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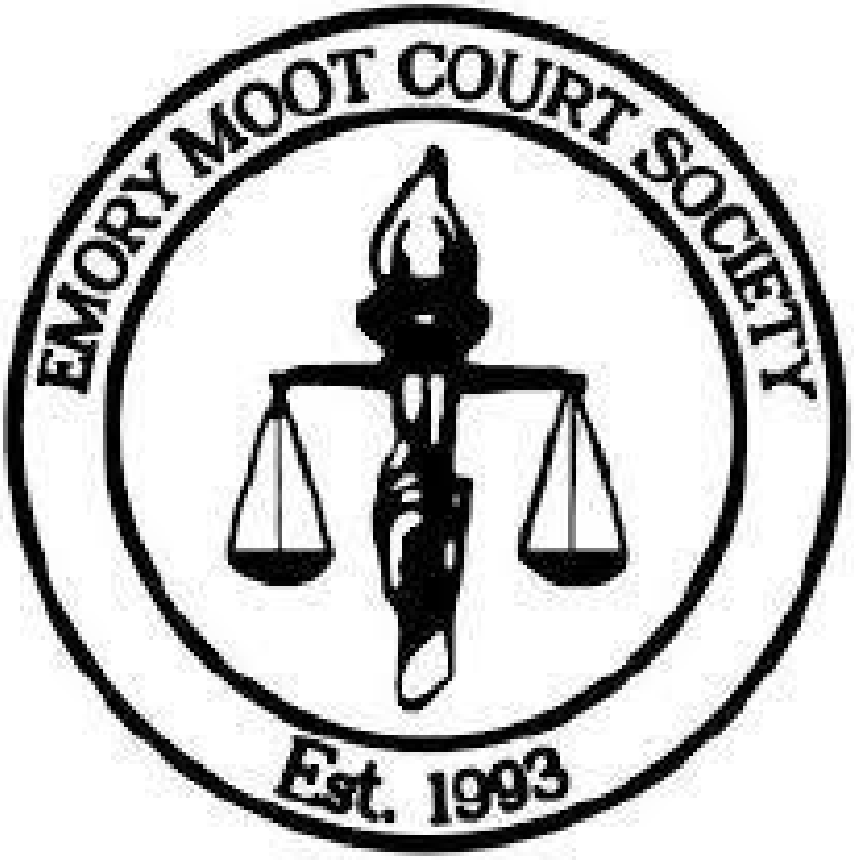

Seventeenth Annual Civil Rights and Liberties Moot Court Competition

No. 23-1008

In the
United States Court of Appeals
for the
Thirteenth Circuit

Jane Doe,
Petitioner,

V.

Board of Regents for Sycamore State University
Respondent.

TRANSCRIPT OF THE RECORD

2023 Civil Rights and Liberties Moot Court Competition

Emory University School of Law
17th Annual Civil Rights and Liberties
Moot Court Competition
October 13 – October 15, 2023
Atlanta, Georgia

INSTRUCTIONS

1. Do not cite to any case that was decided after July 31, 2023.

2. Students are not to argue whether the alleged harassment occurred or the veracity of the harassment itself. Focus on the individual merits of the specific claims. **The alleged harassment is not at issue**.

3. Assume that all motions, defenses, and appeals were timely filed in accordance with the Federal Rules of Civil Procedure.

4. When citing to record, use the page numbers on the footer of each page.

5. A team may make a request for questions and clarifications relating to the competition problem. Any such request must be emailed by a team member or student coach to emorymootcourt@gmail.com with the subject line "Problem Clarification" by Sunday, September 10, 2023 at 11:59 p.m. EST. All clarifications will be posted on the CRAL website at http://www.law.emory.edu/cral.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

JANE DOE, Plaintiff, v. BOARD OF REGENTS FOR SYCAMORE STATE UNIVERSITY, Defendant.	)	Civil Action File No. 23-CV-01234

ORDER CERTIFYING ISSUE ON APPEAL

The United States District Court for the Northern District of Sycamore granted dismissal in favor of Defendant Sycamore State University and denied Plaintiff Jane Doe's request for a permanent injunction and compensatory damages.

This Court hereby certifies the following issues for appeal:

I. Whether Doe's claim for injunctive relief is moot now because after the commencement of litigation, the University altered its sexual harassment policy to eliminate the general requirement of eye-witness corroboration, and because Doe has deferred enrollment and is not enrolled for the upcoming semester?

II. Whether the University can be liable for damages under Title IX for student-on-student sexual harassment, even if the student victim experienced just one specific incident of harassment, and the student victim did not suffer additional acts of harassment after she reported it to the University?

Entered this 22th day of May, 2023.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF SYCAMORE

JANE DOE, Plaintiff, v. BOARD OF REGENTS FOR SYCAMORE STATE UNIVERSITY, Defendant.	)	Civil Action File No. 23-CV-01234

AMENDED **COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES UNDER TITLE IX**

1. This is an action under Title IX for injunctive relief and damages for failure to protect the Plaintiff from sexual harassment and sexual assault at Sycamore State University.[1]

Parties

2. Plaintiff, JANE DOE ("Plaintiff" or "Doe") is an individual residing at [Redacted]. Doe is a 19-year-old female student at Sycamore State University studying Mathematics.

3. Defendant, BOARD OF REGENTS FOR SYCAMORE STATE UNIVERSITY ("Defendant" or "The University") is a federally funded higher education institution located at 1224 MacMillan Avenue, Gambrell, Sycamore 21243.

[1] Plaintiff initially filed suit on March 14, 2023, but has amended Complaint to include evidence from the Sycamore Student Herald and to address Defendants post-filing elimination of the eye-witness policy as indicated herein.

Jurisdiction and Venue

4. This is an action arising under the United States Constitution, particularly the Fourteenth Amendment, and under federal law, particularly Title IX, challenging Defendant's handling of matters of harassment in its educational institution.

5. The Court has personal jurisdiction over the parties because the Defendant is located in the Northern District of Sycamore and the Plaintiff has minimum contacts in the state of Sycamore.

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331.

7. Venue is proper in the Northern District of Sycamore under 28 U.S.C. § 1391 because this claim arose there and because the Defendant is located within the District.

8. This Court has the authority to issue the requested injunctive relief under Fed. R. Civ. P. 65 and 28 U.S.C. § 1343(a)(3) and to grant damages under 28 U.S.C. § 1343(a)(1).

Facts Giving Rise to Doe's Claims for Relief

9. On or about August 27, 2022 Doe auditioned for and received an offer to join the Sycamore State Mathletes. The new Mathletes team captain, John Cooke, ran the try-outs. August 27, 2022 was Doe's first time meeting Cooke.

10. In their first conversation on August 27, 2022, Cooke invited Doe to his Sigma Phi fraternity house's party to be held that evening. Doe accepted the invitation.

11. Upon information and belief, Sigma Phi has been a prior subject of similar complaints that were either rejected or given mild consequences by the University. See *Sycamore Student Herald Article* attached hereto as **Exhibit A**.

12. The evening of August 27, 2022, Doe attended Cooke's party, had one drink, and felt dizzy and nauseous.

13. Upon information and belief, Doe's drink was spiked with a sedative substance at the Sigma Phi fraternity party.

14. Doe asked Cooke, the only person she knew at the party, for a private place to rest.

15. Cooke directed Doe to his room where she passed out for an unknown matter of time, presumably hours.

16. In the early morning hours of August 28, 2022, Doe awoke to Cook on top of her with his pants down and her dress "hiked up."

17. Doe asked Cook "What are you doing?" He did not respond. Doe "instinctively crossed [her] legs," to which Cooke, realizing she was now awake, pinned her arms down beside her so that she could not move her upper body.

18. Doe responded by kicking him in his genital area with her knee, causing him to fall off of her and the bed.

19. On August 29, 2022, Doe attended her first day of classes feeling "numb."

20. On or about the evening of August 29, 2022, Doe went to her first Mathletics team practice where she was confronted by Cooke who told her, "I'm sorry for what happened the other night. The first party of the year can get crazy."

21. Doe experienced severe anxiety and flashbacks to a point where she started "shaking," which did not stop until the end of the two-hour team practice.

22. Doe experienced this same reaction every time she was "forced" to be in the same vicinity as Cooke, making it "impossible for [her] to focus" on the math at hand.

23. On or about September 2, 2022, Doe reported the assault to the University's Title IX coordinator, Linda Curt. See *Title IX Incident Report* attached hereto as **Exhibit B**.

24. On or about September 3, 2022, Doe received an email from Linda Curt, who informed Doe that she required an eyewitness for the investigation to move forward. See *Linda Curt Email from September 3, 2022,* attached hereto as **Exhibit C**.

25. Doe had been on campus for less than a week and knew no one other than Cook at the time. She could not find an eyewitness.

26. On or about September 25, 2022, nearly a month after the initial incident, Cook was questioned by Mrs. Curt.

27. Cooke testified that while he did invite Doe to the frat party, he did not remember seeing her that night. Two other members of his fraternity, Brody Green and Chase Li, both testified on Cook behalf that they were with him most of the night and do not remember seeing Doe either. See *Linda Curt Email from September 5, 2022,* attached hereto as **Exhibit D**.

28. Doe, being so new to the University and not knowing anyone besides Cooke at the University, could not offer any witness names to testify to her account of the night of the 27th.

29. On or about September 26, 2022, Doe received an email from Mrs. Curt notifying her that her claim did not meet the standard to institute remedial action against Cooke.

30. Curt recommended Doe meet with the University's mental health counselor.

31. Doe was not advised of her right to appeal by Ms. Curt, although she had knowledge of her right via the University's website.

32. September 30, 2022, Doe rescinded her acceptance and scholarship to the Mathletics team, as she could not sufficiently perform as her assailant's subordinate, as it caused her anxiety and stress. Doe subsequently lost her $10,000 scholarship.

33. On or about December 25, 2022, Doe notified her parents of the aforementioned facts, and the family decided that Doe would not return to the University for at least one semester and would likely defer enrollment the following semester in compliance with the University's deferment policy.

34. The eye-witness requirement for sexual harassment investigations was eliminated by Defendant one week after the filing of this lawsuit.

COUNT I
VIOLATION OF TITLE IX - INJUNCTIVE RELIEF

35. Plaintiff, JANE DOE, realleges and incorporates paragraphs 1-30 as if fully set forth herein.

36. Plaintiff immediately reported the attempted rape to the Student Protection Office and was assigned a Title IX Coordinator.

37. Defendant University has a Code of Conduct ("the Policy") that outlines expectations and procedures for resolving disputes in the school setting.

38. The Policy further provides for the process of resolution should an individual face sexual harassment within the University.

39. The Policy provides in pertinent part:

> "All students bringing a claim for, or accused of, actual or attempted rape must have eye-witness, evidentiary corroboration for the University to sufficiently and fairly assess all sexual harassment claims and to take appropriate and timely remedial action. If neither party has an eye-witness, only then may alternative evidentiary materials be presented."

Sycamore State University Code of Conduct, section 9.1.12 (2022).

40. Plaintiff did not have eye-witness evidence.

41. Plaintiff's perpetrator, John Cooke presented two accounts of eye-witness evidence to the contrary.

42. Plaintiff was unable to present any further witness evidence under the University's policy.

43. Defendant's handling of Plaintiff's sexual harassment claim violated Title IX by prohibiting her from providing evidence in the absence of an eye-witness when her perpetrator provided eye-witness evidence to the contrary.

COUNT II
VIOLATION OF TITLE IX - DAMAGES

44. Plaintiff, JANE DOE, realleges and incorporates paragraphs 1-30 as if fully set forth herein.

45. Plaintiff suffered an attempted assault at the hands of another student, John Cooke of the Sigma Phi fraternity.

46. Plaintiff reported the attempted sexual assault to her campus Title IX coordinator, Linda Curt.

47. The Defendant University had knowledge of the assault and knowledge of Sigma Phi's history of sexual assault.

48. Plaintiff suffered severe and pervasive injury in her performance in academics and feelings of belonging on campus.

49. Plaintiff's injury compelled her to resign from the Mathletes Team to avoid her perpetrator, losing a $10,000.00 scholarship.

50. Plaintiff deferred her enrollment due to the injury.

51. The harassment suffered by Plaintiff was objectively offensive in nature.

52. Defendant University did not conduct a fair investigation and is in violation of Title IX as the harassment was severe, pervasive, and objectively offensive in nature and the perpetrator student was not appropriately disciplined.

Prayer for Relief

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment against Defendant and provide Plaintiff the following relief:

(a) A preliminary and/or permanent injunction prohibiting the Defendant from requiring eye-witness corroboration for sexual harassment investigations and requiring Defendant to engage in all reasonable efforts to protect her from further harassment.

(b) Nominal, compensatory, and other damages against Defendant in an amount determined by a jury.

Respectfully submitted this 10th day of April, 2023.

THE SYCAMORE STUDENT HERALD

Sycamore State's History of Complacency in Sexual Assault Claims on Campus

EXHIBIT A

April 12, 2023
By: Nirmala Sharma | Sycamore State Women's League

Sycamore State University has remained complacent in a longstanding history of sexual assault and harassment on campus, standing behind and defending the charter of Sigma Phi, the most egregious perpetrators.

It is clear that the University does not care about the corruption occurring in the school community. In 2017, the Sycamore State Women's League (SSWL) was created in response to the #MeToo movement, to advocate for the needs of women on campus. The SSWL has engaged in policy advocacy, petitions, protests, and on-campus engagement in hopes of creating a safer and more positive space for Sycamore State's female population.

The SSWL's main goal has been to amend the Code of Conduct that has long perpetuated a culture of protection for the men on campus. However, every year since, the University has denied the efforts made to amend the Code of Conduct.

When asked for a statement on this, University President David Marcelle stated: "Our policy is in place to protect all students and we stand by it for that reason." What President Marcelle fails to acknowledge is that since 2017, Sigma Phi and its members alone have been at the center of over 20 sexual harassment investigations between 2018-2020. Only one of these investigations have resulted in the victim, a female student, receiving any sort of remedial action in her favor.

The Sycamore State Code of Conduct has allowed perpetrators of sexual violence to hide behind stringent evidentiary requirements. Sigma Phi members abuse this unbalanced policy by having their fraternity brothers vouch for their innocence as eyewitnesses. This is not a coincidence.

This Sexual Assault Awareness Month, on behalf of all female students, the Sycamore State Women's League calls for the University to revoke Sigma Phi's charter and to amend the Code of Conduct that has protected perpetrators of sexual violence for too long.

TITLE IX INCIDENT REPORT

STUDENT PROTECTION OFFICE
SYCAMORE STATE UNIVERSITY
Gambrell, Sycamore
Incident Report No. 1053
Incident Reported: September 2, 2022

EXHIBIT B

Incident Type Sexual Harassment		**Alleged Offense** Attempted Rape; Potential Drugging	
Time of Incident 1:19 a.m.	**Date of Incident** August 28, 2022	**Location of Incident** Sigma Phi Fraternity House 667 Woodruff Lane, Gambrell, Sycamore 21243	
Title IX Coordinator Linda Curt lcurt@sycamorestateu.edu		**Persons Present** [Jane Doe], 18 John Cooke, 20	
Permanent Address [Redacted]	**Date of Birth** [Redacted]	**Race/Ethnicity** [Redacted]	**Gender** Woman

Student Narrative

I was invited to a party at the Sigma Phi house by John Cooke. He said it was to celebrate the new Mathletes Team as some sort of initiation. I had never been to a frat party before, there were a lot of people at the house. I got a drink from the keg and was enjoying the night. After a while I started feeling sick, I think my drink was spiked with something other than alcohol. I found John because he was the only person I knew. He took me to his room to rest and I passed out. I do not know how long I was out for, but it felt like hours. I woke up around 1 a.m. to John on top of me. His pants were down, and my dress was hiked up. I instinctively crossed my legs and he pinned me down once he realized I was awake. I kicked him in his groin with my knee and he fell off the bed.

I began classes the next day but I felt numb throughout them. I had difficulty focusing on the material. August 29th was also the first day of Mathletes practice. I saw John and instantly started feeling anxious and having flashbacks to that night. I started shaking during practice. John came up to me and told me “I’m sorry for what happened the other night, the first party of the year can get crazy.” Being forced to be near him made it nearly impossible for me to focus on the math at hand.

Curt, Linda <lcurt@sycamorestateu.edu>
To: [Jane Doe] <[redacted]>
September 3, 2022

EXHIBIT C

Good morning [Jane Doe],

I am in receipt of your Title IX incident report. In the interest of fairness, and consistent with University policy, you must locate at least one eyewitness to corroborate your story in order to activate remedial action against Mr. Cooke.

I understand this is a sensitive subject and I want you to know I take my job as an investigator very seriously. Unfortunately, given University resources, we cannot possibly act on every single incident of harassment based on he-said/she-said evidence, or lack thereof. I urge you to find an eyewitness if possible so that we may move forward. The same is being asked of Mr. Cooke.

For your reference, the University policy on sexual harassment claims can be found in the student Code of Conduct, section 9.1.12 (2022).

Wishing you the best,
Linda

Title IX Coordinator
Student Protection Office
Sycamore State University

Curt, Linda <lcurt@sycamorestateu.edu>
To: [Jane Doe] <[redacted]>
September 26, 2022

EXHIBIT D

Good morning [Jane Doe],

I am emailing to let you know that my investigation of your claim is now closed. Mr. Cooke was able to present two eyewitnesses that assert the alleged harassment could not have occurred should their testimony be true. We have no way to verify their testimonies as there were no cameras surveilling the party, but we can say we interviewed Mr. Cooke's corroborators separately, and they both confirmed they were with Cooke for the extent of the night of the 27th. This is consistent with the Sycamore State University Code of Conduct, section 9.1.12 (2022).

I would recommend seeing the University's mental health counselor at this time.

Sincerely,
Linda

Title IX Coordinator
Student Protection Office
Sycamore State University

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF SYCAMORE

JANE DOE, Plaintiff, v. BOARD OF REGENTS FOR SYCAMORE STATE UNIVERSITY, Defendant.	)	Civil Action File No. 23-CV-01234

OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

DOOLEY, District Judge:

This is a suit for injunctive relief and damages brought by Plaintiff and University Student Jane Doe[2] against Defendant Board of Regents for Sycamore State University ("Sycamore State University" or "the University"), the institution in which she attends and alleges the sexual harassment took place. Plaintiff seeks to enjoin Defendant from requiring a corroborating eyewitness in its sexual harassment investigation policy and seeks an order protecting her form further harassment. This Court has subject matter jurisdiction and personal jurisdiction over the parties. This case was heard on the Defendant's Motion to Dismiss. This is an issue of first impression for this Court.

I. BACKGROUND

The facts, as alleged by the Plaintiff, are as follows…

A. THE PARTIES

Sycamore State University is a public university located in Gambrell, Sycamore. The University is especially known for its science and math departments, drawing out-of-state students from all over the country. The University has a competitive Mathletics Team ("the Team") that competes as a twelve-person team at a Regional Competition every November, and should they advance, they compete at a National Competition every spring. The Sycamore State Mathletes consistently perform very well in competitions and have won every Nationals competition for the last four years. As such, participating students are awarded a $10,000 annual scholarship from the University if they compete in at least one competition that school year.

[2]Parties do not dispute the anonymous status of Jane Doe.

Jane Doe, a then eighteen-year-old freshman studying mathematics at Sycamore State University (the "University") alleges she was sexually assaulted in an attempted rape by then twenty-year-old junior, John Cooke. Ms. Doe is an out-of-state student who was residing in the University dormitories located on campus. Ms. Doe specifically selected Sycamore State University for her studies because of the Team's reputation and the scholarship opportunity.

Prior to the alleged assault, Doe met Cooke at the Mathletics Team tryouts, as he was and will remain the Mathletics Team Captain until his approaching graduation in May 2023. Cooke, as the captain of the Team, has the authority to remove members and has the duty to train all new members. Doe auditioned for the Team and was invited on as a member on August 27th, 2022. Succeeding the tryouts, Cooke invited Doe to a party at his fraternity house, Sigma Phi.

B. THE SCHOOL POLICY

Sycamore State University has a Code of Conduct that outlines expectations and procedures for resolving disputes in the school setting. The Code of Conduct includes a sexual harassment policy ("the Policy") that prohibits the sexual harassment or abuse of, or by, all persons within the University system. The policy extends to all individuals including, by way of illustration and not by way of limitation, all students, employees, independent contractors, applicants for employment, visitors, and all other non-employees who transact business within the university with or without compensation.

The policy further provides for the process of resolution should an individual face sexual harassment within the University. At the time Doe reported her alleged attempted rape, the policy provided as follows:

> "All students bringing a claim for, or accused of, actual or attempted rape must have eye-witness, evidentiary corroboration for the University to sufficiently and fairly assess all sexual harassment claims and to take appropriate and timely remedial action. If neither party has an eye-witness, only then may alternative evidentiary materials be presented" Sycamore State University Code of Conduct, section 9.1.12 (2022).

The policy has remained largely the same since its inception, however most recently it has been amended to remove language requiring eye-witness corroboration for the first time. This amendment came one week after Doe filed her initial complaint. The policy now provides as follows:[3]

> "All students bringing a claim for, or accused of, actual or attempted rape are recommended, but not required, to have evidentiary corroboration for the University to sufficiently and fairly assess all sexual harassment claims and to take appropriate and timely remedial action." Sycamore State University Code of Conduct, section 9.1.12 (2023).

[3] Every spring, Sycamore State University revises its sexual harassment policy for the upcoming school year.

To date since amending the Policy, the University has implemented the Policy one time in a sexual harassment investigation. In such case, the University did not require the use of eye-witness corroboration from either the alleged victim or perpetrator. While the University never asked for eye-witness corroboration, neither party had access to an eye-witness.

University policy also provides for enrollment deferment for one semester for students who have already been enrolled and attended one full semester of school. Typically, students who defer for longer than one semester are ineligible for re-enrollment. A student who is ineligible for re-enrolment after more than one semester of deferment may appeal for re-enrolment for exceptional circumstances.

C. THE ALLEGED HARASSMENT

The case at hand pertains to Sycamore State University freshman, Jane Doe, who alleges that in the early morning hours of Saturday, August 28th, 2022, her drink was spiked at a Sigma Phi fraternity party. Doe alleges she then asked John Cooke, a fellow member of and captain of the Team, to take her somewhere private where she could overcome her dizziness and nausea from the perceived drugging. She then alleges Cooke took her back to his room where, after resting for a few hours, awoke to Cooke hunching over her.

Doe claims she suffered an "attempted rape" as Cooke's pants were down, her dress was "hiked" up, and Cooke "pinned" her arms beside her body once he realized she had awoken. Doe kicked Cooke in his genitals, releasing his grip, giving her the opportunity to escape the situation and return to her dorm room.

Doe reported the incident the next day to the University's Title IX coordinator, Linda Curt. Curt works in the Student Protection Office (SPO) and has been the lead investigator on all reports of sexual harassment since August 2016.

Doe met with Curt the following week. Curt told her that absent direct evidence, Doe needed to point to an eyewitness corroborator to compel the school to take remedial action. Curt explained to Doe how the University could not possibly act on every single incident of harassment based on he-said/she-said evidence or lack-thereof. Doe, having attended the school for a little over a week at that point, did not know anyone who could serve as a corroborating eyewitness. After Cooke pointed to two eyewitness corroborators, Brody Green and Chase Li, Doe was notified that the investigation had ceased and that no remedial action would be taken. Doe was advised to attend free counseling at the University's mental health counselor. Doe was unable to present any further evidence pursuant to the University's Policy. Doe did not appeal this decision, although she had knowledge of the right to do so via the University's website.

Ms. Doe alleges that the University demonstrated deliberate indifference in violation of Title IX by failing to instate remedial measures in the absence of an eye-witness. She alleges that she has suffered irreparable injury as a result of the University's deliberate indifference to the sexual harassment she suffered on its campus.

Doe was a freshman member of her school's Mathletics Team, and Cooke was the captain, giving him a level of control over her. This fact, alongside an apparently weak apology from Cooke, triggered a trauma response from Doe in the form of shaking, flashbacks, and

nervousness every time she was in Cooke's presence. Naturally, this made her performance on the Team suffer and her circumstances untenable. Consequently, Doe quit the Team, losing a $10,000 scholarship, in which she relied on, as a result.

In December of 2022, Doe detailed the harassment and the lack of a response by the University to her parents. Together, they made the decision to defer admission to the University for at least one semester and stated that Doe "would likely" return the following semester.

II. DISCUSSION

A. PLAINTIFF'S INJUNCTIVE RELIEF CLAIM

To be cognizable in federal court, a suit must touch on a "real and substantial controversy admitting of specific relief through a degree of conclusive character." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). Ms. Doe's claim for injunctive relief as to the sexual harassment policy is moot because there is no longer a cognizable case or controversy for a federal court to resolve. A federal court has no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. *Mills v. Green*, 156 U.S. 651, 653 (1895); *see also Hayburn's Case*, 2 Dall. 409, 1 L.Ed. 436 (1792), as interpreted in *Muskrat v. United States*, 219 U.S. 346, 351—353, 31 S.Ct. 250, 251—252, 55 L.Ed. 246 (1911) (it is not the role of the courts to issue advisory opinions).

Ms. Doe seeks injunctive relief to require the university to take all reasonable steps to prevent further harassment including but not limited to permanently eliminating the eye-witness corroboration requirement in the University's Policy. Traditionally, other courts have rarely found that voluntary cessation moots a controversy where changes occur in the midst of litigation. *Sheely v. MRI Radiation Network, P.A.,* 505 F.3d 1173, 1183 (11th Cir. 2007). The University contends that where subsequent events make it absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur, the challenge to the voluntarily-ceased conduct becomes moot. *See Knights of Columbus Star of Sea Council 7297 v. City of Rehoboth Beach, Delaware*, 506 F.Supp.3d 229 (D. Del. 2020). We agree with the Defendant University.

The voluntary cessation doctrine allows for the possibility of mootness in certain circumstances. *Id.* A case is only moot by voluntary cessation if the changes made fundamentally alter the relationship of the parties such that there is no reasonable expectation that the complaining party will be subject to the same action again. *Horton v. City of St. Augustine, Fla.*, 272 F.3d 1318, 1326-30 (11th Cir. 2001). Here, the Univeristy's Policy has been amended to no longer require the use of eye-witness corroboration for the resolution of sexual harassment claims. Since amending the Policy, the University has implemented the New Policy in accordance with the language of the Policy, and has not required the use of eye-witnesses. Moreover, Ms. Doe has failed to demonstrate that she will return to the University after her deferral or that, if she returns, further harassment is likely given the actions already taken by the University. Moreover, the University's deferment policy clearly states that a student who has completed at least one semester at the University, as Doe has, is ineligible for re-enrollment. While Ms. Doe has the option to appeal, she has not initiated that action yet.

Ms. Doe argues that the New Policy has only been implemented once, in a situation where eyewitnesses were unavailable to both parties. Thus, Ms. Doe's Title IX complaint would be resolved the same under the New Policy as it was under the original policy because only she lacked eyewitnesses. While Ms. Doe does not believe this proves the University will never return to the eye-witness requirement in the future, this Court is not convinced. Even though the University made this change one week after litigation commenced, there is no reasonable expectation that the University will return to enforcing a Policy that is no longer in effect. *See Jews for Jesus, Inc. v. Hillsborough County Aviation Authority*, 162 F.3d 627 (11th Cir. 1998) (holding that a claim for injunctive relief was moot where an airport changed its policy after the commencement of litigation and ceased enforcing the old policy).

Ms. Doe argues that the University's requirement of having eye-witness corroboration is likely to recur because the former Policy was a "continuing practice or was otherwise deliberate." *See Sheely*, 505 F.3d at 1183. Ms. Doe also argues that the University's justification for changing the Policy due to annual review was an "extremely general" justification given that since its inception, the University had not changed the sexual harassment Policy until then. *See U.S. v. Government of Virgin Islands*, 363 F.3d 276 (3rd Cir. 2004). Since the University annually reviews the Policy, we find that there was no evidence that the University made such change to defeat jurisdiction in this case, specifically. *See Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010).

In evaluating the likelihood of recurrence, courts usually focus on two factors: timing and defense of past policies. *Knights of Columbus*, 506 F.Supp.3d at 229; *see also Government of Virgin Islands*, 363 F.3d at 276. We find this case to be more comparable to that of *Knights of Columbus*, wherein the defendants justified changing a policy after the commencement of litigation because the proposed amendment was added to the City Commissioners' agenda before the plaintiff filed its suit. 506 F.Supp.3d at 229. At that time, defendants had no knowledge that the plaintiff would seek a preliminary injunction and thus the policy was not adopted in response to the plaintiff's motion. *Id.* Similarly here, the University's Policy amendment was already on the calendar, as the University reviews its policies annually. The University did not decide to review the Policy simply because Ms. Doe filed suit against it, rather the review was already underway as it had been every year prior.

Courts are without power to decide questions that cannot affect the rights of the litigants before them. *Rice*, 404 U.S. at 246. As such, if an event occurs while a case is pending that makes it impossible for the court to grant "any effectual relief whatever" to a prevailing party, it must be dismissed. *Mills*, 156 U.S. at 653; *see also Church of Scientology of California v. United States*, 506 U.S. 9 (1992). The University has changed its sexual harassment Policy to no longer require the use of eye-witness corroboration, just as Ms. Doe sought with her complaint for injunctive relief. Because the University has ceased requiring eyewitnesses, the only policy for which Ms. Doe sought an injunction to stop, the relief sought would not remedy Ms. Doe's alleged injury. Having found that none of the relief sought by respondent would likely remedy its alleged injury in fact, we must conclude that respondent lacks standing to maintain this suit and thus it is moot. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998).

Moreover, Ms. Doe is not currently enrolled at the University, having deferred her enrollment after the alleged incident. Doe has not even shown that she is definitely returning to the university after her deferment. Because she is not a currently attending student, her claim for

injunctive relief against the University is moot and not even capable of repetition, yet evading review. Even if the Policy never changed, the granting of the injunction would not provide Ms. Doe with any effectual relief because she has deferred her enrollment. *See Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000) (holding that a State university was entitled to vacation of injunctive relief in Title IX failure to accommodate suit, where named plaintiffs' claims were moot due to graduation). Since Ms. Doe is not an actively-attending student, no effectual relief may be granted to her and her claim of injunctive relief is moot. Defendant's motion to dismiss is therefore GRANTED.

B. PLAINTIFF'S TITLE IX DAMAGES CLAIM

Congress passed Title IX in 1972 with the goal of eradicating sex discrimination in educational institutions that receive public funds. Education Amendments Act of 1972, 20 U.S.C. §§1681-1688 (2018) ("No 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."). While Congress explicitly set out that educational institutions can be liable for sex discrimination under Title IX, Congress was less clear as to the circumstances that would trigger that liability, specifically in cases of student-on-student sexual harassment. *Id.* The Supreme Court attempted to alleviate this confusion in *Davis v. Monroe County Board of Education*, establishing that individuals have an implied private right to education under Title IX, and thus "[a] private damages action may lie against a school board under Title IX in cases of student-on-student harassment, but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities, and only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." 526 U.S. 629, 633 (1999). Ms. Doe initiated this suit on the ground that the University's response to her report of attempted rape made her vulnerable to further harassment by effectively forcing her to work alongside and under the control of her assailant on the Mathletics Team or lose her $10,000 scholarship. Ms. Doe claims her harassment was so severe, pervasive, and objectively offensive that this ultimatum was a false choice, as there were no circumstances in which working alongside Mr. Cooke was bearable to her, consequently depriving her of equal access to the University's opportunities and benefits.

In its Motion to Dismiss, the University argues that Doe, having only suffered one incident of sexual harassment preceding its knowledge, has failed to causally link its responsive actions to her alleged injury. *Kollaritsch v. Michigan State University Board of Trustees*, 944 F.3d 613 (6th Cir. 2019) ("At least one more (further) incident of harassment, after the school has actual knowledge and implements a response, is necessary to state a claim."); Fed. R. Civ. P. 12(b)(6). Essentially, the University argues that it cannot be "deliberately indifferent" to harassment of which it is unaware. *Id.* This Court agrees. In *Davis*, the Supreme Court held that a school acts with "deliberate indifference" if its response to known harassment is "clearly unreasonable in light of the known circumstances." *Davis*, 26 U.S. 629-630 ("If a recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment, i.e., at a minimum, causes students to undergo harassment or makes them liable or vulnerable to it."). The circuits interpret this language differently. This Circuit, the Thirteenth, has yet to strictly follow a specific interpretation. We find that the Sixth Circuit's interpretation of *Davis* in *Kollaritsch* is correct,

that unless the alleged drugging and assault "would not have happened but for the clear unreasonableness of the school's response," we cannot hold the University liable under Title IX. 20 U.S.C.A. § 1681(a); *Kollaritsch*, 944 F.3d 619-620; *Borkowski v. Balt. Cty.*, 492 F. Supp. 3d 454 (D. Md. 2020).

Doe asserts two theories of deliberate indifference: the University acted with deliberate indifference (1) when it promulgated an eyewitness corroboration policy that made it impossible for Doe, and victims alike, to access remedial justice without eyewitness corroboration, fostering a toxic on-campus environment where assault went unpunished and thus encouraged; and (2) when it failed to grant remedial measures to Doe despite knowing she worked with her perpetrator on the Team as his underling, making her vulnerable to further harassment. *See Doe v. Fairfax Cnty. Sch. Bd.*, 10 F.4th 406, 412 (4th Cir. 2021) ("When a student experiences sexual assault at the hands of a peer…their school must not respond with indifference, so as to leave the student vulnerable to further attacks."). The *Davis* Court commanded that a school's deliberate indifference must "subject" the student victim to harassment, meaning, the response of the University must cause the student to suffer a subsequent incident of harassment. *Davis*, 526 U.S. at 630. Here, Doe's harassment preceded the University's knowledge and did not recur post-knowledge. While we are empathetic to Doe's obvious predicament, we cannot hold the University liable for Doe's alleged harm. *Kollaritsch*, 944 F.3d at 615 (holding that "a [student-victim's] subjective dissatisfaction with the school's response is immaterial to whether the school's response caused the claimed Title IX violation.").

Even if Doe dealt with further harassment after she notified the University's Title IX coordinator, the University's response was not "clearly unreasonable" in that the "school's disciplinary and remedial responses were reasonably tailored to the findings of [its] investigation." *Stiles ex rel. D.S. v. Grainger Cty.*, Tenn., 819 F.3d 834, 851 (6th Cir. 2016). The University led a fair investigation in accordance with their policy, albeit strict, asking both Doe and Cooke for corroborators, resulting in Cooke's peers confirming his alibi. It is not "clearly unreasonable" that a school, in attempting to prevent unnecessary and unfair punishment required, and now recommends, students to provide at least one person to corroborate parts of or all of his or her accusation or alibi. *Id.*

The University concedes, for purposes of the Motion to Dismiss before the Court, that the harassment as alleged was "objectively offensive" and "severe." *See Doe v. Univ. of Ky.*, 959 F.3d 246, 248 ("Severe means something more than just juvenile behavior…and objectively offensive means behavior that would be offensive to a reasonable person under the circumstances…"). Instead, the University argues at this stage that the harassment cannot be defined as "pervasive" pursuant to *Davis* and *Kollaritsch*, and thus does not satisfy the injury requirement. 526 U.S. at 652-653 ("pervasive" means "systemic" or "widespread,"); 944 F.3d 613 (holding that "pervasive" means the victim suffered more than one incident of harassment). This Court agrees. To demonstrate the University was put on notice of "widespread" or "systemic" harassment prior to her assault, Doe points to a public records request detailing 20 reports of sexual harassment and assault made against Cooke's fraternity in the 2018-2020 school years, only one of which resulted in remedial action against the perpetrator. *See* Exhibit A; *Ostrander v. Duggan*, 341 F.3d 745, 750 (8th Cir. 2003). Doe misinterprets the application of these terms. "Widespread" or "systematic" harassment must happen to the same victim plaintiff for it to be actionable. *See*

Kollaritsch, 944 F.3d at 620 (quoting *Davis*, 526 U.S. at 652–53) ("although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such [systemic] effect, [it is] unlikely that Congress would have thought such behavior sufficient."). We agree that Doe was effectively deprived of equal access to the Team and its scholarship as a result of her harassment, but we cannot find the University responsible for it; the University did not have a duty to protect Doe from unequal access to those educational opportunities, because old reports of harassment made by victims other than Doe do not count towards the pervasiveness of Doe's alleged harassment, nor does the University's knowledge of past allegations then mean that it had actual knowledge of Doe's harassment. The Defendant's motion to dismiss on Doe's Title IX claim for damages is therefore GRANTED.

III. HOLDING

This Court holds that Ms. Doe's claim for injunctive relief is moot and therefore should be dismissed. The University appropriately ceased its challenged conduct, with no evidence of potential recurrence, by properly amending its sexual harassment policy to no longer require eye-witness corroboration. It is not clear that Doe is returning to the university. We hold that the fact that the University changed this Policy after the commencement of litigation is irrelevant, as the Policy is subject to annual review and change. Finally, Ms. Doe has deferred her enrollment and thus has mooted her claim by no longer being an actively attending student of the University.

Furthermore, this Court holds that Ms. Doe has not presented a plausible claim demonstrating that the University acted with deliberate indifference, because the University cannot be liable for just one incident of sexual harassment that preceded its knowledge. Doe did not sufficiently demonstrate that the sexual harassment in which she allegedly suffered was "pervasive," in that it was "systemic," or "widespread," because Doe did not suffer more than one incident of harassment. Whether the University had knowledge of similar reports made against Cooke's fraternity preceding the alleged assault is irrelevant in determining whether the University had actual knowledge of the present harassment. Therefore, Ms. Doe has failed to allege sufficient facts to support her Title IX damages claim against the University.

WHEREFORE, IT IS HEREBY ORDERED: Defendant's Motion to Dismiss as to the Injunctive Relief Claim is GRANTED. Defendant's Motion to Dismiss as to the Title IX damages claim is also GRANTED. Accordingly, Plaintiff's Requests for a Permanent Injunction and Compensatory Damages are DENIED.

Entered this 21st day of April, 2023.