RECORD NO. 22-1441

IN THE

United States Court of Appeals for the Fourth Circuit

ALYSSA REID,

Plaintiff-Appellee,

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-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

On May 3, 2021, Appellant Alyssa Reid brought suit in the United States District Court for the Western District of Virginia against Appellees James Madison University and several of its officials (collectively "JMU" or "University"), as well as the United States Department of Education and its Secretary, Miguel Cardona, alleging that during its Title IX investigation into Appellant, JMU violated a number of her federal and state constitutional and statutory rights. J.A. 7-120. Appellant invoked the District Court's jurisdiction over federal claims under 28 U.S.C. §§ 1331, 1332, 1346, 1367, 2201, 2202 and 42 U.S.C. § 1983, as well as under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. J.A. 11-12. On June 2, 2021, JMU filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). ECF 9. The following month, Department of Education and Secretary Cardona filed their own motion to dismiss under the same rules. ECF 15. Following briefing and argument, the District Court granted both motions and dismissed the case. ECF 29; J.A. 212-32; ECF 30, J.A. 233. Appellant timely noted her appeal.[1] ECF 31, J.A. 234. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291.

[1] Appellant is appealing only the dismissal of her action against the JMU Defendants. Appellant is not appealing the dismissal of her action against the Department of Education or Secretary Cardona.

II. QUESTIONS PRESENTED

1. Whether the District Court erred in holding that the two-year statute of limitations on Appellant's claims ran from the time the Dean of the College of Arts and Letters initially recommended and suggested the imposition of sanctions against Appellant to the University, rather than from the time that the University denied Reid's Appeal of the Dean's decision or at least the time that the period to appeal the Dean's decision had lapsed.
2. Whether the Appellants properly stated a claim upon which relief can be granted.[2]

III. STATEMENT OF THE CASE

Alyssa Reid, a former employee of JMU, appeals the final judgment of the United States District Court for the Western District of Virginia, which held that her Complaint against JMU alleging violations of due process during certain Title IX investigative and disciplinary proceedings was barred by the statute of limitations.

[2] In the proceedings below, Appellees moved to dismiss the case both for lack of jurisdiction, Fed. R. Civ. P. 12(b)(1), and for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6). The District Court addressed only the first portion of the motion. J.A. 222-27. However, because this Court "may affirm [the judgment below] on any grounds apparent from the record," *Pitt Cnty. v. Hotels.com, L.P.*, 553 F.3d 308, 311 (4th Cir. 2009) (quoting *Suter v. United States*, 441 F.3d 306, 310 (4th Cir. 2006)), the brief will present arguments relevant to the 12(b)(6) issue as well.

On April 30, 2019, Reid received a letter from Robert Aguirre, Dean of the College of Arts and Letters, informing her that following an investigation of the Title IX complaint, he agreed with the hearing committee's finding of responsibility and the recommended sanction—a reprimand. On May 5, 2021, within the five-day deadline provided by the internal JMU policy, Reid appealed both the finding of responsibility and what Aguirre's letter itself termed a "sanction *recommendation*," J.A. 204 (emphasis added), to the University Provost. On June 19, 2021, Provost Heather Coltman denied Reid's appeal and upheld the recommendation. According to the University policy, this was the final decision in the internal adjudication process.

On May 3, 2021, Reid filed a civil action against JMU and several university officials (including, *inter alia*, Jonathan R. Alger, President of JMU, Provost Coltman, Dean Aguirre, and Amy M. Sirocky-Meck, JMU's Title IX Coordinator) both in their official and individual capacities. Defendants-Appellees moved to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Over Reid's opposition and addressing only the 12(b)(1) portion of JMU's argument, the District Court concluded that it lacked jurisdiction over Reid's complaint because it was allegedly filed outside of the two-year statute of limitations. The present appeal followed.

IV. STATEMENT OF FACTS

A. FACTUAL BACKGROUND GIVING RISE TO JMU'S ACTION AGAINST APPELLANT

In June 2012, Alyssa Reid began working for James Madison University as Assistant Director of Individual Events in the JMU School of Communication Studies. Her responsibilities involved assisting with coaching, tournament travel and logistics, community outreach, administering finances, mentoring, working with students on their performance skills, and lecturing. The same year, Reid met Kathryn "Katie" Lese[3] while Lese was an undergraduate student. Lese graduated in the Spring of 2014, but re-enrolled in the University as a graduate student the following semester. The two women developed a professional relationship and a close friendship.[4] In the Fall 2014 semester, Lese was assigned as a graduate student to the "Individual Events Team." Neither Reid nor Lee Mayfield (the 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 Communications Studies. Nor was Reid a member of the Graduate Department while Lese was a graduate student; nor did she have other teaching, supervisory, or decision-making authority over Lese. To the

[3] JMU has consistently referred to Lese as "Jane Doe."

[4] It is undisputed that during Lese's time as an undergraduate the relationship was one of friendship between a mentor and a mentee.

contrary, Reid and Lese were colleagues and co-coaches with similar responsibilities.

In October 2015, while on a trip to a forensics tournament, Lese professed her love for Reid. Reid declined Lese's advances at that time and for the subsequent month. Indeed, it was Lese who first (forcefully) kissed Reid during their next trip in November 2015. It was during that trip that a sexual relationship between the two women began. In the summer of 2017, Reid and Lese moved in together in a house purchased by Reid. J.A. 52, ¶285.

In Spring 2016, as Lese was completing her graduate studies, an anonymous complaint was filed against Reid alleging that her relationship with Lese violated Title IX and/or school policies. J.A. 51, ¶280; J.A. 214-15. The complaint was investigated and ultimately dismissed because JMU's officials concluded that a relationship between two adults, neither of whom had any supervisory authority over the other, did not violate any laws or internal rules as they existed at that time. J.A. 51, ¶¶282-83; J.A. 215.

Following Lese's graduation, she was hired by JMU as the Coordinator of Organization Development. The relationship between Reid and Lese continued, and the two women continued to live together until February 2018.[5]

B. JMU'S TITLE IX POLICIES

Over the years, on several occasions JMU rewrote its policies governing the processing of allegations of sexual misconduct. In late 2015, when the Lese-Reid relationship began, the relevant governing policy was Policy #1324, J.A. 129-38, which addressed claims of "Discrimination and Harassment." That policy was adopted in December 2002, J.A. 127, and amended in August 2012, J.A. 138. This policy prohibited discrimination and harassment on the basis of sex or sexual orientation in the employment relationship. J.A. 133. It also prohibited anonymous complaints and complaints on behalf of another person. J.A. 132-33, 134-35. In 2016, when the University first received a complaint regarding Reid's relationship with Lese, it was Policy #1324 that was applied.

Before the beginning of the Fall 2016 semester, *i.e.*, after Lese completed her graduate studies and became an employee of the University on par with Reid, JMU replaced Policy #1324 with new Policy #1340. J.A. 139-55. A revised Policy #1340

[5] Unfortunately, the breakup was not amicable. Following the termination of the relationship, Lese sent Reid a number of abusive and threatening messages and engaged in other improper conduct.

was promulgated in January 2018. J.A. 156-80.[6] The 2018 version of the policy for the first time defined "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" as "nonconsensual." J.A. 165, § 5.6. Examples of such "nonconsensual" (and therefore prohibited) relationships "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." *Id.*

Policy #1340 also laid out procedures to be followed in investigation and adjudication of Title IX complaints. J.A. 165-79. Under the policy, if the investigating Title IX officer makes a preliminary finding of a violation, the matter is referred to a hearing panel. J.A. 173, § 6.6.8.1. Neither the complainant nor respondent is required to be present at a hearing and may rely on a written statement instead. *Id.*, § 6.6.8.4. Neither the complainant nor respondent is permitted to cross-examine each other. *Id.* Representation by an attorney is not permitted at any stage

[6] JMU proceeded against Reid retroactively under the 2018 version of the policy.

of the disciplinary process. J.A. 173-74, 178, §§ 6.6.8.7, 6.7.6.[7] Following a hearing, the hearing panel must decide, by a preponderance-of-evidence standard, whether the responded violated the policy, and if so what sanction to recommend. J.A. 174, §§ 6.6.8.12, 6.6.8.14. The recommended penalty is then communicated (through the Title IX coordinator) to the respondent's associate or assistant vice president or dean. *Id.*, §§ 6.6.8.15-16. The vice president or the dean "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." *Id.*, § 6.6.8.16.

Of particular relevance to the present case is the intramural appeals process contemplated by Policy #1340. The policy permits either party (*i.e.*, complainant or respondent) to "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." J.A. 175, § 6.6.8.17. The appeals are limited to allegations of violation of due process, newly discovered evidence, and harshness (or leniency) of sanctions. *Id.* Cross-appeals are also permitted. *Id.*, § 6.6.8.18. The policy is clear that the appealed

[7] Although Policy #1340 permits both parties to "have access to advice of legal counsel and … have legal counsel or other advisor present during the hearing," it prohibits counsel from "address[ing] the hearing panel directly or on behalf of the parties," and specifies that "[t]he hearing panel will communicate with the parties directly, not through legal counsel or another advisor." J.A. 173, § 6.6.8.7.

decision, *i.e.*, "the decision of the respondent's associate or assistant vice president or dean is final" *only* "[i]n the absence of a timely written appeal." *Id.* On the other hand, if the appeal *is* filed, it is "[t]he decision of the vice president [that] is final." *Id.*, § 6.6.8.20. Because both parties can appeal the decision of the dean or associate vice president, no respondent can be certain as to what the ultimate finding of responsibility and the type of sanction imposed will be until the appeal to the vice president is disposed of. *See id.* ("The vice president may uphold the decision below, reject it, or modify it."). In this case, both Reid and Lese had the ability to appeal Dean Aguirre's recommendation.

C. JMU'S TITLE IX PROCEEDINGS AGAINST ALYSSA REID

Almost a year after Lese's relationship with Reid ended, and more than three years after it began, Lese sent an email to Amy M. Sirocky-Meck, JMU's Title IX Coordinator, disclosing her past relationship with Reid.[8] Attached to the email was an unsigned and undated "Title IX statement." J.A. 182-85. The statement did not allege that the relationship between Reid and Lese was nonconsensual or that it

[8] Of course, by that point there was nothing to "disclose," as the Title IX office had been made aware of the relationship two and a half years prior, investigated it, and concluded that it did not violate any laws or policies. J.A. 51, ¶280-83; J.A. 214-15. It is particularly noteworthy that Lese's "statement" focused on the period between November 2015 and May 2016, *i.e.*, when she was a graduate student at the University—the *very same* period that was the subject of the Spring 2016 Title IX investigation that was resolved in Reid's favor.

constituted sexual harassment. Nevertheless, Sirocky-Meck treated the letter as an allegation of "Sexual Misconduct" as defined by the then-extant (2018) JMU policy #1340. J.A. 187-88. On December 13, 2018, Sirocky-Meck sent an email to Reid informing her that she had been named as a "Respondent in a Formal Complaint of Sexual Misconduct" filed by Lese, and that the Office was investigating the allegations. J.A. 186-89. On January 3, 2019, JMU placed Reid on leave of absence pending the results of investigation and adjudication of the complaint. During the suspension, Reid was prohibited from teaching any classes or otherwise participating in campus life. J.A. 83, ¶533. Furthermore, as a result of the suspension and investigation, the University refused even to consider Reid's application for promotion to Director of Individual Events. *Id.*, ¶534, J.A. 190-91. She was thereby effectively deemed guilty and punished before having the benefit of a hearing.

As already discussed, Lese was never a "student enrolled in [Reid's] class or under [Reid's] supervision," nor was she ever "a member of the team [Reid] coache[d]," nor was there "any other relationship where [Reid] ha[d] the opportunity to pressure or force the relationship on" Lese. To the contrary, it was *Lese* who first forcibly kissed Reid and pursued her romantically. Furthermore, and of particular importance, at the time Policy #1340 was promulgated, Lese was no longer a student of any kind but rather was an employee of equal rank (and in a different department) at the University. Thus, by its own terms, Policy #1340 had no applicability to

Reid's relationship with Lese. Nevertheless, it was this policy that the University wielded to violate Reid's due process rights.

Making matters worse still, from the time Sirocky-Meck received Lese's email, to the time of the hearing which took place on March 28, 2019, JMU did not provide Reid with a statement delineating the charges against her with any specificity. While Sirocky-Meck invited Reid to identify witnesses that would support her version of events, she failed to state what event was being investigated and what the allegations were, until after such witness statements had to be submitted. Sirocky-Meck did not release Lese's email to Reid until February 2019, after Reid's witnesses provided their testimony. Despite the fact that nowhere in her email did Lese allege that her two-and-one-half year relationship with Reid was "nonconsensual," Sirocky-Meck made the unilateral determination that it was and proceeded with the Title IX proceedings based upon that conclusion. Neither Sirocky-Meck nor any other JMU administrator ever provided Reid with the factual or legal support for this false determination.

The pattern of withholding documents continued at the hearing, which was held on March 28, 2019. While Reid appeared in person, Lese chose not to attend the proceedings, instead submitting a letter to be read to the hearing panel, thereby preventing Reid from confronting or cross-examining her. Despite the requirement that "respondent shall have timely access to documents and information considered

by the hearing panel," J.A. 173, § 6.6.8.6, Lese's statement was not provided to Reid prior to the moment that it was read into the record. Lese's "witnesses" also did not attend the hearing. Instead, the committee relied on four unsworn and unsigned statements, all of which confirmed (the already undisputed fact) that Reid and Lese had been in a romantic relationship. The copies of the statements that were provided to Reid prior to the hearing were heavily redacted, and Reid, again contrary to the written policy, *id.*, was not provided with unredacted copies prior to the hearing.

Given the nature of evidence, Reid was precluded from either confronting her accuser (Lese) or cross-examining either Lese or Lese's "witnesses." More than that, because the "evidence," such as it was, was not timely provided to Reid, she could not craft her defense to the amorphous and ill-defined charges with any kind of precision. It is therefore not surprising that on April 1, 2019, the hearing committee found Reid's relationship with Lese between November 2015 and May 2016 violated Policy #1340—a policy that was not even promulgated before *January 2018*.[9] The committee found that a reprimand would be a sufficient sanction because of the "professional consequences that [Reid] has already suffered due to the complaint," and because Reid "is at low risk for repeating the behavior." J.A. 194.

[9] Even the earlier version of the policy was not in effect until September 2016, *i.e.*, several months after Lese graduated JMU.

Consistent with the procedures outlined in Policy #1340, the committee's finding was submitted to Robert Aguirre, Dean of the College of Arts and Letters, so that he could decide whether to "adopt the recommendations of the hearing panel, reject them and make a different decision on the case, or modify them as he[] deem[ed] appropriate." J.A. 174, §6.6.8.16. On April 30, 2019, Dean Aguirre issued a letter concurring with the committee's finding of responsibility and *recommending* that a letter of reprimand be placed in Reid's file.[10] J.A. 205. Aguirre's letter to Reid also outlined her appeal rights and explicitly specified that if an appeal is filed, it will be "[t]he vice president [who] shall make a *final* decision." J.A. 207 (emphasis added).

Consistent with her rights under the policy, and the instructions contained in the letter she received from Dean Aguirre, Reid on May 5, 2019, filed a timely appeal with Vice President and Provost Heather Coltman. On June 19, 2019, Coltman

[10] The timing of Dean Aguirre's letter is yet another instance of JMU's disregarding its own Title IX policies. Under Policy #1340, "the respondent's associate or assistant vice president or dean will send a written decision" *to the respondent* "[w]ithin ten days of receipt of the panel's recommendations." J.A. 174, § 6.6.8.16. Dean Aguirre was required to come to his decision and provide notification thereof to Reid by April 13, 2019. J.A. 196. Despite the clear language of the rule, and the specific date having been listed on the letter transmitting the hearing panel's recommendation to Aguirre, he missed the deadline by more than two weeks.

denied Reid's appeal.[11] At this point, Reid's intra-university remedies were exhausted.

While the process was ongoing and recognizing that the stigma associated with the accusations would make it extraordinarily difficult, if not impossible, for her to continue in her role at JMU,[12] Reid left the University's employ and sought to continue her career elsewhere. However, given the negative mark on her JMU record, other prospective employers have, upon learning of JMU's conclusions, declined to hire her.

D. PROCEEDINGS BELOW

Having failed to obtain relief from the intramural JMU processes, Reid filed a complaint in federal court on May 3, 2021,[13] which was more than two years after she received the letter from Dean Aguirre, but *less than* two years after *the effective*

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[11] Once again, the University ignored the deadlines imposed by its own policy which required "the vice president [to] make a decision on the appeal within 5 days of the final submission." J.A. 175, § 6.6.8.19. Even considering Provost Coltman's excuse that she was out of the office between May 9 and June 3, 2019, J.A. 198, the decision had to be rendered by Monday, June 10, 2019, at the latest. Coltman missed that deadline by more than a week. This consistent disregard for JMU's own rules and procedures is strongly suggestive that Defendants-Appellees' contempt for procedural regularity, fairness, and due process was motivated by bias against the Appellant.

[12] Given that the University refused to even consider her application for promotion, Reid's fears were well grounded in reality.

[13] Hoping to achieve an informal resolution, Reid sent a draft complaint to JMU *months* beforehand. Accordingly, JMU cannot plead that it lacked timely notice or was otherwise unfairly surprised by this suit.

date of Dean Aguirre's recommendation (being five days after it was rendered), and *less than* two years after Provost Coltman denied her appeal and adopted Dean Aguirre's recommendation. As relevant here, Reid alleged that JMU violated her federal and state constitutional due process rights by failing to apply the correct policy to the allegation of misconduct (Count I), J.A. 74-85, failing to permit confrontation and cross-examination of the complainant or witnesses (Count II), J.A. 86-88, and applying a newly promulgated policy retroactively (Count III), J.A. 88-95. Reid also alleged that JMU violated Title IX through its failure to comply with the requirements of 34 C.F.R. § 106.8(b) because it failed to apply "grievance procedures [which are] prompt and equitable [for] resolution of" Lese's complaint against Reid (Count IV), J.A. 96-104.[14]

On June 2, 2021, JMU filed an omnibus motion to dismiss under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). ECF 10. As to the first part of the motion, JMU argued that the two-year statute of limitations began to run on April 30, 2019, when Dean Aguirre issued his recommendation on Lese's complaint against Reid. Thus, according to JMU, the latest Reid could have brought her claim was April 30, 2021, and therefore, her claim (filed on May 3, 2021) was untimely and jurisdictionally barred. Reid, on the other hand, contended that Dean Aguirre's

[14] Count XII of the Complaint, J.A. 116-17, alleging breach of contract, was withdrawn and is not at issue in this appeal.

decision was not "final" until Provost Coltman denied her appeal in June 2019—or until May 5, 2019, at the very earliest.[15] ECF 17.

JMU also argued that Reid's claims fail under Fed. R. Civ. P. 12(b)(6) because (a) "Section 1983 claims against JMU and [its officers] in their official capacities are barred by the Eleventh Amendment," (b) by "fail[ing] to allege a protected property [or liberty] interest," as well as because "Reid received all the process she was due," "Reid fail[ed] to state a due process claim pursuant to 42 U.S.C. § 1983," and (c) "Reid fail[ed] to cast articulable doubts on the accuracy of the proceeding and outcome," she "fail[ed] to state a claim pursuant to Title IX." ECF 10. Reid timely responded to these contentions as well.

On September 29, 2021, the District Court held a hearing on JMU's motion, and six months later issued its opinion and judgment, agreeing with JMU's statute of limitations argument and consequently dismissing the case against JMU for lack of jurisdiction. ECF 29, J.A. 222-27. The District Court did not address JMU's 12(b)(6) arguments.[16] The present appeal followed.

[15] May 5th is the date on which the time to appeal the Dean's recommendation would have run.

[16] The District Court also dismissed claims against the Department of Education and Secretary Cardona. J.A. 227-31. Those claims are not being pursued here.

V. SUMMARY OF THE ARGUMENT

Appellant Reid's civil action is timely because it was filed within two years of the University's final decision in her Title IX disciplinary process. Under JMU's rules, Title IX disciplinary process consists of a hearing with the findings of the hearing panel being transmitted to a dean or assistant vice president of the relevant university unit. J.A. 174, § 6.6.8.15. That individual reviews the hearing panel's recommendation and either confirms, reverses, or modifies it as he believes appropriate. *Id.*, § 6.6.8.16. The Dean's decision, however, is only final "[i]n the absence of a timely written appeal." J.A. 175, § 6.6.8.18. If an appeal to the University's Vice President/Provost is filed—as occurred here—it is the decision of *that* official that is the "final" University decision. *Id.*, § 6.6.8.19.

All communications from the University led Reid (and would have led any reasonable person) to believe that Dean Aguirre's letter was not JMU's "official position," but rather a "recommendation" and a "suggestion." J.A. 205. In addition to the University's regulations referenced above, Dean Aguirre's letter itself uses those terms. Second, the letter never once uses the word "final decision" or claims that sanctions "*are* imposed," but the letter does reference appeal rights at least *six* times. J.A. 203-07. Third, because JMU's policy permits not only respondent, but also complainant to appeal to the Provost, Reid could not have known what the

"final" University position with respect to sanctions was until the Provost had rendered her decision or the time to seek Provost's review had expired.

In rejecting this commonsense reading of JMU's rules and the record, the District Court misconstrued the governing Supreme Court precedent and a nearly-identical case from the Sixth Circuit. *See Del. State Coll. v. Ricks*, 449 U.S. 250 (1980); *Endres v. Ne. Ohio Med. Univ.*, 938 F.3d 281 (6th Cir. 2019). As those two cases explain, in determining when a cause of action in Title VII or Title IX cases accrues, the focus must be on the date when the university *formally* notifies an employee (or a student) of its *official* position. *Ricks*, 449 U.S. at 261. Furthermore, so long as an employee has an opportunity "to influence [a] decision," the decision is not considered "made." *See id.* The District Court, instead of focusing on the specific process that JMU employs in adjudicating and resolving Title IX cases or the actual communications between Reid and JMU, appears to have drawn a bright-line rule where any stage denominated as an "appeal" is automatically treated as being an opportunity to "remedy" rather than "influence" a decision.[17] *Id.* Such an approach ignores not only JMU's own (pre-litigation) understanding of its own processes, but the very facts of *Ricks*. In *Ricks* multiple steps led to an ultimate

[17] Even under the University's litigation position that the District Court accepted, Reid had until May 5, 2021, to *influence* the Dean's decision instead of appealing to the Provost.

denial of tenure to Ricks. Yet, the Supreme Court characterized only the *final* step in that process—the vote by the Board of Trustees and the formal letter delivered to Ricks—as an official expression of Delaware State College's position. The Supreme Court drew a distinction between, on the one hand, stages that were still reviewing the original decision, and on the other hand, stages that merely postponed the occurrence of consequences on which the university had already settled. The Sixth Circuit properly applied this guidance in *Endres*, when it held that a committee's decision to expel a medical student is not final until an appellate body rejected student's appeal precisely because the initial decision did not become effective until the appellate process had run its course. 938 F.3d at 296. In the present case, an appeal to the Provost did not merely delay the *consequences* of the sanctions imposed on Reid, but made the sanctions and the findings of responsibility themselves tentative. Because the District Court failed to apply *Ricks* and its progeny properly to the facts of this case, it erred in concluding that Reid's complaint is time-barred.

Although the District Court did not address JMU's other arguments, they too offer no succor to the University. First, Reid has sufficiently alleged that JMU's Title IX process deprived her of the process to which she was due. Reid has a liberty interest in her "good name, reputation, honor, [and] integrity," *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), and by labeling her as someone who

engages in *nonconsensual* sexual acts, the University essentially branded her as a sex offender. In the process, JMU impacted both her employment in that institution and made it extraordinarily difficult, if not impossible, for her to find a similar job elsewhere. These findings altered her legal status by converting her from an employee (or former employee) "in good standing" to someone who has a significant disciplinary record. *See Doe v. Purdue Univ.*, 928 F.3d 652, 663 (7th Cir. 2019) (Barrett, J.) ("After conducting an adjudicatory proceeding, Purdue formally determined that John was guilty of a sexual offense. That determination changed John's status: he went from a full-time student in good standing to one suspended for an academic year."). Thus, it is not Reid's reputation alone that was injured, but her legal status first as a member, and then as a former member of the JMU community. *Id.*

These injuries were a direct result of the unconstitutional process to which JMU subjected Reid. JMU's proceedings violated the most basic notions of due process—notice and opportunity to be heard. As an initial matter, the University prosecuted Reid, and found her responsible, for violating a policy that did not even exist at the time of the alleged misconduct. If there is one defining feature that separates regimes that abide by the rule of law from those that act arbitrarily and oppressively, it is the postulate that laws proscribing particular conduct should have no retroactive application. *See Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 316

(1945) (noting that in "a case where appellant's conduct would have been different if the present rule had been known and the change foreseen" imposing liability under a new statute is likely to run afoul of the Constitution). Not only did the University proceed against Reid under an inapplicable policy, but throughout the process, it withheld relevant documents until the last possible moment, thus inhibiting Reid's ability to respond to the charges, and never provided her any opportunity to rebut the assertions made either by Lese or any of Lese's witnesses, none of whom even showed up to the hearing. The lack of opportunity to confront and cross-examine one's accuser, and the lack of any other avenue to challenge the assertions made in "witness statements" on which the University relied to reach its decision, violates basic notions of fundamental fairness and constitutional rights.

Reid also properly pleaded a cause of action under Title IX, because it can (and at this stage of the litigation must) be inferred that JMU's consistent failure to provide Reid with an appropriate process or even comply with *its own rules* was motivated by bias.

Finally, the Eleventh Amendment does not bar Reid's complaint. Because Reid seeks prospective declaratory and injunctive relief against officers of the Commonwealth, *viz.*, a declaration that the University's finding of sexual misconduct is irredeemably tainted by constitutionally deficient proceedings, and an

order to expunge this tainted finding from her employment record, her claims are subject to an *Ex parte Young* exception to sovereign immunity.

VI. ARGUMENT

A. STANDARD OF REVIEW

The District Court's decision to grant Appellees' motion to dismiss, whether for lack of subject matter jurisdiction, or for failure to state a claim upon which relief can be granted, is reviewed *de novo*. *See Willner v. Dimon*, 849 F.3d 93, 103 (4th Cir. 2017); *Partington v. Am. Int'l Specialty Lines Ins. Co.*, 443 F.3d 334, 338 (4th Cir. 2006). This Court "may affirm [the judgment] on any grounds supported by the record, notwithstanding the reasoning of the district court." *Kerr v. Marshall Univ. Bd. of Governors*, 824 F.3d 62, 75 n.13 (4th Cir. 2016); *see also Hawes v. Network Sols., Inc.*, 337 F.3d 377, 383-84 (4th Cir. 2003) (affirming Rule 12(b)(1) dismissal on alternate Rule 12(b)(6) ground, where defendant had sought dismissal on both grounds).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Matherly v. Andrews*, 859 F.3d 264, 274 (4th Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In determining whether the standard has been met, the courts must "accept as true all well-pleaded facts in a complaint and construe them in the light most favorable to the plaintiff." *Id.*

B. REID'S COMPLAINT WAS TIMELY BECAUSE THE CAUSE OF ACTION DID NOT ACCRUE UNTIL PROVOST COLTMAN DENIED HER INTERNAL APPEAL

The timeliness of a due process claim brought under 42 U.S.C. § 1983 is governed by "the statute of limitations from the most analogous state-law cause of action." *Owens v. Balt. City State's Att'ys Off.*, 767 F.3d 379, 388 (4th Cir. 2014).[18] Virginia's statute of limitations for personal injury claims is two years. Va. Code § 8.01-243(A). Therefore, in order to be timely, Reid had to file her claim within two years of whenever her cause of action accrued. The parties disagree as to when that happened.

"Under federal law a cause of action accrues when the plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action." *Nasim v. Warden, Md. House of Corr.*, 64 F.3d 951, 955 (4th Cir. 1995). An actionable harm is done to a plaintiff at "the time of the discriminatory acts, not [at] the time at which the consequences of the acts became most painful." *Ricks*, 449 U.S. at 258 (quoting *Abramson v. Univ. of Haw.*, 594 F.2d 202, 209 (1979) (cleaned up)).

[18] "Likewise, because Title IX does not contain an express statute of limitations, 'every circuit to consider the issue has held that Title IX also borrows the relevant state's statute of limitations for personal injury.'" *Wilmink v. Kanawha Cnty. Bd. of Educ.*, 214 F. App'x 294, 296 n.3 (4th Cir. 2007) (quoting *Stanley v. Trustees of Cal. State Univ.*, 433 F.3d 1129, 1134 (9th Cir.2006)) (and cases cited therein) (unpublished).

The key question, therefore, is which of the University's actions was "final" so as to constitute actionable harm?

One need not trawl the U.S. Reports or other law books to solve this puzzle, for the answer is readily available in JMU's policies themselves. Section 6.6.8.18 of Policy #1340 explicitly states that "*[i]n the absence of a timely written appeal*, the decision of the respondent's associate or assistant vice president or dean is final." J.A. 175, § 6.6.8.18 (emphasis added). This necessarily means that if an appeal is lodged, "the decision of the respondent's associate or assistant vice president or dean is" *not* "final." To further clarify matters, Section 6.6.8.20 states that "[t]he decision of the vice president is final, and may not be appealed." *Id.*, § 6.6.8.20. To really drive the point home, the letter from Dean Aguirre to Alyssa Reid explicitly stated that "the Dean/AVP also *recommend* [*sic*] sanctions … commensurate with the severity and/or frequency of the offense(s)." J.A. 205 (emphasis added). These facts taken together make it abundantly clear that Dean Aguirre's determination was not the University's final decision—and thus it was not actionable until any appeal to the Vice President/Provost was disposed of (or the time for filing an appeal had run).

Despite all of that, JMU argued that "the mere fact that there is an administrative appeal process does not negate the fact that the initial decision gives the plaintiff notice of his claim." ECF 10, p.12 (quoting *Doe v. Va. Polytech. Inst.*

& State Univ., 400 F. Supp. 3d 479, 491 (W.D. Va. 2019)).[19] In support of that proposition, JMU cited *Ricks*. However, both JMU and the court below have misinterpreted and misapplied the *Ricks* decision.

As the Sixth Circuit noted, *Ricks* "warrants close study." *Endres*, 938 F.3d at 293. The *Ricks* case involved a 1973 faculty committee recommending that Ricks be denied tenure but agreeing to reconsider that decision in a year's time. 449 U.S. at 252. Upon reconsideration, in February 1974, the committee adhered to its original conclusion, which was thereafter endorsed by the entire faculty senate, and

[19] *Virginia Polytechnic* was decided by the same court and the same District Judge that presided over the present case. It is therefore not surprising that in both cases the trial court concluded that the availability of internal appeals process is irrelevant to determination of when the cause of action accrued. It should, however, be noted that one of the cases on which the District Court relied in *Doe* was subsequently reversed by the Sixth Circuit. *See* 400 F. Supp. 3d at 491 (citing and relying on *Endres v. Ne. Ohio Med. Univ.*, No. 5:17-CV-2408, 2018 WL 4002613, at *6–7 (N.D. Ohio Aug. 22, 2018) (unpublished), *rev'd by* 938 F.3d 281, 292-96 (6th Cir. 2019)).

Furthermore, the present case differs from *Virginia Polytechnic* because in that case, (1) plaintiffs received a letter that stated "sanctions *are* imposed," (2) the letter stated it "is a notice that [the plaintiff is] permanently separated from the University," and (3) the dismissal was legally "effective … months *before* the notice was sent." 400 F. Supp. 3d at 492 (emphasis in original). In contrast, here, Dean Aguirre only recommended sanctions, J.A. 205, the letter specified that a reprimand is "suggested" rather than "imposed," *id.*, and that the letter of reprimand "*should be* placed" rather than "is placed" in Reid's file, J.A. 204 (emphasis added). Moreover, the sanction did not take effect until five days after the Dean's letter was sent if Reid did not appeal (similar to the *Endres* decision), or the Provost's resolution of the appeal, whichever was later.

eventually, by the board of trustees. *Id.* On June 26, 1974, the board sent Ricks a letter that informed him that he would be offered a terminal one-year contract, to expire at the end of June 1975, after which his employment with the college would come to an end. *Id.* at 253. Unsatisfied, Ricks filed *a grievance* (an entirely separate and collateral action) with the board's educational policy committee, which was denied on September 12, 1974. *Id.* at 252-53. Ricks filed his federal suit on September 9, 1977, *i.e.*, more than three years after the board voted to deny him tenure (the action that his lawsuit challenged), although it was less than three years from the date that his separate grievance was denied.[20]

The Equal Employment Opportunity Commission (which supported Ricks in his lawsuit) argued that the statute of limitations began to run when Ricks's grievance was denied on September 12, 1974.[21] The Court rejected that argument, finding that "the Board of Trustees had *made clear* well before September 12 that it had *formally rejected* Ricks' tenure bid." *Id.* at 261 (emphasis added). As the Court

[20] In *Ricks*, the relevant statute of limitations was three years. 449 U.S. at 255 n.5.

[21] Ricks's own argument that his cause of action accrued when his employment ended was also rejected, with the Court noting that "termination of employment at Delaware State is a delayed, but inevitable, consequence of the denial of tenure." 449 U.S. at 257-58. Thus, to the extent that Ricks complained that his tenure was denied in a discriminatory manner, the discrimination occurred not at the termination of employment, but at the time the decision to terminate was made. *Id.* at 258.

observed, the June 26, 1974, letter from the board "itself characterized that as the Board's 'official position.'" *Id.* at 261. These factors convinced the Court that the "earlier decision was [not] in any respect tentative." *Id.* Although a separate grievance process was available, the Court concluded that "[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 Court drew a "critical distinction between collateral and direct review of a hiring decision." *Endres*, 938 F.3d at 294 (citing *Ricks*, 449 U.S. at 261).

Reid's arguments here are fully supported by the Supreme Court's analysis in *Ricks*. For example, Dean Aguirre's letter does not "make clear" that either the finding of responsibility or the sanction imposed is the University's "official position." In fact, Dean Aguirre's letter specifies that it is a *recommendation*. J.A. 205. "[T]he common meaning of the term 'recommendation[]' … is a suggestion or advisement *without decisive authority*." *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094 (9th Cir. 2014) (citing see Merriam–Webster's Collegiate Dictionary 1039 (11th ed. 2003)) (emphasis added). It is for that reason that Dean Aguirre's letter cannot be viewed as JMU's "formal rejection" of Reid's arguments. To the contrary, by classifying Dean Aguirre's decision as a "recommendation," and the proposed sanction as a "suggest[ion]," J.A. 205, the letter conveys to any reasonable reader, that the "formal" decision will be taken by

a different official.[22] Furthermore, the University's emphasis on Reid's right to appeal to Provost Coltman significantly undermines its claim that Reid was placed on notice of the University's "official position" no later than when Aguirre issued his decision. The email sent to Reid providing her with Aguirre's decision mentions the word "appeal" three times in a three-line message. J.A. 203. Nothing about that six-page document indicates "finality." None of this is surprising because the University's rules explicitly state that the decision of the Dean is final only "[i]n the absence of a timely written appeal." If a decision is not "final," almost by definition it cannot be an "official position."

Finally, the intramural appellate rights provided by Policy #1340 are not a *collateral* attack on the disciplinary decision, but a *direct review* of that decision. "Although [Appellees] are correct that a collateral challenge to a final decision will not toll the statute of limitations, their argument misses the mark because [Reid]'s appeal [to the Provost] was not collateral. A collateral challenge necessarily implies the existence of a final decision." *Endres*, 938 F.3d at 294. A collateral attack would

[22] To be sure, Dean Aguirre's recommendation could automatically mature into a "formal" decision, five days after it was issued, unless it was timely appealed. But such "automatic maturation" does not, *ipso facto*, convert a recommendation into a "formal" decision. *Cf. Cardenas v. Walters*, 633 F. Supp. 776, 777 (W.D. Pa. 1985) ("Converting an adverse 'recommendation' into a final decision after a specified period of time is simply a means to ensure [a party] will not stall resolution of the … action.").

have occurred had Reid, at some time after the letter of reprimand was placed in her file, invoked a University procedure to expunge her record of negative information. In this case, however, there was no final action, and Reid could not even know what punishment, if any, would ultimately be imposed against her prior to the Provost's final decision. After all, since Dean Aguirre's recommendation was appealable by *either* Reid or Lese, and because a person in Reid's position would have had no way of knowing whether the other party would exercise her right to appeal, and therefore would have had no way of knowing whether Dean Aguirre's letter was or wasn't "final" until *after* the five-day period lapsed, or the appeal was resolved, whichever was later.[23]

The present case is nearly identical to *Endres*, decided by the Sixth Circuit in 2019. There, "Northeast Ohio Medical University … dismissed Julian Endres, a medical student, for cheating on a test." 938 F.3d at 285. After being accused of cheating, Endres had a hearing before a Committee on Academic and Professional Progress, which found him responsible for the conduct. The medical school's chief officer of student affairs then informed Endres that he could "(1) withdraw within four days, in which case his transcript would state that he had withdrawn; (2) accept

[23] Of course, because Reid did timely file an appeal to the Provost, she knew the decision was *not* final because the Provost could "uphold the decision below, reject it, or modify it." J.A. 175, § 6.6.8.20.

the decision for dismissal, in which case his transcript would state that he had been dismissed; or (3) request an appeal of CAPP's decision if there is 'significant and compelling new information' unavailable at the hearing or if he had evidence that there was a defect or irregularity in the proceedings." *Id.* at 289 (emphasis added). Endres chose the third option, and the appellate body remanded the matter back to the hearing committee for a new, but limited hearing. *Id.* at 290. The new hearing also resulted in a decision to dismiss Endres. *Id.* at 292. When Endres filed suit, the medical school argued, relying on *Ricks*, that his cause of action accrued following the first decision to dismiss him. Although the District Court agreed with the medical school's position, the Sixth Circuit reversed, holding that (1) "the statute of limitations will not begin until the institution conveys its *final* decision to the plaintiff," *id.* at 294 (emphasis in original), and (2) a close reading of the rules governing internal proceedings is necessary to determine when an entity's decision is "final," *id.* at 926.

In *Endres*, notwithstanding that the rules governing disciplinary proceedings and appeals were *more restrictive* than in the present case, the Sixth Circuit held that the statute of limitations did not begin to run until the medical school had reached a "final" decision. In that case, under the Northeast Ohio Medical University's rules, the Committee's decision "becomes final" if the appellate body "refuses to grant the student's appeal" or if an appeal is not timely brought. *Id.* at 294-95. As the Sixth

Circuit explained, "[t]hat of course implies that [the disciplinary committee's] decision does not become final until—at the earliest—four working days after its issuance" if an appeal is not filed, or "while an appeal request is pending." *Id.* at 295. And so long as a decision is not "final," the accused "gets another 'opportunity to *influence* [the] decision before it is made.'" *Id.* (quoting *Ricks*, 449 U.S. at 261). In brief, refusing to "ignore the existence of [the medical school]'s appeals procedure," *id.* at 293, the Sixth Circuit concluded that until an internal appellate process has run its course, "Endres did not know for certain that he had no future at" the medical school, *id.* at 296.

So too here. Much like the rules in *Endres*, JMU's rules state that "*[i]n the absence of a timely written appeal*, the decision of the respondent's associate or assistant vice president or dean is final." "That of course implies that [the Dean's] decision does not become final until—at the earliest—[five] working days after its issuance," if an appeal is not brought, or if one is brought, while the appeal remains under consideration. *Id.* at 295. In other words, the *earliest date* on which Dean Aguirre's recommendation became "final" was May 5, 2021.[24]

Despite the obvious similarities between *Endres* and the present case, the District Court found that "JMU made clear that Dean Aguirre's decision on April

[24] Given that Reid did appeal Dean Aguirre's recommendation, it remained "non-final" "while an appeal request is pending." *Endres*, 938 F.3d at 295.

30, 2019, was the final decision, even though Reid had the right to appeal that decision." J.A. 226. But that is *plainly* incorrect, as the language of Policy #1340 is virtually indistinguishable from the language in *Endres*. *Compare* J.A. 175, § 6.6.8.18, *with Endres*, 938 F.3d at 294-95. Indeed, Reid's appellate rights are *more robust* than those afforded to Endres. Whereas Endres had no automatic right to appeal, *see* 938 F.3d at 293-94, Policy #1340 gives both the complainant (in this case, Lese) and respondent an *unqualified right* to appeal the decision of the Dean, and merely limits the grounds for appeal. *See* J.A. 175, § 6.6.8.17.[25] Lese had every right to appeal Dean Aguirre's decision and could have done so up to five days after he issued his decision. It is therefore impossible to conclude that Dean Aguirre's decision was "final" for appeal purposes until after that time had lapsed.

The District Court also put much stock in the fact that "[w]hen Provost Coltman upheld Dean Aguirre's decision, she referred to it as 'the dean's *final* decision.'" J.A. 226 (quoting J.A. 200) (emphasis in original). But that misses the mark in at least three ways. First, the question is not what the *Provost* understood Dean Aguirre's letter to be, but what a reasonable person in Reid's position

[25] One ground for appeal is the appropriateness or severity of the sanctions. Of course, whether something is or isn't severe enough is often in the eye of the beholder, *cf. Hall v. State*, 403 N.E.2d 1382, 1388 (Ind. 1980) (noting that whether a particular penalty for a specific crime is too severe "is a subjective appraisal"), and neither the complainant nor the respondent is limited in what arguments she can make in support of her plea to increase or decrease the sanction.

understood it to be. At best, the letter is ambiguous because it refers to a "recommendation" and "suggested sanction" rather than a "final decision," because it did not become final for five days, and because it provided for a right to appeal. Second, because the cause of action accrues "when the plaintiff possesses sufficient facts about the harm done to him," *Nasim*, 64 F.3d at 955, the Provost's *June* 2019 letter cannot be used to show that Reid "possesse[d] sufficient facts about the harm done to h[er]" in *April* 2019. Third, the Provost's letter doesn't undermine Reid's argument that Dean Aguirre's decision was not "final." True enough, as Provost Coltman states, Dean Aguirre's decision was "the dean's final decision." However, "the *dean's* final decision" is not the same as the "*University's* final decision." The University's "final decision" is as defined by its rules. To see why it is so, one can refer back to *Ricks*. In *Ricks*, the faculty committee initially voted to deny Ricks tenure, but agreed to revisit the question in a year's time. 449 U.S. at 252. Upon reconsideration, the faculty committee adhered to its original decision. That second vote was the *committee's* "final decision;" however, because it was not the *college's* "final decision," the Supreme Court did not consider the date of the committee's action as the date Ricks's cause of action accrued. Instead, the Court found that the relevant "final decision" was when the ultimate decision-making authority reached and announced its decision, which was when "the Board of Trustees had made clear … that it had formally rejected Ricks' tenure bid." In this case, Dean Aguirre stands

where the faculty committee stood in *Ricks*, whereas Provost Coltman occupies the place that the board of trustees did. Thus, the District Court's reliance on the fact that Provost Coltman identified Dean Aguirre's letter as the "dean's final decision" is misplaced and cannot support the District Court's decision.[26]

One final point further undermines JMU's position (and the District Court's judgment) that Reid's cause of action accrued with the receipt of Dean Aguirre's letter. As already stated, Policy #1340 grants appellate rights not only to the respondent but to the complainant as well (*e.g.*, Lese). J.A. 175, § 6.6.8.17. A complainant (Lese) could appeal a finding that exonerated a respondent from liability or could appeal the sanction imposed if she believes that it was too lenient. This circumstance necessarily means that no cause of action can accrue until the Provost renders a final decision on all appeals, or until the time to file such appeals has come and gone. To see why that is so, consider the following hypotheticals.

Imagine that following a Title IX investigatory proceeding a dean of the relevant school concluded that respondent did not violate any university regulations. At that point, the exonerated respondent would have nothing to complain to the

[26] Appellant also notes that unlike Provost Coltman's letter, which was on University letterhead, Dean Aguirre's letter had the look of an inter-office memorandum. The difference in presentation, though not necessarily determinative, is an additional factor in considering which document a reasonable reader would consider to be the University's "official position." Appellant respectfully submits that such a reader would view Provost Coltman's letter as such, but not Dean Aguirre's.

federal court about—he or she would be "home free." But perhaps not, for the complainant may lodge an appeal with the Provost who "may [then] uphold the decision below, reject it, or modify it." J.A. 175, § 6.6.8.20. Should the Provost "reject" the exonerating decision, the respondent, who up until that point had no reason to complain about anything, would all of a sudden have a cause of action. Thus, the cause of action would accrue not as a result of the dean's decision, but as a result of the Provost's appellate decision. Or consider a situation where a respondent is found liable but the relevant dean chooses to impose mild sanctions. The respondent, convinced that he "got off easy," or that further fight is just not worth it, decides to "let sleeping dogs lie." If, however, a complainant (believing that the respondent "got off *too* easy") appeals to the Provost, the Provost may "modify" the dean's decision and impose significantly harsher sanctions. At that point, the respondent may well have a very different viewpoint as to whether or not it is "worth it" to continue the fight. In short, no participant in the process can know the full consequences thereof until the Provost renders his decision (or until the time to seek such review has run).

For all these reasons, the District Court's decision that Reid's complaint was barred by the two-year statute of limitations was erroneous and should be reversed.

C. REID SUFFICIENTLY ALLEGED THAT HER CONSTITUTIONAL DUE PROCESS RIGHTS WERE VIOLATED

It is well and long established that government employees are entitled to due process of law prior to having any discipline imposed on them. *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 573 (1975) ("[A] state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continue employment absent sufficient cause for discharge may demand the procedural protections of due process."); *see also Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017) ("State universities must afford students minimum due process protections before issuing significant disciplinary decisions."); *Purdue Univ.*, 928 F.3d at 663 ("When a right is protected by the Due Process Clause, a state 'may not withdraw [it] on grounds of misconduct absent[ ] fundamentally fair procedures to determine whether the misconduct has occurred.'") (quoting *Goss*, 419 U.S. a 574). This right stems from the Fourteenth Amendment's prohibition on deprivation "of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.[27] Appellees are correct that "[t]o allege a procedural due process claim, a plaintiff must show 1) that she had a property or liberty interest, 2) of which a state actor deprived her, 3) without due process of law." ECF 10, p.15 (citing *Stone v. Univ. of*

[27] Virginia's Constitution has an identical provision. Va. Const. art. I, § 11; *see also id.* § 15.

Md. Med. Sys. Corp., 855 F.2d 167, 172 (4th Cir. 1998)). However, their arguments that Reid failed to allege these factors cannot withstand even momentary scrutiny.

1. Reid Has a Liberty Interest in Her Good Name and Reputation of Which JMU Deprived Her

As far back as Blackstone, the law has recognized that "[t]he right of personal security consists in a person's … reputation." 1 W. Blackstone, Commentaries on the Laws of England 125.

> 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, 419 U.S. at 575 (quoting *Constantineau*, 400 U.S. at 437). True enough, "injury to reputation by itself is not a 'liberty' interest protected under the" Due Process Clause. *Siegert v. Gilley*, 500 U.S. 226, 233 (1991). "Instead, a plaintiff must demonstrate that his reputational injury was accompanied by a state action that 'distinctly altered or extinguished' his legal status if he wants to succeed." *Shirvinski v. U.S. Coast Guard*, 673 F.3d 308, 315 (4th Cir. 2012) (quoting *Paul v. Davis*, 424 U.S. 693, 711 (1976)); *see also Purdue Univ.*, 928 F.3d at 661.

Addressing these requirements in turn, it is beyond cavil that Reid has a reputational interest in not being branded as a sexual miscreant who engages in *nonconsensual* sexual relationships. "A finding of responsibility for a sexual offense

can have a 'lasting impact' on a [person]'s personal life, in addition to his 'educational and employment opportunities … .'" *Doe v. Miami Univ.*, 882 F.3d 579, 600 (6th Cir. 2018) (quoting *Univ. of Cincinnati*, 872 F.3d at 400). As the Sixth Circuit observed, "[a]n individual accused of sexual misconduct 'will see his own rights curtailed. … [H]e may face severe restrictions, similar to being put on a sex offender list, that curtail his ability to gain a higher education degree'" or future employment. *Id.* (quoting Emma Ellman–Golan, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 Mich. L. Rev. 155, 175 (2017)).[28]

Reid has alleged all these consequences in spades, and at a motion to dismiss stage, her allegations must be treated as true with all the inferences drawn in favor of the plaintiff. *Matherly*, 859 F.3d at 274. For example, in ¶ 540 and ¶ 613 of the Complaint, Reid alleged that JMU's "actions have called into question Plaintiff's good name, reputation, honor and integrity in such a manner as to have made it impossible for her to continue her employment with JMU and to have made it

[28] The fact that the imposed sanction may not be particularly severe only "slightly diminishe[s]" the individual liberty interest. *See Doe v. Cummins*, 662 F. App'x 437, 446 (6th Cir. 2016) (unpublished). It is not exactly clear why the interest is diminished *at all*, because the reputational harm stems from "[a] finding of responsibility for a sexual offense," *Miami Univ.*, 882 F.3d at 600, and not from any particular sanction. At the same time, it is plausible that the lower the sanction, the less opprobrium will be experienced by the individual. Whatever the right answer, a mild sanction clearly does not "zero out" Reid's liberty interest in her reputation.

virtually impossible for her to find new employment in her chosen field." J.A. 84, ¶ 540; J.A. 94, ¶ 613. In ¶ 545 and ¶ 618, she further alleged that because JMU's "false findings have been communicated to prospective employers, Plaintiff Reid has been unable to find suitable academic employment despite being fully qualified." J.A. 85, ¶ 545; J.A. 95, ¶ 618. These allegations also support an inference that the loss of reputation was a result of JMU's (constitutionally deficient) Title IX process.

The only remaining question with respect to this prong of the test then is whether JMU's actions "distinctly altered or extinguished h[er] legal status." *Shirvinski*, 673 F.3d at 315 (internal quotations omitted). The answer to this question is just as clear as the previous one and the Seventh Circuit, in an opinion by now-Justice Amy Coney Barrett, addressed a similar set of facts in *Doe v. Purdue University*. There, plaintiff alleged that Purdue University wrongly found him liable for sexual misconduct and in doing so "inflicted reputational harm by wrongfully branding him as a sex offender; that Purdue changed his legal status by suspending him … and that these actions impaired his right to occupational liberty by making it virtually impossible for him to seek employment in his field of choice, the Navy." 928 F.3d at 661. In rejecting Purdue's University attempt to dismiss the former student's complaint for failure to state a claim, now-Justice Barrett wrote that Purdue's

> determination [that Doe was guilty of sexual misconduct] changed John's status: he went from a full-time student in good standing to

> one suspended for an academic year. And it was this official determination of guilt, not the preceding charges or any accompanying rumors, that allegedly deprived John of occupational liberty. It caused his expulsion from the Navy ROTC program (with the accompanying loss of scholarship) and foreclosed the possibility of his re-enrollment in it.

Id. at 662-63.[29] On the basis of these facts, the Seventh Circuit found that the plaintiff there "satisfied the 'stigma plus' test." *Id.* at 663.

Reid's case is no different. First, as a result of JMU's Title IX process, Reid was prohibited from teaching any classes or otherwise participating in campus life. J.A. 83, ¶ 533. Thus, her status as a member of JMU's academic community changed *on mere complaint* of misconduct. (Indeed, despite Sirocky-Meck's later characterization, Lese's email wasn't even a formal complaint. *See ante*, Part IV.C.). Furthermore, as a result of the suspension and investigation, the University refused even to consider Reid's application for promotion to Director of Individual Events, whereas prior to being subjected to the Title IX process, she was actively being considered for the position. This too indicates that her legal status within the university was "distinctly altered." Third, as a result of the letter of reprimand now being part of Reid's employment record, the University, when queried about Reid's

[29] Much like Reid who resigned from JMU, the plaintiff in *Purdue University* also "voluntarily resigned" from the Navy ROTC, rather than being expelled from it. 928 F.3d at 658 ("A few weeks after his second appeal was denied, John involuntarily resigned from the Navy ROTC, which has a 'zero tolerance' policy for sexual harassment.").

status, consistently discloses it, leading to loss of future employment opportunities. In other words, much like John Doe in *Purdue University*, Reid's legal status as a former employee who left "in good standing" was "distinctly altered" by having her disciplinary record blemished falsely. And therefore, much like John Doe in that case, Reid "has satisfied the 'stigma plus' test." 928 F.3d at 663.

2. The Title IX Process to Which Reid Was Subjected Does Not Comport with Constitutional Requirements

At a minimum, due process requires that (1) "individuals should have an opportunity to know what the law is and to conform their conduct accordingly," *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994), (2) "notice of the reasons for the [discipline,] and [(3)] a meaningful opportunity to rebut the charges," *Lentsch v. Marshall*, 741 F.2d 301, 306 (10th Cir. 1984). The process to which Reid was subjected fails to meet *any* of the above criteria.

First, by applying the 2018 version of Policy #1340, JMU deprived Reid of an "opportunity to know what the law is and to conform [her] conduct accordingly." At the time Reid and Lese began their relationship, it was not prohibited by JMU's policies. And by the time Policy #1340 was promulgated (whether one references the 2016 or the 2018 version), Lese was no longer a student, and thus the relationship between Reid and Lese was outside the scope of the policy. The application of a policy that did not exist at the time the conduct took place violates "[e]lementary considerations of fairness," and is inconsistent with principles that are "deeply

rooted in our jurisprudence, and … a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265.

That government should not be able to apply disciplinary rules retroactively is so self-evident that Lewis Carroll rightly mocked it in *Alice in Wonderland*—a book for children! Lewis Carroll, *Alice's Adventures in Wonderland* 180 (MacMillan 1992) (1st ed. 1866) ("'Well, I shan't go, at any rate,' said Alice; 'besides, that's not a regular rule: you invented it just now.'"). In reading this passage, we instantly recognize that "Wonderland is deficient in all of the generally agreed-upon characteristics of legality … ." Mary Liston, *The Rule of Law Through the Looking Glass*, 21 L. & Literature 42, 54 (2009). This Court should not permit JMU to turn Carroll's Wonderland into modern reality.

Second, Reid never received adequate notice of the nature of the charges against her. As the complaint alleges—and again, at this stage, the allegations must be taken as true, *Matherly*, 859 F.3d at 274—JMU did not provide Reid with a copy of Lese's "Title IX Statement" until after they interviewed Reid's supporting witnesses while Lese's witnesses were aware of the claims. J.A. 60, ¶¶ 338-43. Nor did JMU share the statement Lese submitted to the hearing panel *in lieu* of personal appearance. J.A. 64-65, ¶¶ 372-81. Nor were the statements of "witnesses" that supported Lese's case provided to Reid. J.A. 68, ¶¶ 399-407. Thus, Reid had no ability to know that the University was accusing her of engaging in sexual conduct

with someone whom the University was alleging she supervised. Up until the very last moment, all Reid knew is that she was being accused of a "nonconsensual relationship" with Lese in violation of § 5.6. However, § 5.6 is quite broad and defines "nonconsensual relationship" as anything from a situation where one "must submit to unwelcome sexual conduct in order to accept or continue employment, achieve an employment or educational benefit" to an otherwise consensual relationship between two members of the community with "a power differential" even if no "educational or employment decision will be based on … submission to [the] sexual conduct." J.A. 165, § 5.6. Given the breadth of the policy and lack of specificity of the allegation, Reid could not sufficiently know of what the University was accusing her.

The lack of sufficient notice and timely access to the "witness" statements on which the hearing committee ultimately relied precluded Reid from properly challenging the assertions that "graduate students were not considered coworkers," or that "students would have seen Alyssa Reid and [her supervisor] Lee Mayfield as equals for coaching and team decision-making purposes." J.A. 193. This, combined with the lack of opportunity to question not just Lese, but *any* of the complainant's witnesses deprived Reid of a meaningful opportunity to be heard.

As the Sixth Circuit recently explained in another Title IX case, "[d]ue process requires cross-examination in circumstances [where a person is accused of sexual

misconduct] because it is 'the greatest legal engine ever invented' for uncovering the truth." *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (quoting *Univ. of Cincinnati*, 872 F.3d at 401-02). Similarly, the Third Circuit opined that "notions of fairness … include providing the accused with a chance to test witness credibility through some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge evidence against him or her." *Doe v. Univ. of the Sciences*, 961 F.3d 203, 214 (3d Cir. 2020).[30] At the very least, the University should have had *some process* that permit Reid to examine Lese's and her "witnesses'" credibility. *See Purdue Univ.*, 928 F.3d at 664 (noting that Purdue's failure "to make any attempt to examine [accuser]'s credibility is … troubling").

The key questions in this case are not whether Lese and Reid engaged in a sexual relationship—no one disputed that they did—but whether Lese felt pressured to remain in the relationship, whether other students perceived that Lese was being treated differently because of that relationship, whether graduate students were or were not considered co-workers, and whether Reid and Mayfield were perceived by anyone as "equals." And "it is particularly concerning that [Provost Coltman, Dean Aguirre,] and the committee concluded that [Lese and her "witnesses"] w[ere] the

[30] Although the Third Circuit was applying Pennsylvania law on procedural fairness, these notions are universal. As the court itself stated, "[p]rocedural fairness is a well-worn concept." 961 F.3d at 214; *see also Baum*, 903 F.3d at 581.

more credible witness[es]—in fact, that [they] w[ere] credible at all—without ever speaking to [any of them] in person." *Id.*

In many ways, this case is similar to *Vengalattore v. Cornell Univ.*, 36 F.4th 87, 107 (2d Cir. 2022), recently decided by the Second Circuit. There, a former professor alleged that, *inter alia*, "investigators summoned [him] to respond to Roe's allegations on one day's notice, without a written statement of the charges or identification of the complainant." *Id.* at 107. Vengalattore also alleged that Cornell applied incorrect policy and "rejected numerous requests by Vengalattore that they interview certain witnesses or ask certain questions that could have produced information favorable to him." *Id.* The Second Circuit held that these allegations were sufficient to survive a motion to dismiss because they "made it plausible that the outcome of the investigation was the result of bias." *Id.* at 108. Reid's case is no different. She plausibly alleged that JMU, by "using parts of a policy that was known to be inapplicable," "avoiding inquiries that might support" her version of the nature of the relationship with Lese and her role within her academic department, and giving her very limited time to respond to the amorphous allegations, caused the "procedures followed by [JMU] in dealing with [Lese]'s allegations [to be] fundamentally skewed." *Id.* at 107.

JMU's process that punished Reid before even conducting a hearing, subjected her to an investigation for conduct that had already been investigated and

for which she had already been cleared, punished her under a policy that did not exist at the time that the condemned conduct took place, denied her timely notice of the charges against her, a meaningful opportunity to be heard, and the ability to confront her accuser and cross-examine witnesses, "looks more like Calvinball than the rule of law." *United States ex rel. Sheldon v. Allergan Sales, LLC*, 24 F.4th 340, 356, *reh'g en banc granted*, No. 20-2330, 2022 WL 1467710 (4th Cir. 2022); *see also* Bill Watterson, *The Calvin & Hobbes Tenth Anniversary Book* 129 (1995) ("People have asked how to play Calvinball. It's pretty simple: you make up the rules as you go."). Combined, these failings violated Reid's constitutional due process guarantees.

D. THE ELEVENTH AMENDMENT DOES NOT BAR REID'S CLAIMS

In its submission to the District Court, JMU argued that Reid's § 1983 claims against the university and its officers acting in official capacity are barred by the Eleventh Amendment. Little time needs to be spent dealing with this argument because it is squarely foreclosed by *Ex parte Young*, 209 U.S. 123 (1908), and its progeny.

Under *Young*, "suits against state officials who violate federal law are not suits against the state." *Biggs v. N.C. Dep't of Pub. Safety*, 953 F.3d 236, 242 (4th Cir. 2020). "The 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). Reid explicitly asked for prospective injunctive relief against state agents, including expungement of her disciplinary record, removing the letter of reprimand for her employment file, and destruction of the complaint against her. J.A. 118, ¶¶ (iii)-(iv). This relief can (and should) be provided via declaratory judgment and, if necessary, a properly crafted injunction. This Court, albeit in an unpublished opinion, previously held that "requests for expungement [of an allegedly illegally entered grade] would relate to an ongoing violation of federal law and the relief granted would be prospective in nature," and therefore not barred by the Eleventh Amendment. *Shepard v. Irving*, 77 F. App'x 615, 620 (4th Cir. 2003) (unpublished). This case is no different and JMU's sovereign immunity argument should be rejected.

E. REID PLEADED A VALID TITLE IX CLAIM

Reid pleaded facts showing that the outcome of the Defendants' Title IX proceeding against her was not only rife with due process violations, but erroneous in its outcome. Defendants' failure to apply the correct procedure and policy, failure to timely provide Reid with the complaint or witness statements, failure to provide Reid with an opportunity to question not just the complainant, but also "witnesses" against her, and consistent failure to follow its own deadlines throughout the process all raise a plausible inference of discrimination against Reid.

It is of course possible that JMU treats *all* accused individuals in the same unlawful manner. If so, that might mean that it doesn't discriminate on the basis of any protected characteristic, but simply fails to abide by constitutional safeguards in every case. Such a state of affairs is certainly a possibility (though not a particularly comforting one). However, at the motion to dismiss stage, courts must "accept as true all well-pleaded facts in a complaint and construe them in the light most favorable to the plaintiff." *Matherly*, 859 F.3d at 274. Reid's complaint that she was treated differently because of her status as a woman and a member of the LGBTQ community is "plausible on its face." *Iqbal*, 556 U.S. at 678.

Looking again to *Doe v. Purdue University*, the standards are clear—"do the alleged acts, if true, raise a plausible inference that the university discriminated against John 'on the basis of sex'?" 928 F.3d at 667-68. In *Purdue University*, the Seventh Circuit found sufficient, at a motion to dismiss stage, the allegation that the university was biased against the plaintiff because it chose to believe the complainant over him because it was "*plausible* that [university officials] chose to believe [the accuser] because she is a woman and to disbelieve [the plaintiff] because he is a man." *Id.* at 669 (emphasis added). And in the present case, it is *plausible* that JMU chose to apply wrong policy, subjected Reid to double jeopardy, denied her access to the materials necessary to meaningfully respond to charges, and

routinely ignored its own deadlines and procedures because Reid was a woman and a member of the LGBT community. That is all that is required.

VII. CONCLUSION

For the foregoing reasons, the judgment of the District Court for the Western District of Virginia that dismissed the case for want of jurisdiction should be reversed, JMU's motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) should be denied, and the matter remanded for further proceedings.

REQUEST FOR ORAL ARGUMENT

Because this case presents important issues that have not yet been addressed in the published opinions of this Court, Plaintiff-Appellant respectfully requests that this matter be calendared for oral argument.

July 19, 2022

Respectfully submitted,

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I hereby certify that on July 19, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

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