovery where appropriate, they ignore their concurrent duty to flesh out and provide relevant detail about that defense (as opposed to talismanically intoning the phrase "qualified immunity"). This fact then exposes yet more reasons as to why their failure to support their demand

for qualified immunity should be considered a waiver (and thereby fatal to their argument). Plaintiff should not have to discern all of the arguments that Defendants may proffer to support their claim for qualified immunity. Stated another way, while the Court is not required to supply Defendants with the factual basis for their qualified immunity arguments, neither is the Plaintiff.

At the very least, and given Defendants' trial-balloon approach to qualified immunity, the preferable course would be to deny their motion to dismiss on qualified immunity grounds, allow discovery to proceed, and address this matter further once the facts have been established.

If the Court chooses to consider Defendants' qualified immunity arguments now, we must then evaluate the basis for the claims they are making. Defendants seem to be arguing that their conduct as to Plaintiff Reid was "objectively reasonable under the circumstances." Defendants' Brief at 25, *citing Doe v. Bd. of Visitors of VMI*, 494 F. Supp. 363, 380 (W.D. Va. 2020) (in turn citing *Raub v. Campbell*, 785 F.3d 876, 881 (4th Cir. 2015)). Plaintiff Reid has described in great detail, however, that it was knowingly unreasonable and entirely inappropriate for Defendants to retroactively[16] apply the 2016//2018 version of JMU's sexual harassment/misconduct policy in order to likewise retroactively redefine the prior relationship between Reid and Lese as being somehow inappropriate (*e.g.*, "nonconsensual"). The situation here is thus readily distinguishable from the facts at issue in *Raub*, which involved a grant of ***summary judgment*** upon the finding of objective reasonableness for the conduct at issue. The Court in *Raub* held that the recommendation of a local mental health evaluator to take a former Marine into protective custody after he made strange posts about George W. Bush and a coming revolution was objectively reasonable because (a) it was supported by more than a 911

[16] Plaintiff uses the term "retroactive" and its cognates to refer to the unconstitutional actions by Defendants in applying the wrong, newer version of JMU's harassment policy, whereas Plaintiff used the term "retrospective" and its cognates above to refer to damages relief because such relief provides recompense for illegal past conduct. This terminology helps to keep distinct the very different issues of Eleventh Amendment jurisprudence (which authorizes retrospective relief only against defendants sued in their individual capacities) from due process jurisprudence, which constrains the government's ability to regulate retroactively.

call (whereas a prior Fourth Circuit case denying qualified immunity was premised only on such a phone call); (b) was based on the initial observations of law enforcement officers; (c) was supported by the content of the plaintiff's Facebook posts; (d) was supported by information from the plaintiff's former marine colleagues; and (e) was based on the defendant evaluator's own observations and evaluation of the plaintiff. *Raub v. Campbell*, 785 F.3d 876, 884 (4th Cir. 2015). By contrast, we are not here addressing the propriety of a *summary judgment* motion, and Plaintiff's Complaint contains an overabundance of allegations that the Defendants' conduct ***was objectively unreasonable***.

Considering the fact that Defendants are at least impliedly arguing that this Court should determine *as a matter of law* that their actions and treatment of Plaintiff Reid were "objectively reasonable," a few examples taken from the Complaint showing how unreasonable their actions were should readily dispose of that argument. Plaintiff Reid has alleged as follows:

"These Defendants then proceeded to try Alyssa under a set of rules and policies that did not exist during the relevant time-frame of her relationship with Lese, thereby retroactively applying definitions, concepts, prohibitions, and mandates that could not possibly have governed Alyssa's conduct or provided a basis for Lese's later accusations." Introductory Statement, Complaint at 3:

"The University Defendants knew or should have known that Lese's Title IX action against Plaintiff Reid was retaliatory, baseless, and filed for improper reasons." *Id.* at ¶ 293.

"Plaintiff Reid reasonably relied upon the University Defendants' previous conclusion that her relationship with Lese did not violate University policy. By conducting a Title IX investigation under later-adopted policies, these Defendants violated Reid's due process rights." *Id.* at ¶ 455.

"Fair notice is compromised by the retroactive application of legislation, regulations, or policies." *Id.* at ¶ 480.

"Because Lese's claims against Plaintiff Reid pertained only to acts or actions that took place during the November 2015 to May 2016 time period, the 2012 Policy #1324 governed the University Defendants' receipt of, response to, investigation of, hearing, decisions and findings related to Lese's 'Title IX Statement' and the claims made therein." *Id.* at ¶ 481.

"Plaintiff Reid's actions and her relationship with Lese during the November 2015 to May 2016 time period must be assessed pursuant to JMU's 2012 Policy #1324." *Id.* at 482.

"Plaintiff Reid's actions and her relationship with Lese during the November 2015 to May 2016 interval, having already been adjudges as non-violative of the 2012 Policy #1324, should not have been re-investigated." *Id.* at ¶ 483.

"Defendant Sirocky-Meck knew or should have known that Lese's 'Title IX Statement' did not meet the requirements of and could not be considered a 'Formal Complaint' under the 2012 Policy #1324." *Id.* at ¶ 487.

"Defendant Sirocky-Meck, as the Title IX Coordinator/Title IX Officer, improperly treated Lese's 'Title IX Statement' as a 'Formal Complaint' in violation of JMU policy and Plaintiff Reid's rights." *Id.* at ¶ 491.

"The University first adopted Policy #1340 roughly four months after there was no longer even arguably a 'student to faculty' relationship or 'imbalance of power' between Plaintiff Reid and Lese." *Id.* at ¶ 571.

"By defining Lese's 'Title IX Statement as a 'Formal Complaint' under Policy #1340, the University Defendants imposed a burden of proof on Plaintiff Reid that she could not meet, requiring her to prove that in 2015-2016 she did not violate a policy that did not exist, based on a definition that had not yet been created, and that had nothing to do with the actual allegations that Lese made in her 'Title IX Statement.'" *Id.* at ¶ 583.

"Defendant Sirocky-Meck had an affirmative obligation to determine which JMU policy applied to Lese's 'Title IX Statement.'" *Id.* at ¶ 584.

See also id. at Count III Violation of Due Process, 42 U.S.C. § 1983, and Va. Const. Art. 1, §§ 11, 15, Plaintiff Reid v. James Madison University Defendants, Retroactive Application of University Policy.

The quoted allegations set forth above focus on Sirocky-Meck's role. It is clear that even if the Complaint did not make those specific allegations against the other Defendants involved in imposing discipline on Ms. Reid, it would remain legally sufficient in the Section 1983 context. This is because Section 1983 "imposes liability not only for conduct that directly violates a right but for conduct that is the effective cause of another's direct infliction of the constitutional injury." *Sales v. Grant*, 158 F.3d 768, 776 (4th Cir.1998); *see also Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986) (explaining that Section 1983 liability extends to the natural consequences of a person's actions). Plaintiff Reid has alleged that all of the University Defendants were culpable in their failure to ensure that Sirocky-Meck complied with JMU's policies, that they also deprived Plaintiff of her constitutional rights by relying upon Policy #1340 to find that she was "responsible" for sexual misconduct, and for failing to give her the process that she was due.

These averments quoted above (and the many others in the Complaint) are entitled to be taken as true at the motion-to-dismiss stage. "We review de novo the district court's dismissal of a complaint

under Federal Rule of Civil Procedure 12(b)(6)," and must "accept as true all of the factual allegations contained in the complaint and draw all reasonable inferences in favor of the plaintiff." *Hall v. DIRECTV, LLC*, 846 F.3d 757, 765 (4th Cir. 2017)

Only a plausible claim need be stated on a complaint's face. *See Burnette v. Fahey*, 687 F.3d 171, 180 (4th Cir. 2012). Plaintiff Reid's claim in her Complaint that a new JMU policy was being unconstitutionally applied to past conduct that was actually governed by a ***different and older policy*** is more than simply plausible; it is robust and persuasive. *See, e.g., Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, 389 (1932) (agency cannot retroactively repeal its own policy, ignoring its own prior pronouncements); *Varandani v. Bowen*, 824 F.2d 307, 312 (4th Cir. 1987) (refusing to apply new Department of Health and Human Services regulations retroactively to Medicare pre-suspension hearings concerning a doctor that took place "more than a year ago"); *Grice v. Colvin*, 97 F. Supp. 3d 684, 709 (D. Md. 2015) (denying motion to dismiss on relevant ground because factfinding is required to assess whether the hardships imposed by retroactivity rise to the level of being undue and oppressive); *Pressley Ridge Schools, Inc. v. Stottlemyer*, 947 F. Supp. 929, (S.D. W. Va. 1996) ("Defendants retroactively applied this new standard to plans submitted by Pressley Ridge and gave Pressley Ridge no legitimate explanation for their actions," thereby violating due process); *Moreno v. Toll*, 480 F. Supp. 1116, 1125 (D. Md. 1979) (University of Maryland in-state policy was unlawfully retroactive). *See also Doe v. Western New England Univ.*, 228 F. Supp. 3d 154, 170 (D. Mass. 2017) (on these facts, denying motion to dismiss, in relevant part: "The sexual encounter between Plaintiff and Doe occurred on September 26–27, 2014, more than six weeks before the University implemented the Title IX Policy that it relied on to conclude that Plaintiff had engaged in sexual misconduct.") (citations omitted).

At the very least, new laws or policies cannot be applied retroactively where there is no affirmative indication that the enacting authority (here JMU and its agents) clearly intended to make the new policy retroactive. *See, e.g., Lindh v. Murphy*, 521 U.S. 320, 325 (1997) ("[T]he presumption against retroactivity was reaffirmed in the traditional rule requiring retroactive application to be

supported by a clear statement."); *Reynolds v. American Red Cross*, 701 F.3d 143 (4th Cir. 2012) ("Prospectivity remains the appropriate default rule.") (cleaned up); *Fenner v. Bruce Manor, Inc.*, 409 F. Supp. 1332, 1348 (D. Md. 1976) (stating regarding a HUD regulation that "a law is not to be given retroactive effect where there is a clear expression of intent that the law apply only prospectively"). In fact, this has been well-established law for nigh-on a century in this Circuit. *See Link v. Receivers of Seaboard Air Line R Co.*, 73 F.2d 149, 151–52 (4th Cir. 1934) (statute's limitations period is not merely a procedural regulation, but a "condition annexed to the enjoyment of a right" and a change in that limitations period was thus a change in substantive rights not to be given retroactive effect) (cited in *Lewis v. Gupta*, 54 F. Supp. 2d 611, 617 (E.D. Va. 1999) (Ellis, J.)); *see also New York Life Ins. Co. v. Truesdale*, 79 F.2d 481, 484 (4th Cir. 1935) (similar).[17]

Defendants do not claim that Policy #1340 was to be applied retroactively. They do not argue that such a retroactive application was shown on the face of Policy #1340. As importantly, they do not claim that it was "objectively reasonable" for them to retroactively apply Policy #1340 against Plaintiff Reid in order to pursue Lese's untimely Title IX claim, and to ultimately conclude that she had engaged in a "nonconsensual relationship" during the first six months of her two-year relationship with Lese. The absurdity of the foregoing sentence in fact shows how unreasonable their actions were.

Indeed, the individual Defendants purport to be implementing a policy under the umbrella of Title IX and interpretations thereof by the federal Department of Education. But the Education Department similarly lacks the power to change its current interpretation of Title IX retroactively. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). It would make no sense for state action occurring under the auspices of federal authority to be given more leeway to impose retroactive policy

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[17] When the U.S. Congress adopts legislation that is clearly intended to be retroactive, its power to stay within the bounds of due process are at their zenith. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) ("[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations."). But in this case we are dealing not with a federal statute, or even a state statute or regulation, but a mere policy issued by a state university. Hence, the *Usery* line of cases is irrelevant.

changes than the overarching federal agency on point wields. (State) agents cannot possess more power than (federal) principals. *See Fenner*, 409 F. Supp. at 1348 (rejecting litigant complaint that "HUD should have decided to apply the interim rule retroactively").

Acting as the individual Defendants have done in this case stripped Plaintiff of fair notice of the applicable policy to which she was supposed to conform her conduct as part of the JMU community. For that reason alone, the motion to dismiss on grounds of qualified immunity must fail.

Finally, Plaintiff Reid seek declaratory and injunctive relief in addition to monetary damages. Qualified immunity, however, "only immunizes defendants from monetary damages—not injunctive or declaratory relief." *Endres v. Northeast Ohio Medical University*, 938 F.3d at 302 (citations and internal quotation marks omitted). Even if this Court were to conclude that the Defendants have qualified immunity for damages, Plaintiff's claims for equitable relief should continue.

IV. Section 1983 Provides Plaintiff Reid With a Remedy For Defendants' Violations of Their Own Policies and Every Tenant of Fair Play and Due Process

a. Due Process Requires Fair Notice and an Opportunity to Be Heard

"Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes." Antonin Scalia, "*The Rule of Law as a Law of Rules*," 56 U. Chi. L. Rev. 1175, 1179 (1989). "A fundamental principle of our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.,* 567 U.S. 239, 253 (2012). "Due process under the Fifth Amendment requires at least this much." *Id.* "Due process requires people to have notice of what the law requires of them so that they may obey it and avoid sanctions." *Board Officials v. Code Technology, Inc.*, 628 F.2d 730, 734 (1st Cir. 1980).

The principle that the legal effect of conduct should be assessed and judged pursuant to the law and policies that existed when the conduct took place applies here. The Due Process Clauses of both the United States and Virginia Constitutions protect a person's interest in fair notice and repose.

Fair notice is compromised by the retroactive application of legislation, regulations or policies. *See Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994) (stating that Article I, § 10, cl. 1 prohibits States from passing retroactive legislation that impairs the contractual obligations.); *Fox v. Baltimore City Police Dep't.*, 201 F.3d 526, 532 (4th Cir. 2000) (stating there is a deep-rooted presumption against retroactivity in Anglo-American jurisprudence based on the principle that people should have an opportunity to know what the law is); *e.g.*, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 246 (1978) (holding that Minnesota's Private Pension Benefits Protection Act violates the Contract Clause because it retroactively modified legal duties between parties and undermined reliance interests.); *cf. Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that in determining whether an official's conduct meets the objective reasonableness standard within the qualified immunity context, if the law at the time the conduct was performed was not clearly established, "an official could not … fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.").

Plaintiff had no way of knowing that her relationship with Lese during November 2015 to May 2016 could later be considered "non-consensual" based on a policy that was not even in existence during the relevant time frame. Plaintiff Reid had no "means of knowing" in November 2015 that a policy adopted in August 2016 could be weaponized to brand her as engaging in sexual misconduct during the first six months of a two-year relationship that took place three years earlier.

The University Defendants have side-stepped the history of and foundation for Plaintiff Reid's claims against them. In seeking to prevent her from having her day in court, they have glossed over the fact that they enabled Lese to pursue a complaint against her in violation of their own rules, policies and procedures, as well as Plaintiff's fundamental constitutional rights to fair notice and fair process. They also ignore that through successive steps of their "unbroken array of negative decisions," they

sought to bolster the reasons for finding her "responsible" by adding unfounded accusations, while refusing her the opportunity to challenge them.[18]

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." 42 U.S.C. § 1983 provides a civil right of action for deprivations of constitutional protections taken under color of law. Article 1, Section 11 of the Constitution of the State of Virginia similarly provides that "no person shall be deprived of his life, liberty, or property without due process of law." Article 1, Section 15 of the Constitution of the State of Virginia recognizes that "no free government, nor the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue; by frequent recurrence to fundamental principles; and by the recognition by all citizens that they have duties as well as rights, ***and that such rights cannot be enjoyed save in a society where law is respected and due process is observed***." (Emphasis added). According to *Shivaee v. Commonwealth*, 270 Va. 112, 119 (2005), "[b]ecause the due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution, the same analysis will apply to both."

Due process is the foundation of our adjudicatory system. Without it, lawlessness prevails, and constitutional rights are destroyed. When a right is protected by the Due Process Clauses of the United States Constitution or a state's Constitution, a state may not "withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred." *Goss v. Lopez*, 419 U.S. 565, 574 (1975). *See also, Webster v. Perry*, 512 F.2d 612, 614 (4th Cir. 1975) ("The Supreme Court observed that since [the state] had extended to certain persons rights of public school education, … the State could not rescind the grant because of student misconduct

[18] Dean Aguirre, for example, found that Plaintiff Reid subjected Lese to "verbal abuse and retaliation" after their relationship went sour (ostensibly in 2018). *See* ECF 10-1 at 3. The sole issue at hand in the Title IX proceedings, however, was what took place during the November 2015 to May 2016 period, and there was no evidence to support that finding. Provost Stockman never corrected this erroneous finding, nor gave Plaintiff Reid the opportunity to challenge it.

without "fundamentally fair procedures".); *Goss v. Lopez*, 419 U.S. at 573 ("Accordingly, a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process."); *Ingraham v. Wright*, 430 U.S. 651, 672 (1977) ("The Fourteenth Amendment prohibits any state deprivation of life, liberty, or property without due process of law.").

Defendant JMU, as a public university, and when conducting a disciplinary proceeding and hearing, must provide the accused with prompt, meaningful and specific notice of the violation and charges against them, and the accused must have a meaningful opportunity to be heard. To satisfy the Due Process Clauses of the United States and Virginia Constitutions, a hearing must be a real one, not a sham or pretense. *Palko v. Connecticut*, 302 U.S. 319 (1937). *See also United States v. Nugent*, 346 U.S. 1, 7 (1953) ("The statute does entitle the registrant to a 'hearing,' and of course no sham substitute will meet this requirement").

"'The fundamental requisite of due process of law is the opportunity to be heard,' *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), a right that 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest.' *Mullane v. Central Hanover Trust Co.*, supra, at 314." *Goss v. Lopez*, 419 U.S. at 579 (quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950)).

b. Defendants' Action Against Plaintiff Reid Did Not Comport with Due Process

Because Lese's claims against Plaintiff Reid pertained to conduct that took place during the November 2015 to May 2016 time period, the 2012 Policy #1324 governed the University Defendants' receipt of, response to, investigation of, hearing, decisions and findings. It is initially important to remember that Defendants had already investigated Plaintiff Reid's November 2015 to May 2016 relationship with Lese and concluded that it did not violate University policy. As such it should not have been reinvestigated. Compl. ¶¶ 481-483.

JMU's 2012 Policy #1324 defined the circumstances under which a faculty member was subject to a complaint, a disciplinary proceeding, and sanctions for actions that took place while that policy was in effect. It was JMU's 2012 Policy #1324 that provided Plaintiff Reid with notice as to what conduct would be considered discrimination and harassment and, hence, what actions or conduct could be sanctionable. If the University Defendants were going to allow someone to bring a Title IX claim several years after the allegedly offending conduct, they had an obligation to ensure that they were applying the correct policy. Their failure to do so here resulted in the deprivation of Plaintiff Reid's most fundamental constitutional right—the right to know ahead of time what conduct could subject her to a reputation-destroying proceeding and University discipline. Compl. ¶¶ 484-486.

According to Section 6.2.2. of the 2012 Policy #1324, Defendant Sirocky-Meck was required, "upon receipt of the complaint" to "determine whether the policy applies … and [to] dismiss the complaint if the policy does not apply…." Section 6.2.2.(1) of the Policy #1324 imposed an affirmative obligation on Defendant Sirocky-Meck to test Lese's allegations against the Policy: "the Title IX Officer may find that this policy does not apply upon determining … [t]hat even if the complainant's allegations are true, the respondent's conduct would not constitute harassment or discrimination ***as defined in this policy***." (Emphasis added). Sections 6.2.4. and 6.2.7. of the 2012 Policy #1324 imposed additional obligations on Defendant Sirocky-Meck related to investigating Lese's allegations and, upon finding them deficient (as they clearly were), dismissing her "Title IX Statement." Compl. ¶¶ 493-497. Defendant Sirocky-Meck, for example, knew or should have known that Lese's "Title IX Statement" did not claim that Plaintiff discriminated against her, harassed her, or deprived her of a privilege or right or that she had been otherwise adversely affected. She knew or should have known that Lese's "Title IX Statement" did not claim that Plaintiff had engaged in unwelcome or offensive physical, verbal or written conduct that showed an aversion or hostility towards her based on her sex or sexual orientation or allege that Plaintiff had a negative impact on her as a graduate student. Compl. ¶¶ 498-501.

Section 6.2.1. of Policy #1324 imposed a 180-day deadline for filing a complaint, and Defendant Sirocky-Meck had an affirmative obligation to determine whether Lese's "Title IX Statement" was "timely filed." Lese's "Title IX Statement" was filed well after the 180-day deadline (being filed more than two (2) years after that date had passed). Had Defendant Sirocky-Meck complied with the requirements of Section 6.2.2., she would have dismissed Lese's untimely "Title IX Statement," a decision that would have been final and not subject to appeal. Compl. ¶¶ 491-493, 495-509. Sirocky-Meck's refusal to comply with the requirements of Section 6.2.2. violated Plaintiff's rights, entitlements, and protections under the Fourteenth Amendment to the United States Constitution and the 2012 Policy #1324. Compl. ¶ 511.

Defendant Sirocky-Meck's decision to withhold Lese's "Title IX Statement" from Plaintiff Reid for approximately two months violated Section 6.2.1. of the 2012 Policy #1324, which provision required her to "notify the respondent and the [Director of Equal Opportunity], ***supplying both with a copy of the [formal] complaint***" (emphasis added) as one of the very first steps in the "Complaint Process." By withholding Lese's "Title IX Statement," Defendant Sirocky-Meck denied Plaintiff fair notice of the claims against her, depriving her of the ability to fully prepare for and participate in the Title IX proceedings and defend herself. This delay also allowed Defendant Sirocky-Meck to conceal her failure to comply with JMU's policies for intake and investigation. Sirocky-Meck also avoided timely dismissing Lese's allegations as required by JMU's policies and created a situation whereby Plaintiff and her witnesses were left guessing as to the nature of Lese's claims. Compl. ¶¶ 512-518.

Defendant Sirocky-Meck's misrepresentations regarding the nature of Lese's "Title IX Statement" violated JMU's own policies and procedures and substantially impaired Plaintiff Reid's ability to defend herself, as she was not provided with fair and adequate notice regarding the nature or basis for the charges and allegations against her. By designating Lese's "Title IX Statement" as a "Formal Complaint," Defendant Sirocky-Meck became an advocate on behalf of Lese and falsified the allegations made, commenced a Title IX investigation in violation of JMU policies, and set a

process in motion that by definition violated Plaintiff Reid's rights. Defendant Sirocky-Meck's advocacy on behalf of Lese violated Plaintiff Reid's rights, entitlements and protections, as provided for in the JMU policies and procedures. Compl. ¶¶ 519-524.

The University Defendants violated their obligations and the procedures set forth in JMU's 2012 Policy #1324. They failed to meet the deadlines set forth in JMU's 2012 Policy #1324, and deprived Plaintiff Reid of her right to a fair and timely investigation, hearing, appeal and resolution. By failing to meet the deadlines set forth in JMU's 2012 Policy #1324 they deprived Plaintiff Reid of her right to dismissal of Lese's allegations and claims as set forth in her "Title IX Statement." Their violation of their responsibilities and obligations under JMU's 2012 Policy #1324 deprived Plaintiff Reid of rights, entitlements and protections, as set forth in University policy and violated her constitutional right to due process. Compl. ¶¶ 525-529.

c. Plaintiff Reid Had a Liberty Interest in Her Good Name and Reputation

"The Due Process Clause also forbids arbitrary deprivations of liberty. 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied. … It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution." *Goss v. Lopez*, 419 U.S. at 575 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)). *See also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (Powell, J., concurring in part and concurring in result in part) ("the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. … While the legislature may elect not to confer a property interest in [public] employment, it may not

constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.").[19]

Plaintiff Reid has a cognizable liberty interest in not being falsely branded as having improperly engaged in a nonconsensual relationship with Lese. The University Defendants' finding that Plaintiff Reid had engaged in a non-consensual relationship was false and injurious to her reputation. Their finding that Plaintiff Reid had engaged in an inappropriate relationship while also serving as a supervisor was injurious to her reputation. Had the University Defendants employed an appropriate investigation and conducted a fair hearing in this matter, they would have rightly determined that Lese's allegations did not state a claim of misconduct under 2012 Policy #1324, that such allegations were false, and that Plaintiff Reid did not engage in a non-consensual relationship with her live-in girlfriend of over two years. Defendants' actions have called into question Plaintiff's good name, reputation, honor and integrity so as to have made it impossible for her to continue her employment with JMU and impacted her ability to find employment in her chosen field. Compl. ¶¶ 535-540.

There is no question that Plaintiff Reid has a liberty interest in her good name and that Defendants' actions have deprived her of that interest. The only remaining question is whether Defendants also "altered or extinguished" a legal right or status. *See Doe v. Alger,* 175 F.Supp.3d 646, 659-660 (W.D. Va. 2016). They clearly have by imposing sanctions against Plaintiff **Reid *prior to*** making any finding that she had violated University policy, ***prior to*** conducting the required investigation, and ***prior to*** completing the hearing and appeal process. First, the University Defendants barred Plaintiff Reid from the JMU campus during the course of the investigation and disallowed her from teaching courses or working with her team. Compl. ¶¶ 532-533. Second, in February 2019, Plaintiff Reid applied for a promotion to be appointed as the "Director of Individual Events." On

[19] *See also Ingraham v. Wright*, 430 U.S. 651, 692 (1977) (White, J., dissenting) ("the Constitution requires a State to provide 'due process of law' when it punishes an individual for misconduct … to protect the individual from erroneous or mistaken punishment that the State would not have inflicted had it found the facts in a more reliable way.");

March 13, 2019, two weeks ***before*** the hearing date, the University notified Plaintiff Reid via email that she was no longer being considered as a candidate for that position. It is believed that the named Defendants intervened in the hiring process related to the Director of Individual Events position before that position could be filled, that such intervention occurred as a result of Lese merely filing her "Title IX Statement," and was intended to ensure that Plaintiff Reid was not hired for that position. The University Defendants' adverse actions against Plaintiff Reid violated University policy and violated her rights as a University faculty member. Compl. ¶¶364-367. This thus represents the necessary "stigma plus" required to show a reputational injury. *Id.*

The Due Process Clauses of the United States and Virginia Constitutions also protect decisions relating to personal relationships, and matters involving the most intimate choices central to personal dignity and autonomy are central to the liberty protected by the Fourteenth Amendment. *See Obergefell v. Hodges*, 574 U.S. 644, 663 (2015) (the Due Process Clause of the 14th Amendment extends protection "to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."). Defendants involved themselves with the most personal aspects of Plaintiff's over two-year relationship with Lese, requiring her to share intimate details of their sexual encounters in order to defend herself. They clearly violated her liberty and privacy interests, while allowing Lese to make terrible accusations without having to back them up.

d. Plaintiff Reid Had a Property Interest in the Fair and Reasonable Application of JMU's Policies and Procedures

Plaintiff Reid had a constitutionally protected property interest in being able to rely upon JMU's policies and procedures, and in Defendants' adherence and compliance with them. *Richardson v. Town of Eastover*, 922 F.2d 1152, 1157 (4th Cir. 1991) (holding that mutual expectations may create an entitlement in a license, and once the license is issued, it may not be taken away without procedural due process required by the Fourteenth Amendment.) Plaintiff had a constitutionally protected property interest in not being subjected to disciplinary measures, so long as she complied with the

University's policies as they existed during her employment. Plaintiff and JMU had a mutual understanding that she would be disciplined under the University's policies only if it were proven that she had violated those policies. Elementary considerations of fairness dictate that individuals must have an opportunity to know what the law and policies are in order to conform their conduct accordingly; settled expectations cannot be disrupted. *Landgraf*, 511 U.S. at 265.

This Court found in *Doe v. Virginia Tech*, that while the constitution is not the source of protected property right, a "claim of entitlement may arise from state statutes, contracts, ***regulations, and policies***." 400 F.Supp.3d at 499. (Emphasis added). The lack of a statute or contract provision does not mean that there is no property right. *Id.* (quoting *Doe v. Alger*, 175 F.Supp.3d at 657 (*citing Perry v. Sindermann*, 408 U.S. 593 (1972)). Such property rights can instead arise from "rules and understandings officially promulgated and fostered by the college…." *Id.* at 499-500. A plaintiff claiming an entitlement "in light of the policies and practices of the institution" must be allowed to prove the legitimacy of her claim and dismissal on a motion to dismiss is inappropriate. *Id.* at 500.

In this case "the policies and practices" of JMU as reflected in both the 2012 Policy #1324 (ECF 1-2) and the 2016/2018 Policy #1340 (ECF 1-3 and 1-4), provide Plaintiff with the requisite property interest. Similar to the situations in both *Perry v., Sindermann* (408 U.S. 593) and *Doe v. Alger*, (175 F.Supp.3d 646), JMU's policies provide a comprehensive framework within which allegations of sexual misconduct will be addressed. These written policies represent JMU's long-standing history and procedure for accepting, pursuing, investigating, and prosecuting claims of sexual misconduct. They provide certain procedural safeguards to ensure protection of the rights of the accused, including requiring the dismissal of complaints under particular well-defined circumstances (including that the conduct did not constitute harassment or discrimination as defined by the policy, or if the complaint was untimely). *See* ECF 1-2 at 7; ECF 1-4 at 13. They describe JMU's investigatory and adjudicatory system for addressing claims of discrimination and harassment. They describe the nature of sanctions

that can be imposed against someone found to have violated the policies, with such sanctions to be imposed *only after* the process is complete.

That JMU's rules, regulations and policies are a property interest is evident by one simple fact: they represent the only mechanism by which the University sanctions an employee accused of discrimination or harassment. Not even these Defendants would argue that they regularly (or ever) sanction an employee for alleged misconduct without going through this process and having found that such employee is "responsible" for the offending conduct alleged. Defendants have adopted and implemented a "system" of sanctioning employees only after a finding of "responsibility." That system provides Plaintiff with a property interest, and she is entitled to the "opportunity to prove the legitimacy of [her] claim to a property right 'in light of the policies and practices of the institution[.]'" *Doe v. Virginia Tech*, 400 F.Supp.3d at 500 (quoting *Perry*, 408 U.S. at 603).

e. These Defendants Violated Plaintiff's Right to Confront Her Accuser and Conduct Cross-Examination

By adopting Policy #1340 the University Defendants institutionalized the deprivation of the fundamental due process right to confront and cross-examine one's accuser. Compl. ¶¶ 219-221.

> In the hearing, neither party is required to be present. If a party is not present, he/she may submit a written statement. If the parties are present and testify, neither the reporter nor the respondent shall be allowed to cross-examine the other party directly, but shall propose questions through the chair of the hearing panel.

ECF 1-4 at 18. In enforcing Policy #1340 against Plaintiff Reid, the University Defendants violated her right to question Lese about her accusations, depriving her of due process and a fair hearing.

Cross-examination has been described by the Supreme Court as the "greatest legal engine ever invented for discovery of the truth." *California v. Green*, 399 U.S. 149, 158 (1970) (citation and internal quotation marks omitted). "Not only does cross-examination allow the accused to identify inconsistencies in the other side's story, but it also gives the fact-finder an opportunity to assess a witness's demeanor and determine who can be trusted. So if a university is faced with competing

narratives about potential misconduct, the administration must facilitate some form of cross-examination in order to satisfy due process." *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018). (Citations and internal quotations omitted). Cross-examination is essential in university disciplinary proceedings "because it does *more* than just uncover inconsistencies—it takes aim at credibility like no other procedural device. Without the back-and-forth of adversarial questioning, the accused cannot probe the witness's demeanor under that questioning. Nor can the fact-finder observe the witness's story to test her memory, intelligence, or potential ulterior motives. For that reason, written statements cannot substitute for cross-examination." *Id.* at 582 (citation and internal quotations omitted). The *Baum* court then provided this quotation from Brutus Essay XIII, in *The Anti-Federalist* 180 (Herbert J. Storing ed., 1985):

> It is of great importance in the distribution of justice that witnesses should be examined face to face, that the parties should have the fairest opportunity of cross-examining them in order to bring out the whole truth; there is something in the manner in which a witness delivers his testimony which cannot be committed to paper, and which yet very frequently gives a complexion to his evidence, very different from what it would bear if committed to writing ....

Id. at 582–83 (6th Cir. 2018). The Court in *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401 (6th Cir 2017), explained it best: "The ability to cross-examine is most critical when the issue is the credibility of the accuser.' Cross-examination takes aim at credibility like no other procedural device." (Citations and internal quotations omitted). *Id.* at 401-402. "Few procedures safeguard accuracy better than adversarial questioning. In the case of competing narratives, 'cross-examination has always been considered a most effective way to ascertain the truth.'" *Id.* at 401 (quoting *Watkins v. Sowders*, 449 U.S. 341, 349 (1981)). *See also Doe v. Purdue*, 928 F.3d 652, 669 (7th Cir 2019).

The University's Policy #1340 as applied against Plaintiff was fundamentally flawed and deprived her of her due process rights. Credibility was critically important in Defendants' Title IX proceedings against Plaintiff Reid. Considering the facts and Lese's accusation that

Plaintiff had engaged in a "non-consensual" relationship during the first six months of their two-year-plus relationship, it was imperative that Plaintiff be allowed to confront and cross-examine her and her witnesses. It was also critically important for the hearing panel to personally observe their demeanor and assess their credibility. Defendants' decision to shield Lese, while forcing Plaintiff Reid to defend herself, was the height of unfairness.

f. The University Defendants Failed to Provide Plaintiff with Due Process

The University Defendants deprived Plaintiff of her constitutionally cognizable property and liberty interests. They invaded her right to privacy and subjected her to embarrassment, humiliation and ridicule. Plaintiff Reid has suffered a tangible and material injury as a result of Their actions, investigation, decisions and findings, because those findings have been communicated to other parties, including prospective employers. Because The Defendants' false findings have been communicated to prospective employers, Plaintiff Reid has been unable to find suitable academic employment in her chosen field and expertise despite being fully qualified. Compl. ¶¶ 541-545.

The Defendants, acting under color of law, deprived Plaintiff Reid of her constitutionally protected reputational interests by opening an investigation that was time-barred, and employing a flawed investigation, hearing and appeal process that failed to comport with the basics of due process. As a direct and proximate result of their conduct, Plaintiff Reid sustained damages, including for constructive discharge, for loss of career opportunities and prospects, for reputational damages, for emotional distress, and damages for past and future economic losses. Compl. ¶¶ 546-547.

Plaintiff Reid's factual allegations as set forth in the Complaint must be accepted as true at this stage of the proceedings. Such facts show that she is entitled to a declaratory judgment finding that the Defendants' entire process was flawed and violative of her right to due process. Such facts also show that this Court must enter an injunction to expunge her record related to the proceedings described above and restore her reputation and good name.

V. Plaintiff Reid Has Pled a Valid Title IX Claim

a. Plaintiff has Adequately Pled an Erroneous Outcome Case

Plaintiff has pled facts showing that the outcome of the Defendants' Title IX proceeding against her was not only rife with due process violations, but erroneous in the extreme. By way of example, Defendants failed to apply the correct procedure and policy, they essentially wrote Lese's complaint in order to shoe-horn it into the Policy #1340 framework, they withheld Lese's complaint from Plaintiff for several months after it was filed despite being required to provide a copy immediately at the very beginning of the process, they failed to acknowledge that Lese's Title IX Statement failed to articulate an accusation of harassment or discrimination that was actionable under their own policies; they allowed Lese to proceed with her accusations while refusing to show up at the hearing, and they prohibited Plaintiff from cross-examining her and her witnesses.[20] Defendants' finding that Plaintiff engaged in a "non-consensual relationship" with her long-term girlfriend was absurd on its face, and demonstrates a level of animosity that in and of itself represents discrimination. At every single turn—when the Defendants could have done the right thing—they chose the wrong path.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX applies to all public and private educational institutions that receive federal funding, which includes Defendant JMU. Title IX prohibits any covered entity from discriminating "in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time" "on the basis of sex." 34 C.F.R. § 106.51(a)(1). Title IX requires a school to "adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by" Title IX or regulations thereunder. 34 C.F.R. §106.8(b). Defendant JMU's grievance

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[20] Plaintiff's Complaint lays out 23 examples of the flaws in Defendants' proceedings against her, all of which cast serious doubt on the accuracy of the outcome. *See* Compl. ¶ 647(a)-(w).

procedures related to Lese's allegations against Plaintiff were neither prompt nor equitable. Defendant JMU discriminated against Plaintiff Reid because of her sex by applying an unfair, unreliable, and inapplicable process to resolve Lese's allegations against her. The outcome in this case was erroneous; Plaintiff Reid was innocent and did not violate Defendant JMU's policies. Compl. ¶¶ 625-629.

The fact is that Plaintiff Reid was not accused of and did not violate the 2012 Policy #1324. She could not have violated the Policy #1340 during the November 2015 to May 2016 time frame as such policy did not yet exist. Compl. ¶¶ 631-632. Defendants' entire Title IX proceeding against Plaintiff was tainted and represents a stunning abuse of power. They refused to conclude their investigation with a written report summarizing the relevant exculpatory and inculpatory evidence as they were required to do by 2012 Policy #1324. They failed to provide Plaintiff Reid with timely and equal access to the information used during the hearing. Compl. ¶¶ 639-640.

Gender and LGBTQ bias was a motivating factor in the University Defendants' findings against Plaintiff Reid. For example, Defendants refused Plaintiff Reid's request to have someone from the LGBTQ community appointed to the hearing panel. Compl. ¶ 356. Defendants failed to conduct an impartial, fair, and reliable investigation, hearing and appeal. The University Defendants' discriminatory process deprived Plaintiff Reid, a female member of the LGBTQ community, of employment opportunities and imposed discipline on her on the basis of her sex and sexual orientation. The University Defendants' policies, actions, and procedures violated Plaintiff Reid's rights and entitlements under Title IX. Compl. ¶¶ 641-645.

It is reasonable to assume that Defendants make some effort to comply with their own policies and procedures when responding to other Title IX complaints. Their complete and utter failure to do so here, coupled with their willingness to step into Lese's shoes and prosecute the case for her, is further evidence of their discrimination against Plaintiff Reid.

"In an erroneous outcome case, a plaintiff generally claims he was innocent and wrongfully found to have committed an offense, and challenges the university disciplinary proceeding on grounds

of gender bias." *Doe v. Marymount University*, 297 F.Supp.3d 573, 583 (E.D. Va. 2018) (citations and internal quotations omitted). To survive a motion to dismiss, Plaintiff must allege facts "sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding," and show "a particularized connection between the flawed outcome and gender bias." *Id.* (citations and internal quotations omitted). Plaintiff has met both of these requirements, describing in detail all of the problems with the disciplinary proceedings, and the plausible explanation that such actions were related to Defendants' bias against her because she is a female member of the LGBTQ community.

Defendants attempt to rehabilitate themselves by arguing that their actions against the Plaintiff weren't really that bad, and that even if they had followed the correct policy and procedures (as provided for the 2012 Policy #1324), the outcome would have been the same. Their arguments in that regard ignore the specific language and provisions of the 2012 Policy, including the time limit for bringing a claim (180 days from the date of the last encounter), what proof needed to be made, and the rights of the accused. Defendants are arguing that this is a "no-harm-no-foul" situation, since they would have convicted Plaintiff Reid regardless of the policy in place and regardless of the facts. This is perhaps the most important admission that they could make, as it exposes the manner in which Plaintiff Reid was railroaded. The Defendants have admitted that the particulars of the situation were irrelevant, they apparently had every intention of finding Plaintiff Reid "responsible" and punishing her regardless of the facts or applicable rules. They clearly disliked the fact that she had engaged in an adult, consensual, long-term relationship with another woman, and they used Lese's desire for revenge to weaponize the University's Title IX proceedings to make Plaintiff pay.

Plaintiff has pled sufficient facts regarding what Defendants did, why they did it, and the impact on her, to establish a plausible Title IX claim against them. Plaintiff should be allowed to proceed with discovery to establish the many ways in which Defendants violated her rights and treated her differently than other similarly-situated faculty members.

Defendants' Motion to Dismiss Plaintiff's Title IX claim should be denied.

b. Plaintiff's Claims Against the Defendants in Their Official Capacity are Not Duplicative

Plaintiff's claims naming the individual Defendants in their official capacities are not duplicative. Each of these Defendants in their own right acted to deprive Plaintiff of the protections that she is entitled to under Title IX. They should thus be held accountable for those actions.

CONCLUSION

Plaintiff's Complaint is more than adequate to defeat Defendants' Motion to Dismiss. It sets forth all of the facts necessary to state a claim against the Defendants, showing that they violated her due process rights and violated those protections provided for in Title IX.

Defendants were complicit in allowing a faculty member (Lese) to weaponize Title IX to punish her former significant other. Defendants' actions against Plaintiff Reid violated clear and unequivocal University and public policy as set forth in JMU's own rules and regulations, as well as the Virginia and United States Constitutions. Defendants' wrongful actions caused Plaintiff Reid embarrassment and humiliation and violated her personal right to privacy. Defendants' wrongful accusations against Plaintiff Reid that she engaged in sexual misconduct have exposed her to ridicule and invited harassment. Defendants' wrongful adjudication against Plaintiff Reid that she was responsible for sexual misconduct carried with it a powerful stigma and severe ramifications. Defendants' actions were deliberate and created intolerable working conditions for Plaintiff Reid.

Plaintiff has suffered long enough at the hands of these Defendants. She is now entitled to her day in court in order to repair her name and reputation, and to hold the Defendants accountable for their concerted efforts to railroad her by pursuing a claim that she was involved in a nonconsensual relationship during the first few months of a long-term relationship.

July 2, 2021

Respectfully,

/s/ Harriet M. Hageman

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on 2nd day of July 2021, a copy of Plaintiff' Alyssa Reid's Brief in Response to Defendants' Motion to Dismiss was filed with the Court's CM/ECF system, which will send notice of electronic filing to the counsel of record.

/s/ Harriet M. Hageman
Harriet M. Hageman