UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOHN DOE, Plaintiff, v. AMHERST COLLEGE, CAROLYN MARTIN, JAMES LARIMORE, TORIN MOORE, SUSIE MITTON SHANNON, and LAURIE FRANKL, Defendants.	C.A. No. 3:15-cv-30097-MAP

NON-PARTY ERIC HAMAKO'S MEMORANDUM OF LAW
IN SUPPORT OF HIS MOTION FOR A PROTECTIVE ORDER

On December 12, 2013, Professor Eric Hamako, then an administrator at Smith College, sat on the disciplinary hearing board (the "Hearing Board") that found Plaintiff John Doe responsible for sexual misconduct. As a sanction for his misconduct, Doe was expelled from Amherst College. Months after Doe had exhausted his appeal rights and his expulsion had become final, Doe presented additional evidence to Amherst – namely, certain text messages that were not presented at his disciplinary hearing – and requested that Amherst reinstate him as a student or re-open the disciplinary proceedings. Because Doe's request and desired response had no basis under the College's policies or procedures, Amherst declined. Over a year later, Doe filed this lawsuit, principally contending that Amherst failed to comply with its Sexual Misconduct Policy (the "Policy") in disciplining him and that Amherst discriminated against him on the basis of sex and race.

Through this motion, Professor Hamako seeks to quash a subpoena that Doe served on him in January 2016. The subpoena seeks material that is neither relevant nor proportional to the needs of this case under Federal Rule of Civil Procedure 26(b)(1). Indeed, Professor Hamako's

sole connection to this matter is that he served as one of three panelists on the Hearing Board that adjudicated Doe responsible for sexual misconduct based on evidence presented at that hearing. Because the disciplinary hearing was recorded and transcribed, and because Doe has *appended the entirety of the hearing transcript to his Complaint*, the procedures used during the hearing are not open to dispute. For reasons previously explained by Amherst (and not contested by Doe), those procedures fully complied with Amherst's Policy.[1] Thus, there is no need or justification for deposing Professor Hamako about the hearing procedures.

Beyond serving as a hearing panelist, Professor Hamako had no other involvement in Doe's disciplinary proceedings or the events that Doe contends give rise to his lawsuit, namely Amherst's initiation of mandatory proceedings upon receipt of a misconduct complaint against Doe and the College's later refusal to reopen his then finalized proceedings. While Doe wrongly claims that Amherst acted discriminatorily in taking these actions, the fact remains that Professor Hamako has no personal knowledge concerning either action by Amherst.

Because Doe's subpoena to Professor Hamako does not seek non-duplicative or relevant information concerning the procedures afforded to Doe or the actions taken by the College, it appears that Doe's true purpose in conducting his deposition is to dissect the Hearing Panel's confidential deliberations in an effort to suggest that new evidence might have altered the outcome. But nothing in the law permits an expelled student to seek to re-try a concluded disciplinary proceeding of a private college in this manner. Courts outright forbid disappointed litigants from probing jurors, judges, arbitrators, and other decision-makers' mental and deliberative processes, and similar policy interests heavily favor quashing the subpoena to Professor Hamako. As dissatisfied students increasingly contest disciplinary proceedings in the

[1] *Compare* Doc. No. 37, Defendants' Memorandum of Law in Support of their Motion for Judgment on the Pleadings, "Def. Mem.," pp. 26-33 *with* Doc. No. 43, Plaintiff's Opposition to Defendants' Motion for Motion for Judgment on the Pleadings, "Pl. Opp.," pp. 17-20.

courts, it is critical that hearing panelists have confidence that a student will not tear open and scrutinize their deliberative process in a subsequent lawsuit. Indeed, permitting the deposition of Professor Hamako to go forward will undercut the assurances in Amherst's Policy that Hearing Board deliberations will remain confidential and private, which will likely deter future sexual assault victims from coming forward and seeking relief.

For these reasons, and pursuant to Rule 26(c)(1) of the Federal Rules of Civil Procedure, Professor Hamako requests that the Court issue a protective order quashing the third-party subpoena that Doe served on him and relieving him from any obligation to comply with it.

BACKGROUND

I. Professor Eric Hamako's Sole Connection to this Lawsuit is that He Sat on the Sexual Misconduct Hearing Board that Adjudicated Doe Responsible for Sexual Misconduct.

In 2013, Professor Hamako worked at Smith College, both as an adjunct professor in its School for Social Work and the program coordinator for its Office of Institutional Diversity and Equity. Hamako Aff., ¶2. As the program coordinator at Smith, Professor Hamako had experience investigating and resolving sexual harassment and sexual misconduct allegations, and he received training from his supervisor and third-party training providers on those subjects. *Id.*, ¶3. In 2013, Professor Hamako also received training from Amherst College to serve as a panelist on Amherst's Sexual Misconduct Hearing Board. *Id.*, ¶4.[2] Amherst's training covered the evaluation of sexual misconduct allegations and its policies and procedures for resolving such allegations. *Id.*

[2] Pursuant to the Policy, Amherst College draws Hearing Board panelists "from a pool of individuals from the community, including the Five College Consortium," but not from "faculty, staff or students at Amherst College." Cp., Ex. 1, p. 23. Smith College is a member of that consortium, as is Amherst. *Id.*, p. 3. Professor Hamako and two residential life administrators – one from Mount Holyoke College and another from Hampshire College – heard the allegations against Doe. Cp., Ex. 3, p. 4.

After receiving Amherst's training, Professor Hamako was asked to sit on a Hearing Board panel that adjudicated a sexual misconduct allegation brought against the student who is the plaintiff in this lawsuit, who is referred to as "John Doe." *Id.*, ¶5. Before attending the hearing on the allegation against Doe (which occurred on December 12, 2013), Professor Hamako received and reviewed a copy of an investigative report prepared by Attorney Allyson Kurker concerning the allegation (the "Report"). *Id.*, ¶6. The Report included summaries of interviews and had exhibits appended to it, which Professor Hamako also reviewed before the hearing. *Id.*.

Attorney Kurker's Report appended the sexual misconduct complaint that had been filed against Doe by another student, Sandra Jones (the "Misconduct Complaint"). Cp., Ex. 2, p. 18. The Misconduct Complaint described the sexual encounter between Jones and Doe (the "Incident") as follows:

> Then [Doe] tried to get me to give him a blowjob again. This time I said, "No. I don't want to. You should leave. I don't want to do this anymore." He ignored what I said and pushed his penis into my mouth anyway. He kept my head pushed down so I couldn't move, even though I was a choking with how hard he was holding me down. I pushed against his hand with my head and tried to support myself with my arms but eventually I just waited for it be over. (*Id.*)

According to Attorney Kurker's Report, Jones provided a similar description of the Incident to Attorney Kurker during her interview. Cp., Ex. 2, pp. 3-5. The Report reflected that Doe reported to Attorney Kurker that he was "very intoxicated" and had "no memory of being intimate with Ms. Jones." Cp., Ex. 2, p. 6.

On December 12th, Professor Hamako participated in the disciplinary hearing on the charge against Doe. Cp., Ex. 3, p. 4. At the hearing's outset, Dean James Larimore stressed that the proceeding was "strictly confidential," stating:

> I want to remind all members of the board, the student who's a subject of the complaint, the person filing the complaint, witnesses, and any other person present at this point during this hearing, that you're all reminded that this hearing is -- is confidential. No one should discuss anything that they see or say or hear during the hearing with individuals that are not directly … connected to this hearing. … [T]he hearing process[] will also be private … . (Cp., Ex. 3, p. 2.) [3]

This reminder comported with Amherst's Policy which states, "At all times, the privacy of the parties will be respected and safeguarded," and, further, that the "proceedings [at the hearing] are confidential." Cp., Ex. 1, pp. 4, 26.

Thereafter, Professor Hamako and the other panelists heard testimony from Attorney Kurker and six Amherst students, including Doe and Jones. Professor Hamako also questioned witnesses during the hearing. Cp., ¶48; Cp., Ex. 3, pp. 29, 42, 45-47, 53, 56, 71, 82, 96, 104-08, 114, 116, 119-20, 126, 129-32, 137-38. As reflected by the transcript of the hearing, Jones testified that she began to perform oral sex consensually at first but that she changed her mind when Doe "began saying things about myself and my roommate." Cp., Ex. 3, p. 44. Jones testified that she "said no repeatedly and physically pushed against [Doe]," but that he "did not listen or pay attention to my clear refusal and held me down, forcing his penis into my mouth until he ejaculated." *Id.*, p. 43. For his part, and again as reflected by the transcript, Doe testified that he was intoxicated during the Incident, that he did not "remember anything," and that he "[wouldn't] … comment on … what might have happened that night." *Id.*, p. 72. Professor Hamako heard and considered the testimony at the hearing. Hamako Aff., ¶7.

After the disciplinary hearing's conclusion, the Hearing Board deliberated in private and reached a determination on responsibility, finding that Doe had violated Amherst's policy

[3] The College provided Doe with an audiotape of the entire disciplinary hearing, which he transcribed and appended to the Complaint in this action. Cp., Ex. 3, pp. 1-146.

against sexual assault, and assigning sanctions, both by a majority vote. *Id.*, ¶8.[4] Amherst then notified Doe of the Hearing Board's responsibility finding, stating that the finding was reached "[b]ased on the evidence presented [at the hearing] and after deliberating." Cp., Ex. 4, p. 1. Amherst's notice further stated that, a result of that finding, the Hearing Board had assigned the sanction of expulsion. *Id.* After the Hearing Board concluded its deliberations, Professor Hamako had no other involvement in any proceeding involving Doe. *See* Cp., Ex. 1, 27-28; Hamako Aff., ¶9.

II. Doe Files Suit After Discovering Text Messages that Professor Hamako Never Reviewed During the Disciplinary Hearing.

Months after the disciplinary process's conclusion, Doe presented text messages to Amherst College – not to Professor Hamako – that Doe claims exculpate him from any wrongdoing and requested that Amherst "reinstate" him or "reopen either the hearing or the investigation." Cp., ¶¶72-73, 90. After Amherst declined those requests (which were not supported by the College's Policy), Doe filed suit (the "Lawsuit") against Amherst and five administrators (the "Defendants"). Cp., ¶¶9-14. His ten-count complaint (the "Complaint") asserts a variety of legal theories against the Defendants, including a breach of contract claim, civil rights claims, a defamation claim, and emotional distress claims. *Id.*, ¶¶78-135. As a central allegation in the Complaint, Doe contends that the College acted wrongfully in declining to reopen the sexual misconduct proceeding based on his presentation of the after-acquired text messages. *Id.*, ¶¶72-73. The Defendants have filed an omnibus motion for judgment on the pleadings that seeks the dismissal of Doe's Complaint in its entirety. Doc. No. 37, p. 2. That motion is presently pending before this Court.

[4] Amherst's Policy provides that the Hearing Board "deliberate[s] in private," that it reaches its decisions "by majority vote," and that those "votes themselves will not be shared with the parties." Cp., Ex. 1, pp. 26-27.

III. Doe Subpoenas Professor Hamako.

On December 23, 2015, more than two years after his service on the Hearing Board had ended, Professor Hamako received an email from Doe's counsel, who informed him of Doe's Lawsuit and provided him a copy of Doe's Complaint (without exhibits). Hamako Aff., ¶¶10, 11. In her email to Professor Hamako, Doe's counsel referenced "evidence" that was not made available to the Hearing Board, stating, "Our client discovered evidence that was not made available to him, or to you, at the time [of the disciplinary hearing], which serves as a substantial basis for his position that he was treated unfairly by the College and its administrators." *Id.*, ¶11. Based on his review of the Complaint, Professor Hamako presumed that Doe's counsel was referring to certain text messages that were described in the Complaint, but that were not provided to him or the Hearing Board. *Id.* [5]

On January 20, 2016, Doe served Professor Hamako with a subpoena *duces tecum* that sought to take his deposition in Seattle, Washington[6] on February 29, 2016. *Id.*, ¶13. The subpoena also directed Professor Hamako to produce "[a]ll documents, notes, memoranda, and communications concerning the Amherst college disciplinary hearing involving John Doe and Sandra Jones which was held on December 12, 2013." *Id.*[7]

---

[5] Doe has not alleged that the College had the text messages in its possession during the hearing. Cp., ¶¶72-73. Rather, Doe alleges that, months after its conclusion, he discovered the text messages and presented them to the College. *Id.*

[6] Since sitting on the Hearing Board in 2013, Professor Hamako accepted a faculty position at a college in Shoreline, Washington, where he now resides. Hamako Aff., ¶¶1-2.

[7] Doe's counsel later advised Professor Hamako that the deposition would not go forward on February 29th. *Id.*

ARGUMENT

I. Standard of Review

Federal Rule of Civil Procedure 26(b)(1) limits discovery to non-privileged material that is "(i) relevant to any party's claim or defense and (ii) proportional to the needs of the case." *Id.* (numerals added).[8] This rule "vests the trial judge with broad discretion to tailor discovery narrowly." *Judson v. Midland Credit Mgmt., Inc.*, No. 13-cv-11435, 2014 WL 3829082, *1 (D. Mass. Aug. 1, 2014) (citing cases). Even where the material sought is relevant and proportional, Rule 26(b)(2)(C)(i) mandates that a court must limit discovery that is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive."

Rule 26(c)(1), in turn, allows a court to, "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including that certain discovery not be had. This rule "confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Wilson v. Pharmerica Corporation Long Term Disability Plan*, No. 14-cv-12345, 2015 WL 4572833, *2 (D. Mass. July 29, 2015).

If an objection on relevancy grounds is raised, the party seeking discovery bears the burden of establishing relevancy and proportionality. *See Gilead Scis., Inc. v. Merck & Co, Inc.*, No. 13-cv-04057, 2016 WL 146574, *1 (N.D. Cal. Jan. 13, 2016) (requiring a party seeking discovery to "show, before anything else, that the discovery sought is proportional to the needs

[8] Rule 26(b)(1) was amended in 2015 to add a proportionality requirement. This requirement "guard[s] against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry." Fed. R. Civ. P. 26, 2015 Ctm. It is intended to "encourage judges to be more aggressive in identifying and discouraging discovery overuse by emphasizing the need to analyze proportionality before ordering production of relevant information." *Henry v. Morgan's Hotel Grp., Inc.*, No. 15-cv-1789, 2016 WL 303114, *3 (S.D.N.Y. Jan. 25, 2016) (internal quotations omitted).

of the case"). If that threshold hurdle is cleared, the burden then falls on the objecting party or third-party to show "good cause" for a protective order under Rule 26(c). *See Trustees of Boston Univ. v. Everlight Elecs. Co.*, No. 12-cv-11935, 2014 WL 11030005, *2 (D. Mass. July 8, 2014).

II. Doe's Subpoena to Professor Hamako Exceeds the Scope of Permissible Discovery under Rule 26(b).

Doe's subpoena to Professor Hamako seeks information that is neither relevant nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1). Doe has not set forth a single allegation in the Complaint concerning Professor Hamako. *See* Cp., ¶¶1-134. Rather, Professor Hamako's sole connection to this matter is that he served as a panelist on the Hearing Board that found Doe responsible for sexual misconduct. Cp. Ex. 3, p. 4. Beyond serving as a panelist at the disciplinary hearing, Professor Hamako played no other role in the disciplinary proceeding that led to Doe's expulsion. Regarding the disciplinary hearing, Doe only alleges in his Complaint that:

- he was denied legal counsel at the hearing, *id.*, ¶50;
- a physical barrier prevented him from observing Jones at the hearing, Cp., ¶49;
- the later-obtained text message exchanges were not presented at the hearing, *id.*, ¶56; and
- the evidence at the hearing did not establish that he violated the Policy, *id.*, ¶83.

There is no legitimate need to depose Professor Hamako regarding these allegations. Because Amherst recorded the hearing and Doe later transcribed it, neither the evidence presented nor the procedures used during the disciplinary hearing is open to dispute or debate.[9] Cp., Ex. 3. As a consequence, examining Professor Hamako regarding the hearing's procedure and evidence

[9] In their memorandum in support of their motion for judgment on the pleadings, Defendants demonstrated, on a point-by-point basis, that the procedure followed at the hearing complied precisely with the College's Policy. *See* Def. Mem., pp. 26-33. In his opposition, Doe offered no dispute to Defendants' analysis. *See* Pl. Opp., pp. 17-20.

presented at the hearing is duplicative and adds nothing to the information that Doe has already obtained and presented to the Court. *See Ameristar Jet Charter, Inc. v. Signal Composites, Inc.*, 244 F.3d 189, 193 (1st Cir. 2001) (district court properly issued protective order quashing deposition subpoenas that sought cumulative evidence).

As Doe's breach of contract claim necessarily focuses on the procedure that led to his expulsion, Professor Hamako cannot offer any relevant, non-duplicative information. Indeed, for Doe to prevail on that claim, he must establish that the disciplinary proceedings at issue failed to "fall within the range of reasonable expectations of one reading the relevant rules," or to "comport with notions of basic fairness." *Walker v. President & Fellows of Harvard Coll.*, 82 F. Supp. 3d 524, 530, 532 (D. Mass. 2014). These theories narrowly focus on alleged procedural infirmities in a disciplinary proceeding. *See, e.g.*, *Schaer v. Brandeis Univ.*, 432 Mass. 474, 479-80 (2000) (examining whether disciplinary proceedings complied with reasonable expectations created by particular provisions in a private university's student handbook); *Morris v. Brandeis Univ.*, 60 Mass. App. Ct. 1119, *2 (2004) (unpublished decision) (dismissing "basic fairness" claim where private university "adhered strictly to its procedural rules," from "the date of the charge through the appellate process"). Because the hearing transcript establishes the procedures followed at Doe's disciplinary hearing (and, indeed, how they complied with Amherst's Policy), any testimony from Professor Hamako concerning the hearing is superfluous.[10] *See* Def. Mem., pp. 26-33.

[10] Doe also seeks to state a breach of the implied covenant of good faith and fair dealing based on Amherst's response to Jones's sexual misconduct complaint. Cp., ¶¶88-91. As with his breach of contract claim, the focus is on whether Amherst complied with its policies and procedures in expelling him for sexual misconduct. *See Sullivan v. Boston Architectural Ctr., Inc.*, 57 Mass. App. Ct. 771, 775 (2003) (holding that a student had not shown a breach of the implied covenant where "[t]he policies and procedures contained well-defined processes for addressing [the student's] grievance [were] made ... available ... and applied ... as articulated"); Def. Mem., pp. 33-34. For the same reasons that he lacks any non-duplicative, relevant knowledge regarding Doe's breach of contract claim, Professor Hamako also lacks any such knowledge regarding Doe's implied covenant claim.

Based on his email communication from Doe's counsel, Professor Hamako anticipates that Doe's counsel may seek to present the after-acquired text messages to him, and ask whether those messages *might* have impacted the Hearing Board's deliberations *if* they had been presented at the hearing. Doe's counsel foreshadowed this intention in her email to Professor Hamako, writing that the text messages were "not made available … to you" during the disciplinary hearing and "serve[] as a substantial basis" for Doe's lawsuit. Hamako Aff., Ex. 1. But any line of examination about how, *hypothetically*, the text messages *might* have impacted the Hearing Board's decision is wholly irrelevant to Doe's breach of contract claim. Neither a "reasonable expectation" theory nor a "basic fairness" theory permits Doe to seek to re-try the disciplinary hearing with the benefit of text messages he acquired after its conclusion. Rather, as addressed above, both theories focus only on the disciplinary process itself, which here comported with Amherst's Policy. *See Schaer*, 432 Mass. at 479-480; *Morris*, 60 Mass. App. Ct. 1119 at *2. *See also Schaer*, 432 Mass. at 481 (rejecting basic fairness claim based on "atmosphere of 'hysteria and misinformation'" because "[n]othing in these allegations addresses the conduct of the hearing"); *Walker*, 82 F. Supp. 3d at 532 (determining that "disciplinary proceeding[] … comport[ed] with notions of 'basic fairness'" by examining procedure afforded the student, including advanced notice of charges and an ability to call witnesses); *Kiani v. Trustees of Boston Univ.*, No. 04-cv-11838, 2005 WL 6489754, *8 (D. Mass. Nov. 10, 2005) (examining procedural safeguards in dismissing "basic fairness" claim where student "produced no evidence to establish the basic unfairness of the proceedings other than her understandable unhappiness with the result"). As a consequence, hypothetical questions concerning how other evidence that was not presented to the Hearing Panel might have impacted its deliberations is not pertinent to Doe's contract-based claims.

Nor does Professor Hamako possess any relevant, non-duplicative testimony regarding Doe's Title IX and section 1981 claims. Cp., ¶¶96-108. Doe contends that Amherst acted discriminatorily by not reopening the disciplinary proceedings after he submitted the text messages and by not bringing a sexual misconduct complaint against Jones, whom Doe claims violated the Policy also. *See id.* Professor Hamako can offer no testimony on either contention, as his role was strictly limited to deciding whether Doe had violated the College's Policy against sexual assault based on the evidence presented at the hearing. Hamako Aff., ¶¶7-9.

Doe's remaining claims likewise provide no foundation for deposing Professor Hamako. Doe's Massachusetts Civil Rights Act ("MCRA") claim alleges that the Defendants "capitulated" to pressure from student activists in expelling him. *See* Cp., ¶¶109-116. But Doe has not alleged that Professor Hamako – who was an administrator at Smith at the time – had any contact with the student activists at Amherst, much less that he "capitulated" to any conduct by them in considering the evidence at the hearing. *See id.* Doe's defamation claim concerns a campus-wide email notification that the College circulated in January 2014, after Professor Hamako's involvement in the disciplinary proceeding ended and about which Doe does not allege Professor Hamako had any involvement. *See* Cp., ¶¶109-116. Finally, Doe lacks any reasonable basis for deposing Professor Hamako concerning his claim for negligent infliction of emotional distress, which Doe premises on purported duties of care owed to Doe by the Defendants. *See* Cp., ¶¶117-126.[11]

[11] Doe's Opposition to Defendants' Motion for Judgment on the Pleadings concedes that he has not adequately pled a tortious interference claim (Count III), agrees to dismiss his intentional infliction of emotional distress claim (Count VIII), and fails to address his injunctive relief count altogether (Count X). *See* Pl. Opp., pp. 27, 33. This memorandum therefore does not address these claims. Even if they were still in play, however, Professor Hamako would not have any relevant information to offer regarding them.

III. Significant Policy Interests in Protecting Sexual Misconduct Hearing Board Panelists from Harassment Heavily Favor Quashing the Subpoena Under Rule 26(c)(1).

Because Doe's subpoena to Professor Hamako seeks irrelevant information that falls beyond the scope of discovery under Rule 26(b)(1), this Court should quash it for that reason alone. Even if it sought relevant information, however, this Court should nevertheless issue a protective order pursuant to Rule 26(c)(1). Rule 26(c)(1)'s "good cause" standard is "highly flexible, having been designed to accommodate all relevant interests as they arise." *Gill v. Gulfstream Park Racing Ass'n., Inc.*, 399 F.3d 391, 402 (1st Cir. 2005) (internal quotations omitted). The standard "requires an individualized balancing of the many interests that may be present in a particular case," including "considerations of the public interest, the need for confidentiality, and privacy interests."[12] *Id.* Even where no explicit common law or statutory privilege bars disclosure outright, Rule 26(c)(1) nevertheless permits a court to deny discovery based on confidentiality and privacy interests. *See id.* (quoting *In re Sealed Case*, 381 F.3d 1205, 1210, 1215 (D.C. Cir. 2004) for the proposition that the courts should take "interests in privacy … into account in the Rule 26 analysis, even when 'the information sought is not privileged'").

The balance under Rule 26(c) heavily favors quashing the subpoena served on Professor Hamako. *First*, as explained above, the subpoena does not seek information that is relevant to Doe's claims. See, *supra*, pp. 9-12. Absent a legitimate need for the information sought by the subpoena, Doe's side of the scale is empty. *See, e.g.*, *Gill*, 399 F.3d at 400 (requiring "the trial

[12] Since its amendment in December 2015, Rule 26(b)(1) has explicitly required the courts to consider proportionality in assessing whether requested information falls within the scope of discovery. The undue burden analysis that supports quashing Doe's subpoena under Rule 26(c)(1) applies equally to Rule 26(b)(1)'s proportionality requirement. To avoid duplicating the same arguments, however, this motion presents that analysis in the context of Rule 26(c)(1).

court … to balance the burden of proposed discovery against the likely benefit" under Rule 26(c)).

Second, Professor Hamako is a non-party in this action. When "evaluating the balance of competing needs" under Rule 26(c), the First Circuit has made clear that it is proper to accord "special weight" to "the unwanted burden thrust upon non-parties." *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998). Professor Hamako's status as a non-party therefore further tips the scale against subjecting him to invasive discovery. *See Cascade Yarns, Inc. v. Knitting Fever, Inc.*, 755 F.3d 55, 59 (1st Cir. 2014) (internal quotations omitted) (stating that "[t]he district court accorded appropriate weight to the fact that [the subpoena recipient] is a stranger to the underlying litigation" and citing cases).

Third, strong policy considerations heavily favor keeping the Hearing Board's deliberations confidential and private. Recognizing the chilling effect that the threat of trial and deposition testimony can have on participation in the deliberative process – both during deliberations and by discouraging participation in the first place – courts outright forbid litigants from probing the mental processes of both judicial and quasi-judicial decision-makers, including jurors, judges, and arbitrators. *See*, e.g., Fed. R. Evid. 606 (codifying common law rule against examining jurors, subject to narrow exceptions); *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 66-67 (2d Cir. 2003) *overruled on other grounds, Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008) (emphasizing that "cases are legion in which courts have refused to permit parties to depose arbitrators—*or other judicial or quasi-judicial decision-makers*—regarding the thought processes underlying their decisions") (emphasis added); *Western Elec. Co., Inc. v. Piezo Tech., Inc.*, 860 F.2d 428, 431-32 (Fed. Cir. 1988) (refusing to compel patent examiner "to testify regarding his 'mental processes' in reaching a decision on a patent application"); *Bliss v. Fisher*,

714 F. Supp. 2d 223, 224 (D. Mass. 2010) (recognizing "overwhelming authority" insulating judges from testimony "concerning the mental processes used in formulating official judgments or the reasons that motivated him in the performance of his official duties"). These testimonial immunities generally stem from a need to "encourag[e] frank and honest deliberations" and to protect against "subsequent harassment by a losing party." *United States v. Villar*, 586 F.3d 76, 83 (1st Cir. 2009) (overviewing testimonial immunity for jurors). As the Second Circuit has explained regarding arbitrators:

> Permitting depositions of arbitrators regarding their mental processes would make arbitration only the starting point in the dispute resolution process and deprive arbitration awards of the last word on their authors' intentions. … An arbitrator should be free to decide the dispute before him without fear that he will have to explain the basis for his decision, and how he arrived at it, at some later date. … Once an arbitrator issues an award, … his role is complete and, like a judge or a jury, he may not be required to answer questions about why he reached a particular result.

Hoeft, 343 F.3d at 68. *See also Tanner v. United States*, 483 U.S. 107, 120-121 (1987) (reasoning that "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct").

These same policy interests likewise support barring Doe from probing and scrutinizing Professor Hamako's deliberative process. More and more, dissatisfied students are turning to the courts to contest the outcome of disciplinary proceedings. *See, e.g.*, *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 360 (S.D.N.Y. 2015) (recognizing "growing phenomenon"). As these proceedings result in an increasing number of lawsuits, the threat of depositions seeking to invade the deliberative processes of sexual misconduct hearing panels may well deter faculty and staff from serving on those panels, and those who choose to participate on a panel may feel constrained in their deliberations and less free to exchange ideas. Given the stakes for both

parties in a sexual misconduct proceeding, it is critical that panelists have confidence that they may perform their adjudicatory function unencumbered by the threat of future litigation and depositions, no different than jurors, judges, and arbitrators.

Permitting the deposition of Professor Hamako would also undercut assurances in Amherst's Policy that the disciplinary hearing is "confidential" and that the Board "deliberate[s] in private." Cp., Ex. 1, p. 26-27. By appending the entire hearing transcript to the Complaint, Doe has already undercut the Policy's assurances that the hearing itself would remain confidential. If Doe is also permitted to depose Professor Hamako regarding his deliberative process – by, for example, probing whether Professor Hamako found a particular student's testimony credible, or whether other after-acquired evidence might have impacted those assessments – those assurances erode even further. The Policy plays a critical role in cultivating sexual respect on Amherst's campus. Cp., Ex. 1, pp. 3-4. To ensure that sexual assault victims continue to take advantage of its provisions, it is critical that the Policy not be denigrated whenever a disciplined student turns to the courts.

Policy interests thus heavily favor keeping Professor Hamako's deliberations confidential. These interests, in turn, support issuing a protective order under Rule 26(c). Indeed, when faced with similar intrusions on confidential deliberations and processes, courts have done just that under Rule 26(c)'s balancing test, even where no common law, testimonial immunity is squarely applicable. *See Cusumano,* 162 F.3d at 717 (concluding that trial court properly refused to compel disclosure of interviews conducted by academic researchers, who had provided confidentiality assurances to their subjects, because disclosure would "hamstring not only the [investigators'] future research efforts but also those of other similarly situated scholars"); *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, 249 F.R.D. 8, 14

(D. Mass. 2008) (protecting peer review comments to academic research journal because their disclosure "will be harmful to [the journal's] ability to fulfill both its journalistic and scholarly missions, and by extension harmful to the medical and scientific communities, and to the public interest").

CONCLUSION

WHEREFORE, Professor Eric Hamako respectfully requests that this Court issue a protective order quashing the third-party subpoena that Plaintiff John Doe served on him on or about January 20, 2016 and relieving him from any obligation to comply with it.

ERIC HAMAKO

By his attorneys,

/s/ Tobias W. Crawford
Scott A. Roberts (BBO No. 550732)
sroberts@hrwlawyers.com
Tobias W. Crawford (BBO No. 678621)
tcrawford@hrwlawyers.com
Hirsch Roberts Weinstein LLP
24 Federal Street, 12th Floor
Boston, Massachusetts 02110
(617) 348-4300

Dated: March 10, 2016

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on March 10, 2016.

/s/ Tobias W. Crawford
Tobias W. Crawford