No. 16-2290

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

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE DEFENDANTS–APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Trustees of Boston College is a non-profit, charitable corporation, which has no stock and is not a subsidiary of any corporation.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

STATEMENT OF THE ISSUES

1. Whether the District Court properly granted summary judgment for Boston College ("BC") on Counts I and III, the breach of contract claims.

2. Whether the District Court properly granted summary judgment for BC on Count IV, the "basic fairness" claim.

3. Whether the District Court properly granted summary judgment for BC on Counts VI and VII, the Title IX claims.

4. Whether the District Court properly granted summary judgment for BC and the individual defendants on Counts VIII, IX, X, and XI, the claims for negligence and negligent infliction of emotional distress.

STATEMENT OF THE CASE

I. RELEVANT FACTS

A. The Parties

The plaintiffs are "John Doe" ("Doe"), who received his undergraduate degree from BC in 2014, and his parents, "James Doe" and "Mary Doe." Joint Appendix ("A.") 16, 44. BC suspended Doe in the fall of 2012, his junior year, after an Administrative Hearing Board, following a full evidentiary hearing, determined that Doe indecently touched a female student on the buttocks during a student-sponsored boat cruise. A.1586-90. The Board determined that the evidence did not support a finding that Doe committed a sexual assault by penetrating the female student with his fingers. A.1507. Following Doe's suspension, he returned to BC in January 2014, graduated in May 2014, A.628, ¶ 221, and enrolled in law school. A.1331.

BC, the formal name of which is Trustees of Boston College, is a private, non-profit university. A.601, ¶¶4-5. Relevant to Plaintiffs' Title IX claims, BC is a recipient of Federal funds. A.93, ¶159.

Paul Chebator, Ph.D. was BC's Dean of Students during the events at issue. A.18, ¶7. Among other duties, he had overall responsibility for student discipline and he was one of two administrators who reviewed and denied Doe's appeal from the Board's decision. A.271, 1566.

Carole Hughes, Ph.D. was BC's Senior Associate Dean of Students during the events at issue. A.18, ¶8. She administered the disciplinary proceedings in Doe's case but had no decision-making role in the hearing or the appeal. A.605, ¶29; A.605, ¶35; A.1350.

Catherine-Mary Rivera was Associate Director, Staff Supervision & Educational Initiatives, at BC during the events at issue. A.608, ¶71. She chaired the Administrative Hearing Board that heard Doe's case. A.18.

Patrick J. Keating, Ph.D. recently had been named Interim Vice President for Student Affairs when Doe appealed from the Board's decision. A.602, ¶9. Along with Dean Chebator, he considered and denied Doe's appeal from the Board's decision. A.625, ¶196; A.1566.

Barbara Jones, Ph.D., Vice President for Student Affairs at BC, conducted a further review of Doe's case in the fall of 2014, after Doe graduated, at the request of BC's President, Father William Leahy, Ph.D. A.1518-23. She determined that there was nothing procedurally unfair about the 2012 proceedings and that Doe and his parents had failed to offer any new evidence that warranted reconsideration of the Board's decision. A.1521-23.

B. A.B. is Assaulted and Identifies Doe as the Assailant

On October 21, 2012, during a student-sponsored boat cruise in Boston Harbor, a female BC student, "A.B.," reported that while she was dancing, she felt

a hand go up her dress, touch her buttocks, and digitally penetrate her anus. A.1552. She immediately turned around and saw a "lone male" standing behind her with a "weird look" on his face. A.1421, 1552. He had his hands outstretched toward her waist and then put his hands up in the air. A.1545.

The assault was reported to security personnel on the boat. A.1549. 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. A.1552, ¶176.

The boat returned to the dock where State Police arrested Doe. A.1553. The police took swabs of Doe's hands and fingernails, which later were tested for the presence of blood, and obtained a copy of the board's surveillance video of the dance floor. A.657, ¶9; A.603, ¶21. Doe was arraigned the following morning on a charge of indecent assault and battery. A.603, ¶22; A.1550. By this time, Doe had a team of lawyers working with him, including his father, who is an attorney; Michael Fee, then a partner at Ropes & Gray LLP and a family friend; and the office of Conrad Bletzer. A.1310-11.

The State Police retained jurisdiction over the criminal investigation. A.606, ¶46. As a result, the BC Police did not investigate the incident. *Id.*, ¶¶47-48. The BC Police perform investigations only in connection with criminal proceedings, not in connection with student disciplinary proceedings. A.232, 1504.

C. BC's Polices Concerning Sexual Misconduct Allegations

For the 2012-2013 academic year, BC had three written policies relevant to sexual misconduct accusations: Section 4 of the Student Guide, which establishes community standards, prohibits "all forms of sexual harassment, sexual assault, and sexual misconduct," including "non consensual sexual contact" of any kind. A.217, 228. The procedures for addressing allegations of sexual misconduct are found in Section 5 of the Student Guide, which describes the student conduct system, A.237, and the Conduct Board Procedure, which establishes procedures for cases referred to Administrative Hearing Boards. A.251, 603, ¶24.

The Student Guide provides that a complaint of sexual misconduct will be investigated and adjudicated through the Student Conduct System, A.228, which allows a Dean to refer the case directly to an Administrative Hearing Board. A.228, 239. An Administrative Hearing Board consists of five individuals from a cross-section of the BC community: three administrators, one faculty member or academic administrator, and one student, led by a chairperson. A.240. The Board for any particular case is drawn from a panel of faculty, administrators and students who have received training in BC's disciplinary procedures and, in cases involving allegations of sexual misconduct, additional training specific to that topic. *Id*.; A.610, ¶75. Board chairs receive additional training specific to their responsibilities as chair. A.240.

Prior to a hearing before the Board, a member of the Dean's office provides the accused student with notice of the charge(s), meets with the student to discuss the complaint, and affords the student an opportunity to review any statement from the complaining party. A.238-40.

The Board thereafter conducts an evidentiary hearing, at which the complainant and the accused student each have the right to speak on their own behalf, call supporting witnesses, introduce documents and other relevant evidence, ask questions of witnesses through the chair, and make a closing argument. A.238, 242. A student facing criminal charges has the right to be accompanied by and confer with an attorney throughout the hearing. A.241.

Following the hearing, the Board deliberates to decide the case based upon a preponderance of the evidence – whether it is more likely than not that a conduct violation has or has not occurred. A.237. The four possible outcomes are a finding of "responsible" for the alleged conduct violation; a finding of "responsible for a lesser inclusive charge"; a finding of "not responsible"; or "no findings," meaning that a preponderance of the evidence does not support a finding of either "responsible" or "not responsible." A.240.

A student found responsible for a conduct violation has the right to appeal the outcome on the basis of procedural unfairness or new evidence which was not previously available and which likely would change the outcome. A.241-43.

D. The 2012 Disciplinary Proceedings in Doe's Case

Dean Hughes, an experienced student affairs administrator, A.603, ¶30, was responsible for administering Doe's disciplinary process. A.605, ¶¶35-36. She sought to convene an Administrative Hearing Board within two weeks of the incident. A.84, ¶62. In consultation with BC's Associate General Counsel, Hughes confirmed that the Board would act as the "investigating" body, i.e., that the Board would be responsible for determining the facts of the case. A. 291-93, 318.

Doe met with Hughes on three occasions before the hearing. A.604, ¶29. At the first meeting on October 24, 2012, Doe, accompanied by his father, told Hughes that he did not commit the assault and that the charge against him was a case of mistaken identity. A.604, ¶31. Hughes told Doe that he would be able to tell his side of the story to the Board, and she explained the Board process. A.604, ¶32. Doe met with Hughes again, this time with his mother, on October 26, 2012. A.678, ¶44. At this meeting, Doe read the statement that A.B. had provided to Hughes, A.158; he also received a copy of the formal notice that he was being charged with "Sexual Assault" and a copy of the Board procedures. A.678, ¶44. Doe met with Hughes again on October 30, 2012; this time he reviewed the police report and his conduct records. A.678, ¶46.

The first day of the hearing was on November 8, 2012. A.681, ¶51. The Administrative Hearing Board included the Chairperson, Catherine Mary Rivera; Darrell Peterson, the Director of the Office of Graduate Life; William Mills, the Director of Community Affairs; Norah Wylie, a professor and former dean at BC's law school; and Brian Fishman, an undergraduate student. A.609, ¶71. Doe was accompanied by an attorney and his parents. A.682, ¶54.

A.B. testified about the assault and why she believed it was Doe who assaulted her, including the fact that he was the "lone male" standing behind her when she turned around. A.1421. She also testified that when she turned around to confront her assailant, Doe's hands were stretched out toward her waist, and then he raised his hands above his head. A.1584.

Doe testified and denied that he committed the assault. A.614, ¶¶102-103. He showed 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. A.615, ¶114. Doe sought to persuade the Board that another male student, J.K., committed the assault: he testified that J.K. was crossing the dance floor at the same time as Doe, and that after A.B. turned around to yell at Doe, J.K. said to Doe, "Sorry, Dude, my bad." A.655, ¶6. Doe also submitted text messages from J.K., including a message to Doe the day after the incident, in which J.K. asked Doe what happened and said he had no recollection

of the boat cruise. A.614, ¶108. Doe also called as witnesses three of his friends who were on the boat, A.1421, but none of them saw the assault take place—in fact none of them even saw A.B. on the dance floor. A.1316, 1587.

The Board adjourned the hearing to a second day so that it could hear testimony from J.K. and A.B.'s friend Betsy, who was with her when the incident occurred. A.616, ¶122.

On November 9, 2012, the next day, Dean Hughes sent notices to Betsy and J.K. to appear for the second day of hearing. A.1555-56. Hughes subsequently met with J.K. and his father; she explained that J.K. was required to attend the hearing as a witness, but that at that time he was not being charged with any conduct violations. A.684, ¶58.[1]

The hearing resumed on November 16, 2012. A.685, ¶60. 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, A.1423, 1559, and that she did not see J.K. behind A.B. A.1559. J.K. testified that he had a full recollection of the boat cruise and was not intoxicated that night. A.616, ¶126. He denied

[1] Doe's claim that BC granted J.K. "immunity," Br.30, has no basis in the record. There is no evidence that Hughes or anyone else granted him immunity. The fact is that A.B. accused Doe, not J.K., and while Doe effectively did accuse him, the Board as discussed below found the evidence did not support that claim. As a result there was no reason for BC to bring a complaint against J.K.

committing the assault and denied saying to Doe "Sorry, dude, my bad," or words to that effect, when they were on the dance floor. A.685, ¶62.

Doe sought to offer the testimony of Kevin Mullen, a private investigator his attorneys had engaged in connection with the criminal case against Doe. A.616, ¶131. Doe informed the Board that Mullen would testify about an October 22, 2012 phone call between Doe and J.K., to which Mullen listened without J.K.'s knowledge, in which J.K. reiterated that he had no recollection of the boat cruise and said "Oh, that's weird," when Doe told J.K. that he allegedly said, "Sorry, dude, that was my bad." A.617, ¶¶132-33; A.660, ¶17. Doe also informed the Board that Mullen would testify about Mullen's interview with J.K. on October 29, 2012, in which J.K. claimed he had a good memory of most of the evening on the boat cruise, denied calling or texting about Doe after the cruise, and claimed not to recall crossing the dance floor with Doe or saying "Sorry, dude, that was my bad." A.617, ¶¶132-33.

Rivera, the Board Chair, consulted with BC's General Counsel, Joseph Herlihy, who indicated that it was up to the Board to decide whether Mullen should be permitted to testify; he also suggested that the Board review the Student Guide, which provides that "witnesses should be able to speak to the facts of the incident which they have witnessed." A.617, ¶134; A.242. The Board decided that Mullen would not be allowed to testify because he was not a percipient witness to the

incident on the boat and there was nothing Mullen could add about J.K. that the Board had not already heard from Doe. A.617, ¶137-39. The Board also told Doe he could submit a written statement from Mullen, but he never did. A.618, ¶¶140-41; A.805-06.

During the hearing, Doe also requested that the Board defer its decision until it could consider the laboratory results from the swab of his hands and a digitally enhanced version of the surveillance video, which his defense team was working on. A.619, ¶148. Doe could not say when this evidence would be available. A.619, ¶151. The Board decided to proceed without the additional evidence because a negative result of the swab test would not definitively exonerate Doe, A.619, ¶¶153-54, and an enhanced video was unlikely to show anything new because the room was crowded and poorly lit and the camera was in a poor location. A.619, ¶155.

The Board began to deliberate immediately after the second day of the hearing. A.687, ¶67. Rivera led the deliberations but all of the panel members had an opportunity to share their views and all of them had a role in the decision-making process. A.620, ¶162. At the end of the first day of deliberations, the Board took a straw poll, but did not make a final decision. A.621, ¶169. Everyone believed that Doe was responsible for touching A.B. on the buttocks, but they were not convinced that he had digitally penetrated her. *Id.*

The Board deliberated over the course of two days and came to a unanimous decision. A.621, ¶¶170, 173. On November 20, 2012, the Board concluded that Doe was "responsible" for indecent assault and battery but not for digital rape. A.622, ¶¶173-74; A.623, ¶180. The Board prepared a written decision which summarized its key findings. A.412.

On November 26, 2012, Doe was notified that the Board found him responsible for "Sexual Assault: Indecent Assault and Battery" and that he would be suspended for the reminder of the fall 2012 semester and two additional semesters. A.1589.

Doe appealed the Board's decision, claiming a denial of due process and citing the Board's refusal to wait for the lab results and enhanced surveillance video. A.1560. The appeal was directed to Chebator, the Dean of Students, and Keating, the Interim Vice President for Student Affairs. A.690, ¶75.

Chebator consulted with Rivera to clarify some of the Board's findings. A.625, ¶¶200-01. Chebator drafted a proposed response explaining why the standard for an appeal had not been met, which he reviewed with Keating. A.626, ¶205. Keating, who was new to his role, consulted with Herlihy, BC's General Counsel, regarding the appeal standard and the process for handling an appeal. *Id.* ¶206. Chebator sent the draft letter denying Doe's appeal to Rivera and Herlihy

for their comments, which they supplied. A.691, ¶79. On December 7, 2012, Chebator and Keating denied Doe's request for an appeal. A.1566.

E. The Criminal Case is Dismissed

In February 2013, the results of the forensic testing became available. A.661, ¶20; A.193. The swabs tested negative for blood, but no DNA testing was performed. A.194. Sometime later, Doe's attorney had a copy of the surveillance video professionally enhanced and analyzed. A.662, ¶22. In May 2014, the Commonwealth moved to dismiss the criminal charge against Doe, which the court allowed. A.665, ¶27.

F. The 2014 Review of the 2012 Disciplinary Proceeding

Following his suspension, Doe returned to BC in January 2014 and graduated in one semester, in May 2014. A.628, ¶221. In September 2014, Doe's parents wrote letters to BC's President, Father William Leahy, expressing their belief that BC wrongfully found Doe responsible in the 2012 disciplinary proceeding; they said they did not "desire to file a lawsuit against Boston College as well as the individuals particularly responsible for this injustice[,] but this injustice must be corrected." A.1517.

Although BC's policies did not provide for any further review of Doe's case, Father Leahy indicated that Vice President Jones would "review the case and make a recommendation, which she would send to the Executive Vice President."

A.465-66. Father Leahy did not instruct Jones how to conduct her review; he left it to her judgment as the student affairs professional. A.1611-12. Jones did not undertake a de novo review of Doe's case; instead, consistent with the usual practice for reviewing student conduct cases, she sought to determine whether BC followed its procedures in 2012 and whether there was new evidence that might warrant a different outcome. A.694, ¶89.

On November 14, 2014, Jones wrote a letter to Doe's father with the initial results of her review. A.1521-23. She had determined that BC followed its policies and procedures in connection with Doe's case. A.1521. She also did not believe that the negative result of the swab test would have changed the Board's decision; it was consistent with the Board's conclusion that the evidence did not support a finding of digital penetration, and it was not inconsistent with the Board's finding that Doe improperly touched A.B.'s buttocks. A.1522. Jones went on to say that she would like to review the enhanced video before deciding whether that evidence could have affected the outcome. *Id*.

Thereafter Jones personally reviewed the enhanced video and a presentation by the videographer who prepared it. A.1523. She determined that it was at best inconclusive and did not justify a reconsideration of Doe's case. *Id.*

II. PROCEDURAL HISTORY

On March 11, 2015, Doe and his parents filed their complaint against BC and the individual defendants – Chebator, Hughes, Rivera, Keating, and Jones. A.16.

On March 11, 2016, Doe moved to amend the complaint to add Herlihy, BC's General Counsel, as a defendant, which BC opposed. A.8.

On May 16, 2016, BC and the individual defendants moved for summary judgment on all counts of the complaint, and Doe moved for partial summary judgment on Counts I (breach of contract regarding the 2012 disciplinary proceeding) and IV (violation of "basic fairness" in connection with the 2012 proceeding).

The District Court (Hon. Denise J. Casper) conducted a hearing on all the pending motions on June 23, 2016. A.10. On October 4, 2016, the District Court denied Doe's motion to amend the complaint, granted summary judgment for the defendants on all counts, and denied Doe's motion for partial summary judgment. Addendum to Brief of Plaintiffs-Appellants ("Add.") 28.

The Court entered final judgment on October 4, 2016, and Plaintiffs filed their notice of appeal on October 21, 2016. A.11.

Plaintiffs' brief does not address the claims for promissory estoppel (Count II), declaratory judgment (Count V), unjust enrichment (Count XIV), or intentional

infliction of emotional distress (Counts XII and XIII), or the denial of their motion to amend the complaint. Accordingly, any argument as to those issues is waived. *See Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 239 (1st Cir. 2013).

SUMMARY OF THE ARGUMENT

The District Court applied the appropriate standard of review in relation to BC's handling of this student conduct case. It did not afford "extreme deference" to BC or deem BC to be "immune from challenge" so long as it merely complied with its policies, as Plaintiffs contend. The District Court properly cited and then applied the correct standard of review with respect to Plaintiffs' common law and statutory claims, pursuant to which the Court carefully reviewed the record not only for any evidence that BC failed to follow its policies, but also any evidence that BC failed to afford Doe a fundamentally fair process, or reached an arbitrary and capricious decision, or was motivated in any way by gender bias. Applying the appropriate standards of review, the Court correctly determined that Plaintiffs failed to identify any triable issue of fact.

The District Court properly awarded summary judgment for BC on the breach of contract claims. With respect to the 2012 disciplinary proceedings, the undisputed evidence is that the Hearing Board's decision was not arbitrary and capricious, but instead was firmly grounded in the evidence; that BC afforded Doe an entirely fair process; and that BC followed its policies and procedures as any

student reasonably would understand them. With respect to the 2014 review, the Court correctly determined that no contract was formed, because there was no meeting of the minds as to what that review would involve. Moreover, even assuming a contract was formed, Plaintiffs have failed to identify any way in which BC failed to comply with it.

The District Court properly awarded BC summary judgment on the "basic fairness" claim, because Massachusetts law recognizes no such independent cause of action – it is merely one part of a university's contractual obligation to its students – and BC afforded Doe a fair process in any event.

The District Court properly awarded BC summary judgment on the Title IX claims. With respect to Doe's "erroneous outcome" claim, there simply is no evidence that the Board or any BC administrators were motivated by gender bias, much less that any such bias affected the outcome of Doe's case. Doe's "deliberate indifference" claim fails because such claims apply only to alleged victims of sexual violence or other harassment, not persons such as Doe who are found to have perpetrated such conduct. Moreover, there is no evidence that anyone at BC was "indifferent" to Doe's complaints of gender bias in any event.

The District Court properly awarded summary judgment to BC and the individual defendants on the claims for negligence and negligent infliction of emotional distress. The relationship between Doe and BC was essentially

contractual and any claims arising from an allegedly improper disciplinary process accordingly sound in breach of contract, not tort. Absent any underlying duty in tort, it follows that there also can be no claim for negligent infliction of emotional distress.

ARGUMENT

I. THE DISTRICT COURT APPLIED THE APPROPRIATE STANDARD OF REVIEW.

The Argument section of Plaintiffs' brief opens by claiming that the District Court applied the wrong standard of review by "holding that 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.'" Br.27 (quoting Add.10). That is blatantly false. The District Court's decision nowhere says or implies that a university is entitled to "extreme deference" in relation to its handling of a student sexual assault case, or that a university is "immune from challenge" if it merely has "complied with the terms of its policies." To the contrary, the District Court cited and then properly applied the correct standard of review with respect to Plaintiffs' statutory and common law claims.

With respect to Plaintiffs' contract claims, the District Court correctly observed that under Massachusetts law, "[t]he 'inquiry is whether the challenged conduct [on the part of the university] conformed to the parties' reasonable

understanding of performance obligations, as reflected in the overall spirit of the bargain," which requires assessing whether the university complied with not just the letter but also the "spirit" of the parties' agreement, including the implied covenant of good faith and fair dealing. Add.8 (citing *Brandeis*, 177 F. Supp. 3d at 612). The Court went on to observe that "as part of the analysis of the express and implied terms of the contract between the university and its students, the [Court] also must determine whether the university provided a process conducted with 'basic fairness' to the student…." *Id*. (citing *Brandeis*, 177 F. Supp. 3d at 594). The Court went on to note that while a private university need not adhere to "the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts," *id.* (quoting *Schaer v. Brandeis Univ.*, 432 Mass. 474, 482, 735 N.E.2d 373, 381 (2000)),[2] the Court must consider each alleged breach,

[2] *See also Newman v. Burgin*, 930 F.2d 955, 960 (1st Cir. 1991) ("The Due Process Clause of the Constitution … does not require the University to follow any specific set of detailed procedures as long as the procedures the University actually follows are basically fair ones."); *Hernandez-Loring v. Universidad Metropolitana*, 233 F.3d 49, 51 (1st Cir. 2000). Plaintiffs' suggestion that the Department of Education's 2001 Revised Sexual Harassment Guidance imposes a due process obligation on private schools, Br. 9, is incorrect; the cited passage is directed only to "public and State-supported schools." 2001 Guidance at 22, available at https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. To the extent BC afforded students such as Doe the right to appeal a disciplinary outcome for a "lack of due process," Add.44, that is a reference not to constitutional due process, but to the process that was due under BC's own procedures. *See Matthews v. Planning Bd. of Brewster*, 72 Mass. App. Ct. 456, 462, 892 N.E.2d 797, 802 (2008) (contract language "must be considered in the context of the entire contract rather than in isolation").

as well as "the cumulative impact of same" in determining whether the university met its obligation to afford "basic fairness" to the accused student. *Id*. It was in the context of these overarching principles that the District Court observed, correctly, that "courts must accord a school some measure of deference in matters of discipline," *id.* (citing *Havlik v. Johnson & Wales Univ.*, 509 F.3d 25, 35 (1st Cir. 2007)),[3] and that a court "will not second guess the thoroughness or accuracy of a university investigation, so long as the university complied with the terms of its policies." Add.10.

Nor did the District Court afford BC "extreme deference" with respect to Doe's Title IX claims. Here, too, the Court cited and applied the correct standard of review, which is not limited to whether the university merely complied with its own policies, but instead focuses on "whether the [university's] actions were motivated by gender bias," thereby resulting in an "erroneous outcome," Add.22,

[3] *See also Cloud v. Trustees of Boston Univ.*, 720 F.2d 721, 724 (1st Cir. 1983); *Bleiler v. Coll. of Holy Cross*, No. CIV.A. 11-11541-DJC, 2013 WL 4714340, at *10 (D. Mass. Aug. 26, 2013); *Kiani v. Trs. of Boston Univ.*, No. 04–cv–11838, 2005 WL 6489754, at *6 (D. Mass. Nov. 10, 2005); *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 316-17 (D. Mass. 1997); *Schaer v. Brandeis Univ.*, 432 Mass. at 481, 735 N.E.2d at 381; *Coveney v. Pres. and Trs. of Holy Cross Coll.*, 388 Mass. 16, 19-20, 445 N.E.2d 136, 139 (1983); *Driscoll v. Bd. of Trustees of Milton Acad.*, 70 Mass. App. Ct. 285, 292, 873 N.E.2d 1177, 1185 (2007); *Morris v. Brandeis Univ.*, No. 01-P-1673, 60 Mass. App. Ct. 1119, 2004 WL 369106, *2 (Mass. App. Ct. Feb. 27, 2004) (Rule 1:28); *Sullivan v. Boston Architectural Ctr., Inc.*, 57 Mass. App. Ct. 771, 774, 786 N.E.2d 419, 421 (2003).

or involved "deliberate indifference," which caused a student to be vulnerable to sexual harassment. Add.24.

Simply put, it is reprehensible for Plaintiffs to argue that the District Court applied the wrong standard by holding that a private university's handling of a sexual assault cause is "immune from challenge" based upon "simple compliance with unjust and biased policies." Br.26-27. That is not what the District Court said, nor what it did.

Nor is there any merit to the premise underlying Plaintiffs' argument that courts should not defer to university policies and decision-making in student sexual assault cases – the baseless claim that the Department of Education's April 2011 "Dear Colleague Letter" has "impelled" changes to student disciplinary procedures, which are "intended to make it easier for victims of sexual assault to make and prove their claims and for the schools to adopt punitive measures in response." Br.26 (quoting *Doe v. Brandeis*, 177 F. Supp. 3d 561, 572 (D. Mass. 2016)). The Dear Colleague Letter requires in relevant part that universities provide for the "prompt, thorough, and ***impartial***" investigation of complaints of sexual misconduct, A.1275 (emphasis added), and that universities employ a "preponderance of evidence" standard for determining whether misconduct has occurred – consistent with the standard that applies to other civil rights laws. A.1281. The Dear Colleague Letter does not remotely suggest that universities

should make it "easier" to find accused student's responsible for sexual misconduct, should adopt or tolerate any bias against students accused of misconduct, or should deny such students a fair process. *See Doe v. Cummins*, 662 F. App'x 437, 449 (6th Cir. 2016); *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 602 (S.D. Ohio 2016). More to the point, there is no evidence of such nefarious motives at work in Doe's case, as discussed at length below.

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR BC ON PLAINTIFFS' BREACH OF CONTRACT CLAIMS.

The Complaint alleges that BC breached its contractual obligations to the Plaintiffs in relation to both the 2012 disciplinary proceedings that resulted in Doe's suspension (Count I) and the further review of those proceedings that BC afforded in 2014 (Count III). It is well-settled that a breach-of-contract claim arising from a university's imposition of student discipline fails as a matter of law where, as in this case, (1) the university's decision was not arbitrary and capricious; (2) the decision was reached through a process that afforded basic fairness; and (3) the university followed its policies and procedures as it would reasonably expect a student to understand them. *Walker v. President & Fellows of Harvard Coll.*, 840 F.3d 57, 61 (1st Cir. 2016); *Cloud*, 720 F.2d at 724; *Schaer*, 432 Mass. at 478, 735 N.E.2d at 378; *Coveney*, 388 Mass. at 19, 445 N.E.2d at 138-39. Applying these well-established principles, the District Court properly awarded summary judgment for BC on Counts I and III.

A. The Board's Decision was Not Arbitrary and Capricious.

"A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support." *City of Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 303, 682 N.E.2d 923, 925 (1997). Where there are any "reasonable grounds" to support the finding of a university disciplinary board, it "will not be subject to successful challenge in the courts." *Cloud*, 720 F.2d at 724 (quoting *Coveney*, 388 Mass. at 19, 445 N.E.2d at 139 (1983)); *Schaer*, 432 Mass. at 479 n.9, 735 N.E.2d at 379 n.9 (rejecting student's contract claim where "[t]here was ample evidence which, if believed, could have supported the board's decision"). Moreover, it is not for the Court to assess "the credibility of hearing witnesses," or "whether the [hearing board] should have believed a certain party's version of events." *Doe v. Coll. of Wooster*, No. 5:16-CV-979, 2017 WL 1038982, at *11 (N.D. Ohio Mar. 17, 2017) (citing *Doe v. Univ. of the South*, 687 F. Supp. 2d 744, 755 (E.D. Tenn. 2009); *Pierre v. Univ. of Dayton*, 143 F. Supp. 3d 703, 713 (S.D. Ohio 2015)).

The Board's decision had a fully "rational explanation" that was amply supported by "reasonable grounds." A.B. testified that someone reached under her skirt and touched her inappropriately while she was on the dance floor; that when she turned around immediately to confront the person, a "lone male" – Doe – was standing right there behind her with a "weird" look on his face; and that his hands

were stretched out toward her waist and then went up in the air. A.1545, 1552. Doe admitted and the surveillance video confirmed that he was in close proximity to A.B. when the assault occurred. A.615, ¶114. Doe never disputed that an assault occurred, but instead tried to blame it on another student, J.K. A.614, ¶105. J.K. testified at the hearing and denied assaulting A.B. A.616, ¶125. A.B.'s friend Betsy confirmed that Doe was behind A.B. and said that she did not see J.K. when the assault occurred. A.175. None of Doe's witnesses saw the assault occur or even saw A.B. on the dance floor. A.1587. The Board ultimately concluded that Doe's attempt to pin the assault on J.K. just "didn't completely add up." A.1441.

Simply put, there was ample evidence from which the Board could conclude it was more likely than not that someone touched A.B. inappropriately and that it was Doe, the "lone male" right behind her at the time, who did so. As the District Court correctly determined, the fact that no one saw Doe commit the assault "does not mean that there was no rational basis for the board's conclusion." Add.18. Nor does it matter that there was no physical evidence to prove directly that Doe was the assailant. *Doe v. Coll. of Wooster*, 2017 WL 1038982, at *11 ("There is no requirement, contractual or otherwise, that a finding of [responsibility] in a student disciplinary proceeding must be based on physical evidence.").

B. The Process was Conducted with Basic Fairness.

Disciplinary proceedings are "conducted with basic fairness" if the student has notice of the allegation against him and an opportunity to be heard, i.e., to present his version of events, and offer supporting evidence. *Cloud*, 720 F.2d at 725; *Kiani*, 2005 WL 6489754, at *8; *Schaer*, 432 Mass. at 481, 735 N.E.2d at 381; *Driscoll*, 70 Mass. App. Ct. at 295, 873 N.E.2d at 1187; *Morris*, 2004 WL 369106 at *2.

Doe was afforded a process that easily meets that test. He was given notice of the charge against him well in advance of the hearing at which the charge would be decided. A.1601. He had ample opportunity to prepare for the hearing with the assistance of a team of lawyers and a private investigator. A.612, ¶90; A.616, ¶129. He had the opportunity to review in advance the documents that would be introduced at the hearing. A.613 ¶96. The case was heard by a trained, five-person panel, which represented a cross-section of the BC community. A.610, ¶¶71-79. The panel afforded Doe a presumption of innocence. A.621, ¶179. In making its decision, the panel understood and applied the preponderance of evidence standard. A.621, ¶165. The panel understood that it had the option to decide that the evidence did not support any finding. *Id*. ¶166. Throughout the hearing Doe was accompanied by and had the opportunity to consult with one of his attorneys. A.613, ¶93. Doe was able to tell his side of the story, call

supporting witnesses, introduce supporting exhibits, and pose questions to the complainant and other witnesses to be asked by the Chairperson. A.614, ¶102; A.613, ¶98; A.615, ¶121. Doe was notified of the Board's decision, in writing, and afforded the opportunity to appeal the decision on the grounds of procedural error or newly available evidence in accordance with BC policy. A.624, ¶¶190, 194; A.243. Moreover, following Doe's graduation, and with no obligation to do so, BC agreed to have a new Vice President, who had no involvement in the earlier proceedings, conduct a further review of the matter including the "new" evidence that Doe claimed should be deemed to exonerate him. A.633, ¶¶257-58. The process Doe was afforded thus easily meets the test of "fundamental" or "basic" fairness. *See Driscoll*, 70 Mass. App. Ct. at 295, 873 N.E.2d at 1187.

In support of his "basic fairness" argument, Doe relies entirely on the trial court's decision in *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561 (D. Mass. 2016), which involved a procedural posture and alleged facts entirely different from this case. In *Brandeis*, Judge Saylor determined that, for purposes of ruling on a motion to dismiss, a complaint stated a plausible violation of basic fairness based upon allegations that the accused student received no notice of the specific allegations against him; he was not permitted to consult with his counsel; he was not permitted to confront or pose questions to his accuser or other witnesses, either directly or indirectly; he was not able to view witness statements or other evidence;

he was denied the opportunity to submit facts and evidence after learning the charges against him; and his case was investigated and decided by a single individual. *Id.* at 601-07. None of those things are true in this case.

C. BC Followed its Policies and Procedures.

In determining whether a university has followed its stated policies, the Court applies a standard of "reasonable expectation" – what meaning the university reasonably should understand a student to give to its policies. *Walker*, 840 F.3d at 61; *Schaer*, 432 Mass. at 478, 735 N.E.2d at 378 (quoting *Cloud*, 720 F.2d at 724). The complaint identified 13 alleged violations of BC's policies. The District Court correctly found that the claims were entirely without merit. Add.9-19.

1. BC had no obligation to perform a "threshold evaluation."

Doe contends that BC breached its obligation to perform a "threshold evaluation" of A.B.'s complaint against him, because Hughes – who met with Doe three times before the hearing – allegedly failed to listen to his argument that it was J.K. who had assaulted A.B., as a result of which "the Board never fairly considered the heart of John's defense." Br.29-30. The argument is without merit in multiple respects.

First, the District Court correctly determined that BC had no obligation to perform a "threshold evaluation" before proceeding with Doe's hearing. Add.9. Section 5 of the Student Guide states that "[a] student who has had a complaint

lodged against him or her will be called by the Dean of Students or designee to discuss the complaint. At the meeting, the case may be kept open for later resolution, dropped, resolved, or referred to an appropriate hearing board as determined by the Dean or designee." Add.38. It is undisputed that Hughes met with Doe three times before the hearing, during which she gave him copies of A.B.'s written statement, notice of the charge against him, and the Conduct Board Procedures, and during which he stated that the case was one of mistaken identity – i.e., that someone else was the perpetrator. A.604, ¶¶29, 31; A.678, ¶44. Thus, the obligation to meet with Doe and "discuss the complaint" with him plainly was met.

It also is undisputed that Hughes decided to refer the case to an appropriate hearing board, and that this was entirely in accordance with the Student Guide, which provides that allegations of sexual assault will be "followed within a reasonable period of time … by a conduct hearing." Add.244. Nothing in the Student Guide says or suggests that the Dean's office must conduct a "threshold evaluation" of the case; nor would there be any point to such an evaluation when the matter, pursuant to the Guide, will be decided by a conduct hearing.

Also without merit is Doe's claim that Hughes's "conduct ensured that the Board never fairly considered the heart of John's defense," which was that J.K. was the person who assaulted A.B. Doe called J.K. as a witness at the hearing; he argued to the Board that J.K. was the perpetrator; the Board had the opportunity to

question Doe; and the Board considered Doe's arguments about J.K. in its deliberations. A.609, ¶67; A.616, ¶125-27; A.614, ¶105; A.1441. Doe's claim that Hughes prevented the Board from considering this defense is simply false.

2. Doe's case involved an appropriate investigation.

Doe claims that BC breached its contractual obligations to him because the BC Police did not investigate the case "before the University brought any charges against [him]." Br.31. The District Court correctly determined that BC's policies did not give rise to any reasonable expectation that Doe's case would be investigated by the BC Police. Add.10. The policy on which Doe relies states only that, if an incident occurs off-campus, "the Boston College police will assist the victim in informing the appropriate municipal department if he or she so desires." Add.36. The policy does not mandate any investigation by the BC Police, and in fact the BC police determined they had no jurisdiction to conduct their own investigation in light of the ongoing criminal investigation by the State Police. A.606, ¶¶45-48.

Nor does the Student Guide require an investigation by the BC Police. Add.35. The Guide provides only that "[t]he University will promptly conduct an investigation of the alleged incident, which will include a review of statements obtained from either party, interviews with the complainant and the accused (if identified), interviews with appropriate witnesses, and a review of other relevant

information." *Id*. It is undisputed that the Board did all of these things in connection with the hearing at issue. A.677, ¶41.

It also is beyond dispute that the Board is the appropriate investigative body in cases of alleged sexual misconduct. The Student Guide provides that complaints of sexual misconduct "will be investigated and adjudicated in accordance with the Student Conduct System policies and procedures, as described in Section 5." A.228. Section 5 provides that, "the function of the [disciplinary] proceedings is to investigate the facts of the matter and to determine responsibility for alleged violations." A.237. As the District Court found, these sections make clear that an Administrative Hearing Board has both investigative and adjudicatory functions, and Doe had no reasonable expectation that they would be separated. Add.10.

3. Doe was given an appropriate hearing date.

The District Court correctly determined that BC followed its policies in relation to the hearing date, which initially was scheduled to go forward two weeks after BC learned of his arrest, and which ultimately went forward later than that – the hearing began on November 8, 2012, almost three weeks after the incident, and resumed on November 16, 2012, almost four weeks after the incident. Add.11. The Student Guide provides that in sexual assault cases, BC will "promptly conduct an investigation … [and] make every reasonable effort to resolve the complaint within 60 days," A.231; "[a] case may be referred ***directly*** to a[n] …

Administrative Hearing Board if the Dean or Residential Life staff member feels that such a referral is appropriate," A.239 (emphasis added); and "[i]f the complainant proceeds with both a disciplinary complaint and a criminal complaint, the University conduct process will normally proceed while the criminal action is in process." A.232. The rules allow the Dean to "elect to stay" the disciplinary process, *id*., but such a decision is discretionary and Hughes elected not to do so.[4]

Doe's argument that he was deprived of the "right to adequate time to prepare a response to the charges," Br.32, is belied by the undisputed facts. Prior to the hearing, Doe received written notice of the charge, A.1544, 1601; secured the assistance of a team of lawyers and a private investigator, A.660, ¶2; reviewed the police report and A.B.'s statement, A.613, ¶96; obtained the ship's surveillance video of the dance floor, A.662, ¶¶21-22; obtained text messages to use as evidence, A.614, ¶108; and lined up three friends to serve as witnesses on his behalf at the hearing. *Id.* ¶102. Doe met with his legal team several times to

[4] If BC had stayed Doe's hearing until after the criminal case was over, it would have violated A.B.'s right to a timely disposition. According to the administrative requirements of Title IX, a university must promptly resolve complaints of sexual misconduct. A.1279-82. The Department of Education expects that this ordinarily will be done within 60 days. A.1282. Doe's criminal case concluded on May 16, 2014, A.628 ¶220, more than 573 days after the incident. It would have been unreasonable and unfair to A.B. for BC to wait that long to conduct its hearing. A.1280.

prepare for the hearing, A.612, ¶¶90-91, and one of his attorneys accompanied him at the hearing. A.682, ¶54.

Doe argues that he did not have "adequate time to prepare" because he had not yet received the results of the forensic testing on his hands and the surveillance video had not yet been enhanced. Br.32. The Board determined to go forward without the evidence because Doe could not say when it might be available, A.619, ¶151, and the Board determined it could make an appropriate decision without it. A.619, ¶53-59. More time would not have altered the outcome. The forensic testing was only for the presence of blood on Doe's hands. A.194. The Board found Doe responsible only for touching A.B.'s buttocks, as to which the absence of blood was not dispositive. A.1567. During the 2014 Review, Jones came to the same conclusion. A.1522-23. As for the enhanced video, it was viewed by Jones during the 2014 Review and it was determined not to exonerate Doe. A.1523.

Doe argues without citation to the record that the District Attorney's Office dismissed the criminal charge against Doe because it viewed the forensic evidence as exculpatory. Br.32. This argument is entirely without merit. BC's community standards are distinct from criminal law standards. Even if the District Attorney's office concluded that it likely could not obtain a conviction on criminal charges, which require proof of guilt beyond a reasonable doubt, that does not mean Doe should be immune from student discipline, the standard for which is a

preponderance of the evidence. Moreover, there is no admissible evidence establishing that the District Attorney's Office viewed the evidence as exculpatory. It is equally as plausible that the District Attorney's office agreed to dismiss the charge because by that point A.B. had achieved a satisfactory result through the BC conduct system and no longer desired to pursue a criminal case. *See* A.1280.

4. There is no evidence the Board was biased against Doe.

The District Court correctly determined that no genuine issue of fact exists as to whether the Hearing Board was "impartial." Add.15. Doe's claim of bias rests on the entirely subjective and self-serving testimony by Doe and his parents that Rivera, the chair, was "openly hostile," "aggressive" and "bias[ed]" and used a "tone of voice that was very dismissive." Br.34-35. Such allegations, without more, fail to create a triable issue of fact.

Claims of "[a]lleged prejudice" on the part of "university hearing bodies must be based on more than mere speculation and tenuous inferences. … [A] presumption [of impartiality] favors the administrators, and the burden is upon the party challenging the action to produce evidence sufficient to rebut this presumption." *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 15 (1st Cir. 1988) (citing *Duke v. North Texas State Univ.*, 469 F.2d 829, 834 (5th Cir. 1972), cert. denied, 412 U.S. 932 (1973)); *see also Doe v. Cummins*, 662 F. App'x at 449. ("It is … well established that school-disciplinary committees are entitled to a

presumption of impartiality, absent a showing of actual bias."); *Nash v. Auburn Univ.*, 812 F.2d 655, 665 (11th Cir. 1987) ("Any alleged prejudice on the part of the board must be evident from the record and cannot be based in speculation or inference."); *Ikpeazu v. Univ. of Nebraska*, 775 F.2d 250, 254 (8th Cir. 1985) ("[T]he committee members are entitled to a presumption of honesty and integrity unless actual bias, such as personal animosity, illegal prejudice, or a personal or financial stake in the outcome can be proven.").

Applying these well-established principles, courts routinely have rejected allegations of bias that are indistinguishable from Doe's. *See Cloud*, 720 F.2d at 726 (hearing examiner's statement indicating respect for the Dean of Student Life was insufficient evidence of bias); *Bleiler*, 2013 WL 4714340 at *13 (student's allegations that a panel member was "growing angry" with him at the hearing and "persisting in detailed questioning of him" were insufficient evidence of bias); *Doe v. Coll. of Wooster*, 2017 WL 1038982, at *10 (allegations that university officials used hand signals, rolled their eyes, and asked "irrelevant questions" at a hearing were insufficient evidence of bias); *Doe v. Miami Univ.*, No. 1:15CV605, 2017 WL 1154086, at *15 (S.D. Ohio Mar. 28, 2017) (allegations of a hearing panel member's manner of asking questions, body language, and accusatory questioning, such as "I'll bet you do this all the time," were insufficient of bias); *cf. United States v. DeCologero*, 530 F.3d 36, 56 (1st Cir. 2008) ("judicial remarks during the

course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge….").

Moreover, even assuming for the sake of argument that Doe's allegations created a genuine issue of fact as to bias on the part of Rivera, she was just one of five panel members, and the panel was unanimous in its findings – not only that Doe was responsible for indecently touching A.B., but also that the evidence failed to support a finding that he digitally penetrated A.B. A.622, ¶173. *See Doe v. W. New England Univ.*, No. CV 15-30192-MAP, 2017 WL 113059, at *25 (D. Mass. Jan. 11, 2017) (allegations of bias as to one panel member are insufficient where other panel member with no conflict of interest also found plaintiff responsible). [5]

The District Court thus did not engage in improper "fact finding" or "credibility determinations," as Doe claims. Br.35. Rather, the District Court

[5] There is no merit to Doe's argument that Board member Norah Wylie had a "conflict of interest" as a result of holding a leadership position with Emerge, an organization which is concerned with domestic violence – an issue Doe's case did not involve. Br.36 n.27; A.375. *See Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 31 (D. Me. 2005) (hearing committee chair's involvement with a rape response and victim advocate program was not evidence of bias); *accord Doe v. Miami Univ.*, 2017 WL 1154086 at *13; *M.N. v. Rolla Pub. Sch. Dist. 31*, No. 2:11-CV-04173-NKL, 2012 WL 2049818, at *4 (W.D. Mo. June 6, 2012). *See also Levitt v. Monroe*, 590 F. Supp. 902, 907 (W.D. Tex. 1984), aff'd sub nom. *Levitt v. Univ. of Texas at El Paso*, 759 F.2d 1224 (5th Cir. 1985) ("[t]he impartiality [of] the tribunal must be with respect to the specific charges against the accused [person], not with respect to some unrelated matter.").

properly determined that Doe's purported evidence was insufficient to show bias as a matter of law.

Doe's reliance on *Burns v. Johnson*, 829 F.3d 1 (1st Cir. 2016), on this point, Br.35, is misplaced. That was an employment discrimination case, not one involving student discipline, as to which courts afford university decision-makers a presumption of impartiality. Moreover, the employee in *Burns* offered evidence of gender bias on the part of her supervisor that went beyond the mere "tone" of the supervisor's remarks and included specific comments and conduct which supported an inference of discrimination – specifically, plaintiff's job responsibilities were taken away from her upon the arrival of a new supervisor who reassigned her duties to a group of men; the new supervisor made specific, demeaning comments to her, such as "who are you?", "what do you do for me?", and "so you do still work here?"; the supervisor told plaintiff that, despite her history of "excellent" performance, he had "misgivings" about her alternative work schedule and "concerns" about her work; he called her flight scheduling system "stupid," and when he changed the system he told her "how much better things were going to be;" he carried a baseball bat in an intimidating manner around her; and he emphasized the word "she" in a condescending tone when referring to her. *Id.* at 13-16. Thus, while *Burns* stands for the proposition that a jury may infer bias from specific facts that include but are not limited to a person's tone and

inflection, the meager evidence Doe presented fails to create a triable issue of fact as to actual bias, particularly in the context of a student conduct case. *See Ikpeazu*, 775 F.2d at 254.

5. The Board was adequately trained.

The Student Guide provides that "[a]ll board members are trained by the Office of the Dean of Students," and that "Chairpersons for the Administrative Hearing Board … receive additional training." A.240. As the District Court noted, the undisputed evidence showed that the Board was trained, thereby satisfying any student's reasonable expectation in relation to the Student Guide. Add.16. The Board members who heard Doe's case received training as to hearing board procedures and were specifically trained in handling student sexual assault cases, A.610-11, ¶¶74-79; each of the Board members had previous experience handling disciplinary proceedings and some had served on sexual assault hearing panels, A.611, ¶¶80-85; and Rivera attended additional chairperson training, A.610, ¶76. *See Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 472 (S.D.N.Y. 2015) (rejecting challenge to adequacy of disciplinary panel's training where record indicated the panelists all received training, which was all the university's policies required).

Doe contends that a triable issue of fact exists as to the adequacy of the panel's training because an April 23, 2012 report from BC's Title IX Committee stated that "[b]ased on best practices, the training of a hearing board such as ours is

insufficient," and there was no evidence that BC changed its training prior to Doe's hearing later that year. Br.36. The argument fails for two reasons. First, the record did include evidence that in response to the April 2012 report, BC "ramp[ed] up the training for those individuals who would be hearing sexual assault cases." A.771. Second, while the Committee report noted that additional training across a "wide array" of issues would be necessary to meet the standard of "best practices," there is no evidence any additional training was necessary for the panel to be able to decide the simple question whether one student improperly touched the buttocks of another student on a dance floor. That finding did not involve any difficult issues of consent, incapacitation, or other potentially complicated subjects that can arise in sexual misconduct cases different from this one. The Board did not require training on a "wide array of topics" in order to weigh the accounts of A.B., Doe, and the other witnesses and decide whether it was more likely than not that Doe was the person who inappropriately touched A.B. Simply put, Doe does not identify any way in which the training the Board members received was insufficient, nor does he identify how any purported deficiency in training affected the outcome of his case.[6]

[6] For this reason, the District Court properly disregarded the report of Plaintiffs' purported expert, Brett Sokolow, who claims to describe the standards for adequate hearing board training; as the District Court noted, Sokolow cited no authority for his opinions and gave no rationale as to why any additional training was necessary for BC to meet its contractual obligations in Doe's case. Add.16.

6. No one interfered with the Board's deliberations.

Doe argues that BC breached its contractual obligation for the Board to deliberate "in private," with no outside influence, because the Board communicated during its deliberations with the Dean's office and the General Counsel. With respect to the Dean's office, Doe complains that when Rivera informed Hughes that the panel was considering a result of "no finding," Hughes improperly responded by communicating Dean Chebator's view that, while such results have occurred in the past, he discouraged them. Br.38. There is no evidence the Board was improperly influenced by this remark, much less to Doe's detriment. A result of "no finding" is akin to a hung jury. By discouraging a result of "no finding," Chebator was merely expressing his view that, if possible, a Board should make a finding. Chebator did not say or suggest that he preferred for Boards to make findings ***of responsibility***. Moreover, as the District Court noted, the undisputed evidence is that no Board member recalled hearing that Chebator had discouraged a result of "no finding," A.621, ¶167, and that the reason the Board did not make a "no finding" determination was because the Board in fact felt that it "had enough information to make a decision…." A.1428.

Doe also takes Rivera's remarks about the Board "struggling" with its decision and consideration of a "no finding" entirely out of context. Br.19, 38. The undisputed evidence was that the Board took a straw poll, which showed

unanimous support for a finding that Doe was responsible for inappropriately touching A.B., but not for a finding of anal penetration. A.621, ¶169. Rivera told Hughes that at that point in the Board's deliberations, it was "not a clear yes for responsible," by which she meant responsible for a finding of anal penetration, but that the Board was "going on the notion not to have 'no finding'" because there was consensus about an indecent touching. A.391, 1428.

With respect to the General Counsel, Doe argues that Herlihy improperly gave the Board the basis for its decision by assisting them with the language of its written findings. Br.38-39. Here, too, Doe mischaracterizes the record. As the District Court noted, it was undisputed that the Board did not contact Herlihy about the language of its decision until ***after*** it had reached a decision, and that he merely helped them articulate what they had found – not that he influenced their findings. Add.18; A.689, ¶71; A.1499-1500. Moreover, Doe's argument that Herlihy interfered by helping to articulate the rationale for the Board's finding of "no penetration," Br.39, is nonsensical, as that finding was in Doe's favor.

7. Other alleged breaches in relation to the 2012 proceedings.

Plaintiffs' brief makes bullet-point references to nine "other breaches" that were argued on summary judgment below, each of which the District Court rejected. The brief makes no argument, but instead "refer[s] the Court to the arguments contained in the Appendix," i.e., Doe's memorandum of law. Br.40.

"Such a practice has been consistently and roundly condemned … and any incorporated argument is ordinarily deemed forfeited." *United States v. Orrego-Martinez*, 575 F.3d 1, 8 (1st Cir. 2009) (citing *Gilday v. Callahan*, 59 F.3d 257, 273 n. 23 (1st Cir. 1995); *Sleeper Farms v. Agway, Inc.*, 506 F.3d 98, 104-05 (1st Cir. 2007); *see also Galvin v. U.S. Bank, N.A.*, 852 F.3d 146, 159 (1st Cir. 2017). The Court should deem the arguments forfeited in this case. In the unlikely event it does not, the Court should reject them on the merits for the reasons set forth in the District Court's well-reasoned and thorough decision. Add.12-14, 17-18.

D. There was No Breach of Contract with the 2014 Review.

Count III of the complaint alleges that BC breached its contractual obligations in connection with the 2014 review. The claim fails on two grounds.

First, the parties never entered into any enforceable agreement with respect to the 2014 review. The District Court correctly observed that the formation of a binding contract under Massachusetts law requires a "bargained-for exchange" – a "manifestation of mutual assent" to "a definite offer, acceptance, and consideration," the "essential terms" of which are sufficiently "definite and certain,"[7] and that, applying those well-established principles, no enforceable

[7]Add.21 (quoting *Hinchey v. NYNEX Corp.*, 144 F.3d 134, 142 (1st Cir. 1998); *United States ex rel. Hagerty v. Cyberonics, Inc.*, 146 F. Supp. 3d 337, 346 (D. Mass. 2015); *Cygan v. Megathlin*, 326 Mass. 732, 733-34, 96 N.E.2d 702, 703 (1951); *I & R Mech. Inc. v. Hazelton Mfg. Co.*, 62 Mass. App. Ct. 452, 454-55, 817 N.E.2d 799, 802 (2004)).

contract was formed in relation to the 2014 review. Add.21. The emails between Doe's father and BC's President, Father Leahy, do not manifest any intent on the part of BC to be bound to any particular terms; to the contrary, Father Leahy merely indicated that Jones would review the matter, without making any representation as to how the review would be conducted, what standards or procedures would be applied, when it would occur, or what the outcome might be. A.465-66; A.630, ¶¶233-34; A.1065-66.

Second, even assuming for the sake of argument that an enforceable agreement was formed, there is no triable issue of fact with respect to any breach. The undisputed facts demonstrate that Jones conducted the further review that Father Leahy asked her to perform, using the broad discretion he afforded her. A.630-32, ¶¶235-53. Doe's brief fails to identify any act or omission by Jones that amounts to a breach of the alleged agreement. His contention that Jones should have reached a different decision does not create a triable issue of fact about whether there was a breach.

III. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR BC ON DOE'S "BASIC FAIRNESS" CLAIM.

Count IV of the complaint purports to allege a "breach of [the] common law duty of basic fairness." A.60. As the District Court correctly observed, a university's obligation to conduct student disciplinary proceedings with basic fairness is one aspect of the university's contractual undertaking; it does not give

rise to an independent claim apart from one for breach of contract; and Judge Saylor's decision in the *Brandeis* case is not to the contrary – Judge Saylor addressed basic fairness as one aspect of the breach of contract analysis, not as a separate cause of action. Add.21-22 (citing *Brandeis*, 177 F. Supp. 3d at 611-12). Moreover, for the reasons discussed above, the disciplinary proceedings were conducted with basic fairness in any event.

IV. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR BC ON DOE'S TITLE IX CLAIMS.

Title IX of Education Amendments of 1972 generally prohibits educational programs or activities that receive Federal funds from discriminating on the basis of sex. 20 U.S.C. § 1681(a). The complaint alleges that BC violated Title IX because gender bias led to an "erroneous outcome" in his conduct case (Count VI) and BC officials were "deliberately indifferent" to that alleged bias (Count VII). The District Court correctly determined that both claims fail as a matter of law.

A. Erroneous Outcome

To sustain an "erroneous outcome" claim under Title IX, the plaintiff must offer competent evidence to show that he wrongfully was found responsible for violating the university's conduct rules and that gender bias was "a motivating factor in the decision to discipline." *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994); *Mallory v. Ohio Univ.*, 76 F. App'x 634, 639 (6th Cir. 2003); *Bleiler*, 2013 WL 4714340 at *5; *Doe v. W. New England Univ.*, 2017 WL 113059, at *1;

Bleiler, 2013 WL 4714340, at *5. The District Court correctly determined that Doe failed to adduce any such evidence. Add.23-24. As the District Court observed: BC's sexual misconduct and disciplinary policies are entirely gender-neutral, Add.23[8]; there is no "pattern of decision-making" at BC that evidences a bias against male students accused of sexual misconduct, Add.23[9]; there is no evidence of any statement evidencing gender bias on the part of any decision-maker in Doe's case, or any other BC official, Add.23-24[10]; and there is no

[8] BC's policies use terms such as "victim," "survivor" and "perpetrator" in reference to sexual assault cases, all of which are gender-neutral. A.227-32. Even assuming *arguendo* that these terms evidence some inherent bias in favor of alleged victims of sexual assault (which BC denies), that is not a bias on the basis of gender. *See Sahm v. Miami Univ.*, 110 F. Supp. 3d 774, 778 (S.D. Ohio 2015).

[9] A substantial percentage of male students accused of sexual assault over a 10-year period, roughly one-third, were ***not*** found responsible in campus disciplinary proceedings. A.1300, A.626, ¶210. *See Bleiler*, 2013 WL 4714340, at *8 (fact that one-third of male students are found not responsible precludes finding of gender bias). The fact that only male students have been accused of sexual assault at BC also is not any evidence of gender bias, as it is the persons who report accusations of sexual assault – not BC – who determine the pool of accused students. *See Doe v. Cummins*, 662 F. App'x at 453; *Doe v. Miami Univ.*, 2017 WL 1154086 at *8; *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d at 608; *King v. DePauw Univ.*, No. 2:14-CV-70-WTL-DKL, 2014 WL 4197507, at *10 (S.D. Ind. Aug. 22, 2014).

[10] On this point, as elsewhere in their brief, Plaintiffs blatantly mischaracterize the District Court's decision. The District Court did not say or suggest that Doe could prove an "erroneous outcome" case only with such "smoking gun" or other "direct" evidence of discrimination. Br.45-46. The District Court considered not only that question but also whether Doe offered any indirect evidence of discrimination, and it correctly found that he did not. Add.23-24.

evidence that BC officials were influenced by any external pressure to "convict all male students" or the like, either in relation to guidance issued by the Department of Education or otherwise. A.66, ¶¶179-80.[11]

Doe's "erroneous outcome" theory fails not only because he adduced no evidence of gender bias on the part of the decision-makers or other BC officials, but also because he cannot demonstrate any connection between supposed gender bias and the outcome of his case. Doe never denied that someone indecently assaulted A.B.; his defense was not that it never happened, but that it was another male student, J.K., who was responsible. Assuming the Board was determined from the outset to find a male student responsible for assaulting A.B., that aim would have been served equally well by finding J.K. responsible, instead of Doe. Moreover, a supposed determination to "always convict" male students accused of sexual assault regardless of the evidence cannot be squared with the Board's

[11] As noted above, the Department's guidance is to the effect that investigations and disciplinary proceedings should be fair and equitable to both complainants and respondents. A.1276-79. Lacking any actual evidence to support the "outside pressure" theory, Plaintiffs resort to citing media reports and the unsubstantiated opinions of supposed experts, Br.48 (citing A.1157-58), none of which is sufficient to defeat a motion for summary judgment. *See Magarian v. Hawkins*, 321 F.3d 235, 240 (1st Cir. 2003) ("'conclusory allegations, improbable inferences, and unsupported speculation' are insufficient to defeat summary judgment … [and] this principle applies with equal force to expert opinions"); *Williams*, 11 F.3d at 282 & n.20 (affirming decision to exclude expert opinion as to a person's state of mind).

determination that the evidence did not support a finding that Doe digitally penetrated A.B. *See Doe v. Cummins*, 662 F. App'x at 454.

B. Deliberate Indifference

The "deliberate indifference" claim in Count VII fails for two reasons. First, Title IX gives rise to a claim for "deliberate indifference" only when school officials have actual knowledge that a student is at risk of or has been subjected to sexual violence or other sexual harassment and the officials fail adequately to respond, thereby causing the student to suffer or become vulnerable to such harassment. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998); *Bleiler*, 2013 WL 4714340, at *5 n.4. The "deliberate indifference" theory does not apply to students such as Doe who are accused of, rather than victims of, sexual harassment. *See Doe v. Baum*, No. 16-13174, 2017 WL 57241, at *26 (E.D. Mich. Jan. 5, 2017); *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 191 (D.R.I. Feb. 22, 2016); *Marshall v. Ohio Univ.*, No. 2:15-CV-775, 2015 WL 1179955, at *8 (S.D. Ohio Mar. 13, 2015).

Second, Doe in any event failed to adduce any evidence that BC officials had actual knowledge of gender bias against male students accused of sexual misconduct and were deliberately indifferent to it. Doe claims that Dean Chebator was aware of the Title IX Committee's April 2012 report, which noted that the training of sexual misconduct hearing boards was not sufficient to meet "best

practices," Br.52, but there is no evidence that Chebator or anyone else at BC felt the hearing boards were not fair and impartial, much less biased on the basis of gender, nor – as discussed above – is there any evidence that additional training was required to properly handle Doe's case. Nor is there merit to Doe's claim that BC officials were deliberately indifferent to the purported evidence of gender bias set forth in the September 2014 letters from Doe's parents, in which they complained about the handling of Doe's case. Br.52. It is undisputed that Father Leahy suggested that Jones conduct a further review of Doe's case, notwithstanding that Doe had no right to such a review, and that Jones found no reason to overturn the original decision. That was not "deliberate indifference" to evidence of discrimination, but instead a determination – which the District Court properly affirmed – that no such evidence exists.

V. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR BC ON PLAINTIFFS' NEGLIGENCE CLAIMS.

A. Negligence in Connection with the 2012 and 2014 Proceedings.

The District Court correctly determined that Plaintiffs' claims of negligence in connection with the 2012 disciplinary proceedings (Count VIII) and the 2014 review (Count IX) fail as a matter of law because BC did not owe Plaintiffs any duty in tort. Add.25-27.

It is well-settled in Massachusetts that the relationship between a student and university is essentially contractual in nature, with the result that cases such as this

one, in which a student alleges that he wrongfully was disciplined for violating a university's code of conduct, are evaluated as claims for breach of contract. *E.g.*, *Schaer*, 432 Mass. at 478, 735 N.E.2d at 378. As a matter of contract law, the university has a duty to substantially follow its own policies, afford the student a process that is basically fair, and reach decision that is not arbitrary and capricious. *See supra* Part II.A-C. Where, as in this context, a contract governs the performance of a duty, the plaintiffs have no cause of action in tort absent an independent duty imposed by law – *Treadwell v. John Hancock Mut. Life Ins. Co.*, 666 F. Supp. 278, 289 (D. Mass. 1987) (citing Prosser & W. Keeton, Torts § 92 (5th ed. 1985)); *see also Doe v. Amherst Coll.*, No. CV-15-30097-MGM, 2017 WL 776410, *21-22 (D. Mass. 2017) – and no such independent duty exists. Courts in Massachusetts consistently have held that universities do not owe their students any general duty of reasonable care,[12] and in particular that universities do not owe

[12] Massachusetts courts have held that universities and their administrators owe their students a duty of care only in the most limited circumstances. *See, e.g.*, *Mullins v. Pine Manor Coll.*, 389 Mass. 47, 51-53, 449 N.E.2d 331, 334-36 (1983) (recognizing a duty to use reasonable care to protect students from the foreseeable risk of assault in a residence hall, where students were required to live on-campus, the risk of harm from an intruder was foreseen, students were not in a position to take security measures on their own behalf, and the defendants undertook security measures on which students and their families reasonably could have relied). *See also Bash v. Clark Univ.*, No. 06745A, 2006 WL 4114297, at *4 (Mass. Super. Ct. Nov. 20, 2006) (recognizing the limited nature of the holding in *Mullins* and finding no duty to protect a student from the harm at issue, even though the risk of harm was foreseeable); *Erickson v. Tsutsumi*, No. CA199801842B, 2000 WL 1299515, at *2 (Mass. Super. Ct. May 17, 2000) (recognizing that the *Mullins*

their students a duty of reasonable care in the administration of student discipline. *See Doe v. Emerson Coll.*, 153 F. Supp.3d 506, 515 (D. Mass. 2015) (dismissing negligence claim against university and its administrators based on plaintiffs' dissatisfaction with a Title IX investigation, because "Massachusetts does not … impose a common-law or statutory duty on administrators to enforce university policies") (citing *Bash*, 2006 WL 4114297 at *5); *see also Driscoll*, 70 Mass. App. Ct. at 292, 873 N.E.2d at 1185 (citing *Nicholas B. v. School Comm. of Worcester*, 412 Mass. 20, 21, 587 N.E.2d 211, 212 (1992); *Coveney*, 388 Mass. at 19-20, 445 N.E.2d at 138-39)); *Sullivan v. Boston Architectural Ctr., Inc.*, No. 96-4267C, 2000 WL 35487586 (Mass. Super. Ct. April 3, 2000).

Nor does Title IX establish any duty of care that would support a claim of negligence. "A duty of care must already exist before a plaintiff can use a defendant's statutory violation to support a claim of tort liability." *Juliano v. Simpson*, 461 Mass. 527, 532, 962 N.E.2d 175, 180 (2012); *see also Brown v. Bank of Am. Corp.*, No. CIV.A.10-11085, 2011 WL 1311278, at *4 (D. Mass. Mar. 31, 2011) ("the existence of a positive regulation imposing a duty on one actor does not by itself create a similar duty as a matter of state tort common law"); *accord*

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court limited its holding to situations in which a duty of care is traditionally imposed, such as providing dormitory security).

MacKenzie v. Flagstar Bank, FSB, 738 F.3d 486, 495 (1st Cir. 2013). Moreover, Title IX creates a private right of action only for discrimination on the basis of gender, not for the alleged failure to comply with Title IX's procedural requirements or to exercise "reasonable care" in the administration of student discipline. *See Gebser*, 524 U.S. at 292 (no private right of action for violation of Title IX's administrative requirements). As a result, Title IX provides no foundation for a claim of negligence. *See Doe v. Univ. of the South*, No. 4:09-CV-62, 2011 WL 1258104, at *14 (E.D. Tenn. Mar. 31, 2011) ("If the Court were to allow a regulation used in administering a federally-created right to create a state negligence per se claim, it would effectively eviscerate the *Gebser* rule."); *Doe v. Brown Univ.*, 166 F. Supp. at 196-97; *Ross v. Univ. of Tulsa*, No. 14-CV-484-TCK-PJC, 2015 WL 4064754, at *4 (N.D. Okla. July 2, 2015). *Cf. Doe v. Bradshaw*, No. Civ. A. No. 11-11593-DPW, 2013 WL 5236110, at *10 (D. Mass. Sept. 16, 2013).[13]

[13] Moreover, to the extent Plaintiffs complain (without basis) that BC and its administrators failed to comply with the procedural guidance set forth in the April 2011 Dear Colleague Letter, Br.54, that letter is merely a "guidance document," which was not subject to notice and comment rulemaking and does not have the force and effect of law. A.1271 n.1; *see Moore v. Regents of the Univ. of California*, No. 15-CV-05779-RS, 2016 WL 2961984, at *5 (N.D. Cal. May 23, 2016) (citing letter from OCR to Senator James Lankford, dated February 17, 2016); *see also Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015); *Christensen v. Harris County*, 529 U.S. 576, 586 (2000).

Nor does Judge Saylor's decision in *Brandeis* support Plaintiffs' negligence claims, as the District Court correctly observed. Add.26. The negligence claim in that case, which Judge Saylor aptly characterized as "dubious," was one for "negligent supervision" – specifically, that the university allegedly was negligent in placing an unfit person in the position of decision-maker. 177 F. Supp. 3d. at 613-14. No such allegation is made in this case. A.69.

Also unavailing is Plaintiffs' reliance on "the general principal of tort law, [that] every actor has a duty to exercise reasonable care to avoid physical harm to others." Br.53. That duty arises where some dangerous condition that the defendant created or has an obligation to mitigate creates a foreseeable risk of physical harm. *See Commerce Ins. Co. v. Ultimate Livery Serv., Inc.*, 452 Mass. 639, 648, 897 N.E.2d 50, 58 (2008); *Remy v. MacDonald*, 440 Mass. 675, 677, 801 N.E.2d 260, 263 (2004) (citing Restatement (Second) Torts § 302 comment a (1965)). As the District Court observed, BC's administration of the 2012 disciplinary proceedings, as well as its "voluntary undertaking" in 2014 to conduct a further review of those proceedings, presented no such risk. Add.26-27. *See Fieldwork Boston, Inc. v. United States*, 344 F. Supp. 2d 257, 264 (D. Mass. 2004) (rejecting "voluntarily assumption" theory where no physical injury was at issue); *accord Kirtz v. Wells Fargo Bank N.A.*, No. Civ. A. 12-10690-DJC, 2012 WL 5989705, at *4 (D. Mass. Nov. 29, 2012); *see also Faiaz v. Colgate Univ.*, 64 F.

Supp. 3d 336, 362 (N.D.N.Y. 2014) (university's voluntary undertaking to conduct disciplinary proceedings did not create a duty of care where student was not physically injured).

Simply put, university students and their parents who are unhappy with the outcome of disciplinary proceedings have no cognizable claim that a university or its administrators should be held liable because they "negligently" failed to conduct the proceedings with "reasonable care." Allowing such claims to proceed would nullify well-settled Massachusetts law, which is that courts should defer to a university's handling of student conduct issues provided the university substantially follows its own procedures, affords the accused student a process that is fundamentally fair, reaches a decision that is not arbitrary and capricious.

B. Negligent Infliction of Emotional Distress

The District Court correctly determined that absent an underlying duty of care, the claims for negligent infliction of emotional distress (Counts X and XI) failed as well. Add.27 (citing *Conley v. Romeri*, 60 Mass. App. Ct. 799, 801, 806 N.E.2d 933, 936 (2004)).

CONCLUSION

This Court should affirm the District Court's Order granting summary judgment for the Defendants and denying summary judgment for the Plaintiffs.

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CERTIFICATE OF COMPLIANCE

This brief, submitted in accordance with Fed. R. App. P. 32(a)(7)(B), complies with the type-volume limitation and contains 12,945 words, exclusive of the exempted portions. It has been prepared in proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font.

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I certify that on May 15, 2017, this brief was filed electronically with the Court via ECF and that the following opposing counsel will receive a copy through electronic notification of that filing:

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