UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DOE MC-1,

Plaintiff,

v.

THE UNIVERSITY OF MICHIGAN, THE REGENTS OF THE UNIVERSITY OF MICHIGAN (official capacity Only),

Defendants.

Case No. 2:20-cv-10568

Hon. Victoria A. Roberts
Hon. Elizabeth A. Stafford

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendants the University of Michigan and the Regents of the University of Michigan (collectively, "the University") hereby move, under Federal Rules of Civil Procedure 12(b)(1) and (b)(6), to dismiss the Amended Complaint.

Plaintiff alleges that he was sexually assaulted in the 1980s by Robert Anderson, a former University doctor who died in 2008. The University condemns Anderson's misconduct. The University recognizes the harms he caused and is committed to developing a fair, just, timely, and efficient resolution process—one that does not require drawn-out litigation. With the mediator's assistance, the University has been working with Anderson's survivors, including Plaintiff, to

identify the best approach to bring closure and resolution to these matters. The University is eager to continue that work in earnest.

What matters for purposes of this motion, however, is that this lawsuit cannot proceed, as a matter of law, for two fundamental reasons. *First*, all of Plaintiff's claims are time-barred. Anderson has been dead for 12 years, he has not been employed by the University for 17 years, and the conduct at issue occurred more than 30 years ago. The 3-year statute-of-limitations has thus long expired. *Second*, Plaintiff's claims are barred by sovereign immunity. The University is a state instrumentality, so it is immune from damages suits under the Eleventh Amendment except where its immunity has been statutorily abrogated. Section 1983 does not abrogate Eleventh Amendment immunity, so Plaintiff's § 1983 claims must be dismissed. And Congress abrogated immunity for Title IX claims only for "violations that occur[ed] in whole or in part after October 21, 1986," 42 U.S.C. § 2000d-7(b), so Plaintiff's Title IX claims must be dismissed to the extent the alleged conduct occurred on or before that date.

The Amended Complaint suffers from additional flaws, too. Even if Plaintiff's Title IX claim were not barred by the statute of limitations and sovereign immunity, it would fail for the additional reason that Plaintiff has not alleged actionable Title IX damages. Plaintiff also lacks standing to seek injunctive relief under Title IX or § 1983. Further, if this case proceeds at all, the University of

Michigan should be dismissed as an improper defendant.

Consistent with Local Rule 7.1(a), counsel for the University contacted Plaintiff's counsel on September 28, 2020 to ask whether counsel would concur in the relief sought. Plaintiff's counsel stated that Plaintiff does not concur.

For these reasons, as further developed in the attached memorandum, the University respectfully requests that the Court grant its motion and dismiss Plaintiff's Amended Complaint with prejudice.

Dated: September 30, 2020

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

STATEMENT OF ISSUES PRESENTED

Plaintiff seeks damages stemming from alleged assaults he claims occurred in the 1980s. The issues presented are:

1. Are Plaintiff's claims barred by the statute of limitations?

Defendants' answer:	Yes
Plaintiff's answer:	No
This Court should answer:	Yes

2. Are Plaintiff's claims barred by the University's sovereign immunity?

Defendants' answer:	Yes
Plaintiff's answer:	No
This Court should answer:	Yes

3. Should Plaintiff's Title IX claim be dismissed for failure to allege a Title IX injury?

Defendants' answer:	Yes
Plaintiff's answer:	No
This Court should answer:	Yes

4. Does Plaintiff lack standing to seek injunctive relief?

Defendants' answer:	Yes
Plaintiff's answer:	No
This Court should answer:	Yes

5. Should the University of Michigan be dismissed as an improper party?

Defendants' answer:	Yes
Plaintiff's answer:	No
This Court should answer:	Yes

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INTRODUCTION

The University of Michigan is confronting through credible allegations the sad reality that some of its students suffered sexual abuse at the hands of one of its former employees. In particular, the University has learned that Robert Anderson, a former University doctor who died in 2008, sexually assaulted students. The University is determined to acknowledge and reckon with that past and, to the extent possible, provide justice—including in the form of monetary relief—to Anderson's survivors. To that end, the University has announced its commitment to developing a fair, just, timely, and efficient resolution process for the former patients he harmed—one that does not require drawn-out litigation.

Plaintiff's lawsuit, however, cannot proceed for two fundamental reasons.

First, Plaintiff's claims are barred by the 3-year statute of limitations. Limitations periods are fundamental to the operation of courts, "vital to the welfare of society," and provide "security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). They "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944). Plaintiff's claims in this case involve an alleged assault that occurred more than 30 years ago by a perpetrator who has not been employed by the University for 17 years and has

been dead for 12 years. The statute of limitations therefore precludes a litigated recovery.

Second, Plaintiff's claims are barred by sovereign immunity. "Sovereign immunity principles enforce an important constitutional limitation on the power of the federal courts." *Sossamon v. Texas*, 563 U.S. 277, 284 (2011) (citation omitted). As an arm of the State, the University is immune under the Eleventh Amendment from damages suits in federal court except where a statute provides otherwise. Because § 1983 does not abrogate sovereign immunity, those claims are barred by the Eleventh Amendment. And because Congress abrogated immunity for Title IX claims only for "violations that occur[ed] in whole or in part after October 21, 1986," 42 U.S.C. § 2000d-7(b), Plaintiff's Title IX claim must be dismissed to the extent the alleged abuse occurred on or before that date.

Even if Plaintiff's claims were not time-barred and the University lacked immunity, Plaintiff's Title IX claim must be dismissed for the additional reason that he fails to allege a Title IX injury. Plaintiff also lacks standing to seek injunctive relief. And Plaintiff's claims against "the University of Michigan" should be dismissed because the Board of Regents is the only proper Defendant. *See* Mich. Comp. Laws § 390.4.

The University does not here question Plaintiff's claim that Anderson abused him or the harm he suffered as a result. Indeed, the University stands ready to

compensate Plaintiff through a resolution process developed in mediation. But Plaintiff cannot recover damages in court. This Court should grant the University's motion and dismiss the Amended Complaint.

PLAINTIFF'S ALLEGATIONS

Robert Anderson worked as a physician for the University from 1966 through 2003. *See* Am. Compl. ¶ 1. Plaintiff Doe MC-1 alleges that he was recruited to the University of Michigan in the 1980s to be part of its wrestling team. *See id.* ¶¶ 208, 213. "During his time on the team in the 1980s," Plaintiff says that he saw Anderson "as many as" 50 to 60 times, and he estimates that at least 35 of those visits involved digital anal penetration or excessive genital fondling. *Id.* ¶¶ 213, 218–20. At the time, "Plaintiff felt uncomfortable about Anderson's acts," which "were different, uncomfortable, or unfamiliar to him." *Id.* ¶¶ 231, 238. But he alleges that, as a college student without medical training, he believed that "these acts by Anderson were medically necessary." *Id.* ¶ 230. According to Plaintiff, however, other students with similar experiences understood that Anderson's conduct had been inappropriate and reported that conduct to the University. *See id.* ¶¶ 34–46, 153–59, 167–76, 316–17.

Plaintiff alleges that the University's response to those reports was inadequate, and that the University fraudulently concealed his cause of action through general statements about the medical care offered at the University and a

1980 President's Report in which the University "thanked" Anderson for his service and noted his "resign[ation]" from his prior position. *Id.* ¶¶ 109–10, 192–94, 291, 298. Plaintiff does not say that he read this Report or otherwise relied on any specific statements about Anderson in the three years after the alleged abuse.

Plaintiff alleges that he first realized he had a possible cause of action when he read a newspaper article about Anderson in February 2020. *See id.* ¶ 255. He filed his initial complaint against the University on March 4, 2020, and subsequently amended that complaint on August 31, 2020. The Amended Complaint includes one claim under Title IX, and three under § 1983. *See id.* ¶¶ 306–63. Plaintiff seeks to recover damages for the emotional distress he alleges he has suffered since February 2020, as well as declaratory and injunctive relief. *See id.* ¶¶ 255–63, 364, 369.d.

LEGAL STANDARD

Legal defenses like untimeliness and sovereign immunity are properly considered at the motion-to-dismiss stage. *See, e.g.*, *Myers v. United States*, 526 F.3d 303, 305–06 (6th Cir. 2008) (statute of limitations); *Puckett v. Lexington-Fayette Urban Cty. Gov't*, 833 F.3d 590, 599 (6th Cir. 2016) (sovereign immunity). To survive a motion to dismiss, a plaintiff must plead plausible facts that, if true, would legally entitle him to relief. *See* Fed. R. Civ. P. 12(b)(6). When "a complaint pleads facts that are merely *consistent* with a defendant's liability, it stops short of

the line between possibility and plausibility of entitlement to relief"—and dismissal is required. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted).

Federal Rule of Civil Procedure 9(b)'s heightened pleading standard applies to allegations of fraudulent concealment. *See Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975); *Fillinger v. Lerner Sampson & Rothfuss*, 624 F. App'x 338, 341 (6th Cir. 2015). Rule 9(b) requires pleading with particularity, which means that the complaint must specifically allege the "who, what, when, where, and how" of the alleged fraud. *Republic Bank & Tr. Co. v. Bear Stearns & Co.*, 683 F.3d 239, 247 (6th Cir. 2012) (quotation omitted).

ARGUMENT

I. PLAINTIFF'S CLAIMS ARE TIME BARRED.

A. The Three-Year Statute of Limitations Expired Decades Ago.

When a federal statute does not provide a statute of limitations, courts "borrow[ ]" from "the state law of limitations governing an analogous cause of action." *Bd. of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 483–84 (1980). For both Title IX and § 1983, that means Michigan's general "statute of limitations for personal injury claims" applies. *Lillard v. Shelby Cnty. Bd. of Educ.*, 76 F.3d 716, 729 (6th Cir. 1996) (Title IX); *see also Owens v. Okure*, 488 U.S. 235, 250 (1989) (§ 1983). In Michigan, that statute of limitations is, at most, three years. *See* Mich. Comp. Laws § 600.5805(2); *Green v. City of Southfield*, 759 F. App'x

410, 414 (6th Cir. 2018); *cf.* Mich. Comp. Laws § 600.5805(3) (providing an even shorter, two-year period for assaults).

The "accrual date of a federal cause of action is a matter of federal law." *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 762 (5th Cir. 2015) (quotation omitted); *see McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019) (similar). The "standard" federal rule is that accrual occurs "when the plaintiff has a complete and present cause of action"—not when the plaintiff discovers that cause of action. *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (quotation omitted). And the Supreme Court has recently clarified that, unless a statute *unambiguously* provides otherwise, courts must apply that "standard rule." *See Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019) (quotation omitted); *accord Everly v. Everly*, 958 F.3d 442, 460 (6th Cir. 2020) (Murphy, J., concurring) ("The Supreme Court has since squelched [the] circuit evolution in decisions spanning many federal statutes, criticizing the 'expansive approach to the discovery rule [as] a 'bad wine of recent vintage.'"). Courts may not, therefore, "read" a discovery rule into a statute of limitations that does not expressly include a discovery-based trigger. *Rotkiske*, 140 S. Ct. at 360; *accord, e.g.*, *Goodman v. Norristown Area Sch. Dist.*, 2020 WL 5292051, at *3 (E.D. Pa. Sept. 4, 2020) (holding that *Rotkiske* overruled prior caselaw applying the discovery rule to Title VII and equivalent state-law claims).

The "standard rule," not the discovery rule, applies here. In adopting Title IX and § 1983, Congress "legislate[d] against" the presumption "that the limitations period commences when the plaintiff has a complete and present cause of action." *Rotkiske*, 140 S. Ct. at 360 (quoting *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418–19 (2005)). Accordingly, if Congress had anticipated private actions at all, it would have understood that the limitations period would begin running at the time the violation occurred, not the time the violation was discovered. That assumption is borne out in the text of the Michigan statute of limitations, which runs from "the time of the death or injury." Mich. Comp. Laws § 600.5805(2); *see also* Mich. Comp. Laws § 600.5827 (a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results"); *Trentadue v. Buckler Lawn Sprinkler*, 738 N.W.2d 664, 672 (Mich. 2007) ("[C]ourts may not employ an extrastatutory discovery rule to toll accrual[.]").

Consistent with these principles, Plaintiff's claims accrued—and the three-year limitations clock began ticking—at the time the allegedly abusive acts occurred. *See, e.g.*, *Bowling v. Holt Pub. Sch.*, 2017 WL 4512587, at *2 (W.D. Mich. May 26, 2017) (holding that sexual assault claims accrued, "at the latest," on the date of the last alleged assault); *Anderson v. Bd. of Educ. of Fayette Cnty.*, 616 F. Supp. 2d 662, 668–69 (E.D. Ky. 2009) (holding that § 1983 claims "accrued at the time of the

alleged abusive acts"); *cf. Lemmerman v. Fealk*, 534 N.W.2d 695, 697–98 (Mich. 1995) (holding that sexual-abuse claims accrued at the time of the abuse). Because Plaintiff's claims are based on abusive acts that he alleges occurred in the 1980s, *see* Am. Compl. ¶¶ 213, 218–21, the statute of limitations expired many years ago.

B. Even if the Discovery Rule Applied, It Would Not Delay Accrual of Plaintiff's Claims.

Even if the discovery rule applied, Plaintiff's claims would still be time-barred for two related reasons.

First, to the extent the discovery rule applies, the limitations period begins to run "when [the plaintiff] discovers that he has been injured, *not* when he determines that the injury was *unlawful*." *Anderson*, 616 F. Supp. 2d at 668 (quoting *Amini v. Oberlin College*, 259 F.3d 493, 500 (6th Cir. 2001)) (emphasis added); *see also Rotella v. Wood*, 528 U.S. 549, 555 (2000) ("[I]n applying a discovery accrual rule, we have been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock."). That means, for example, that a medical malpractice claim is "discovered"—and the limitations clock starts—when the inadequate treatment is provided, even if the plaintiff has no awareness "that his injury was negligently inflicted" or is otherwise "ignoran[t] of his legal rights." *United States v. Kubrick*, 444 U.S. 111, 122–23 (1979).

Second, the question for purposes of the discovery rule is not when a plaintiff *actually learns* he has been injured, but rather when he first "*has reason to know* of

his injury." *Johnson v. Memphis Light Gas & Water Div.*, 777 F.3d 838, 843 (6th Cir. 2015) (emphasis added); *see Owner-Operator Indep. Drivers Assoc., Inc. v. Comerica Bank*, 562 F. App'x 312, 319 (6th Cir. 2014) (explaining that the federal discovery rule is triggered upon inquiry notice). "A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence." *Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984). "In this objective inquiry, courts look to what event should have alerted the typical lay person to protect his or her rights." *Johnson*, 777 F.3d at 843 (quotation omitted).

Consistent with those principles, the statute of limitations on Plaintiff's claims (assuming the discovery rule even applied) would have begun running when Plaintiff had inquiry notice that he had been injured, not when Plaintiff learned that "the injury was unlawful." *Anderson*, 616 F. Supp. 2d at 668 (quotation omitted). And Plaintiff's own allegations establish that he had at least inquiry notice at the time the alleged assaults occurred. After all, Plaintiff acknowledges that Anderson's conduct was "different" and "unfamiliar," and that Plaintiff "felt uncomfortable about Anderson's acts." Am. Compl. ¶¶ 231, 238; *cf. also* Compl. ¶ 85 ("Not once did Plaintiff see Anderson for issues related to his genitals or anus; yet most of the times that Anderson treated Plaintiff, Anderson required Plaintiff to drop his pants, so Anderson could digitally penetrate Plaintiff's anus and fondle Plaintiff's genitals."); *id.* ¶ 105 (alleging that Anderson's conduct was "odd or weird"). Although Plaintiff

did not report those acts or inquire as to their validity, he certainly could have. *Cf. Rotella*, 528 U.S. at 556 (noting that a medical malpractice patient is on notice of his injury even though "investigation may be necessary before he can make a responsible judgment about . . . actionability"). Indeed, Plaintiff alleges that dozens of similarly situated students did exactly that. *See* Am. Compl. ¶ 317 ("Defendants were notified about Anderson's sexual abuse and molestation by young male students in or around 1968, 1969, 1973, 1975, 1976, 1979, 1980, 1982, 1983, 1988, 1993, 1994, and, on information and belief, on many other occasions before and after 1980."). That similarly situated students allegedly reported abuse underscores that, by any objective measure, Plaintiff had reason to know of his injury.[1]

Courts applying the discovery rule to similar claims have found that the statute of limitations started to run at the time the alleged assaults occurred—not years later, when the plaintiff sees media coverage or otherwise learns about the perpetrator's abuse of others. In *Twersky v. Yeshiva University*, for example, a group of former students filed suit in 2013 after a newspaper published a story about a history of abuse at their high school decades earlier. *See* 993 F. Supp. 2d 429, 440 (S.D.N.Y.

[1] Notice would have only intensified in the intervening decades, wherein Plaintiff presumably obtained medical treatment that did not involve the kind of inappropriate conduct Anderson initiated. *See, e.g.*, *Doe v. Univ. of S. Cal.*, 2019 WL 4228371, at *3 (C.D. Cal. Apr. 18, 2019) ("Plaintiff undoubtedly had further gynecological examinations . . . over the 27 years since and would have had a basis to conclude that Dr. Tyndall's conduct fell outside of medically acceptable standards.").

2014), *aff'd*, 579 F. App'x 7 (2d Cir. 2014). The court explained that, under the federal discovery rule, "the clock begins to run when the plaintiff has inquiry notice of his injury, namely when he discovers or reasonably should have discovered the injury." *Id*. at 439 (quotation omitted). Because the plaintiffs (even as minors) reasonably should have discovered their injury at the time of the abuse, the court rejected their argument that the newspaper article started the limitations clock running anew. *See id*. at 440.

Twersky is consistent with decisions from courts across the country:

- In *Doe v. Pasadena Hosp. Ass'n*, the plaintiff argued that she only "became of [sic] aware of her causes of actions . . . when the L.A. Times published a report about [her gynecologist's] misconduct." 2020 WL 1529313, at *2 (C.D. Cal. Mar. 31, 2020). The court rejected that argument, finding that the plaintiff "had reason to suspect [the gynecologist] of wrongdoing" at the time abusive gynecological examinations occurred. *Id.* at *5.

- The court reached the same result in *Doe v. Univ. of S. Cal.*, 2019 WL 4228371 (C.D. Cal. Apr. 18, 2019). "The fact that Plaintiff only learned [in 2018] that she was not the only female patient abused by" a doctor during a gynecological exam, the court reasoned, does "not affect Plaintiff's knowledge of the abuse she received back in 1991." *Id.* at *5.

- Similarly, in *King-White v. Humble Indep. Sch. Dist.*, the court rejected the argument that the high-school-age plaintiff did not discover her claim until facts came to light during the perpetrator's criminal case. *See* 803 F.3d 754, 756, 762 (5th Cir. 2015). "[T]he circumstances alleged in Plaintiffs' complaint," the court explained, "would undoubtedly have prompted a reasonable person to investigate." *Id.* at 762.

- Likewise, in *Doe 56 v. Mayo Clinic Health Sys.–Eau Claire Clinic, Inc.*, the plaintiffs alleged that their sexual assault claims "did not accrue until they learned in news reports that the State had charged [the doctor who abused them] with second-degree sexual assault of another boy for

> physically manipulating that boy's penis during a genital examination very similar to the Does' own examinations." 880 N.W.2d 681, 684 (Wis. 2016). The Court held that the claims "accrued on the date of the last physical touching by [the doctor] because that is the only moment at which a 'physical injurious change' occurred." *Id.* at 685.

As these and other courts have concluded, the discovery rule simply does not delay accrual where, as here, "a victim of sexual abuse recalls th[e] abuse but does not appreciate its wrongfulness" until later. *Doe v. Kipp DC Supporting Corp.*, 373 F. Supp. 3d 1, 8 (D.D.C. 2019).

Plaintiff cannot resuscitate his claims by restyling his injury either as the University's failure to report Anderson's abuse of others or as the media's reporting of Anderson's misconduct. Plaintiff's legal claims all arise from the alleged assaults themselves. And courts have consistently rebuffed plaintiffs' efforts to evade statutes of limitations by recharacterizing their injuries along these very lines. *See, e.g.*, *Guy v. Lexington-Fayette Urban Cnty. Gov't*, 488 F. App'x 9, 15 (6th Cir. 2012) (reasoning that the abuse itself, not the government's "failure to report," was "the injury that [gave] rise to plaintiffs' claims"); *Doe 56 v. Mayo Clinic Health Sys.–Eau Claire Clinic, Inc.*, 865 N.W.2d 885 (Wis. Ct. App. April 1, 2015) ("Although the plaintiffs allege they were not injured by the touching until they later realized it was improper[,] . . . actionable injury flows immediately from a nonconsensual, intentional sexual touching." (quotation omitted)), *aff'd*, 880 N.W.2d 681 (Wis. 2016).

C. Fraudulent-Concealment Tolling Does Not Apply.

Plaintiff's claims are not subject to equitable tolling on fraudulent-concealment grounds, either. State law governs equitable tolling, including for federal claims. *See Tomanio*, 446 U.S. at 485; *Johnson*, 777 F.3d at 845. With respect to fraudulent-concealment tolling, Michigan law provides:

> *If a person* who is or may be liable for any claim *fraudulently conceals the existence of the claim* . . . from the knowledge of the person entitled to sue on the claim, the *action may be commenced at any time within 2 years after the person* who is entitled to bring the action discovers, or *should have discovered*, *the existence of the claim* . . . although the action would otherwise be barred by the period of limitations.

Mich. Comp. Laws § 600.5855 (emphases added). That provision must be "strictly construe[d] and narrowly appl[ied]." *B&P Process Equip. & Sys., LLC v. Applied Indus. Techs.*, 2015 WL 13660565, at *3 (E.D. Mich. Feb. 3, 2015) (quotation omitted). It does not apply here for two independent reasons: Plaintiff is not eligible for tolling because he had at least inquiry notice of his injury, and Plaintiff has not pleaded facts showing that the University fraudulently concealed his claim.

1. *Fraudulent Concealment Does Not Apply Where a Plaintiff Has Knowledge or Inquiry Notice of His Claims.*

"It is well established . . . that when a limitations period is tolled because of fraudulent concealment of facts, the tolling ceases when those facts are, or should have been, discovered by the plaintiff." *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012); *see also The Reserve at Heritage Vill. Ass'n v. Warren*

Fin. Acquisition, LLC, 850 N.W.2d 649, 665 (Mich. Ct. App. 2014) (similar). As already explained, Plaintiff knew of his injury—or, at the very least, had inquiry notice—at the time of his abuse. *Supra* Part I.B. Accordingly, fraudulent-concealment tolling is unavailable as a matter of law.

The Michigan Court of Appeals' decision in *Doe v. Roman Catholic Archbishop of Archdiocese of Detroit* is illustrative. *See* 692 N.W.2d 398 (Mich. Ct. App. 2004). In that case, the plaintiff alleged that he was abused by a priest between 1972 and 1976. *See id.* at 401. But he alleged that "he did not discover his claims" until 2002, after he saw "widespread media coverage" about clergy abuse and learned that his priest had been criminally prosecuted for abusing another boy. *See id.* at 401–02. And he argued that "the statutes of limitation should be tolled because [the] defendant engaged in fraudulent concealment." *Id.* at 404. The Court of Appeals disagreed. Because "[t]he facts that plaintiff alleged in support of his claims were all facts that plaintiff knew or should have known at the time of his injury," fraudulent-concealment tolling did not apply. *Id.* at 405.

Courts in other jurisdictions have reached the same result. In *Doe v. USC*, the court found that "even if USC [had] attempted to conceal [an allegedly abusive doctor's] improper behavior," the plaintiff's "own allegations show[ed] that she independently had reason to believe that [the doctor] did not conduct the examination . . . according to accepted medical standards." 2019 WL 4228371 at

*5. Fraudulent-concealment tolling was thus unavailable. *See id.* Similarly, in *Doe v. Pasadena Hospital Association*, the court found that fraudulent concealment could not toll the limitations period because the complaint established that the plaintiff "knew the necessary facts to place her on notice" of her claims based on, among other things, "aggressive and prolonged" and inappropriate examinations that the plaintiff "suspected" were "strange." 2020 WL 1529313 at *4–*5.[2]

Consistent with these authorities, Plaintiff "has failed to allege a claim of fraudulent concealment" because "he knew or should have known all the essential elements of potential causes of action against defendant at the time of his injury." *Archdiocese of Detroit*, 692 N.W.2d at 406.

2. *Plaintiff Has Not Adequately Alleged that the University Fraudulently Concealed His Claims.*

Even if Plaintiff lacked inquiry notice of his injury such that fraudulent-concealment tolling were conceivably available, he failed to plead facts to support its application. "Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action." *Archdiocese of Detroit*, 692 N.W.2d at

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[2] The list goes on. *See, e.g.*, *King-White*, 803 F.3d at 764–65 (finding "sufficient knowledge of the relevant facts . . . to end any 'estoppel effect' that would otherwise apply" from fraudulent concealment); *Anderson*, 616 F. Supp. 2d at 671 (similar); *Gourd v. Indian Mountain Sch., Inc.*, 2020 WL 1244920, at *6 (D. Conn. Mar. 16, 2020) (similar).

405 (quotation omitted). "[T]he fraud," moreover, "must be manifested by an affirmative act or misrepresentation." *Id.* (quotation omitted). "Mere silence is insufficient." *Sills v. Oakland Gen. Hosp.*, 559 N.W.2d 348, 352 (Mich. Ct. App. 1996) (citation omitted).

To survive a motion to dismiss based on fraudulent-concealment tolling, "[t]he plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment." *Id.* And those acts or misrepresentations must be pled with particularity. *See Dayco Corp.*, 523 F.2d at 394; *Fillinger*, 624 F. App'x at 341. That means that Plaintiff must "(1) . . . specify the allegedly fraudulent statements; (2) . . . identify the speaker; (3) . . . plead when and where the statements were made; and (4) . . . explain what made the statements fraudulent." *Republic Bank*, 683 F.3d at 247.

In attempting to plead fraudulent concealment, Plaintiff relies on two categories of "affirmative representations": representations allegedly made by Anderson himself, and representations allegedly made by University representatives. *See* Am. Compl. ¶¶ 274, 291. Neither suffices.

As an initial matter, "[t]he fraudulent concealment act extends the statute of limitations against those who fraudulently conceal causes of action"—and *only* against those individuals. *See Stoneman v. Collier*, 288 N.W.2d 405, 407 (Mich. Ct. App. 1979). Accordingly, any fraudulent representations allegedly made by

Anderson—representations that, by definition, were fraudulent only insomuch as they furthered his own illegal acts—do not toll the limitations period for claims against the University. *See Chandler v. Wackenhut Corp.*, 465 F. App'x 425, 432 (6th Cir. 2012) (explaining that an employee's fraudulent acts outside the "course of employment . . . cannot be imputed" to the employer).[3]

In any event, Plaintiff's allegations are much too general to satisfy Rule 9(b). With one exception, Plaintiff does not even specify *what* the alleged representations were—much less when they were made or how they were conveyed to Plaintiff. *See, e.g.*, Am. Compl. ¶ 291.c (alleging that the University represented that Anderson's conduct was "normal" without specifying who made that statement, or when, where, and how it was made). As a matter of law, such conclusory allegations are insufficient to show fraud. *See, e.g.*, *Republic Bank*, 683 F.3d at 246–47; *Evans v. Pearson Enters., Inc.*, 434 F.3d 839, 851 (6th Cir. 2006).

The only affirmative representation that Plaintiff pleads with any specificity is the issuance of the 1979–80 President's Report, which "thank[s]" Anderson for service, "acknowledge[s]" his "contributions to health care," and notes his "resign[ation] as Director of the University Health Service." Am. Compl. ¶¶ 291a–

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[3] Because Title IX does not impose vicarious liability on the University for Anderson's abuse, *see Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998), his acts cannot be imputed to the University.

b; *see also id.* at 107–10.[4] But the statements in that Report do not to amount to fraudulent concealment for three reasons.

First, the statements in the Report cannot plausibly be read to "mislead or hinder acquirement of information" regarding Anderson's alleged assaults, much less to have been "planned," designed, or intended to do so. *Archdiocese of Detroit*, 692 N.W.2d at 405. At most, the Report could have misled those who read it as to the reason for Anderson's departure from the University Health Service. *See* Am. Compl. ¶¶ 88–114. But the Report does not even reference any particular conduct by Anderson during physical exams, let alone does it endorse or conceal the nature of that conduct. *Cf., e.g.*, *Kelly v. Marcantonio*, 187 F.3d 192, 195, 201 (1st Cir. 1999) (holding that allegations that the defendants "engaged in a 'cover-up'" of priests' sexual assaults "by transferring the priests to different parishes" did not show that the defendants "concealed . . . the *fact of the injury* itself" (emphasis added)). And the Report certainly cannot be read to conceal the abuse of Plaintiff specifically. *Cf., e.g.*, *Archdiocese of Detroit*, 692 N.W.2d at 407 ("[E]ven if defendant attempted

[4] Plaintiff also cites a statement by a "former UM football player and assistant football coach . . . in a November 2008 newspaper obituary of Dr. Anderson" that "[w]e used to tell people when we recruited them, 'You will get no finer medical care.'" Am. Compl. ¶ 194. But Plaintiff does not rely on that statement—made long after the limitations period would have expired—in seeking fraudulent-concealment tolling. *See id.* ¶¶ 274, 291 (detailing the statements on which Plaintiff's fraudulent-concealment theory relies). And the statement cannot plausibly be read to address—much less conceal under the guise of appropriate medical treatment—the abusive acts plaintiff alleges.

to conceal the 'widespread sexual abuse' problem from the public at large, this attempt could not have concealed from plaintiff his causes of action against defendant.").

Second, fraudulent concealment requires that the plaintiff actually *rely* on the representations at issue. *See, e.g.*, *id.* at 404–05. But Plaintiff does not allege that he even read this Report, much less that he relied on it. *Cf. Johnson v. Johnson*, 2013 WL 2319473, at *2 (Mich. Ct. App. May 28, 2013) (explaining that it is "impossible for plaintiff to have acted in reliance upon defendant's representation" when plaintiff "was not even aware of the representation").

Third, to toll a limitations period, concealing acts must take place "*after* the alleged injury . . . because actions taken before the alleged injury would not have been capable of concealing causes of action that did not yet exist." *Archdiocese of Detroit*, 692 N.W.2d at 404; *see also Doe v. Bishop Foley Catholic High Sch.*, 2018 WL 2024589, at *6 (Mich. Ct. App. May 1, 2018) ("We may only consider actions by defendants-appellants that occurred after the alleged injury . . . ."). Because the Report predated Plaintiff's abuse, it cannot toll the limitations period for his claims. Am. Compl. ¶ 213.

Finally, to the extent Plaintiff seeks to rely on allegations of inaction—rather than affirmative misrepresentations—he cannot do so. *See Archdiocese of Detroit*, 692 N.W.2d at 405; *see also King-White*, 803 F.3d at 764. Plaintiff cannot evade

the "affirmative representation" requirement by arguing that Anderson or the University owed him a fiduciary duty. Any duty Anderson possessed as Plaintiff's doctor does not extend to the University. *Cf., e.g.*, *Ellsworth v. Battle Creek Health Care Sys.*, 1997 WL 33344742, at *3 (Mich. Ct. App. June 27, 1997) (finding no fiduciary relationship between a patient and the hospital that employed the patient's doctor and, as a result, no "duty to make disclosures"). And although the University has an important and meaningful relationship with its students, "no special relationship exists between a college and its own students" for purposes of legal claims. *Freeman v. Busch*, 349 F.3d 582, 587 (8th Cir. 2003); *see also Valente v. Univ. of Dayton*, 438 F. App'x 381, 387 (6th Cir. 2011).[5]

II. PLAINTIFF'S CLAIMS ARE BARRED BY SOVEREIGN IMMUNITY.

Even if Plaintiff's claims were timely, they are barred by sovereign immunity.

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[5] Some of Anderson's survivors have publicly supported the introduction of Michigan House Bill No. 6237, which would change Michigan's statute of limitations for individuals alleging under state law that they were sexually assaulted by their physicians. *See generally* Beth LeBlanc, *Legislation would remove legal barriers to lawsuits filed against UM's Anderson, others*, THE DETROIT NEWS (Sept. 16, 2020), *available at* https://www.detroitnews.com/story/news/local/michigan/2020/09/16/bills-barriers-lawsuits-um-anderson-sexual-assault/5814542002/. This legislative effort underscores that, under existing state and federal law, claims like Plaintiff's are untimely.

A. The University Is Immune from Federal Suit Under the Eleventh Amendment Absent Abrogation or Consent.

Under the Eleventh Amendment, states and their instrumentalities are immune from suit in federal courts. "The [Eleventh] Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (citation omitted). Eleventh Amendment immunity is so fundamental to our system of federalism that denial of a motion to dismiss on this ground is immediately appealable. *See id.* at 147. So too is the refusal to rule on a motion to dismiss on this ground pending discovery or otherwise. *See, e.g.*, *Smith v. Reagan*, 841 F.2d 28, 30–31 (2d Cir. 1988) (holding that the State "is entitled to an immediate determination of its claim of immunity").

As Plaintiff recognizes, the University is "a public university organized and existing under the laws of the State of Michigan." Am. Compl. ¶ 21. So the Eleventh Amendment applies to claims against it. *See Thomas v. Noder-Love*, 621 F. App'x 825, 831 (6th Cir. 2015) ("[T]he Board of Regents of the University of Michigan is a state entity protected by Eleventh Amendment sovereign immunity." (citing *Estate of Ritter v. Univ. of Mich.*, 851 F.2d 846, 851 (6th Cir. 1988))).

B. Plaintiff's § 1983 Claims Are Barred By Sovereign Immunity.

Eleventh Amendment immunity extends to "claims under § 1983, meaning that states . . . cannot be sued for money damages [under that statute] without the

state's consent." *Thomas*, 621 F. App'x at 831 (citation omitted). Section 1983 does not abrogate the University's immunity, *see id.*, and the University has not consented to this suit. Accordingly, Counts II–IV should be dismissed on immunity grounds.

C. Plaintiff's Title IX Claims Are Barred By Sovereign Immunity To the Extent They Involve Conduct on or Before October 21, 1986.

Sovereign immunity also bars all Title IX claims against the University for alleged abuse occurring on or before October 21, 1986. In 1986, Congress abrogated the States' sovereign immunity for Title IX claims, but *only* for "violations that occur[ed] in whole or in part after October 21, 1986." 42 U.S.C. § 2000d-7(b); *see also Estate of Ritter*, 851 F.2d at 848 n.6 (42 U.S.C. § 2000d-7 "was made applicable only to violations occurring *after* October 21, 1986"). The Court therefore lacks jurisdiction over all Title IX claims based upon alleged abuse occurring on or before October 21, 1986, and Plaintiff's Title IX claim must be dismissed to the extent the alleged conduct occurred on or before that date. *Cf., e.g.*, *Adatsi v. Mathur*, 935 F.2d 272 (7th Cir. 1991) (table) (holding that Congress's abrogation of immunity in § 2000d-7 did not apply because the basis of plaintiff's Title VI claim was his denial of admission on October 13, 1986); *Jones v. Frederick Cnty. Bd. of Educ.*, 689 F. Supp. 535, 537 n.1 (D. Md. 1988) (finding that § 2000d-7 did not apply "because plaintiff ha[d] not alleged any violations occurring after its effective date").

III. THE DAMAGES PLAINTIFF SEEKS ARE NOT COGNIZABLE UNDER TITLE IX.

Plaintiff's Title IX should also be dismissed because he fails to allege a Title IX injury. Injury is an indispensable element of a Title IX claim. *See Kollaritsch v. Michigan State Univ. Bd. of Trs.*, 944 F.3d 613, 621 (6th Cir. 2019). And Title IX provides damages only for "sexual harassment . . . that . . . deprive[d] the victims of access to the educational opportunities or benefits provided by the school." *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). Accordingly, "'[i]njury' in th[e] Title IX context means the deprivation of access to the educational opportunities or benefits provided by the school." *Kollaritsch*, 944 F.3d at 622 (quotation omitted). Here, Plaintiff seeks to recover damages related *exclusively* to harms he allegedly incurred in the wake of February 2020 media reports about Anderson. *See* Am. Compl., ¶¶ 255–63. But Plaintiff has not been a University student since the 1980s. *See id.* ¶ 213. So the damages he seeks do not relate to any "deprivation of access to the educational opportunities or benefits provided by the school.'" *Doe v. Univ. of Kentucky*, 959 F.3d 246, 251 (6th Cir. 2020) (quotation omitted). His Title IX claim thus cannot proceed.

IV. PLAINTIFF LACKS STANDING TO SEEK INJUNCTIVE RELIEF.

For similar reasons, Plaintiff lacks standing to pursue the non-monetary relief he seeks—*i.e.*, "declaratory, equitable, and/or injunctive relief, including, but not limited to implementation of institutional reform and measures of accountability."

Am. Compl. ¶ 369.d. A former student cannot demand *any* injunctive relief from a school under Title IX or § 1983, let alone relief to remedy the acts of a deceased perpetrator. *See Williams v. Bd. of Regents of Univ. Sys. of Georgia*, 477 F.3d 1282, 1303 (11th Cir. 2007) (Title IX) (holding that a former student "lacked standing to pursue injunctive relief" because the former student and his assailants "no longer attend UGA"); *Lipian v. Univ. of Mich.*, 2020 WL 1814081, at *8 (E.D. Mich. 2020) (Title IX and § 1983) ("Plaintiff has graduated . . . and is no longer enrolled at U of M. He therefore lacks standing to sue for injunctive relief . . . .").

V. THE UNIVERSITY OF MICHIGAN SHOULD BE DISMISSED AS AN IMPROPER DEFENDANT.

If any of Plaintiff's claims survive dismissal, the "University of Michigan" should be dismissed as an improper defendant. The Board of Regents of the University of Michigan is the body corporate with the capacity to be sued under law. *See* Mich. Comp. Laws § 390.4; *Ali v. Univ. of Michigan Health Sys.-Risk Mgmt.*, 2012 WL 3112419, at *3 (E.D. Mich. May 4, 2012), *report and recommendation adopted*, 2012 WL 3110716 (E.D. Mich. July 31, 2012) (finding that a suit must be dismissed because, among other things, the plaintiff failed to sue the proper party: the Board of Regents).

CONCLUSION

The University has great sympathy for what Plaintiff suffered. And the University is committed to developing a process to compensate survivors of

Anderson's abuse. But for the reasons stated above, Plaintiff cannot state a legal claim against the University.

Dated: September 30, 2020

Respectfully submitted,

/s/ Stephen J. Cowen

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CERTIFICATE OF SERVICE

I certify that I caused the foregoing to be filed on the CM/ECF system, which will effectuate service on all counsel of record.

Date: September 30, 2020

/s/ Stephen J. Cowen
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