No. 16-2290

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOHN DOE, MARY DOE, and JAMES DOE,

Plaintiffs-Appellants,

v.

TRUSTEES OF BOSTON COLLEGE, PAUL J. CHEBATOR, CAROLE HUGHES, CATHERINE-MARY RIVERA, PATRICK J. KEATING, and BARBARA JONES**,**

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Massachusetts

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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INTRODUCTION

The brief for defendants-appellees (collectively the "University") obscures the summary judgment standard in attempting to show that the disciplinary board reached the correct decision in John Doe's case and that the district court's decision was sound. But the University does not adequately address, nor can it, the district court's impermissible factfinding, which was a product of the highly deferential standard of review that the court employed. John was entitled to (1) summary judgment on his breach-of-contract claims and his basic fairness claim, both related to the 2012 proceeding; and (2) a jury trial on his (and his parents') 2014 breach-of-contract claims, his 2014 basic fairness claim, his Title IX claims, and his (and his parents') negligence claims.

In taking a "hands-off" approach to the University's process and in assuming the role of factfinder, the district court failed to conduct a meaningful examination of an investigation and quasi-judicial process conducted by poorly-trained amateurs. The inherently prejudicial nature of that process was exacerbated by the Department of Education's threat of loss of federal funding that had been directed at all colleges in April 2011. The end result – a finding that John committed sexual assault despite an absolute failure of proof – has had a devastating impact on John and his family. Without relief from this Court, that impact will be lifelong.

RESPONSE TO STATEMENT OF "RELEVANT FACTS"

The University, in setting forth the "relevant facts" in the statement of the case and throughout its brief, has mischaracterized the evidence of record in a number of significant ways. In doing so, the University reinforces precisely why the Does' claims were improperly disposed of on summary judgment – the facts in question were both material to the claims and were vigorously disputed.

> - "A.B. is Assaulted and Identifies Doe as the Assailant." Brief for Defendants-Appellees ("Appellees' Br.") at 3.

In this heading and the text that follows, the University attempts to convey the impression, without any evidentiary support, that John Doe's accuser, A.B., saw her assailant in the act. She did not and never claimed that she did. No one saw an assault of any kind, and no one saw John touch A.B. in any way. *See* Brief for Plaintiffs-Appellants ("Appellants' Br.") at 15-18.

> - "Both A.B. and her friend 'Betsy,' who was dancing with her at the time of the assault, identified Doe as the 'lone male' behind A.B. when the assault occurred." Appellees' Br. at 4.
>
> - "Betsy testified that she did not see the assault itself, but she confirmed that Doe was the only person directly behind A.B. when it occurred . . . ." *Id*. at 9.

Although A.B. testified that John "was a lone, white[1] male standing behind her," Appellants' Br. at 16, Betsy testified to no such thing. Rather, she testified that "the dance floor was tightly packed," including "behind [A.B.]," and "there were a lot of people around [Betsy] and [A.B.] as they were dancing." Appellants' Br. at 18. Betsy also testified that John "stood out because he was tall." *Id.*

- "[John] showed [the raw] video surveillance footage of the dance floor to the Board, which showed that the dance floor was crowded and that he was close behind A.B. when the assault took place." Appellees' Br. at 8.

- "Doe admitted and the surveillance video confirmed that he was close in proximity to A.B. when the assault occurred." *Id.* at 24.

Although the University is correct that the raw footage showed that the dance floor was crowded[2] – which contradicts the assertion that John was a "lone male" behind A.B. – it did not show that John was "close behind A.B. when the assault took place." Nor did he admit any such thing. To the contrary, it was the University that admitted in its answer to the complaint that "the video presented during the Administrative Board Hearing was of poor quality." A81. In fact, the raw video was extremely "compressed," *i.e.*, it did not reflect the depth of the sizable dance floor and the distorted distances between people and objects.

[1] The event that John was covering for the school newspaper was sponsored by AHANA, the University's organization for minority students. A102.

[2] The photographs that John provided showed the same thing. ADD45-46.

Appellants' Br. at 7. Moreover, the forensically-enhanced and analyzed video that convinced the prosecutor to dismiss all charges showed that, at the instant of the assault, John was 4-6 feet away from A.B. and there were at least 2-3, and perhaps as many as 5, people between John and A.B. *Id.* at 7-8.

- "Doe never disputed that an assault occurred, but instead tried to blame it on another student, J.K." Appellees Br. at 24.
- "Doe sought to persuade the Board that another male student, J.K., committed the assault . . . ." *Id.* at 8.
- "Doe's claim that BC granted J.K. 'immunity' . . . has no basis in the record. There is no evidence that [Senior Associate Dean of Students Carole] Hughes or anyone else granted him immunity." *Id.* at 9 n.1.

John could not "dispute" whether an assault occurred, for he had no knowledge, one way or the other. Moreover, John did not seek to persuade the Board that J.K. was the perpetrator, nor was it his burden to do so. John had, however, the right to advance an alternative theory of the alleged offense, but the University thwarted his efforts from the very beginning. First, Board Chair Catherine-Mary Rivera, after consulting Hughes and University General Counsel Joseph Herlihy, prohibited John from calling investigator Kevin Mullen as a witness. Mullen, a former Boston Police Department Sergeant Detective, would have testified as to his first-hand interactions with J.K. that evidenced a consciousness of guilt and a serious lack of credibility. *See* Appellants' Br. at 6.

Second, Hughes most certainly did grant J.K. immunity after consulting Herlihy and Dean of Students Paul Chebator. She refused to consider J.K. as a possible perpetrator; had a subordinate tell Rivera to "put him at ease"; and, with Herlihy, recommended criminal defense counsel to represent him at the hearing. Appellants' Br. at 17, 30.

> - "The four possible outcomes" of a Board hearing include a "no finding," [ADD4, 40], which "mean[s] that a preponderance of the evidence does not support a finding of either 'responsible' or 'not responsible.'" Appellees' Br. at 6.

The definition that the University attempts to ascribe to the "no finding" result appears nowhere in the procedures. In fact, the procedures do not define "no finding," and the University may not now create a definition out of whole cloth.[3]

> - Patrick Keating, the Interim Vice President for Student Affairs and one of two appellate officers, "was new to his role [and] consulted with Herlihy, BC's General Counsel, regarding the appeal standard and the process for handling an appeal." Appellees' Br. at 12.

This incomplete and inaccurate description of Keating's interaction with Herlihy on the appeal ignores Keating's own testimony. Herlihy told Keating that (1) the appeal "was essentially procedural, [and he should] follow the recommendations of [Chebator]"; and (2) it was "not necessary" for Keating to "be

[3] The significance of the meaning of "no finding" and Chebator and Hughes' interference with the Board's deliberations is discussed below at pp. 15-16.

involved in all the details of the case and understand the background." A425. Consequently, Keating "undertook no evaluation of the merits of the appeal" and merely "waited for [Chebator's] review of the case." A426. Without any independent consideration of the matter, Keating simply signed the appeal decision letter that Chebator presented to him. A427.

> - In 2014, University President William Leahy, S.J., assigned Barbara Jones, the Vice President for Student Affairs, to conduct the review of John's case that he promised the Does. "[C]onsistent with the usual practice for reviewing student conduct cases, [Jones] sought to determine whether BC followed its procedures in 2012 and whether there was new evidence that might warrant a different outcome." Appellees' Br. at 14.

There is no evidence in the record to establish the "usual practice for reviewing student conduct cases" or whether the University had previously conducted such a review. In any event, the relevant standard is what Father Leahy promised the Does: an "independent review" by Jones, who would be "thorough and fair" in "re-examining the facts and mak[ing] a determination." A210, 214, 465. Regardless of how the University wishes to characterize Jones' approach, it is plain that her limited view of her charge contradicted Father Leahy's promise of thoroughness, which required more than a superficial assessment of whether procedures were followed. *See* Appellants' Br. at 22-23.

Aside from Jones' limited view, the other fact that corrupted the review was Jones allowing Herlihy to become involved in, and assume control of, the process. *See id.* at 23. As set forth in detail in the reports of campus sexual misconduct expert Brett Sokolow and legal ethics expert Nancy Moore, Herlihy's conduct was a violation of the standard of care, a violation of Title IX, and a violation of the Massachusetts Rules of Professional Conduct. Herlihy had a serious conflict of interest because of his personal stake in validating (1) the pre-hearing procedure, which lacked the required investigation as a result of advice given by his subordinate; (2) the procedure followed and the decision reached by the Board, all done with his involvement and/or advice; and (3) his perversion of the appeal process by advising Keating to abdicate his responsibility under the University's procedures. *See* A984-87 (Sokolow Report); A1047-48 (Moore Report).[4]

[4] Herlihy's conflicts of interest were not limited to the 2014 review. Professor Moore determined that Herlihy assumed the role of the University's Title IX Coordinator with regard to John's disciplinary process and thereby violated Massachusetts Rule of Professional Conduct 1.7, which is the fundamental conflict-of-interest rule. Herlihy's obligation to zealously represent his client – the University – was in conflict with his obligation as a functioning Title IX coordinator to be independent and impartial. The University's interests – which included avoiding the loss of federal funds as threatened by the Department of Education's Office for Civil Rights ["OCR"] in the April 2011 Dear Colleague Letter – were directly at odds with Herlihy's Title IX obligations of independence and impartiality. A1036-40, 1045-47. Professor Moore concluded:

> Herlihy could not have reasonably believed that he could act as an impartial Title IX coordinator and simultaneously represent the University with respect to

Herlihy injected himself into every aspect of the investigation and review and, unsurprisingly, found nothing wrong with John's disciplinary process. Herlihy also instructed Jones to disregard the Commonwealth's dismissal of the criminal charges and the evidence that led to that decision, *i.e.* the forensic test results, the enhanced video, and the polygraph results. A476-78.

ARGUMENT

I. THE DISTRICT COURT'S INAPPROPRIATE DEFERENCE TO THE UNIVERSITY'S PROCESS AFFECTED THE ANALYSIS OF EACH ISSUE AND LED TO IMPERMISSIBLE FACTFINDING ON SUMMARY JUDGMENT.

A. The District Court's Standard of Review

The University states that plaintiffs have made a "reprehensible" and "blatantly false"[5] argument that the district court applied this standard of review: "a private university's handling of a sexual assault proceeding is entitled to extreme deference and, moreover, is immune from challenge if the school 'complied with the terms of its policies.'" Appellants' Br. at 27.

Hyperbole aside, the University's argument remains puzzling. The district court specifically stated that it would "not second guess the thoroughness or

> John Doe's disciplinary proceeding. Nor could the University have been unaware of or indifferent to the degree of risk posed by A.B.'s complaint. Internal University communications reveal that there was substantial pressure continually being applied to the University by A.B.'s father throughout the process. A1040.

[5] Appellees' Br. at 18, 21.

accuracy of a university investigation, so long as the university complied with the terms of its policies." ADD10. And the court employed the term "investigation" to encompass the entire disciplinary process, including adjudication: the University's "thorough investigation [included] testimony from both Doe and AB, evidence proffered by each, including testimony from and about other witnesses, including JK, that Doe urged it to consider." *Id.*

What the court below called "second guessing," the *Brandeis*[6] court called the "'fairness' inquiry," which has "two principal threads": (1) "procedural fairness – that is, whether the process used to adjudicate the matter was sufficient to provide the accused student a fair and reasonable opportunity to defend himself"; and (2) "substantive fairness – that is, even if the procedure was fair, whether the decision was unduly arbitrary or irrational, or tainted by bias or other unfairness." 177 F. Supp. 3d at 602.

The standard used by the court below eliminated the first of these "principal threads," as the school's policies were not analyzed for fairness, but were accepted at face value: so long as the school "complied with the terms of its policies," ADD10, the court's analysis of those policies was over.

As for the second principal thread – a determination of whether the decision was substantively fair even if the procedure was appropriate – the University

[6] *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561 (D. Mass. 2016).

argues strenuously that the district court did engage in such an analysis and did not improperly defer to the University's process. *See* Appellees' Br. at 18-21. But there can be no doubt that the court employed an extremely deferential standard of review in lieu of appropriate examination of the University's conduct. How else to explain the court's excusal of two instances of interference in the Board's deliberations: (1) Hughes telling Rivera that Chebator "discouraged" the "no finding" result after Rivera reported that the Board was "struggling" with the lack of evidence[7]; and (2) Herlihy's supplying of the critical factual finding and rationale for the Board's decision, *i.e.*, that "penetration" was "less likely than not."[8]

The district court plainly adopted a deferential mindset that permeated its analysis of each issue and led to numerous violations of the rule against factfinding on summary judgment.

B. Breaches of Contract

Certain of the University's arguments as to the alleged breaches of contract merit a response.

1. No Threshold Evaluation

The University, in denying its obligation to perform a threshold evaluation of the complaint against John, quotes the very language requiring such an

[7] Appellants' Br. at 19, 37-38.

[8] *Id.* at 20, 38-39.

evaluation: the Dean or designee will meet with the accused student "to discuss the complaint," and, based on that discussion, decide how to proceed. Appellees' Br. at 27-28. Merely because Hughes met with John on three occasions does not mean that she satisfied the University's obligation. There was no discussion of the complaint. Hughes not only admitted that she refused to let John tell his side of the story, she also testified that she had decided to send the matter to a hearing before even speaking to John. Appellants' Br. at 13-14, 29-30. That conduct breached the University's obligation.

2. No Appropriate Investigation

The plain language of the procedures gives rise to a student's reasonable expectation that the BC Police would investigate a sexual assault allegation. The BC Police's determination – however made – that they would have no role in the investigation does not negate the contractual obligation. Appellants' Br. at 31-32. Moreover, the basis for that determination was never disclosed to John or his parents.

3. Prejudicial Hearing Date

The University's argument contains the following statement:

> [T]here is no admissible evidence establishing that the District Attorney's Office viewed the [forensic test results, the enhanced video, and the polygraph results] as exculpatory. It is equally as plausible that the District Attorney's Office agreed to dismiss the charges because by that point A.B. had achieved a satisfactory result

> through the BC conduct system and no longer wished to pursue a criminal case.

Appellees' Br. at 33.

This statement grossly mischaracterizes the record. First, there is unrebutted evidence that the District Attorney's Office agreed, after receiving the forensic testing and polygraph results, and viewing the enhanced video, that the prosecution "should not go forward" and that "unequivocal dismissal of all charges" was appropriate. A186 (¶ 4), A187-88 (¶¶ 8, 10). Second, the ethical obligation of a Massachusetts prosecutor is unambiguous: "The prosecutor in a criminal case shall . . . refrain from prosecuting where the prosecutor lacks a good faith belief that probable cause to support the charge exists . . . ." Mass. R. Prof. Conduct 3.8(a).[9] Finally, what is not "plausible" is that, in this day and age, the prosecutor dismissed a meritorious sexual assault case because a college disciplinary panel satisfactorily disposed of the matter. There is no evidence that the prosecutor considered the University proceeding in any way.[10]

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[9] Probable cause is a lower standard of proof than preponderance of the evidence. *See United States v. Rivera*, 825 F.3d 59, 63 (1st Cir. 2016) (search warrant); *People v. Hardacre*, 90 Cal. App. 4th 1392, 1400, 109 Cal. Rptr. 667, 673 (2001) (hearing on sex offender status); *State v. Pledger*, 896 P.2d 1226, 1228 (Utah 1995) (preliminary hearing). *See also United States v. Agriprocessors, Inc.*, 2009 WL 595562, at *2 (N.D. Iowa 2009) (on motion to dismiss indictment, expert witness "erroneously equated the probable cause standard with the preponderance of the evidence standard").

[10] The University also argues, with regard to the prejudicial hearing date, that a stay of the campus proceedings would have violated Title IX, for such a stay would

4. Biased Tribunal

To the extent that the Board enjoys a "presumption of impartiality,"[11] John rebutted that presumption by adducing the same type of evidence identified by this Court in *Burns v. Johnson*, 829 F.3d 1, 12-13 (1st Cir. 2016) (reversing summary judgment). *See* Appellants' Br. at 34-36. Moreover, there is additional evidence of bias that distinguishes this case from those cited by the University: (1) Hughes' mistaken belief that three people had identified John as the assailant, resulting in Hughes' "treat[ing] him as a contemptible criminal"[12]; (2) Hughes' refusal to consider J.K. as a possible perpetrator and instructing a subordinate to tell Rivera to "put him at ease"[13]; and (3) Hughes' informing Rivera between the two deliberation sessions that Chebator "discouraged" a "no finding" result.[14]

As for the notion that Rivera was "just one of five panel members" and her bias did not taint the others, even the University admits that "Rivera led the

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have needed to last "more than 573 days after the incident," until the May 2014 dismissal. Appellees' Br. at 31 n.4. This argument is a red herring, for it assumes that the criminal case would have lasted that long in all events. Once the University hastily concluded its process, there was absolutely no need for John and his counsel to hurry the criminal case. The forensic test results on John's hands were available in February 2013, and there is no reason why the enhanced video and the polygraph results could not have been presented to the prosecutor at that time if the campus process had been stayed.

[11] Appellees' Br. at 33-34.

[12] Appellants' Br. at 12-13, 14.

[13] *Id.* at 17.

[14] *Id.* at 19.

deliberations . . . ." Appellees' Br. at 11. Furthermore, improper communications with one member of a jury – leader or not – is "presumptively prejudicial" for "obvious reasons,"[15] and the same reasoning should apply to the Board.

5. Improperly-Trained Tribunal

The University claims that it "ramp[ed] up the training for individuals who would be hearing sexual assault cases." Appellees' Br. at 38 (citing A771). The record citation is to Chebator's deposition, but he did not testify as to when this "ramping" occurred. The record is plain, however, that the first Board training specifically devoted to sexual assault cases took place on January 13, 2013, two months after John's hearing. A1202.

The University's response to the Title IX Committee's April 2012 finding of "insufficient" training[16] came too late for John.[17]

6. Interference in the Board's Deliberations

It cannot be emphasized too strongly that the two instances of interference in the Board's deliberations are established by the testimony of Hughes, Rivera, and

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[15] *Remmer v. United States*, 347 U.S. 227, 229 (1954).

[16] Appellants' Br. at 36.

[17] The University argues that the case was a simple one, with no "potentially complicated" issues to resolve, and, therefore, deficient training was of no moment. Appellees' Br. at 38. But the case did present a difficult issue, one of intent. If there was a touching, was it intentional or incidental? The record shows that the Board never considered this issue and did not even recognize their duty to do so, a failure that demonstrates the lack of training.

Herlihy as well as Rivera's email to Hughes. Appellants' Br. at 19-20, 37-39. The University wants to quibble and impose its own view on the meaning of that testimony and Rivera's email,[18] but that exercise misses the larger point: under no circumstances should (1) Rivera and Hughes (and Chebator) have been communicating during the deliberations; or (2) Herlihy have provided the Board with the linchpin of its decision.

The University also argues that it is "nonsensical" for plaintiffs to argue that "Herlihy interfered by helping to articulate the rationale for the Board's finding of "no penetration" because "that finding was in Doe's favor." Appellees' Br. at 40. No, the finding was not in John's favor in any way. Herlihy concocted that finding in order to allow the Board to ignore the very evidence that, in Rivera's words, they had been "struggling with needing to see," A391, and for which John had been begging the Board to wait.

Finally, the University attempts, once more, to define "no finding." As noted above (p. 5), the University first says that "no finding" means that "a preponderance of the evidence does not support a finding of either 'responsible' or 'not responsible.'" Appellees Br. at 6. In its second try, the University claims that "[a] result of 'no finding' is akin to a hung jury." *Id.* at 39. There is no basis for this definition either.

[18] Appellees' Br. at 39-40.

According to Rivera's testimony and email, she and the Board viewed a "no finding" as one denoting insufficient evidence for a finding of "responsible." This view is consistent with a three-verdict system: guilty, not guilty, and not proven.[19] Had the Board been left alone, there is every indication that a "no finding" would have been the result.

II. THE DISTRICT COURT ERRONEOUSLY RULED THAT THE UNIVERSITY PROVIDED BASIC FAIRNESS IN 2012 AND 2014.

The University argues that it was entitled to summary judgment on the breach-of-contract claims because (1) it "followed its policies and procedures"[20]; (2) "[t]he Board's decision was not arbitrary and capricious"[21]; and (3) the 2012 "process was conducted with basic fairness."[22] Although the University makes the second and third arguments as part of its breach-of-contract analysis, the duty of basic fairness is, under Massachusetts law, independent of contractual obligations. *See* Appellants' Br. at 41. Similarly, the "arbitrary and capricious" standard, to the extent that it applies in this case, is also independent of contractual obligations, as set forth below.

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[19] *See generally* Samuel Bray, *Not Proven: Introducing a Third Verdict*, 72 U. Chi. L. Rev. 1299 (2005) (discussing the Scottish criminal system).

[20] Appellees' Br. at 27-42.

[21] *Id.* at 23-24.

[22] *Id.* at 25-27.

A. The "Arbitrary and Capricious" Standard

The district court referred to the "arbitrary and capricious" standard twice in connection with its breach-of-contract analysis. *See* ADD8, 18. But although Massachusetts courts have, in the past, applied this standard in the school discipline context, there is a threshold question as to whether the standard "applies to school disciplinary proceedings that are also governed by the express terms of a student-university contract." *Brandeis*, 177 F. Supp. 3d at 600 (*comparing Coveney v. President & Trustees of the College of the Holy Cross*, 388 Mass. 16, 19, 445 N.E.2d 136, 138 (1983) and *Schaer v. Brandeis Univ.*, 432 Mass. 474, 482, 735 N.E.2d 373, 381 (2000) *with DMP v. Fay School*, 933 F. Supp. 2d 214, 223 (D. Mass. 2013)).

The University's interest in urging this standard of review is obvious. As this Court has held as to the review of administrative agency action, the arbitrary-and-capricious standard is a "narrow" and "highly deferential" one. *Citizens Awareness Network, Inc. v. Nuclear Reg. Comm'n*, 59 F.3d 284, 290 (1st Cir. 1995). Even still, a court may not "rubber-stamp" agency decisions under the guise of arbitrary-and-capricious review. *Id.* Rather, a court must set aside such a decision if it is in conflict "with substantive statutory commands" or if "procedural corners are [not] squarely turned." *Puerto Rico Sun Oil Co. v. EPA*, 8 F.3d 73, 77 (1st Cir. 1993).

The University's decision here is violative of both statute – the requirements of Title IX[23] – and the University's own procedural requirements, and is arbitrary and capricious for those reasons. Moreover, it cannot be said that the decision is supported by "reasonable grounds," the flip side of arbitrary and capricious. *See, e.g.*, *Coveney*, 388 Mass. at 19, 445 N.E.2d at 139. As a result, there is no "meaningful distinction between the questions of whether [the University's] procedures afforded John 'basic fairness' and whether [the University's] actions were 'arbitrary and capricious.'" *Brandeis*, 177 F. Supp. 3d at 600-01 (identifying, but not reaching, the issue).

B. Basic Fairness

The University defines "basic fairness" as limited to the provision of (1) "notice [to the accused student] of the allegation against him"; (2) "an opportunity to be heard"; and (3) an opportunity to "offer supporting evidence." Appellees' Br. at 25. This narrow definition has no support in the law and, if applied, would afford no meaningful scrutiny to a school's disciplinary process.

As the *Brandeis* court held, there is "no one-size-fits-all answer to the question of what constitutes 'basic fairness' that a student is due." 177 F. Supp. 3d at 601. Rather, "[t]he case law appears to indicate, and common sense and experience would likewise suggest, that the answer may vary depending upon the

[23] Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688.

competing interests at stake, include such factors as the magnitude of the alleged violation, the likely sanctions and other consequences of a finding of guilt, and the university's experience and aptitude in resolving disputes of that nature." *Id.* This Court has held that in evaluating the "basic fairness" of a private school disciplinary proceeding, a court may refer to both procedural due process protections and rules of evidence "in measuring the adequacy and fairness of the hearing." *Cloud v. Trustees of Boston Univ.*, 720 F.2d 721, 725 (1st Cir. 1983). *See also Brandeis*, 177 F. Supp. 3d at 601-02.

Plaintiffs, in their initial brief, identified a number of violations of the duty of basic fairness as to both the 2012 proceeding and the 2014 review. *See* Appellants' Br. at 42-43. Most of these violations come within the "procedural fairness" wing of the "fairness" inquiry. And if the Court were to ignore every one of the University's procedural violations, the fact remains that the results of the 2012 hearing violated substantive fairness.

Even if Chebator and Hughes had not interfered with the Board's deliberations and Herlihy had not supplied the Board with its key evidentiary finding and rationale, the Board's decision may not stand for a simple reason: there was no evidence to support it, much less a preponderance of evidence.

Despite the University's argument that the Board's decision was "rational" and "amply supported by reasonable grounds,"[24] the evidence against John amounted to this: when A.B. turned around, she saw John, who was 6'4" and wearing a purple shirt. A.B.'s "lone male" and "lone, white male" testimony was contradicted by the photographs of the dance floor, the raw video shown at the hearing – as the University admits (the dance floor was "crowded"), and Betsy's testimony that "the dance floor was tightly packed," including "behind [A.B.]." Nor was A.B.'s further testimony probative: when she turned around and yelled at John, "his hands were stretched out toward [her] waist. He then raised his hands above his head." A158. Finally, John's three witnesses all testified that they saw him crossing the dance floor without doing anything unusual. *See* Appellants' Br. at 16-17. There was an absolute failure of proof at the hearing and not, as the district court found, "a close circumstantial case." ADD17.

This failure of proof was exacerbated by the Board's finding John guilty of conduct that was contradicted by his accuser's own testimony and that was otherwise unsupported by any evidence. A.B. testified that she was a victim of a two-finger anal rape. She did not testify as to other unwanted touching of any sort, and certainly not a "grope gone wrong," which was the language used by the Board

[24] Appellees' Br. at 23-24.

in its deliberations.[25] John denied touching A.B. in any way. The Board was not free to (1) reject A.B.'s evidence of digital anal rape; (2) hypothesize that some other "unwanted touching in a sexual nature occurred to A.B."[26]; and (3) conclude that John was the perpetrator. The offense that the Board found John guilty of – an "unwanted touching in a sexual nature" without penetration – was unsupported by any evidence whatsoever.

The failure of proof violated the duty of basic fairness in the most fundamental of ways.

III. THE UNIVERSITY AND THE DOES ENTERED INTO A VALID CONTRACT THAT PROVIDED FOR THE 2014 REVIEW, AND IT IS FOR A JURY TO DETERMINE WHETHER THE UNIVERSITY BREACHED THE CONTRACT.

A contract for the review of John's case was formed in the fall of 2014 or, alternatively, the issue is one for the jury. *See* Appellants' Br. at 43-44. The University's argument as to whether that contract was breached relies on the following "facts": (1) "The undisputed facts demonstrate that Jones conducted the further review that Father Leahy asked her to perform, using the broad discretion he afforded her;" and (2) "Doe's brief fails to identify any act or omission by Jones

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[25] One Board member testified as follows: "[W]e did talk about the fact that it didn't seem malicious, . . . [that it] very likely had been . . . a grope gone wrong . . . . [W]hile inappropriate, [it] still would fall under the category of sexual assault, [and] that calling it digital rape, based on what we knew, seemed a stretch . . . ." A1462.

[26] A412.

that amounts to a breach of the alleged agreement." Appellees' Br. at 42. Neither is correct.

First, as set forth above (p. 6), Jones' limited view of her task was entirely at odds with Father Leahy's promise to the Does as well as his own expectations. Second, as also set forth above (pp. 6-8), the limitations that Jones placed on the review violated the agreement, as did her enlisting the aid of a conflict-ridden Herlihy and allowing him to hijack the review. As a result, Jones was neither "independent" nor "thorough and fair."

These issues are all ones of fact for the jury.

IV. THE TITLE IX CLAIMS ARE LEGALLY VALID AND SUPPORTED BY SUFFICIENT EVIDENCE.

The University's only Title IX argument that requires a response relates to the deliberate indifference standard. The University has misstated both the law and John's evidence.

A. Deliberate Indifference Standard

The Title IX deliberate indifference standard has its roots in sexual harassment cases. In *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292-93 (1998), the Supreme Court held that a school subject to Title IX may be liable in damages where it is deliberately indifferent to known acts of sexual harassment by a teacher. In *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999), the Court expanded a school's Title IX liability for damages to acts of student-on-

student sexual harassment when the school's response is deliberately indifferent, *i.e.*, "clearly unreasonable in light of the known circumstances." Neither *Gebser* nor *Davis* limited the deliberate indifference standard to sexual harassment settings or to plaintiffs who were victims of such harassment.

The University asserts, without qualification, that "[t]he 'deliberate indifference' theory does not apply to students such as Doe who are accused of, rather than victims of, sexual harassment." Appellees' Br. 46. But none of the three cases cited in support stand for such a principle. Rather, each notes that the typical deliberate indifference claim is brought by an alleged victim, but none forecloses the claim to accused students.[27] A fair statement of the current state of the law is that "it is an open question whether the Title IX deliberate indifference standard applies to claims related to alleged gender discrimination in a university's disciplinary proceedings." *Doe v. Univ. of St. Thomas*, 2017 WL 811905, at *4 n.2 (D. Minn. 2017).

There is a single case that has directly decided the issue of whether an accused student can bring a Title IX deliberate indifference claim to challenge a

[27] *See Doe v. Baum*, 2017 WL 57241, at *26 (E.D. Mich. 2017) ("[E]ven if the 'deliberate indifference' theory could apply here, Doe has failed to make out any plausible claims on that basis."); *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 191 (D.R.I. 2016) ("Some courts have questioned its application to a case of a disciplined student."); *Marshall v. Ohio Univ.*, 2015 WL 1179955, at *8 (S.D. Ohio 2015) (construing disciplined student's claim liberally but denying TRO for lack of gender discrimination evidence).

sexual assault disciplinary proceeding.[28] In *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746 (S.D. Ohio 2014), the plaintiff alleged that the university president (1) knew of the sexual assault allegations against the plaintiff; (2) "ignored warnings from the [county] Prosecutor that such allegations were unfounded"; and (3) nevertheless "allowed the defective hearing against Plaintiff [to go forward] with the goal of demonstrating to the OCR that [the school] was taking assault allegations seriously." *Id.* at 752. The court held that the allegations were sufficient to make out a deliberate indifference claim. *Id.*

B. John's Evidence

The allegations in *Wells* are strikingly similar to the facts supporting the deliberate indifference claim based on the 2014 review. The University President – Father Leahy; the Vice President for Student Affairs – Jones; and the University General Counsel – Herlihy were all on actual notice of both (1) the gender-biased misconduct and defects in John's hearing and appeal process; and (2) the evidence that convinced the District Attorney to dismiss the criminal charges. Appellants' Br. at 52. Their failure to remedy the injustice done to John was a response "clearly unreasonable in light of the known circumstances."

[28] An alleged victim of sexual assault was allowed to maintain a Title IX deliberate indifference claim to challenge the adequacy of a college's disciplinary proceedings as opposed to alleging a failure to remedy known sexual harassment. *See Shank v. Carleton College*, 2017 WL 80249, at *4-5 (D. Minn. 2017).

Similarly, Chebator, the Dean of Students, was deliberately indifferent in 2012 when he falsely stated shortly before the second day of John's hearing (as reported in an interview with the school paper) that the University was entirely compliant with Title IX. He knew the statement was false and that the Board was insufficiently trained. *See* Appellants' Br. at 51-52.

V. THE NEGLIGENCE CLAIMS ARE COGNIZABLE.

A. Massachusetts Law Recognizes an Independent Duty of Care.

Contrary to the University's argument, there is no "well-settled" Massachusetts law that precludes plaintiffs' negligence claims. Unlike all the Massachusetts decisions cited by the University, the issue was squarely presented and resolved in *Brandeis*: a student found "responsible" for sexual assault under a university's disciplinary system may maintain negligence-based claims in addition to breach-of-contract claims. 177 F. Supp. 3d at 613-14, 617.[29]

[29] The University primarily relies on *Doe v. Emerson College*, 153 F. Supp. 3d 506 (D. Mass. 2015), which concerned a suit by a student who alleged that the school "fail[ed] to take reasonable precautions to safeguard its students" from sexual assault. *Id.* at 514. The *Brandeis* court (Saylor, J.) also wrote the *Emerson* decision. Given the *Brandeis* opinion, *Emerson* cannot be said to stand for the proposition that negligence claims are precluded as a matter of law for students found responsible for sexual assault and who seek to challenge the school's process. None of the other cases cited stand for such a proposition. For example, in *Driscoll v. Board of Trustees of Milton Academy*, 70 Mass. App. Ct. 285, 291-92, 873 N.E.2d 1177, 1184-85 (2007), the plaintiff – a student expelled for sexual assault – unsuccessfully argued that the *in loco parentis* doctrine provided a basis for a negligence claim.

B. The Requirements of Title IX Inform the Standard of Care.

With regard to the claims grounded in negligence, the standard of care applicable to the University and the individual defendants includes these components: (1) the University's own policies, procedures, and practices[30]; (2) the custom and practice in the field of higher education discipline, particularly with regard to allegations of sexual assault[31]; (3) relevant statutes, regulations, and standards[32]; and (4) relevant case law,[33] including the common law duty of basic fairness.

The University argues that Title IX does not "establish any duty of care that would support a claim of negligence." Appellees' Br. at 49. That statement is true; it is the common law of Massachusetts that establishes the duty of care. But Title IX has an important role in the negligence claims here, for, like other industry regulations, it is a component of the standard of care for educational institutions.

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[30] *E.g., Commonwealth v. Angelo Todesca Corp.*, 446 Mass. 128, 138, 842 N.E.2d 930, 940 (2006) (violation of internal procedures is evidence of negligence).

[31] *E.g.*, *Lopez v. Equity Office Mgmt., LLC*, 597 F. Supp. 2d 189, 193 (D. Mass. 2009) (court considered evidence of "customary industry and trade practices" in evaluating whether defendant violated standard of care).

[32] *E.g.*, *Resendes v. Boston Edison Co.*, 38 Mass. App. Ct. 344, 358, 648 N.E.2d 757, 766 (1995) ("It has long been the established rule in the Commonwealth that violation of a statute or regulation, while not negligence per se, is 'evidence of negligence on the part of a violator as to all consequences that the statute, ordinance or regulation was intended to prevent.'").

[33] *E.g.*, *Bourassa v. County of Hampton*, 2006 WL 1699728, at *3 n.6 (Mass. App. Ct. 2006); Restatement (Second) of Torts §§ 285, 295A (1965).

And, more specifically, Title IX, its regulations, and the significant guidance documents promulgated by OCR have been held to inform the standard of care for negligence claims brought by a student challenging a university's finding that he was responsible for sexual assault.[34] They are part of the standard of care in this case as well.[35]

CONCLUSION

The Court should reverse the decision below and award the relief requested in appellants' initial brief.

Respectfully submitted,

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[34] Order, *Doe v. University of the South*, No. 4:09-cv-62 (E.D. Tenn., July 8, 2011), ECF No. 152 at 18, 20-21 (available on PACER). *See also Leader v. Harvard Univ. Bd. of Overseers*, 2017 WL 1064160, at *7 (D. Mass. 2017) (OCR guidance documents are relevant to issue of negligence in responding to complaints of sexual harassment for they "inform the reasonableness of choices made by" the defendant-university).

[35] *See* A953-54, 955 (Sokolow report).

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CERTIFICATE OF COMPLIANCE

This brief, submitted under Fed. R. App. P. 32(a)(7)(B), complies with the type-volume limitation and contains 6,483 words, exclusive of the exempted portions. It has been prepared in proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Charles B. Wayne

CERTIFICATE OF SERVICE

I certify that on this 13th day of June, 2017, I have electronically filed the Reply Brief for Plaintiffs-Appellants with the United States Court of Appeals for the First Circuit by the CM/ECF system, which will then send notification of such filing to all counsel of record.

/s/ Charles B. Wayne