UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
Winchester Division

2009 JUN -3 P 12:57

JOHN DOE, MARY DOE, and JAMES DOE,

Plaintiffs,

v.

THE UNIVERSITY OF THE SOUTH,

Defendant.

Case No. 4:09-cv-62
Mattice/Lee

COMPLAINT

Plaintiffs John Doe, Mary Doe, and James Doe,[1] for their complaint against defendant The University of the South, allege as follows:

NATURE OF ACTION

1. This is an action for declaratory and injunctive relief and for damages arising out of the defendant university's unlawful conduct that resulted in the wrongful suspension and ultimate withdrawal of plaintiff John Doe, a former student. Defendant's actions, which were in violation of both federal and state law, were taken to achieve a predetermined result and with deliberate disregard of the consequences to plaintiffs and the grievous harm that they would suffer and have suffered.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over plaintiffs' federal claims under 28 U.S.C. §§ 1331 and 1343. This Court has subject matter jurisdiction over plaintiffs' state claims

[1] Plaintiffs have filed, contemporaneously with this complaint, a motion to proceed pseudonymously.

under 28 U.S.C. §§ 1332 because this action is one between citizens of different states. The amount in controversy exceeds $75,000, exclusive of interest and costs. In addition, an actual controversy exists between plaintiffs and defendant, justiciable in character, in respect to which plaintiffs seek a declaration of their rights and appropriate further relief under the provisions of 28 U.S.C. §§ 2201, 2202, and 1651.

3. This Court has personal jurisdiction over defendant because it regularly does business and engages in other persistent courses of conduct in this district.

4. Venue is proper in this court under 28 U.S.C. § 1391(b), as defendant resides in the Winchester Division of the Eastern District of Tennessee, and a substantial part of the events and omissions giving rise to plaintiffs' claims occurred in this district.

PARTIES

5. Plaintiffs John Doe, Mary Doe, and James Doe are citizens and residents of a state other than Tennessee.

6. Defendant The University of the South is a Tennessee corporation with its principal place of business in Sewanee, Franklin County, Tennessee.

FACTS

A. The University of the South

7. The University of the South, known generally as Sewanee (the "University"), is owned and governed by the 28 dioceses of the Episcopal Church located in the southeastern United States. The University's statement of purpose includes the goal of preparing its students "to search for truth, seek justice, [and] preserve liberty under law."

8. The University admitted plaintiff John Doe ("Doe") to the freshman class beginning in the fall semester of 2008. Plaintiffs Mary Doe and James Doe are Doe's parents and are committed to funding his college education. They paid the University for the fall semester,

advancing approximately $22,000 for Doe's tuition, room, board, and other expenses. Classes started on Thursday, August 28.

B. Events of August 29-30

9. Beginning at approximately 9:00 p.m. on Friday, August 29, Doe was in the company of A.B.,[2] a fellow freshman who, like Doe, was at least 18 years of age. For the first few hours, they were part of a group; thereafter, they were, for the most part, alone together in Doe's dormitory room until the following morning.

10. At approximately 1:00 a.m. on August 30, Doe and A.B. engaged in sexual intercourse. During the act, A.B. never gave any indication that her participation was anything but consensual and enthusiastic. She remained in Doe's bed until approximately 7:00 a.m., never making any sort of complaint to Doe or expressing any reluctance about spending the night. At that time, she told Doe that she was going to her friend's room and departed.

11. A.B. did not go to her friend's room, but instead walked across campus and used an emergency phone to call the Sewanee Police Department. When the police arrived, A.B., upon information and belief, told them that she had been raped. Upon information and belief, the police took her to the emergency room at the local hospital.

12. The Sewanee Police Department is part of the University. In addition to having responsibility for the campus, the Department polices the unincorporated town of Sewanee as well "the Domain," a 13,000-acre hardwood forest that surrounds the University. The Sewanee Police are vested with full law enforcement powers and responsibilities. They routinely investigate crimes committed on campus as well as in the neighborhood and business areas near

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[2] Although A.B.'s allegations, as set forth herein, are entirely false, a pseudonym is used to protect her identity. *See, e.g., Hodge v. Hurley*, 426 F.3d 368, 372 n.2 (6th Cir. 2005).

the campus. Two current members of the Sewanee Police Department also serve as Deputy Sheriffs for Franklin County.

13. The Sewanee Police Department investigated A.B.'s charge of rape and produced a report. Upon information and belief, the Department never referred the charge to the Office of the District Attorney General for the district of which Franklin County is a part.

14. Doe has never been contacted by the Sewanee Police Department, the Office of the District Attorney General, or any other law enforcement agency.

15. In addition to providing her statement to the police, A.B. filed a formal charge with the University disciplinary system, claiming that Doe sexually assaulted her, as more fully described below.

C. Federal Statutory and Regulatory Requirements Concerning Allegations of Sexual Assault

16. The issue of sexual assaults on college and university campuses is addressed by two separate acts of Congress: (a) Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX"); and (b) The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) ("Clery Act").

1. Title IX

17. Title IX applies to all public and private educational institutions that receive federal funds, including colleges and universities. The statute prohibits discrimination on the basis of sex in a school's "education program or activity," which includes all of the school's operations. 20 U.S.C. §§ 1681(a), 1687. A school specifically agrees, as a condition for receiving federal funds, to operate all of its programs and activities in compliance with Title IX and the Department of Education's Title IX regulations. This agreement is known as an "assurance of compliance." 34 C.F.R. § 106.4(a)-(c).

18. The University is a recipient of federal funds, is bound by Title IX and its regulations, and, upon information and belief, has executed an assurance of compliance.

19. Sexual harassment is a form of sex discrimination prohibited by Title IX. Sexual harassment is defined for Title IX purposes as unwelcome conduct of a sexual nature that includes sexual intercourse, sexual assault, and rape. Student-on-student sexual harassment is prohibited by Title IX, as are other forms of sexual harassment.[3]

20. Both the Department of Education and the Department of Justice have promulgated regulations under Title IX that require a school to "adopt and publish grievance *procedures providing for the prompt and equitable resolution of student . . . complaints* alleging any action which would be prohibited by" Title IX or regulations thereunder. 34 C.F.R. § 106.8(b) (Dep't of Education); 28 C.F.R. § 54.135(b) (Dep't of Justice) (emphasis added). Such prohibited actions include all forms of sexual harassment, including sexual intercourse, sexual assault, and rape.[4]

21. The procedures adopted by a school covered by Title IX must not only "ensure the Title IX rights of the complainant," but must also "*accord[] due process to both parties involved . . . .*"[5]

22. The "prompt and equitable" procedures that a school must implement to "accord due process to both parties involved" must include, at a minimum:

- "Notice . . . of the procedure, including where complaints may be filed";

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3 *See generally* U.S. Dep't of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties -- Title IX* (2001) at 2-3 & nn.2, 3, 6, 8, 20 (notice of publication at 66 Fed. Reg. 5512 (January 19, 2001)).

4 *Id.* at 19-20, 21 & nn.98-101.

5 *Id.* at 22 (emphasis added).

- "Application of the procedure to complaints alleging [sexual] harassment . . .";
- "Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence";
- "Designated and reasonably prompt timeframes for the major stages of the complaint process"; and
- "Notice to the parties of the outcome of the complaint . . . ."[6]

23. A school also has an obligation under Title IX to make sure that all employees involved in the conduct of the procedures have "adequate training as to what conduct constitutes sexual harassment," which includes "alleged sexual assaults."[7]

2. Clery Act

24. The Clery Act mandates that schools receiving federal funding create and publish procedures for complaints involving charges of sexual assault. A school is required to have a written statement of policy[8] detailing such procedures. That policy must have, at a minimum,

> [p]rocedures for on-campus disciplinary action in cases of alleged sexual assault, which include a clear statement that --
>
> (I) the accuser and the accused are entitled to the same opportunities to have others present during a campus disciplinary proceeding; and
>
> (II) both the accuser and the accused shall be informed of the outcome of any campus disciplinary proceeding brought alleging a sexual assault.[9]

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6 *Id.* at 20.

7 *Id.* at 21.

8 20 U.S.C. § 1092(f)(8)(A)(ii).

9 *Id.* (8)(B)(iv). *See also* 34 C.F.R. § 668.46(b)(vi) (similar).

25. Under the Clery Act, a "forcible" sexual offense is defined as "[a]ny sexual act directed against another person, forcibly and/or against that person's will; or not forcibly or against the person's will where the victim is incapable of giving consent."[10]

D. The University's Procedures Concerning Allegations of Sexual Assault

26. The University, on its website,[11] sets forth separate written policies and procedures as to (a) "sexual harassment" (which, under Title IX, includes sexual assault); and (b) "sexual assault." The first set of policies and procedures governs sexual harassment complaints by students, faculty, and staff members. The second set ("Sexual Assault Policies and Procedures") appears to address only complaints of sexual assault made by one student against another student.

27. These two sets of policies and procedures are found on the University website under a number of headings: "Campus Safety"; "Campus Policies"; "Student Policies"; and "Student Life Policies." The website also refers to "Student Life Policies" as the "Student Handbook," which is said to be part of the "College Catalog." The Sexual Assault Policies and Procedures are also said to be part of the "Student Handbook." The University represents that all of these policies and procedures comply with Title IX and the Clery Act.

28. With regard to the Sexual Assault Policies and Procedures, the University expressly represents as follows: "The University will also endeavor to protect the rights of any person against whom a complaint is lodged."[12]

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[10] 34 C.F.R. Pt. 668, Subpt. D, App. A.

[11] www. sewanee.edu.

[12] All quotations concerning the Sexual Assault Policies and Procedures are from the University website.

29. A University student who wishes to file a sexual assault complaint against another student has an array of "internal" [i.e., University] options: (a) report the incident with a request that "no action" be taken; (b) report the incident with a request that "informal action" [i.e., an informal resolution] be taken; (c) report the incident and request that the respondent agree to have no contact with the complainant for a specified period of time; or (d) report the incident and "file a formal charge of sexual assault" with one of the deans of students.

30. Once a complainant files a formal charge of sexual assault against another student, the University's Sexual Assault Policies and Procedures mandate the following steps:

a. Notification to Respondent. "The Dean of Students will inform the respondent of the charges pending against him or her typically within 5 class days of learning that a formal charge is being pursued." In addition, "[a]t that time, the respondent will be informed of the [support] services that are available to him or her . . . ." The Dean of Students, who has overall responsibility for student discipline and procedures, carries out the prosecutorial functions throughout the process. The Sexual Assault Policies and Procedures does not designate a prosecutor.

b. Support Services for Complainant and Respondent. During the pendency of the complaint, both the complainant and respondent are entitled to a range of services including health care, counseling services, spiritual guidance, and academic assistance. In addition, the complainant and the respondent are each entitled to select a designated "Consultant" who will serve as his or her "Hearing Advisor." "A consultant is familiar with the formal processes for hearing cases of sexual assault . . . ." A Consultant "may be helpful to the respondent" because the consultant is knowledgeable about (i) "[t]he seriousness of the charge(s), procedure, and possible penalties if found responsible"; (ii) "[t]he University's

conduct standard for sexual assault"; (iii) "[t]he University resources available to the respondent"; (iv) "[t]he option of informing parents and guardians of the matter. Even though parents cannot participate in the campus hearing, they can provide moral support and advice"; and (v) "[t]he option of consulting a lawyer. While an attorney cannot participate in an on-campus hearing, if the matter passes to the criminal or civil courts, legal counsel can be important."

c. Appointment of Investigator. The Dean of Students appoints an investigator (one of the other deans) within three class days of receiving a formal charge of sexual assault.

d. Investigation of the Complaint. The investigator is to interview "each of the students involved in the alleged incident as well as any possible witnesses," and, if possible, obtain a written statement from each. "The investigation portion of the process typically takes 5-10 class days."

e. Pre-Hearing Phase. The complainant and the respondent are each permitted to submit a written statement that sets forth facts in support of their respective positions. Each is to have the opportunity to work with his or her Consultant/Hearing Advisor in the preparation of his or her statement, and, if desired, to consult with his or her parents and/or an attorney. During the period before the hearing, the complainant and the respondent are each "permitted to invite a member of the college community (faculty, staff, or student) to speak to [his or her] character during the official hearing. This witness will only be present at the hearing during his or her statement."

f. Notification to Respondent of the Hearing. "[T]he respondent will be notified of the actual date and time of the hearing at least 24 hours prior to the hearing."

g. Convening of the Faculty Discipline Committee. The hearing is presided over by the Faculty Discipline Committee (the "Committee"), which is composed of the Dean of Students and four faculty members. The Dean of Students is the Chair of the Committee. Three members of the Committee "constitute a quorum and must be present at all stages of a hearing."

h. Conduct of the Hearing. The complainant and the respondent may be accompanied to the hearing by his or her respective Consultant/Hearing Advisor. During the hearing, the Consultant/Hearing Advisor may confer with his advisee, but may not address the Committee. A respondent's parents or attorney may not attend the hearing. "[A]t the beginning of the hearing," the complainant and the respondent will each "have an opportunity to see the other reports [i.e., witness statements]." The complainant and the respondent are not permitted to be in the hearing room at the same time. The Dean of Students fulfills the role of prosecutor at the hearing. The hearing is not recorded "unless special permission is requested and granted by the chair," i.e., the Dean of Students.

i. Evidentiary Phase of the Hearing. "[P]rior to the hearing," the investigator reports the results of his investigation to the Committee, including the written statements of witnesses, if any. The Committee then reviews the written statements of the complainant and the respondent. The character witnesses give oral testimony, as do the complainant and the respondent. "Any witnesses that have information pertaining to the incident will be given a chance to [testify]." The Committee is free to question any witness and to recall any witness for additional questioning.

j. Decisionmaking Process. After the evidentiary phase concludes, the Committee, including the Dean of Students, holds a "closed meeting" and determines whether the respondent is guilty of the charges. The evidentiary standard is "a preponderance of the evidence," which the University defines as a "51% certainty that the respondent is responsible for a violation of the sexual assault policy." If the decision is adverse to the respondent, the Committee members (but not the Dean of Students) recommends a proposed punishment to the Dean of Students, "who has authority to accept, modify, or reject the recommendation of the [C]ommittee." The Dean of Students thus acts as the prosecutor, fact finder, and sentencing judge. Finally, the Dean of Students notifies the respondent of the Committee's decision and the punishment to be imposed, if any.

k. Appeal. The Sexual Assault Policies and Procedures do not prescribe an appellate process. A respondent found guilty of sexual assault has the right to appeal the decision and punishment imposed under the appeals process set forth in the general student disciplinary system procedures. That appeal lies with the Vice Chancellor of the University, who is the chief executive officer and "the official ultimately responsible for the order and discipline of the University."

E. The Charge Against Doe and the Investigation

31. Although the precise date is not known to plaintiffs, A.B. filed a formal charge in September, accusing Doe of "Category 1" sexual assault. The Sexual Assault Policies and Procedures defines Category 1 sexual assault as follows:

> Rape (anal, oral or vaginal intercourse without consent or through force, intimidation, threat, coercion, physical helplessness, and/or incapacitation). Intercourse is penetration, however slight, with any object (finger, penis, tongue, or other instrument).

The preamble to the description of the three categories of sexual assault states: "Sexual activity with someone a person knows to be, or should know to be, mentally or physically incapacitated (because of disability, alcohol or other drug use, sleep, unconsciousness, or bodily restraint) is a violation of this policy."

32. Upon information and belief, the Dean of Students, Eric E. Hartman, appointed Alexander Bruce to investigate the charge. Bruce is the Associate Dean of Students and reports directly to Hartman. Upon information and belief, Bruce has no training in investigative techniques in general, in investigating allegations of sexual assault, or in what conduct constitutes sexual harassment or sexual assault. At all material times, Hartman and Bruce were each acting within the course and scope of his employment with the University.

33. The Sexual Assault Policies and Procedures required that Bruce "meet with each of the students involved in the alleged incident as well as any possible witnesses." The University has not furnished plaintiffs with the investigator's work product, and, as a result, the details of Bruce's investigation are not known to plaintiffs at this time. One detail, however, cannot be disputed: Bruce first met with Doe, the accused, approximately 30 minutes prior to the hearing. The interview lasted less than five minutes.

34. Although Bruce apparently interviewed A.B., it is unknown to plaintiffs at this time whether or to what extent Bruce inquired about A.B.'s use of prescription drugs generally or on the night in question. *See infra* ¶ 48.

F. Notification to Doe of the Charges

35. At 11:00 p.m. on September 17 -- three weeks after the alleged incident, the matron of Doe's dormitory told him that Dean Hartman wanted to see him first thing in the morning. Doe met with Hartman at 8:00 a.m. the following day.

36. Hartman began the meeting by giving Doe a document entitled "Faculty Discipline Notification Report" that informed Doe that (a) he was accused of "Sexual Assault -- Category 1" that occurred in his dormitory on August 29; (b) the basis for the charge was "statements"; (c) the "witnesses" were two police officers, Doe's roommate and another resident of Doe's dormitory; and (d) the disciplinary hearing would take place on September 19th at 2:00 p.m. -- in other words, in 30 hours.

37. Hartman did not explain what constituted Category 1 sexual assault other than to give Doe the description from the Sexual Assault Policies and Procedures. Hartman did say that A.B. "chose Category 1," but declined to tell Doe any details of her allegations. Hartman said that Doe would be given a copy of A.B.'s written statement immediately prior to the hearing, but no other statements. Hartman told Doe that an adverse finding could result in Doe's suspension or expulsion.

38. Hartman also told Doe that (a) an investigator had gathered all the relevant information; (b) Hartman and the Committee would "provide all the witnesses"; (c) the only witness that Doe could bring was a character witness who could testify as to Doe's morals and his standing in the community; and (d) Doe needed to provide a written statement of his defense as soon as possible -- even though Doe had not seen A.B.'s written statement and was not aware of the nature or details of her allegations. Hartman also discouraged Doe from bringing any supporters to the hearing.

39. Hartman repeatedly told Doe during their meeting that "even though you think you haven't done anything, [A.B.] is in a terrible place right now" and "there's a lot you don't know."

40. Finally, Hartman told Doe that he was entitled to a representative, i.e., a Consultant/Hearing Advisor. Hartman suggested that Doe use David L. Spaulding, Ph.D., the Director of the University Counseling Service. Hartman told Doe to use Dr. Spaulding because "if anything went to court, there would be doctor-patient confidentiality." Doe spoke with Dr. Spaulding for approximately an hour later that day. Dr. Spaulding explained the hearing process generally and gave Doe guidance on how to write his statement of defense.

41. In the 30 hours between notification to Doe of the charges and the hearing, Doe did not tell his parents about the hearing, nor did he consult an attorney. Because of classes and a paper deadline, Doe did not finish his statement of defense until 2:00 a.m. on the 19th, the day of the hearing. He hand-delivered it to Hartman's office at that time, sliding it under the door.

G. The Hearing and the Decision

42. As he had been instructed, Doe arrived at Hartman's office at 1:00 p.m. on the 19th with his character witness, an "assistant proctor" (a resident advisor) from his dormitory. They were met by Dr. Spaulding. Shortly after Doe arrived, Investigator Bruce spoke with him for less than five minutes. Bruce asked that Doe be more specific about some of the times in his written statement and had no other questions. Their sole prior contact had been a brief telephone call earlier that day in which Bruce had asked for the full name of a witness mentioned in Doe's written statement. At approximately 1:15 p.m., Hartman gave Doe a copy of A.B.'s written statement and left for the hearing. Doe, his character witness, and Dr. Spaulding remained outside Hartman's office.

43. Neither Doe nor Dr. Spaulding was permitted to attend any portion of the hearing other than when Doe was testifying and being questioned by the panel. No recording or transcript was made of the proceedings.

44. The hearing panel consisted of Dean Hartman and three other members of the Faculty Discipline Committee: professors of psychology, chemistry, and Russian language. Upon information and belief, none of the hearing panel had any training in adjudication; in the law; in the weighing of evidence; in what type of conduct constitutes sexual harassment or sexual assault; or in the relevance or irrelevance of particular types of evidence in the alleged sexual assault setting. In addition to chairing the Committee, Hartman also served as the prosecutor during the hearing.

45. Upon information and belief, the hearing panel heard oral testimony from Investigator Bruce, A.B., Doe, and the respective character witnesses for A.B. and Doe. The remainder of the evidence was in the form of written statements from A.B., Doe, and other witnesses. Upon information and belief, the panel also reviewed the police report of the alleged sexual assault as well as the hospital records of A.B.'s examination on August 30.

46. Because no transcript or other record was made of the hearing, plaintiffs are unaware of the precise content of the oral testimony given by A.B. The written statement that she submitted prior to the hearing contained the following:

- A.B. had no more than "three mixed drinks" ("Smirnoff and Diet Coke") early in the evening of August 29, prior to seeing Doe. She had nothing more to drink for the rest of the evening. She did not smoke marijuana or use any other recreational drug that evening.

- During the sexual encounter, several hours after her last drink, Doe asked A.B. "if that felt good, and [she] said yes."

- After A.B. and Doe had intercourse, A.B. realized that Doe had left the bed and was on the top bunk with a laptop computer. Doe asked A.B. "if [she] wanted him to lay in bed with [her]." A.B. said "yes."

- A.B. voluntarily remained in Doe's bed until the following morning.

47. A.B. was also permitted to submit an additional written statement to the hearing panel after reading Doe's written statement. In that second written statement, A.B. made the following claims: (a) "I've never had that much to drink before"; and (b) "I've never had sex with someone or even made out with someone before." The University did not provide A.B.'s second written statement to Doe until long after the hearing and appeal process was concluded.

48. Based on notes taken of A.B.'s testimony by members of the hearing panel, A.B. also testified to the following:

- She suffers from narcolepsy and takes two kinds of medication for the condition: one drug to help her sleep at night and another drug to keep her wakeful during the day. On August 29, she took her nighttime medication early in the evening.
- She also takes medication that she described as "mood stabilizers."
- She "could tolerate some alcohol" while taking these medications.

49. Doe was the last witness to testify. He stated that the sex was consensual and that A.B. gave no indication of being impaired or unable to consent. To the contrary, she made statements to him, both during and after the act, that demonstrated that she was a willing participant. Doe testified that he was not impaired by alcohol or drugs at the time that he and A.B. had sex. Doe also testified that A.B., at some point during the night, after having intercourse with Doe, got out of bed, went down the hall to the bathroom, and then returned to Doe's bed. Doe had previously given Investigator Bruce the name of a witness who saw A.B. leave Doe's room, go to the bathroom, and return. There is no indication in the administrative record that Bruce ever spoke to the witness.

50. At the conclusion of Doe's testimony, the three faculty panel members each stated that they believed that Doe was truthful, but that he failed to "understand the situation" because

he had not had enough experience with alcohol and did not recognize that A.B. was incapacitated. They also said that Doe had "made a mistake."

51. The hearing -- which lasted between five and six hours -- ended with Hartman's statement that (a) he and the rest of the hearing panel members would deliberate and decide whether the charges had been proven; and (b) if the charges were proven, the three faculty members of the hearing panel would recommend a punishment to Hartman, who was free to accept, reject, or modify their recommendation.

52. Approximately one hour after the conclusion of the hearing, Hartman telephoned Doe and asked him to come to his office. Hartman told Doe that he and the other panel members had deliberated and that a "majority" had determined that Doe had committed Category 1 sexual assault. Hartman reiterated that the panel found Doe to be truthful, but had concluded that he did not "understand the situation." Hartman told Doe that A.B. "believes that it was against her will" and that "you put her through hell."

53. Hartman also stated that Doe had two options with regard to punishment: (a) suspension for the current semester, return in January 2009, but with the sexual assault finding part of his record; or (b) "withdrawal" from the University, return in the fall of 2009, but with a clean disciplinary record. Under either option, the University imposed additional conditions for Doe's return, including re-application to and approval by the Admissions Committee.

54. Hartman informed Doe of his right to appeal the decision to the Vice Chancellor, but actively discouraged him from doing so. Hartman told Doe that the Vice Chancellor could increase the punishment to a multiple-year suspension or an expulsion. Hartman also stated that if Doe were to appeal or to choose the one-semester suspension, A.B. might feel that the

punishment was not severe enough and that she might pursue criminal charges. Hartman said that "she [A.B.] still does have that rape kit," an apparent reference to her examination at the local hospital.

55. Hartman concluded by stating that (a) Doe had a few days to choose the punishment option but that he must leave the campus in two days, by Sunday, September 21; and (b) Doe should destroy all the written materials he had related to the charge and the hearing.

56. Doe, as instructed, destroyed the written materials. He packed his belongings, left the campus on the morning of the 21st, and went home.

H. The Appeal

57. Shortly after Doe returned home, he and his mother, plaintiff Mary Doe, each spoke by telephone with Dean Hartman in order to determine the deadline for filing the appeal. In these separate conversations, Hartman attempted to intimidate Doe and his mother and to dissuade them from appealing the decision, making the same veiled threats of the potential for increased punishment and potential criminal charges that he had previously made to Doe.

58. On the same day as the telephone conversations with Hartman, Mary Doe spoke with Dr. Spaulding by telephone. Dr. Spaulding stated that he was "appalled" by the Committee's decision and that Doe had been "railroaded." He also stated that he was "shocked" to learn that (a) the investigator first interviewed Doe immediately before the hearing and only briefly; and (b) the Committee found A.B. to be incapacitated at 1:00 a.m. when her last drink was before 9:00 p.m.

59. Doe appealed the Committee's decision by letter of September 26 to Vice Chancellor Joel Cunningham. Doe recounted his version of events and demonstrated the inconsistencies in A.B.'s story. He also pointed out that (1) he did not have sufficient notice of the hearing, particularly given the seriousness of the allegation; and (2) it was evident that the charge was not

properly investigated, given that the investigator first interviewed him shortly before the start of the hearing.

60. Cunningham, a mathematician by training, had no transcript or recording of the hearing. The administrative "record" consists only of the written statements of witnesses and notes taken by members of the Committee. Upon information and belief, Cunningham did not have training in adjudication; in the law; in the weighing of evidence; in what types of conduct constitutes sexual harassment or sexual assault; or in the relevance or irrelevance of particular types of evidence in the alleged sexual assault setting.

61. Despite the absence of any meaningful record, Cunningham, in denying the appeal by letter of October 3, was able to conclude that "the preponderance of the evidence supports the conclusions and judgment reached by the Committee and the Dean." As a result of the purported review of the evidence, Cunningham "reached the decision to affirm Dean Hartman's action."

62. Cunningham, in the same letter, reiterated Doe's options as to punishment: a one-semester suspension with sexual assault on his record or a withdrawal for two semesters, with a clean record.

I. Aftermath

63. Given these two options and the unacceptability of a sexual assault finding on his record, Doe had no real choice and withdrew from the University with a possibility of returning in the fall of 2009. Because of the timing of the University's action, he was effectively precluded from attending a comparable institution for the 2008-2009 school year. Doe ultimately decided that he would not seek re-admission to the University. The University has refused to refund any portion of the $22,000 paid by plaintiffs for the fall 2008 semester.

64. Upon information and belief, A.B. left the University before the end of the fall semester and entered a drug and/or alcohol rehabilitation program. Her withdrawal under these circumstances did not cause the University to reconsider its decision as to Doe.

65. The University's General Counsel stated to a representative of plaintiffs that she had spoken with the members of the hearing panel but "was unable to determine the basis of their finding."

COUNT I
(Breach of Contract)

66. Plaintiffs incorporate paragraphs 1 through 65 as if fully pleaded.

67. Doe applied to and enrolled in the University and, with the assistance of his parents, paid tuition and other fees and expenses. Plaintiffs did so in reliance on the understanding and expectation that the University would implement and enforce the promises and policies made in its official publications, including the Student Handbook, the College Catalog, the Sexual Assault Policies and Procedures, the other publications named in paragraphs 26 through 28, and other relevant documents, including those not mentioned in this complaint.

68. An express contract or, alternatively, a contract implied in law or in fact, was therefore formed between the University and plaintiffs. Alternatively, an express contract or one implied in law or in fact was formed between the University and Doe, with his parents as intended third-party beneficiaries.

69. The contract contained an implied covenant of good faith and fair dealing. It also contained the following provision relating to the University's Sexual Assault Policies and Procedures: "The University will also endeavor to protect the rights of any person against whom a complaint is lodged." As set forth below, the University repeatedly and materially breached this global promise of fundamental fairness as well as the implied covenant of good faith and fair

dealing and other contractual provisions. These breaches include, but are not limited to, the following:

A. Breach of Obligation to Provide Timely and Meaningful Notice to Doe

70. The contract specifically required the University, through Dean Hartman, to inform Doe of A.B.'s charges "within 5 class days ["typically"] of learning that a formal charge is being pursued." Upon information and belief, this provision was breached, as Doe did not receive notice of the charges until September 18, the day before the hearing was to take place. Even if Hartman complied with the letter of this provision, scheduling the hearing as he did and waiting to notify Doe of the charges until the day before the hearing violated the University's promise of fundamental fairness and the implied covenant of good faith and fair dealing because it prejudiced Doe as set forth below. Regardless of whether the University was in technical compliance with the five-class-day period, Hartman, the University's Dean of Students, intentionally, willfully, and recklessly scheduled the hearing and waited to notify Doe of the charges until the day before the hearing in order to prejudice him and to deny him a reasonable period of time to seek appropriate advice and assistance and to properly prepare his defense for the hearing.

71. In particular, the timing of the hearing and the notice prevented Doe from any meaningful consultation with his Consultant/Hearing Advisor. There was only time to meet for an hour on the day before the hearing, prior to Doe's submission of his written statement of defense. The Consultant/Hearing Advisor is the most important resource among a number of campus resources available to a respondent during the period of time between notification of the charges and the hearing. The Sexual Assault Policies and Procedures contemplate that this period will be significantly longer than one day.

72. The timing of the notice also, for all practical purposes, foreclosed any opportunity for Doe to consult or retain a lawyer. The Sexual Assault Policies and Procedures itself recognizes the importance of legal counsel, particularly where there is potential criminal exposure, such as an allegation of rape: "[I]f the matter passes to the criminal or civil courts, legal counsel can be important [in the University disciplinary process]." Hartman, too, well knew that Doe potentially faced criminal proceedings, as demonstrated by Hartman's recommendation that Doe use Dr. Spaulding as his advisor because of "doctor-patient confidentiality."

73. Timing aside, the written notice of the charges that Hartman gave to Doe was woefully inadequate and in breach of the notice requirement, the promise of fundamental fairness, and the implied covenant of good faith and fair dealing. Such a notice is among the most basic procedural protections and must state the nature of the allegations with sufficient particularity to enable the accused party to meet the charges. The "Faculty Discipline Committee Notification Report" that Hartman gave to Doe contained no meaningful information. The charge was described only as "Sexual Assault -- Category 1." Hartman gave Doe the definition of that offense from the Sexual Assault Policies and Procedures, but provided no other information. That offense covers a wide variety of conduct, and Doe had no idea what A.B. was claiming until Hartman gave him A.B.'s written statement immediately prior to the hearing.

74. Hartman plainly had A.B.'s written statement in hand when he met with Doe on the day before the hearing, but withheld A.B.'s statement from Doe in order to prejudice him and to hamper him in the preparation of his defense. Moreover, Doe was also entitled to be made aware that A.B. was claiming to be an inexperienced drinker and a virgin who had never "even made out with someone before" as set forth in her second written statement. Without notice of all of

A.B.'s allegations and claims well prior to the hearing, Doe had no meaningful opportunity to prepare his defense or to present evidence to refute the charge against him.

75. The written notice was also defective in that it did not provide the names of the University's witnesses or a summary of the testimony of each. The promise of fundamental fairness and the implied covenant of good faith and fair dealing required that Doe, particularly given the timing of the notice, be given that information. Instead, Doe was given only a redacted list of witnesses. The provision of such basic information as the identity of all witnesses and the substance of their testimony is a fundamental right in all adversarial proceedings, and "trial by ambush" is not tolerated. Yet, ambush was the University's intent here.

B. Breach of Obligation to Conduct Appropriate Investigation

76. The University's breach of its obligations under the Sexual Assault Policies and Procedures to conduct an appropriate investigation began with Dean Hartman's appointment of one of his subordinates to be the investigator. Given Hartman's roles as the prosecutor and as the Chair of the Faculty Discipline Committee, the appointment of Alexander Bruce violated both the promise of fundamental fairness and the implied covenant of good faith and fair dealing.

77. Bruce, upon information and belief, had no investigative training either generally or with regard to sexual assault. The minimal investigative protocol set forth in the Sexual Assault Policies and Procedures required Bruce to "meet with each of the students involved in the alleged incident as well as any possible witnesses." Although the extent of his efforts are not now known to plaintiffs, Bruce breached the University's obligations by "meeting" with Doe for less than five minutes just before the hearing and asking no substantive questions. Moreover, although Bruce obtained from Doe the full name of the witness who saw A.B. leave Doe's room, go to the bathroom, and return, there is no indication in the administrative record that Bruce ever spoke to that witness.

78. As noted above, plaintiffs do not know at this time whether, during his investigation, Bruce ever asked A.B. about her use of prescription drugs generally or on the night in question. If he did, and received information similar to that contained in A.B.'s hearing testimony, then the University breached its obligation to conduct an appropriate investigation by failing to obtain the assistance of medical expert(s) to determine the possible effects of those medications as discussed in paragraphs 96-100 below. If Bruce did not ask those questions, that was a breach as well.

79. This incomplete and haphazard investigation violated the University's promise of fundamental fairness and the implied covenant of good faith and fair dealing.

C. Breach of Obligation to Refrain from Proceeding if Charge Lacks Sufficient Evidence

80. The University's promise of fundamental fairness and the implied covenant of good faith and fair dealing placed an obligation on Hartman, as the University's prosecutor, to refrain from proceeding with A.B.'s charge of Category 1 assault if the investigation demonstrated that there was insufficient evidence to convince an unbiased tribunal of Doe's guilt.

81. Regardless of any other evidence yielded by the investigation, A.B.'s initial written statement alone demonstrated that there was not sufficient evidence to convince an unbiased tribunal of Doe's guilt. That written statement contained the following admissions: (a) A.B. had nothing to drink and used no recreational drugs after 9:00 p.m. on the night in question; (b) during the sexual encounter, long after her last drink, Doe asked A.B. "if that felt good, and [she] said yes"; (c) she invited Doe back into bed with her; and (d) she voluntarily remained in Doe's bed until the following morning.

82. In the face of A.B.'s admissions, Hartman's decision to proceed with A.B.'s charge and convene a hearing of the Faculty Discipline Committee was a breach of the University's promise of fundamental fairness and the implied covenant of good faith and fair dealing.

83. When the complete results of the investigation are made known to plaintiffs, there will, upon information and belief, be additional grounds for this breach.

D. Denial of Right to Counsel at Hearing

84. In specifically denying a respondent accused of rape the right to have counsel present at the hearing, the University violated its promise of fundamental fairness and the implied covenant of good faith and fair dealing. In fact, the Sexual Assault Policies and Procedures itself recognizes that the potential for criminal prosecution makes an attorney's involvement critical. A respondent like Doe -- accused of rape -- is faced with a difficult choice: (a) defend himself at the campus hearing with the potential for self-incrimination or, at least, discovery for the state prosecutor; or (b) guard against criminal exposure by not contesting the school's charges and virtually ensuring expulsion. The stakes are enormous, and fundamental fairness requires that the accused be represented by counsel at the hearing, as does the implied covenant of good faith and fair dealing.

85. Self-incrimination issues aside, the notion of a student being able to defend himself competently in this intensely emotional situation is absurd. An accused student in this situation is bound to be intimidated -- as Doe was -- and cannot be expected to prepare and deliver his version of the facts in a coherent and logical manner. Doe should not have been forced to go it alone without counsel, and a Consultant/Hearing Advisor -- a non-lawyer forbidden from speaking at the hearing -- is no substitute. For these reasons as well, the University violated its promise of fundamental fairness and the implied covenant of good faith and fair dealing.

E. Breach of Obligation to Provide Written Statements of All Witnesses

86. The Sexual Assault Policies and Procedures provides that "at the beginning of the hearing," the complainant and the respondent will each "have an opportunity to see the other report/s [i.e., witness statements]."

87. Although Doe was provided a copy of A.B.'s first written statement immediately prior to the hearing, he was not provided any other witness statements prior to or at the hearing. Nor was he provided A.B.'s second written statement until long after the hearing and appeal process had concluded. The failure to provide these witness statements is a breach of the obligation set forth in the preceding paragraph as well as the promise of fundamental fairness and the implied covenant of good faith and fair dealing. These breaches prevented Doe from presenting an effective defense, and seriously prejudiced him.

F. Breach of Promise that All Persons with Relevant Information Will Be Permitted to Testify

88. The Sexual Assault Policies and Procedures makes this promise: "Any witnesses that have information pertaining to the incident will be given a chance to [testify]." This promise gave Doe the right to call any person with relevant evidence as a witness.

89. The University breached this promise when Dean Hartman told Doe something entirely different: (a) Hartman and the Committee "would provide all the witnesses"; and (b) Doe was permitted to call only one witness, a character witness. Hartman's misrepresentation prevented Doe from presenting an effective defense and seriously prejudiced him. It also breached the promise of fundamental fairness and the implied covenant of good faith and fair dealing.

G. Breach of Obligation to Disclose Exculpatory Evidence

90. In order to ensure the fairness required by the contract, the University had an ongoing obligation to disclose to Doe any exculpatory evidence, including the details of A.B.'s use of prescription medication, whenever the University first learned those facts. The refusal and failure to provide such information was a breach of the promise of fundamental fairness and of the implied covenant of good faith and fair dealing.

91. The University's ongoing obligation to disclose exculpatory evidence also included a duty to provide Doe, well before the hearing, a copy of the report created by the Sewanee Police Department, an arm of the University, after investigating A.B.'s charge of rape. The University has, to this day, refused to provide a copy of this report to Doe or his counsel. This refusal was and is a breach of the promise of fundamental fairness and of the implied covenant of good faith and fair dealing. The same is also true with regard to the hospital records of A.B.'s examination on August 30, which, like the police report, was reviewed by the Committee.

H. Breach of Obligation to Provide an Unbiased Disciplinary Tribunal

92. The Sexual Assault Policies and Procedures' promise of fundamental fairness and the implied covenant of good faith and fair dealing obligated the University to provide an unbiased disciplinary tribunal and to guarantee that the outcome of the hearing was not predetermined. The University breached these obligations.

93. Although the Sexual Assault Policies and Procedures does not designate a person to serve as a prosecutor in the disciplinary process or even state that someone should fill that role, Dean Hartman served as the prosecutor. His doing so tainted the entire process, beginning with his appointment of his subordinate as the investigator; his failure to give timely, proper, and adequate notice to Doe; his prejudicial scheduling of the hearing; his misrepresentation to Doe as to Doe's right to call witnesses; and, finally, his triple role at the hearing of prosecutor, fact

finder, and sentencing judge. Upon information and belief, as the Chair of the Committee, he dominated the decisionmaking process and ensured that Doe would be found guilty of Category 1 sexual assault. Hartman's demonstrated bias was so pervasive as to destroy any possibility of fairness in the hearing process.

I. Breach of Obligation to Provide a Trained, Competent Disciplinary Tribunal

94. The Sexual Assault Policies and Procedures' promise of fundamental fairness and the implied covenant of good faith and fair dealing obligated the University to provide a competent disciplinary tribunal whose members had been appropriately trained. Upon information and belief, none of the panel that heard Doe's case had any training in adjudication; in the law; in the weighing of evidence; in what type of conduct constitutes sexual assault; or in the relevance or irrelevance of particular types of evidence in the alleged sexual assault setting. The University thus breached its promise of fundamental fairness and the implied covenant of good faith and fair dealing.

95. The University's breach of its obligation to provide a trained, competent disciplinary tribunal deprived Doe of a fair hearing and seriously prejudiced him.

96. The hearing panel's lack of training had an additional harmful and prejudicial dimension in that they failed to recognize the need for expert testimony to assist them in their consideration of the evidence and in their decisionmaking. A.B.'s testimony at the hearing revealed that (a) she suffers from narcolepsy and takes two types of medication for that condition: one drug to help her sleep at night and another drug to keep her wakeful during the day; (b) she took her nighttime medicine early in the evening of August 29; (c) she also takes "mood stabilizers"; and (d) she "could tolerate some alcohol" while taking these medications.

97. This testimony was a red flag that could not be ignored by a conscientious and competent tribunal. But the hearing panel never even inquired as to A.B.'s narcoleptic

symptoms or what specific drugs she was taking. Had the hearing panel sought the advice of a medical expert(s), they would have not only made those critical inquiries, they would have learned about the side effects of such drugs, the consequences of the drugs' interaction with each other, and the effects of combining those drugs with alcohol.

98. Had the hearing panel sought the advice of a medical expert(s) and inquired as to what drugs A.B. was taking, they would have, upon information and belief, likely learned that (a) A.B.'s evening narcolepsy medication was gamma-Hydroxybutyric acid, or Xyrem, which is also used to treat clinical depression and alcoholism; (b) her morning medication was Modafinil, or Provigil, a wakefulness drug also used as an adjunct to anti-depressants; and (c) "mood stabilizers" are used to treat depression and bipolar disorder, sometimes called manic depression.

99. Had the hearing panel sought the advice of a medical expert(s), they would have, upon information and belief, received information that would have assisted them in evaluating how this cocktail of psychotropic drugs and alcohol in A.B.'s system could have affected (a) her appearance to Doe; (b) her behavior that night; (c) her reaction to the sexual encounter; (d) her memory of the sexual encounter the following day; and (e) her susceptibility to paranoia, mood swings, or other unstable behavior. A neurological or psychiatric expert also could have provided information regarding how any depression and/or bipolar disorder suffered by A.B. may have affected her emotional response to a sexual act.

100. Had the hearing panel sought the advice of a medical expert(s), they would have been able to recognize A.B. as a person with serious chemical and psychological issues. Such information would have unquestionably been relevant to the weighing of evidence by the hearing panel.

101. Later in the semester, A.B., upon information and belief, dropped out of school to enter a drug and/or alcohol rehabilitation program.

J. Breach of Obligation to Afford Opportunity for Confrontation and Cross-Examination

102. Although the Sexual Assault Policies and Procedures states only that the complainant and the respondent are not to be permitted in the hearing room at the same time, Doe was permitted in the hearing room only when he was testifying.

103. This barring of Doe from the hearing room for nearly the entire proceeding breached the express provisions of the Sexual Assault Policies and Procedures, which prohibited his presence only when the complainant was in the room. Upon information and belief, the complainant was only present when she testified. Barring Doe from the hearing room also breached the promise of fundamental fairness and the implied covenant of good faith and fair dealing.

104. These breaches were egregious in that Doe was deprived of the opportunity to confront the University's evidence, a key component of fundamental fairness. Moreover, the rule prohibiting the accused from being in the hearing room when the complainant is present is in direct conflict with the promise of fundamental fairness and the implied covenant of good faith and fair dealing.

105. When there are allegations of student-on-student sexual misconduct, a hearing panel has a heightened responsibility to weigh the credibility of both parties. Typically, there are no third-party witnesses, and consensual foreplay often precedes an alleged date rape. Barring the accused from hearing the complainant's testimony cannot be squared with fundamental fairness.

106. Similarly, in situations like this one, where the fact of intercourse is not in dispute and consent is the sole contested issue, the importance of cross-examination is magnified. Denying Doe any form of cross-examination breached both the promise of fundamental fairness and the implied covenant of good faith and fair dealing.

K. Breach of Obligation that There Be Sufficient Evidence to Support the Panel's Finding

107. The Sexual Assault Policies and Procedures has no specific provision addressing either the presumption of innocence or the assignment of the burden of proof. Both the promise of fundamental fairness and the implied covenant of good faith and fair dealing require that Doe have been presumed innocent and that the University had the burden of proof. The administrative record, such as it is, demonstrates that the University breached these obligations.

108. At the conclusion of the hearing, the three faculty panel members each told Doe that they thought that he was telling the truth but that he failed to "understand the situation" because he was inexperienced with alcohol and did not recognize that A.B. was incapacitated. They also stated that Doe had "made a mistake." Hartman repeated these comments to Doe later that evening.

109. As set forth above, the offense of Category 1 sexual assault requires "rape," which is defined as including "vaginal intercourse . . . through . . . incapacitation" by a person who knew or should have known of that incapacitation. As defined, the offense clearly calls for proof of *mens rea* on the part of the accused: intentionally having sex with a partner that the accused knows or should know is incapacitated. The statements of Hartman and the rest of the hearing panel in the previous paragraph are incompatible with the University having proved that Doe knew or should have known that A.B. was incapacitated. The panel's own words demonstrate that the University did not carry its burden of proof.

110. Moreover, the burden of proof that the University had to meet is said in the Sexual Assault Policies and Procedures to be a "preponderance of the evidence." That term is then defined as a "51% certainty that the respondent is responsible for a violation of the sexual assault policy." That definition -- a preponderance is a "51% certainty" -- is not to be found in the law of Tennessee or anywhere else. In any event, given the serious nature of the charge -- rape -- the promise of fundamental fairness and the implied covenant of good faith and fair dealing required the University to use a "clear and convincing" burden of proof.

111. Regardless of the burden of proof actually used by the Committee -- even if a true preponderance of the evidence standard -- the University did not adduce sufficient evidence to support the panel's finding and, as a result, that finding is arbitrary and capricious. In fact, the University's General Counsel has stated that she has been unable to determine the basis of the panel's finding.

L. Breach of Obligation that a Record Be Made of the Hearing

112. The Sexual Assault Policies and Procedures contains this provision: "Hearings of the committee will not be recorded unless special permission is requested and granted by the chair." Having been deprived of meaningful pre-hearing access to any advisor by the University and Dean Hartman, Doe did not make such a request.

113. The failure to require that an audio or stenographic record be made of sexual assault hearings is a breach of both the promise of fundamental fairness and the implied covenant of good faith and fair dealing. There is no reason, cost or otherwise, why a record cannot be made of every sexual assault hearing. Further, there was no legitimate reason for Hartman to instruct Doe to destroy his copies of the written materials related to the charges and the hearing, which was also a breach of both the promise of fundamental fairness and the implied covenant of good faith and fair dealing.

114. An appeal of a sexual assault finding is available as of right under the University's procedures, but that right is illusory and a sham without a verbatim record of the hearing.

M. No Meaningful Right of Appeal

115. The appeal available to Doe was to Vice Chancellor Cunningham, as set forth in the general student disciplinary system procedures.

116. In order to take meaningful advantage of the right to appeal, Doe needed to be able to point to an error or fundamental unfairness in the record. There was, however, nothing resembling a true record of the hearing -- only witnesses' statements with panel members' notes on them. This record was *not* provided to Doe before his appeal, and he had, in accordance with Dean Hartman's directions, destroyed whatever documents he possessed relating to the hearing.

117. Upon information and belief, Cunningham did not have training in adjudication; in the law; in the weighing of evidence; in what types of conduct constitutes sexual harassment or sexual assault; or in the relevance or irrelevance of particular types of evidence in the alleged sexual assault setting.

118. Despite the absence of any real evidentiary record and any relevant training, Cunningham was nevertheless able to conclude that "the preponderance of the evidence supports the conclusions and the judgment reached by the Committee and the Dean."

119. This "appeal" was illusory and a sham, and breached the promise of fundamental fairness and the implied covenant of good faith and fair dealing.

N. Summary

120. All of the foregoing breaches of contract were wrongful, without lawful justification or excuse, prejudicial, and were part of an effort to achieve a predetermined result in Doe's case: a finding that he had committed a Category 1 sexual assault. As a direct and foreseeable result of these breaches of contract, plaintiffs have sustained, and will continue to

sustain, substantial injury, damage, and loss, including, but not limited to: mental anguish; severe emotional distress; injury to reputation; past and future economic loss; deprivations of due process; loss of educational and athletic opportunities; and loss of future career prospects.

COUNT II
(Promissory Estoppel)

121. Plaintiffs incorporate paragraphs 1 though 120 as if fully pleaded.

122. As described above, the Sexual Assault Policies and Procedures and the other official University publications constitute promises that the University should have reasonably expected to induce action or forbearance on the part of the plaintiffs. The University should have expected plaintiffs to accept its offer of admission to Doe and to incur the cost of tuition and related expenses based on the University's representations that it would honor its express and implied promises, including that of fundamental fairness and the implied covenant of good faith and fair dealing.

123. Plaintiffs relied to their detriment on these express and implied promises and representations made by the University.

124. Injustice can only be avoided by enforcement of the University's promises and representations.

125. As a direct and foreseeable result of the University's failure to honor its promises and representations, plaintiffs have sustained, and will continue to sustain, substantial injury, damage, and loss, including, but not limited to: mental anguish; severe emotional distress; injury to reputation; past and future economic loss; deprivations of due process; loss of educational and athletic opportunities; and loss of future career prospects.

COUNT III
(Declaratory Judgment – Title IX and Clery Act)

126. Plaintiffs incorporate paragraphs 1 through 125 as if fully pleaded.

127. As set forth above, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, and the regulations promulgated thereunder require a school receiving federal funds to "adopt and publish grievance procedures providing for the prompt and equitable resolution of student . . . complaints" alleging any form of sexual harassment, including sexual assault.[13] These procedures must "accord[] due process to both parties involved . . . ."[14]

128. The "prompt and equitable" procedures that a school must implement to "accord due process to both parties involved" must include, at a minimum, those listed in paragraph 22 *supra*. Among those minimal requirements are (a) "[n]otice . . . of the procedure"; (b) "[a]dequate, reliable, and impartial investigation of complaints"; (c) "the opportunity to present witnesses and other evidence"; and (d) "[d]esignated and reasonably prompt timeframes for the major stages of the complaint process." A school must also ensure that all employees involved in the conduct of the procedure have "adequate training as to what conduct constitutes sexual harassment," which includes "alleged sexual assaults."[15]

129. As set forth above, the Clery Act states that both "the accuser and the accused are entitled to the same opportunities to have others present during a campus disciplinary proceeding."[16]

130. As written, the University's student disciplinary process, including the Sexual Assault Policies and Procedures, violates Title IX and the regulations thereunder, which have the force of law, including the requirements that the procedures comport with due process and be "prompt and equitable." Those violations, which are described above, include, but are not

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13 *See supra* ¶ 20 & n.4.

14 *See supra* ¶ 21 & n.5.

15 *See supra* ¶¶ 22-23 & nn.6 & 7.

16 *See supra* ¶ 24 & nn.8 & 9.

limited to, the following: (a) denial of the right to counsel at the hearing to a respondent accused of rape; (b) denial of the rights of confrontation and cross-examination; (c) no requirement that an accurate audio or stenographic record be made of the hearing; (d) the use of a burden of proof in rape cases less stringent than a "clear and convincing" standard; and (e) the lack of a meaningful right to an appeal because no record of the hearing was required.

131. As implemented, the University's student disciplinary process, including the Sexual Assault Policies and Procedures, violates Title IX and the regulations thereunder, which have the force of law, including the requirements that the procedures comport with due process and be "prompt and equitable." Those violations, which are described above, include, but are not limited to, the following: (a) the Dean of Students' appointment of a subordinate to be the investigator, when the Dean of Students acts as the prosecutor throughout the process as well as serving as the Chair of the Faculty Discipline Committee; (b) the appointment of an untrained individual to be the investigator; (c) the failure to provide an unbiased disciplinary tribunal by allowing the Dean of Students to serve as prosecutor, fact finder (as Chair of the Faculty Discipline Committee), and sentencing judge; (d) the failure to provide appropriate training for the members of the Faculty Discipline Committee; and (e) the failure to provide appropriate training for the appellate officer, the Vice Chancellor.

132. As applied to Doe, the University's student disciplinary process, including the Sexual Assault Policies and Procedures, violated Title IX and the regulations thereunder, which have the force of law, including the requirements that the procedures comport with due process and be "prompt and equitable." Those violations which are described above, include, but are not limited to, the following: (a) the prejudicial timing of the notice to Doe and the scheduling of the hearing, which denied him a reasonable time to seek appropriate advice and assistance and to

properly prepare his defense; (b) the deficient content of the written notice to Doe, both as to the description of the allegations and the identity and expected testimony of witnesses; (c) the failure of the investigator to "meet with each of the students involved in the alleged incident as well as any possible witnesses" as required by the Sexual Assault Policies and Procedures; (d) proceeding with the charge against Doe and convening a hearing of the Faculty Discipline Committee when there was not sufficient evidence to convince an unbiased tribunal of Doe's guilt; (e) failing to provide Doe with copies of all witness statements "at the beginning of the hearing" as required by the Sexual Assault Policies and Procedures; (f) depriving Doe of his right to call any person with relevant evidence as a witness as stated in the Sexual Assault Policies and Procedures; (g) breaching the ongoing duty to disclose exculpatory evidence to Doe; (h) the finding of the Faculty Discipline Committee that Doe committed rape even though there was not sufficient evidence to support such a finding; (i) Hartman's direction to Doe to destroy his written materials relating to the charges and the hearing; (j) the affirmance of the Committee's finding on appeal even though the Vice Chancellor had no record of the hearing and thus could not conclude legitimately or in good faith that "the preponderance of the evidence supports the conclusions and judgment reached by the Committee and the Dean"; (k) otherwise acting to achieve a predetermined result, i.e., a finding that Doe committed rape.

133. As applied to Doe, the University's student disciplinary process, including the Sexual Assault Policies and Procedures, violated the Clery Act in that the timing of the notice of the hearing and the scheduling of the hearing deprived Doe of the same opportunity as A.B. to have witnesses present at the hearing.

134. Pursuant to the provisions of 28 U.S.C. §§ 2201, 2202, and 1651, Doe is entitled to (a) a declaratory judgment that the University's student disciplinary process, including the

Sexual Assault Policies and Procedures, is, as written, contrary to Title IX (including its due process requirements); (b) a declaratory judgment that the University's student disciplinary process, including the Sexual Assault Policies and Procedures, is, as implemented, contrary to Title IX (including its due process requirements); (c) a declaratory judgment that the University's student disciplinary process, including the Sexual Assault Policies and Procedures, is, as applied to Doe, contrary to Title IX (including its due process requirements) and the Clery Act; and (d) further necessary or proper relief.

COUNT IV
(Title IX – Damages)

135. Plaintiffs incorporate paragraphs 1 through 134 as if fully pleaded.

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

137. As set forth above, the University's actions in the investigation and adjudication of the allegations against Doe were wrongful, willful, intentional, reckless, in clear violation of Title IX's requirements, and constituted an effort to achieve a predetermined result: a finding that Doe had committed a Category 1 sexual assault. The University was also deliberately indifferent to the effects of its actions on plaintiffs.

138. As a direct and proximate result of the University's actions, plaintiffs have sustained, and will continue to sustain, substantial injury, damage, and loss, including, but not limited to: mental anguish; severe emotional distress; injury to reputation; past and future economic loss; deprivations of due process; loss of educational and athletic opportunities; and loss of future career prospects.

COUNT V
(Negligence)

139. Plaintiffs incorporate paragraphs 1 through 138 as if fully pleaded.

140. Having put in place a student disciplinary process, including the Sexual Assault Policies and Procedures, the University owed a duty of care to plaintiffs and others to conduct that process in a non-negligent manner and with due care.

141. The applicable standard of care is informed by the law of Tennessee and by the requirements of Title IX and the Clery Act.

142. The University's conduct, as described above, fell below the applicable standard of care and amounted to a breach of the University's duty of care.

143. Moreover, the timing of the notice of the hearing and the scheduling of the hearing deprived Doe of the same opportunity as A.B. to have witnesses present at the hearing. This deprivation, in violation of the Clery Act, was also a breach of the University's duty of care.

144. The University's breaches of the duty of care caused plaintiffs, in fact and proximately, to sustain substantial injury, damage, and loss, including, but not limited to: mental anguish; severe emotional distress; injury to reputation; past and future economic loss; deprivations of due process; loss of educational and athletic opportunities; and loss of future career prospects.

COUNT VI
(Negligence *Per Se*)

145. Plaintiffs incorporate paragraphs 1 through 144 as if fully pleaded.

146. Both Title IX and the Clery Act create statutory duties that the University was obligated to perform.

147. Plaintiffs are persons within the protection of Title IX and the Clery Act and are intended to be benefited thereby.

148. The University's violations of these statutes and its failure to perform its duties thereunder as described above, have proximately caused injury to plaintiffs, constitute negligence *per se*, and are actionable.

149. The University's breaches caused plaintiffs, in fact and proximately, to sustain substantial injury, damage, and loss, including, but not limited to: mental anguish; severe emotional distress; injury to reputation; past and future economic loss; deprivations of due process; loss of educational and athletic opportunities; and loss of future career prospects.

COUNT VII
(Gross Negligence)

150. Plaintiffs incorporate paragraphs 1 through 149 as if fully pleaded.

151. As set forth above, the University has engaged in conduct that amounts to ordinary negligence and negligence *per se*.

152. The University's actions were taken with such a reckless disregard for the rights of others that a conscious indifference to consequences is implied in law. The University's actions evidence a conscious neglect of duty, a callous indifference to consequences, and such an entire want of care as would raise a presumption of a conscious indifference to consequences.

153. The University has acted willfully, intentionally, and recklessly. The University was reckless in that it was aware of, but consciously disregarded, a substantial and unjustifiable risk of injury or damage to plaintiffs. The University's disregard of this risk was a gross deviation from the standard of care.

154. The University's gross negligence has caused plaintiffs, in fact and proximately, to sustain substantial injury, damage, and loss, including, but not limited to: mental anguish; severe

emotional distress; injury to reputation; past and future economic loss; deprivations of due process; loss of educational and athletic opportunities; and loss of future career prospects.

COUNT VIII
(Negligent Training and Supervision of Employees)

155. Plaintiffs incorporate paragraphs 1 through 154 as if fully pleaded.

156. Investigator Bruce, Dean Hartman, the three faculty members of the hearing panel, and Vice Chancellor Cunningham were employees of the University at all material times.

157. As described above, these employees lacked the proper training in order to carry out their responsibilities under the student disciplinary system, the Sexual Assault Policies and Procedures, Title IX, and the Clery Act.

158. As alleged above and below, these employees committed negligent, grossly negligent, and intentional tortious acts that caused injuries to plaintiffs.

159. The University knew, or in the exercise of due care, should have known of these employees' lack of training and inability to carry out their responsibilities under the student disciplinary system, the Sexual Assault Policies and Procedures, Title IX, and the Clery Act.

160. The University's negligent failure to train and supervise these employees directly and forseeably caused injuries to plaintiffs. Had the University taken appropriate steps to train and supervise these employees, such steps would, more probably than not, have prevented the injuries.

161. The University's breach of its duty to ensure proper training and adequate supervision for these employees proximately caused plaintiffs to sustain substantial injury, damage, and loss, including, but not limited to: mental anguish; severe emotional distress; injury to reputation; past and future economic loss; deprivations of due process; loss of educational and athletic opportunities; and loss of future career prospects.

COUNT IX
(Negligent Infliction of Emotional Distress)

162. Plaintiffs incorporate paragraphs 1 through 161 as if fully pleaded.

163. The University's conduct described above was negligent and involved numerous breaches of the standard of care.

164. It was reasonably foreseeable that these breaches of the standard of care would cause plaintiffs mental anguish, severe emotional distress, and serious mental injury.

165. These breaches of duty did actually and proximately cause plaintiffs mental anguish, severe emotional distress, and serious mental injury, as well as other substantial injury, damage, and loss.

COUNT X
(Reckless Infliction of Emotional Distress)

166. Plaintiffs incorporate paragraphs 1 through 165 as if fully pleaded.

167. The University's conduct described above was willful, intentional, and reckless, and the University acted in deliberate disregard of a high degree of probability that plaintiffs would suffer mental anguish, severe emotional distress, and serious mental injury as a result.

168. The University's conduct did actually and proximately cause plaintiffs mental anguish, several emotional distress, and serious mental injury, as well as other substantial injury, damage, and loss.

COUNT XI
(Intentional Infliction of Emotional Distress)

169. Plaintiffs incorporate paragraphs 1 through 168 as if fully pleaded.

170. The University's conduct described above was extreme and outrageous; done willfully and intentionally without regard to the consequences for plaintiffs; and was part of an effort to achieve a predetermined result in Doe's case: a finding that he had committed Category

l sexual assault. As such, the conduct was so outrageous that it is not tolerated by civilized society.

171. The University's conduct did actually and proximately cause plaintiffs mental anguish, severe emotional distress, and serious mental injury, as well as other substantial injury, damage, and loss.

COUNT XII
(Unjust Enrichment)

172. Plaintiffs incorporate paragraphs 1 through 171 as if fully pleaded.

173. As set forth above, Doe's parents paid the University approximately $22,000 for tuition, room, board, and other expenses related to the fall 2008 semester. After Doe's departure, the University refused to refund any portion of the sum paid.

174. Plaintiffs, in paying the $22,000, conferred a benefit on the University, which the University accepted. Under the circumstances set forth above, it would be inequitable for the University to retain the pro rata portion of the benefit attributable to the remainder of the semester.

175. In order to avoid the University's unjust enrichment at plaintiffs' expense, plaintiffs are entitled to an award of damages in the amount that the University has been unjustly enriched.

RELIEF REQUESTED

WHEREFORE, plaintiffs pray for judgment against defendant and ask this Court to:

1. issue a judgment that (a) declares the University's investigation, prosecution, and adjudication of the charge against Doe to be contrary to the University's contractual and other obligations, its own rules and regulations, contrary to law, and arbitrary and capricious; (b) declares the University's student disciplinary process, including the Sexual Assault Policies

and Procedures, as written, as implemented, and as applied to Doe, to be contrary to Title IX (including its due process requirements) and the Clery Act; (c) sets aside the decision of the Faculty Discipline Committee (as affirmed by the Vice Chancellor) as contrary to the University's own rules and regulations, contrary to law, unsupported by substantial evidence, and arbitrary and capricious; (d) requires the University to expunge the entire incident from the University's records; (e) requires the University's records to reflect that Doe left the University in good standing with no disciplinary record whatsoever and to so represent in the event of any third-party inquiry; and (f) declares the University's conduct to be wrongful, willful, intentional, and reckless.

2. issue a permanent injunction that directs the University to comply with Title IX (including its due process requirements) and the Clery Act;

3. award plaintiffs compensatory damages in an amount to be determined at trial, but not less than $1,000,000, for mental anguish, severe emotional distress, serious mental injury, injury to reputation, past and future economic loss, deprivations of due process, loss of educational and athletic opportunities, loss of future career prospects, and other injuries proximately caused by the wrongful conduct of the University and its employees;

4. award plaintiffs compensatory damages in the amount that the University has been unjustly enriched by its wrongful conduct;

5. award plaintiffs punitive damages in an amount to be established at trial, but not less than $2,000,000, to punish the University for its wrongful, willful, intentional, and reckless conduct;

6. award plaintiffs their attorney's fees, disbursements, and costs pursuant to the provisions of 42 U.S.C. § 1988(b) (relating to Title IX), or pursuant to any other statute or common law doctrine providing for the award of attorney's fees, disbursements, and/or costs;

7. award prejudgment interest; and

8. grant such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury of all claims so triable.

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