UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

BENJAMIN KING,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.: 2:14-cv-0070-WTL-DKL
	)	
DEPAUW UNIVERSITY,	)	
	)	
Defendant.	)	

DEPAUW'S RESPONSE IN OPPOSITION TO PLAINTIFF'S SECOND VERIFIED MOTION FOR PRELIMINARY INJUNCTION

Defendant, DePauw University ("DePauw") submits that Plaintiff's Second Verified Motion for Preliminary Injunction (the "Motion") should be denied for the reasons set forth below. DePauw accorded Benjamin King full process consistent with its Sexual Misconduct Policy ("Policy") and found him to have violated that Policy and sanctioned him appropriately for his conduct. Plaintiff has not demonstrated any irreparable injury and preliminary injunctive relief is not warranted.

INTRODUCTION

This is Plaintiff's second attempt to avoid a two-semester suspension resulting from a finding after hearing that he was responsible for a violation of DePauw's Policy.[1] Plaintiff was found responsible for non-consensual sexual contact and sexual harassment from an encounter with a female DePauw student, J.B., in December, 2013. The hearing panel expelled him, subject to his right to appeal. The Vice President for Student Services, who decides appeals,

[1] Plaintiff's Brief in Support of his Second Motion suggests that DePauw and Plaintiff entered into a preliminary injunction order previously. That is not DePauw's view. Plaintiff and DePauw agreed to terms that allowed him to finish his classes last spring, and the Magistrate Judge approved those terms. [Dkt. 34.]

reduced the sanction of expulsion to a two-semester suspension. Plaintiff asks the Court to put him back in school this fall as if nothing happened.

Plaintiff's Complaint generally alleges via his claims under Title IX of the Education Amendments Act of 1972, 20 U.S.C. §1681-88 ("Title IX") and his claim for breach of contract that he was falsely accused of sexual misconduct and found responsible by a process that was biased against him. Plaintiff has not come close to demonstrating a likelihood of success on the merits. DePauw investigated the charge of sexual misconduct made by J.B. once it knew J.B. wanted to pursue the claim, determined that a hearing was warranted, recommended qualified advisors to assist each party, held a hearing conducted by three individuals who have received training by outside consultants, resolved conflicting testimony, issued a decision, processed an appeal, and issued a modified decision after appeal.

Plaintiff contends that the admitted sexual contact was consensual, and disputes the hearing panel's conclusion that J.B. was too intoxicated to effectively consent. Plaintiff complains about delay, about how DePauw conducted its investigation, and about the way in which the disciplinary hearing was conducted. These allegations, which DePauw disputes, do not set forth facts showing that he is likely to succeed on the merits. Under Title IX, the question is whether DePauw's processing of the sexual misconduct charges discriminated against Plaintiff on the basis of his gender. There is no showing that DePauw's Policy, the investigation, the hearing, or the sanction were tainted by gender bias. The state law allegations similarly will not support preliminary injunctive relief, because Plaintiff cannot meet his burden to prove that DePauw acted arbitrarily or in bad faith.

Further, Plaintiff has not demonstrated any irreparable harm. The harm he poses is little more than speculation and can be mitigated should he choose to do so. Plaintiff's ability to

continue his education during the period of suspension is entirely in his control and he has an adequate remedy at law for any financial harm resulting from a wrongful suspension. In contrast, DePauw has obligations under Title IX to all students. The harm to DePauw from an erroneous injunction is to require it to permit someone who has been found responsible for sexual misconduct to be on its campus as if nothing happened – divesting DePauw of its authority to make determinations concerning the acceptable behavior of its student body and impacting DePauw's ability to comply with its Title IX obligations.

FACTUAL BACKGROUND

DePauw received a complaint from J.B. on December 8, 2013, alleging sexual misconduct by Plaintiff late in the evening of December 6 and the early morning of December 7, 2013. DePauw's records reflect that at that time J.B. was not sure whether she wanted DePauw to investigate or proceed with a charge of sexual misconduct. This is not unusual for these types of matters. (Babington Aff. ¶7, Ex. A-2.) DePauw's Title IX Coordinator and Dean of Campus Life, Dorian Shager, interviewed Plaintiff on December 18, 2013, to obtain his side of the story, and later filed a statement regarding what Plaintiff had said to him that day with the panel hearing the charge. (Babington Aff. ¶9, Ex. A-3.) Before Mr. Shager filed the statement he showed it to Plaintiff. (*Id.*)

DePauw recessed for the Christmas holiday from December 20, 2013 through January 6, 2014. From January 6, 2014 through January 22, 2014, DePauw conducted its Extended Studies (formerly Winter Term) session, which allows students an opportunity to pursue a concentrated area of study on or off campus. Approximately 70% of DePauw's students pursue a project off campus during the Extended Studies session. (Babington Aff. ¶10.)

On January 22, 2014, DePauw received notice from J.B. that she wanted to pursue a charge of sexual misconduct. At DePauw this means that a formal report is filed with the Office of Public Safety. Charlene P. Shrewsbury, a captain with DePauw's Public Safety Department, interviewed J.B. at that time. (Babington Aff. ¶11; Shrewsbury Aff. ¶5; Ex. B-2.) Captain Shrewsbury is a sworn police officer in the State of Indiana. (Shrewsbury Aff. ¶2.) That same day, per DePauw policy, Captain Shrewsbury issued "no contact" instructions to Plaintiff and to J.B. instructing that they were to avoid all contact with each other. (Shrewsbury Aff. ¶5.)

The Investigation.

DePauw then initiated its formal investigation of J.B.'s allegations. As a part of that investigation, Captain Shrewsbury asked Plaintiff to come in for an interview to discuss what had happened. (Shrewsbury Aff. ¶6.) It is standard protocol for police officers such as Captain Shrewsbury to issue a *Miranda* warning to any student being investigated for conduct which could result in criminal charges and to videotape any statement given by that student. (Shrewsbury Aff. ¶6.) DePauw has an agreement with the Putnam County Prosecutor that it will forward for review the results of its investigations of sexual misconduct. (Babington Aff. ¶12; Shrewsbury Aff. ¶6.) Plaintiff declined to be interviewed by Captain Shrewsbury and did not otherwise provide any information or potential witnesses to DePauw in connection with its investigation. (Shrewsbury Aff. ¶6; Babington Aff. ¶12.) In addition to J.B. and her attempted interview of Plaintiff, Captain Shrewsbury interviewed seven DePauw students who were determined to be likely to have information relevant to the events of December 6 and 7. (Shrewsbury Aff. ¶7, Exs. B-1 & B-2.) DePauw notified Plaintiff by letter dated February 12, 2014 that it was charging him with nonconsensual sexual contact and sexual harassment. (Babington Aff. ¶13, Ex. A-4.)

The Hearing.

DePauw has separate protocol for hearing allegations of sexual misconduct. Complaints are heard by a panel of 3 members of a 7 member Sexual Misconduct Hearing Board (the "Board"). The members of the Board have received training by outside consultants to assist them in their roles. (Babington Aff. ¶14; Ex. A-1 at 38.) DePauw offers the names of advisors to students participating in sexual misconduct hearings. Students can either use an advisor identified by DePauw or use an advisor of their own choosing. Sarah Ryan was J.B.'s advisor and William Tobin was Plaintiff's advisor. Plaintiff was offered the opportunity to use J.C. Lopez as his advisor. Mr. Lopez is a member of the Board who was not sitting on the panel in this case. Plaintiff declined to use him. (Babington Aff. ¶15; Ex. A-1 at 38-39.)

Once a hearing is scheduled, it can be delayed if either party petitions the chair of the panel and makes a "strong showing of substantial need of such a continuance in order to maintain the fairness and integrity of the process" or if the chair of the panel determines that a situation exists that requires a continuance. If the panel finds the accused student to be responsible, it imposes a sanction which may include expulsion. (Ex. A-1 at 39.) The complainant is allowed to submit an impact statement. If the panel determines a finding of responsibility, it will review the impact statement and take it into consideration of the sanction. (Ex. A-1 at 39.)

The hearing was held before the three member panel on February 24, 2014. Five witnesses, in addition to J.B. and the Plaintiff, appeared before the panel to testify and a sexual assault nurse examination of J.B., reports prepared by Captain Shrewsbury and Mr. Shager, along with written statements prepared by each witness were also provided to the panel. (Babington Aff. ¶16, Ex. A-5.) The panel found Plaintiff responsible for violating DePauw's

Sexual Misconduct Policy by non-consensual sexual contact and sexual harassment. The panel determined that Plaintiff should be expelled for his conduct. (Exs. A-5, B-1 and B-2.)

Because Plaintiff had admitted in his statement to Mr. Shager that sexual activity had occurred between Plaintiff and J.B., the panel focused on the determination of whether J.B. "had given or was in a state to give consent [to sexual activity] and whether Plaintiff should have known if she was in a state to not give consent." (Exs. A-3 & A-6.) The panel determined that J.B. was extremely intoxicated and based on her behaviors, as described by witnesses, "it should have been apparent to Plaintiff that [J.B.] was extremely intoxicated, to the point that she could not give consent to any sexual activity." (Ex. A-6.)

The Appeal.

Either student may file an appeal of any finding of fact, conclusion of responsibility, or sanction imposed by the panel with the Vice President for Student Life and Dean of Students. (Ex. A-1 at 39.) An appeal may be based on new evidence, procedural error, or appropriateness of the sanction. (Ex. A-1 at 40.) The Dean of Students may 1) affirm the action taken by the panel; 2) reverse the panel's findings of facts and/or responsibility and refer the case back to the Board for another hearing; 3) reverse the panel's determination of facts and/or responsibility and vacate any sanction; or 4) impose different sanctions. *Id.*

Plaintiff's current counsel appealed the panel's determination to Cindy Babington, Vice President for Student Services.[2] Plaintiff asked for and received a one-week extension to file his appeal, and then asked for a second week's extension which Dean Babington denied. (Babington Aff. ¶16, Exs. A-7 & A-9.) Plaintiff's appeal attacked DePauw's entire process by arguing that:

[2] Vice President Babington was promoted to the position of Vice President for Development and Financial Aid on July 1, 2014. She served as Dean of Students for 15 years.

a. DePauw's investigation was not prompt and the delay prejudiced his rights (Ex. A-8 at p.1; Ex. A-7 at pp.3-4);

b. DePauw's investigation was not sufficiently thorough (Ex. A-8 at p.2; Ex. A-7 at pp.5-10);

c. the panel's hearing was not sufficiently thorough and the panel improperly resolved inconsistent testimony (Ex. A-8 at p.3; Ex. A-7 at pp.5-18);

d. the investigation and hearing process lacked impartiality (Ex. A-8 at p. 3; Ex. A-7 at pp.10-19);

e. Plaintiff was prejudiced by the denial of an opportunity to submit an impact statement to the panel (Ex. A-8 at p.4; Ex. A-7 at p.2); and

f. The sanction of expulsion was excessive. (Ex. A-8 at p.4; Ex. A-7 at pp.20-23)

On March 13, 2014, Dean Babington issued her decision. (Babington Aff. ¶17, Ex. A-8.) Dean Babington affirmed the panel's finding of responsibility, but reduced the sanction from expulsion to suspension for the Spring and Fall 2014 semesters, because she did not think the evidence showed that Plaintiff's conduct was predatory in the sense that he had targeted J.B. (Babington Aff. ¶17, Ex. A-8.) In her decision, Dean Babington addressed each of Plaintiff's arguments. She explained that because the events took place just prior to Christmas break, which is followed by the Extended Studies session, and J.B.'s uncertainty, some delay was unavoidable. Dean Babington further explained that any prejudice occasioned by any delay applied equally to Plaintiff and J.B. (*Id.* at pp.1-2.) Dean Babington further explained that although more witnesses could have been interviewed during the investigation, it was unclear that more interviews would have altered the panel's decision. Dean Babington also noted that Plaintiff's own refusal to participate in the investigation by identifying potential witnesses was a limiting factor on the number of people interviewed. (*Id.* at p.2.)

Dean Babington reviewed the audio of the hearing and decided that the hearing was sufficiently thorough, and that it was within the panel's purview to resolve inconsistent

testimony. (*Id.* at p.3.) She further concluded that there was sufficient evidence to support the panel's finding of responsibility, and that Plaintiff's bias allegations were unfounded. With respect to Plaintiff's complaint about the expertise of his advisor, Dean Babington noted that despite the suggestion from Student Services that he choose a trained member of the Board who was not empaneled for his hearing, Plaintiff chose another DePauw staff member who was not a member of the Board. (*Id.* at p.3.)

In response to Plaintiff's complaint that he was not permitted to submit an impact statement, Dean Babington noted that there was a typographical error in a set of hearing instructions Plaintiff was given, and that a typographical error in one document did not negate statements in all other documents describing the process, including the Student Handbook, all providing for an impact statement by the complainant, not the respondent. Dean Babington further noted that Plaintiff was not denied the opportunity to describe the impact to the panel, as he had the opportunity to do so at the hearing. (*Id.* at p.4.)

Dean Babington disagreed with the hearing panel's sanction, however. She decided that the panel's determination that Plaintiff should be expelled from DePauw was based, at least in part, on the finding that Plaintiff's conduct with respect to J.B. had been predatory. Dean Babington reviewed evidence related to this assertion and found that there was insufficient evidence to support the finding that Plaintiff's conduct was predatory, and that the sanction of expulsion was unduly severe and reduced the sanction to a two-semester suspension. (*Id.* at p.4.)

ARGUMENT

Plaintiff essentially asks this Court to regulate DePauw's internal affairs—an action which DePauw submits, under the circumstances presented here, would be an unwarranted imposition into the academic freedom to be accorded it in disciplinary matters. Academic

freedom "is not just the freedom of teachers, school authorities [and students] to express ideas and opinions. It includes the authority of the university to manage an academic community . . . free from interference by . . . the courts." *Brandt v. Bd. of Educ.*, 480 F.3d 460, 467 (7th Cir. 2007). As Judge Posner observed in a Title IX case, "one component of academic freedom is the right of schools to a degree of autonomy in the management of their internal affairs." *Doe v. St. Francis School District*, 649 F.3d 869, 873 (7th Cir. 2012).

I. Preliminary Injunction Standard

"[A] preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 389 (7th Cir. 1984); *see also Silver Streak Indus., LLC v. Squire Boone Caverns, Inc.*, No. 4:13-cv-00173, RLY-DML, 2014 U.S. Dist. LEXIS 7015, at *6 (S.D. Ind. Jan. 21, 2014) (Young, J.). To obtain preliminary injunctive relief, the moving party must demonstrate that he or she has a reasonable likelihood of success on the merits, lacks an adequate remedy at law, and will suffer irreparable harm if immediate relief is not granted. *Silver Streak Indus.*, at *6. "Under the threshold phase for preliminary injunctive relief, a plaintiff must establish — and has the ultimate burden of proving by a preponderance of the evidence," these elements. *Id.; see also Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S.A., Inc.*, 549 F.3d 1079, 1085-86 (7th Cir. 2008).

> **If the court determines that the moving party has failed to demonstrate any one of these threshold requirements, it must deny the injunction.** If, on the other hand, the court determines the moving party has satisfied the threshold phase, the court then proceeds to the balancing phase of the analysis. The balancing phase requires the court to balance the harm to the moving party if the injunction is denied against the harm to the nonmoving party if the injunction is granted.

Silver Streak Indus. at *6-*7 (emphasis added).

If the Court reaches the balancing phase, it should take into account all four of these factors and then exercise its discretion to arrive at a decision "based on a subjective evaluation of the import of the various factors and a personal, intuitive sense about the nature of the case." *Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1436 (7th Cir. 1986); The Court should employ a "sliding scale" approach, balancing the degree of likelihood of success on the merits against the irreparable harm that will occur if immediate relief is not granted. *See Vencor, Inc. v. Webb*, 33 F.3d 840, 845 (7th Cir. 1994). Accordingly, "the more likely the moving party will succeed on the merits, the less the element of irreparable harm must weigh in its favor. Similarly, the less likely that the party seeking the preliminary relief will have success on the merits, the greater the element of irreparable harm required to weigh the balance in its favor." *Vencor, Inc.*, 33 F.3d at 845; *See also Silver Streak Indus.* at *7.

II. Plaintiff Fails to Demonstrate a Likelihood That He Will Prevail on His Title IX Claim With His Erroneous Outcome Theory.

Title IX guarantees that "[n]o person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX "bars the imposition of university discipline where gender is a motivating factor in the decision to discipline." *Yusuf v. Vassar College*, 35 F.3d 709, 714 (2d. Cir. 1994). Plaintiff asserts two theories for recovery under Title IX: 1) the panel reached an erroneous outcome; and 2) DePauw was deliberately indifferent to gender-based discrimination.

An erroneous outcome claim requires Plaintiff to demonstrate that DePauw's actions "are motivated by sexual bias" or that "the disciplinary process constitutes a pattern of decision-making whereby [DePauw's] disciplinary procedures governing sexual assault claims is discriminatorily applied or motivated by a chauvinistic view of the sexes." *Bleiler v. College of*

the Holy Cross, Civil Action No. 11-11541-DJC, 2013 U.S. Dist. LEXIS 127775, at *17 (D. Mass. Aug. 26, 2013) (citing *Doe*, 687 F. Supp. 2d at 756; *Mallory v. Ohio Univ.*, 76 Fed. Appx. 634, 640 (6th Cir. 2003)); *Yusuf*, 35 F.3d at 715. Stated differently, an erroneous outcome claim requires particular facts that show "some articulable doubt on the accuracy of the disciplinary proceeding" and "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." *Yusuf*, 35 F.3d at 715.

Plaintiff's claim has a "fatal gap" due to "the lack of a particularized allegation relating to a causal connection between the [allegedly] flawed outcome and gender bias." *Id.* Plaintiff has not set forth evidence of gender bias that caused an erroneous outcome, such as "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." *Id.*; *see Murray v. N.Y. Univ. College of Dentistry*, 57 F.3d 243, 251 (2d Cir. 1995); *Bleiler*, 2013 U.S. Dist. LEXIS 127775, at *15*; see also Mallory*, 76 Fed. Appx. at 639-40 (upholding summary judgment in favor of university on student's Title IX claim where there was no evidence that discipline result was linked to discrimination based on the student's sex).

Plaintiff complains about 1) delay in the investigation; 2) treatment of Plaintiff during the investigation; 3) quality of the investigation; 4) the timing of the hearing; 5) the relationships between staff persons involved; 6) the panel's determination; 7) his advisor; and 8) not being allowed to submit an impact statement to the panel. Each of these complaints is discussed below.

A. The Investigation Was Prompt, Thorough and Neutral.

1. Plaintiff's Allegations of Delay Do Not Demonstrate Gender Bias.

Any delay in the investigation is not attributable to gender bias. DePauw's Policy is gender-neutral and gives a complainant some control over the situation. This is an appropriate

policy dictated by considerations of privacy for students complaining of sexual assault. *See* The White House Task Force to Protect Students from Sexual Assault, *Not Alone*, April 2014 pp. 11-12 (that some sexual assault victims are not immediately sure they want to make a formal complaint and that the victim's decision should be honored); Department of Education Violence Against Women Act, 79 Fed. Reg. 35418, 35429 (proposed June 20, 2014) (to be codified at 34 C.F.R. pt. 668.46(b)(4)(iii).

The incident reported by J.B. occurred shortly before DePauw's Christmas break and DePauw's Extended Studies Session Term, during which 70% of its students were away from campus. (Babington Aff. ¶10.) Neither of these circumstances is related to Plaintiff's or J.B's gender and neither of these circumstances prejudiced the proceedings. As evidenced by the interview summaries, witness statements, and the hearing transcript, students who gave testimony about the incident or the surrounding circumstances had adequate memory of the night's events to assist the hearing board in the necessary factual determinations. (Exs. A-5, B-1 & B-2.) Ultimately, any delay affected Plaintiff and J.B. equally, barring any inference of gender bias as a result of the delay.

2. DePauw's Treatment of Plaintiff During its Investigation Does Not Evidence Gender Bias.

Captain Charlene Shrewsbury conducted the investigation of the claims against Plaintiff. She asked both Plaintiff and J.B. to give a statement and gave them each the opportunity to identify potential witnesses. (Shrewsbury Aff. ¶¶6-7.) Plaintiff complains that he was treated like a criminal. DePauw has an agreement with the Putnam County Prosecutor that it will forward for review the results of its investigations of sexual misconduct. (Shrewsbury Aff. ¶6.) Thus, DePauw officers always issue a *Miranda* warning to individuals who are the subject of an

investigation for potentially illegal activity and Captain Shrewsbury followed this protocol in beginning her interview of Plaintiff. (Shrewsbury Aff. ¶6.) This does not indicate a gender bias.

3. DePauw's Investigation Was Thorough.

Plaintiff has argued that DePauw's investigation should have been broader—including interviews of as many as thirty students who were present at the party in the basement of the Delt house. (Ex. A-7, p. 5.) However, this scattershot approach to an investigation of a student complaint would not be an efficient use of limited resources and would be particularly inappropriate in this instance, where privacy concerns of both Plaintiff and J.B. are heightened. *See, e.g., Gorman v. Univ. of R.I.*, 837 F.2d 7, 14-15 (1st Cir. 1988) (requiring the interest in fairness of judicial procedures be balanced against the proper allocation of limited resources in an academic environment). This argument is not well taken where Plaintiff himself declined to participate in the investigation in any meaningful way. (Shrewsbury Aff. ¶¶6-7.) Plaintiff terminated the interview and did not identify any witnesses that could or should be interviewed by Captain Shrewsbury.[3] (Shrewsbury Aff. ¶7.) Again, this conduct does not indicate gender bias.

B. DePauw's Panel Members Are Entitled to a Presumption of Integrity and There Is No Particularized Evidence of Gender Bias to Overcome that Presumption.

Plaintiff's assertions that the panel was motivated by gender bias are not supported. Panel 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." *Ikpeazu v. Univ. of Ne.*, 775 F.2d 250, 254 (8th Cir. 1985) (citing *Hortonville Joint School Dist. No. 1 v. Hortonville Education Assn.*, 426 U.S. 482, 497 (1976)); s*ee also Gorman*,

[3] It was not until after Captain Shrewsbury completed her investigation that Plaintiff identified a witness to the panel. (Shrewsbury Aff. ¶7.) This witness was permitted to testify at the hearing. (Ex. A-5.)

837 F.2d at 15 ("alleged prejudice of university hearing bodies must be based on more than mere speculation and tenuous inferences"). Thus, without specific evidence of gender bias, Plaintiff does not show a reasonable likelihood of success sufficient to support a preliminary injunction.

1. Relationships Between DePauw Student Life Staff Do Not Evidence Gender Bias.

Plaintiff's complaint that the hearing panel members work with and have personal relationships with other student life employees who participated in the investigation and hearing process does not indicate gender bias. "In a university setting, prior contact among the faculty and students is likely" and does not indicate bias or partiality. *Holert v. Univ. of Chi.*, 751 F. Supp. 1294, 1301 (N.D. Ill. 1990). Without specific evidence that the panel members were motivated by bias, it is immaterial that they had prior contact and relationships outside of the hearing process.

2. The Panel Appropriately Weighed Conflicting Testimony and Made Credibility Determinations.

The allegations against Plaintiff raised the issue of whether J.B. consented to the sexual activity. (Ex. A-6.) The panel found that J.B. could not have consented, given her level of intoxication, and that Plaintiff should have known she could not consent. (*Id.*) Plaintiff argues that the hearing panel did not credit his version of the events, but the fact that the hearing panel ultimately found some witnesses' testimony to be more credible than others does not meet the burden to demonstrate that the entire outcome was flawed. That is simply evidence that the hearing panel did its job, especially where, as here, Plaintiff's own testimony and statements varied throughout the investigation and hearing process. The panel did not exclude any testimony Plaintiff wished to introduce at the hearing. (Exs. A-5 & A-6.) Plaintiff, like J.B., was permitted to ask questions during the hearing to elicit additional testimony for the panel's

consideration. (*Id.*) There was no gender bias where both Plaintiff and J.B. were subject to the same hearing procedures.

3. Plaintiff Was Subject to the Same Procedure as J.B. During the Hearing.

Plaintiff, like J.B., was provided with an advisor of his own selection during the hearing. (Babington Aff. ¶15.) Plaintiff rejected DePauw's suggestion that he work with a trained member of the Sexual Misconduct Board who was not empaneled in Plaintiff's case. (*Id.*) Neither Plaintiff nor J.B. was permitted to have an attorney present in the hearing room. (Babington Aff. ¶15, Ex. A-1.) This procedure is a valid attempt to avoid "undue judicialization" of the administrative hearing to an extent that would detract from DePauw's primary educational mission. *Gorman*, 837 F.2d at 14-15. Moreover, this procedure is not gender-biased, as it applied to all students participating in sexual misconduct hearings regardless of gender. (Ex. A-1 at 38-39.)

3. DePauw's Policy Does Not Permit Plaintiff to Submit an Impact Statement and He Was Not Prejudiced by This Policy.

Plaintiff's argument that he was denied an opportunity to present an impact statement to the panel is based on an admitted typo and does not evidence gender bias. The provision that only the complainant is entitled to submit an impact statement after a finding of responsibility is firmly grounded in the goal of following Title IX's directive that a student not be deprived access to his or her education due to sexual harassment by another student. Office for Civil Rights, *Dear Colleague Letter*, Apr. 4, 2011 p.4; Office of Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, Apr. 29, 2014 p. 1-3 (requiring a hostile environment analysis to be analyzed from the victim's position). The impact statement is not a vehicle for additional testimony relevant to a finding of responsibility, but rather informs the panel members as to an appropriate sanction that, upon a finding of responsibility, will restore the complainant's sense of

safety on campus. (Ex. A-1.) Title IX does not require similar considerations be made for a student found responsible for sexual misconduct. *See* Office of Civil Rights, *Questions and Answers*, at 1-3. In any event, any effect of this alleged failure was resolved by the reduced sanction on appeal and could have been mitigated by Plaintiff through his oral testimony at the hearing or in his Appeal. This minor inconsistency cannot be linked to any evidence of gender bias operating against Plaintiff.

III. Plaintiff Fails To Demonstrate A Likelihood That He Will Prevail On His Title IX Deliberate Indifference Theory.

The deliberate indifference standard traditionally applies to claims of sexual harassment and requires the plaintiff to "produce evidence that [the defendant] was deliberately indifferent to sexual harassment that was so severe or pervasive that it altered the conditions of [plaintiff's] education." *Hendrichsen v. Ball State Univ.*, 107 Fed. Appx. 680, 684 (7th Cir. 2004) (citing *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220, 1226 n.7 (7th Cir. 1998)). To prevail on a deliberate indifference claim, Plaintiff must prove "that an official of the institution who had authority to institute corrective measures had actual notice of, and was deliberately indifferent to, the misconduct." *Doe v. Univ. of the South*, 687 F. Supp. 2d 744, 757 (E.D. Tenn. 2009). "Deliberate indifference is more than negligence and approaches intentional wrongdoing." *Milligan v. Bd. of Trustees of Southern Ill. Univ.*, 686 F.3d 378, 388 (7th Cir. 2012) (noting that "deliberate indifference is a more exacting standard than the negligence standard governing employer liability under Title VII").

Claims under the deliberate indifference standard in the Seventh Circuit generally have been limited to an analysis of liability for permitting a hostile environment due to sexual harassment to continue. *See, e.g., Milligan*, 686 F.3d at 387-88 (upholding summary judgment in favor of university because school's response to report of sexual harassment was reasonable);

Hendrichsen, 107 Fed. Appx. at 684 (school was not deliberately indifferent to sexual harassment where it promptly responded to the harassment). Plaintiff's claim does not fit within this framework. Indeed, deliberate indifference is the claim that DePauw could be exposed to from complainants that it failed to investigate charges of sexual misconduct and sexual harassment. *See, e.g., Ha v. Northwestern Univ.*, No. 1:14-cv-00895 (N.D. Ill. filed Feb. 21, 2014) (alleging violation of Title IX for failure to adequately respond to sexual harassment and assault by a professor); *Luby v. Univ. of Conn.*, No. 3:13-cv-01605-MPS (D. Conn. filed Feb. 10, 2014) (five separate plaintiffs alleging Title IX violations including being discouraged from reporting rape, hostile environment due to a professor's publication of victim identities, and deliberate indifference)

In this case, even if this Court agrees that a deliberate indifference claim can be based on an allegedly defective investigation or hearing, Plaintiff is unlikely to prevail because as demonstrated above, the investigation and hearing process were not motivated by gender bias. DePauw's record of the outcomes of its sexual misconduct investigations and hearings in recent years reflects an even-handed approach to these matters. (Babington Aff. ¶19.) Dean Babington clearly did not ignore the investigation or the hearing process when reviewing Plaintiff's appeal.[4] Dean Babington re-examined the evidence heard by the panel in detail and confirmed that the panel's finding of responsibility was supported by the evidence. (Ex. A-8 at 2-4.)

There is no evidence that Dean Babington herself was motivated by gender bias in reaching her decision. Her written determination as to the appeal reflects careful and logical consideration of each issue raised by Plaintiff in his appeal. (Ex. A-8.) Her decision to reduce Plaintiff's sanction evidences the fact that she gave independent consideration to the panel's

[4] Plaintiff argues that DePauw's President, Dr. Brian Casey, also exhibited indifference. However, Plaintiff presents no evidence or argument indicating that Dr. Casey would have had any reason to doubt the investigation, hearing procedure, or outcome in this matter. (Dkt. 34 at p. 10.)

determination and did not merely rubber-stamp it. (Ex. A-8 at pp. 4-5.) Because a deliberate indifference claim requires proof of more than negligence—proof of something approaching intentional wrongdoing—DePauw was not deliberately indifferent where the Dean of Students re-examined the evidence in good faith without being motivated by gender bias. *See Milligan*, 686 F.3d at 388. Thus, neither of Plaintiff's theories for liability under Title IX is likely to succeed and neither should support the issuance of a preliminary injunction.

IV. Plaintiff Is Unlikely to Demonstrate That DePauw Breached Any Contract With Him.

"[T]he basic legal relation between a student and a private university or college is contractual in nature." *Park v. Ind. Univ. Sch. of Dentistry*, 781 F. Supp. 2d 783, 786 (S.D. Ind. 2011). "The terms of the contract, however, are rarely delineated, nor do the courts apply contract law rigidly." *Amaya v. Brater*, 981 N.E.2d 1235, 2013 Ind. App. LEXIS 39, at *11 (Ind. Ct. App. 2013) Indiana courts take a liberal approach to the scope of contractual promises between students and universities and "exercise the utmost restraint in applying traditional legal rules to disputes within the academic community." *Id.* at *12. *See also Holert*, 751 F. Supp. at 1301 (explaining that courts adopt a deferential standard in evaluating university disciplinary decisions because of a "reluctance to interfere with the academic affairs and regulation of student conduct in a private university.")

> In order to state a claim for breach of contract in the student-university context, [Plaintiff] must point to an identifiable contractual promise that the defendant[ ] failed to honor. The essence of such a claim is not that the institution failed to perform adequately a promised educational service, but rather that it failed to perform that service *at all*. **Thus, ruling on a breach of educational contract requires an objective assessment of whether the institution made a good faith effort to perform on its promise.**

Park at 786. (italicized emphasis original, bold emphasis supplied).

Before a court applying Indiana law should "intervene into the implied contractual

relationship between student and university, there must be some evidence that the university **acted arbitrarily** or **in bad faith.**" *Amaya*, 2013 Ind. App. LEXIS 39, at *15 (emphasis supplied); *see also Holert v. Univ. of Chicago*, 751 F. Supp. 1294, 1301 (N.D. Ill. 1990) (applying Illinois law, which is substantively similar to Indiana's law in this area, to determine that a university did not breach its contract with a student where it "conducted its proceedings in substantial compliance with university standards.") (emphasis added). DePauw's Policy sets forth a detailed, gender-neutral procedure for resolving sexual misconduct complaints, and DePauw substantially followed those provisions. (Ex. A-1 at 40). Thus, because DePauw complied with its Policy, Plaintiff is not entitled to relitigate the matter. *See, e.g.*, *Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 433 (Pa. Super. 2007) (applying Pennsylvania's substantively similar contract law to a breach of contract claim by a professor challenging denial of tenure on the basis of sexual harassment claims).

A "private university may prescribe the moral, ethical and academic standards that its students must observe; it is not the court's function to decide whether student misbehavior should be punished or to select the appropriate punishment for transgressions of an educational institution's ethical or academic standards." *Holert*, 751 F. Supp. at 1301. "University disciplinary determinations in most cases are premised upon the subjective professional judgment of trained educators, and therefore ***our courts have quite properly exercised the utmost restraint*** in applying traditional legal rules to disputes within the academic community." *Chang v. Purdue Univ.*, 985 N.E.2d 35, 46 (Ind. Ct. App. 2013) (emphasis added).

To prevail on a claim for breach of contract in the student-college context, Plaintiff must "point to an identifiable contractual promise that [DePauw] failed to honor," for example, "if [DePauw] took tuition money and then provided no education, or alternately, promised a set

number of hours of instruction and then failed to deliver." *Ross v. Creighton Univ.*, 957 F.2d 410, 416-17 (7th Cir. 1992). Consequently, the "essence" of a breach of contract claim in this context is that "the institution failed to perform [a promised educational] service at all." *Id.* As set forth in the foregoing discussion regarding Plaintiff's Title IX claim, Plaintiff has not shown a likelihood of prevailing on his breach of contract theory.

V. Plaintiff Is Unlikely to Prevail on His Claims for Negligence, Intentional Infliction of Emotional Distress, Promissory Estoppel, or Defamation.

Plaintiff fails to make any argument that he will prevail on his claims for negligence, intentional infliction of emotional distress, promissory estoppel, or defamation. DePauw conducted an investigation, a hearing was held by persons trained to hold hearings, a sanction was imposed upon a finding of responsibility, and after formal appeal, a modified sanction was imposed. This is all the law requires on Plaintiff's remaining state law claims. *See Greg Allen Constr. Co. v. Estelle*, 798 N.E.2d 171, 175 (Ind. 2003) (negligence); *Creel v. I.C.E. & Assocs.*, 771 N.E.2d 1276, 1282 (Ind. Ct. App. 2002) (quoting Restatement (Second) of Torts § 46 cmt. d (1965)). (intentional infliction of emotional distress); *Ind. BMV v. Ash, Inc.*, 895 N.E.2d 359, 367 (Ind. Ct. App. 2008) (promissory estoppel); *see also Decatur Ventures, LLC v. Stapleton Ventures, Inc.*, 373 F. Supp. 2d 829, 848-49 (S.D. Ind. 2005) (Tinder, J.); *Trail v. Boys & Girls Clubs of N.W. Ind.*, 845 N.E.2d 130, 136-37 (Ind. Ct. App. 2006) (defamation).

VI. Plaintiff Has an Adequate Remedy at Law and Will Not Suffer Irreparable Harm Upon the Denial of His Motion.

Even if the Court remains unconvinced about the propriety of DePauw's process, Plaintiff fails to show irreparable harm and absence of a remedy at law. Plaintiff alleges that he will be irreparably injured and that he has no adequate remedy at law, but he fails to provide any supporting facts for these allegations. He complains about possible delay in the completion of

his college career and the loss of prestige of graduating from DePauw. The delay of King's return to classes does not constitute irreparable injury under the circumstances existing here.

Harm is "irreparable" when it is more than substantial and "it cannot be prevented or fully rectified by the final judgment after trial." *Grund v. Buss*, 2010 U.S. Dist. LEXIS 28846 at *8 (S.D. Ind. Mar. 24, 2010) (quotation omitted). The threatened harm must be, in some way, "peculiar." *Ball Memorial Hospital, Inc. v. Mut. Hospital Ins., Inc.*, 603 F.Supp. 1077, 1086 (S.D. Ind. Mar. 1, 1985). Irreparable injury "cannot be repaired, retrieved, put down again, atoned for and is not compensable in monetary terms." *Grund*, 2010 U.S. Dist. LEXIS 28846 at *8 (quotation omitted). "[A] plaintiff cannot obtain a preliminary injunction by speculating about hypothetical future injuries." *E. St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 705-706 (7th Cir. 2005). *See also Ball Memorial Hospital*, 603 F. Supp. at 1086.

The Seventh Circuit has considered the issue of whether delay constitutes irreparable harm in the context of admission to graduate school. In *Martin v. Helstad*, 699 F.2d 387 (7th Cir. 1983), the court found that delayed admission to graduate school "is not ordinarily considered irreparable injury warranting injunctive relief." *Id.* at 391-92. The plaintiff in *Martin* ultimately enrolled in another law school, and the Court noted that "[b]ecause the appellant is now attending law school in California, he can no longer assert that [the law school at issue] is continuing to delay his legal education." *Id.* at 392 n.7. In line with this same reasoning, the Fourth Circuit has found that delayed admission to a university can cause irreparable injury when the person harmed has no comparable options elsewhere. *See Faulkner v. Jones*, 10 F.3d 226, 233 (4th Cir. 1993) (emphasis added); *see also Doe v. New York University*, 666 F.2d 761 (2d Cir. 1981) (suggesting that a student must show a change in circumstance in reliance on the

ability to enroll in classes, such as leaving employment in order to make a sufficient showing of irreparable harm).

There is no evidence, beyond speculation and conjecture, that Plaintiff's suspension will delay his college graduation or prevent him from obtaining a DePauw diploma. For example, Plaintiff makes no showing that he cannot attend another school and transfer the credit to DePauw. Moreover, Plaintiff alleges nothing more than the "risk" that he will not be able to transfer to another university for the 2014-2015 school year or that he will have difficulty transferring his credits. (Dkt. 34 at p. 11.) Plaintiff does not provide any evidence that he has actually sought to transfer away from DePauw. He also overlooks DePauw's willingness to work with him to complete the requirements for his major upon readmission to DePauw.

A. There Is No Evidence That Plaintiff Cannot Continue His Education During His Suspension.

As described in the Affidavit of Kenneth Kirkpatrick, DePauw's Registrar, DePauw routinely allows its students to receive credit for approved classes successfully concluded at other institutions. (Kirkpatrick Aff. at ¶6.) Those other institutions can include junior colleges, community colleges, and four-year colleges. (*Id.*) A current or suspended DePauw student desiring to receive DePauw credit for a class taken elsewhere typically will obtain the approval of the Registrar's Office for DePauw credit before the class is to be taken. (Kirkpatrick Aff. at ¶7.)

DePauw routinely gives credit to students who have been suspended temporarily for either academic or disciplinary reasons for successful completion of courses taken elsewhere during the period of suspension. Whether credit for such classes is given by DePauw is dependent upon the nature of the class and the course of study being pursued by the student at DePauw. (Kirkpatrick Aff. at ¶8.) Since Fall, 2010, DePauw has suspended 18 students,

including Mr. King, for disciplinary reasons. Of the 17 other students, 6 have not returned and 11 have successfully applied for readmission and returned. Of the 11 who returned, 7 did course work elsewhere while on suspension. Those 7 who did course work while on suspension had an average of 3.2 DePauw course credits (12.8 semester hours) transfer back to DePauw. (Kirkpatrick Aff. at ¶9.) Plaintiff has already applied for and was given preapproval to take two classes at Indiana State University this summer. (Kirkpatrick Aff. at ¶11.) Ordinarily, DePauw has a graduation requirement that six (6) of the last eight (8) class credits must be taken at DePauw in order for the student to be entitled to receive a DePauw diploma. However, there is a waiver of this requirement available to any student who can show good cause for the waiver. (Kirkpatrick Aff. at ¶12.)

B. There Is No Evidence That Plaintiff Cannot Transfer to Another College.

Plaintiff's transcript does not show Plaintiff as having been suspended by DePauw. Under DePauw's current policy, the only suspension which appears on an official transcript is an academic suspension. Plaintiff does show as a suspended student in a database internal to DePauw entitled "Client Information Services." That database shows Plaintiff as being suspended for "disciplinary reasons." (Kirkpatrick Aff. ¶10.) Without competent evidence that the suspension would actually delay Plaintiff's college career, job prospects, or ability to transfer to another college or university, he has not made the requisite showing of irreparable harm and the Motion should be denied. Indeed, it does not appear that Plaintiff has sought to transfer to another school. There is no record at DePauw that a transcript has been ordered for Plaintiff. (Kirkpatrick Aff. ¶4.)

VII. The Balancing Of The Harms Favors DePauw.

Because Plaintiff failed to meet the above "threshold" requirements for a preliminary injunction,

this Court need not, and DePauw respectfully submits should not, consider the balancing of harms. *See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008) ("If the court determines that the moving party has failed to demonstrate any one of these threshold requirements, it must deny the injunction.")

If the Court does address the balance of harms, it weighs against Plaintiff's request. *See Roland Machinery Co.*, 749 F.2d at 387 ("[S]ince the defendant may suffer irreparable harm from the entry of a preliminary injunction, the court must not only determine that the plaintiff will suffer irreparable harm if the preliminary injunction is denied–a threshold requirement for granting a preliminary injunction–but also weigh that harm against any irreparable harm that the defendant can show he will suffer if the injunction is granted.").

As discussed above, the harm that Plaintiff has articulated is temporal, at best. In contrast, DePauw's harm, as addressed above, would be substantial upon entry of a preliminary injunction. DePauw is required to maintain a safe, non-hostile environment for all students. *See, e.g., Murray*, 57 F.3d at 249. Upon reaching a determination that Plaintiff was responsible for a violation of DePauw's Policy, it had a duty to implement sanctions to address the impact to J.B., prevent future occurrences and prevent the campus from becoming a hostile environment. Office for Civil Rights, *Dear Colleague Letter*, Apr. 4, 2011. DePauw's obligation to prevent future occurrences of sexual misconduct does not abate simply because the victim in this case, J.B., is no longer present on campus. The suspension served not only to protect J.B. during her remaining time as a student at DePauw, but also to punish Plaintiff and rehabilitate his behavior. The suspension allows Plaintiff an opportunity to reflect on his actions and consider how he could have acted differently. Additionally, the suspension has a deterrent effect on such behavior. *See* Ronet Bachman et al., *The Rationality of Sexual Offending: Testing a*

Deterrence/Rational Choice Conception of Sexual Assault, 26 Law & Soc'y Rev. 343, 361 (1992) (The perceived certainty of formal sanctions for sexual assault on college campuses has been found to have a "significant deterrent effect" in cases similar to the one at hand.).

Any student suspended from DePauw for any reason is required to follow a readmission process. DePauw's settlement offer to allow Plaintiff to return to campus for the spring, 2015 semester included that requirement which would include a conversation with DePauw's current Vice President for Student Life, Christopher Wells, for Mr. Wells to "evaluate [Plaintiff's] understanding of the issues raised by his interaction with [J.B.]." (Ex. D.)[5] This offer was in line with the original terms of Plaintiff's suspension, in that Plaintiff was required to apply for readmission. (Ex. D.)

Putting aside the factual dispute as to what happened between Plaintiff and J.B., Plaintiff was found to have engaged in nonconsensual sexual contact. The lack of consent stems from the panel's finding that J.B. was too intoxicated to give consent. Plaintiff's brief seems to argue that Plaintiff is not a threat because his actions were not a serious or overtly violent form of sexual battery. "It was never alleged that Plaintiff **forcefully coerced** J.B. or that J.B. was unconscious during the sexual activity." (Dkt. 34 at p. 12.) The following paragraph continues, "Plaintiff is not a sexual predator and does not pose a risk to DePauw students." (Dkt. 34 at p. 12.) This argument fails to recognize that any sexual touching or act without consent is considered to be a violation of DePauw's Policy. The hearing panel found Plaintiff responsible for engaging in sexual activity with J.B. without her consent. It is not persuasive to argue that because this conduct is less egregious than other types of sexual misconduct, it should not be considered a serious threat to campus security and the well-being of other students.

[5] Plaintiff violated Rule 408 of the Federal Rules of Evidence when he referred to this offer in his Brief. So that the Court has the benefit of the complete discussion, DePauw has attached the entire e-mail exchange to its Designation filed herein wherein Plaintiff threatens to add J.B. as a party to this case if DePauw does not settle.

Additionally, Plaintiff's argument that DePauw would have immediately removed him if it truly considered him to be a threat to the campus is inconsistent with his assertion that he should receive a fair disciplinary process. In this instance, J.B.'s allegation of misconduct against Plaintiff alone was insufficient to establish responsibility in the eyes of DePauw. *See, e.g., St. Francis School Dist.*, 694 F.3d at 872 ("to know that someone suspects something is not to know the something and does not mean the something is obvious"). DePauw's provision of full process to Plaintiff should not operate to later restrict its ability to sanction Plaintiff upon reaching a final determination as to Plaintiff's responsibility for the misconduct alleged against him.

D. The Public Interest Favors Denying the Motion.

Finally, the harm to the public weighs in favor of denying Plaintiff's request for a preliminary injunction. As demonstrated above, the public interest is served by enforcing DePauw's disciplinary process—thereby complying with its obligations under Title IX. Following policy set by federal law is well-recognized public interest in the weighing of preliminary injunctions. *See, e.g., Sofinet v. INS*, 188 F.3d 703, 708 (7th Cir. 1999) (public interest favors enforcement of immigration law); *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 904 (7th Cir. 1989) (public interest favors enforcement of antitrust law); *United States ex rel. Clauser v. McCevers*, 731 F.2d 423 (7th Cir. 1984) (public interest favors enforcement of criminal laws); *Eli Lilly & Co. v. Natural Answers, Inc.*, 86 F.Supp 2d 834, 853 (S.D. Ind. Jan. 20, 2000) (public interest favors enforcement of trademark laws). Additionally, the public interest favors limiting the intrusion of courts into academic affairs. *See, e.g., St. Francis School District*, 649 F.3d at 873 (7th Cir. 2012) ("[j]udges must be sensitive to the effect on education of heavy-handed judicial intrusion into school disciplinary issues, or heavy-handed administrative intrusion

required by judges interpreting Title IX and other statutes that . . . have made education one of the most heavily regulated American industries"); *Brandt*, 480 F.3d at 467 (7th Cir. 2007); *Holert*, 751 F. Supp. at 1301 (a "private university may prescribe the moral, ethical and academic standards that its students must observe; it is not the court's function to decide whether student misbehavior should be punished or to select the appropriate punishment for transgressions of an educational institution's ethical or academic standards."). Accordingly, the sanction against Plaintiff should proceed and the court should deny Plaintiff's request for a preliminary injunction.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiff's Motion for Preliminary Injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 1, 2014, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system:

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