
2021

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Recommended Citation

Bunster, James (2021) "He Said, She Said: Plausible Pleadings for Reverse Title IX Claims," *Touro Law Review*. Vol. 37: No. 2, Article 14.

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He Said, She Said: Plausible Pleadings for Reverse Title IX Claims

*James Bunster**

I. INTRODUCTION

Sexual assaults have plagued the lives of millions of Americans each year, and college women are three times more likely to be victims of this crime.¹ Reports of sexual assault often go unreported because the survivors fear a backlash from their perpetrators and from society.² Survivors also feel “ashamed to come forward” or fear that nothing will be done about it.³ Thankfully, this notion has started to subside as an effect of the #MeToo movement, which empowered women’s voices by standing in solidarity against sexual assault.⁴

In 2006, a different story captivated the country’s attention as a Judge in North Carolina dismissed the infamous rape case of three Duke Lacrosse players after the allegations against them were shown

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¹ Courtney Smith-Kimble, *The Realities of Sexual Assault on Campus*, BEST COLLEGES, <https://www.bestcolleges.com/resources/sexual-assault-on-campus/> (last visited Nov. 1, 2020).

² Cameron Kimble, *Sexual Assault Remains Dramatically Underreported*, BRENNAN CTR. FOR JUSTICE (Oct. 4, 2016), <https://www.brennancenter.org/our-work/analysis-opinion/sexual-assault-remains-dramatically-underreported>.

³ *Id.*

⁴ See *Understanding the Me Too Movement: A Sexual Harassment Awareness Guide*, MARYVILLE UNIV., <https://online.maryville.edu/blog/understanding-the-me-too-movement-a-sexual-harassment-awareness-guide/> (last visited Nov. 1, 2020).

to be false.⁵ The typical gender-discrimination suit, often in the context of sports, involves a female victim against her school.⁶ Recently, courts have seen an increase in cases where a male student claims that his school unfairly punished him for allegations of sexual assault because of his gender.⁷ These cases are typically referred to as “reverse” gender discrimination claims in which the plaintiff asserts a violation of Title IX. Title IX provides that “[n]o person 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.”⁸

Despite all of the case law surrounding Title IX claims, there is an inconsistent application of pleading requirements for these claims to survive a motion to dismiss. When reviewing a motion to dismiss, a court evaluates the sufficiency of the complaint and draws all reasonable inferences in the plaintiff’s favor.⁹ The Second Circuit applies a “minimal evidence” standard that affords the student a “temporary presumption” of discrimination,¹⁰ while the Sixth Circuit adheres to the plausibility standard set forth in *Bell Atlantic Corp. v. Twombly*¹¹ and affirmed in *Ashcroft v. Iqbal*.¹²

For clarification, “reverse” Title IX claims are analyzed in the same manner that any Title IX claim would be. These claims are referred to as “reverse” gender-discrimination simply because a male student is asserting the claim rather than a female. Additionally, for the purposes of this Note, all references are to Title IX as they apply to post-secondary educational institutions, and not as applied to K-12 schools. Finally, for the purposes of this Note, sexual misconduct refers to any sexual violence or harassment defined as

⁵ Jen Yamato, *The Stripper Who Cried ‘Rape’: Revisiting the Duke Lacrosse Case Ten Years Later*, DAILY BEAST (Mar. 12, 2016), <https://www.thedailybeast.com/the-stripper-who-cried-rape-revisiting-the-duke-lacrosse-case-ten-years-later>.

⁶ *Title IX Frequently Asked Questions*, NCAA, <https://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions> (last visited Feb. 1, 2021).

⁷ Weiru Fang, *Gender Parity: The Increasing Success and Subsequent Effect of ‘Anti-Male Bias’ Claims in Campus Sexual Assault Proceedings*, 104 CORNELL L. REV. 467, 468 (2019).

⁸ 20 U.S.C. § 1681.

⁹ *Doe v. Miami Univ.*, 882 F.3d 579, 593 (6th Cir. 2018).

¹⁰ *Doe v. Colum. Univ.*, 831 F.3d 46, 53-56 (2d Cir. 2016).

¹¹ 550 U.S. 544 (2007).

¹² 556 U.S. 662 (2008); *Miami Univ.*, 882 F.3d at 588.

unwelcome *sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment. Sexual violence, as OCR uses the term, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion.*¹³

This Note will use the same definitions as provided by the U.S. Department of Education.

Part I of this Note provides the introduction and procedural requirements mandated by Title IX. Part II of this Note discusses the evolving pleading requirements established by the Supreme Court as well as the burden-shifting framework for Title VII claims established by *McDonnell Douglas Corp. v. Green*,¹⁴ and its progeny. Part III provides an overview of the Second Circuit's and the Sixth Circuit's conflicting standard for evaluating the sufficiency of a Title IX complaint upon review of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).¹⁵ Finally, Part IV will argue that the Second Circuit Court of Appeals is misinterpreting Supreme Court precedent. Additionally, Part IV will explain why the plausibility standard is the best way to judge the sufficiency of a complaint, in the context of "reverse" Title IX claims. Furthermore, this section will address the negative ramifications for both the school and the victims of sexual assault on college campuses that result from the Second's Circuit's lower pleading standards.

A. Title IX Procedural Requirements

Title IX requirements apply to any educational institution that receives federal funding.¹⁶ These requirements are not limited to

¹³ OFF. FOR CIVIL RIGHTS, *Sex-based Harassment*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/oct/frontpage/pro-students/issues/sex-issue01.html> (last visited Feb. 1, 2021).

¹⁴ 411 U.S. 792 (1973).

¹⁵ FED. R. CIV. P. 12(b)(6).

¹⁶ 20 U.S.C. § 1681.

public schools because almost every private school receives funding through federal financial aid programs used by their students.¹⁷ Title IX is enforced by the Office for Civil Rights, (OCR) which ensures that schools are complying with all the mandates.¹⁸

Once a student asserts a claim of sexual assault or harassment and files a grievance to the school's Title IX Coordinator, the school is required to investigate the claim to ensure a safe environment.¹⁹ Schools use Title IX hearings to investigate the alleged misconduct and discipline a student if found guilty.²⁰ Currently, schools are free to choose between using the preponderance of the evidence standard or the clear and convincing evidence standard for finding culpability.²¹ There are standards in place that require that the administrative Title IX hearing be live and impartial.²² Additionally, the accused student must be allowed to cross-examine witnesses, challenge evidence, and submit evidence for his defense.²³ Finally, both parties must be notified in writing of the school's final decision and the rationale used to reach its decision.²⁴ Title IX also mandates that a student has the opportunity to appeal any disciplinary decision.²⁵

In recent years, numerous schools have been defending federal lawsuits for unfairly punishing male students for sexual misconduct

¹⁷ *Title IX Frequently Asked Questions*, *supra* note 6.

¹⁸ OFF. FOR CIVIL RIGHTS, *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC. (Apr. 2015), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

¹⁹ *What You Need to Know About Title IX Hearings*, LAW OFF. OF BRIAN JONES, LLC, <https://thelawofficeofbrianjones.com/2019/02/20/what-you-need-to-know-about-title-ix-hearings/> (last visited Feb. 1, 2021).

²⁰ *Id.*

²¹ R. Shep Melnick, *Analyzing the Department of Education's Final Title IX rules on Sexual Misconduct*, BROOKINGS (June 11, 2020), <https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct>.

²² *U.S. Department of Education Launches New Title IX Resources for Students, Institutions as Historic New Rule Takes Effect*, U.S. DEP'T OF EDUC. (Aug. 14, 2020), <https://www.ed.gov/news/press-releases/us-department-education-launches-new-title-ix-resources-students-institutions-historic-new-rule-takes-effect>. These hearings must be conducted in real time, but may be done through video conferencing to protect the victims. *Id.*

²³ *Id.*

²⁴ *Title IX*, KNOW YOUR IX, <https://www.knowyourix.org/college-resources/title-ix/> (last visited Nov. 20, 2020).

²⁵ *Id.*

without sufficient evidence.²⁶ In this situation, the male student's best recourse would be asserting a Title IX claim against his school by pleading an erroneous outcome of the administrative hearing due to the gender-based bias of the disciplinary panel.²⁷

II. SUPREME COURT PRECEDENT

A. The Evolution of Pleading Requirements

Shortly after the Civil Rights Movement began to gain traction in the United States, the Supreme Court decided the landmark case *Brown v. Board of Education*,²⁸ where it held that segregation of students in public schools on the basis of "color" was a violation of the Fourteenth Amendment and overturned the "separate but equal" doctrine.²⁹ Five months later, the Supreme Court decided *Conley v. Gibson*,³⁰ which involved a discrimination claim by railway employees against their union for firing black workers in order to replace them with their white counterparts.³¹ The workers' complaint alleged the union fired or demoted forty-five African-Americans under the pretext that their jobs were eliminated, but the union did not actually eliminate those jobs and hired forty-five white workers to fill their "eliminated" positions.³² The union moved to dismiss the complaint for "fail[ure] to state a claim upon which relief can be granted."³³ In its decision, the Supreme Court established the "notice" pleading standard by holding a complaint does not need to set forth detailed facts, but rather put the defendant on "fair notice" of the claim and the "grounds on which it rests."³⁴ The Court noted that this lower standard would permit claims to move onto the discovery phase in order to "facilitate a proper decision [based] on the merits."³⁵ Additionally, the Court held

²⁶ Greta Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDE HIGHER ED (Oct. 3, 2019), <https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings>.

²⁷ *Id.*

²⁸ 347 U.S. 483 (1957).

²⁹ *Id.* at 495.

³⁰ 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

³¹ *Id.* at 43.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 47.

³⁵ *Id.* at 48.

that a complaint is sufficient unless it is clearly evident that “no set of facts” would support the claim.³⁶

Conley’s liberal notice pleading standard was precedent until it was abrogated in 2007, when the Supreme Court decided *Twombly*.³⁷ *Twombly* involved a claim brought by a group of subscribers against telephone and internet service providers for violating § 1 of the Sherman Act.³⁸ The complaint alleged that the telecommunication providers conspired with each other to eliminate competition by showing the providers’ parallel conduct of raising the price of their service, inferring these service providers had entered into a contract with each other to not compete by offering lower prices.³⁹ The Supreme Court noted that the parallel conduct of the service providers, absent any factual context suggesting an agreement, was insufficient to establish an agreement between the service providers because it was a mere legal conclusion.⁴⁰ “[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”⁴¹ The Court explained that the parallel behavior described in the complaint was likely the result of market forces.⁴²

The Supreme Court addressed the plausibility standard again two years later in *Iqbal*.⁴³ This case involved a Muslim man who was arrested and detained in the United States on criminal charges in the wake of the September 11, 2001, terrorist attacks.⁴⁴ The man asserted a discrimination claim against federal officials, Robert Muller, former Director of the FBI, and John Ashcroft, former Attorney General of the United States.⁴⁵ Specifically, the complaint alleged both Muller and Ashcroft “knew of, condoned, and willfully and maliciously agreed to subject’ respondent to harsh conditions of confinement ‘as a matter of policy, solely on account of [his] religion, race, and/or national origin

³⁶ *Id.* at 45-46.

³⁷ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 568 (2007).

³⁸ *Id.* at 550.

³⁹ *Id.* at 551-52.

⁴⁰ *Id.* at 564-65.

⁴¹ *Id.* at 570.

⁴² *Id.* at 568.

⁴³ *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁴⁴ *Id.* at 666.

⁴⁵ *Id.*

and for no legitimate penological interest.”⁴⁶ The complaint further alleged that Ashcroft was the “‘principal architect’ of the policy” and that Muller was instrumental in adopting and implementing it.⁴⁷ The Court applied a two prong test for establishing a sufficient pleading by removing legal conclusions from the complaint, and then determining if the remaining factual allegations supported a plausible inference of discriminatory purpose.⁴⁸ The Court noted that the allegations in the complaint were simply a “formulaic recitation of the elements” of a discrimination claim and were mere legal conclusions.⁴⁹ The Court added that because the claims were legal conclusions, they were not entitled to the “presumption of truth.”⁵⁰ After removing the legal conclusions from the complaint, the Court held that the pleading did not contain sufficient facts to plausibly allege discrimination by Muller and Ashcroft.⁵¹

Iqbal affirmed that *Twombly*’s holding applied to all pleadings and was not limited to anti-trust claims. This plausibility standard was designed to protect defendants from meritless claims, where a plaintiff attempts only to find useful information during the expensive discovery process.⁵²

B. Burden-Shifting Framework of *McDonnell* and its Progeny

In 1973, the Supreme Court decided *McDonnell Douglas Corp. v. Green*,⁵³ and established the burden-shifting framework for a Title VII claim.⁵⁴ Title VII is an anti-discrimination law that prohibits workplace discrimination based on “race, color, religion, sex, or national origin,” and was recently expanded to include sexual orientation and gender identity.⁵⁵ In *McDonnell*, a mechanic was laid off of work, after several years of employment, because of a reduction in the

⁴⁶ *Id.* at 669 (quoting First Am. Compl., *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (No. 04–CV–1809)).

⁴⁷ *Id.*

⁴⁸ *Id.* at 680.

⁴⁹ *Id.* at 681.

⁵⁰ *Id.*

⁵¹ *Id.* at 687.

⁵² *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007).

⁵³ 411 U.S. 792 (1973).

⁵⁴ *Id.* at 802–04.

⁵⁵ 42 U.S.C. § 2000e-2; *see Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

employer's work force.⁵⁶ The employee was an active member of the civil rights movement and thought his lay-off was racially motivated, so he arranged a public protest against the corporation.⁵⁷ The mechanic participated in a protest that illegally obstructed traffic as well as a "lock in."⁵⁸ Three weeks after the protests, the corporation publicly advertised an opening for a qualified mechanic and the former employee applied for the position.⁵⁹ The corporation denied the application based on the mechanic's involvement in the protests.⁶⁰ The mechanic filed a lawsuit asserting he was denied employment based on his race, which violated Title VII protection, and his participation in the protest.⁶¹ The corporation asserted that he was not re-hired based on his involvement in the unlawful protest and race was not a factor in its decision.⁶² The Court held that in Title VII claims, the plaintiff carries the burden of proof to establish a prima facie case, then the burden shifts to the defendant to establish a non-discriminatory reason, then the burden shifts back to the plaintiff to establish the non-discriminatory reason was a pretext for discrimination.⁶³ Here, the case was remanded to the district court to allow the mechanic to demonstrate that the corporation's reason for not re-hiring was a pretext for actual discrimination.⁶⁴

In 2002, the Supreme Court decided *Swierkiewicz v. Sorema N.A.*,⁶⁵ to address the issue "whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the framework" established in *McDonnell*.⁶⁶ Here, the Court unanimously held that a pleading did not need to "contain specific facts establishing a prima facie case" but rather "a short and plain statement showing that the pleader is entitled to relief."⁶⁷ It is important to note that this case was decided under the

⁵⁶ *McDonnell*, 411 U.S. at 794.

⁵⁷ *Id.* at 794-95.

⁵⁸ *Id.* at 795 ("[A] 'lock-in' took place wherein a chain and padlock were placed on the front door of a building to prevent the occupants . . . from leaving.").

⁵⁹ *Id.* at 796.

⁶⁰ *Id.*

⁶¹ *Id.* at 801.

⁶² *Id.*

⁶³ *Id.* at 802-04.

⁶⁴ *Id.* at 806.

⁶⁵ 534 U.S. 506 (2002).

⁶⁶ *Id.* at 508 (quoting Fed. R. Civ. Pro. (8)(a)(2)).

⁶⁷ *Id.*

“no set of facts” pleading standard established in *Conley* and not the current plausibility standard. In *Swierkiewicz*, the Supreme Court expressly noted that “[t]he prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement.”⁶⁸

Looking forward, it is paramount to understand the evolution of pleading standards from *Conley*’s abrogated “no set of facts” standard to the current plausibility standard established in *Twombly* and *Iqbal* along with the burden-shifting framework from *McDonnell*. Part III will focus on the Second and Sixth Circuit’s inconsistent application of these standards in the context of Title IX claims at the 12(b)(6) motion-to-dismiss phase.

III. CIRCUIT SPLIT ON PLEADING REQUIREMENTS FOR TITLE IX CLAIMS

This section will provide an analysis of both the Second and Sixth Circuits’ inconsistent interpretation of *Swierkiewicz* and the fundamentally different pleading standards that stem from the inconsistent holdings. This section will also focus on how the two Circuits apply these different pleading standards to “reverse” Title IX gender-discrimination claims in separate, yet substantially similar situations, where a school unfairly punished a male student for alleged claims of sexual assault.

A. The Second Circuit’s Minimal Evidence Standard

Although “reverse” Title IX claims have gained attention in recent years, the Second Circuit Court of Appeals first addressed this concept in 1994, when deciding the sufficiency of a student’s complaint in *Yusuf v. Vassar College*.⁶⁹ Here, a male student was “brutally attacked” by his roommate, and when the student filed criminal charges, the roommate’s girlfriend claimed that the student sexually harassed her on multiple occasions.⁷⁰ The school found the student guilty of sexual harassment and suspended him for a year.⁷¹ The student brought a Title IX action against his school on the ground

⁶⁸ *Id.* at 510.

⁶⁹ 35 F.3d 709 (2d Cir. 1994).

⁷⁰ *Id.* at 712.

⁷¹ *Id.* at 713.

that his school's decision constituted gender discrimination.⁷² The Second Circuit noted that "Title IX bars the imposition of university discipline where gender is a motivating factor in the decision to discipline."⁷³ The court separated gender discrimination claims into two categories, erroneous outcome and selective enforcement.⁷⁴ An erroneous outcome claim involves an innocent student who was wrongfully punished for sexual misconduct.⁷⁵ A selective enforcement claim asserts that, regardless of fault, the severity of the punishment was affected by the student's gender.⁷⁶

At the time this case was decided, the court adhered to the abrogated "no set of facts" pleading standard established in *Conley*.⁷⁷ The complaint required a fairly low burden of proof and would have satisfied an erroneous outcome claim if it "allege[d] particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding" and a "causal connection between the flawed outcome and gender bias."⁷⁸ The school did not allow the student to introduce evidence that proved he was in the infirmary on the date of the alleged sexual harassment or call witnesses that showed the roommate's girlfriend had an ulterior motive for claiming sexual harassment.⁷⁹ The court ultimately held that the student's complaint cast doubt on the outcome of the school's proceeding.⁸⁰ Additionally, the causal connection was satisfied because the school's prosecution of males for sexual misconduct "'historically and systematically' and 'invariably found [males] guilty, regardless of evidence, or lack thereof.'"⁸¹

The Second Circuit created the minimal evidence standard in 2015, when it interpreted *Swierkiewicz* in the Title VII case, *Littlejohn v. City of New York*.⁸² Here, the Second Circuit Court of Appeals deviated from the plausibility standard for pleadings, when it held that a Title VII complaint only required a "minimal inference of

⁷² *Id.* at 714.

⁷³ *Id.* at 715.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 713.

⁷⁸ *Id.* at 715.

⁷⁹ *Id.* at 712-13.

⁸⁰ *Id.* at 715.

⁸¹ *Id.* at 716.

⁸² 795 F.3d 297 (2d Cir. 2015).

discriminatory motivation.”⁸³ The court attempted to reconcile its decision with *Iqbal*, by noting the Supreme Court’s holding was broad.⁸⁴ Additionally, the court explained that *Iqbal* did not apply to cases that fall under the *McDonnell* burden-shifting framework, and by further noting that a decision otherwise would be inconsistent with *Swierkiewicz*.⁸⁵ The Second Circuit stated that “[t]o the same extent that the *McDonnell Douglas* temporary presumption reduces the facts a plaintiff would need to show to defeat a motion for summary judgment prior to the defendant’s furnishing of a non-discriminatory motivation, that presumption also reduces the facts needed to be pleaded under *Iqbal*.”⁸⁶

After the decisions in *Twombly* and *Iqbal*, the Second Circuit decided to readdress the sufficiency of a complaint in Title IX claims in *Doe v. Columbia University*.⁸⁷ This case involved a male student who was suspended from school for eighteen months after a school proceeding found him guilty of non-consensual sex with a female student.⁸⁸ The male student adamantly claimed the encounter was consensual and sued the school for gender discrimination.⁸⁹ The Second Circuit completely deviated from the “plausibility” standard established in *Twombly* and *Iqbal* when it held the male student’s complaint “plead[] sufficient specific facts giving at least the necessary minimal support to a plausible inference of sex discrimination to survive a Rule 12(b)(6) motion to dismiss.”⁹⁰

In *Columbia University*, the Second Circuit justified the link between the Title VII analysis and the Title IX claim by noting how factually similar the claims are and how it has consistently interpreted Title IX claims with Title VII case law.⁹¹ Finally, the court added that it implicitly adopted the burden-shifting framework of *McDonnell* when it decided *Yusuf* and “made [it] clear that Title VII cases provide the proper framework for analyzing Title IX discrimination claims.”⁹²

⁸³ *Id.* at 310.

⁸⁴ *Id.* at 309-10.

⁸⁵ *Id.*

⁸⁶ *Id.* at 310.

⁸⁷ 831 F.3d 46 (2d Cir. 2016).

⁸⁸ *Id.* at 52.

⁸⁹ *Id.* at 53.

⁹⁰ *Id.* at 56.

⁹¹ *Id.* at 55.

⁹² *Id.* at 55-56, 59.

The Second Circuit held that the male student sufficiently pleaded specific facts to plausibly show a minimal inference that the school acted with a “pro-female, anti-male bias” with respect to the student’s hearing, the school’s punishment, and their rejection of his appeal.⁹³ There was evidence that the bias was endorsed by the school in response to allegations by students and the press that the school did not adequately investigate or punish male students for sexual assault.⁹⁴ Here, the school never sought any witness to corroborate the male student’s version of events that the female engaged in consensual sex with him.⁹⁵ Additionally, there was no evidence introduced that the female was coerced and the school relied on her unsupported accusation.⁹⁶ The court noted that when the evidence is clearly in favor of one side yet the school rules in favor of the other, without reason, it would be plausible to infer the decision was “influenced by bias.”⁹⁷

B. Sixth Circuit and the *Iqbal* Standard

The Sixth Circuit Court of Appeals has consistently applied the plausibility standard, established in *Twombly* and *Iqbal*, to pleading requirements without modification for Title IX claims.⁹⁸ The Sixth Circuit expressly rejected the Second Circuit’s modified pleading standard of “minimal plausible inference.”⁹⁹ The primary reason for the inconsistent application of pleading requirements is attributed to the two Circuits’ different interpretation of *Swierkiewicz*, which both Circuits still recognize as good law.¹⁰⁰

In *Keys v. Humana, Inc.*,¹⁰¹ the Sixth Circuit did not interpret *Swierkiewicz* as a pleading requirement but rather an evidentiary standard for a prima facie case.¹⁰² Here, an employee claimed a Title VII violation against her employer alleging termination based on

⁹³ *Id.* at 56.

⁹⁴ *Id.*

⁹⁵ *Id.* at 57.

⁹⁶ *Id.*

⁹⁷ *Id.* The Second Circuit could have reached the same result under the plausibility standard of *Iqbal* and *Twombly* if the student pleaded an erroneous outcome theory of liability. *Infra*, Section IV.B.¶7.

⁹⁸ *Doe v. Miami Univ.*, 882 F.3d 579, 588 (6th Cir. 2018) (quoting *Colum. Univ.*, 831 F.3d at 56).

⁹⁹ *Id.* at 589.

¹⁰⁰ *Id.*

¹⁰¹ 684 F.3d 605 (6th Cir. 2012).

¹⁰² *Id.* at 609.

race.¹⁰³ The employee appealed the district court's decision to dismiss her Title VII claim.¹⁰⁴ The Sixth Circuit Court of Appeals ultimately held that the employee's complaint was plausible on its face, therefore, sufficient to survive a motion to dismiss.¹⁰⁵

The Sixth Circuit explained that *Twombly* and *Iqbal* did not change *Swierkiewicz*'s holding because *Swierkiewicz* “‘did not change the law of pleading,’ but simply reemphasized that application of the *McDonnell Douglas* prima facie case at the pleading stage ‘was contrary to the Federal Rules’ structure of liberal pleading requirements.”¹⁰⁶ The Sixth Circuit held that the plaintiff in a Title VII case must establish sufficient facts to satisfy *Twombly* and *Iqbal* to survive a motion to dismiss.¹⁰⁷ Additionally, it is important to note that the Sixth Circuit recognizes that the *Twombly* and *Iqbal* standard is not to be interpreted “so narrowly as to be the death of notice pleading” but requires a plaintiff's allegations to be plausible.¹⁰⁸

The Sixth Circuit readdressed pleading requirements for Title IX in *Doe v. Miami University*,¹⁰⁹ which involved a Title IX claim by a male student who was suspended after his school found him guilty of sexually assaulting a female student.¹¹⁰ His complaint alleged erroneous outcome, among other theories of liability, and stated that he could not remember the events.¹¹¹ Additionally, the female student's written statement was inconsistent with her testimony at the administrative hearing.¹¹² The Sixth Circuit found that the inconsistency coupled with the lack of explanation by the school regarding how they resolved the inconsistency, satisfied the first prong of casting “articulable doubt on the accuracy of the outcome of the disciplinary hearing.”¹¹³

The male student also showed a “causal connection between the flawed outcome and gender bias” by presenting statistical evidence

¹⁰³ *Id.* at 608-09.

¹⁰⁴ *Id.* at 608; the claim involved both a Title VII claim and a violation of 42 U.S.C. § 1981.

¹⁰⁵ *Id.* at 610.

¹⁰⁶ *Id.* at 609 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

¹⁰⁷ *Id.* at 610.

¹⁰⁸ *Id.*

¹⁰⁹ 882 F.3d 579 (6th Cir. 2018).

¹¹⁰ *Id.* at 584.

¹¹¹ *Id.* at 592.

¹¹² *Id.*

¹¹³ *Id.*

which clearly showed a “pattern of gender-based decision-making.”¹¹⁴ He alleged facts that showed every male student who was accused of sexual misconduct that year was found guilty.¹¹⁵ Additionally, the vast majority of students that were found guilty by the school, in the previous three years, had “male first-names.”¹¹⁶ Finally, his attorney submitted an affidavit that stated he “represent[ed] many students in Miami University’s disciplinary proceedings, [and] describe[d] a pattern of the University perusing investigations concerning male students, but not female students.”¹¹⁷ The court also noted that the school “faced external pressures” to vigorously adjudicate perpetrators of sexual misconduct by the federal government, specifically noting the “Dear Colleague Letter” and private lawsuits.¹¹⁸

Here, the Sixth Circuit held that the male student sufficiently pleaded factual allegations that casted doubt on his adjudication proceeding and coupled with the external pressures the school faced, his complaint plausibly supported an inference of gender-bias decision-making.¹¹⁹

IV. PROPOSAL TO FOLLOW THE SIXTH CIRCUIT

This section proposes that the best solution for these different approaches would be to follow the Sixth Circuit. There is strong evidence that the Second Circuit’s key case to support its minimal evidence standard is based on a misinterpretation of the Supreme Court precedent. Furthermore, the plausibility standard is appropriate because any student who is wrongfully punished by his school would already have access to everything he needs to plausibly allege gender-discrimination. Finally, allowing a lower pleading standard would have harmful economic effects for the school and devastating mental health effects on the female victims of sexual misconduct.

There is no doubt that there are cases where a public school unfairly adjudicated a male student on the basis of his gender.¹²⁰ Adhering to the Supreme Court precedent set forth in *Twombly* and

¹¹⁴ *Id.* at 593.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* (quoting *Am. Compl., Doe v. Miami Univ.*, 882 F.3d 579 (6th Cir. 2018) (No. 1:15–CV–00605)).

¹¹⁸ *Id.* at 594.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 584.

Iqbal does not bar a chance at recovery.¹²¹ In the Sixth Circuit, any individuals who believes they have been found guilty in a university disciplinary proceeding based on their gender has at least four different theories of liability available to them: selective enforcement, deliberate indifference, hostile environment, and erroneous outcome.¹²² It is important to remember that a student's claim of gender discrimination will survive a motion to dismiss if the factual allegations assert "more than a sheer possibility that a defendant has acted unlawfully."¹²³

The first theory, selective enforcement, requires a plaintiff to demonstrate that an individual, of opposite gender, was in a circumstance sufficiently similar to plaintiff's and was treated more favorably.¹²⁴ The second theory, deliberate indifference, requires plaintiff to "demonstrate that an official of the institution who had authority to institute corrective measures had actual notice of and was deliberately indifferent to the misconduct"¹²⁵ Additionally, for a student's claim, plaintiff must also allege that the "harassment [was] so severe, pervasive, and objectively offensive that it effectively bar[ed] the victim's access to an educational opportunity or benefit."¹²⁶ The third theory of liability is hostile environment, where a "plaintiff must allege that his educational experience was 'permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive [so as] to alter the conditions of the victim's' educational environment."¹²⁷

The last theory, and by far the most successful theory of liability, is erroneous outcome.¹²⁸ "To plead an erroneous-outcome

¹²¹ *Id.*

¹²² *Id.* at 589-90.

¹²³ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

¹²⁴ *Mallory v. Ohio Univ.*, 76 Fed. Appx. 634, 638 (6th Cir. 2003).

¹²⁵ *Miami Univ.*, 882 F.3d at 589 (quoting *Mallory*, 76 Fed. Appx. at 638).

¹²⁶ *Davis v. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

¹²⁷ *Miami Univ.*, 882 F.3d at 590 (quoting *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993)).

¹²⁸ *Id.* at 593-94; *see Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018). The court held that a student successfully pleaded erroneous outcome because the school discredited all male testimony and exclusively credited female testimony. *Id.* The student also pleaded that external pressure on the school to quickly adjudicate Title IX claims led to his punishment, therefore, the student claim was plausible. *Id.* at 586-87. Similarly, in *Doe v. Oberlin College*, 963 F.3d 580, 586-88 (6th Cir. 2020), the court held that a student sufficiently pleaded erroneous outcome because he pleaded facts that casted a grave doubt to the school's decision as a matter of common sense because of clear procedural irregularities. The Sixth Circuit's erroneous

claim, a plaintiff must allege: ‘(1) facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding’ and (2) a ‘particularized . . . causal connection between the flawed outcome and gender bias.’”¹²⁹

Allowing a claim, that only shows minimal evidence of discrimination, to survive a motion to dismiss is inappropriate because a student would already have access to all of the information he would need to plausibly establish sex-based discrimination. Furthermore, the potential ramification for allowing potentially meritless claims to proceed into discovery will have a negative effect on the school and the female victims. This would defeat the purpose of the Supreme Court’s decisions in *Twombly* and *Iqbal* that directed the courts “to act as gatekeepers and to take a hard look at the pleadings before opening the doors to expensive pretrial discovery.”¹³⁰

A. Second Circuit Misinterpreted *Swierkiewicz*

Although drawing the analogy between Title IX and Title VII is logical because of the similar legislative intent of the statutes to protect against discrimination, the Second Circuit was incorrect when it held in *Littlejohn*, that *McDonnell* and *Swierkiewicz* lowered the pleading requirement for Title VII claims. The Supreme Court in *Swierkiewicz* expressly noted that it had “never indicated that the requirements for establishing a prima facie case under [*McDonnell*] also apply to the pleading standards that plaintiffs must satisfy in order to survive a motion to dismiss.”¹³¹ The only explanation the Second Circuit gave for its interpretation was that *Iqbal* was broad and did not apply to all cases, and that a ruling otherwise would be contradictory to *Swierkiewicz*.¹³² A fundamental problem with the Second Circuit’s logic is that the Supreme Court expressly addressed this scenario in the lengthy opinion of *Twombly* which is typically read with *Iqbal*.¹³³ The Supreme Court cleared up any possible confusion by reiterating that

outcome theory of liability was taken from the Second Circuit’s decision in *Yusuf*, which the Second Circuit abandoned after adopting the burden-shifting framework of *McDonnell*. *Miami Univ.*, 882 F.3d at 589.

¹²⁹ *Miami Univ.*, 882 F.3d at 592 (quoting *Doe v. Cummins*, 662 Fed. Appx. 437, 452 (6th Cir. 2016)).

¹³⁰ Edward D. Cavanagh, *Making Sense of Twombly*, 63 S.C. L. REV. 97, 116 (2012).

¹³¹ *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002).

¹³² *Littlejohn v. City of New York*, 795 F.3d 297, 309-10 (2d Cir. 2015).

¹³³ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569-70 (2007).

the Second Circuit's decision in *Swierkiewicz* was reversed because the court had "impermissibly applied what amounted to be a heightened pleading requirement by insisting that Swierkiewicz allege 'specific facts' beyond those necessary to state his claim."¹³⁴ The Supreme Court's language is explicitly clear when it noted that its holding in *Twombly* does "not require heightened fact pleadings of specifics, but only enough facts to state a claim [for] relief that is plausible on its face."¹³⁵

The Second Circuit is clearly following its own interpretation and logic that is inconsistent with the Supreme Court. Furthermore, the Second Circuit's ability to justify its rationale on lowering the pleading standard in Title IX claims is dependent on *Littlejohn*, which is fundamentally inconsistent with Supreme Court precedent.

B. Discovery is Not Required to Establish Plausibility

Supporters of the Second Circuit's decision argue the burden-shifting framework established in *McDonnell* is appropriate in Title IX cases because it allows a plaintiff to survive a motion to dismiss at the initial phase on the case, therefore, allowing him access to discovery materials to prove gender discrimination.¹³⁶ However, if a student pleads erroneous outcome, he will already have access to all the information required to establish the claim, without discovery. Remember, an erroneous outcome complaint has two prongs.¹³⁷ The student must allege facts that "cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding" and show a "causal connection between the flawed outcome and gender bias."¹³⁸

In *Doe v. Miami University*, the student pleaded facts that discredited his disciplinary proceeding by referencing his own testimony, witness statements, and the written decision from the hearing, thus satisfying the first prong.¹³⁹ Title IX mandates that schools provide an accused student with written notice of the complaint and its final decision after the hearing, which must contain the school's rationale for its decision, as well as a chance to review all

¹³⁴ *Id.* at 570 (quoting *Swierkiewicz*, 534 U.S. at 514).

¹³⁵ *Id.*

¹³⁶ Fang, *supra* note 7, at 487-88.

¹³⁷ *Doe v. Miami Univ.*, 882 F.3d 579, 592 (6th Cir. 2018).

¹³⁸ *Id.*

¹³⁹ *Id.*

of the relevant evidence during his proceeding and an opportunity to appeal its decision.¹⁴⁰ If the school complies with these Title IX mandates then the accused student already has access to all the relevant information needed to cast doubt on his proceeding. It is extremely doubtful that a school would withhold these documents and blatantly violate the mandates of Title IX because non-compliance would risk the loss of federal funding.¹⁴¹ If the school did withhold these documents, it would be clear evidence of procedural irregularities. The Sixth Circuit has noted that procedural irregularities during the adjudication hearing, such as a lack of notice to the involved parties, unexplained or uncommunicated delays in adjudication, or a lack of impartial treatment, would constitute strong evidence of gender bias.¹⁴² The Second Circuit has reached a similar conclusion, when it held that procedural irregularities in the adjudication process sufficiently implied gender bias.¹⁴³ If a student was unfairly adjudicated by his school, he could plausibly cast doubt on his proceeding without advancing into discovery regardless of his school's compliance with Title IX mandates.

The second prong is also within the student's ability, by showing a causal connection between the school's flawed outcome and gender bias. A student can plausibly allege that the school faced external pressure to quickly adjudicate sexual crimes or risk losing federal funding, with the "Dear Colleague Letter" and the surrounding circumstances.¹⁴⁴ Additionally, he could compile statistical evidence that showed a pattern of finding males guilty of sexual offenses. Taken together, courts can plausibly infer the causal connection with the flawed outcome and gender bias.¹⁴⁵

In 2011, under the Obama administration, the United States Department of Education's Office for Civil Rights (OCR) released the "Dear Colleague Letter" which provided troubling statistics published by the National Institute of Justice, such as, one in five women are

¹⁴⁰ U.S. DEPT. OF EDUC., TITLE IX FINAL RULE OVERVIEW, GUIDING PRINCIPLES 2-3, <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf> (last visited Nov. 20, 2020).

¹⁴¹ *Title IX*, *supra* note 24.

¹⁴² *Doe v. Oberlin Coll.*, 963 F.3d 580, 587 (6th Cir. 2020).

¹⁴³ *Menaker v. Hofstra Univ.*, 935 F.3d 20, 37 (2d Cir. 2019).

¹⁴⁴ *Miami Univ.*, 882 F.3d at 594; *Oberlin Coll.*, 963 F.3d at 587; *Doe v. Baum*, 903 F.3d 575, 586-87 (6th Cir. 2018).

¹⁴⁵ *Miami Univ.*, 882 F.3d at 592; *Oberlin Coll.*, 963 F.3d at 587.

sexually assaulted while in college.¹⁴⁶ OCR's letter instructed schools that receive federal funding, to investigate and adjudicate sexual assault claims by using the preponderance of evidence standard and advised that a typical investigation takes approximately sixty days.¹⁴⁷ The letter also outlined that failure to comply with its guidelines would result in the loss of federal funding for the violating school.¹⁴⁸

In 2017, under the Trump administration, the OCR rescinded the "Dear Colleague Letter."¹⁴⁹ The rescission letter asserted that the 2011 letter "[placed] improper pressure upon universities to adopt procedures' . . . for resolving allegations that 'lack[ed] the most basic elements of fairness [for the accused.]'"¹⁵⁰ Additionally, OCR no longer required schools to use the preponderance of the evidence standard but allowed them to decide the acceptable standard to use.¹⁵¹ Despite the Trump Administration's rescission of the "Dear Colleague Letter," courts are still citing to its effects of pressure on schools to vigorously combat sexual assault or risk losing federal funds.¹⁵² Moving forward, President Joe Biden has vowed to reverse the Trump Administration's rules regarding sexual assault investigations, which will only strengthen the argument for external pressure.¹⁵³

Additionally, a student would already have access to the school's sexual-crime statistics pursuant to the Clery Act.¹⁵⁴ This federal statute mandates that any school that receives federal funding must collect, publish, and disseminate statistics for the past three years regarding every sexual offense reported to campus security or law enforcement.¹⁵⁵ Although the Clery Act does not require schools to disclose identifiable information, a student can request the final decision of any disciplinary proceedings where a student was found

¹⁴⁶ See OFF. FOR CIVIL RIGHTS, *Dear Colleague Letter from Assistant Secretary for Civil Rights, Russlynn Ali*, U.S. DEP'T OF EDUC. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

¹⁴⁷ *Id.* at 11-12.

¹⁴⁸ *Id.* at 16.

¹⁴⁹ OFF. FOR CIVIL RIGHTS, *Sept. 22, 2017*, U.S. DEP'T OF EDUC. (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

¹⁵⁰ *Id.* at 2-3.

¹⁵¹ *Id.*

¹⁵² *Doe v. Oberlin Coll.*, 963 F.3d 580, 587 (6th Cir. 2020).

¹⁵³ Erica L. Green, *Biden's Education Department Will Move Fast to Reverse Betsy DeVos's Policies*, N.Y. TIMES (Nov. 13, 2020), <https://www.nytimes.com/2020/11/13/us/politics/biden-education-devos.html>.

¹⁵⁴ 20 U.S.C. § 1092(f)(1)(F)(i)(II).

¹⁵⁵ *Id.*

guilty of a sex offense, without consent of the perpetrator.¹⁵⁶ This final decision must reveal the perpetrator's name, violation committed, sanction, and any evidence that supports the sanction.¹⁵⁷ This information can be used to create the statistical evidence referenced in *Doe v. Miami University*.¹⁵⁸ Finally, in the age of social media, it would also be easy to access any public criticism of the school for not perusing sexual assault allegations with a simple Google search, which has been a factor in determining the causal connection.¹⁵⁹ If a school is engaged in gender-based decision making with regard to disciplinary proceedings, any victim of reverse gender-discrimination has access to enough facts to plausibly support his claim without access to discovery.

The Second Circuit could have achieved the same result if it required the *Iqbal* pleading standard of plausibility. In *Doe v. Columbia University*, the student essentially pleaded erroneous outcome by alleging facts that show the clear procedural irregularities during his administrative hearing, thus, satisfying the first prong.¹⁶⁰ He also alleged facts that show the causal connection between his flawed outcome and gender-bias by stating the school was combating public criticism from the press for ignoring females' complaints of sexual assault in the past.¹⁶¹ These facts coupled with the external pressures from the government to combat sexual assault would clearly satisfy the second prong, and allow the student to survive a motion to dismiss. In this case, all the facts the student pleaded were already in his possession or easily accessible through means outside of the discovery process.

¹⁵⁶ 34 C.F.R. § 99.31(a)(14) (2020). This statute is an exception to the Family Educational Rights and Privacy Act (FERPA) which prohibits a school from disclosing a student's disciplinary records without the student's consent. *Id.*; *Balancing Student Privacy and School Safety: A Guide to the Family Educational Rights and Privacy Act for Colleges and Universities*. U.S. DEP'T OF ED., (Oct. 2007), <https://www2.ed.gov/policy/gen/guid/fpco/brochures/postsec.html>.

¹⁵⁷ 34 C.F.R. § 99.39 (2020).

¹⁵⁸ *Doe v. Miami Univ.*, 882 F.3d 579, 593 (6th Cir. 2018).

¹⁵⁹ *Doe v. Colum. Univ.*, 831 F.3d 46, 56 (2d Cir. 2016).

¹⁶⁰ *Id.* at 56.

¹⁶¹ *Id.*

C. Ramifications of a Lower Pleading Requirement

Upon first impression, it would be reasonable to think the Second Circuit's burden-shifting framework is harmless because once the initial "minimal evidence" burden is met and the school states a non-discriminatory reason for the disciplinary action, the student's presumption of discrimination disappears.¹⁶² The effects of the Second Circuit's decision will lead to increased settlements due to the tangible and intangible cost of litigation as well as negatively impacting the mental health of the victimized women.

Once the student's minimal evidence is met and survives a motion to dismiss, discovery will ensue. Schools must "allocate precious time, energy, and resources to meet the new federal guidelines" when handling Title IX claims and now have to pay for the cost of a potentially meritless lawsuit.¹⁶³ This undoubtedly takes away from the time, resources, and support that should go to the victim of a campus sexual assault. It is no secret that when a claim is allowed to survive a motion to dismiss and proceed into discovery, there is higher litigation expense and chance of settlement. Discovery expenses typically comprise half of the litigation expense.¹⁶⁴

In addition to the monetary cost of proceeding with the case, such litigation would involve a significant amount of negative publicity.¹⁶⁵ In 2016, the University of Tennessee settled a Title IX case for \$2.48 million dollars.¹⁶⁶ Raja Jubran, University of Tennessee Board Vice Chairman, said with regard to the settlement, "[o]ne side ultimately would have won in court several years from now, and we felt confident about our legal position, but I truly believe that both sides would have lost."¹⁶⁷ She went on to add, "[t]he intangible costs of emotional stress to those involved and the distraction to all of our

¹⁶² *Id.* at 54.

¹⁶³ Greta Anderson, *New Requirements, More Costs*, INSIDE HIGHER ED (June 10, 2020), <https://www.insidehighered.com/news/2020/06/10/community-colleges-burdened-new-title-ix-regulations>.

¹⁶⁴ Bethany A Corbin, *Riding The Wave Or Drowning?: An Analysis Of Gender Bias And Twombly/Iqbal In Title IX Accused Student Lawsuits*, 85 FORDHAM L. REV. 2665, 2711 (2017).

¹⁶⁵ Anita Wadhvani, *Settling Sex Assault Lawsuits Cost Universities Millions*, TENNESSEAN (July 6, 2016), <https://www.tennessean.com/story/news/2016/07/06/settling-sex-assault-lawsuits-costs-universities-millions/86756078/>.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

positive progress at UT, over and above the actual legal cost, would have been exorbitant.”¹⁶⁸ It is clear that there is a strong desire to avoid litigation. This desire inevitably coerces schools to settle Title IX claims quickly and quietly outside of the courtroom.

Sexual assaults on college campuses have risen in the past few years.¹⁶⁹ The Association of American Universities (AAU) announced that its 2019 survey of over 181,752 students revealed a thirteen percent increase of sexual assaults from its 2015 survey.¹⁷⁰ Additionally, women are disproportionately affected compared to their male counterparts.¹⁷¹ According to the Justice Department’s report of sexual assault on school campuses, roughly eighty percent of sexual assaults go unreported.¹⁷² The Center for Public Integrity conducted a yearlong investigation on sexual assaults on college campuses and found that “students deemed ‘responsible’ for alleged sexual assaults . . . can face little or no consequence for their acts.”¹⁷³ Underreporting coupled with a higher rate of perpetrators settling with schools for gender-discrimination will have a serious impact on victimized women’s mental health because the victims will see their perpetrator’s punishment lifted for the sole reason of avoiding litigation.¹⁷⁴

There is no doubt that women who have been sexually assaulted suffer from a range of trauma, such as post-traumatic stress disorder (PTSD), eating disorders, substance abuse problems, anxiety, depression and other serious social and emotional problems.¹⁷⁵ When the perpetrators go unpunished, it sends a strong message to victimized

¹⁶⁸ *Id.*

¹⁶⁹ *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, ASS’N OF AM. UNIVS. (Jan 1, 2020), [https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20and%20appendices%201-7_\(01-16-2020_FINAL\).pdf](https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20and%20appendices%201-7_(01-16-2020_FINAL).pdf).

¹⁷⁰ *Id.* at 7.

¹⁷¹ *Id.*

¹⁷² U.S. DEP’T OF JUSTICE, NCJ 248471, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE-FEMALES, 1995-2013 (2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Andrew Van Dam, *Less Than 1% Of Rapes Lead To Felony Convictions. At Least 89% Of Victims Face Emotional And Physical Consequences*, WASH. POST. (Oct. 6, 2018, 7:00 AM), <https://www.washingtonpost.com/business/2018/10/06/less-than-percent-rapes-lead-felony-convictions-least-percent-victims-face-emotional-physical-consequences>.

women that they were not believed when they came forward which tends to lead to “secondary victimization.”¹⁷⁶ The lower pleading standard will inevitably lead to more cases settling, resulting in more perpetrators staying in school with their victims, and causing more harm to the victims.

V. CONCLUSION

Although “reverse” gender discrimination claims are not a new phenomenon, they have clearly increased in recent years. The current Circuit split is an important issue and is ripe for the Supreme Court to address and establish the proper pleading requirements for Title IX claims. By no means does this Note seek to jeopardize the avenue of recourse of an alleged victim of “reverse” gender discrimination, but a clear and uniform standard should be applied to these federal claims. The Second Circuit relies on *Littlejohn*, to support its “minimal evidence” standard but its holding expressly conflicts with Supreme Court precedent. Additionally, there is no necessity for courts to allow a lower pleading requirement because a student already has access to all the facts he would need to plausibly assert his claim of gender discrimination. Finally, allowing a lower pleading standard for “reverse” Title IX claims will have serious ramifications for the school and the victims of sexual misconduct. In the interest of justice, this Note offers guidance on why the Second Circuit’s minimal evidence standard should be abandoned and why the Sixth Circuit’s pleading standard should be adopted.

¹⁷⁶ See *Top Ten Things Advocates Need To Know*, UNIV. OF KY. CTR. FOR RES. ON VIOLENCE AGAINST WOMEN (Dec. 2011), https://opsvaw.as.uky.edu/sites/default/files/07_Rape_Prosecution.pdf.