UH Law Center
UNIVERSITY OF HOUSTON

HUNTON ANDREWS KURTH
MOOT COURT
NATIONAL CHAMPIONSHIP

2023 Competition Problem

KYLER PARK,
Petitioner

v.

QUICKSILVER STATE UNIVERSITY,
Respondent

(ORDER LIST: 597 U.S.)

MONDAY, October 10, 2022

CERTIORARI GRANTED

21-8289 PARK, KYLER V. QUICKSILVER STATE UNIVERSITY

The petition for writ of certiorari is granted limited to the following questions: 1) Whether a student accused of misconduct in a university disciplinary proceeding has a right, under the Fourteenth Amendment and Title IX, 20 U.S.C. § 1681 et seq., to direct and unfettered cross-examination of witnesses and to insist that such witnesses testify without face coverings? 2) Whether the term “costs,” as used in Federal Rule of Civil Procedure 41(d), includes attorney’s fees?

UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

No. 21-4601

KYLER PARK,
Plaintiff-Appellant,

v.

QUICKSILVER STATE UNIVERSITY,
Defendant-Appellee.

Filed: October 18, 2021

Appeal from the United States District Court
for the District of Quicksilver
(D.C. No. 20-cv-7615)

Before GROSS, FERNANDEZ, and WALT, Circuit Judges.

OPINION

GROSS, Circuit Judge.

Appellant, Kyler Park, was expelled from Quicksilver State University following a campus disciplinary proceeding in which Park was accused of violating the university's policies prohibiting sexual misconduct. Park contends his expulsion, and the circumstances leading thereto, violated his constitutional due-process rights

under the Fourteenth Amendment. Park further contends the Appellee, Quicksilver State University, violated Park's rights under Title IX, 20 U.S.C. § 1681 *et seq.*, which prohibits discrimination on the basis of sex. Finding no error, we AFFIRM.

I.

A.

Kyler Park had just completed his junior year at Quicksilver State University ("QSU") when he was expelled for violating the university's policies prohibiting sexual misconduct.

The alleged misconduct occurred on March 14, 2020, when Park engaged in sexual intercourse with a female student, Jane Roe. Park contends his encounter with Roe was consensual. Roe disagrees. She says she was too intoxicated to consent to sex, that Park knew she was intoxicated, and that Park assaulted her.

Most of the facts are undisputed. Before their encounter on March 14, 2020, Park and Roe were casual acquaintances. On the night in question, they ran into each other at a bar inside a movie theater and, recognizing each other, sat down to talk. Park, who was of legal age, purchased one alcohol drink and gave it to Roe,[1] who was underage. Roe drank it. After talking for approximately an hour, Park and Roe walked back to Roe's dorm room on campus, and there they engaged in sexual intercourse.

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[1] The record does not indicate whose idea this was.

There were no identified witnesses to any of these events other than Park and Roe. The encounter took place during Spring Break, after most students had left campus, and neither Park nor Roe knew any other person in the movie-theater bar.

In the three days following their encounter, Roe called Park several times. The content of these telephone calls is disputed.

According to Park, during those calls Roe seemed happy and repeatedly expressed interest in a romantic relationship with Park, referring to herself as his "girlfriend" and to him as her "boyfriend." Park claims he told Roe that he considered their encounter a one-time "hookup" and that he was not interested in a romantic relationship with her. Park claims Roe responded angrily to that news and that she threatened to report Park for assaulting her.

Roe's account of those telephone calls is very different. Roe claims she called Park because she vaguely recalled seeing him at the movie theater but, due to her intoxication level, did not remember what happened afterward until she remembered awakening to find Park engaging in intercourse with her. She says she called Park to find out what had happened that night.

On March 23, 2020, after QSU resumed classes following Spring Break, Park was notified by QSU's Division of Student Affairs that Park had been accused of violating QSU's Code of Student Conduct ("CSC"), specifically, that that he had allegedly "committed acts of sexual abuse, unwanted sexual contact, and dating

violence." Park was further informed that QSU had scheduled a student conduct hearing (the "Hearing") for May 20, 2020 to adjudicate the alleged violations.

Later that week, QSU formally canceled all in-person classes for the spring semester because of the outbreak of the COVID-19 pandemic. In the roughly two months between the filing of disciplinary proceedings and the hearing, QSU assigned an investigator, Ali Mills, who interviewed both Roe and Park. No additional witnesses could be located to corroborate either Roe's or Park's accounts of the events from March 14.

B.

Although QSU canceled all in-person classes for the Spring semester, QSU nevertheless held the Hearing in-person as scheduled on May 20, 2020. The stated reason why the Hearing was held as scheduled was that QSU had determined that certain changes would be made to the CSC after that school year and before the next school year,[2] and QSU decided that the CSC policies that would govern the Hearing should be those policies that were in place for the 2019-20 school year when the alleged assault occurred.

The Hearing Board was composed of five employees and students appointed by the Vice Chancellor for Student Affairs, Tory Nichols. Roe attended the hearing in person. So did Park, accompanied by his attorney.

[2] These CSC amendments would respond to the new Title IX regulations announced by the Department of Education in May 2020.

Because of the ongoing COVID-19 crisis, all persons in attendance were required to wear face coverings during the Hearing.

Several aspects of the Hearing are of particular relevance to Park's contentions in his lawsuit and in this appeal, so we describe them here. Pursuant to the CSC, neither party was permitted to "directly" cross-examine the other, either personally or through an attorney. Instead, Roe and Park were allowed to submit requested questions to the Hearing Board; the Board would decide which questions were acceptable; and the Board itself would question the witnesses.

Park requested that Roe be required to remove her face covering while speaking or answering questions. Roe refused, and the Board denied Park's request. Park then asked the Board to require Roe to testify *remotely* without a face covering, to assuage her safety concerns. But Roe insisted upon being physically present during the Hearing, and the Board denied Park's request.

The Board's approach to questioning Roe and Park was dictated by QSU policy. The university's manual for its Hearing Board instructed the Board to prioritize student comfort at the expense of rigorous examination. Specifically, the Board was to start any examination by calming the student with "easy" questions, to avoid leading questions whenever possible, and to avoid "pursuing a line of questions" because of the concern that "pressing a traumatized student for too many details can be very adversarial and can increase the risk of trauma to the student." The manual also excused the Board from

having to "observe the rules of evidence usually followed by courts" and provided that the Board could exclude "unduly repetitious or irrelevant evidence."

Park submitted numerous questions, both initially and in follow-up, regarding Roe's claim of intoxication. The Board asked most of Park's initial questions on the subject of intoxication but refused to ask many of Park's follow-up questions that sought to elicit further details or to impeach Roe's statements.

For example, Park had stated that, when he first saw and approached Roe, Roe was drinking a clear liquid which Park assumed to be non-alcoholic. Park claimed that, as far as he knew, the only alcoholic drink Roe consumed that night was the one Park had purchased and given to her.

Roe admitted that she was drinking a clear beverage when approached by Park, but she insisted it was alcoholic. Park urged the Board to press Roe for details as to the specific kind of alcohol Roe claimed to be drinking, but the Board refused Park's requests, deeming the proposed questions overly aggressive and irrelevant.

Roe also testified that she had consumed other alcoholic drinks before Park entered the movie-theater bar, but she could not remember how many. In response to Park's request that Roe produce receipts from the theater to show what Roe had ordered, Roe stated she had not retained the receipts from that evening. Park submitted follow-up questions in which he asked the Board to compel Roe to access her credit-card statement (on her smartphone) to provide the requested

information, but the Board refused Park's requests. The Board explained that such questions would be invasive of Roe's financial privacy and that her credit-card statements would not necessarily identify the beverage Roe had ordered, only the total amount of her charges.[3]

Park also submitted follow-up questions asking how Roe, who was underage, could have purchased drinks for herself. But the Board refused to ask those questions to avoid Roe's potentially implicating herself in possibly criminal conduct (*e.g.*, possessing a fake ID card).

Another area of dispute was Park's knowledge of Roe's intoxication. Park presented grainy security-camera footage from outside the bar. Park contends the video demonstrated that Roe did not appear intoxicated and had no difficulty walking. Roe responded, however, that she has excellent balance from many years of martial-arts training. The Board, at Park's request, asked follow-up questions asking whether Roe's credit-card statement would reflect any payments for martial-arts training; however, Roe responded that she trained in her father's karate dojo and did not have to pay for lessons. However, the Board refused to ask further questions submitted by Park in which Park argued Roe's father could not have operated a karate dojo because it was well known he was a car salesman; the Board deemed questions about Roe's father's occupation irrelevant.

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[3] It was undisputed that this movie-theater bar also charged patrons for non-alcoholic drinks, so the presence of credit-card charges on Roe's statement would not necessarily resolve the question whether her drinks were alcoholic.

At the completion of Roe's questioning, Park asked the Board to wholly disregard Roe's statements because the face covering she wore obscured most of her face and complicated efforts to assess her credibility. The Board declined Park's request.

The Board ultimately found against Park. Specifically, the Board found that Park's testimony was less credible than Roe's and that Park likely had committed acts of sexual misconduct prohibited by the CSC. The Board recommended expulsion, and Vice Chancellor Nichols, in agreement with the Board, expelled Park from QSU.

C.

On June 12, 2020, Park sued QSU in the District Court of Quicksilver, alleging QSU violated his civil rights under § 1983 by depriving him of due process and that QSU violated Title IX by reaching an erroneous outcome in his disciplinary proceeding because of Park's sex. *See* 20 U.S.C. § 1681 *et seq*.

Park's lawsuit was assigned to Judge John Kreese, who happens to be a QSU alumnus, a former member of the Omega Chi fraternity at QSU, and an outspoken supporter of QSU's football team, the Cobras.[4]

[4] Judge Kreese's Twitter page regarding all things QSU football and the Omega Chi fraternity, @CobraChi, boasts more than 347,000 followers.

On July 1, 2020, QSU moved to dismiss Park's lawsuit for failure to state a claim upon which relief could be granted. *See* FED. R. CIV. P. 12(b)(6).

The hearing on QSU's motion was conducted on the morning of July 22, 2020. Prior to the hearing, the district court began the day's proceedings, as that court always does, by asking those in attendance to join him in reciting the Pledge of Allegiance and in singing the QSU fight song, "Hail to Thee, Quicksilver State, and Quicksilver A&M Can Go to Hell."

Notwithstanding the court's obvious collegiate allegiance and outspoken social-media presence, the transcript from the hearing shows Judge Kreese listened carefully to both sides' arguments, asked numerous probing questions about the merits of each party's claims, and made no comment suggestive of bias toward either party. At the conclusion of the hearing, Judge Kreese did not announce any ruling on QSU's motion but instead stated that he would take the matter under advisement.

Later that afternoon, Park filed a voluntary dismissal of the lawsuit pursuant to Federal Rule of Civil Procedure 41(a)(1).

On September 21, 2020, Park refiled his lawsuit against QSU in district court, asserting the same claims as before. Park's second lawsuit was assigned to Judge Demetri Alexopoulos.[5]

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[5] Unlike some other federal districts, the District of Quicksilver does not prohibit the refiling of an action in an attempt to get a different judge. *See, e.g., United States v. City of Chicago*, 752 F. Supp. 252, 255 (N.D. Ill. 1990); *Collins*

QSU again filed a Rule 12(b)(6) motion. In addition, QSU filed a motion under Federal Rule of Civil Procedure 41(d), asking Judge Alexopoulos to find that Plaintiff acted in bad faith and/or vexatiously, and QSU asked the court to award QSU not only its costs but also its attorney's fees of $74,500.00.

Park promptly responded to QSU's Rule 12(b)(6) motion and also tendered affidavits from himself and his counsel, both of which denied that Plaintiff's actions in dismissing and refiling his lawsuit were motivated by bad faith or a desire to engage in vexatious litigation. Both affidavits (respectfully) expressed concerns about possible bias in the first court. Park's counsel's affidavit also explained the dismissal was prompted by counsel's desire to better study applicable law and to ensure Park's claims were supported by existing law or presented a good-faith basis for extension or modification of existing law. *See* FED. R. CIV. P. 11(b). QSU did not object to either affidavit and did not present counter-affidavits.

The court heard both of QSU's motions on December 17, 2020. At the conclusion of the hearing, the court

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v. Quintana, No. C15-1619RAJ, 2016 WL 337262, at *4 (W.D. Wash. Jan. 28, 2016) ("[T]o dismiss a claim 'without prejudice' means Plaintiff may refile the claim(s) in the same or different court."); *but see Hernandez v. City of El Monte*, 138 F.3d 393, 398 (9th Cir. 1998) ("Viewed as a whole, the circumstances presented could fairly support a determination that the plaintiffs were trying impermissibly to judge-shop in violation of C.D. Cal. R. 4.2.1, which states: 'It is not permissible to dismiss and thereafter refile an action for the purpose of obtaining a different judge.'").

granted both of QSU's motions but reduced QSU's fee award to $28,150.00. Judge Alexopoulos found as follows:

> The Court finds that Plaintiff's actions, in dismissing his first action and refiling the instant action, were *technically* motivated by a desire to gain a tactical advantage—or more appropriately, to eliminate a perceived tactical *disadvantage* in a different court in which Plaintiff believed (erroneously) that the court favored his opponent from the get-go. The Court finds that Plaintiff likely nonsuited his first action to avoid an unfavorable judgment on the merits.
>
> Nevertheless, the Court finds that Plaintiff's actions, although misguided, were not the result of bad faith.

Whatever the significance of the court's factual findings, the district court granted QSU's request for fees because the court interpreted Rule 41(d) as permitting the court to award attorney's fees as part of "the costs of that previous action." FED. R. CIV. P. 41(d)(1).

Park appealed from the district court's judgment.

II.

A.

Park's lawsuit was dismissed for failure to state a claim upon which relief may be granted. FED. R. CIV. P. 12(b)(6). We review the dismissal of Park's complaint *de novo*. *Zell v. Ricci*, 957 F.3d 1, 7 (1st Cir. 2020).

To avoid dismissal, a party's complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). At the pleading stage, a claimant need not demonstrate he is likely to prevail; nevertheless, a complaint must "possess enough heft to show that the pleader is entitled to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (cleaned up). That is, Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Further, a complaint's factual allegations must be "enough to raise a right of relief above the speculative level." *Twombly*, 550 U.S. at 555.

In reviewing Park's complaint, we will "isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements." *Zell*, 957 F.3d at 7 (citation omitted). We are required to accept the truth of all well-pled facts and to draw all reasonable inferences therefrom in the pleader's favor. *See id.* A "well-pled fact" is one that is non-conclusory and non-speculative. *Id.* Our ultimate goal is to see whether Park's well-pled facts "plausibly narrate a claim for relief." *Id.* (citation omitted). "Plausible, of course, means something more than merely possible, and gauging a pleaded situation's plausibility is a 'context-specific' job that compels us 'to draw on our judicial experience and common sense.'" *Id.* (citation omitted). Plausibility is not equivalent to *probability*, but a claimant must show "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

With these principles in mind, we turn to Park's specific due-process claims under § 1983.

B.

The Due Process Clause of the Fourteenth Amendment requires certain minimum procedures before an individual may be deprived of a liberty or property interest. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). The law is well-settled that these protections apply to higher-education disciplinary decisions, *see Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633 (6th Cir. 2005), and that a student's suspension or expulsion clearly implicates a property interest. *See Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 65 (1st Cir. 2019).

That said, the question remains "what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). To decide that question, we consult *Mathews*, in which the Supreme Court explained that the level of process required is determined by balancing three factors: (1) the nature of the private interest affected by the deprivation; (2) the risk of an erroneous deprivation under the governmental unit's current procedures and the probable value, if any, of additional or alternative procedures; and (3) the government's interest, including the burden imposed by additional procedures. *See Mathews*, 424 U.S. at 335. At a minimum, of course, due process requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id*. at 333 (citation omitted).

Nevertheless, disciplinary proceedings against students are not criminal trials and "need not take on many of those formalities." *Flaim*, 418 F.3d at 635. Notably for our purposes here, a full-scale adversarial trial is not required; instead, the focus should be on whether the student had an opportunity to "respond, explain, and defend," not whether the hearing mirrored a criminal trial. *Id*. at 635, 640 (citation omitted).

These principles, although well-settled, may take different forms as to different procedural questions involved in a university disciplinary proceeding. This case requires us to decide *Mathews*'s application to several of these procedural questions.

C.

Park's lead complaint—and the issue to which he devotes the majority of his briefing—challenges QSU's refusal to permit Park to cross-examine Roe "directly," that is, personally or through his attorney. Under QSU's Code of Student Conduct, in a disciplinary proceeding the involved students are not allowed to directly cross-examine witnesses, either personally or through counsel. Instead, involved students may submit requested questions to the Board. The Board may decide which questions are acceptable, and the Board itself questions the witnesses.

Park contends QSU's policy against direct examination violates his due-process rights to "adversarial cross-examination" under the Fourteenth Amendment.

This very question has been the subject of much discussion, by both the judiciary and the executive branch, over the last ten years or so. In 2011, the Department of Education, under President Obama, issued a letter commonly known as the "Dear Colleague" letter. *See* DEP'T OF EDUC., *Dear Colleague Letter* (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. The "Dear Colleague" letter provided guidance to universities on compliance with Title IX's requirements pertaining to sexual harassment and violence. *See id.* at 1. The "Dear Colleague" letter had sweeping ramifications across college campuses:

> [T]he now-famous "Dear Colleague" letter . . . ushered in a more rigorous approach to campus sexual misconduct allegations by defining "sexual harassment" more broadly than in comparable contexts and requiring that schools prioritize the investigation and resolution of harassment claims and adopt a lower burden of proof when adjudicating claims of sexual misconduct.

Rossley v. Drake Univ., 979 F.3d 1184, 1196 (8th Cir. 2020) (cleaned up).

After the "Dear Colleague" letter, universities across the country began revamping their policies regarding sexual misconduct. *See id.* Among other things, many universities adopted a lower preponderance-of-the-evidence standard to evaluate complaints of sexual misconduct. *See Dear Colleague Letter*, at 11 ("[I]n order for a school's grievance procedures to be consistent with

Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred).").

Schools also amended their policies regarding cross-examination to comply with the Department's exhortation that:

> OCR does not require schools to permit parties to have lawyers at any stage of the proceedings . . . . OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.

Id. at 12.

During the following administration, the pendulum would swing the other way when the Department of Education, under President Trump, rescinded the "Dear Colleague" letter and issued regulations that dramatically altered the requirements for disciplinary proceedings involving alleged sexual misconduct. *See* 34 C.F.R. § 106.45.

But in the intervening years between those two actions by the executive branch, numerous litigants filed lawsuits challenging the disciplinary procedures used by schools attempting to comply with the "Dear Colleague" letter. Thus, much of the opinions that have discussed and advanced the common law in this area have been issued during the last few years.

Some of the circuits have advocated somewhat different approaches to the question of what degree of cross-examination is required to satisfy due process.

However, there appears to be some uniformity on the basic concepts. First, as a general rule, the amount of due process owed the student depends upon the seriousness of the possible sanction. *See Goss v. Lopez*, 419 U.S. 565, 584 (1975); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400 (6th Cir. 2017). Second, in the school-disciplinary context, the opportunity to be heard requires "some kind of hearing." *Goss*, 419 U.S. at 579. Third, if the university's decision depends upon credibility, "the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder." *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018). Finally, despite these requirements, schools must ensure that student disciplinary proceedings do not "mirror common law trials." *Haidak*, 933 F.3d at 69.

With these principles in mind, and for the reasons we discuss below, we hold QSU's refusal of Park's request to directly cross-examine Roe did not violate Park's due-process rights. In so holding, we follow what appears to be the majority rule: due process in the university disciplinary setting only requires some opportunity for real-time cross-examination, and that requirement may be satisfied by permitting the hearing panel to question witnesses instead of direct cross-examination by the accused student or his attorney. *See Haidak*, 933 F.3d at 69.

We reach this conclusion, as have many other circuits, because we agree that a process in which the hearing board questions witnesses in a live setting strikes the right balance: it satisfies the accused student's due-process rights while preventing the proceeding from devolving into madness or a *de facto* criminal trial.

Indeed, numerous courts have upheld processes, just like this one, in which the parties were permitted to submit questions to the board, and the board itself would question the witnesses. *See Walsh v. Hodge*, 975 F.3d 475, 485 (5th Cir. 2020); *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 867–68 (8th Cir. 2020); *Haidak*, 933 F.3d at 69; *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987). "A process under which the adjudicating panel poses questions to witnesses is not 'so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation.'" *Ark-Fayetteville*, 974 F.3d at 867 (citation omitted). And "there are legitimate governmental interests in avoiding unfocused questioning and displays of acrimony by persons who are untrained in the practice of examining witnesses." *Id.* at 868; *see Walsh*, 975 F.3d at 485 (holding professor's request to personally cross-examine student "might well have led to an unhelpful contentious exchange or even a shouting match").

Park urges us to follow *Doe v. Baum*, in which the Sixth Circuit stated that "if a public university has to choose between competing narratives to resolve a case," due process requires "adversarial" cross-examination by an accused student or "an individual aligned with" that

student. 903 F.3d at 578, 582–83. We decline to do so, for several reasons.

First, we believe the statements from *Baum* that are quoted by Park and by our dissenting colleague are dicta. The actual issue presented in *Baum* was a complete denial of cross-examination by *anyone*, including the hearing board. *See id.* at 582. Thus, the Sixth Circuit did not need to decide whether Baum had a right to *directly* cross-examine witnesses, where that specific issue was not squarely presented to the court, simply to confirm Baum's right of cross-examination *generally*.

Second, the Sixth Circuit itself has agreed that a student's right to cross-examine witnesses is "circumscribed," *see Baum*, 903 F.3d at 585, and in fact, the Sixth has approved the very process that was used by QSU in this case. *See Doe v. Cummins*, 662 F. App'x 437, 448 (6th Cir. 2016) (unpublished) (holding student's due-process rights were not violated where student was allowed to submit only written questions to panel and panel asked questions). We note that *Baum* did not overrule *Cummins* or the Sixth Circuit's approval of "circumscribed" cross-examination through a hearing board.

Park also directs us to language from *Doe v. University of Cincinnati*, 872 F.3d 393 (6th Cir. 2017), about the merits of "adversarial questioning." But once again, *Cincinnati* did not actually turn on the issue presented in this case. In fact, the claimant in *Cincinnati* did not challenge the university's procedure—the same process used here—in which the accused submitted

written questions to the board and in which the board, after approving or rejecting the submitted questions, itself asked the questions. *Id*. at 396–97, 403.

Park may not have been happy that not all of his requested questions were asked—a contention we address in the next section—but ultimately, the Board asked almost all of Park's initial questions (and even used his requested wording in most instances); Roe's claims were tested by cross-examination; and the Board was able to assess her credibility.

Accordingly, we reject Park's due-process complaints regarding his inability to directly cross-examine Roe.

D.

Park next challenges QSU's refusal to ask some of his requested follow-up questions to Roe. The Board's refusal was based upon QSU's policies for questioning of witnesses in disciplinary proceedings. Pursuant to the Board's manual for handling disciplinary proceedings involving allegations of sexual misconduct, QSU prioritized student comfort over "rigorous" examination. Specifically, the Board was supposed to, and did, avoid leading questions and "pursuing a line of questions" because of concerns about traumatizing Roe. Park contends the Board's selective-questioning approach violated his due process rights.

In support of this argument, Park cites to *Haidak*, in which the First Circuit stated:

> When a school reserves to itself the right to examine the witnesses, it also assumes for itself the responsibility to conduct reasonably adequate questioning. A school cannot both tell the student to forgo direct inquiry and then fail to reasonably probe the testimony tendered against that student.

Haidak, 933 F.3d at 70. The question thus posed by *Haidak* is: did QSU comply with its duty to reasonably question Roe? We hold it did.

We recognize the Board's understandable desire to protect Roe from further trauma. "We have acknowledged the importance of supporting victims of sexual harassment." *Walsh*, 975 F.3d at 484 (expressing concerns that forcing victim to testify "would discourage future students from coming forward"). Nevertheless, *Haidak* expressly frowned on this kind of "ill-suited kid-gloves approach," *see Haidak*, 933 F.3d at 70, and so do we. But we cannot conclude that its use here deprived Park of due process.

Notably, the Board opted to use the same approach when questioning both Roe *and* Park, a fact the First Circuit thought significant. *See Haidak*, 933 F.3d at 70. And as in *Haidak*, the Board did question Roe "at length on the matters central to the charges" against Park. *See id*. The Board did ask Roe for an estimate of the number of drinks she had consumed, and it questioned her about possible ulterior motives, namely, Park's claim that Roe reported him to the Division of Student Affairs as retaliation for his refusal to pursue a romantic relationship with her.

But the main reason we decide this issue against Park is that, even taking his factual allegations as true, we cannot conclude that the follow-up questions the Board did not ask would have changed the outcome; their exclusion therefore was not harmful.

Our conclusion is supported by the Sixth Circuit's decision in *Doe v. Michigan State University*, 989 F.3d 418 (6th Cir. 2021). There the court recognized, as have other courts, that a hearing board may restrict parties from asking some questions and can even allow the witness to reasonably refuse to answer some questions. *See id.* at 430–31. "Forcing the claimants to answer two additional categories of questions over the entire course of their cross-examination does not significantly add to the fact-finder's ability to test their credibility." *Id.* at 431. And in fact, "[f]orcing claimants to answer all questions could go against" the university's interest "in protecting victims of alleged sexual assault while on the stand." *Id.*

Moreover, we are reminded of the need to ensure that school disciplinary proceedings do not mirror criminal trials. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005). To follow Park's reasoning—that a board should have to ask every question submitted by a student and also should have to demand answers to those questions—"would be an expansion of *Baum*'s mandate for a circumscribed form of cross-examination and would open up witnesses to potential harassment at the hands of their accusers or their accusers' attorneys." *Mich. State*, 989 F.3d at 431.

We also find instructive the Sixth Circuit's opinion in *Doe v. Cummins*, in which the appellants made the same argument that Park presents here—and they lost:

> [A]ppellants claim that they were denied effective cross-examination of witnesses because they were allowed to submit only written questions to the ARC panel, the panel did not ask all of the questions they submitted, and they were not allowed to submit follow-up questions. Although due process may require a limited ability to cross-examine witnesses in school disciplinary hearings where, like here, credibility is at issue, that requirement was satisfied in this case. Any marginal benefit that would accrue to the fact-finding process by allowing follow-up questions in appellants' ARC hearings is vastly outweighed by the burden on [the university].

Doe v. Cummins, 662 F. App'x 437, 448 (6th Cir. 2016) (unpublished) (citations omitted).

Upon our review of the record, we are not convinced that asking Park's follow-up questions would have altered the outcome here. Those questions largely dealt with irrelevant and collateral matters, like the contents of Roe's credit-card statements and her father's occupation. The Board apparently did not believe those lines of inquiry were necessary or appropriate for the Board to decide the issue of Park's alleged violations of the CSC.

Accordingly, we overrule Park's due-process complaint related to the Board's manner of questioning of the witnesses.

E.

Next, we address Park's complaint about the Board's decision not to require Roe to remove her face covering while she was speaking during the Hearing. Although we acknowledge the importance of a fact finder's ability to assess witness credibility, nevertheless we hold QSU did not violate Park's due process rights.

It is important to recall that this Hearing occurred during the early days of the COVID-19 pandemic, at a time when remote technology was not as commonplace as it is now, and before the mechanism by which COVID-19 could be spread was understood. As a starting place, then, we cannot fault Roe for her caution in wanting to protect herself, nor can we fault the Board for prioritizing Roe's physical safety. *See Mich. State*, 989 F.3d at 431 (recognizing the importance "in protecting victims of alleged sexual assault while on the stand").[6]

It also was reasonable for the Board to conduct the Hearing during the same school year as the alleged defense. As the Department of Education recognized when discussing the effective date of its 2010 Title IX regulations:

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[6] That quote was directed at protecting witnesses from psychological trauma, but we think it no less important that schools and courts protect an alleged victim's *physical well-being*, too.

> A few commenters requested . . . that the Department issue the final regulations in the month of May so that the requested 90-day implementation window takes place over the summer, when recipients have more time and ability to address and implement the changes constructively; some of these commenters asserted that *requiring changes to be made in the middle of a school year will raise problems with applying two different sets of rules to sexual misconduct incidents occurring in the same school year* based on an arbitrary cut-off date.

DEP'T OF EDUC., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026, 30533–34, 2020 WL 2525707 (May 19, 2020) (emphasis added). The same concern applies here, too; it was reasonable for QSU to hold the hearing in May 2020 rather than grapple with the prospect of "applying two different sets of rules to sexual misconduct incidents occurring in the same school year."[7] *Id.*

We acknowledge the dissent's references to cases discussing the difficulty in assessing credibility of witnesses who wear face coverings. But we note those citations are to criminal cases. And criminal law features an overlay not present here: a constitutional right to

[7] To the extent we might have decided this question differently were we in the Board's shoes, it is worth noting that Park has not raised any issue in this Court about the scheduling of the May 2020 Hearing.

confront one's accuser. We are loath to extend that right here, lest we run afoul of the admonition that school disciplinary proceedings should not mirror criminal trials. *See Flaim*, 418 F.3d at 635.

Alternatively, Park contends QSU should have disregarded Roe's testimony because of her refusal to testify without a face covering. To support this argument, Park relies heavily on regulations issued in 2020 from the Department of Education that state: "If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility . . . ." 34 C.F.R. § 106.45(b)(6)(i).

We reject Park's contention for three reasons. First, although Section 106.45 was *issued* on May 19, 2020—one day before the Hearing—it did not take effect until August 14, 2020 (three months after the Hearing). *See Victim Rights Law Ctr. v. Cardona*, ___ F. Supp. 3d ___, 2021 WL 3185743, at *1, *14 (D. Mass. July 28, 2021). Thus, section 106.45 did not control the Hearing held on May 19, 2020. Second, even had Section 106.45 been effective, it would not have required exclusion of Roe's testimony because Roe *did* "submit to cross-examination at the live hearing." 34 C.F.R. § 106.45(b)(6)(i). Third, on July 28, 2021, the regulatory provision in question was held to be arbitrary and capricious, and it was vacated. *See Cardona*, 2021 WL 3185743, at *15–16.

Accordingly, we overrule Park's final challenge under the Due Process Clause of the Fourteenth Amendment.

III.

A.

Separately, Park has accused QSU of sex discrimination under Title IX, 20 U.S.C. § 1681. The relevant part of Title IX provides, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a). To state a claim, Park must adequately allege that QSU disciplined him on the basis of sex, specifically, because he is a male. *See Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 864 (8th Cir. 2020).

Under the framework established in *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994), we analyze Park's claims under the "erroneous outcome" standard, not the "selective enforcement" standard, because Park does not contend a similarly accused female was treated differently under QSU's disciplinary process. *See Cummins*, 662 F. App'x at 452 & n.10. To state an erroneous-outcome claim, Park must plead (1) "facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding" and (2) a "particularized . . . causal connection between the flawed outcome and gender bias." *Id*. at 452 (quoting *Yusuf*, 35 F.3d at 715).

B.

Here, we need not decide whether Park has met his burden under the first element because we hold Park has not pleaded a particularized causal connection between the allegedly flawed outcome of the Hearing and gender bias. *Yusuf*, 35 F.3d at 715; *see also Cummins*, 662 F. App'x at 452 ("Because appellants have failed to show any causal connection between the adverse outcomes in their hearings and gender bias, they have not met their burden here. Accordingly, their Title IX claims fail.").

Park directs us to his pleading in which he contends QSU adopted a practice of investigation and enforcement that was inherently biased against male students "to appease the Department of Education." But the claimants in *Cummins* made the same allegation, and they lost for the same reason Park does here: because Park's allegations are mere conclusory statements and are not sufficiently supported by factual allegations so as to make his claims plausible. *See Cummins*, 662 F. App'x at 452.

The Sixth Circuit's decision in *Baum* provides an example of the sort of fact-supported pleading that satisfies the erroneous-outcome standard:

> Around two years before Doe's disciplinary proceeding, the federal government launched an investigation to determine whether the university's process for responding to allegations of sexual misconduct discriminated against women.

> When news of the investigation broke, student groups and local media outlets sharply criticized the administration. The federal government's investigation and the negative media reports continued for years, throughout the [b]oard's consideration of Doe's case.
>
> This public attention and the ongoing investigation put pressure on the university to prove that it took complaints of sexual misconduct seriously. The university stood to lose millions in federal aid if the Department found it non-compliant with Title IX. The university also knew that a female student had triggered the federal investigation and that the news media consistently highlighted the university's poor response to female complainants.

Doe v. Baum, 903 F.3d 575, 586 (6th Cir. 2018). Park's pleadings, by contrast, are devoid of facts showing any such kind of apparent institutional bias.

Alternatively, Park contends, as did the claimant in *Baum*, that causation is demonstrated from the fact that the Board "credited exclusively female testimony from Roe and rejected all of the male testimony," namely, Park's. *See Baum*, 903 F.3d at 586. But the circumstances here are very different than in *Baum*.

In *Baum*, the board rejected the testimony from Doe and his witnesses because the board concluded they lacked credibility inasmuch as many were Doe's fraternity brothers. *See id.* Nevertheless, that board did

not discount the testimony of the complainant's witnesses despite the fact that several were her sorority sisters. *See id.* And importantly, the board in *Baum* apparently made all of these credibility determinations "on a cold record" inasmuch as that board did not personally observe any of these witnesses' accounts. *See id.*

Here, although it is factually true that the QSU Board "credited exclusively female testimony" and "rejected all of the male testimony," only one female (Roe) and one male (Park) testified. The situation faced by the Board here was thus a zero-sum game: to rule for either Park or Roe necessarily means the Board will have credited *all* of the testimony from one sex and rejected *all* of the testimony from the other. Therefore, we cannot reasonably infer that the Board's decision resulted from gender bias, as opposed to another "more innocent" cause, that is: Roe was simply more credible than Park. *See Cummins*, 662 F. App'x at 453–54. If "nine cases is hardly a sufficient sample size for this court to draw any reasonable inferences of gender bias," *see id.* at 454, a sample size of <u>one</u> is even more damning to Park's claims.

Finally, Park directs us to a handful of miscellaneous factual allegations about the Board's conduct on the date of the Hearing—*i.e.*, frowning at Park and praising Roe's bravery—and he says those allegations, taken together, demonstrate QSU's disciplinary process was inherently biased against him. However, it is well-established that school-disciplinary committees are entitled to a presumption of impartiality unless the plaintiff can make a showing of actual bias. *See Cummins*, 662 F. App'x at

449. Accordingly, any alleged prejudice by the Board must be evident from the record and cannot be based in "speculation or inference." *See id*. at 450. And that is all that Park's pleadings raise: speculation or inference based on Park's subjective beliefs about the Board.

Accordingly, we hold the district court did not err by concluding that Park failed to state a Title IX claim upon which relief may be granted and by dismissing Park's Title IX claim.

IV.

A.

We turn now to the district court's award of attorney's fees to QSU. "We review a district court's award of attorney's fees for an abuse of discretion, but we review *de novo* 'the district court's application of the legal principles underlying that decision." *D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1236 (10th Cir. 2013) (citation omitted). In this specific context, the district court's interpretation of Rule 41(d) is a question of law subject to *de novo* review. *Andrews v. Am.'s Living Ctrs., LLC*, 827 F.3d 306, 309 (4th Cir. 2015). But to the extent the court's award of attorney's fees represents a finding of fact, we review such findings for clear error and will reverse only if the court's findings are "without factual support in the record." *United States v. Hardage*, 985 F.2d 1427, 1436–37 (10th Cir. 1993); *see Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795, 800 (5th Cir. 2006). We may uphold the district court's ruling on any ground supported by the record. *See Jackson v. S.*

Calif. Gas Co., 881 F.2d 638, 643 (9th Cir. 1989). "If the decision below is correct, it must be affirmed, even if the district court relied on the wrong grounds or wrong reasoning." *Id.*

B.

The crux of the parties' dispute about attorney's fees requires an interpretation of Federal Rule of Civil Procedure 41(d), which provides:

> If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:
>
> (1) may order the plaintiff to pay all or part of the costs of that previous action; and
>
> (2) may stay the proceedings until the plaintiff has complied.

FED. R. CIV. P. 41(d). The parties' specific dispute involves the definition of the word "costs," as used in Rule 41(d)(1), and whether that term also includes attorney's fees.

The question of whether, and under what circumstances, Rule 41(d) permits an award of attorney's fees as a component of "costs" is the subject of a circuit split. Most of the circuits generally have adopted one of three different approaches to decide this question. Each of these approaches is supported by well-settled law, and the arguments for and against each approach are well-reasoned.

The first approach—which as best we know has been taken only by the Sixth Circuit—is that Rule 41(d) does not allow a recovery of attorney's fees under any circumstances. *See Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 874 (6th Cir. 2000). The Sixth Circuit bases that conclusion on *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), in which the Supreme Court cited the so-called American Rule in noting that "attorney's fees generally are not a recoverable cost of litigation 'absent explicit congressional authorization.'" *Id*. at 814 (citation omitted). Although the absence of a specific reference to attorney's fees is not necessarily dispositive, "[m]ere 'generalized commands' . . . will not suffice to authorize such fees." *Id*. at 815 (citations omitted). The Sixth Circuit's takeaway from *Key Tronic* is that attorney's fees are not recoverable under Rule 41(d) because "the rule does not explicitly provide for them." *Rogers*, 230 F.3d at 874. The *Rogers* court further reasoned that the law recognizes a difference between the terms "costs" and "attorney fees"; that Congress recognizes that distinction; that other rules of civil procedure explicitly mention attorney's fees but Rule 41(d) does not; and that, for purposes of Rule 41(d), attorney's fees are not part of an award of "costs." *See id.* at 874–75.

The second approach, adopted by the Second, Eighth, and Tenth Circuits, reaches the opposite conclusion from *Rogers* and instead holds that Rule 41(d) *always* allows for the recovery of attorney's fees. The leading case for this approach is *Horowitz v. 148 South Emerson*

Associates LLC, 888 F.3d 13 (2d Cir. 2018).[8] *Horowitz*, like *Rogers*, relies on *Key Tronic*, but the Second Circuit concluded that Rule 41(d) "evinces an intent to provide for attorney's fees" because its purpose is to deter forum shopping and vexatious litigation, and to interpret Rule 41(d) to exclude fees would "substantially undermine[]" "the entire Rule 41(d) scheme." *Horowitz*, 888 F.3d at 25. "Rule 41(d) would be greatly limited as an effective deterrent if district courts were precluded from assessing attorneys' fees as part of costs." *Id*. at 25–26. Thus, the approach espoused by the Second, Eighth, and Tenth Circuits means to give effect to the policy underlying Rule 41(d), if not the rule's language itself.

The third approach to interpreting Rule 41(d) is a hybrid model—adopted by the Third, Fourth, Fifth, and Seventh Circuits—in which attorney's fees are "permitted under Rule 41(d) only if the underlying statute defines 'costs' to include fees." *Portillo v. Cunningham*, 872 F.3d 728, 739 (5th Circ. 2017); *see Garza v. Citigroup Inc.*, 881 F.3d 277, 282–83 (3d Cir.

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[8] The Eighth and Tenth Circuits also follow this rule, but their opinions on the subject devote significantly less attention to the subject than does *Horowitz*. *See Meredith v. Stovall*, 216 F.3d 1087, 2000 WL 807355, at *1 (8th Cir. 2000) (unpublished) ("Under the language of Rule 41(d), the decision whether to impose costs and attorney's fees is within the discretion of the trial court."); *Evans v. Safeway Stores, Inc.*, 623 F.2d 121, 122 (8th Circ. 1980) ("We are satisfied the district court did not abuse its discretion in awarding defendant-appellee $200 attorney fees.") (citing FED. R. CIV. P. 41(d)); *see also Kent v. Bank of Am., N.A.*, 518 F. App'x 514, 517 (8th Cir. 2013) (unpublished) (following *Evans*, without explanation).

2018); *Andrews v. Am.'s Living Ctrs., LLC*, 827 F.3d 306, 311 (4th Cir. 2016); *Esposito v. Piatrowski*, 223 F.3d 497, 501 (7th Cir. 2000). This hybrid approach relies heavily on *Marek v. Chesny*, 473 U.S. 1 (1985), in which the Supreme Court interpreted Rule 68 the same way:

> [T]he most reasonable inference is that the term "costs" in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. In other words, all costs properly awarded in an action are to be considered within the scope of Rule 68 "costs."

Marek, 473 U.S. at 9.

Here, we decline to follow the Sixth Circuit's no-fees approach because we believe it is contrary to the Supreme Court's decision in *Marek*. "[C]ategorically forbidding fees makes little sense where the object—'costs'—is defined [in the substantive statute] to include attorneys' fees." *See Portillo*, 872 F.3d at 739. And we agree with the Second Court's observation in *Horowitz* that, where the primary purpose of Rule 41(d) is to deter forum shopping and vexatious litigation, the rule "would be greatly limited as an effective deterrent if district courts were precluded from assessing attorneys' fees as part of costs." *Horowitz*, 888 F.3d at 25–26. After all, many voluntary dismissals subject to Rule 41(d) are filed very early in the action, that is, "before the opposing party serves either an answer or a motion for summary judgment." *See* FED. R. CIV. P. 41(a)(1)(A)(i). In such cases, the defendant may already have incurred

significant attorney's fees but very few costs. We believe Rule 41, taken as a whole, evinces an intent to provide for the recovery of attorney's fees in at least some cases.

That said, we need not decide, in this case, whether to adopt the *Horowitz* "always fees" rule or the hybrid rule,[9] because we conclude that, under either approach, the district court in this case properly awarded fees to QSU.[10]

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[9] Jurisprudentially, we need not and should not decide, in this case, whether fees are recoverable in all cases—as the concurrence urges—because on this record, fees are available no matter which approach we would adopt.

"Damn the torpedoes" may have worked for Admiral Farragut, but it has less application to a court of appeals that is charged, and vested with jurisdiction, only to decide the cases presented. It is well-settled that federal courts of appeals lack jurisdiction to render advisory opinions. *See In re Lazy Days' RV Ctr. Inc.*, 724 F.3d 418, 421 (3d Cir. 2013); *Vencor Hosps. v. Blue Cross Blue Shield of R.I.*, 284 F.3d 1174, 1184 (11th Cir. 2002). And that is precisely what we would be doing if we were to adopt one approach over the other in this case. We need not decide whether attorney's fees are always available under Rule 41(d) to conclude that QSU's fees are recoverable here.

[10] Because the Court has not yet decided which approach to adopt, this opinion states the "majority" rule on this holding, despite the concurrence's refusal to join it, because this opinion decides the attorney's fee issue on the narrowest grounds possible. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When . . . no single rationale explaining the result enjoys the assent of [a majority of] Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'") (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

See Jackson v. S. Calif. Gas Co., 881 F.2d 638, 643 (9th Cir. 1989) ("[W]e may affirm on any ground finding support in the record.").

C.

We hold the district court did not abuse its discretion by awarding attorney's fees to QSU. First, we hold that QSU was a "prevailing party" for purposes of 42 U.S.C. § 1988(b). The general rule is that "[w]here a plaintiff has voluntarily dismissed a prior action," a defendant is not a prevailing party for § 1988 purposes. *Portillo*, 872 F.3d at 740. But that general rule is subject to a notable exception in cases, like this one, in which "the defendant can demonstrate that the plaintiff withdrew to avoid a disfavorable judgment on the merits." *Id.* (citing *Dean v. Riser*, 240 F.3d 505, 511 (5th Cir. 2001)). And that was precisely what Judge Alexopoulos found here:

> The Court finds that Plaintiff's actions, in dismissing his first action and refiling the instant action, were *technically* motivated by a desire to gain a tactical advantage—or more appropriately, to eliminate a perceived tactical *disadvantage* in a different court in which Plaintiff believed (erroneously) that the court favored his opponent from the get-go. The Court finds that Plaintiff likely nonsuited his first action to avoid an unfavorable judgment on the merits.

Further, the evidence in the record, although sparse, supports the district court's findings. Although the first

court had not yet ruled on QSU's motion at the time Park voluntarily dismissed his lawsuit, neither had the court denied QSU's motion, either. In addition, it is undisputed that Park filed his voluntary dismissal the same day of, and after, the hearing on QSU's 12(b)(6) motion. That fact gives rise to a reasonable inference that the purpose for the dismissal was "to avoid a disfavorable judgment on the merits." *Portillo*, 872 F.3d at 740.

Second, we hold the district court was permitted to award fees after finding that Park's nonsuit was motivated by a desire to gain a tactical advantage. A court may, within its discretion, award attorney's fees if the court specifically finds the plaintiff acted "'in bad faith, vexatiously, wantonly, or for oppressive reasons,' a well-established exception to the American Rule." *Andrews*, 827 F.3d at 311.

The facts of this case are similar to those present in *Andrews*:

> Here, the magistrate did not specifically label Andrews's conduct vexatious. Nonetheless, he found an award [of fees] was warranted because Andrews "voluntarily dismissed the first action shortly after a hearing on a motion to dismiss in order to avoid an adverse ruling. Plaintiff then re-filed the action the very same day." The magistrate judge found these actions to have "delayed the resolution of this case, increased the costs of defending this action, and wasted the judicial resources of the Court."

> . . . [T]he district court affirmed the decision of the magistrate judge. The district court found,
>
> > From the record before this Court, it is clear that the Plaintiff dismissed the prior action in order to avoid negative rulings on the Defendants' motion to dismiss as well as her motion to amend. . . . Although the Plaintiff may not have been acting in bad faith, the end result of such conduct is repeated litigation of the same claim against the same defendant; that is, vexatious litigation.

Andrews, 827 F.3d at 312.

Similar to *Andrews*, in this case the district court did not specifically label Park's actions vexatious. Nevertheless, the court found that, by dismissing and refiling his lawsuit, Park did attempt to gain a tactical advantage. Attempts to manipulate the proceedings "in order to gain tactical advantage" are sufficient for an award of attorney's fees under a court's inherent power. *See Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001); *see also Andrews*, 827 F.3d at 309 (noting that purpose of Rule 41(d) is to prevent "attempts to 'gain any tactical advantage by dismissing and refiling th[e] suit'") (citation omitted).

It is true, as Park argues, that the *Andrews* court determined the litigant's conduct "not so egregious as to rise to the level of vexatious." *Andrews*, 827 F.3d at 312–13. But in reaching that conclusion, the Fourth Circuit

relied on an important fact not present here: in *Andrews*, the magistrate judge expressly presented Andrews with the option of dismissing and then refiling her lawsuit. *See id*. at 313. In addition, Andrews's second complaint "was much more detailed" than either of her complaints in the first action. *See id*. at 313–14. Here, by contrast, Park's second lawsuit asserted the same claims and contained no greater factual detail than his complaint in the first lawsuit.

Accordingly, we hold the district court did not abuse its discretion by awarding attorney's fees to QSU.

V.

Accordingly, we **AFFIRM** the district court's dismissal of Plaintiff's due-process claims. We also **AFFIRM** the district court's dismissal of Plaintiff's Title IX claim. Finally, we **AFFIRM** the district court's award of costs and attorney's fees to QSU.

FERNANDEZ, Circuit Judge, concurring.

I join all parts of the Court's opinion except for Part IV.B. I agree that QSU is entitled to recover its attorney's fees. However, I write separately to urge the Court to adopt the interpretation of Rule 41(d) that is espoused by the Second Circuit (and to a lesser extent, by the Eighth and Tenth Circuits), that is, that attorney's fees are recoverable in all cases to which Rule 41(d) applies. *See Horowitz v. 148 S. Emerson Assocs.*, 888 F.3d 13, 26 (2d Cir. 2018); *Meredith v. Stovall*, 216 F.3d 1087, 2000 WL 807355, at *1 (8th Cir. 2000) (unpublished); *Evans v. Safeway Stores, Inc.*, 623 F.2d 121, 122 (8th Circ. 1980).

This approach best serves the purpose for Rule 41(d), which is "to serve as a deterrent to forum shopping and vexatious litigation." *Andrews v. Am.'s Living Ctrs., LLC*, 827 F.3d 306, 309 (8th Cir. 2016) (citation omitted); *see Horowitz*, 888 F.3d at 25; *Esposito v. Piatrowski*, 223 F.3d 497, 501 (7th Cir. 2000). For that reason, the Court is correct not to adopt the no-fees approach advocated by our dissenting colleague. Such a rule would render Rule 41(d) toothless, particularly in the context of Rule 41(a) dismissals—the very target of Rule 41(d). As *Horowitz* explains:

> The need for attorneys' fees may be especially acute in the Rule 41(d) context. The targets of deterrence under the rule will often be litigants, such as [Park], that file complaints and quickly dismiss them, perhaps in reaction to initial unfavorable rulings, or *hoping for a subsequent*

> *case assignment to a judge they view as more favorable*. These are actions with minor costs to the adversary other than attorneys' fees, which may be substantial. Indeed, such actions will rarely incur most of the expenses routinely recoverable as costs.

Horowitz, 888 F.3d at 26 (emphasis added). So it is here: QSU's court costs are in the low hundreds of dollars, but it has incurred attorney's fees of $74,500.00. An award of a few hundred dollars in costs would have almost no deterrence effect, as the Second Circuit recognized. *See id.* at 25–26.

Although I appreciate the Court's admirable preference for caution, its failure to adopt the *Horowitz* rule and to reject the middle-ground approach from the Third, Fourth, Fifth, and Seventh Circuits, likely will cause problems. As *Horowitz* convincingly explains, this hybrid rule "places an arbitrary condition" on the deterrence effects of Rule 41(d):

> We think such a rule makes little sense as to Rule 41(d), where there is no connection between the underlying cause of action and the behavior the rule seeks to influence. . . . [T]he purpose of Rule 41(d) is to deter litigants from forum shopping or filing vexatious suits, acts largely untethered to the merits. The hybrid rule therefore places an arbitrary condition on the Rule 41(d) deterrent.

Horowitz, 888 F.3d at 26 n.6.

Therefore, the Court should reject the hybrid approach and instead adopt the bright-line rule described in *Horowitz*. The Court's failure to do so here will, in my opinion, simply encourage more destructive satellite litigation in the state of Quicksilver. The new battle lines in many cases, like in this § 1983 and Title IX dispute, will be drawn over whether a given plaintiff's lawsuit was frivolous, brought in bad faith, or vexatious. And until we say otherwise, defendants in our circuit unfortunately will learn that the cost of attempting to recover their attorneys' fees may be to spend *even more* fees developing such arguments, and yet more fees trying to hold onto such fee awards on appeal. Plaintiffs, in turn, must expend time and resources attempting to defend their claims from being labeled vexatious or frivolous.

The Supreme Court has already cautioned that satellite litigation "over attorney's fees should not be encouraged." *Crawford v. Astrue*, 586 F.3d 1142, 1152 (9th Cir. 2009) (citing *Gisbrecht v. Barnhart*, 535 U.S. 789, 808 (2002)); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 408 (1990). But unproductive satellite litigation is not the only cost of today's failure to stake out a position, and specifically, to adopt the bright-line rule explained in *Horowitz*. The alternative—the hybrid rule—would only encourage the parties to fight more often, and nastier. The financial cost to parties will be significant, but that is not its only cost. Such destructive satellite litigation will result in a concomitant cost in judicial resources, cordiality, and public perception of the legal field.

Adopting the bright-line rule described in *Horowitz* would discourage satellite litigation. Equally importantly, adopting a bright-line rule also would bring predictability to parties and the law. *See Howard v. City of Coos Bay*, 871 F.3d 1032, 1040 (9th Cir. 2017) ("Given the importance of 'certainty and predictability,' we agree that a bright-line rule . . . is appropriate."); *Underwriters at Lloyd's, London v. Osting-Schwinn*, 613 F.3d 1079, 1088 (11th Cir. 2010) ("[T]he *Carden* rule has the distinct advantages of all bright-line rules: predictability and ease of application."); *Swope v. Columbian Chems. Co.*, 281 F.3d 185, 193–94 (5th Cir. 2002) (declining to join "in-between rule" adopted by Seventh and Ninth Circuits, in favor of bright-line rule that "fosters predictability and streamlines review"); *Brown v. Angelone*, 150 F.3d 370, 375 n.5 (4th Cir. 1998) ("[T]he bright-line rule we have adopted provides for 'ease of administration, consistency and predictability.'") (citation omitted); *Jaske v. C.I.R.*, 823 F.2d 174, 176 (7th Cir. 1987) ("Such bright line, mechanical tests are designed to achieve simplicity, to provide predictability, and to obviate the need for case-by-case inquiry."); ANTONIN SCALIA, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989) (urging "firm rule[s] of decision" to bring predictability).

Accordingly, while I concur in the Court's decision to affirm the district court's fee award, I would adopt the reasoning of the Second, Eighth, and Tenth Circuits and hold that Rule 41(d) allows for the recovery of attorney's fees in all cases.

WALT, Circuit Judge, dissenting.

I respectfully dissent.

In my opinion, the Court's review of Appellant's due-process claims should have been less focused on "trees" and more oriented to the forest. Some of the fault probably lies with our briefing rules, which obligate appellants to separately list their issues presented for review, *see* FED. R. APP. P. 28(a)(5), (a)(8)(B), and it is not uncommon for courts to approach each issue independently. But there are times, as here, in which courts should not find themselves repeatedly donning and doffing blinders when reviewing each appellate complaint, as though there were no connection between what are, in fact, clearly related issues.

Taken individually, each of the due-process issues Park faced in QSU's disciplinary hearing at best straddles the lines of constitutional propriety in this context. But the correct approach here is to consider these due-process issues as a whole, not merely as component parts.[11]

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[11] *See, e.g., T.D. v. Patton*, 868 F.3d 1209, 1213 (10th Cir. 2017) (holding investigating social worker's conduct, "taken as a whole, shocks the conscience and thus amounts to a substantive due process violation under the Fourteenth Amendment"); *Lock v. Jenkins*, 641 F.2d 488, 491 (7th Cir. 1981) ("Plaintiffs argue that the district court erred in considering each of the alleged constitutional violations separately rather than determining whether all the conditions cumulatively constitute unconstitutional treatment. This court finds it appropriate to consider together all the conditions of confinement . . . ."); *United States v. Carter*, 576 F.2d 1061, 1065 (3d Cir. 1978)

Due Process

This case presents a perfect storm in the context of school-disciplinary-proceedings cases. Kyler Park was punished with the most serious of all possible sanctions (expulsion) in a case in which the claims against him depended entirely on a relative credibility determination as between himself and his accuser. This case is the proverbial he-said-she-said case. "I struggle to imagine a scenario where the constitutional floor is higher than it is here." *Doe v. Mich. State Univ.*, 989 F.3d 418, 434 (6th Cir. 2021) (Nalbandian, J., concurring); *see Goss v. Lopez*, 419 U.S. 565, 584 (1975) ("Longer suspensions or expulsions . . . may require more formal procedures."); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400 (6th Cir. 2017) ("The more serious the deprivation, the more demanding the process."). Park's case turned on the university's assessment of two witnesses' credibility: his and Roe's. And we've called these credibility contests "the most serious of cases." *Cincinnati*, 872 F.3d at 401 (citation omitted); *see Mich. State*, 989 F.3d at 433 (Nalbandian, J., concurring) ("It's hard to imagine a

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(reviewing appellant's due-process claims "both individually and collectively"); *see also Dist. Atty's Office for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 109 (2009) (Souter, J, dissenting) ("Standing alone, the inadequacy of each of the State's reasons for denying Osborne access to the DNA evidence he seeks would not make out a due process violation. But taken as a whole . . . the State has demonstrated a combination of inattentiveness and intransigence in applying those conditions that add up to procedural unfairness that violates the Due Process Clause.").

combination of facts entitling an accused to more robust process than this one.").

To pile on with yet one more case, the Fifth Circuit explained just last year that:

> [T]he entire hearing boiled down to an issue of credibility. It was Walsh's word (mutual flirtation) versus Student #1's (unwanted harassment).
>
> In this case, where credibility was critical and the sanction imposed would result in loss of employment and likely future opportunities in academia . . . Walsh should have had an opportunity to test Student #1's credibility.

Walsh v. Hodge, 975 F.3d 475, 484–85 (5th Cir. 2020).

The constitutional need for robust, adversarial, and direct cross-examination is at its greatest in cases like this one, because the "ability to cross-examine is most critical when the issue is the credibility of the accuser." *Cincinnati*, 872 F.3d at 400 (citation omitted). As *Doe v. Baum* so eloquently explains:

> Due process requires cross-examination in circumstances like these because it is "the greatest legal engine ever invented" for uncovering the truth. Not only does cross-examination allow the accused to identify inconsistencies in the other side's story, but it also gives the fact-finder an opportunity to assess a witness's demeanor and determine who can be trusted.

***

> Cross-examination is essential in cases like [Park's] because it does *more* than uncover inconsistencies—it "takes aim at credibility like no other procedural device." Without the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives. Nor can the fact-finder observe the witness's demeanor under that questioning.

Doe v. Baum, 903 F.3d 575, 581, 582 (6th Cir. 2018) (citations omitted). Also:

> Cross-examination takes aim at credibility like no other procedural device. A cross-examiner may "delve into the witness' story to test the witness' perceptions and memory." He may "expose testimonial infirmities such as forgetfulness, confusion, or evasion ... thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." He may "reveal[] possible biases, prejudices, or ulterior motives" that color the witness's testimony. His strategy may also backfire, provoking the kind of confident response that makes the witness appear more believable to the fact finder than he intended. Whatever the outcome, "the greatest legal engine ever invented for the discovery of truth" will do what it is meant to: "permit[] the [fact finder] that

> is to decide the [litigant]'s fate to observe the demeanor of the witness in making his statement, thus aiding the [fact finder] in assessing his credibility."

Cincinnati, 872 F.3d at 401–02 (citations omitted) (alterations in original).

These truths are unassailable. And the truth-seeking goals that are served only by *adversarial* cross-examination cannot be achieved by a process in which a disinterested fact-finder—here, the Board—questions witnesses instead of allowing direct questioning by the accused student. Indeed, such a process is not, by definition, adversarial; it is "inquisitorial." *See Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 68 (1st Cir. 2019). Perhaps, as the First Circuit suggests, the inquisitorial model may be sufficient for some purposes. But not here, where the stakes cannot be higher for a university student facing expulsion on the barest of evidentiary margins: preponderance of the evidence in which a board must decide, solely on credibility, the student's fate.

The Court's fretting about "madness" and "shouting matches" is commendable, but those competing concerns are not mutually exclusive, and they do not preclude cross-examination by *an attorney*. "After all, an *individual aligned with the accused student* can accomplish the benefits of cross-examination—its adversarial nature and the opportunity for follow-up—without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker." *Baum*, 903 F.3d at 583 (emphasis added).

Neither the Court, nor the authorities it cites, satisfactorily answer this suggestion from *Baum*. *See, e.g., Haidak*, 933 F.3d at 69 (worrying about debates and "displays of acrimony or worse" if cross-examination is left in "the hands of a relative tyro").[12] So it was with *Doe v. University of Arkansas-Fayetteville*, in which the Eighth Circuit acknowledged that "adversarial cross-examination, when employed by a skilled practitioner, can be an effective tool for discovering the truth" but expressed concerns about allowing "persons who are untrained" to cross-examine witnesses. 974 F.3d 858, 868 (8th Cir. 2020). That is fine, but it does not answer the question presented here: why couldn't Park's *attorney* cross-examine Roe? The Court should have addressed and answered this question, but it did not. Apparently, and no doubt to Park's understandable disappointment, this question will remain unanswered for now.

The Court compounds its mistake by rejecting Park's legitimate complaints about the Board's failure to permit reasonable follow-up questions. Even the *Haidak* court rejected this kind of "ill-suited kid-gloves approach." *Haidak*, 933 F.3d at 70. Further, that court stated that

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[12] The *Haidak* court stated, "we are simply not convinced that the person doing the confronting must be the accused student *or that student's representative*," 933 F.3d at 69 (emphasis added), but offers no explanation for that conclusion. Indeed, the *Haidak* court did not need to reach that issue, as it acknowledged that Haidak did not even assert a right to have legal counsel present. *See id*. If *Baum* is dicta, as the majority says, *ante* at 19a, then so is *Haidak*.

it was a "close question" "[w]hether the university in this case fulfilled [its] responsibility" to "conduct reasonably adequate questioning." *Id*. If it was a close question in *Haidak*, it is not here: the Board's failure to permit reasonable follow-up questions, particularly as to Roe's iffy or inconsistent answers, deprived Park of due process.

The Court thinks it significant that the Board employed the same approach with both Park and Roe. But Roe has not been accused of any wrongdoing, so her due-process interests must yield to Park's. Park was entitled to a rigorous cross-examination of Roe to test her claims and to impeach her credibility before the Board.

The Court cites *Doe v. Michigan State*, 989 F.3d 418 (6th Cir. 2021) in support of its conclusion that the Board could limit the scope of Park's requested questions to Roe, but *Michigan State* is not at all like the instant matter. There, unlike here, the accused student received a *three-day hearing* during which he received "extensive process." *Id*. at 427. Further, MSU permitted the student's *attorney* to cross-examine witnesses all three days. *Id*. at 430. Because of those allowances, the factfinder "was able to watch their demeanor, both during testimony and in response to cross-examination, and Doe's attorney was able, with each witness, to 'probe [her stories] to test her memory, intelligence, or potential ulterior motives.'" *Id*. (alteration in original) (citation omitted).

Doe v. Cummins, also relied on by the Court, fares no better in a comparison with this case. 662 F. App'x 437 (6th Cir. 2016) (unpublished). Although the *Cummins* court rejected the appellant's complaint that he was not allowed to submit follow-up questions and that the Board did not ask all of his submitted questions, the Sixth Circuit noted that the appellant's due-process rights were "diminished because he was not facing expulsion, only disciplinary probation." *See id.* at 448.

Here, the precise factual questions that the Board had to decide were: was Roe intoxicated at the time she had sex with Park, and did Park have reason to know that Roe could not consent because of such intoxication? Accordingly, Park's requested questions—which sought to test Roe's claims of intoxication—were entirely appropriate.

For example, Park testified, and Roe agreed, that Roe was drinking a clear beverage at the time Park approached her in the bar. Roe claimed her drink was alcoholic, but it was fair game for Park to inquire whether Roe could name the particular type of alcohol she claimed to be drinking.

Similarly, Park's proposed questions that would have asked how Roe even managed to purchase alcohol in the first place were relevant—as Roe was underage, she should not have been able to buy alcohol. These questions go not only to the question whether Roe *had* been drinking at all, but also to whether Park had reason to know she had been drinking.

Park also should have been allowed to follow up on Roe's explanation why she had no difficulty in walking from the theater to her dorm room despite her claim of intoxication. Admittedly, questions regarding the nature of her father's business may have been of dubious pertinence; but some reasonable inquiry was permissible for Park to be able to explore Roe's claims.

I also would hold that Roe should have been required to testify, either in-person or remotely, without a mask. Frankly, this conclusion should be a slam dunk because of the well-settled principle that, in these cases, cross-examination is required not only to test witnesses' stories but also for the fact-finder to be able to fairly assess the witnesses' credibility. Cross-examination "gives the fact-finder an opportunity to assess a witness's demeanor and *determine who can be trusted*." *Baum*, 903 F.3d at 581 (emphasis added); *see also id*. at 582 ("Without the back-and-forth of adversarial questioning . . . the fact-finder [cannot] observe the witness's demeanor under that questioning.").

Michigan State reiterates the constitutional minimum here: "the form of cross-examination required must allow for the defendant to prove the claimant's credibility and *for the factfinder to observe the witness's demeanor under questioning*." 989 F.3d at 430 (emphasis added).

As the Sixth Circuit explained in *Cincinnati*:

> [T]he opportunity to question a witness and observe her demeanor while being questioned can be just as important to the trier of fact as it is to the accused. . . .
>
> . . . A cross-examiner may . . . "expose testimonial infirmities such as forgetfulness, confusion, or evasion ... thereby *calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony*." . . . . Whatever the outcome, [cross-examination] will do what it is meant to do: "permit[] the [fact finder] that is to decide the [litigant's] fate to *observe the demeanor of the witness* in making his statement, thus aiding the [fact finder] in assessing his credibility.

Cincinnati, 872 F.3d at 401–02 (emphases added) (citations omitted); *see also Baum*, 903 F.3d at 585 ("[T]he value of cross-examination is tied to the fact-finder's ability to assess the witness's demeanor.").

In fact, during the early days of the pandemic, several courts cited the inability to assess witness credibility *due to face masks* as sufficient reason to grant trial continuances. *See United States v. Sheikh*, 493 F. Supp. 3d 883, 887 (E.D. Cal. 2020) ("[L]awyers have expressed concerns about the ability to effectively evaluate prospective jurors, assess the credibility of witnesses, or communicate with the jury if the participants are wearing masks. The court shares those concerns.");

United States v. Young, No. 19-cr-00496-CMA, 2020 WL 3963715, at *2 (D. Colo. July 13, 2020) ("Defendant may be prejudiced by the jury's inability to clearly observe witness reactions to assess credibility because the witnesses would be required to wear masks that cover their face.").

The concurring opinion in *Michigan State* posits this hypothetical: "If an accuser alleging a sexual crime *refuses to appear* at the hearing, it would violate due process for the university to sanction the student without giving him the right to cross-examine his accuser." 989 F.3d at 433 (Nalbandian, J., concurring) (emphasis added). I submit that is the functional equivalent of permitting the accuser to testify with a facemask that covered most of her face and thereby denied both Park and the Board the chance to fully adjudge her credibility.

Alternatively, the Board should have disregarded Roe's testimony, or at least assigned it less weight than Park's, because of her insistence upon wearing a face covering that rendered a fair determination of her credibility impossible. *See Baum*, 903 F.3d at 581–82; *see also id.* at 585 ("[T]he value of cross-examination is tied to the fact-finder's ability to assess the witness's demeanor.").

In conclusion, I would hold that Park stated a viable claim under § 1983 for QSU's deprivation of his constitutional rights under the Due Process Clause of the Fourteenth Amendment. I would reverse the judgment and remand for further proceedings. Because the Court concludes otherwise, I respectfully dissent.

Title IX

I also dissent from the Court's decision to affirm the district court's dismissal of Park's Title IX claims. Park has pled facts sufficient to cast articulable doubt on the accuracy of the outcome of the disciplinary proceeding. *See Baum*, 903 F.3d at 585–86 (citing *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994)).

Turning to the second prong of the *Yusuf* test for erroneous outcome, admittedly Park's pleadings of a "particularized causal connection between the flawed outcome and gender bias" are not as compelling as those present in *Baum*. But they are enough to clear the very low pleadings bar.

In reviewing the district court's dismissal under Rule 12(b)(6), we must accept "all well-pleaded allegations in the complaint as true," and "consider[] the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief." *Mich. State*, 989 F.3d at 425 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009)). This pleadings bar is low indeed: "Dismissal of a complaint for the failure to state a claim on which relief may be granted is appropriate only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Brown v. Bargery*, 207 F.3d 863, 867 (6th Cir. 2000).

In his pleading, Park asserted all of these allegations as indicative of an inherently biased process:

- the Board expressly praised Roe's "bravery" in "stepping forward";

- the Board frowned at Park whenever he addressed them—even at the beginning of the Hearing—but did not treat Roe with the same skepticism;
- one of the Board members, without any prompting or request by Roe, grilled Park about "statistics" showing that only "two to ten percent" of rape allegations ultimately prove to be false, effectively tipping the scales in Roe's favor based solely upon "statistics" that have nothing to do with the veracity of Roe's claims in this case; and
- the Board rejected significantly more of Park's requested follow-up questions than Roe's.

In addition, the simple fact remains that the Board could not have effectively assessed Roe's credibility because of her face covering, but it proceeded to do so anyway—and to adjudge her more believable than Park. The Sixth Circuit found that fact compelling in *Baum*, in which the disciplinary board apparently credited the testimony of the female witnesses over the male witnesses despite the fact that the board itself never saw any of those witnesses testify. *See Baum*, 903 F.3d at 586–87.

This is not a case in which "the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Brown*, 207 F.3d at 867. I would hold that Park has pleaded sufficient facts to survive a Rule 12(b)(6) motion to dismiss. Because the Court concludes otherwise, I respectfully dissent.

Attorney's Fees

Finally, on the subject of attorney's fees, I would follow the Sixth Circuit in holding that Federal Rule of Civil Procedure 41(d) does not provide for the recovery of attorney's fees in any case. It is true, as the Sixth Circuit has observed, that the majority of courts believe that attorney's fees are available under Rule 41(d). *See Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 874 (6th Cir. 2000). But in my opinion, those courts have usurped Congress's role, in approving our federal rules, to decide when fees may be recovered—and when they may not.

I appreciate the Court's citation to *Marek v. Chesny*, 473 U.S. 1 (1985), and its handling of this question vis-à-vis Rule 68. But *Marek* does not exist in a vacuum: nine years after *Marek*, the Supreme Court issued *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), which tells a very different story about fees:

> [A]ttorney's fees generally are not a recoverable cost of litigation "absent *explicit congressional authorization*." Recognition of the availability of attorney's fees therefore requires a determination that "Congress intended to set aside this longstanding American rule of law." . . . The absence of specific references to attorney's fees is not dispositive if the statute otherwise evinces an intent to provide for such fees. . . . Mere "generalized commands," however, will not suffice to authorize such fees.

Id. at 814–15 (emphasis added) (citations omitted).

The language quoted above apparently was significant to the Sixth Circuit when it wrote that the reason attorney's fees are not available under Rule 41(d) is "simple": "the rule does not explicitly provide for them." *See Rogers*, 230 F.3d at 874. As the *Rogers* court explained:

> Where Congress has intended to provide for an award of attorney fees, it has usually stated as much and not left the courts guessing. Further, the law generally recognizes a difference between the terms "costs" and "attorney fees" and we have no desire to conflate the two terms. Rather, we must assume that Congress was aware of the distinction and was careful with its words when it approved Rule 41(d).

Id.

We should remain mindful that "[w]here Congress knows how to say something but chooses not to, its silence is controlling." *Pinares v. United Techs. Corp.*, 973 F.3d 1254, 1262 (11th Cir. 2020) (citation omitted). And to put a finer point on it, "[w]hen Congress wants to provide that the loser shall pay the winner's attorney fees, it knows how to say so." *Foltice v. Guardsman Prods., Inc.*, 98 F.3d 933, 939 (6th Cir. 1996). As the Supreme Court observed in *Key Tronic*, Congress included two express provisions for fee awards in SARA provisions without including a similar role in CERCLA provisions, and "[t]hese omissions strongly suggest a deliberate decision not to

authorize such awards." *Key Tronic*, 511 U.S. at 818–19. In fact, several of our rules of civil procedure explicitly provide for the recovery of attorney's fees. *See, e.g.*, FED. R. CIV. P. 37(a)(5)(A). Other rules demonstrate a distinction between "costs" and attorney's fees. *See* FED. R. CIV. P. 54(d).

Those courts that have interpreted Rule 41(d) as allowing for the recovery of attorney's fees generally have done so because they deem such awards better further their assumptions about the policy for the rule. *See, e.g., Horowitz v. 148 S. Emerson Assocs.*, 888 F.3d 13, 25–26 (2d Cir. 2018). But the rule's plain language is and should be our "primary guide" to Congress's preferred policy. *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1678 (2017). And it is not our role to rewrite the law under the guise of interpreting it. *See Nebraska v. Parker*, 577 U.S. 481, 493 (2016); *United States v. Wilburn*, 473 F.3d 742, 746 (7th Cir. 2007).

Even if we were to follow the hybrid rule from the Third, Fourth, Fifth, and Seventh Circuit, QSU still would not be entitled to recover its attorney's fees here. Generally, defendants cannot recover attorney's fees in actions brought under § 1983 or Title IX absent exceptional circumstances. First, a defendant who seeks to recover fees must be a "prevailing party." 42 U.S.C. § 1988(b); *Portillo v. Cunningham*, 872 F.3d 728, 739 (5th Cir. 2017). Here, QSU was not a prevailing party in Park's first action because, notwithstanding Appellant's fears about possible bias by the first judge, at the time of the nonsuit, the first court had not ruled on QSU's

motion, but instead had taken the matter under advisement, and because the record does not indicate Judge Kreese probably would have granted the motion.

The majority makes much of Judge Alexopoulos's speculation that the reason Park nonsuited his claim on the same day as the hearing on the 12(b)(6) motion was to "avoid an unfavorable judgment." But that is not a reasonable inference from the circumstances surrounding the dismissal. QSU's 12(b)(6) motion was the earliest motion heard on the morning docket, and although Judge Kreese took the matter under advisement, he stated, "You will have my ruling soon, probably later today." And in fact, Park filed his voluntary dismissal at the very end of the business day. Thus, neither the trial court nor the majority can fairly conclude, without more evidence, that Park's purpose for voluntarily dismissing his claim was to avoid an unfavorable judgment, where he filed such dismissal after the time he reasonably expected to receive the first court's ruling.

Second, even if a defendant prevails, a court can award fees "only if the Plaintiffs' action was frivolous, unreasonable, or without foundation." *Portillo*, 872 F.3d at 739–40 (citation omitted); *Esposito v. Piatrowski*, 223 F.3d 497, 501 (7th Cir. 2000). Under that standard:

> The plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees . . . . [A] plaintiff should not be

> assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.

Hughes v. Rowe, 449 U.S. 5, 14–15 (1980) (citation omitted).

Here, Judge Alexopoulos made no such finding; to the contrary, the court expressly found "that Plaintiff's actions, although misguided, were not the result of bad faith." The court's findings are supported by evidence and therefore are not clearly erroneous. *See United States v. Hardage*, 985 F.2d 1427, 1436–37 (10th Cir. 1993).

But because the district court misinterpreted Rule 41(d) to allow for attorney's fees, I would reverse the award of attorney's fees. *See Andrews v. Am.'s Living Ctrs., LLC*, 827 F.3d 306, 309, 314 (4th Cir. 2016).