UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN HARRIS	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	NO. 13-CV-3937
	:	
SAINT JOSEPH'S UNIVERSITY	:	
and	:	
JOSEPH KALIN	:	
and	:	
JANE DOE	:	
	:	
Defendants.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF OPPOSITION TO MOTION OF DEFENDANT, JANE DOE, TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Plaintiff, Brian Harris ("Harris"), hereby submits this memorandum of law in support of his opposition to the motion of Defendant, Jane Doe ("Doe"), to dismiss Plaintiff's Amended Complaint (the "Doe Motion") (Document 24).

I. PRELIMINARY STATEMENT

Although styled as a motion to dismiss pursuant to Fed.R.Civ.Pro. 12(b)(6), the Doe Motion is nothing more than a springboard from which Doe launches her factual opposition to the allegations (which Doe aptly concedes **must** be accepted as true) of Harris' Amended Complaint (the "Amended Complaint"). The Doe Motion's contra statement of facts[1] not only denies[2] the Complaint's allegations (again, which must be accepted as true) but offers a completely different version of Doe's and Harris' sexual encounter which not only highlights the deficiencies of the internal administrative and disciplinary procedures of Defendant, Saint Joseph's University ("SJU"), but compels the denial of the Doe Motion as hopelessly premature.[3] Doe's factual assertions not only contradict any reasonable interpretation of Doe's own words included in the text messages[4] but make clear that without an opportunity, at the very least,[5] to confront his own accuser of such serious offenses as rape and sexual misconduct Harris was effectively denied any type of fundamental process, let alone due process, not only warranting but mandating this Honorable Court's review of SJU's policies and procedures. Accordingly, the Doe Motion was must be denied.

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[1] Doe Motion, notably, pp. 1-3.

[2] See e.g., Doe's denial of Harris' definitions of "cuddling" (Doe Motion, pp. 1-2).

[3] For example, soaring outside the borders of the Amended Complaint, Doe asserts she offered Harris an opportunity to sleep in her room because he was not permitted to return to his own dormitory room; that, notwithstanding the clear meaning of the text messages, the term "sex" was never mentioned; that Doe was intoxicated; that Harris took advantage of Doe's inebriated condition; that Harris forcibly engaged in sexual intercourse without Doe's consent; that Doe was crying when she went to the bathroom and used Harris' nickname; and, that Doe elected not to report the incident because she was afraid of Harris' reaction (Doe Motion, pp. 2-3).

[4] A copy of the transcript of the text messages is attached to the Amended Complaint as Exhibit "A."

[5] In his opposition to the motion to dismiss the Amended Complaint filed by SJU and Defendant, Joseph Kalin ("Kalin"), (the "SJU Motion"), and in the Amended Complaint, itself, Harris details a myriad of deficiencies in SJU's internal disciplinary procedures and their implementation in the disposition of the Doe complaint of sexual misconduct.

II. COUNTERSTATEMENT OF FACTS

At all relevant times, Harris was a matriculated student at SJU, commencing his freshman year on August 25, 2012 (Amended Complaint, ¶11). Harris, as were all SJU students, was issued the 2012/2013 Hawk Year Student Handbook/Planner (the "Handbook")[6] addressing, *inter alia*, expected student standards of conduct, and policies and procedures for investigating and adjudicating student complaints (Amended Complaint, ¶44). The Handbook defines and precludes sexual offenses[7] (Amended Complaint, ¶45). Allegations of sexual misconduct between students are to be resolved through a Community Standards process, initiated when an incident report or a written complaint is submitted to the Office of Community Standards (Amended Complaint, ¶¶47-48). Claims of sexual offense are resolved by an Administrative Chair Officer or by the Community Standards Board ("CSB"), the latter, a 17-person assembly of students, faculty members and administrators which assigns a 5-member CSB panel (the "Panel") to "adjudicate" the claim (Amended Complaint, ¶¶49, 51).[8]

Following the commencement of the Fall, 2012 semester, Harris and Doe became acquainted, Harris later learning Doe "liked him" (Amended Complaint, ¶¶12, 14). During the evening hours of November 16, 2012, Harris and Doe commenced an exchange of text messages, which include Doe's inviting Harris to come to her dormitory room to "cuddle" [9] with her

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[6] A copy of various portions of the Handbook is attached to the Doe Motion as Exhibit "B;" a complete copy of the Handbook is attached to the SJU Motion as Exhibit "A."

[7] Such offenses include rape, involuntary deviate sexual intercourse, sexual assault, aggravated indecent assault, indecent assault and indecent exposure (Amended Complaint, ¶45).

[8] A detailed explanation of the Community Standards process, including the reporting of the complaint, defining of the accused, the hearing procedure and presentation of evidence is more particularly set forth in ¶¶44 through 66 of the Amended Complaint.

[9] As alleged, the terms "cuddle" or "cuddling" are synonymous with, *inter alia*, "sex" or "having sex" (Amended Complaint, ¶21). Doe's assertion the term "sex" does not appear in the text messages is misleading. The messages, read as a whole, plainly bespeak a "sex call."

(Amended Complaint, ¶¶19-20, 26). Doe wrote she was a "good cuddler" (Amended Complaint, ¶22) and "asked Harris if he was a 'gooood cuddler,' adding o's to the word 'good' intimating great or very good" (Amended Complaint, ¶23). Doe also asked Harris to sleep in her room[10] and arranged for Harris' entrance into Doe's dormitory building (Amended Complaint, ¶¶27-29). At Doe's solicitation, without any force, duress or intimidation on Harris' part, Doe and Harris began kissing and engaging in foreplay.[11] They removed their clothing and freely and voluntarily, with mutual consent, had sexual intercourse (Amended Complaint, ¶¶30, 32). "At no time did Doe ask, or demand, that Harris leave her dormitory room; at no time did Doe tell Harris she did not want to engage in sexual intercourse with him" (Amended Complaint, ¶33). Following their consensual lovemaking, Doe briefly left her room to go to the bathroom,[12] returning, within 3 to 4 minutes later, to bed with Harris, embracing him as they slept into the morning hours of November 17, 2012 (Amended Complaint, ¶¶34-35). Upon the arrival of Doe's roommate, Harris left Doe's dormitory room without incident (Amended Complaint, ¶36).

Later that day, Harris was informed by a SJU Resident Area Manager that he (Harris) "was being investigated and, possibly, accused of non-consensual sexual relations with Doe,"

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[10] Doe claims she offered to have Harris sleep in her room because he was not permitted back into his own room (Doe Motion, p. 2). Again, this statement is contradicted by the text messages wherein Harris wrote he was being "sexiled" and "kicked outta my room." No where does Harris write he was barred from his room the entire night. Doe, to the contrary, simply wrote "Sleep over!!!" without a scintilla of explanation other than the reasonable inference she expressly wanted Harris to sleep with her, repeatedly urging Harris not to fall asleep (presumably in his own room) before she (Doe) returned to her dormitory room.

[11] Doe, conversely, claims Harris took advantage of her intoxicated condition and became aggressive; yet, in a dormitory building, full of people, Doe did nothing to halt the process; she did not yell or scream, and, importantly, did not demand that Harris leave her room.

[12] Doe claims she left the room, "crying because of the traumatic sexual assault she just experienced" and while in the bathroom, she told another person (O.T.) "that Harris forcibly engaged in sexual intercourse with her without her consent." (Doe Motion, p.2). Yet, Doe returned to the room (afraid of Harris, notwithstanding she was talking to another person and was free to flee), and got back into bed with him (Doe Motion, p.2; Amended Complaint, ¶¶34-35). Doe first reported the incident **after** she claims Harris and his friends laughed at her later that morning in the cafeteria (Doe Motion, p. 3).

an accusation Harris found unfathomable under the circumstances (Amended Complaint, ¶37). SJU's Public Safety Officer, Kalin, was assigned to investigate Doe's claim and on November 19, 2012, Kalin met with Harris regarding same. Kalin's interviewing techniques were aggressive and accusatorial, demonstrating unwarranted personal animus towards Harris, in one instance comparing Harris to "Jerry Sandusky" and feigning concern that Harris would retaliate against him (Amended Complaint, ¶¶38-39).[13] During the investigation Harris first learned that when Doe went to the bathroom she saw another female student, O.T.,[14] allegedly telling her that Doe "had been intimidated into having sex with a male, identified by a name other than Harris" (Amended Complaint, ¶41).[15] Although Doe was either unwilling or disinterested in reporting the incident, O.T. insisted she do so, threatening to report the incident on Doe's behalf if Doe did not (Amended Complaint, ¶41).

An initial investigation report (the "report"),[16] allegedly detailing the incident including the respective versions of both Doe and Harris, was prepared by Kalin, the report including a charge against Harris for forcible rape. The report was shown to Harris at a prehearing conference during which Harris was afforded limited time within which to review same, [17] innocently believing his account of the incident was accurately recorded based upon his

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[13] Interestingly, Doe perpetuates this gross mischaracterization of Harris, claiming she did not report the alleged incident upon its occurrence, fearing Harris' reaction if she did (Doe Motion, p. 2).

[14] Per stipulation of counsel, the individual is identified as "O.T." in the Amended Complaint (Amended Complaint, ¶40).

[15] Again, contrary to Doe's assertion (Doe Motion, p. 2), the name used was not Harris' nickname.

[16] A copy of the report is not attached to the Amended Complaint for the following reasons: (1) SJU never gave Harris a copy of any report relating to the alleged incident; and, (2) importantly, Harris cannot say, with certainty, any report regarding the incident still exists as it is SJU's policy is to destroy "case notes" upon the conclusion of the appeal period (Handbook, p. 40).

[17] Doe's comment that Harris "voluntarily did not review the entire report" (Doe Motion, p. 6) contradicts Harris' well pleaded allegation he was given little time to review the report, and the Handbook's mandate that a complete report be given to the accused in advance of the hearing not on the day of the hearing.

interview with Kalin (Amended Complaint, ¶67). Although the Handbook reads the completed and final report was to be shown to the accused **prior** to the Panel hearing held on December 4, 2012,[18] a supplemental report, including additional comments from other students, was given to Harris at the hearing (Amended Complaint, ¶67). During the hearing, Doe and Harris were separately, and privately, questioned, Harris denied any opportunity to confront Doe "despite the glaring evidence contradicting Doe's baseless accusations" (Amended Complaint, ¶68).[19] Critically, the text messages, "earlier provided but purposely omitted by Kalin," were not presented to the Panel (Amended Complaint, ¶69). Following the hearing, based upon a woeful preponderance of the evidence standard, Harris was found guilty of disrespecting another student and sexual assault, and was summarily suspended by SJU (Amended Complaint, ¶70). Harris timely filed an appeal, challenging the Panel's findings "as against a great weight of the evidence, and the Panel's failure to review the text messages which, on their face, contradicted Doe's baseless accusations of involuntary sexual conduct" (Amended Complaint, ¶71). On or about January 11, 2013, the appeal board, "finding the text messages were critical to the investigation and, thus, necessary evidence, remanded the matter to the Panel for further consideration" (Amended Complaint, ¶75). On or about January 18, 2013, a second hearing was held during which the text messages were presented; both Harris and Doe, again separately, were questioned concerning same (Amended Complaint, ¶¶76-77). Notwithstanding the clear exculpatory nature of the text messages, the Panel, influenced by SJU's gender bias, and reluctance to allow the Panel to change its position, and again employing a preponderance of

[18] A Community Standards board hearing was held before 5 panelists, identified in ¶68 of the Amended Complaint.

[19] As addressed in Harris' opposition to the SJU Motion, the letter dated April 4, 2011, authored by Russlynn Ali ("Ali"), Assistant Secretary for Civil Rights, United States Department of Education, commonly known as the "Dear Colleague" letter, is not a proper ratification of existing law. See, *amicus curiae* brief of Foundation for Individual Rights in Education ("FIRE") (the "*amicus curiae* brief") to be filed in this action.

the evidence standard, renewed the conviction; consequently, Harris was unfairly stigmatized as a sexual offender, his scholastic record besmirched, and was immediately suspended from SJU for a year (Amended Complaint, ¶¶77-78).

Effectively denied due, or any other type of fundamental, process, Harris brings the within action,[20] charging SJU with: breach of contract[21] (Count I); violation of Title IX of the Education Act Amendments of 1972 (Count II); negligence (Count III); and, violations of the Unfair Trade Practices and Consumer Protection Law (Count IV). Harris further charges SJU, Doe and Kalin with defamation (Count V); false light (Count VI); and, intentional infliction of emotional distress (Count VII). Harris separately charges Doe with intentional interference with contractual relations (Count VIII, [sic, IX]).

III. LEGAL ARGUMENT

A. Standard of Review

A motion to dismiss under Fed.R.Civ.Pro. 12(b)(6) tests the sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45 (1957) (abrogated in other respects by Bell Atlantic Corporation v. Twombly, 550 U.S. 544 (2007)); Hall v. Raech, 2009 WL 811503, *2 (E.D.Pa., 2009). In ruling on a motion to dismiss, the Court relies upon the complaint and attached exhibits, Sands v. McCormick, 502 F.3d 263, 268 (3d Cir., 2008); Hall v. Raech, supra. The complaint is sufficient

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[20] The action was originally instituted by way of Complaint (Document 1). Harris, through counsel, granted Defendants extensions of time within which to respond to the Complaint. On August 15, 2013, Doe filed a motion to dismiss the Complaint (Document 16) and, of even date, SJU and Kalin filed a motion to dismiss to the Complaint (Document 18). On September 3, 2013, Harris filed the Amended Complaint (Document 20).

[21] Notwithstanding, and as discussed *infra*, SJU, itself, does not characterize the Handbook as a contract.

> The handbook has been prepared for all students, administrators, faculty and staff at Saint Joseph's University and others wishing to know more about University policies, procedures, programs and activities. **It is intended to be for informational purposes only, and is not a contract.**

Handbook, p. 3 (emphasis added).

if it complies with Fed.R.Civ.Pro. 8(a)(2), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(a)(2) does not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Twombly, 550 U.S. at 570. In determining whether a complaint is sufficient, the Court must accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading, the plaintiff may be entitled to relief. Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir., 2009) (citing, Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir., 2008)). A complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits. Phillips, 515 F.3d at 231.

Testing the sufficiency of a complaint requires a three-step inquiry. Santiago v. Warminster Twp., 629 F.3d 121, 130–31 (3d Cir., 2010). First, "the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.'" Id. (quoting, Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)). Second, the factual matters averred in the complaint, and any attached exhibits, should be separated from legal conclusions asserted. Fowler, 578 F.3d at 210. Third, the Court must determine whether those factual matters averred are sufficient to show that the plaintiff has a "plausible claim for relief." Id. at 211 (quoting, Iqbal, 556 U.S. at 679).

B. The Amended Complaint Pleads Sufficient Facts to Warrant Challenge of SJU's Administrative Procedures and their Implementation

Doe's flagship argument is that SJU's adjudication of her complaint is impervious to judicial challenge, shielded by SJU's egregiously flawed internal disciplinary proceedings.[22] Following this (il)logic to its conclusion, Doe, as here, can knowingly lure a male student to her dormitory room, replete with invitation, bordering upon mandate, of sexual encounter, freely

[22] The flagrant flaws are detailed both in the Amended Complaint and in Harris' opposition to the SJU Motion.

and voluntarily engage in same, then, for whatever inexplicable reason,[23] change her mind, hurl an outrageous accusation of rape, then walk away under the veil of procedure designed to deny the accused the fundamental right to defend himself. Doe must not be permitted, under such circumstances, to discard Harris' challenges at this initial stage of the proceedings particularly, as set forth below, where the very "contract" upon which Doe bases her argument is unclear.

1. The Handbook is not the Sole Contract Sufficient to Bar Judicial Review of SJU's Internal Disciplinary Procedures and their Implementation to the Doe Complaint

In the Amended Complaint, although not necessarily directed to Doe,[24] Harris pleads the existence of an alleged contract with SJU, i.e., the Handbook. However, Harris does not necessarily contend the Handbook is the sole source of the entirety of the contractual agreements and obligations between SJU and Harris. Although both the Doe Motion and the SJU Motion assert a contract existed between SJU and Harris, as the relationship between SJU and Harris is "contractual in nature," Doe's (and SJU's) assertion the Handbook[25] constitutes the sole contract between SJU and Harris directly contradicts the Handbook's language, itself, reading, in pertinent part:

> This Handbook has been prepared for all students, administrators, faculty and staff at Saint Joseph's University and others wishing to know more about University policies, procedures, programs and activities. It is intended to be for informational purposes only, **and is not a contract.**

(Handbook, p.3) (emphasis added).

[23] To be vetted in discovery.

[24] Doe is not named as a defendant in Count I of the Amended Complaint; however, the explanation of this claim is germane to Doe's instant argument.

[25] The Handbook is a contract of adhesion drafted solely by or on behalf of SJU, and is not a negotiated contract between SJU and Harris. Harris had no input or say in the drafting of any provision or portion of the Handbook, and was not afforded the opportunity to modify or reject any provision or portion thereof.

This contradiction raises key issues, given Doe's instant characterization of the Handbook, contrasted with the Handbook's insisting it is not a contract, conjuring immediate questions of unresolved fact, whether the Handbook evidences all, some, or none of the alleged contractual obligations between SJU and Harris.

The law on this issue, itself, lacks clarity. Manning v. Temple Univ., 2004 WL 3019230, *12 (E.D.Pa., 2004), the Court held that the because a university handbook which stated that the rules, regulations, and information provided therein are announcements only, and not a contract between the university and its students, a dismissed student could not establish the existence of a contract which would obligate the school or other defendants to conform to certain specific procedures before the student could be dismissed. In Gjeka v. Delaware County Community College, 2013 WL 2257727, *14 (E.D.Pa. 2013), the Court, distinguishing Manning, denied the defendant college's motion to dismiss the plaintiff's breach of contract claim because the college's harassment policy did not contain a provision similar to the handbook provision relied upon by the plaintiff (i.e., that the handbook in no way serves as a contract between the student and university). The court determined the Harassment Policy could thereby fall under one or more of the categories of documents (such as student catalogues, bulletins, circulars, and regulations) which can create a contract between a student and a school. The Gjeka court, citing, Barr v. Cmty. Coll. Of Beaver Cnty., 968 A.2d 235, 238 (Pa.Cmwlth., 2009), noted that student catalogues, bulletins, circulars and regulations can become "part of" the contract, that questions of discipline have been addressed by courts and resolved on contract matters, and that although the basic relationship between a student and private university or college is contractual in nature, courts have been reluctant to apply strict contract concepts to the unique relationship that exists between students and universities or colleges. Id.

However, in Furey v. Temple University, 730 F.Supp.2d 380, 400-01 (E.D.Pa., 2010), the Court, although determining the plaintiff's breach of contract claim was deemed moot, agreed with Temple University that the plaintiff (student), who had been expelled after an off-campus altercation with an off-duty police officer, failed to show the creation of any contract. The Furey Court observed that the plaintiff did not point to any official materials to demonstrate the creation of a contract between himself and the university, and went on to note that "some courts have found creation of a contractual relationship in a university handbook or bulletin, but others have cautioned against finding such a contract which is unilaterally created by the university without bargaining. See, Slaughter v. Brigham Young University, 514 F.2d 622 (10th Cir., 1975) (cautioning against rigid application of contract theory in the relationship between students and universities); Fellheimer v. Middlebury College, 869 F.Supp.238 (D.Vt., 1994) (finding no legal bar to a breach of contract action where the terms of a college handbook ground the contract). Id. at FN 17.

Yet, in Dempsey v. Bucknell University, 2012 WL 1569826, *17 (M.D.Pa., 2012), wherein the plaintiffs (a male student and his mother) asserted eighteen counts against Bucknell relating to its handling of an alleged sexual misconduct claim asserted against the male student by a female student, the Court determined the plaintiffs sufficiently pleaded the existence of a contract, i.e., the Student Handbook. One of the plaintiffs' claims alleged that a contractual relationship existed between the male student plaintiff and Bucknell, and that Bucknell's Student Handbook outlined some of the terms of that relationship. Id. The plaintiffs alleged that Bucknell breached its contract with the plaintiff male student by failing to comply with the Student Handbook. Id.

The Dempsey Court further, and importantly, noted that the relationship between a private educational institution and an enrolled student is contractual in nature; therefore, a

student **can** bring a cause of action against the institution for breach of contract where the institution ignores or violates portions of a written contract. Id. (quotation marks and citation omitted). Where, as here, nature of the totality of the contract is in dispute based upon its ambiguity, Doe cannot simply argue the Amended Complaint must be dismissed as a matter of law. While, generally, contracts are afforded their plain meaning, the axiom does **not** apply where the terms of the contract are ambiguous, susceptible to one or more reasonable interpretations. See, Profit Wize Marketing v. Wiest, 812 A.2d 1270 (Pa.Super., 2002); Cordero v. Potomac Ins. Co. of Illinois, 794 A.2d 897 (Pa.Super. 2002). See also, Baney v. Eoute, 784 A.2d 132 (Pa.Super., 2002).

The Handbook, which SJU alone drafted, and which Doe offers to block Harris claims, expressly reads it is **not** a contract. Nonetheless, SJU and Doe aver that not only is the Handbook a contract, but it constitutes the totality of the contractual obligations owed by SJU to Harris. Doe highlights significant factual and legal issues arising from the Handbook, thus, inviting support for Harris' claim the Handbook, as a contract, is subject to judicial challenge. The Handbook is significantly and materially flawed, confusing, internally inconsistent, self-contradictory, and unclear as written. Such obvious problems within the document naturally lend themselves, as Harris has alleged, to problematic implementation and execution of the purported disciplinary procedures contained therein. Accordingly, Harris' pleading is sufficient to satisfy the notice standard, and both Doe's and SJU's position further exemplifies existing issues of fact and law in relation to which discovery should be permitted.

2. Harris has Sufficiently Pled the Existence of an Actionable Dispute Regarding SJU's Breach of the Contractually Implied Duty of Good Faith and Fair Dealing Thereby Allowing Judicial Challenge of Both the Contract and its Implementation

Pennsylvania law imposes the implied duty of good faith and fair dealing in **every** contract. Excelsior Ins. Co. v. Incredibly Edible Delites, No. 09-3198, 2009 WL 5092613, at *3 (E.D.Pa. Dec. 17, 2009). "This duty arises not so much under the terms of the contract but is said to arise because of the contract and to flow from it." Gray v. Nationwide Mut. Ins. Co., 422 Pa. 500, 223 A.2d 8, 12 (1966). The Third Circuit noted that "... Pennsylvania courts have cited Restatement (Second) of Contracts § 205 for the proposition that every contract has an implied term that the parties will perform their duties in good faith." Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 91 (3d Cir., 2000).

The breach of this duty forms part of Harris' breach of contract claim.[26] Excelsior Ins. Co., supra. Harris has sufficiently pled that SJU has failed to carry out, in good faith, its obligations and procedures set forth in the Handbook,[27] and that SJU has failed to deal fairly and in good faith with Harris in the course of initiating and implementing disciplinary proceedings and action against him.[28] As both Doe and SJU concede a contractual relationship between Harris and SJU, it follows that SJU assumed the duty of good faith and fair dealing with respect to its performance of obligations owed to Harris arising out of the contract. Thus, at this early stage of the proceedings, without discovery, this Court cannot determine the scope or extent of SJU's contractual obligations to Harris and, accordingly, Doe cannot employ the "contract" as a procedural roadblock to Harris' claims.

[26] This duty would be implied whether the contract between SJU and Harris is considered express, implied, or quasi-contract.

[27] Amended Complaint ¶¶82-83.

[28] Amended Complaint ¶¶82-83.

3. Harris Sufficiently Pleads Entitlement to Judicial Review and Examination of the Fundamental Fairness of and Due Process Afforded by SJU's Disciplinary Procedures and SJU's Implementation Thereof

Contrary to Doe's assertions, private schools are **not** exempt from adherence to principles of due process and fundamental fairness and may be subject to judicial review. Where "the process has been found to be biased, prejudicial or lacking in due process" courts may become involved in the internal discipline of private colleges. Boehm v. University of Pennsylvania School of Veterinary Medicine, 392 Pa.Super. 502, 514 (1990) (citing, Schulman v. Franklin and Marshall College, 371 Pa.Super. 345, 538 A.2d 49 (Pa.Super., 1998).

In Boehm, The Superior Court of Pennsylvania reversed an order preliminarily enjoining the School of Veterinary Medicine at the University of Pennsylvania (the "School") from enforcing disciplinary sanctions levied against two students accused of conduct "compatible with cheating." Id. The Court treated the School as a private school, and evaluated the School's "Code of Rights," the individual facets of the School's due process protections afforded to the accused students, and the School's implementation of them, in evaluating whether the disciplinary proceedings were "fundamentally fair." Id. at 514-19.

Notably, certain key protections were afforded by the disciplinary procedures applicable in Boehm, which were not provided by SJU to Harris, such as the right to cross-examine witnesses who testified against the accused students, and the right to call witnesses to testify on the accused students' behalf, among others.[29] These factors were significant to the Boehm

[29] In conducting its fairness analysis of the University's disciplinary proceedings, The Boehm court considered the following factors: (1) the accused students were given notice of the charges against them; (2) the students were given notice of the evidence against them; (3) the students were present at and participated in a hearing which lasted approximately ten and one-half hours; (4) at the hearing, the students were assisted by a faculty advisor; (5) at the hearing, the students were permitted to cross-examine witnesses who testified against them; (6) at the hearing, the students were permitted to call witnesses to testify on their behalf; and, (7) after the hearing, the panel prepared a detailed decision, including findings of fact, which comprise nearly two full pages of the Boehm opinion. Id. at 514-19. Additionally, the Boehm Court observed that a review of the panel's decision (repeated at length in the Boehm opinion), compelled the conclusion that the hearing was held before an **impartial** panel, which was another significant factor in the court's fairness analysis. Id. at 518-19.

Court's analysis and determination whether the School's disciplinary procedures complied with due process. Id. at 514-15.

By stark contrast, the students in Boehm received far greater and more significant due process protections than Harris for a far less grievous alleged offense. Harris was accused of sexual misconduct towards another student, whereas the Boehm students were accused of conduct "compatible with cheating;" sexual misconduct may be punishable as a crime under Pennsylvania statutes,[30] whereas conduct "compatible with cheating" between students is not. Certainly, where the alleged offense is of a potentially criminal nature, one can and should expect to be afforded, at a minimum, the process protections afforded to students accused of conduct "compatible with cheating." Harris was not afforded these due process protections by SJU; accordingly, an examination of the fundamental fairness and due process associated with SJU's disciplinary procedures is appropriate, and this Court has the power and authority to allow for same based upon the facts as currently pled (Amended Complaint, ¶83).

Doe's primary reliance upon Reardon v. Allegheny Coll., 926 A.2d 477 (Pa.Super., 2007) is both misplaced and incongruous with Psi Upsilon of Phila. v Univ. of Pa., 591 A2d. 755 (Pa.Super., 1991). In Reardon, the Superior Court upheld a dismissal of a student's breach of contract claim against Allegheny College, holding the student was merely asking the Court to "review the 'private, internal decisions' of the College - something that is forbidden by the terms of both The Compass [student handbook] and case law." Id. at 484. However, Reardon dealt merely with academic dishonesty - plagiarism by way of one student cheating off of another student. The instant action involves a potentially criminal charge. Under no circumstances could a disciplinary proceeding for the type of plagiarism in Reardon ever give

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[30] See, 18 Pa.C.S.A. §3121 et seq.

rise to a criminal charge by the state, or for that matter, give rise to a private tort action by an allegedly injured third party. A charge of academic dishonesty is obviously simply a matter existing solely between the institution and the student.

This distinction is important, and is actually supported by Psi Upsilon, supra. "The only caveat to this principle [difference between the process afforded to students of public institutions versus private ones] presumption of validity is that the disciplinary procedures established by the institution must be fundamentally fair." Psi Upsilon, 591 A.2d at 758. Harris has successfully and sufficiently alleged that the fairness protections found in Boehm were conspicuously absent in the instant case.

There are other key distinctions in Reardon which render it inapplicable to the instant action. First, unlike Harris, the (appellant) student in Reardon did **not** contend the language of the student handbook was ambiguous, confusing, internally inconsistent, self-contradictory, or inapplicable; to the contrary, the Court observed, finding central to its analysis, that:

> Appellant's breach of contract action is based on the premise that The Compass [student handbook] memorializes the terms of the contract between herself and Allegheny. Appellant does not raise any argument on the issue of whether these terms were bargained for or whether she was aware of the terms contained within The Compass before enrolling at Allegheny. When this fact is coupled with the fact that appellant does not allege The Compass is ambiguous, **it becomes apparent that appellant is asking us to review The Compass by reading it strictly**.

Reardon, 926 A.2d at FN3 (emphasis added). Conversely, in the instant action, Harris has argued and alleged that it is unclear to what extent the Handbook memorializes the terms of the contract between Harris and SJU, that the Handbook was not a bargained-for contract and instead was one of adhesion, and that the Handbook is anything but clear (emphasizing this point, as noted *supra*, the Handbook declares itself **not** to be a contract).

Second, significant to the Reardon Court's decision was its reliance upon and acceptance of the student handbook as being a valid and binding agreement (contract) between the student and college, including the disciplinary procedures contained therein. Id. The Court observed:

> **[w]hen a contract so specifies**, generally applicable principles of contract law will suffice to insulate the institution's internal, private decisions from judicial review.

Id. at 480-81 (citing, Murphy v. Duquesne Univ. of the Holy Ghost, 565 Pa. 571, 777 A.2d 418 429 (2001)) (emphasis added). However, as noted supra., at this early and premature stage of the proceedings, it cannot be said, with the requisite certainty required to grant a R.12(b)(6) motion, that there unequivocally exists an unambiguous contract between SJU and Harris which specifies that the internal procedures of SJU are to be insulated from judicial review. Even if such language were to be found in the Handbook, given the Handbook's declaration that it is "**not** a contract," such language and its implications would unquestionably and necessarily be subject to judicial review.

Third, to the extent the student in Reardon raised due process issues in addition to issues regarding the school's strict adherence to its disciplinary procedures, the Court's declining to engage in a due process analysis, in accordance with Boehm, supra., may have been in error. The Reardon Court elected to apply Murphy, supra., noting that despite significant distinctions[31], "we believe that the central premise of Murphy, providing that breach of contract actions brought by a party against a private college or learning institution should be treated as any other contract, should be adhered to." Id. at 481. While the Reardon Court offered lengthy discourse, premised upon the existence of a binding and uncontested contract, the Court

[31] "We recognize that Murphy v. Duquesne Univ. of the Holy Ghost, [citation omitted] can be distinguished from the matter *sub judice* for two reasons. First, Murphy was a contract action based on the allegation that Duquesne breached its employment contract with one of its professors. Second, Murphy was at the summary judgment stage when decided." Reardon, 926 A.2d at FN2.

conspicuously observed that due process was **not raised as an issue** in Murphy. See, Murphy, 777A.2d at 428 FN 8. ("Throughout, the parties have treated this action as involving allegations that a private employment contract was breached ... Murphy has not alleged that he was entitled to due process under the Pennsylvania or the United States Constitution. Nor has he argued by analogy that the University's procedures must be evaluated for fundamental fairness. See, Boehm v. University of Pennsylvania, 392 Pa. Super. 502, 573 A.2d 575, 580-81 (1990) (noting that some courts have permitted inquiry into whether proceedings to discipline students established by a private academic institution incorporated basic notions of due process and fundamental fairness)").

Accordingly, this Court must deny the Doe Motion and permit discovery, *inter alia*, relating to the fundamental fairness of and due process afforded by SJU's procedures as implemented with respect to Harris, especially in light of Harris' allegations addressing these very issues, and his calling into question SJU's procedures and implementation thereof regarding improper bias, personal animus shown towards him by Kalin, and the value of, and his preclusion from, cross-examination of witnesses.

Furey v. Temple University, supra, (decided after Reardon) further illustrates the critical need for procedural due process and fundamental fairness, especially when dealing with a charge such as rape or physical assault, as opposed to, e.g., cheating on an exam or assignment.

In Furey, 730 F.Supp.2d at 384, the Court denied defendant Temple University's motion for summary judgment with respect to the plaintiff's claim that Temple and individual defendants violated the plaintiff's right to procedural due process in the expulsion process. Id. at 384. The plaintiff argued that his expulsion violated procedural due process in a variety of ways, amounting to a challenge to the way the university's code of conduct was applied to him. Id. at 395. The Court grouped those claims into seven categories: bias and impartiality; departures

from the code of conduct; right to remain silent; no right to counsel or to cross-examination; absence of witnesses and alleged perjured testimony; consideration of evidence; and, appeal and process of decision. Id. The Court concluded that taking all of the facts in the light most favorable to the plaintiff and considering all the claims of a due process violation as a whole, the Court could not grant summary judgment to the defendants on the due process claims. Id.

In the instant action, the facts, as pled,[32] are sufficient to raise a reasonable inference that the Handbook (and other express or implied contractual obligations), SJU's implementation of its disciplinary procedures, and its employees' conduct towards Harris, reveal gender bias, prejudice and the clear absence of fundamental fairness and due process associated with SJU's handling of Doe's claim against Harris. Harris has sufficiently alleged, with the necessary plain statement of a claim, how the Handbook and SJU's conduct towards Harris lacked the necessary protections and principles of due process and fundamental fairness required of private universities. All well-pled facts must be accepted as true at this stage of the proceedings, and all reasonable inferences must be drawn in Harris' favor. Hall v. Raech, supra, 2009 WL 811503, *2. Accordingly, it is appropriate for this Court to examine SJU's disciplinary proceedings and due process protections, considered significant by the Superior Court in Boehm,. Despite her argument to the contrary, Doe cannot shield herself from liability, preliminarily thwarting a well grounded attack upon SJU's disciplinary procedures or the implementation thereof from judicial scrutiny, simply by virtue of SJU's private school status. Pennsylvania law does not support such an outcome, and Harris has sufficiently satisfied the threshold pleading standards to invoke judicial challenge of the due process protections and fundamental fairness of SJU's disciplinary procedures and implementation thereof.

[32] Amended Complaint, ¶83.

C. Doe's Statements are not Protected by Judicial or Quasi-Judicial Immunity

Doe argues her defamatory statements enjoy absolute immunity because they were made in connection with a quasi-judicial proceeding.[33] Not only ironic, considering the overwhelming lack of fundamental due process in SJU's disciplinary process,[34] the assertion is simply incorrect.

The Third Circuit determined defamatory statements made during private internal grievance proceedings doe not enjoy absolute immunity.[35] Overall v. University of Pennsylvania, 412 F.3d 492 (3d Cir., 2005). In Overall, the plaintiff filed a defamation action against the defendants for allegedly defamatory unsworn statements made during the University's Faculty Grievance Procedure. Id. at 495-96. While the District Court ruled the University's internal grievance proceedings were quasi-judicial, cloaking the statements made therein with absolute immunity (Id. at 496), the Third Circuit reversed, holding that quasi-judicial status requires more than simply applying facts to law. Id. 496-97. Instead, government involvement is a necessary predicate to quasi-judicial status. Id. at 497. The Third Circuit found support in Milliner v. Enck, 709 A.2d 417 (Pa.Super., 1998), a case cited by Doe, wherein the Superior Court addressed thirteen (13) cases discussing quasi-judicial matters, each of which involving a grievance proceeding before a government entity or private entity operating pursuant to a state or federal statute. Id.; see also, Milliner, 709 A.2d at 419 n.1. Here, SJU's disciplinary proceedings are entirely private with no participation by any governmental entity. Furthermore, SJU's disciplinary proceedings do not involve a private party acting pursuant to state or federal

[33] Doe Motion, p, 16.

[34] Doe Motion, pp. 14-15.

[35] Doe claims school administrative hearings constitute quasi-judicial proceedings under Pennsylvania law citing Schanne v. Addis, 898 F.Supp. 2d 751 (E.D.Pa., 2012). For the reasons discussed *infra*, Schanne is inapplicable to the facts of this case.

law. Therefore, the proceedings do not qualify as quasi-judicial such that Doe's defamatory statements immune from attack.

Doe's reliance upon Schanne v. Addis, 898 F. Supp. 2d 751 (E.D.Pa., 2012) is misplaced for two critical reasons. First, in Schanne, unlike Harris, the plaintiff conceded the defamatory statements related to a quasi-judicial proceeding. Id. at 755-56. Second, Schanne did not address the issue presented in the instant action, *i.e.* whether a purely private internal disciplinary proceeding constitutes a quasi-judicial proceeding, as Schanne involved a required Loudermill hearing.[36] Id. at 754-55. Conversely, SJU's disciplinary proceedings are entirely private proceedings, not required by state or federal law.

In addition to the lack of government participation, the Court in Overall v. University of Pennsylvania, supra. relied upon the absence of sworn testimony and lack of a transcript or record of the proceedings in determining private internal grievance proceedings are not quasi-judicial. 412 F.3d at 498. The absolute privilege in judicial and quasi-judicial proceedings "exists because the courts have other internal sanctions against defamatory statements, such as perjury or contempt proceedings." Binder v. Triangle Publ'ns, Inc., 275 A.2d 53, 56 (Pa., 1971). Without the important safeguards provided by sworn testimony and procedural due process, private internal grievance proceedings, such as SJU's disciplinary proceeding, simply do not qualify as quasi-judicial proceedings such that absolute immunity applies.

In a frail attempt to support her unwarranted position, Doe argues applying the absolute privilege to proceedings such as SJU's promotes the privilege's purpose.[37] This is not true. "The purpose of the privilege is 'to afford [parties] freedom of access to the courts,' to 'encourage

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[36] Pursuant to the Supreme Court's holding in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985), a pre-termination hearing is mandatory for public employees with a constitutionally protected interest in their employment.

[37] Doe Motion, p. 18.

[witnesses'] complete and unintimidated testimony in court,' and 'to enable [counsel] to best represent his client's interests.'" Schanne, 898 F.Supp.2d at 757 (citing, Binder v. Publ'ns, Inc., 275 A.2d 53, 56 (Pa., 1971)) (emphasis added). Doe concedes as much as she cites Pawlowski v. Smorto, 588 A.2d 36, 42 (Pa.Super., 1991), holding that the privilege "ensure[s] free and uninhibited access to the judicial system."[38] Here, access to, and testimony in, court is not at issue. To the contrary, witnesses, including complainants, in private internal grievance proceedings do not provide sworn testimony, and no record or transcript of the proceeding is maintained. This key distinction is what differentiates quasi-judicial proceedings from SJU's disciplinary proceedings. As noted by the Overall Court, quasi-judicial proceedings, have mechanisms to protect against defamatory statements such as perjury and contempt proceedings. These safeguards, as well as fundamental procedural due process protections, exist in quasi-judicial proceedings but are utterly lacking in private internal grievance proceedings such as SJU's. Thus, SJU's disciplinary proceedings are not quasi-judicial and statements made therein are not privileged. Accordingly, Doe's motion to dismiss Harris' claims of defamation and false light must be denied.

D. The Doe Motion Does not Specifically Move to Dismiss Harris' Claims of Intentional Infliction of Emotional Distress (Count VII) and Intentional Interference with Contractual Relations (Count VIII [sic, IX] Which, by Omission, Must Survive

The Doe Motion, on its face, principally challenges all of Harris' claims, as against Doe, on the grounds the Handbook, as the only contract, serves as Harris' sole remedy for his grievances. As demonstrated, supra, Doe's arguments' fail. Additionally, the Doe Motion addressed Harris' defamation and false light claims. The Doe Motion, however, does not specifically address Harris' claims of intentional infliction of emotional distress ("IIED") (Count

[38] Doe Motion, p. 18 (emphasis added).

VII), asserted against Doe (as well as against SJU and Kalin); and, Harris' claim of intentional interference with a contractual relations (Count VIII [sic, IX]) against Doe, only. Accordingly, Harris is under no obligation to offer legal support for these well pleaded Counts.[39]

Accordingly, to the extent otherwise incorporated, Doe's motion to dismiss Harris' claims of IIED and of intentional interference with contractual relations, as against Doe, must be denied.

IV. CONCLUSION

For all of the foregoing reasons, the Doe Motion must be denied and Doe compelled to answer the Amended Complaint.

Respectfully submitted,

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[39] Notwithstanding, in his opposition to the SJU Motion, Harris, at §IIIH, details the sufficiency of his allegations in support of his IIED claim as against SJU and Kalin.