IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN HARRIS,	:	
Plaintiff,	:	**No. 2:13-cv-3937-LFR**
v.	:	
SAINT JOSEPH'S UNIVERSITY, JOSEPH KALIN, and JANE DOE,	:	
Defendants.	:	

O R D E R

AND NOW, this _____ day of _____, 2013, after consideration of Defendants Saint Joseph's University and Joseph Kalin's Motion to Dismiss (Doc. No. 18), and all responses thereto, it is **ORDERED** that the motion is **GRANTED**. Plaintiff Brian Harris' claims against Defendants Saint Joseph's University and Joseph Kalin are **DISMISSED WITH PREJUDICE**.

BY THE COURT:

_____
Hon. L. Felippe Restrepo

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BRIAN HARRIS,	
Plaintiff,	**No. 2:13-cv-3937-LFR**
v.	
SAINT JOSEPH'S UNIVERSITY, JOSEPH KALIN, and JANE DOE,	
Defendants.	

DEFENDANTS SAINT JOSEPH'S UNIVERSITY AND JOSEPH KALIN'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

For the reasons set forth in their Memorandum of Law filed concurrently with this Motion, Defendants Saint Joseph's University and Joseph Kalin move to dismiss Plaintiff's claims against them for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted,

SAUL EWING LLP

Date: August 16, 2013

/s/ James A. Keller
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Defendants.	:	

DECLARATION OF JOSHUA W. B. RICHARDS

I, Joshua W. B. Richards, declare as follows:

1) I am an attorney at law licensed to practice in the State of Pennsylvania, am admitted as counsel for Defendants Saint Joseph's University and Joseph Kalin (together, the "University Defendants") in this action, and am associated with the law firm of Saul Ewing, LLP. Unless otherwise indicated, I have personal knowledge of the matters stated herein, and I could, and would, competently testify thereto if called upon as a witness.

2) Attached as Exhibit A to this Declaration is a true and correct copy of the 2012/2013 Saint Joseph's University Student Handbook, referred to as the "Handbook" in the Memorandum of Law filed in support of the University Defendants' Motion to Dismiss.

3) Attached as Exhibit B to this Declaration is a true and correct copy of the United States Department of Education Office for Civil Rights Dear Colleague Letter, dated April 4, 2011, referred to as the "Dear Colleague Letter" in the Memorandum of Law filed in support of the University Defendants' Motion to Dismiss.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of August, 2013.

/s/ Joshua W. B. Richards
Joshua W. B. Richards
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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Plaintiff,	:	**No. 2:13-cv-3937-LFR**
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SAINT JOSEPH'S UNIVERSITY, JOSEPH KALIN, and JANE DOE,	:	
Defendants.	:	

DEFENDANTS SAINT JOSEPH'S UNIVERSITY AND JOSEPH KALIN'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendants Saint Joseph's University and Joseph Kalin submit this Memorandum of Law in support of their Motion to Dismiss Plaintiff Brian Harris' Complaint in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.

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PRELIMINARY STATEMENT

This case arises from an internal administrative disciplinary investigation and student conduct hearing at Saint Joseph's University (the "University"), a private, Catholic Jesuit university. As a result of the administrative investigation and hearing, plaintiff and University student Brian Harris ("Harris") was found responsible for sexually assaulting defendant and University student Jane Doe ("Doe").

Harris' federal lawsuit suggests that during the internal administrative disciplinary process he was entitled to the rights of a criminal defendant, or a civil litigant, or both. This fundamental misunderstanding of the law carries through Harris' Complaint, and requires its dismissal. Harris also heavily, and quite remarkably, ties his fortunes to a series of text messages that he believes "plainly" mean Doe consented to have sex with him later that same night. To be crystal clear, in Brian Harris' view, text messages where Doe uses the word "cuddle" and invites Harris to "sleep over" mean that Doe gave Harris preemptive, continuing, and unbreakable ongoing consent to sexual intercourse for hours thereafter. That this rather astounding and frankly disheartening worldview is being asserted in the year 2013 is of no moment, ultimately, as this court is not the forum for relitigating the underlying merits of a campus disciplinary matter. However, this does indicate the mindset behind the Complaint, from which any dissenting view becomes a personal and actionable attack on Harris.

In truth, the legal issues here are much more simple. Did the University set forth its procedures clearly, and did it follow them? It did, even as pled by Harris – he just does not like the outcome. Harris' Complaint must be dismissed.

STATEMENT OF ALLEGED FACTS

Although the University strongly disagrees with many of the facts asserted by Harris in his Complaint, it and the Court are compelled to accept Harris' well-pleaded allegations as true for purposes of this motion. In his Complaint, Harris alleges that in the autumn of 2012, both Harris and Doe were students at the University. Compl. ¶¶ 5, 11. On the afternoon of November 16, 2012, Harris and Doe began exchanging text messages about meeting up that night. Compl. ¶¶ 15-18. Harris and Doe corresponded via text message over the course of approximately seven hours, into the early morning of November 17, and their texting culminated in Doe inviting Harris to her dorm room to "cuddle" and to "sleep over". Compl. ¶¶ 23-27; Compl. Ex. A at 5.

Harris alleges that when he arrived in Doe's dorm room, Doe invited him to lie down on the bed, and the two began kissing and engaging in foreplay. Compl. ¶ 30. Harris then asked Doe whether he should get a condom, to which Doe replied in the affirmative. Compl. ¶ 31. Harris alleges that the two then had consensual sex. Compl. ¶ 32. Following intercourse, Doe got up from the bed to go to the bathroom, then returned after a few minutes to the bed, where the two slept until morning. Compl. ¶¶ 34-35. When Doe's roommate returned on the morning of November 17, 2012 at approximately 10:00 a.m., Harris hugged and kissed Doe before leaving the room. Compl. ¶¶ 36, 43.

Later on November 17, Harris was approached by the Resident Area Manager for Doe's dormitory and told that he was being investigated for engaging in nonconsensual sexual relations with Doe. Compl. ¶ 37. On November 19, Harris met with moving defendant and University Public Safety officer Joseph Kalin ("Kalin"), who was responsible for investigating Doe's allegations. Compl. ¶¶ 38-39.

Harris contends that during the investigation, he learned that while Doe was in the bathroom on the night in question, she met another student, O.T. Compl. ¶ 40. Doe told O.T.

that she had been intimidated into having sex, and that she did not want to report the incident. Compl. ¶ 41. O.T. purportedly insisted that Doe report the incident, and told Doe that if Doe did not report the incident, O.T. would. *Id.* Following the investigation of Doe's allegations against Harris, a report was prepared by the University charging Harris with, among other things, the forcible rape of Doe. Compl. ¶ 67. Harris was shown the report at a prehearing conference at some time prior to December 4, 2012. *Id.* On December 4, a University Community Standards Board hearing was held before a panel of five members of the University community (the "Panel") to evaluate the charges against Harris. Compl. ¶ 68. At the hearing, Doe, Harris, and O.T. were separately questioned by the Panel. *Id.* Harris was not provided with an opportunity to confront Doe directly at the hearing, *id.*, and the record before the Panel purportedly did not include the text messages exchanged between Harris and Doe. Compl. ¶ 69.

The Panel found Harris responsible for sexually assaulting and disrespecting Doe, and Harris was suspended from the University. Compl. ¶ 70. Harris appealed the Panel's decision, challenging the Panel's decision as being "against the great weight of the evidence," and, in particular, challenged "the Panel's failure to review the text messages, which, on their face, contradicted Doe's baseless accusations of involuntary sexual contact." Compl. ¶ 71. While his appeal was pending, Harris completed his first semester of coursework and returned home for the winter holiday. Compl. ¶ 72. Harris returned to campus in early 2013, and on January 11, 2013 the appeal board remanded Harris' proceedings to the Panel for further consideration of the text messages. Compl. ¶ 75. On January 18, the Panel convened for a second hearing, at which both Harris and Doe were questioned by the Panel regarding the text messages. Compl. ¶ 76. Despite the "plain meaning of the text messages," following the January 18 hearing, the Panel upheld its earlier findings against Harris. Compl. ¶ 77. Harris was not allowed a further appeal. *Id.* The

Panel imposed a sanction of one year's suspension from the University. Harris was notified of the Panel's decision on January 19, and asked to remove his belongings from the dormitory and leave campus promptly. Compl. ¶ 78.

The University issues to all of its students a Student Handbook (the "Handbook").[1] The Handbook sets forth, *inter alia*, standards of conduct for students, the University's administrative policies and procedures for investigating and adjudicating internal complaints made by members of the University community, and policies and procedures related to the Community Standards process. Compl. ¶ 44. Pursuant to the Handbook, a complaint of sexual assault of any nature is required to be reported to the Office of Public Safety and Security. Compl. ¶¶ 45-46; Richards Decl., Ex. A at 28, 103-05. Following receipt of such a complaint, the Office of Public Safety and Security is charged with conducting a prompt and thorough investigation, which culminates in the preparation of a factual report for presentation to the Student Life Administrator. Compl. ¶ 46; Richards Decl., Ex. A at 107.

Where a student-on-student sexual assault is alleged, the Handbook provides that the Community Standards process will govern the adjudication of the complaint. Compl. ¶ 48; Richards Decl., Ex. A at 107-08. Specifically, the complaint will be resolved through a hearing before a panel of the Community Standards Board (the "CSB"), or by an Administrative Hearing Officer. Compl. ¶ 49; Richards Decl., Ex. A at 32. The student or other University community member alleging misconduct is known as the complainant; the student who engaged in the alleged misconduct is known as the respondent.

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[1] A true and correct copy of the Handbook in effect during the time period alleged in the Complaint is attached to the Declaration of Joshua W. B. Richards ("Richards Decl.") as Exhibit A. On a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b), a Court is free to examine not just the pleadings, but any documents attached to or referenced in the pleadings. *See Mele v. Fed. Reserve Bank of N.Y.*, 359 F.3d 251, 256 n.5 (3d Cir. 2004).

When the CSB receives notice of a violation, it sends a University email to the respondent outlining the process of the prehearing and hearing process. Compl. ¶ 52; Richards Decl., Ex. A at 34. Prior to the hearing, prehearing meetings are scheduled for both the complainant and the respondent. Richards Decl., Ex. A at 34. In the time period between the initial complaint of misconduct and the hearing, the University is empowered by the Handbook to put in place interim remedial measures to protect all parties, including suspension and other lesser remedies. Compl. ¶ 54; Richards Decl., Ex. A at 31. The Handbook sets out clearly how CSB hearings differ from judicial proceedings, and the standards that apply to the CSB's consideration of the issues. These points are critical in considering the current motion to dismiss, and have been adopted and followed by courts throughout the country when evaluating private university disciplinary proceedings:

> Community Standards proceedings are not criminal or civil proceedings, but rather, internal administrative determinations of violations of institutional policy. Civil or criminal rules of procedure and evidence do not apply. . . . Information, including hearsay, may be considered if material to the issue, not unduly repetitious, and the sort of information on which responsible persons are accustomed to rely in the conduct of serious affairs. After receiving information at the hearing, the . . . Community Standards Board shall determine, as to each respondent and as to each potential violation of the Community Standards, whether the respondent[] is responsible for violating the Community Standards. The . . . CSB evaluates the information received and considers credibility of information and witnesses when determining if the Community Standards were violated. This determination shall be based upon the facts of the conduct alleged, and whether it is more likely than not that the student is responsible for the alleged violation(s). Subsequent reviewers shall not determine anew whether there was a Community Standards violation.

Richards Decl., Ex. A at 35-36; *see also* Compl. ¶¶ 55-56, 60.[2]

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[2] The "more likely than not" standard is consistent with and mandated by policy guidance from the Department of Education. On April 4, 2011, the U.S. Department of Education, Office for Civil Rights ("OCR") issued a "Dear Colleague" Letter which represented OCR's first substantive guidance regarding sexual harassment under Title IX since 2001 (the "Dear Colleague Letter"). A true and correct copy of the Dear Colleague Letter is

[FOOTNOTE CONTINUED ON NEXT PAGE]

If it finds the respondent responsible for sexual assault, the CSB panel can impose sanctions including "removal from the residence community, removal from participation in extracurricular activities, suspension from the University and/or expulsion from the University." Compl. ¶ 61; Richards Decl., Ex. A at 110; *accord id.* at 36-38. Following a CSB determination, either the complainant or respondent may appeal the panel's decision to a University administrator within three business days of written notification of the outcome. Compl. ¶ 63; Richards Decl., Ex. A at 39. Grounds for appeal are limited to when: (1) a material failure to follow the procedures of the Community Standards process affected the outcome; (2) there is new information, sufficient to alter a decision, that was not reasonably available at the time of the original hearing; or (3) the sanction(s) was not consistent with the Community Standards violation(s). *Id.* Should one of these grounds be properly stated, the administrator responsible for considering the appeal may (1) replace the sanction with another which may be more severe, less severe, or otherwise different; (2) remand the case for reconsideration; (3) direct the case for a new hearing. Compl. ¶ 64; Richards Decl., Ex. A at 39.

Here, Harris filed his appeal, suggested he had new information that should be considered (the text messages), and was granted a new hearing so the CSB could consider those text messages. Compl. ¶¶ 75-77. In other words, the process worked as stated.

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attached to the Richards Declaration as Exhibit B. The Dear Colleague Letter provided two pieces of policy guidance germane to this lawsuit: (1) it stated OCR's view that recipients of federal funding must apply a preponderance of the evidence or "more likely than not" standard in evaluating claims of sexual assault, Richards Decl., Ex. B at 10; and (2) schools are "strongly discouraged" from allowing alleged perpetrators to directly cross-examine alleged victims during on-campus administrative hearings, *id.* at 12. In other words, the specific procedural issues about which Harris complains are mandated by the federal agency responsible for enforcing universities' compliance with Title IX. A federal agency's guidance document is entitled to substantial deference in interpreting federal regulations and statutes. *See, e.g., Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). In light of the Dear Colleague Letter, the University's implementation of a preponderance of the evidence standard and its policy limiting an accused's right to cross examine his or her accuser simply cannot form the basis for a Title IX claim – these procedures are not only not violative of the law, they are mandated by it.

LEGAL STANDARD

Where a plaintiff does not plead sufficient facts to support the claims he asserts in his complaint, a Court should dismiss the claims pursuant to Federal Rule of Civil Procedure 12(b)(6). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice" to defeat a Rule 12(b)(6) motion. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Applying *Iqbal* and *Twombly*, the Third Circuit has set forth a three-part analysis that the court must conduct in evaluating whether allegations in a complaint survive a 12(b)(6) motion to dismiss. *See Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010). First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." *Id.* Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* Finally, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Id.* While a district court must accept all of the complaint's well-pleaded facts as true, a complaint must do more than allege a plaintiff's entitlement to relief—it must "show" such an entitlement with its facts. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009).

ARGUMENT

The Supreme Court has cautioned that "courts should refrain from second-guessing the disciplinary decisions made by school administrators." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999); *see also Stefanowicz v. Bucknell Univ.*, No. 10-CV-2040, 2010 WL 3938243, at *5 (M.D. Pa. Oct. 5, 2010) (Kane, C.J.). Harris' Complaint asks this Court to disregard the Supreme Court's cautionary instruction and rehash a private, internal administrative disciplinary process and a result with which Harris is unsatisfied. Harris wants this federal court, in other words, to act as a super-administrator and policy maker at Saint

Joseph's University and dictate how the University runs its campus. Courts have consistently refused to assume this role, and this Court should do the same. Harris' claims should be dismissed in their entirety.

I. Count I of the Complaint (Breach of Contract) Should be Dismissed for Failure to State a Claim.

To state a claim for breach of contract, a plaintiff must adequately plead (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resulting damages. *Chemtech Int'l, Inc. v. Chem. Injection Techs., Inc.*, 170 F. App'x 805, 807 (3d Cir. 2006). The University concedes that "the relationship between a private educational institution and an enrolled student is contractual in nature," *Swartley v. Hoffner*, 734 A.2d 915, 919 (Pa. Super. Ct. 1999),[3] and here, the terms of that contract are outlined in the Handbook. Because Harris has failed to provide any well-pleaded allegations of breach, his claim fails.

It is axiomatic that a party's obligations under a contract are limited to the terms of the contract. Put more concretely, the University was obligated to investigate and adjudicate Doe's allegations against Harris in a manner consistent with the Handbook. Harris does not assume the constitutional rights of a criminal defendant, nor the civil procedure rights of a civil litigant, when he is involved in an internal administrative university disciplinary matter. He gets what the University promises; no more, no less.

A line of case law extending back ninety years bears out this conclusion. Pennsylvania courts have consistently held that the relationship between a student and a privately funded college is "strictly contractual in nature." *Reardon v. Allegheny Coll.*, 926 A.2d 477, 480 (Pa.

[3] Pennsylvania substantive law governs Harris' breach of contract claim. Subject matter jurisdiction over Harris's breach of contract claim arises from diversity jurisdiction, and the substantive law of the forum state thus applies. *Nationwide Mut. Ins. Co. v. Buffetta*, 230 F.3d 634, 637 (3d Cir. 2000). To the extent that there is any dispute that Pennsylvania law applies, and, moreover, the Court were to find that a conflict existed, Pennsylvania law would still apply as Pennsylvania has the "most interest in the problem," given that all of the conduct asserted in the Complaint occurred in Pennsylvania. *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 226-27 (3d Cir. 2007).

Super. Ct. 2007); *see also Barker v. Bryn Mawr Coll.*, 122 A. 220, 221 (Pa. 1923); *Psi Upsilon of Phila. v. Univ. of Pa.*, 591 A.2d 755, 758 (Pa. Super. Ct. 1991); *Boehm v. Univ. of Pa. Sch. of Veterinary Med.*, 573 A.2d 575, 579 (Pa. Super. Ct. 1990). In *Psi Upsilon*, the Superior Court explained the difference between the process to be afforded to students at public universities compared to students at private institutions:

> In the university context due process is defined according to whether the institution is public or private. . . . [T]he law is fairly well established that in a state owned college or university, due process requires notice and some opportunity for hearing before a student is disciplined. However, the law pertaining to judicial review of disciplinary proceedings at private colleges and universities is not so well settled. Generally, it has been said that courts are more reluctant to interfere in the disciplinary proceedings of a private college than those of a public college. . . . A majority of courts have *characterized the relationship between a private college and its students as contractual in nature.* **Therefore, *students who are being disciplined are entitled only to those procedural safeguards which the school specifically provides.***

591 A.2d at 758 (citing *Boehm,* 573 A.2d at 579) (emphasis in original) (internal marks omitted).

In Paragraph 82 of his Complaint, Harris lists no fewer than twenty four purported breaches of the Handbook. *See* Compl. ¶ 82(a)-(x). Quantity does not equal quality, however, and drafting a long Complaint does not satisfy *Iqbal*. Not one of Harris' twenty four statements of purported breach is sustainable as a matter of law. *See Fowler*, 578 F.3d at 210-11. Instead, Harris is complaining about the procedures that the University provided to him, a theory that is completely unsustainable in light of the nine decades of Pennsylvania case law noted above.

Harris' contract allegations fail at the outset for a lack of specificity. Harris repeats generalized allegations of a failure to provide "adequate" or "proper" policies, without reference to what the Handbook actually says, and without explaining in what way the policies are

"inadequate" or "improper". With this global pleading deficiency noted, the University will now specifically address each purported breach enumerated in Paragraph 82 of the Complaint.

¶ 82(a) (Inadequate Policies). The Handbook incorporates all policies applicable to the investigation and adjudication of complaints of student misconduct, including violations of policies prohibiting sexual misconduct. When Harris matriculated at the University, he accepted those policies and procedures as governing his relationship with the University. *Accord* Compl. Count I. Harris does not plead any facts that explain what policies or procedures he contends are inadequate, or why. The University *did* provide Harris with notice of precisely what its policies were; he, like all University students, was issued the Handbook, as Harris himself pleads. Compl. ¶ 44. This averment does not set forth any breach. *See Psi Upsilon*, 591 A.2d at 758.

¶ 82(b) (Inadequate Notice of Policies). This averment is directly contradicted by Harris' own Paragraph 44, as noted above. Harris also specifically pleads that he had a prehearing meeting where the administrative policies and procedures were further explained to him. Compl. ¶ 67. In all, just stating that "I had inadequate notice," without providing any plausible factual basis for that statement, is not sufficient to state a claim.

¶ 82(c) (Cursory Investigation). The Handbook provides, and Harris himself acknowledges and alleges, that the University is obligated to undertake a "prompt and thorough" investigation when a violation of the University's policies prohibiting sexual assault is reported. *See* Compl. ¶ 46. Other than the conclusory statements in Paragraph 82(c), Harris does not allege any facts to support his conclusory inference that either (1) the investigation was not thorough; or (2) the investigation was biased. Likewise, Harris does not allege any facts supporting the inference that he is entitled, under the terms of the Handbook, to any specific manner of administrative investigation, apart from one that is prompt and thorough. Even if

Kalin compared Harris to Jerry Sandusky during the investigation (which is denied), the Complaint fails to explain how such a statement breaches the Handbook.

¶ 82(d) (Investigative Report). Harris cannot and does not point to any Handbook provision that entitles him to a particularly-worded investigative report. In fact, Harris pleads and acknowledges that the report was prepared and shown to Harris at a prehearing conference, at which time Harris had an opportunity to review the report. Compl. ¶ 67. Harris further notes that the report shown to him at the prehearing meeting was supplemented with statements from two additional witnesses prior to his hearing. *Id.* Harris' bald allegation that this report was inadequate, without more, cannot suffice to state a claim for breach of contract.

¶ 82(e) (Notice of Offenses). Harris concedes that he was given notice of an investigation against him in connection with Doe's allegations. Compl. ¶¶ 37, 39. He concedes that he attended a prehearing meeting to discuss the specific charges against him. Compl. ¶ 67. Harris affirmatively pleads that the investigative report he was shown at his prehearing meeting included and described a charge for forcible rape in violation of the University's policies. *See id.* To the extent Harris is contending he was not provided with fair notice of what "forcible rape" means (if this would even be required), the Handbook defines it at page 104. To the extent Harris is contending he did not understand the parameters of "sexual assault" as prohibited by University policy, *see* Compl. ¶ 70, it too is defined at page 104 of the Handbook. In the absence of specific factual allegations regarding what notice the University failed to provide -- and Harris provides none -- this superficial averment cannot form the basis for any breach.

¶ 82(f) (Interim Suspension). As Harris specifically pleads, the Handbook provides that the University is empowered to put in place interim remedial measures while charges are pending, which can include suspension and conditional attendance, and without a hearing.

Compl. ¶ 54; Richards Decl., Ex. A at 31. In other words, the University did exactly what it told Harris, and every other student, it could do. *See Psi Upsilon*, 591 A.2d at 758. This purported basis for breach is flatly contradicted by Harris' own allegations.

¶ 82(g). This allegation is vague and confusing, and states no breach of contract.

¶ 82(h) (Inadequate Investigation). This is duplicative. *See* analysis of Paragraph 82(c).

¶ 82(i) (Information Gathering). Harris pleads no facts in his Complaint regarding the University's efforts, or lack thereof, to "locate, preserve, and/or present" relevant information, what information he contends was not located, preserved, or presented, nor does he plead any facts suggesting that anything in the Handbook gives rise to such a duty.

¶ 82(j) (Information). *See* ¶ 82(i). Harris pleads that he **was** provided with a copy of the investigative report prior to the hearing, and that he chose not to read it in its entirety. Compl. ¶ 67.

¶ 82(k-m) (Process). These allegations illustrate Harris' confusion between criminal law and an internal administrative disciplinary process. *See Psi Upsilon*, 591 A.2d at 758; *see also* Richards Decl., Ex. A at 35-36. Harris' subjective expectations of "due process" do not control the inquiry. In fact Harris specifically pleads that the Handbook does *not* provide for an opportunity to "confront and question" a complainant. Compl. ¶¶ 55-56. Harris cannot claim that the University has breached a contractual provision he concedes does not exist.

¶ 82(n) (Evidence/Text Messages). Nowhere in Harris' Complaint does he plead where the Handbook says that any one student gets to dictate the presentation of evidence to, or the consideration of evidence by, the CSB. Compl. ¶¶ 71, 75-76. More fundamentally, the text messages *were* considered. Harris affirmatively pleads that he was afforded the right to an

appeal, which was successful, and the remand after appeal was specifically focused on consideration of the text messages. Compl. ¶¶ 75-76. Both Harris and Doe were questioned about the text messages. Compl. ¶ 76. Notwithstanding the text messages, the panel upheld its finding of responsibility. Compl. ¶ 77. It is difficult to understand how the University could be found to have breached any duty to Harris arising from an alleged failure to consider the text messages, even if such a duty were to exist, since Harris himself pleads and acknowledges that the text messages *were considered.*

¶ 82(o) (Incident Report). Harris does not plead any facts that establish an inference that the University would breach its contract with a student by considering, among other evidence, the investigative report that Harris himself pleads the University is required to create in connection with its adjudication of a complaint of sexual assault. *See* Compl. ¶ 46.

¶ 82(p) (Hearing). This conclusory allegation seeks to place on the University a burden to conduct its hearing process in the manner Harris imagines it should be, rather than the manner laid out by the Handbook. Harris pleads the various burdens and evidentiary standards governing the hearing process, *see* Compl. ¶¶ 55-61; *see also* Richards Decl., Ex. A at 35-36. Harris pleads no facts supporting an inference that the University failed to comply with these standards. What Harris seems to be arguing here is not that the Handbook/contract was breached, but that he does not like the terms to which he agreed.

¶ 82(q) (Training). Harris' Complaint lacks a single allegation relating to the training or experience of the CSB hearing panel, and also fails to explain, contractually, where that duty comes from.

¶ 82(r-t) (Evidence/Proof). Each of these allegations is flatly contradicted elsewhere in the Complaint. Harris acknowledges and pleads, at paragraph 59, that under the University's

policies the "accused is not permitted [by the Handbook] to be accompanied by parents, counsel, or by any person other than a Community Standards advisor during the hearing." Likewise, Harris pleads and acknowledges that the Handbook requires a "more likely than not" standard be applied at a CSB hearing. Compl. ¶ 60. Harris' view that this standard of proof is "lax" has no legal weight and does not state a breach of contract claim. Finally, remanding Harris' case to the CSB board following his appeal is entirely consistent with Harris' own allegations as to how the appeal process should work. Compl. ¶ 64. There is no breach pled here.

¶ 82(u) (Timing). Harris pleads no facts regarding the time in which the University is required to resolve a claim of sexual assault. Doe reported a sexual assault on November 17, 2012. Compl. ¶ 37. A hearing was held two weeks later, on December 4, 2012, with Thanksgiving break occurring in between. Compl. ¶ 68. Harris pleads no facts regarding the date he was alerted of the CSB's decision, *accord* Compl. ¶ 70, but he does plead that during the pendency of his appeal, he was able to complete the semester's coursework. Compl. ¶ 72. In any case, no later than January 11, 2013, Harris' appeal was granted for the limited purpose of a remand, and a follow-up hearing was held exactly one week later. Compl. ¶ 76. Harris pleads that he was notified of the remand hearing result no later than two days later, on January 19, 2013. Compl. ¶ 78. As pled, then, the entire process -- from complaint, to hearing, to appeal, to remand hearing, to final disposition -- took sixty days, a significant portion of which occurred over the winter holidays. *Id.* Harris pleads no duty arising from the Handbook that requires the University to conduct such proceedings in *any* specific amount of time. In any event, it strains credulity to contend that conducting a minimum of three separate proceedings in 60 days, with adequate time for the investigation Harris affirmatively pleads was required, could be characterized as "untimely." The Department of Education certainly does not think so. *Accord*

Richards Decl., Ex. B at 12 ("Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint.").

¶ 82(v) (Weight of Evidence). This allegation crystallizes the reality that Harris' real gripe is with the outcome, not the process. The Handbook does not guarantee Harris a favorable outcome when investigated for any disciplinary violation. Harris has a right to notice, to participate in the hearing, and to appeal. All of these rights were provided. Complaint ¶¶ 69-78. Harris' own view of how the evidence should have been evaluated by the CSB does not control, and a "clear weight of the evidence" standard does not apply in any event.

¶ 82(w) (Presumption of Responsibility). Without any facts alleged in support, Harris asks the Court to suppose that because he is a male, and he was found responsible, *ipso facto* the University acted in a discriminatory fashion. Harris pleads no actual facts that support this inference. Harris' theory means that any student can contend that, as a member of one gender or the other, s/he was subjected to an undesirable result, and that, therefore, the institution's anti-discrimination policy has been violated.[4] Every outcome will impact a respondent of one gender or the other. This is not discrimination. Because Harris states no more than a conclusion, this allegation is not entitled to the assumption of truth. *Santiago*, 629 F.3d at 130.

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[4] To the extent that Harris is broadly asserting that he has been discriminated against on account of his sex in an educational context, his remedy, if any, is to attempt to plead a claim under Title IX. To permit Harris to proceed otherwise on such a claim would frustrate Congressional intent in passing Title IX by encouraging courts and litigants to develop alternative legal standards for claims that are factually and substantively identical to claims under Title IX. Put differently, if what Harris alleges here states a breach of contract claim, the University would be effectively penalized for enacting a policy statement that is required by federal law. Courts in the employment context have consistently declined to hold that nondiscrimination policies in employee handbooks are actionable as a basis for a breach of contract for the same reasons articulated above. *See, e.g., Peralta v. Cendant Corp.*, 123 F. Supp. 2d 65, 84 (D. Conn. 2000); *Gally v. Columbia Univ.*, 22 F. Supp. 2d 199, 208 (S.D.N.Y. 1998); *Belgrave v. City of N.Y.*, No. 95cv1507, 1999 WL 692034 (E.D.N.Y. Aug. 31, 1999), *aff'd*, 216 F.3d 1071 (2d Cir. 2000); *see also Malik v. Carrier Corp.*, 202 F.3d 97, 106 (2d Cir. 2000). This line of cases is particularly persuasive given that the application of Title IX is drawn largely from courts' Title VII jurisprudence. *See Yusuf v. Vassar Coll.*, 35 F.3d 709, 714-15 (2d Cir. 1994).

¶ 82(x) (Unfair Process). Harris pleads at length the obligations the University followed in investigating and adjudicating the claims of sexual assault against him. *See* Compl. ¶¶ 67-78. Harris does not plead any specific facts giving rise to an inference that the University departed from those policies. Indeed, Harris almost point-by-point confirms that the University followed the very policies promised in the Handbook. Harris simply complains that the outcome was not what he would have liked. Irrespective of the outcome, the University's duty was to adhere to its policies, and Harris' allegations make clear that it did. *Id.* Post-hoc complaints that things turned out differently than Harris hoped, and broadly characterizing the process as "unfair," are far from factual averments sufficient to support a breach of contract claim. This type of generalized, catch-all allegation has no grounding in contract and cannot state a claim for breach.

For all the foregoing reasons, none of Harris' allegations suffice to state a claim for breach of contract. Harris' allegations simply confirm that the University followed its Handbook, the result of which was discipline against Harris, and he is upset. Count I of the Complaint should be dismissed in its entirety for failure to state a claim.

II. Count II of the Complaint (Title IX) Should be Dismissed for Failure to State a Claim.

Title IX provides, in pertinent part, that "[n]o person ... 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" that receives federal funding. 20 U.S.C. § 1681(a). The Third Circuit has not had occasion to precisely articulate the elements of a private Title IX claim in the context of a student disciplinary matter, but courts throughout the country have relied on the Second Circuit Court of Appeals' opinion in *Yusuf v. Vassar College*, 35 F.3d 709, 714 (2d Cir. 1994) in this regard. In *Yusuf*, the Second Circuit explained that a cognizable Title IX claim

arising from a disciplinary proceeding will fall within one of two categories: "erroneous outcome" based on gender, or "selective enforcement" based on gender. *Id.* at 715.

"Plaintiffs who claim that an erroneous outcome was reached must allege particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding," and "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." *Id.* (emphasis added). By contrast, conclusory "allegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss." *Id.* Harris does not state a Title IX claim under an erroneous outcome theory because he alleges no "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." That is, Harris' Title IX Count does not allege any particular facts indicating that gender motivated the outcome of his disciplinary proceedings. Complaint ¶¶ 85-92. In fact, Harris does not explain how gender impacted the outcome, at all, other than he happens to be a man. *Id.* This "lack of a particularized allegation relating to a causal connection between the flawed outcome and gender bias" is "fatal" to Harris' putative "erroneous outcome" Title IX claim. *Yusuf*, 35 F.3d at 715.

A student-plaintiff may also attempt to plead a selective enforcement/disparate impact claim under Title IX. As noted, this requires specific factual allegations indicating that the educational institution's disciplinary process was motivated by his gender, and that a similarly situated woman would not have been treated the same. *Doe v. Univ. of the South*, 687 F. Supp. 2d 744, 757 (E.D. Tenn. 2009). Harris may be attempting to state such a claim in Count II:

> SJU, in the manner in which it approaches the investigation, adjudication, and appeal of allegations of sexual misconduct, and related claims made in connection to sexual misconduct, creates an environment in which a male accused is so fundamentally denied due process as to be virtually assured of a finding of guilt.

> Such a biased and one-sided process deprives male students of educational opportunities on the basis of gender.

Compl. ¶ 89. However, and consistent with *Iqbal*, these "wholly conclusory allegations [of selective enforcement] [do not] suffice for purposes of Rule 12(b)(6)." *Yusuf*, 35 F.3d at 715 (internal citations omitted). Harris must specifically allege that the University had actual knowledge of the discriminatory effect of its disciplinary processes, knew that similarly situated women were treated differently, and yet failed to remedy the violation. *See, e.g., Horner v. Ky. High Sch. Athletic Ass'n*, 206 F.3d 685, 692-93 (6th Cir. 2000); *Yusuf*, 35 F.3d at 714-16; *see also Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1362 (M.D. Ga. 2007) (citing *Horner*, 206 F.3d at 692; *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005)). Harris does not do so, other than perhaps to suggest that "[i]n virtually all cases of campus sexual misconduct, the accused student is male and the accusing student is female." Compl. ¶ 88. Even if this fact were properly supported in the Complaint, which it is not, the fact that more respondents are male does not mean that the University acts with an intentionally discriminatory bent. As Harris himself alleges, *see* Compl. ¶¶ 46-48, if an administrative disciplinary complaint is filed, the University procedures must be invoked and followed, regardless of the gender of the parties.

Harris also fails to plead how similarly situated female students at the University have been treated differently as respondents to a charge of sexual assault. *Cf. Albert v. Carovano*, 851 F.2d 561, 573 (2d Cir. 1988) (Section 1981 claim of selective enforcement in student disciplinary process at private Hamilton College fails because no allegation that similarly situated students of a different race were treated differently). Absent a judicial insistence on particularized allegations of selective enforcement, "every conclusory selective-enforcement claim would lead to discovery concerning the entire disciplinary history of a college and then to

a confusing, unmanageable and ultimately incoherent retrial of every disciplinary decision, including decisions not to investigate." *Albert*, 851 F.2d at 574. Harris' conclusory allegations of selective enforcement, lacking any factual averments, cannot support Harris' Title IX claim as a matter of law. *See Ross*, 506 F. Supp. 2d at 1362 (rejecting disparate impact claim for failure to allege discriminatory intent); *Mallory v. Ohio Univ.*, 76 F. App'x 634, 640-41 (6th Cir. 2003) (rejecting male student's selective enforcement claim for failure to show bias motivated outcome). Because Harris has not pleaded such facts, his Title IX claim should be dismissed with prejudice.

III. Count III of the Complaint (Negligence) Should be Dismissed for Failure to State a Claim.

To state a claim for negligence under Pennsylvania law, a plaintiff must allege: (1) a duty recognized by law requiring the actor to conform to a certain standard of conduct; (2) failure by the actor to observe this standard; (3) causation between the conduct and injury; and (4) actual damages. *Tomko v. Marks*, 602 A.2d 890, 892 (Pa. Super. Ct. 1992). Harris has failed to state a claim for negligence, and Count III of the Complaint should be dismissed.[5]

Harris appears to allege that the University was negligent in ensuring that the policies in its Handbook were reasonable, Compl. ¶ 95, and that it was somehow negligent in the hiring, training, and supervision of its employees, Compl. ¶ 96. As a threshold matter, Harris fails to identify the duty owed to him by the University in connection with either of these theories, stating only in conclusory fashion that the University "owed a duty of care to Harris to ensure that its policies and procedures, including, without limitation, those set forth in the Handbook were fair and reasonable" and a duty "to ensure that its staff and personnel were properly trained

[5] Even with the federal law claims dismissed, the Court retains jurisdiction over Harris' state law claims based on diversity jurisdiction.

and supervised." Compl. ¶ 95. There is no articulated basis for these duties other than Harris' self-serving and conclusory averments that "the University had a duty because it did," and this alone requires the dismissal of his negligence claims. *Santiago*, 629 F.3d at 130 (self-serving conclusions do not satisfy *Iqbal* or *Twombly*).

Even if Harris did identify a plausible duty, his negligence claim fails for two additional reasons. *First*, Harris' theory that the University can be liable in tort for a Handbook breach is barred by Pennsylvania's gist of the action doctrine. The gist of the doctrine action maintains the distinction between breach of contract claims and tort claims by precluding recovery in tort in any of four situations:

> (1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim.

eToll v. Elias/Savion Adver., Inc., 811 A.2d 10, 19 (Pa. Super. Ct. 2002). When a party to a contract seeks relief based upon an alleged breach of that contract, the party cannot simultaneously seek relief under a tort theory based on the same breach. *Hart v. Arnold*, 884 A.2d 316, 339-40 (Pa. Super. Ct. 2005). To the extent that Harris asserts that the University's Handbook is somehow improper, or the University negligently implemented its Handbook in dealing with the accusations against him, the claims arise from the contractual relationship between Harris and the University, and are thus barred by the gist of the action doctrine. *See Dempsey v. Bucknell Univ.*, 4:11-CV-1679, 2012 WL 1569826, at *21 (M.D. Pa. May 3, 2012).[6]

Second, to the extent Harris purports to assert that the University was negligent in the hiring, training, or supervision of its employees, he again has failed to adequately state a claim.

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[6] And those contract claims must be dismissed for the reasons noted above.

Pennsylvania law imposes a duty on employers to "exercise reasonable care in selecting, supervising and controlling employees." *R.A. ex rel. N.A. v. First Church of Christ*, 748 A.2d 692, 697 (Pa. Super. Ct. 2000). To impose liability for failure to exercise such care, a Plaintiff must specifically plead "that the employer knew or, in the exercise of ordinary care, should have known of the necessity for exercising control of his employee." *Dempsey v. Walso Bureau, Inc.*, 246 A.2d 418, 422 (Pa. 1968).

Harris' claim fails because he has not pled with any specificity: (1) the scope of the University's legal duty with regard to the training or supervision of its employees; (2) which employees he contends the University failed to properly train or supervise; *or* (3) how the University allegedly breached any duty to train or supervise employees in a way that impacted Harris. Harris only states in a conclusory fashion that the University owed him a duty "to ensure that its staff and personnel were properly trained and supervised." Compl. ¶ 95. This is not sufficient to state a claim. *See Walso*, 246 A.2d at 422; *Dempsey*, 2012 WL 1569826, at *22.

IV. Count IV of the Complaint (Unfair Trade Practices) Should be Dismissed for Failure to State a Claim.

Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL") creates a private right of action for "'any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property' as a result of the seller's deceptive or unlawful actions." *Wise v. Am. Gen. Life Ins. Co.*, No. 04-3711, 2005 WL 670697, at *7 (E.D. Pa. Mar. 22, 2005) (quoting 73 Pa. Stat. § 201-9.2(a)), *aff'd*, 459 F.3d 443 (3d Cir. 2006).

Harris alleges that the University violated the UTPCPL by:

a. Representing, warranting and guaranteeing in writing that SJU trained its employees and agents in the proper and unbiased investigation and adjudication of complaints about sexual misconduct, when in fact it had not;

b. Representing that Harris would receive a fair and impartial hearing in connection with any allegation of sexual misconduct, when he would not;

c. Representing that Harris would receive adequate notice of and due process in connection with allegations of sexual misconduct, when he would not; and

d. Misrepresenting SJU's compliance with Title IX.

Compl. ¶ 100. Harris has not alleged sufficient facts to state a claim as to any of these alleged misrepresentations. To have standing to state a claim under the UTPCPL, a party must be, as a threshold matter, someone who "purchases or leases" goods or services for "personal, family, or household purposes." 73 Pa. Stat. §201-9.2(a). Harris does not plead that he purchased or leased particular goods or services from the University. Similarly, the "representations" that Harris addresses – representations about the University's disciplinary process – were not made to induce Harris to buy anything, nor did those alleged representations relate to "personal, family or household" goods or services. The UTPCPL is simply a bad fit for Harris' claims.

To the extent Harris' claims could somehow be contorted to fit the UTPCPL – and they cannot – Harris still must plead: (1) deceptive conduct; (2) an ascertainable loss; (3) justifiable reliance on the defendant's wrongful conduct or misrepresentations; and (4) that such reliance caused an injury. *Pellegrino v. State Farm Fire & Cas. Co.*, No. Civ. A. 12-2065, 2013 WL 3878591, at *8 (E.D. Pa. July 29, 2013). *First*, Harris has not identified any deceptive conduct. He merely alleges that the University made certain written representations about training of employees and agents. However, the Complaint contains no allegations identifying these

representations with any particularity, by whom they were made, how they were made, how these representations induced reliance by Harris, or how they were misleading or made in connection to a purchase of goods or services from the University. Compl. ¶ 100.

Second, Harris has failed to allege causation or damages. The UTPCPL requires pleading an "ascertainable loss of money or property, real or personal, as a result of" a deceptive act that is prohibited by the statute. As noted above, Harris has failed to allege that he suffered an ascertainable loss of *money or property* in response to the alleged misrepresentations made by the University *See* Compl. ¶¶ 98-102. In fact, it is difficult to see how Harris could have continued to "make payments" to the University after the alleged misrepresentations were made, since by Harris' own description, the misrepresentations relate to the disciplinary process, and as a result of that process Harris was suspended from and left the University. Harris simply has not pled cognizable damages with respect to the UTPCPL claim. Moreover, to the extent Harris' sole claim is that he lost the benefit of his contractual bargain as a result of alleged misrepresentations by the University, his UTPCPL claim may be barred by the economic loss doctrine. *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 681 (3d Cir. 2002).

Finally Harris' request that the Court "[e]njoin SJU from continuing to investigate and adjudicate claims of sexual misconduct in the manner prescribed by the Handbook" is improper. A private party may not seek injunctive relief under the UTPCPL. *See Goleman v. York Int'l Corp.*, No. Civ. A. 11-1328, 2011 WL 3330423, at *10 n.6 (E.D. Pa. Aug. 3, 2011).

V. Count V of the Complaint (Defamation) Should be Dismissed for Failure to State a Claim.

Harris' defamation claim rests solely on the premise that the University, Kalin and Doe "each referred to Harris as the perpetrator of a sexual assault on Doe, even though they knew the allegations were false, or with reckless indifference to the truth or falsity of said allegations."

Compl. ¶ 105. However, in describing the specific statements allegedly made by Kalin or the University, Harris describes only internal communications made during the course of the disciplinary proceeding. Compl. ¶ 113. Harris fails to state a defamation claim against the University or Kalin.

Defamation is the "tort of detracting from a person's reputation, or injuring a person's character, fame, or reputation, by false and malicious statements." *Joseph v. Scranton Times L.P.*, 959 A.2d 322, 334 (Pa. Super. Ct. 2008). To state a prima facie action for defamation under Pennsylvania law, the plaintiff must allege: "(1) the defamatory character of the communication; (2) publication by the defendant; (3) its application to the plaintiff; (4) understanding by the recipient of its defamatory meaning; (5) understanding by the recipient of it as intended to be applied to plaintiff; (6) special harm to the plaintiff; (7) abuse of a conditionally privileged occasion." *Krajewski v. Gusoff*, 53 A.3d 793, 802 (Pa. Super. Ct. 2012).

The second element, publication, means "the communication of the information to at least one person other than the person defamed." *Cushman v. Trans Union Corp.*, 115 F.3d 220, 230 (3d Cir. 1997). On this issue alone Harris' defamation claim fails, as his specific averments are that individuals within the University, in the course of the internal administrative disciplinary proceedings, shared information about allegations of sexual misconduct with one another. Kalin is an employee of the University, Iannucci is an employee of the University, and the CSB panel is made up of University members. The University cannot have defamed Harris by sharing Doe's allegations with itself. Compl. ¶ 113.

Harris also needs to allege "special harm", which means actual compensatory damages which are economic or pecuniary in nature. *Sprague v. Am. Bar Ass'n*, 276 F. Supp. 2d 365,

368-69 (E.D. Pa. 2003). Because he does not do so, instead vaguely alleging "loss to his reputation and personal humiliation," Compl. ¶ 119, Harris' claim fails.

Even if Harris had appropriately pled the elements for a defamation claim, which he has not, his claims are conclusively barred as a matter of law by three applicable privileges – truth, the common interest privilege, and the quasi-judicial privilege. A threshold requirement of a defamation claim is an allegation that someone published a statement about Harris that was untrue. *Joseph*, 959 A.2d at 334. Harris' specific allegations are that the University and Kalin repeated information about "Harris' alleged sexual misconduct" as reported by Doe. Compl. ¶ 113. The fact that Harris was *alleged* to have engaged in such sexual misconduct, however, is true – such allegations ***were*** made against Harris, and he acknowledges and pleads this himself. Compl. ¶ 67.

Likewise, an allegedly defamatory statement is privileged "where the circumstances are such as to lead those having a common interest in a particular subject matter reasonably to believe that facts exist which another sharing such common interest is entitled to know," *Aydin Corp. v. RGB Sales,* No. 89-8084, 1991 WL 152465, at *10 (E.D. Pa. Aug. 5, 1991), *aff'd,* 983 F.2d 1049 (3d Cir. 1992), such as where "(1) some interest of the publisher of the defamatory matter is involved; (2) some interest of the recipient of the matter, or a third party, is involved; or (3) a recognized interest of the public is involved." *Chicarella v. Passant*, 494 A.2d 1109, 1113 (Pa. Super. Ct. 1985) (quoting *Beckman v. Dunn*, 419 A.2d 583, 587 (Pa. Super. Ct. 1980)). Such communication must be "made on a proper occasion, from a proper motive, in a proper manner, and based upon reasonable cause." *Id.* Courts routinely find that internal administrative investigations are privileged because they involve the common interest of those conducting the investigation. *See, e.g., Aydin Corp.*, 1991 WL 152465, at *10; *Chicarella*, 494 A.2d at 1113.

Finally, and relatedly, statements made in quasi-judicial proceedings are absolutely privileged. *Milliner v. Enck*, 709 A.2d 417, 419 n.1 (Pa. Super. Ct. 1998); *accord* Restatement (Second) of Torts § 588. Investigative/adjudicative proceedings at educational institutions are included within the scope of "quasi-judicial proceedings" in Pennsylvania. *See Schanne v. Addis*, 898 F. Supp. 2d 751, 758 (E.D.Pa. 2012) (rejecting defamation claim arising out of allegations of an inappropriate student-teacher relationship and subsequent investigation and adjudication). Harris' defamation claim fails at the pleading stage.

VI. Count VI of the Complaint (False Light) Should be Dismissed for Failure to State a Claim.

False light claims in Pennsylvania "'require publicity', specifically, 'that a matter is made public by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.'" *Herron v. MortgageNOW Inc.*, No. Civ. A. 12-3605, 2013 WL 867177, at *2 (E.D. Pa. Mar. 7, 2013) (quoting *DeBlasio v. Pignoli*, 918 A.2d 822, 824 n.3 (Pa. Commw. Ct. 2007)). As the *Herron* court explained, "publicity" means that a communication "reaches, or is sure to reach the public." Restatement (Second) of Torts § 652D cmt. a.

Mere discussion about an internal administrative investigation among a small group of people within the University who are tasked with addressing disciplinary matters is not "sure to reach the public" and cannot, as a matter of law, form the basis for a false light claim. The Complaint lacks any allegation that the University or Kalin published anything publicly – there is no allegation of an email disseminated regarding Doe's allegation, nor of a press release or media contact, nor anything similar. Although the Complaint alleges in conclusory fashion that the University and Kalin "made public statements about Harris", Compl. ¶ 123, the Complaint contains not a single factual allegation about that purported publication, where it was made, and

to whom. The first "publicity" that has resulted from Doe's allegations, ironically, occurred when Harris filed this lawsuit. Harris' false light claim against the University and Kalin must be dismissed.

VII. Counts VII and VIII of the Complaint (Intentional and Negligent Infliction of Emotional Distress) Should be Dismissed for Failure to State a Claim.

Pennsylvania has not officially recognized the tort of intentional infliction of emotional distress ("IIED"), but the Third Circuit has determined that Pennsylvania is likely to follow the Restatement (Second) of Torts § 46. *Johnson v. Caputo*, No. 11-2603, 2013 WL 2627064, at *12 (E.D. Pa. June 12, 2013). The Restatement lists the following elements for an IIED claim: (1) extreme and outrageous conduct; (2) that intentionally or recklessly causes; (3) emotional distress to another; and (4) which was severe. *Id.; see also Manley v. Fitzgerald*, 997 A.2d 1235, 1241 (Pa. Commw. Ct. 2010). The Restatement requires a plaintiff to allege conduct:

> so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in any civilized society ... [I]t has not been enough that the defendant has acted with intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort.

Toney v. Chester Cnty Hosp., 961 A.2d 192, 202 (Pa. Super. Ct. 2008), *aff'd*, 36 A.3d 83 (Pa. 2011). Harris' allegations do not rise to this level. The University simply could not have intentionally or recklessly caused Harris emotional distress as a matter of law while acting to comply with its contractual duties under the Handbook, nor Kalin while discharging his duty as University investigator. *See Reardon*, 926 A.2d at 487 & n.12 (holding that adhering to administrative duties under Handbook related to disciplinary procedures could not constitute IIED as a matter of law); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 247 (D. Vt. 1994) ("A College's decision, when confronted with a female student's accusation of rape, to confront

the male student with the charges, hold a hearing, and support the findings of the initial tribunal on appeal, even where various procedural errors are alleged, cannot form the basis of an IIED claim"). At a minimum, Harris' Complaint does not sufficiently allege extreme, outrageous, intentional or reckless conduct that is so "atrocious, and utterly intolerable in any civilized society" that it would support a claim for IIED. *Toney*, 961 A.2d at 202 (citation omitted).

A plaintiff pleading the existence of emotional distress must also plead "that he actually suffered the claimed distress with expert medical confirmation" and present more than cursory allegations of bodily harm in support. *Hunger v. Grand Cent. Sanitation*, 670 A.2d 173, 177 (Pa. Super. Ct. 1996). Plaintiff's Complaint contains no allegation of any physical manifestation of emotional distress, nor any allegation that Plaintiff has seen a medical professional to address his purported emotional distress. Plaintiff's IIED claim must be dismissed for this reason as well.

Finally, a cause of action for *negligent* infliction of emotional distress ("NIED") "exists in only two circumstances: (1) where a close family member experiences a contemporaneous sensory observance of physical injuries being inflicted on another family member; or (2) where the plaintiff nearly experiences a physical impact in that he was in the zone of danger of the defendant's tortious conduct." *Hunger*, 670 A.2d at 178. Harris' Complaint alleges neither, and his NIED claim must accordingly be dismissed.

VIII. Kalin Should Be Dismissed in his Individual Capacity.

SJU Public Safety Officer Joseph Kalin is named as an individual defendant in four counts in the Complaint: Count V (Defamation); Count VI (False Light); County VII (Intentional Infliction of Emotional Distress); and Count VIII (Negligent Infliction of Emotional Distress). If the Court does not dismiss those claims outright -- and it should -- Kalin should be at least dismissed in his individual capacity.

Harris does not allege in his Complaint that Kalin acted outside the scope of his employment in undertaking any of the acts alleged in the Complaint. The University concedes an agency relationship with Kalin, and concedes that if Kalin were liable under any theory pleaded in the current Complaint, the University would be liable for Kalin's acts pursuant to principles of *respondeat superior*. There is no basis or reason for Kalin to be a separately named party in this civil action.

CONCLUSION

For all the foregoing reasons, Harris' claims against the University and Kalin should be dismissed with prejudice for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted,

SAUL EWING LLP

Date: August 16, 2013

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CERTIFICATE OF SERVICE

I, Joshua W. B. Richards, certify that on this date I filed via the ECF system a true and correct copy of the foregoing Motion to Dismiss and accompanying Memorandum of Law, which constitutes valid service on the following registered users:

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