UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOHN DOE,
Plaintiff,

v.

AMHERST COLLEGE, CAROLYN MARTIN, JAMES LARIMORE, TORIN MOORE, SUSIE MITTON SHANNON, and LAURIE FRANKL,
Defendants.

C.A. No. 3:15-cv-30097-MAP

REPLY MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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Dated: February 17, 2016

INTRODUCTION

Defendants submit this reply brief to address legal and factual mischaracterizations in Plaintiff John Doe's opposition to Defendants' motion for judgment on the pleadings.[1]

ARGUMENT

A. Doe Misstates the Pleading Standard and Improperly Limits the Special Deference Afforded to Disciplinary Decisions by Colleges and Universities.

Doe premises his opposition on the incorrect legal standard. Relying on case law that predates *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), Doe argues that he need only "sketch a scenario" that could state a claim for relief if "fleshed out by means of appropriate facts." Pl. Opp.,[2] p.7 (quoting *Garrett v. Tandy Corp.*, 295 F.3d 94, 105 (1st Cir. 2002)). But this minimal pleading standard is no longer good law. For a complaint to survive a motion to dismiss, it must now "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal quotations omitted). A complaint cannot merely leave "open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery"; rather, it must possess enough factual "heft" to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555-556, 561 (internal quotations omitted).

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[1] Doe's opposition concedes that he has not adequately pled a tortious interference claim (Count III), agrees to dismiss his intentional infliction of emotional distress claim (Count VIII), acknowledges that his negligent infliction of emotional distress ("NIED") claim does not specify physical symptoms as presently pled (Count IX), and fails to address his injunctive relief count altogether (Count X). Pl. Opp., pp. 27, 33-34. This reply memorandum therefore does not address those counts, except for individual liability with respect to his NIED claim. Nor does this reply address Doe's section 1981 claim, which he now contends is "secondar[y]" to his Title IX claim, because Defendants' memorandum of law effectively rebuts all the arguments raised in his opposition on its own (Count V). *Compare id.*, pp. 27-28 *with* Def. Mem., pp. 43-45. The reply also does not address Doe's breach of the covenant of good faith and fair dealing claim (Count II) for this same reason. *Compare* Pl. Opp., pp. 20-22 *with* Def. Mem., pp. 33-34.

[2] In this reply memorandum, "Pl. Opp." refers to Plaintiff's Opposition to Defendants' Motion for Judgment on the Pleadings (Doc. 43), "Def. Mem." refers to the Memorandum of Law in Support of Defendants' Motion for Judgment on the Pleadings (Doc. 38), "Roberts Aff." refers to the Affidavit in Support of Defendants' Motion for Judgment on the Pleadings (Doc. 37), and "Cp." refers to the Complaint in this action (Doc. 1).

Not only does Doe misstate the pleading standard, he also incorrectly posits that Massachusetts law only affords *academic* decisions by colleges and universities special deference. *See* Pl. Opp., p. 8 (citing *Doe v. University of South*, No. 09-cv-62, 2011 WL 1258104, *13 (E.D. Tenn. 2011)). Plaintiff's single citation to a case applying Tennessee law cannot supersede the principle, well-established in Massachusetts, that "[c]ourts are chary about interfering with academic *and* disciplinary decisions made by private colleges and universities." *Schaer v. Brandeis University*, 432 Mass. 474, 482 (2000) (emphasis added). To claim that the deferential standard established in *Schaer* does not apply here is particularly unfounded because *Schaer* itself also involved a student accused of engaging in sexual misconduct. *See id.* at 376 (describing allegations against student). *See also* Def. Mem., p. 19; *Bleiler v. College of Holy Cross*, No. 11-cv-11541, 2013 WL 4714340, *10 (D. Mass. 2013) (affording "broad discretion" to college to discipline student accused of sexual assault).

B. Doe Cannot Sustain a Breach of Contract Claim Under Either a Reasonable Expectations Theory or a Basic Fairness Theory (Count I).

Doe continues to mischaracterize the relevant law and facts in his breach of contract argument. Pl. Opp., pp. 9-20. Although Doe dedicates the majority of his opposition to attempting to salvage this claim, he abandons many of the allegations that supposedly served as its foundation. Specifically, Doe provides no response for the College's positions:

- that the College's timetable for resolving Jones's complaint comported with its Policy, Def. Mem., p. 24;
- that the College advised Doe of his right to consult an attorney in a manner that comported with its Policy and Massachusetts law, *id.*, pp. 26-27;
- that the College partitioned the hearing room in a manner that also comported with its Sexual Misconduct Policy ("the Policy") and Massachusetts law, *id.*, p. 28;
- that the Policy creates no reasonable expectation that the College will undertake additional information-gathering after a hearing, *id.*, pp. 28-29; and

- that the Policy created no reasonable expectation that the College could reopen a sexual misconduct proceeding after the appeal process's conclusion, *id.*, pp. 31-32.

1. *Doe Fails to Set Forth Plausible Allegations that the Board Lacked Sufficient Evidence to Find Him Responsible for Sexual Assault.*

Regarding drugs or alcohol impairment, the Policy could not be clearer, stating, "Being intoxicated or impaired by drugs or alcohol is *never* an excuse for sexual misconduct and does not excuse one from the responsibility to obtain consent." Cp., Ex. 1, p. 8 (emphasis added).[3] Despite the Policy's unequivocal language, Doe nevertheless contends that his alleged "blacked out" state should have absolved him from any wrongdoing under the Policy, *see* Pl. Opp., p. 14, notwithstanding the undisputed evidence at the disciplinary proceeding that he forced Jones to perform oral sex on him after she had withdrawn her consent by holding her head down and forcing his penis into her mouth. Cp., Ex. 2, pp. 4, 18; Cp., Ex. 3, p. 43.

Doe sidesteps these facts and the College's straightforward analysis of the consent obligations under the Policy, which he dismisses as "hypertechnical," "flawed," and "bizarre." Pl. Opp., pp. 13-15. Rather than address what the College's Policy *actually says*, Doe argues that the law *implies* a "mens rea" element into certain criminal statutes and that, therefore, a student could reasonably expect the Policy to contain one too. Pl. Opp., pp. 14-15.

Doe's argument is baseless for several reasons. *First*, Doe could not have reasonably expected that the College would imply an additional, mens rea requirement into the Policy that was not already there. *See Sullivan v. Boston Architectural Ctr., Inc.*, 57 Mass. App. Ct. 771, 775 (2003) (refusing to "second-guess or supplement the processes developed by the [private university]"). Massachusetts law is clear that "[i]t is *not* what plaintiff's expectations of the

[3] Faced with this unequivocal language, Doe claims that incapacitation may relieve a student "from responsibility for his or her own actions." Pl. Opp., pp. 16. In making this strained argument, Doe relies on the definition of incapacitation outlined in the Policy's statement on consent. *See id.* That statement contains no language absolving incapacitated students from sexual misconduct committed while incapacitated. Cp., Ex. 1, pp. 8-9. Nor is such language found anywhere in the Policy. *Id.*, pp. 1-28; Def. Mem., pp. 21-22.

proceeding were, but whether the proceedings fell within the range of reasonable expectations of *one reading the relevant rules*." *Walker v. President& Fellows of Harvard Coll.*, 82 F. Supp. 3d 524, 530 (D. Mass. 2014) (emphasis added). *Second*, Massachusetts law is also clear that criminal law concepts do not apply to disciplinary actions by private colleges. *Schaer*, 432 Mass. at 481 (refusing to require a private university "to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts" in its student conduct proceedings). *Third*, even if such concepts did apply, it is established law in Massachusetts that a defendant's knowledge of a victim's lack of consent is irrelevant in a rape prosecution. *See, e.g.*, *Commonwealth v. Lopez*, 433 Mass. 722, 727 (2001) (stating that "no mens rea or knowledge as to the lack of consent has ever been required").[4] No College policy, and no civil or criminal case, supports Doe's repellent argument that a student can escape responsibility for sexual assault by becoming drunk to the point where the perpetrator is no longer "capable of having knowledge of the [victim's] lack of consent." Pl. Opp., p. 16. From Doe's perspective, the message to perpetrators is this: "If you're drunk, keeping drinking, and then you're bullet-proof." Nothing in the College's Policy, or even common sense, permits that interpretation.

Doe also argues that the Hearing Board never found that Doe compelled Jones to perform oral sex "by force." Pl. Opp., p. 17. Relying on an implausible and troubling reading of the Board's decision, Doe contends that the Board "merely" found that Jones "expressed her lack of

[4] Massachusetts law has a limited exception to this rule for rape prosecutions based on proof that a *victim* was incapable of giving consent due to his or her incapacitation. *Commonwealth v. Mountry*, 463 Mass. 80, 90 (2012). If a prosecution is based on a victim's incapacitated state, as opposed to rape by physical force, then the prosecution must also prove that the defendant knew, or should have known, that the victim was incapacitated. *Id.* at 90-92 (stating that its "holding is confined to cases in which the Commonwealth relies on proof that a victim was incapable of consent"). Even though Jones never claimed that she was incapacitated, Doe nevertheless cites to case law laying out this inapplicable exception, rather than the general rule set forth in *Lopez* regarding forcible rape. Pl. Opp., pp. 15-16.

consent but then apparently continued to perform the act." *Id.* This argument is devoid of any merit and, as with so many of Doe's arguments, simply disregards the record evidence. The Board's decision states unequivocally that Doe violated the Policy's prohibition against sexual assault. Cp., Ex. 4, p. 1. The decision goes on to identify "factors" that it considered "influential," including Jones's "*account of withdrawing consent* after it had initially been given– as evidenced by Ms. Jones's *saying 'no,'* and '*I don't want to keep going*' and by her *asking [Doe] to leave and pushing him away.*" *Id.*, pp. 1-2 (emphasis added). From this language, Doe inconceivably surmises that the Board's findings "lend themselves to the conclusion that Doe could have understood Jones to have renewed her consent by continuing to perform the act even after expressing that she did not wish to continue." Pl. Opp., p. 17.[5] His argument simply ignores Jones's undisputed account before the Board, in which she stated that Doe "*did not listen or pay attention to my clear refusal and held me down, forcing his penis in to my mouth until he ejaculated*." Cp., Ex. 3, p. 43 (emphasis added). On this evidence and on these findings, Doe's claim that he was "entitled to be found not responsible" is absurd. Pl. Opp., p. 17.

2. *Doe Cannot Show that the College Contravened Any Reasonable Expectation Created by the Policy by Raising Perceived Inadequacies in Investigation.*

While admitting that Attorney Kurker conducted interviews "with persons who had been identified for her" by Jones and Doe, Doe condemns her investigation because she did not "identify and interview" two students, DR and ML, or obtain their text messages with Jones. Cp., ¶30; Pl. Opp., pp. 12, 18-19. With these texts in hand and the benefit of 20/20 hindsight,

[5] This is a curious and inconsistent argument by Doe. He has alleged that he lacked "conscious awareness" of his actions during his encounter with Doe, but now argues that he "could have understood" Jones's actions to reflect "renewed consent."

Doe works backwards to argue that Attorney Kurker's investigation was "incompetent" and "grossly inadequate" because she did not uncover this information, and that her investigation thus was not "thorough, impartial or fair." Pl. Opp., pp. 18-19. Neither the College's Policy nor the applicable law permits this type of after-the-fact second-guessing to serve as the foundation for a breach of contract claim.

Nothing in the Policy guarantees that an investigator will find every piece of information that could possibly be relevant, or that a "thorough, impartial, and fair investigation" will be flawless. *Cf. Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 174 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009) (noting that, "[i]n hindsight, there may be other and better avenues that the [school district] could have explored or other and better questions that could have been asked during the interviews … [b]ut Title IX does not require ... flawless investigations [or] perfect solutions"). Rather, the Policy is clear in its "Investigation Process" section that "the Investigator will *try* to obtain such other physical or medical evidence relevant to the investigation as the Investigator determines, *in his or her judgment, to be necessary*," and further provides that:

> The Investigator will *make a good-faith effort* to contact and interview any witnesses identified by the parties or in the documentation, including those no longer at the college. The Investigator *may also interview any other individual he or she finds to be potentially relevant* to the allegations of the complaint. Cp., Ex. 1, pp. 21-22 (emphasis added).

As the College previously set forth, *see* Def. Mem., pp. 25-26, the Policy thus vests the investigator with discretion in identifying relevant witnesses and documents. The law is likewise clear that "investigations involve judgment calls," and that "courts have no roving writ to second-guess an educational institution's choices from a universe of plausible investigative

procedures." *Fitzgerald*, 504 F.3d at 175.[6] The Policy does not promise perfection, and Doe could not have had any reasonable expectation that it did. *See, e.g., Greer v. Mondelez Glob., Inc.*, 590 F. App'x 170, 174 (3d Cir. 2014) (emphasizing that "[a]n employer's investigation into a harassment complaint need not be perfect"); *Tingle v. Arbors at Hilliard*, 692 F.3d 523, 531 (6th Cir. 2012) (refusing to require that an employer's investigation "be optimal or that it left no stone unturned").

Notwithstanding the Policy's specific statements to the contrary, Doe also contends that Attorney Kurker had no discretion with respect to "explor[ing] the existence of contemporaneous witnesses or communications that might bear on complainant's account." Pl. Opp., pp. 18-19.[7] To avoid the discretionary language in the "Investigative Process" section, Doe misdirects the Court to a different section of the Policy describing the College's "Title IX Review" process in general terms.[8] *Id.* Not only is the Policy clear that the Title IX Review section simply "outlines the college's *approach* to addressing reports of sexual misconduct," with the Investigation Process section providing the actual "*procedures* for adjudicating a sexual misconduct complaint

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[6] Given that the law recognizes that investigators act with broad discretion and have many options for gathering information, Doe's contention that he "expects to offer expert testimony as to what a competent investigation by a qualified investigator would look like" adds nothing to his argument. Pl. Opp., p. 19 n. 19. Similarly unavailing is Doe's suggestion that Attorney Kurker breached a duty to him by not meeting an unidentified "standard or care," in support of which he cites cases involving claims of medical and legal malpractice, where a patient or client sues a doctor or lawyer for breaching a standard of care. *See id.* Even if the law recognized a particular standard of care for conducting investigations, which it does not, Doe has no basis to argue that Attorney Kurker was in privity with him, as is the case in doctor/patient and lawyer/client relationships.

[7] Continuing his inconsistent argument, Doe first chides the investigator for *not "uncover[ing]"* evidence that was "conceal[ed]" by Jones, thus confirming that the investigator did not become aware of this evidence. Pl. Opp., pp. 2, 18. Later, Doe asserts that the investigator "*excluded* exculpatory information from her inquiry," suggesting (falsely) that the investigator was aware of the evidence, considered it exculpatory, and eliminated it from the investigation. *Id*., p. 19.

[8] The general statement that Doe relies on is found in "Appendix B: College Sexual Misconduct Policy" under the heading "Title IX Review" and the subheading "Investigation." Cp., Ex. 1, pp. 2, 16-17. The more specific statement that Defendants rely on is found in "Appendix C: Procedures for Addressing Sexual Misconduct Complaints Against Students Under the Student Conduct Process" under the heading "Investigation Phase" and the subheading "Investigation Process." *Id.*, pp. 18, 21-22. Doe cannot reasonably contend that the general overview of the Policy's process found in Appendix B should supersede the specific procedures implementing that process in Appendix C.

against a student," the Title IX Review section does not mandate that the investigator identify or obtain all relevant information. Cp., Ex. 1, pp. 17-18 (emphasis added). Rather, that section instead makes clear that the investigator will play an information-gathering role within the College's sexual misconduct process. *Id.*

In the end, it bears emphasis that the investigation was just one phase in the College's sexual misconduct process. The Policy expressly anticipates that additional information may surface *after* an investigation's completion, either before the hearing or during the appeal process, and sets forth procedures for its consideration. *See id.*, p. 24 (establishing a procedure for the parties "to present additional documentation or other evidence at the hearing that was not provided to the Investigator"), p. 27 (listing "[r]elevant, substantive and new information, not available at the time of the hearing," as a basis for appeal). The Policy thus does not create a reasonable expectation that the investigation will unearth or encompass all potentially relevant information.

3. *Doe Has Not Alleged that the College Failed to Provide him with a Trained Advisor, Let Alone that his Advisor Provided Inaccurate Advice.*

Doe has not set forth any particularized allegations that the College failed to provide him with a "trained" advisor. *See* Cp., ¶42 (alleging in conclusory fashion that Dean Moore received "little training" regarding "the new procedures"). Unable to identify any deficiencies in Dean Moore's actual training, Doe again works backwards, contending that because *either* Dean Moore or Dean Mitton Shannon "incorrect[ly]" told him that Jones's subsequent sexual encounter with another student (ML) "would be inadmissible" at Doe's disciplinary hearing, this alleged statement (which Doe is uncertain was even said by Dean Moore) unequivocally "demonstrate[s]" that the College failed to provide Doe with a "[t]rained advisor." Cp., ¶¶45-46; Pl. Opp., p. 20. This argument fails for multiple reasons. *First*, the Policy merely states that

"[t]he Complainant and Respondent may select [an advisor] from the list maintained by the Dean of Students of trained Advisors" and, further, that these advisors "serve[] to *guide* the student through the pre-hearing and hearing process and may *accompany* the student to any meeting with a college employee and to the hearing." Cp., Ex. 1, p. 19. (emphasis added). The Policy is thus clear that the College will make available a list of faculty and staff members who have received education on the disciplinary process and can shepherd students through that process. Nothing in the Policy creates a reasonable expectation that a faculty or staff member will provide advice on possible evidentiary issues. Cp., Ex. 1, p. 19.

Second, the statement that Doe attributes to Dean Moore or Dean Mitton Shannon is not an incorrect statement of the College's Policy. The Policy states, "Generally, prior sexual history of the Complaint or Respondent will not be allowed" as evidence in disciplinary proceedings, except "in limited circumstances, such as pattern evidence." Cp., Ex. 1, p. 24. In this context, the term "prior" refers to all sexual history *before the hearing*. Cp., Ex. 1, p. 24. *See also United States v. Torres*, 937 F.2d 1469, 1472 (9th Cir. 1991) (concluding that the term "past sexual behavior," as used in a prior version of Federal Rule of Evidence 412, encompasses "all sexual behavior of the victim of an alleged sexual assault which *precedes the date of the trial*") (emphasis added). Nothing in the Policy supports the interpretation suggested by Doe, i.e., that he had free rein to offer any evidence regarding Jones's sexual activity that occurred after the Incident but before the hearing.[9]

Third, Jones's interaction with ML, which was indisputably consensual, is irrelevant to whether Doe assaulted Jones. Doe argues that the "fact that [ML] was invited for and engaged in

[9] Doe argues that the Policy "does not speak to *subsequent* sexual activity." Pl. Opp., p. 20. If the Policy "does not speak" to the issue, then Doe could not have had a reasonable expectation that the Policy permitted him to offer evidence of Jones's sexual activity occurring after the Incident.

sexual activity with Jones" was "relevant to challenge the veracity of her claim that she had been assaulted by Doe and was distraught." Pl. Opp., p. 20. But the fact that Jones "*invited*" ML to engage in sexual activity with her has no bearing on whether her interaction with Doe was consensual. Indeed, a sexual assault victim's "consent to intercourse with one man does not imply her consent in the case of another." *See Commonwealth v. Gentile*, 437 Mass. 569, 583 (2002) (internal quotations omitted). Distilled to its offensive essence, Doe's argument is this: if Jones had sex with ML, then she must have wanted to have sex with me too. This disturbing argument finds no support in the College's Policy, and Doe could have had no reasonable expectation that the College would have permitted such evidence at his disciplinary hearing. Indeed, even if criminal evidentiary rules governed the College's proceeding (which they did not), such evidence would have been inadmissible. *See id.* (recognizing that Massachusetts's rape-shield law "prevents a defendant in a rape case who claims consent from putting the complainant on trial by raising collateral issues of little or no probative value concerning the complainant's alleged predisposition for promiscuity"); Fed. R. Evid. 412(a) (excluding "evidence offered to prove that a victim engaged in other sexual behavior" or "evidence offered to prove a victim's sexual predisposition," subject to certain, limited exceptions).

4. *Doe Fails to Allege Sufficient Facts Establishing that the Procedures Followed at the Hearing Violated Basic Fairness.*

In reviewing a disciplinary proceeding's outcome for basic fairness, Massachusetts courts engage in a limited, deferential review of the procedures applied during the proceedings. *See Schaer*, 432 Mass. at 481-482. Notwithstanding these narrow contours, however, Doe interprets "basic fairness" as an invitation to reconsider his expulsion with the benefit of text messages that he obtained *after* the conclusion of an investigation, disciplinary hearing, and appeal. *See* Pl. Opp., pp. 9-14. Without any precedential support, Doe announces that "basic fairness" permits

Massachusetts courts to override the "black letter components of [a college's] written procedure" and to determine whether a disciplinary proceeding succeeded in "getting to the truth of what happened." *See id.*, pp. 13-14. His position finds no support in Massachusetts law.[10]

Rather than invite an intrusive, wide-ranging review of a disciplinary proceeding at a private college, "basic fairness" focuses narrowly and exclusively on *the procedures* applied during the disciplinary proceeding. *See Schaer*, 432 Mass. at 481 (rejecting basic fairness claim based on "atmosphere of 'hysteria and misinformation'" because "*[n]othing in these allegations addresses the conduct of the hearing*"); *Morris v. Brandeis Univ.*, 60 Mass. App. Ct. 1119, *2 (2004) (unpublished decision) (dismissing "basic fairness" claim where college "*adhered strictly to its procedural rules*," from "the date of the charge through the appellate process"); *Walker*, 82 F. Supp. 3d at 532 (determining that "disciplinary proceeding[] … comport[ed] with notions of 'basic fairness'" by examining procedure afforded the student, including advanced notice of charges and an ability to call witnesses); *Kiani v. Trustees of Boston Univ.*, No. 04-cv-11838, 2005 WL 6489754, *8 (D. Mass. Nov. 10, 2005) (examining procedural safeguards in dismissing "basic fairness" claim where student "produced no evidence to establish the basic unfairness of the *proceedings* other than her understandable unhappiness with the result") (all with emphasis added). Massachusetts courts do not second-guess the evidentiary basis underlying a private college's disciplinary decision in evaluating a proceeding for basic fairness, and nothing in the law permits an expelled student to seek to overturn an expulsion decision based on information that was never presented during the disciplinary hearing.

[10] Doe also equates "basic fairness" to the procedural due process protections afforded by the U.S. Constitution. *See* Pl. Opp., p. 9-10 (relying on *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951), a seminal decision on procedural due process). Established law dictates, however, that basic fairness does not constitute a procedural due process guarantee for students at private colleges. *See Schaer*, 432 Mass. at 481.

Against the proper legal backdrop, Doe's basic fairness claim fails as a matter of law. His own allegations establish that the College afforded him a fundamentally fair hearing process that complied with the Policy, from providing him advance notice of the charges against him, to apprising him of his right to consult an attorney, to affording him multiple opportunities to identify witnesses and present evidence, to providing a hearing where he presented and challenged evidence, to considering his written appeal. *See* Def. Mem., pp. 20-33. Doe responds by claiming that the proceeding was deficient in three ways. Not only has he failed to support these claims with particularized allegations, the actual allegations that he has set forth contradict each of them.

First, Doe claims that he did not have "anything approaching an equal ability to present or respond to the evidence." Pl. Opp., p. 12. But the Complaint and hearing transcript make clear that Doe was notified of the charge against him (Cp., ¶29); spoke to an investigator and provided her a list of witnesses and relevant documents (Cp., ¶¶31, 38); was provided the investigator's report (Cp., Ex. 2); was afforded the opportunity to present additional documentation and evidence that had not been given to the investigator (Cp., Ex. 1, p. 24); and was afforded a hearing at which he called witnesses and asked questions, including a dozen directed at Jones (Cp., Ex. 3, pp. 2-146 (Doe asked thirty-six questions in total, with twelve of those to Jones, while Jones only asked nine questions in total)). After Jones testified regarding her texts with ML and DR, nothing prevented Doe from asking follow-up questions concerning those text messages. *See* Cp., pp. 46-47, 135-136. In fact, even after Jones mentioned her text messages with DR near the end of the hearing, Dean Larimore subsequently asked whether there were any additional questions seven times, including twice at Doe directly. *Id.*, pp. 137-142. Despite this direct invitation, Doe asked no questions about the text messages. *See id.*

Second, Doe claims that he was denied both an attorney and an "advocate" at the hearing,

see Pl. Opp., p. 12, but neither the Policy nor Massachusetts law requires the presence of attorneys or advocates at private disciplinary proceedings. *See Coveney*, 388 Mass. at 22 (student may not challenge his dismissal from private college on grounds that he had no attorney present at hearing); Cp., Ex. 1, p. 19 ("Attorneys *cannot* participate in the Hearing Board process") (emphasis added). Nor did the College allow Jones to have an attorney or advocate present at the hearing, while preventing Doe from having one. Cp., Ex. 3, pp. 5-6.

Third, Doe contends (again) that Attorney Allyson Kurker's investigation was not "thorough, impartial, and fair" because she did not "turn[] up" the text messages that Doe obtained after the proceeding's conclusion. See Pl. Opp., p. 12. Yet the Complaint itself establishes that Attorney Kurker complied with the College investigative procedures by interviewing all six witnesses identified by the parties; interviewing Jones and Doe; requesting supporting documents from them; and summarizing her interviews in a fourteen-page report. Cp., ¶¶31, 33, 38-39, Ex. 2, pp. 1-14. *See also* Def. Mem., pp. 24-26. That Attorney Kurker did not uncover the text messages notwithstanding these efforts does not contravene basic fairness.

Fourth, Doe contends that a purported confidentiality obligation stymied his own investigation, leaving him with "no ability to investigate on his own." Pl. Opp., p. 12. In making this argument, Doe embellishes the actual allegations in his Complaint, which state:

> [Dean Susie Mitton Shannon] told [Doe] that the process was confidential; that he must not speak to anyone about the allegations against him *unless he obtained prior authorization from the College's investigator*; and that he could provide a list of relevant witnesses to the investigator, but that relevant witnesses would only be people who were directly involved in the event. Cp., ¶29 (emphasis added).

Doe's allegations, even if credited, do not establish that the College contravened basic fairness. His contention that Dean Mitton Shannon informed him that the disciplinary process itself is confidential is consistent with the Policy. *See* Cp., Ex. 1, p. 4 ("the privacy of the parties will be respected and safeguarded"), p. 18 ("all college investigations will respect individual privacy

concerns"). His allegation that Dean Mitton Shannon told him to request Attorney Kurker's permission before speaking to witnesses did not preclude his ability to investigate on his own. Cp., ¶29. Doe has not alleged that he made any such requests to Attorney Kurker, much less that she denied them, and it is clear from the Complaint, moreover, that Doe did gather information during the investigative phase. *See id.*, Ex. 2, pp. 2, 23-24, 31-34. His allegation that Dean Mitton Shannon told him that "only" witnesses with "direct involvement" were relevant is squarely contradicted by the fact that Doe identified EH as a witness, and EH only offered testimony about Doe's character and his reaction, *several months after the Incident,* to the article that Jones wrote in which she described their encounter as non-consensual. *Id*., pp. 9, 26-27. Doe's own allegations establish that he was not barred from pursuing evidence, or requesting that Attorney Kurker do so.

C. Doe Fails to State a Claim for Relief under Title IX's Selective Enforcement and Erroneous Outcome Theories (Count IV).

1. *Jones is Not a Valid Comparator for Doe's Selective Enforcement Claim.*

Doe concedes that he must allege a valid comparison between himself and a similarly-situated female student to state a Title IX selective enforcement claim. Def. Mem., p. 40; Pl. Opp., p. 22. This requires Doe to identify a female student who is "similarly situated to [him] *in all relevant respects*." *Garcia v. Bristol-Myers Squibb Co.*, 535 F.3d 23, 31 (1st Cir. 2008) (interpreting Title VII) (emphasis added). Doe has failed to meet that burden.

Although Doe claims that Jones is a valid comparator, *see* Cp., ¶99; Pl. Opp., pp. 23-25, his Complaint and its exhibits reveal precisely the opposite. *See* Def. Mem., pp. 40-43. As made clear in Defendants' initial brief, Jones *filed an assault complaint* against Doe seeking disciplinary action, and the College *then followed its mandatory* disciplinary process. *Id.* There was nothing "selective" about the initiation or enforcement of the College's disciplinary process.

As Doe further concedes in his opposition, he *never filed a sexual misconduct complaint* against Jones, presumably because he has characterized their sexual encounter as "consensual" and, for that same reason, "has never sought to punish Jones." *See* Pl. Opp., p. 25; Cp., ¶1. Significantly, even after obtaining and presenting the text messages to the College in April 2014 (which, he now argues, demonstrate that he was "assaulted by Jones"), Doe *still* did not file a sexual misconduct complaint against her, even though Jones "was still a student and under the jurisdiction of the College" and Doe had the ability to do so. Cp., ¶75; *id.*, Ex. 1, pp. 4, 14 (providing that "*[a]ny individual* may make a report alleging a violation of this policy," that the College "does not limit the timeframe for reporting," and that the College loses jurisdiction over an individual only when he or she "is no longer affiliated with the college").

Despite this stark difference between their situations (i.e., Jones initiated a proceeding against Doe, and the College followed its mandatory process; Doe never initiated a disciplinary proceeding against Jones), Doe argues that the College could have filed a sexual misconduct complaint against Jones on its own initiative and was "explicitly authorized" to do so. Pl. Opp., p. 25. In simply making this argument, Doe nullifies any contention that he and Jones were similarly situated. The College did not initiate a disciplinary proceeding against Doe on its own accord in the absence of the filing of a complaint by Jones, even after Jones first reported in the spring of 2013 that Doe had forced her to perform oral sex upon him during the Incident in February 2012. Cp., Ex. 2, p.1. It was only *after* Jones filed a Complaint Form on October 28, 2014 that the College commenced disciplinary proceedings against Doe, as mandated by its Policy. Cp., Ex. 1, pp. 20-21; Cp., Ex. 2, pp. 17-18. Once Jones's Complaint Form was filed, the College proceeded as required by its Policy. Moreover, the Policy provision that affords the College discretion to initiate a disciplinary complaint on its own applies only "*[i]n exceptional cases, such as cases threatening community safety*." Cp., Ex. 1, p. 20 (emphasis added). There

is no valid comparison between the College's *mandatory* obligation under the Policy to commence a sexual misconduct proceeding upon receipt of Jones's complaint and a *discretionary* decision that is limited to exceptional circumstances that are inapplicable here. *See* Cp., Ex. 1, p. 20-21. Simply put, Doe has not alleged, and cannot allege, that a male student filed a sexual misconduct complaint against a female student, and that the College then failed to follow its mandatory disciplinary process.

Doe also argues that Jones is a comparator because she committed the "*identical conduct*" that led to Doe's expulsion. Pl. Opp., pp. 24-25 (emphasis in original). This argument is not only irrelevant to the issue of selective enforcement for the reasons addressed above, it is also demonstrably wrong, as Doe's own allegations demonstrate. There is no dispute that Jones alleged that Doe forcibly caused her to perform oral sex on him even after she told him no and pushed him away, and that he ignored her protests, forced his penis into her mouth, and choked her. *See* Cp., Ex. 2, p. 18 (Doe "ignored what I said and pushed his penis into my mouth anyway. He kept my head pushed down so I couldn't move, even though I was a choking with how hard he was holding me down"). By contrast, Doe, who claims that the encounter was "consensual" (Cp., ¶1), asserts in retrospect that Jones violated the Policy by performing oral sex on him while he was allegedly incapacitated. *See* Cp. ¶ 99. Nowhere does Doe allege that Jones ignored any protest, that he pushed her away, or that she forced him to engage in activity while disregarding words and conduct that demonstrated a lack of consent. The respective conduct described by Jones and Doe is not remotely "identical," and provides no foundation for Doe's contention that they were similarly situated. *See Marshall v. Ohio Univ.*, No. 15-cv-775, 2015 WL 7254213, *7 (S.D. Ohio Nov. 17, 2015) (rejecting comparison to university's treatment of female student who had made "numerous" requests to date a male student and a male student who had made "offensive" requests to date a female student in granting motion to dismiss).

2. *Doe has Not Adequately Pled an Erroneous Outcome Claim.*

Doe contends, for the first time,[11] that the Complaint also states a Title IX claim under an erroneous outcome theory. Pl. Opp., p. 26. To state such a claim, Doe must "allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 368 (S.D.N.Y. 2015) (quoting *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994)). Doe cannot merely "cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding." *Doe v. Univ. of Massachusetts-Amherst*, No. 14-cv-30143, 2015 WL 4306521, *8 (D. Mass. July 14, 2015) (internal quotations omitted). Instead, for his claim to survive, Doe must allege "a particularized allegation relating to a causal connection between the flawed outcome and gender bias." *Id.* (internal quotations omitted). "[S]tatements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender" may establish the requisite, causal connection. *Columbia*, 101 F. Supp. 3d at 368 (internal quotations omitted).

Doe fails to adequately plead any such allegations here. Doe identifies no pattern of decision-making that reflects an anti-male bias. *See* Cp., ¶¶1-135; Pl. Opp., p. 26. Nor does Doe identify statements by members of the Hearing Board or university officials that reflect such a bias. *See* Def. Mem., p. 42. To the contrary, the Complaint only references gender-neutral statements by the College and its administrators, including President Martin's statement that the College's response to sexual misconduct has "left *survivors* feeling that they were badly served" and the Sexual Oversight Committee on Sexual Misconduct Committee's recommendation that

[11] The Complaint only identified selective enforcement and equitable procedures claims. Cp., ¶¶ 96-102. Doe has now abandoned his equitable procedure claim, which is neither a viable claim for relief under Title IX nor addressed at all in the opposition. *See* Def. Mem., pp. 38-39; Pl. Opp., pp. 22-27. Doe's selective enforcement claim also fails for the reasons previously discussed. *See supra* at 13-16; Def. Mem., pp. 39-43.

Amherst focus on "empowering *victims*." Cp., ¶¶6, 19 (emphasis added).

Doe attempts to overcome these deficiencies by arguing that his Complaint "sufficiently allege[s]" (1) disparate treatment on the basis of sex, (2) stereotypical views of gender roles, and (3) "extreme pressure" to take disciplinary action against a male. Pl. Opp., p. 26. Contrary to Doe's contention, this argument is not supported by any particularized allegations (and Doe tellingly fails to cite to any), and he fails to raise a plausible inference that gender bias improperly affected the Hearing Board proceeding's outcome, which, for reasons previously detailed at length, was amply supported by the evidence presented at hearing. Def. Mem., pp. 10-15. *First*, as set forth above, the Complaint does *not* allege disparate treatment on the basis of sex, and Jones was not similarly situated to Doe. *See supra*, pp. 13-16. *Second*, the Complaint likewise fails to set forth a single particularized allegation that demonstrates that chauvinistic views concerning gender roles motivated the College to initiate mandatory disciplinary proceedings or the eventual expulsion decision by the members of the Hearing Board that heard the evidence. *See UMass*, *supra* at *8 (dismissing claim by expelled male student who cited to "no examples of any comments that targeted him based on his gender—as opposed to his status as a student accused of sexual assault—or any conduct suggestive of gender bias"). *Third*, the Complaint contains no particularized allegations that the College was under "extreme pressure" to expel a male student in particular, much less that it succumbed to any such pressure.[12]

D. Doe Cannot Sustain his MCRA Claim Because He Has Not Alleged that Defendants' Conduct Caused Him to Give Up a Protected Right (Count VI).

Doe's Massachusetts Civil Rights Act ("MCRA") claim is nothing more than a contrived

[12] Regarding this last argument, Doe cites to *Wells v. Xavier University*, 7 F. Supp. 3d 746 (S.D. Ohio 2014) for support. As *Doe v. Columbia University*, 101 F. Supp. 3d at 374, recently recognized, the *Wells* court considered whether the student's complaint placed the college on "adequate notice," a standard that the Supreme Court retired in *Twombly* and *Iqbal*, and credited the student's unsubstantiated, subjective belief that defendants had discriminated against him. *See Wells*, 7 F. Supp. 3d at 751. For the reasons recognized by the court in *Columbia University*, the *Wells* decision does not reflect the appropriate standard of reviewing a Rule 12 motion.

attempt to repackage his deficient Title IX claim under the Massachusetts statute. Doe alleges the College violated his Title IX rights; this allegation, in itself, does not provide a basis for an MCRA claim in the absence of threats, intimidation, or coercion by the Defendants. *Longval v. Comm'r of Correction*, 404 Mass. 325, 333 (1989) ("direct violation of a person's rights does not by itself involve threats, intimidation, or coercion" and therefore cannot give rise to an MCRA claim). The prerequisite that a plaintiff establish that a defendant engaged in threats, intimidation, or coercion is a central requirement of the MCRA, and was "specifically intended [by the Legislature] to limit liability under the Act." *Freeman v. Planning Bd. of West Boylston*, 419 Mass. 548, 565-566 (Mass. 1995). *See also Abrami v. Town of Amherst*, No. 09-cv-30176, 2013 WL 3777070, *12 (D. Mass. July 16, 2013) ("A direct deprivation, even if unlawful, is not coercive because it is not an attempt to force someone to do something the person is not lawfully required to do, and thus not actionable under the MCRA") (internal quotations omitted). Try as he might, Doe cannot simply write this requirement out of the statute by alleging that Defendants "capitulated" to an allegedly "charged and activist environment on campus." Pl. Opp., pp. 28-29.

Doe has not alleged that the Defendants threatened, intimidated, or coerced him. Instead, the only alleged "threatening, intimidating, and coercive pressure" he identifies stems from "demonstrations and vigils" by students expressing concern about sexual misconduct on campus. Cp., ¶¶111-114. Even if this sort of civil discourse, which is precisely the type of engaged and critical conversation that colleges and universities are designed to foster, could constitute "threats, intimidation, or coercion," it in no way can be attributed, and indeed is not attributed, to the Defendants. Doe's reliance on *Redgrave v. Boston Symphony Orchestra, Inc*. 399 Mass. 93 (1987), does not compel a different result, as that case does not absolve him of his obligation to allege that *the Defendants* engaged in threatening, intimidating, or coercive conduct, which he

has indisputably failed to do. *Redgrave* simply provides that a defendant need not "specifically intend" to interfere with a plaintiff's rights, through threats, intimidation, or coercion, to violate the MCRA. *Id*. at 99 (stating that the MCRA "imposes no express or implied requirement that an actor specifically intend to deprive a person of a secured right in order to be liable under the statute"). Crucially, *Redgrave* still requires that *the defendant* actually engage in threats, intimidation, or coercion. In *Redgrave*, the actionable coercive action was the conduct *by the defendant orchestra*, namely the cancellation of an actress's performance contract, *not the public outrage over her political views* that prompted that cancellation. *See id. See also Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 909 (1st Cir. 1988) (making clear that liability hinged on *cancellation of artistic performance by defendant orchestra*); *Bally v. Ne. Univ.*, 403 Mass. 713, 719 (1989) (explaining that *Redgrave* orchestra violated the MCRA "because *its cancellation of its contract with [the performer] had the effect*, intended or otherwise, desired or not, *of coercing [her] not to exercise her First Amendment rights*") (emphasis added).

Nor does Doe allege, as he must, that Defendants' actions "caused [him] to give up something that he has the constitutional right to do." *See Santiago v. Keyes*, 890 F. Supp. 2d 149, 154 (D. Mass. 2012). Instead, Doe points only to his expulsion from the College, the same alleged *direct* harm that underlies his direct Title IX claim. *See* Cp., ¶¶110-113. Because Doe does not identify any threats, intimidation, or coercion undertaken by the College, he likewise cannot identify a right that he forewent as a result. *Cf. Haufler v. Zotos*, 446 Mass. 489, 508 (2006) (neighbor's abusive conduct interfered in landowner's right to use and enjoy property where neighbor's conduct made landowner afraid to enter property); *Planned Parenthood League of Massachusetts, Inc. v. Blake*, 417 Mass. 467, 476 (Mass. 1994) (upholding liability on MCRA claim where defendants' conduct would make women seeking abortion services fearful

and apprehensive and therefore desist from seeking those services). This failure is fatal to Doe's MCRA claim. *See Santiago*, 890 F. Supp. 2d at 154.[13]

E. Doe Cannot Base His Defamation Claim on a Statement that Even His Own Complaint Demonstrates is Objectively True (Count VII).

Doe's effort to resurrect his infirm defamation claim is an exercise in misdirection. In his Complaint, Doe identified three statements that purportedly formed the basis of his claim of defamation, namely:

- "[A]fter a full hearing on the matter in December, a hearing board found, by a preponderance of the evidence that an Amherst College student violated Amherst College's Sexual Misconduct Policy."
- "As a result of this finding, the Hearing Board determined that the student be expelled from Amherst College."
- "Expulsion means the permanent termination of student and degree status at Amherst College. Expelled students are not allowed on campus." (Cp., ¶¶118-119.)

While Doe argues that these statements are "actionably false," each is objectively true. Pl. Opp., pp. 29-30. Indeed, Doe's own allegations establish that the Hearing Board determined that he should be expelled based on its finding that he had violated the Policy. Cp., ¶58.

In response, Doe first argues that the statements' "innuendo," "insinuation," and "defamatory sting" nevertheless render them false. Pl. Opp., pp. 30-31. But that simply is not the law. As the First Circuit held in *Noonan v. Staples, Inc.*, 556 F.3d 20 (1st Cir. 2009), for a libel action to lie, "the impugned statement must be both defamatory and false … , and these are distinct elements." *Id.* at 27 (interpreting Massachusetts law). Although a court may evaluate whether a statement is *defamatory* based on its context, its "truth-or-falsity" determination is a "separate inquiry" and "a much simpler one," with "*substantial truth* … all that is required." *Id.*

[13] Doe has evidently abandoned his MCRA claim based on purported privacy rights, as it is not addressed in his opposition. *See* Pl. Opp., pp. 28-29. In any event, for the same reasons that his MCRA claim based on purported Title IX violations fails, his MCRA claim based on purported privacy rights also fails as a matter of law. *See* Cp., ¶114.

at 27-28 (emphasis added). For this reason, *Noonan* declined "to adopt a rule whereby even an objectively true statement can give rise to a libel claim if reasonable readers might infer from it other, untrue characteristics of the plaintiff or conduct by him." *Id.* at 27.

Noonan is instructive. In *Noonan*, an executive circulated an email to approximately 1,500 employees stating that the plaintiff was terminated following a "thorough investigation" that "found" that plaintiff had not complied with the company's travel and expense policies. *Id.* at 23-24. The email further advised company employees to carefully review the company's code of ethics. *Id.* Read in context, the salesperson argued that the notification had the "effect" of suggesting that he had committed "some sort of grave misconduct." *Id.* at 26-27. The *Noonan* court nevertheless declined to look beyond the four-corners of the email notification in assessing its truthfulness. *See id.* at 27-28 (emphasizing that "everything said in the e-mail was true—or at least substantially true—and substantial truth is all that is required").[14]

As in *Noonan*, the email notification here relayed truthful statements: that the Hearing Board had found a student responsible for sexual misconduct, and that the student was expelled. Roberts Aff., Ex. C, p. 1; Cp., ¶58. Doe's opposition attempts to muddy the waters by pointing to a different statement in the notification, one his Complaint did not even identify as providing a foundation for his defamation claim, namely:

- "It is now Amherst College's practice to notify the community when a student has been expelled for committing sexual violence." (Pl. Opp., p. 30.)

[14] The *Noonan* court goes on to hold that the terminated employee could nevertheless prevail on a defamation claim because the employer had shown actual malice. *Noonan*, 556 F.3d at 30. In contrast to its holding on truthful statements, however, this holding is distinguishable. In *Noonan*, the notification identified the plaintiff *by name*; the employer failed to send around a similar notification after another employee was terminated for embezzlement, a much more serious offense; and the employer sent the notification to employees not even covered by the Policy. *Id.* at 30-31. Here, by contrast, the College's notification only referred to "an Amherst College student" and not Doe specifically; it stated that the College's practice is to circulate such notifications following expulsions; and it was only circulated to members of Amherst community, all of whom fall within the Policy's scope. Cp., ¶62; *id.* Ex. 1, p. 3 (stating that "this policy applies to all members of the Amherst College community"); Roberts Aff., Ex. C, p. 1.

But even this sentence is objectively true. The College did expel Doe based on its finding that he had committed sexual violence. Cp., ¶58. Doe may respond that the sentence should have referenced the College's finding explicitly,[15] but the notification's first and second sentences *had already done so. See* Roberts Aff., Ex. C, p. 1.

A statement is true "unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *LaChance v. Boston Herald*, 78 Mass. App. Ct. 910, 912 (2011) (internal quotations omitted). Even Doe's own allegations reveal that the statement here is true. *See* Cp., ¶58. Absent actual malice, which Doe has not adequately pled, his defamation claim fails as a matter of law. *See* Def. Opp., pp. 50-51.

F. Doe Fails to Allege that the Individual Defendants Owed Him a Duty of Care, Let Alone that they Breached It, Rendering His Negligent Infliction of Emotional Distress Claim Meritless.

Without justification, Doe continues to pursue his negligent infliction of emotional distress ("NIED") claim with respect to the five college administrators whom he has sued (the "Individual Defendants"). Pl. Opp., p. 33.[16] As noted previously, Doe lumps all of the Individual Defendants together, without so much as considering the very different roles that they played. Def. Mem., p. 36 n.26. Instead, Doe declares, without legal support, that all of the Individual Defendants "had an obligation as part of their jobs to ensure that [Doe] received a disciplinary process that was basically fair and met the College's guidelines." *Id.* Doe's argument finds no support in the law.

Contrary to Doe's contention, "Massachusetts does not … impose a common-law or statutory duty on administrators to enforce university policies." *Doe v. Emerson Coll.*, No. 14-

[15] Furthermore, the sentence refers to the College's *practice* concerning campus-wide notifications. *See* Roberts Aff., Ex. C, p. 1. It thus contrasts with the notifications' first two sentences, which describe Doe's expulsion specifically. *Id.*

[16] Doe appears to have abandoned the other claims that purport to be asserted against the Individual Defendants.

cv-14752, 2015 WL 9455576, *8 (D. Mass. Dec. 23, 2015). Because Doe has no foundation to allege that any Individual Defendant owed or breached a duty of care, his NIED claim necessarily fails. *Rhodes v. Ocwen Loan Servicing, LLC*, 44 F. Supp. 3d 137, 146 (D. Mass. 2014). Not only is the law clear that the duty claimed by Doe simply does not exist, his scant allegations reflect nothing that could provide the foundation of *any* claim against *any* administrator.[17] Legally and factually, the claims asserted against the Individual Defendants fail in every particular.

CONCLUSION

For the foregoing reasons, as well as those set forth in Defendants' Memorandum of Law (Doc. 38), Defendants respectfully request that the Court dismiss Plaintiff's Complaint in its entirety.

[17] Doe's allegations are wholly insufficient to sustain claims against any Individual Defendant, as none of them engaged in anything approaching tortious conduct. According to the Complaint:

- Carolyn Martin, the College's President, made public statements regarding the College's prior response to allegations of sexual violence (noting that the response "left survivors feeling badly served") and met personally with a student who reported and publicize her sexual assault. Cp., ¶¶10, 19, 24.
- Laurie Frankl, the College's Title IX coordinator at the time, attended Doe's disciplinary hearing. Cp., ¶¶14, 48.
- James Larimore, the College's former Dean of Students, chaired the disciplinary hearing and correctly stated the College's policy and procedures at the hearing's outset. Cp., ¶¶11, 48, 50.
- Susie Mitton Shannon, the former Interim Dean of Student Conduct and Deputy Title IX Coordinator, communicated with Doe regarding the sexual misconduct complaint, timetables, and hearing, all consistent with the College's Policy, and then attended his disciplinary hearing. Cp., ¶¶13, 29, 45, 48; Def. Mem., pp. 24-29.
- Torin Moore, formerly the Assistant Dean of Students and Doe's advisor, communicated with Doe regarding the disciplinary process and accompanied him to his investigative interview and the hearing, consistent with his shepherding role under the Policy. See Cp., ¶12, 42, 45; Def. Mem., p. 30.

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Dated: February 17, 2016

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on February 17, 2016

/s/ Scott A. Roberts
Scott A. Roberts