UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN DOE, Plaintiff, v. WILLIAMS COLLEGE, Defendant.	CIVIL ACTION NO. 3:16-CV-30184 **Leave to file in excess of 20 pages granted on Dec. 16, 2016.**

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Daryl J. Lapp (BBO No. 554980)
daryl.lapp@lockelord.com
Elizabeth H. Kelly (BBO No. 672277)
liz.kelly@lockelord.com
LOCKE LORD LLP
111 Huntington Avenue
Boston, MA 02199
617.230.0100

Counsel for Defendant

December 22, 2016

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ARGUMENT

Defendant Williams College submits this Memorandum in support of its motion to dismiss the Complaint for failure to state a claim upon which relief can be granted. For the limited purpose of its Motion to Dismiss, the College accepts as true the non-conclusory, factual allegations of the Complaint. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940-41 (2009).

I. COUNT I FAILS TO STATE A CLAIM UNDER TITLE IX.

In Count I of the Complaint, plaintiff "John Doe" asserts that the College violated Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88, in connection with his disciplinary case in two respects: (1) the College allegedly failed to comply with the Department of Education's administrative requirements for investigating and adjudicating complaints of student sexual misconduct and (2) his case was unfairly influenced by an anti-male bias. Compl. ¶¶ 196-203, 210.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). It is undisputed that Title IX applies to Williams as a recipient of federal funds. Pursuant to Title IX, the Department of Education has adopted formal regulations and issued various forms of sub-regulatory guidance for the handling of sexual harassment and sexual violence complaints at educational institutions.[1] Sexual harassment and sexual violence constitute prohibited discrimination on the basis of sex when they create a hostile environment which interferes with a

[1] *See, e.g.*, 34 C.F.R. § 106.8(b); Dept. of Educ., Office For Civil Rights, "Revised Sexual Harassment Guidance: Harassment of Students By Schools Employees, Other Students, or Third Parties," dated January 19, 2001, available at http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html; Dept. of Educ., Office For Civil Rights, "Dear Colleague Letter" dated April 4, 2011, available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; Dept. of Educ., Office For Civil Rights, "Questions and Answers on title IX and Sexual Violence," dated April 29, 2014, available at http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

person's ability to participate in an educational program or activity. *See* Dear Colleague Letter at p. 3.

A. There is No Private Right of Action for Violation of Title IX's Administrative Requirements and the College Did Not Violate Them in Any Event.

Doe's claim that the College failed to comply with the Department's administrative requirements for addressing complaints of sexual misconduct fails because there is no private right of action for an alleged violation of those requirements. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291-92, (1998); *Moore v. Regents of the Univ. of California*, No. 15-CV-05779-RS, 2016 WL 2961984, at *5 (N.D. Cal. May 23, 2016); *Doe v. Univ. of the South*, 687 F. Supp. 2d 744, 758 (E.D. Tenn. 2009). The College did not violate the Department's regulations in any event. The regulations require in relevant part that the College "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints" of sexual misconduct. 34 C.F.R. § 106.8(b). The College's procedures do just that. *See* Sexual Misconduct Policy (Dkt. No. 1-11) at 12-16. And, as further discussed below, the College followed its procedures in this case.[2]

B. The Complaint Fails to Allege Any Evidence of Gender Bias.

Doe's assertion that the College violated Title IX because the disciplinary proceedings were influenced by anti-male bias also fails to state a claim. Doe contends that gender bias against male students accused of sexual assault has resulted in "selective enforcement" of the College's policies against sexual misconduct, "disparate treatment" of males accused of such misconduct, "deliberate indifference" to his claim of harassment against Smith, and an "erroneous outcome" in his case. Compl. ¶¶ 21, 77, 205, 214. Doe's Complaint, however, fails

[2] The College also complied with the Department's sub-regulatory guidance, which also does not give rise to any private right of action. *See Moore v. Regents of the Univ. of California*, 2016 WL 2961984, at *5 (citing letter from OCR to Senator James Lankford).

to allege facts sufficient to support a finding of gender bias on any of those theories.

1. Selective enforcement and disparate treatment

The College's policies which prohibit sexual misconduct and provide a grievance process for addressing claims of misconduct make no distinction based upon the gender of the complainant or that of the respondent. *See* Code of Conduct and Sexual Misconduct Policy (Dkt. No. 1-11). Accordingly, to make out a claim of selective enforcement or disparate treatment, Doe would have to allege and prove that regardless of his actual "guilt or innocence," the decision to initiate a disciplinary proceeding or the severity of the penalty "was affected by [his] gender." *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994).[3] To do that, Doe must demonstrate that "a female was in circumstances sufficiently similar to [his] and was treated more favorably by the University." *Mallory v. Ohio Univ.*, 76 F. App'x 634, 641 (6th Cir. 2003); *see also Doe v. Case W. Reserve Univ.*, No. 1:14CV2044, 2015 WL 5522001, at *6 (N.D. Ohio Sept. 16, 2015) (plaintiff has the burden to identify "a comparator of the opposite sex who was treated more favorably by the educational institution when facing similar disciplinary charges").

Doe fails to allege any such facts. His Complaint fails to identify any case in which a female student accused of similar misconduct either was not subjected to disciplinary proceedings at all or received a lesser sanction than Doe did notwithstanding a similar history of prior conduct violations.

Doe alleges that "female students and employees rarely (if ever) face charges of sexual misconduct" at Williams. Compl. ¶ 221. That fact standing alone, assuming its truth, evidences no gender bias on the part of the College, but instead is merely a product of the complaints that

[3] The First Circuit has not yet addressed a Title IX claim in the context of student disciplinary proceedings. Three District Court cases in this Circuit have done so, all following the Second Circuit's rationale in *Yusuf*. *Doe v. Trs. of Boston Coll.*, No. 15-CV-10790, 2016 WL 5799297, at *24 (D. Mass. Oct. 4, 2016); *Doe v. Univ. of Massachusetts-Amherst*, No. CV 14-30143-MGM, 2015 WL 4306521, at *8 (D. Mass. July 14, 2015); *Bleiler v. Coll. of the Holy Cross*, No. 11–11541, 2013 WL 4714340, at *5 (D. Mass. Aug. 26, 2013).

the College receives. *See Doe v. Case W. Reserve Univ.*, 2015 WL 5522001, at *6. Doe would have to allege specific instances in which the College actually received similar complaints of sexual misconduct against women but decided not to pursue them, which he does not do.

Doe also alleges that males invariably lose when accused of sexual harassment at the College, Compl. ¶ 222, but he cites no specific facts to support this conclusory allegation, much less any facts sufficient to support the inference that males lose because of their gender – rather than lose because the complaints of harassment had merit. *See Doe v. Cummins*, No. 16-3334, 2016 WL 7093996, at *14 (6th Cir. Dec. 6, 2016) (male student's allegations that in all nine cases of alleged sexual assault since 2011 the accused student was male and was found responsible failed to state a claim of gender bias).

Moreover, Doe's claim that accusations of sexual misconduct generally are made against men and that the men accused of such misconduct "invariably" lose "might suggest a bias in favor of sexual assault victims and against accused students, but says nothing about gender." *King v. DePauw Univ.*, No. 2:14-CV-70-WTL-DKL, 2014 WL 4197507, at *10 (S.D. Ind. Aug. 22, 2014); *accord Doe v. Trs. of Boston Coll.*, No. 15-CV-10790, 2016 WL 5799297, at *25 (D. Mass. Oct. 4, 2016) ("Showing that a school favors alleged victims of sexual assault claims is not the equivalent of demonstrating bias against male students, even if accused students are generally male."); *see also Sahm v. Miami Univ.*, 110 F. Supp. 3d 774, 778 (S.D. Ohio 2015); *Marshall v. Ohio Univ.*, No. 2:15-cv-775, 2015 WL 7254213, at *8 (S.D. Ohio Nov. 17, 2015); *Haley v. Virginia Comm. Univ.*, 948 F. Supp. 573, 579 (E.D. Va. 1996).

Doe's allegation that Smith was treated more favorably then he was in the proceedings at issue also does not suffice. Any allegedly favorable treatment of Smith as the complainant against Doe is irrelevant, as the complainant obviously is not a comparator vis-a-vis the

respondent. *Doe v. Case W. Reserve Univ.*, 2015 WL 5522001, at *6. Nor is there any relevance to Doe's allegations of favorable treatment of her as the respondent on his claims of misconduct against her: the allegations were entirely dissimilar (Doe did not accuse her of engaging in nonconsensual sex); she no longer was a student at the College when she slapped Doe, and thus her violation of College policies did not subject her to expulsion; and, unlike Doe, she had no history of significant conduct violations.

2. Deliberate indifference

A Title IX claim for "deliberate indifference" arises in the context of alleged sexual harassment. *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 191 (D.R.I. 2016) (citing *Marshall v. Ohio Univ.*, No. 15-cv-775, 2015 WL 1179955, at *8 (S.D. Ohio Mar. 13, 2015)). "To establish a Title IX 'deliberate indifference' claim, a plaintiff must demonstrate that [a school] official with authority to address the alleged discrimination and take corrective measures had actual knowledge of the misconduct and failed to adequately respond to that misconduct." *Doe v. Trs. of Boston Coll*, 2016 WL 5799297, at *26. "The university's deliberate indifference must also cause the student to face sexual harassment or become vulnerable to such harassment." *Id.* The alleged victim also "has a burden to show that [the school] officials' response or inaction was clearly unreasonable given the known circumstances." *Id.*

The Complaint fails to state a claim of deliberate indifference to any alleged sexual harassment of Doe. The Complaint alleges that the College did not promptly investigate Doe's allegations of misconduct against Smith, which the College learned about when Doe's attorney blind-copied Dean Sarah Bolton on a "cease and desist" letter to Smith. Compl. ¶ 68. Although the March 13, 2016 letter accused Smith of "harassing" Doe, the letter did not say or suggest that Smith's alleged conduct involved ***sexual*** harassment. *See* Cease & Desist Letter (Dkt. No. 1-8). Moreover, when Doe first asserted an actual Title IX complaint – his attorney's April 13, 2016

letter to the Title IX Coordinator, Dkt. No. 1-9 – the College was not "deliberately indifferent." The College promptly responded, commenced a full investigation, and conducted a disciplinary hearing in which Smith was found responsible for slapping Doe and disciplined accordingly. *See* Compl. ¶¶ 79, 82; Investigation Rpt. (Kelly Decl. Exh. A); Decision Letter (Kelly Decl. Exh. B); Sanction Letter (Kelly Decl. Exh. C). Having promptly investigated and adjudicated Doe's claims against Smith, the College as a matter of law was not "deliberately indifferent" to them. *See Keskinidis v. Univ. of Massachusetts Boston*, 76 F. Supp. 3d 254, 260 n. 3 (D. Mass. 2014) (deliberate indifference to sexual harassment not shown where a trained investigator conducted an investigation and prepared a report provided to the university and complainant).

3. Erroneous outcome

The crux of Doe's "erroneous outcome" claim is whether his gender was a "motivating factor" in the Hearing Panel's determination that he violated the College's sexual misconduct policy and that he should be expelled as a result. *See Yusuf*, 35 F.3d at 715. Merely alleging that procedural or other flaws in the proceedings led to an erroneous outcome, coupled with a conclusory allegation of gender bias, is not enough. *Id*. To state a claim under Title IX, Doe must allege "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding," such as statements by members of the disciplinary panel or other relevant college officials that exhibit gender bias or decision-making patterns that tend to show the influence of gender. *Id.*[4]*; see also Doe v. Trs. of Boston Coll.*, 2016 WL 5799297, at *24.

[4] The Second Circuit recently adopted a more lenient pleading standard, in which allegations supporting a "minimal plausible inference" of gender bias can suffice, based on its decision to apply the *McDonnell Douglas* burden-shifting framework for Title VII employment discrimination claims to student disciplinary cases arising under Title IX. *Doe v. Columbia Univ.*, 831 F. 3d 46, 55 (2d Cir. 2016). This "minimal plausible inference" standard, however, has not been and likely will not be adopted in the First Circuit in the context of student disciplinary proceedings under Title IX. *See Cohen v. Brown Univ.*, 991 F.2d 888, 902 (1st Cir. 1993) (rejecting application of *McDonnell Douglas* framework to Title IX claim involving alleged discrimination in athletic opportunities); *see also Austin v. Univ. of Ore.*, No. 6:15-CV-02257-MC, 2016 WL 4708540, at *9 (D. Or. Sept. 8, 2016) (declining to follow *Columbia* in a Title IX case involving student discipline). Moreover, unlike the plaintiff in *Columbia*, Doe has

The Complaint contains no such allegations. Doe alleges no statement by any member of the Hearing Panel, or any other Williams official, which exhibits any bias against men in relation to allegations of sexual assault or otherwise. Nor does Doe cite any statistics that would tend to show gender bias was a factor in the outcome of his case, such as statistics showing that men accused of sexual misconduct are found responsible in numbers disproportionate to the findings against female students accused of similar misconduct. *See Doe v. Cummins*, WL 7093996, at *14.

Moreover, Doe's conclusory allegations of anti-male bias are patently implausible where two of the three Panel members are male, Compl. ¶ 162, and the Panel refrained from finding Doe responsible for additional conduct violations, notwithstanding its conclusion that he had acted inappropriately. *See* Decision Letter (Kelly Decl. Exh. B) at 1-2. *Cf. Doe v. Cummins*, 2016 WL 7093996, at *14 (claim that gender bias resulted in men "invariably" losing sexual misconduct cases was belied by the fact that plaintiffs themselves were found "not responsible" on some charges).

II. COUNT II FAILS TO STATE A CLAIM FOR BREACH OF CONTRACT.

It is well settled that a private college's handling of student discipline is entitled to considerable deference, including the college's interpretation and application of its own rules. *Havlik v. Johnson & Wales Univ.*, 509 F.3d 25, 35 (1st Cir. 2007); *Kiani v. Trs. of Boston Univ.*, No. 04–cv–11838, 2005 WL 6489754, at *6-7 (D. Mass. Nov. 10, 2005); *Dinu v. Pres. and Fellows of Harvard Coll.*, 56 F. Supp. 2d 129, 131-33 (D. Mass. 1999); *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 316-17 (D. Mass. 1997); *Schaer v. Brandeis Univ.*, 432 Mass. 474, 481, 735 N.E.2d 373, 381 (2000); *Coveney v. Pres. & Trs. of Holy Cross Coll.*, 388 Mass. 16, 19-20,

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failed to allege any facts to support a "minimal plausible inference" of bias in any event. *Cf. Doe v. Cummins*, 2016 WL 7093996, at *13.

445 N.E.2d 136, 139 (1983).

The college has a contractual obligation to substantially follow its student conduct policies and procedures, as it would reasonably expect a student to understand them; to conduct its procedures with "basic fairness," which means providing the student with notice of the charge against him and a meaningful opportunity to respond; and to reach a decision that has some rational basis, i.e., one that is not arbitrary and capricious. *See Cloud v. Trs. of Boston Univ.*, 720 F.2d 721, 724 (1st Cir. 1983); *Schaer*, 432 Mass. at 478, 735 N.E.2d at 378; *Coveney*, 388 Mass. at 19, 445 N.E.2d at 138-39. Where, as in this case, a college's disciplinary process meets that test, the outcome is not subject to judicial challenge. *See id*. In addition, as discussed just below, a student cannot bring a breach of contract claim unless he first has exhausted the procedures available to him under the College's policies.

A. Doe Has Failed to Exhaust His Contractual Remedies.

The College's procedures afford Doe the right to appeal the decision in his case on the basis of significant procedural lapses or newly available evidence that could materially impact the outcome of his case. Compl. ¶ 175; Sexual Misconduct Policy (Dkt. No. 1-11) at 15; Sanction Letter (Kelly Decl. Exh. C) at 2-3. On December 7, 2016, roughly two weeks after he filed his Complaint in this case, Doe exercised that right to appeal, which is now under review by the College's Vice President for Institutional Diversity & Inclusion. *See* Appeal Email (Kelly Decl. Exh. D). The appellate officer may deny the appeal, affirm the original disposition, or allow the appeal and remand the matter to the original Hearing Panel or a new Panel for further proceedings. *See* Sanction Letter (Kelly Decl. Exh. C) at 2-3.

Doe's contract claim should be dismissed because he has invoked, but not yet exhausted his contractual rights including the right to appeal. *Cf. Brennan v. King*, 139 F.3d 258, 270 (1st

Cir. 1998) (university professor could not sue for breach of his employment contract before pursuing the grievance procedure afforded in that contract); *Berkowitz v. Pres. & Fellows of Harvard Coll.*, 58 Mass. App. Ct. 262, 275, 789 N.E.2d 575, 585 (2003) (a contractual exhaustion requirement stems from the contractual bargain that defines the parties' rights; it allows contracting parties to educate each other as to their respective conceptions of their rights, allows for an opportunity to resolve differences, and preserves scarce judicial resources). The rationale of these university employment cases is fully applicable to claims arising from student disciplinary proceedings and Doe's contract claim should be dismissed on this basis alone.

B. The College Has Followed its Policies and Procedures.

Doe's Complaint, at ¶¶ 228, 262, alleges a litany of supposed procedural violations, none of which has merit. As to each issue, the allegations fail to state a claim that the College failed to follow its procedures as it reasonably would expect Doe to understand them. *See Schaer*, 432 Mass. at 478, 735 N.E.2d at 378 (quoting *Cloud*, 720 F.2d at 724); *see also Walker v. Pres. & Fellows of Harvard Coll.*, 840 F.3d 57, 62 (1st Cir. 2016); *Doe v. Trs. of Boston Coll.*, 2016 WL 5799297, at *9.

1. There is no evidence of bias or disparate treatment.

The College's sexual misconduct policy calls for a "prompt, fair, and impartial investigation and resolution" of complaints of sexual misconduct. Dkt. No. 1-11 at 12. Doe alleges that the College breached its contractual obligations to him because he was subjected to a disciplinary process that was biased in favor of females and because he was treated in a "highly disparate manner." Compl. ¶¶ 228a & c.

Doe's conclusory allegations of gender bias are without merit for the reasons discussed in Section I.B. above.

As other evidence of supposed bias, Doe points to the alleged conduct of Dean Sarah

Bolton, who was Dean of the College (effectively "Dean of Students") at Williams. *See* Pl. Mem (Dkt. No. 6) at 6. Doe criticizes Dean Bolton's handling of the honor code complaint against him, i.e., Smith's allegation that she wrote certain papers on Doe's behalf, Compl. ¶ 43, Dean Bolton's communication with Smith about the outcome of that complaint, *id.* ¶¶ 57-61, 88, Dean Bolton's response to the cease and desist letter that Doe's attorney sent to Smith with a blind copy to Dean Bolton, *id.* ¶¶ 68-71, 101, Dean Bolton's issuance of a no-contact order, *id.* ¶¶ 74-78, Dean Bolton's purported encouragement of Smith to lodge a counter-complaint against Doe, *id.* ¶ 93, and Dean Bolton's response to Smith's email seeking certain accommodations, *id.*¶¶ 133-135.

Most of these allegations of bias concern the honor code matter, as to which Doe ultimately was exonerated and suffered no consequences. *Id.* at 87. Those allegations do not support a breach of contract claim in relation to Doe's expulsion for engaging in nonconsensual sex. *See Dempsey v. Bucknell Univ.*, 76 F. Supp. 3d 565, 585 (M.D. Pa. 2015), amended in part, No. 4:11-CV-1679, 2015 WL 999101 (M.D. Pa. Mar. 6, 2015), aff'd, 834 F.3d 457 (3d Cir. 2016) (alleged defects in a proceeding in which a student was exonerated were inapplicable to breach of contract claims arising from a finding of responsibility in a separate proceeding).

Moreover, Doe admits that as of June 30, 2016, Dean Bolton left the College to become the President of another college; she had no role in the hearing which occurred several months later, on October 22, 2016; she was not a witness during the investigation; and she was not a fact finder or decision maker with respect to the outcome of the proceeding. Compl. ¶¶ 21, 162; Investigation Rpt. (Dkt. No. 1-13) at 1-2. *See Doe v. Cummins*, 2016 WL 7093996, at *11 (a dean's alleged bias during a preliminary investigation was not actionable where a hearing panel made the ultimate decision).

In addition, none of Dean Bolton's alleged actions involve any evidence of actual bias. *See Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 15 (1st Cir. 1988) ("Alleged prejudice of university hearing bodies must be based on more than mere speculation and tenuous inferences."); *Ikpeazu v. Univ. of Nebraska*, 775 F.2d 250, 254 (8th Cir. 1985) (university disciplinary officials "are entitled to a presumption of honesty and integrity unless actual bias, such as personal animosity, illegal prejudice, or a personal or financial stake in the outcome can be proven"); *see also Doe v. Cummins*, 2016 WL 7093996, at *11; *Doe v. Trs. of Boston Coll.*, No. 15-CV-10790, 2016 WL 5799297, at *16 (D. Mass. Oct. 4, 2016) .

To the contrary, the evidence is that Dean Bolton followed the College's policies in relation to the honor code proceedings, rather than departing from them to unfairly advantage Smith or disadvantage Doe. Doe complains that Dean Bolton was involved communications with Smith concerning Doe's hearing and the outcome. Compl. ¶¶ 46, 57, 58. Nothing about this violates Doe's "reasonable expectations." The communications show that Dean Bolton was assisting Smith in gathering information for the honor code hearing and keeping her apprised of the process. *See* Investigation Rpt. (Kelly Decl. Exh. A) at Exhibit H(g). The College's procedures contemplate that the Dean will provide information to the hearing committee; the procedures provide that the Dean's office is available to assist witnesses such as Smith, and they provide that, as the accuser, she was entitled to know the outcome. *See* Honor Hearing Procedures (Kelly Decl. Exh. E) at 1.

Also without merit is Doe's criticism of Dean Bolton's response to the March 13, 2016 cease and desist letter that Doe's attorney sent to Smith. Compl. ¶ 68. The letter was addressed only to Smith and it did not say that Doe was filing a complaint or seeking any accommodations under any College policy. *See* Cease & Desist Letter (Dkt. No. 1-8). Moreover, Doe does not

allege that he requested an investigation or adjudication of Smith's actions during his meeting with Dean Bolton ***the next day***. Compl. ¶ 69.

Equally without merit is Doe's criticism of Dean Bolton for issuing a no-contact order. *Id.* at 80. The College's policy expressly allows for no-contact orders, *see* Sexual Misconduct Policy (Dkt. No. 1-11) at 12, and Dean Bolton had every reason to issue a mutual no-contact order in light of the honor code appeal, Doe's cease and desist letter, and Smith's previous reports of problems in their relationship.

Doe's allegation that Dean Bolton encouraged Smith to pursue her complaint against Doe, Compl. ¶ 93, also fails to implicate any violation of College policy. To the contrary, the College's policy is expressly to encourage the reporting of sexual misconduct. *see* Sexual Misconduct Policy (Dkt. # 1-11) at 12.

Nor is there any evidence of bias, as Doe alleges, in Dean Bolton's response to his attorney's cease and desist letter to Smith when compared with Dean Bolton's response to Smith's October 5, 2014 email, in which she disclosed problems in her relationship with Doe and requested a week off from classes. Compl. ¶ 135; Investigation Rpt. (Kelly Decl. Exh. A) at Exhibit B. There is no comparison. One is a letter from an attorney to a student, which neither requests nor references any request for action by the Dean, whereas the other is an email from a student to the Dean disclosing a troubled relationship and requesting the Dean's help. *See Doe v. Cummins*, 2016 WL 7093996, at *11 (providing accommodations to a complainant does not evidence bias).

Simply put, none of Dean Bolton's alleged conduct evidences any personal animosity against Doe, any anti-male bias, any personal or other stake in the outcome of Doe's case, or any other basis for his claim of "bias" and "disparate treatment."

2. College policy called for the investigation of Smith's complaint.

Doe alleges that the College improperly investigated and adjudicated Smith's complaint of sexual misconduct because she was an employee, not a student, when she made it and because there was not adequate evidence to proceed. Compl. ¶ 228b. Neither claim has any merit.

The College's policy expressly encourages "[a]ny person who experiences [sexual misconduct]," not just students, "to report it." *See* Sexual Misconduct Policy (Dkt. No. 1-11) at 12. Doe had no "reasonable expectation" that he could sexually assault a College employee with impunity.

Nor did the College's policies give Doe any "reasonable expectation" that some different or additional evidence was needed for the College to investigate and adjudicate Smith's complaint. The policy contains no "probable cause" standard or the like, nor does it require any "threshold evaluation" prior to an investigation. Moreover, the very fact that Doe was found responsible, by a preponderance of the evidence, confirms that the College had good reason to go forward with Smith's complaint. *See* Decision Letter (Kelly Decl. Exh. B) at 2.

3. The College did not act with deliberate indifference.

Doe alleges that the College breached its contract with him by responding with "deliberate indifference" to his report that he had been harassed and assaulted by Smith. Compl. ¶¶ 228d, m, n. That claim fails for the reasons stated in section I.B.2 above.

4. The College did not breach any obligation relative to Doe's appeal in the plagiarism case.

Doe alleges that Dean Bolton misinformed Doe when she told him that he could not appeal the original sanction in his plagiarism case. Compl. ¶ 228e. Dean Bolton was correct: the Honor Hearing Procedures provide that "[t]he accused student may request a reconsideration of the Committee's decision [only] on the basis of substantial new evidence or improper

procedures," not as to the sanction imposed. Honor Hearing Procedures (Kelly Decl. Exh. E) at 2. Regardless, Doe did appeal and he was exonerated on all the plagiarism charges in any event. Compl ¶ 85-87.

5. The College did not violate the policy on hearing records.

Doe alleges that the College "capriciously" applied the Honor Hearing Procedures when the Dean saved a record of the hearing. Compl. ¶ 228f. The Honor Hearing Procedures provide that "[a]ll notes and documentary evidence must be left in the room and will be shredded after the hearing, save original copies of evidence to be retained by the Dean's office." Honor Hearing Procedures (Kelly Decl. Exh. E) at 1. They also provide that "the committee and its officers are free to act flexibly in ways consistent with fairness, and minor variations should not be considered violations of procedures." *Id.* The procedures do not state that a record of the hearing may not be retained by the Dean's office. In any event, Doe has not alleged any harm arising from the fact that the Dean kept a record of the hearing; to the contrary, as noted above, Doe was exonerated on the honor code violation.

6. Doe has no claim in relation to the College's policy on relationship abuse or the general guidelines of its Code of Conduct.

Doe complains that the College improperly charged him with violating its relationship abuse policy and the "general guidelines" of its Code of Conduct, and that the College deprived him of an opportunity to respond to these charges. Compl. ¶¶ 228g-i. Even if these allegations were true, which is not the case, they do not support a breach of contract claim in any event. The Panel did not find Doe in violation of either the relationship abuse policy or the "general guidelines" of the Code of Conduct. *Id.* ¶ 164; Decision Letter (Kelly Decl. Exh. B) at 2.

7. The College did not violate any policy by requesting that Doe not attend a dance team performance.

Doe includes among his "procedural" arguments a claim that the College discriminated against him and denied him an "educational opportunity" by asking him not to participate in a dance team performance that Smith was coordinating and for which she would be present. Compl. ¶¶ 78, 228j. As discussed above, the Dean had issued mutual no-contact orders in accordance with College policy. Not surprisingly, Doe fails to identify any violation of his contractual rights arising from the instruction to abide by the no-contact order. Moreover, the fact that Doe was asked to refrain from participating in a single dance competition is not a cognizable depravation of an educational opportunity. *Cf. Laney v. Farley*, 501 F.3d 577, 581 (6th Cir. 2007) (one-day suspension involved no deprivation of educational opportunity).

8. The College did not breach any obligation to provide transcripts.

Doe alleges the College breached its contract by failing to follow through on a promise to provide him transcripts of witness interviews. Compl. ¶ 228k. Nothing in the applicable policy provides that respondents in sexual misconduct cases are entitled to interview transcripts. *See* Sexual Misconduct Policy (Dkt. No. 1-11). Nor does an isolated statement by one college administrator operate to change the policy. *See Doe v. Trs. of Boston Coll.*, 2016 WL 5799297, at *10. Moreover, the College timely informed Doe's counsel that while he had no right to receive a copy of the transcripts, he would be permitted to inspect them pursuant to a request under the Family Educational Rights and Privacy Act (FERPA). Compl. ¶ 128. That statute permits students such as Doe to "inspect and review," but generally not to receive copies of, records "maintained" by an educational institution to the extent those records "directly relate" to the student. *See* 20 U.S.C. § 1232g(a)(1)(A) & § 1232g(a)(4)(A); 34 C.F.R. § 99.10. Protecting the confidentiality of sexual misconduct proceedings in this manner is entirely consistent not

only with FERPA but also College policy; as a result, Doe could not "reasonably expect" that he had a right to receive copies of the transcripts. *Cf. Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 598 n.26 (D. Mass 2016) ("An accused student might not necessarily be permitted to retain a copy of the [Investigation] Report, as opposed to simply having "access" to it … .").

9. The College did not breach any obligation of confidentiality.

Doe alleges that the College violated its policy of confidentiality and its obligation to comply with FERPA when Dean Bolton disclosed information to Smith during the honor code hearing. Compl. ¶ 228l. As discussed in section II.B.1 above, Dean Bolton's communications with Smith were entirely in accordance with the Honor Hearing Procedures. Nor did FERPA prohibit Dean Bolton from sharing information with Smith about the plagiarism case in which she was the accuser. Doe identifies no confidential student information about him that was disclosed much less how he might have been harmed as a result. FERPA creates no private right of action in any event. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002).

10. The College did not violate any obligation relative to hiring the investigator or the investigator's report.

Doe alleges that the College hired its independent investigator without his input. Compl. ¶ 228o. Of course it did. Nothing in the applicable policy provides that respondents are allowed input into the College's hiring of investigators. *See* Sexual Misconduct Policy (Dkt. No. 1-11).

Doe goes on to allege that the investigator prepared a biased report in which she made errors in applying the College's policies, improperly cited a Dean as a witness, used the term "testify" when referring to Smith's statements, and did not investigate Doe's discrimination complaint against the College. Compl. ¶ 228o. None of these claims involves any actionable departure from College policies. Doe's conclusory claim of bias is merely that; he fails to allege any specific facts to support it. The investigator properly cited Assistant Dean Rosanna Reyes as

a witness, as Smith had identified her as a witness in connection with the incidents in October 2014 and January 23, 2015. Investigation Rpt. (Kelly Decl. Exh. A) at 14-18. Additionally, the investigator's use of the word "testified," when referring to Smith's statements at Doe's honor hearing, is entirely appropriate. *Id.* at 35. To "testify" simply means "to give evidence as a witness." Black's Law Dictionary (Thomson West 8th ed.). Nor was the investigator responsible for investigating Doe's allegation of disparate treatment/deliberate indifference by Dean Bolton. The College's sexual misconduct policy provides for the investigation of violations of that policy; it does not say or suggest that the investigator will investigate an allegation about the investigation. *See* Sexual Misconduct Policy (Dkt. No. 1-11) at 12.

11. The College did not violate its policies concerning disclosure of the investigation report and the responses to it.

Doe and Smith were given the Investigation Report and afforded an opportunity to respond in writing before the final Report, and their responses, went to the Hearing Panel. Compl. ¶¶ 129, 136, 154, 163. Doe complains that he never received a copy of the final Report. Compl. ¶ 228p. Nothing in the College's policy provides for delivery of the final report. Moreover, a "redline" comparison of the final report to the one Doe received demonstrates that it included only a handful of minor revisions, none of them substantive. *See* Redline (Kelly Decl. Exh. F). Doe has not alleged any harm from the revisions or from the fact that he never saw them. (This is hardly surprising, since the only revisions were made at his attorney's request.)

Doe also complains that he never received Smith's second response to the Investigation Report. Compl. ¶ 228p. Nothing in the policy requires that the complainant or respondent receive the other's response. *See* Sexual Misconduct Policy (Dkt. No. 1-11).

12. The panel applied the correct standards in determining whether Doe engaged in non-consensual sexual intercourse.

Doe alleges that the College violated its policies by failing to apply the preponderance of the evidence standard, by failing to apply the correct version of its policy on non-consensual sexual intercourse, and by finding Doe responsible without adequate evidence – based on the "mere credibility" of Smith's account. Compl. ¶¶ 228q, 262u. None of these claims has merit.

The Panel applied the correct, preponderance of the evidence standard when it found "more likely than not" that Doe engaged in non-consensual sexual intercourse. Compl. ¶166; Decision Letter (Kelly Decl. Exh. B) at 2. Moreover, there was ample evidence to support that finding. Smith alleged that while she was lying face down in bed, Doe penetrated her from behind, a position they never started in – a fact that he conceded. Investigation Rpt. (Kelly Decl. Exh. A) at 10-11. Smith alleged that she gave no indication that she wanted to have sex, whereas she and Doe always talked about having sex before beginning any sexual activity, and Doe conceded that Smith "almost always initiated sexual activity." *Id.* at 10-12. Smith testified that Doe forced himself on her and had sex when she did not want to – consistent with what she told at least two corroborating witnesses. *Id.* at 13. While Doe denied that he acted without Smith's consent, ultimately the Panel found her to be credible. Decision Letter (Kelly Decl. Exh. B) at 2. *See also Doe v. Trs. of Boston Coll.*, 2016 WL 5799297, at *19 ("The fact that the case was a circumstantial one, or even a close circumstantial case, however, does warrant the conclusion that there was insufficient evidence to reach the conclusion that the board reached."); *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 462 (S.D.N.Y. 2015) (declining to second guess credibility determinations); *Doe v. Univ. of the South*, 687 F. Supp. 2d. at 755 (it is not for the court to review "whether a sexual assault occurred, whether any such acts were consensual, or who, as between John Doe and the Complainant is credible").

Doe's allegations that the Panel "failed to consider" that Smith's corroborating witnesses were her friends, Compl. ¶ 173, that he and Smith were in a long term relationship, *id.* at ¶¶174a, h, or that Smith purportedly lied to the investigator, *id.* at 174e, are pure conjecture and entirely implausible at that. The Investigation Report identified the corroborating witnesses as Smith's witnesses, *see* Investigation Rpt. (Kelly Decl. Exh. A) at 2, 13, and Doe's response highlighted that they were Smith's friends who, according to Doe, were improperly influenced. Response to Report (Dkt. No. 1-15) at 10-11. The Investigation Report also contained a detailed history of the parties' longstanding relationship, Investigation Rpt. at 1-38, including detailed accounts of their sexual encounters, *id.* at 10-12. The record shows that the Hearing Panel reviewed the Investigation Report and Doe's response. *See* Decision Letter (Kelly Decl. Exh. B) at 1. Doe's claim that Smith lied to the investigator is also unsupported. The Report indicates that Smith admitted to the Investigator that she had accessed Doe's Facebook and told Lady Doe about it. Investigation Rpt. (Kelly Decl. Exh. A) at 19. Doe's attempt to point out inconsistencies in Smith's account is also insufficient. Compl. ¶ 174c. Doe does not state a claim for breach of contract merely by picking out facts he thinks the Panel should have weighed differently.

Doe's claim that the College erred by applying the wrong version of its sexual misconduct policy also provides no basis for his breach of contract claim. Compl. ¶ 165. Assuming for the sake of argument that the Panel applied a version of the policy that came into effect only after the incident at issue, the new version did not differ in substance from the old one.

The Code of Conduct in effect in September 2014, when the incident at issue took place, provided as follows:

> **Non-Consensual Sexual Intercourse: Any sexual intercourse** (anal, oral or vaginal); however slight; with any object; by a man or a woman upon a man or a

> woman; **without effective consent**.
>
> **Consent means that at the time of the sexual contact, words or conduct indicate freely given approval or agreement, without coercion, by both participants in the sexual contact.** Both parties have the obligation to communicate consent or the lack of consent. A verbal "no" (no matter how indecisive) or resistance (no matter how passive) constitutes the lack of consent. In addition, consent once given may be withdrawn at any time. If consent is withdrawn, the other party must immediately stop whatever sexual contact is occurring.

Response to Report (Dkt. No. 1-15) at 5 (emphasis supplied).

Doe alleges that the Panel applied a newer version of the Code of Conduct, which did not come into effect until sometime after October 2014. That version continued to include the prior language about "effective consent," which means "words or conduct [that] indicate freely given approval or agreement," and further emphasized the need for "affirmative consent":

> **Non-Consensual Sexual Intercourse means any sexual penetration** (anal, oral or vaginal), however slight, with any body part or object, by any person upon any other person, **without effective consent.**
>
> Consent is a crucial part of both the Williams Code of Conduct and Massachusetts law. **The Williams College Code of Conduct requires affirmative consent for all sexual activity. Consent means that at the time of the sexual contact, words or conduct clearly indicate freely given approval or agreement, without coercion, by all participants in the sexual contact.** Both parties have an obligation to communicate consent or the lack of consent. In the absence of affirmatively expressed consent, sexual activity is a violation of the code of conduct. In addition, a verbal "no" (no matter how indecisive) or resistance (no matter how passive) constitutes the lack of consent. In addition, consent once given may be withdrawn at any time. …

Investigation Rpt. (Dkt. No. 1-13) at 4 (emphasis supplied).

Thus, assuming for the sake of argument that the Panel applied the newer version of the policy, there was no substantive difference from the old version. Both required "effective consent," which requires "words or conduct [that] clearly indicate freely given approval or agreement" – in other words, "affirmative consent."

Smith's complaint was that Doe forced himself upon her when she was lying face down, and when she had not done or said anything to indicate consent, much less "effective consent"

that was "freely given." Simply put, Doe's conduct violated either version of the College's policy, both of which require consent that is actually "given" and thus "affirmative." *Contrast Doe v. Brown Univ.*, No. CV 16-017 S, 2016 WL 5409241, at *19-20 (D.R.I. Sept. 28, 2016) (a "very close case" in which a hearing panel found a lack of consent based upon a substantively new policy not in effect at the time of the event at issue; the new policy provided that "manipulation" of the complainant negates consent, and the panel found lack of consent on the basis of "manipulation").

13. The College met its obligations with respect to an appeal.

Doe alleges that the College improperly limited his right to appeal to significant procedural lapses and the appearance of substantive new evidence not available at the time of the decision. Compl. ¶ 228r. That is entirely consistent with the College's policy, which provides that "[t]he right to appeal is limited to (a) significant procedural lapses or (b) the appearance of substantive new evidence not available at the time of the original decision." Sexual Misconduct Policy (Dkt. No. 1-11) at 15.

Nor is limiting appellate rights in this way unfair. A college need not provide any right to appeal; when it does, a college can limit the grounds for appeal; and where a college expressly limits an appeal to procedural grounds, a student has no expectation of a review of the merits of the case. *Doe v. Trs. of Boston Coll.*, 2016 WL 5799297, at *20; *Doe v. Brown Univ.*, No. CV 16-017 S, 2016 WL 5409241, at *26 & n.22 (D.R.I. Sept. 28, 2016); *Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 41 (D. Me. 2005).[5]

[5] This case is easily distinguished from *Doe v. Brandeis Univ.*, 177 F. Supp. 3d at, 608, in which the Court was troubled by the fact that a single individual acted as the "investigator, prosecutor, judge, and jury," the potential risks of which were exacerbated by limited appeal rights. *Id.* at 606-07. Here, in contrast, the case was decided by a three-person Hearing Panel, separate from the investigator. *Cf. Doe v. Brown Univ.*, 2016 WL 5409241, at *26 & n.22 (upholding similarly limited appellate right where a panel separate from investigator made determination of responsibility). Moreover, unlike in *Brandeis*, the College procedures "seek to ensure a prompt, fair and impartial

14. The College did not retaliate or facilitate retaliation by adjudicating Smith's complaint.

Doe alleges that the College retaliated against him and facilitated Smith's retaliation against him in violation of the College's policy against retaliation. Compl. ¶ 228s. Doe alleges no specific facts to support this claim; he merely speculates that Smith lodged a counter-complaint against him in order to accomplish his expulsion. *Id.* at ¶¶ 93-94, 99-101. He made this claim in the underlying case; it was fully investigated; and the Panel found it to be without merit. Investigation Rpt. (Kelly Decl. Exh. A) at 34-38; Decision Letter (Kelly Decl. Exh. B) at 1. His breach of contract claim on this point evidences no violation of College policy, only his disagreement with the Panel's conclusion.

C. The Proceedings Have Been Conducted with Basis Fairness.

Disciplinary proceedings are "conducted with basic fairness" if the student has notice of the allegation against him and an opportunity to be heard, i.e., to present his version of events and offer supporting evidence. *Cloud*, 720 F.2d at 725; *Kiani*, 2005 WL 6489754, at *8; *Schaer*, 432 Mass. at 481, 735 N.E.2d at 381; *Driscoll v. Bd. of Trs. of Milton Acad.*, 70 Mass. App. Ct. 285, 295, 873 N.E.2d 1177, 1187 (2007).[j] *Morris v. Brandeis Univ.*, No. 01-P-1673, 60 Mass. App. Ct. 1119, 2004 WL 369106, *2 (Mass. App. Ct. Feb. 27, 2004).

Doe was afforded a process that easily meets that test. He first was notified of Smith's complaint that he had displayed abusive behavior toward her during the preceding two years and that the allegation would be investigated in accordance with the College's sexual misconduct policy. *See* May 10, 2016 Email (Dkt. No. 1-10). After Smith disclosed the sexual assault, the Investigator met with Doe, informed him of the allegation of non-consensual intercourse, read

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investigation and resolution." Dkt. No. 1-11 at 12. The College thus allows students to appeal the basic fairness of the outcome under the rubric of "procedural lapses." Dkt. No. 1-11 at 14.

him a summary of Smith's complaint, and gave him the opportunity to respond to the allegations and to tell his side of the story. *See* Investigation Rpt. (Kelly Decl. Exh. A) at 11. Doe could "suggest questions to the investigator to be asked of others [including Smith], and [to] suggest others that the investigator speak with." *See* Sexual Misconduct Policy (Dkt. No. 1-11) at 13. Throughout the process, Doe had the right to consult an attorney, *id.* at 3, and did so. Prior to any determination of responsibility, Doe was given a copy of the Investigation Report, including its exhibits. Compl. ¶¶ 129, 139 (conceding that the report itself constituted notice). Doe was provided an opportunity to submit a written response and he did so, submitting a 24 page response prepared with the help of his attorney. Compl. ¶¶ 136, 140. In that response he not only gave his account of the events at issue, but also presented his argument as to which policies, or version of policies, should be applied, including in relation to "consent." Compl. ¶ 140; Response to Report (Dkt. No. 1-15) at 5, 9-11. Then, because new information was contained in the students' responses, each was provided with a copy of the other's response and given a second opportunity to respond. Compl. ¶ 154. The investigator did not make the ultimate finding of responsibility, which was left to the three-person Panel after a review of the Investigation Report and the students' responses. Sexual Misconduct Policy (Dkt. No. 1-11) at 14; Compl. ¶ 163. The Panel applied the preponderance of the evidence standard and found it "more likely than not" that Doe did not have consent to have sexual intercourse with Smith during the encounter. Decision Letter (Kelly Decl. Exh. B) at 2. Moreover, Doe was afforded – and has exercised – the right to appeal. Sexual Misconduct Policy (Dkt. No. 1-11 at 15). That process easily meets the test of "basic" or "fundamental" fairness.[6]

[6] Here, too, this case is easily distinguished from *Doe v. Brandeis Univ.*, in which the Court determined that the plaintiff had stated a plausible violation of "basic fairness" under vastly different circumstances. Unlike in this case, the accused student in *Brandeis* was not permitted to consult with his counsel, confront or cross-examine his accuser or other witnesses either directly or indirectly, view witness statements or other evidence, or submit facts and

D. The Hearing Panel's Decision Was Not Arbitrary and Capricious.

"A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support." *City of Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 303, 682 N.E.2d 923, 925 (1997). Where there are any "reasonable grounds" to support the finding of a university disciplinary board, it "will not be subject to successful challenge in the courts." *Cloud*, 720 F.2d at 724 (quoting *Coveney*, 388 Mass. at 19, 445 N.E.2d at 139 (1983)); *Schaer*, 432 Mass. at 479 n.9, 735 N.E.2d at 379 n.9 (rejecting student's contract claim where "[t]here was ample evidence which, if believed, could have supported the board's decision").

The Hearing Panel's decision in this case had a fully "rational explanation" that was supported by "reasonable grounds," as discussed in section II.B.12 above.

III. COUNT III FAILS TO STATE A CLAIM FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING.

"The covenant of good faith and fair dealing requires that 'neither party shall do anything that will have the effect of destroying or injuring the right of the other party to the fruits of the contract.'" *Young v. Wells Fargo Bank*, N.A., 717 F.3d 224, 237–38 (1st Cir. 2013) (citations omitted). "The concept of good faith 'is shaped by the nature of the contractual relationship from which the implied covenant derives,' and the 'scope of the covenant is only as broad as the contract that governs the particular relationship.'" *Id.* (citations omitted). The covenant cannot "create rights and duties not otherwise provided for in the existing contractual relationship." *Id.* (citations omitted). Moreover, "[g]ood faith and fair dealing cannot be separated from context … and in evaluating those covenants in the educational milieu, courts must accord a school some measure of deference in matters of discipline." *Havlik*, 509 F.3d at 35.

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evidence after learning the charges against him, and was not provided with a copy of the report until the entire proceeding concluded; in addition, the investigation and determination of his responsibility was decided by a sole special examiner. *See* 177 F. Supp. 3d at 578-581.

Doe's claim for breach of the implied covenant of good faith and fair dealing rests on the same allegations as his breach of contract claims. Compl. ¶¶ 234-36. As explained above, the College complied with its policies and procedures and Doe's reasonable expectations. His claim for breach the implied covenant of good faith and fair dealing thus fails as well. *See Bleiler*, 2013 WL 4714340, *17; *Sullivan v. Boston Architectural Ctr., Inc.*, 57 Mass. App. Ct. 771, 774, 786 N.E.2d 419, 421 (2003).

IV. COUNT IV FAILS TO STATE A CLAIM FOR PROMISSORY ESTOPPEL AND RELIANCE.

Doe's promissory estoppel and reliance claims are merely duplicative of his breach of contract claims and thus fail for the reasons stated above. Moreover, where, as here, a written contract governs the same subject matter, recovery under a quasi contract theory is not available. *Brandeis*, 177 F. Supp. 3d at 12-13; *Trent Partners & Assocs. Inc. v. Digital Equip. Corp.*, 120 F. Supp. 2d 84, 104-05 (D. Mass. 1999); *see also Doe v. Brown Univ.*, 166 F. Supp. 3d at 196.

V. COUNT V FAILS TO STATE A CLAIM UNDER M.G.L. C. 93 § 102 OR 93A § 9.

Count V fails to state a claim under M.G.L. c. 93A because the College was not engaged in "trade or commerce" with respect to the events at issue. The College is a non-profit corporation. Compl. ¶¶ 3, 12. It is well-settled that colleges and universities, as charitable corporations, are not engaged in "trade or commerce" for purposes of Chapter 93A when they undertake activities that are "in furtherance of" or "incidental to" their core mission, as distinct from commercial activities undertaken solely to make a profit. *Trs. of Boston Univ. v. ASM Commc'ns, Inc.*, 33 F. Supp. 2d 66, 77 (D. Mass. 1998); *Linkage Corp. v. Trs. of Boston Univ.*, 425 Mass. 1, 25, 679 N.E.2d 191, 208 (1997); *see also Thornton v. Harvard Univ.*, 2 F. Supp. 2d 89, 95 (D. Mass. 1998); *Shin v. Mass. Inst. of Tech.*, No. 020403, 2005 WL 1869101, at *8 (Mass. Super. June 27, 2005).

It is self-evident that addressing student conduct violations is an activity conducted "in furtherance of" or "incidental to" the College's core educational mission, and not a commercial activity undertaken to make a profit. Indeed, engaging in such disciplinary activities, at least with respect to student conduct that implicates Title IX, is now a ***mandated*** part of the College's mission. *See* 34 C.F.R. § 106.8(b) (colleges must adopt and publish grievance procedures for addressing complaints of conduct that involves sexual discrimination, including sexual harassment and sexual violence).

Doe's Ch. 93A claim also fails because he did not send the requisite demand letter at least thirty days before filing suit. G.L. c. 93A, § 9(3); *Rodi v. Southern New England School of Law*, 389 F.3d 5, 19 (1st Cir. 2004) (statutory notice "is not a mere procedural nicety, but, rather a 'prerequisite to suit.'"); *see also Lingis v. Waisbren*, 75 Mass. App. Ct. 464, 468, 914 N.E.2d 976, 979-80 (2009).

Count V also fails to state a claim under the Massachusetts Equal Rights Act, G.L. c. 93 § 102, which entitles "all persons ... regardless of sex, race, color, creed or national origin ... to the same rights enjoyed by white male citizens to make and enforce contracts, to inherit, to purchase, to lease, sell, hold and convey real and personal property, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property." Doe contends that the College's "gender-based bias against [him] constituted discrimination" in violation of the Act. Compl. ¶ 250. His conclusory allegation of gender bias fails for the reasons discussed in sections I.B. and II.B.1 above.

VI. COUNT VI FAILS TO STATE A NEGLIGENCE CLAIM.

The relationship between student and college is essentially contractual in nature, with the result that cases such as this one, in which a student alleges that he wrongfully was disciplined

for violating a college's code of conduct, are evaluated as claims for breach of contract. *See Schaer*, 432 Mass. at 478, 735 N.E.2d at 378 (2000).[7] Recognizing this to be the case, Doe asserts a variety of contract claims against the College in Counts II-IV and VII of the Complaint.

Where, as here, a contract governs the performance of a duty, the plaintiff has no cause of action in tort absent an independent duty imposed by law. *Treadwell v. John Hancock Mut. Life Ins. Co.*, 666 F. Supp. 278, 289 (D. Mass. 1987) (citing Prosser & W. Keeton, Torts § 92 (5th ed. 1985)). No such independent duty exists here. *See Doe v. Trs. of Boston Coll.*, 2016 WL 5799297, at *28 (finding no duty of reasonable care to a student accused of sexual misconduct beyond the obligations to provide basic fairness and abide by the parties' contractual relationship). To the contrary, courts in Massachusetts consistently have held that colleges do not owe their students any general duty of reasonable care,[8] and in particular that colleges do not owe their students a duty of reasonable care in the administration of student discipline. *See Doe v. Emerson Coll.*, No. CV 14-14752-FDS, 2015 WL 9455576, at *8 (D. Mass. Dec. 23, 2015) (dismissing negligence claim against university and its administrators based on plaintiffs' dissatisfaction with a Title IX investigation, because "Massachusetts does not . . . impose a

[7] *See also Havlik*, 509 F.3d at 34 (citing *Mangla v. Brown Univ.*, 135 F.3d 80, 83 (1st Cir. 1998)); *Russell v. Salve Regina Coll.*, 890 F.2d 484, 488 (1st Cir. 1989), *rev'd on other grounds*, 499 U.S. 225 (1991), *reinstated on remand*, 938 F.2d 315, 316 (1st Cir. 1991); *Cloud*, 720 F.2d at 724; *Bleiler*, 2013 WL 4714340, at *14 n.7; *Dinu*, 56 F. Supp. 2d at 132; *Govan v. Trs. of Boston Univ.*, 66 F. Supp. 2d 74, 82 (D. Mass. 1999); *Thornton v. Harvard Univ.*, 2 F. Supp. 2d at 93-94; *Guckenberger*, 957 F. Supp.at 317; *Coveney*, 388 Mass. at 21-11, 445 N.E.2d at 138-139.

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

common-law or statutory duty on administrators to enforce university policies") (citing *Bash*, 2006 WL 4114297, at *5); *see also Driscoll*, 70 Mass. App. Ct. at 292, 873 N.E.2d at 1185 (citing *Nicholas B. v. School Comm. of Worcester*, 412 Mass. 20, 21, 587 N.E.2d 211, 212 (1992); *Coveney*, 388 Mass. at 19-20, 445 N.E.2d at 138-39)); *Sullivan v. Boston Architectural Ctr., Inc.*, No. 96-4267C, 2000 WL 35487586 (Mass. Super. Ct. April 3, 2000); *see also Berkowitz v. Pres. & Fellows of Harvard Coll.*, 58 Mass. App. Ct. 262, 269-70, 789 N.E.2d 575, 581 (2003) ("in the absence of a violation of a reasonable expectation created by the contract, or arbitrary and capricious conduct by the university, courts are not to intrude into university decision-making") (internal citations omitted).[9]

Doe attempts to couch his dubious negligence claim in terms of negligent training and supervision. Compl. ¶¶ 255, 257. "Negligent retention [or supervision] occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge or reassignment." *Foster v. Loft, Inc.*, 26 Mass. App. Ct. 289, 291-92, 526 N.E.2d 1309 (1988). Doe has alleged no facts that would support such a claim. Unlike the specific facts alleged in *Brandeis*, 177 F. Supp. 3d at 14, Doe has not alleged any facts that would show the College should have known there were "problems" with any particular person indicating an "unfitness" to handle Doe's case.

VII. COUNT VII FAILS TO STATE A CLAIM BASED ON FUNDAMENTAL FAIRNESS.

There is no independent cause of action for "failing to provide basic fairness" in connection with a university disciplinary proceeding. *See Doe v. Trs. of Boston Coll.*, 2016 WL

[9] Courts in other jurisdictions similarly have rejected purported negligence claims in relation to a university's administration of student discipline. *See Yu v. Vassar Coll.*, 97 F. Supp. 3d at 484; *Salus v. Nevada ex rel. Bd. of Regents of Nev. Sys. of Higher Educ.*, No. 2:10-CV-01734-GMN, 2011 WL 4828821, at *5 (D. Nev. Oct. 10, 2011).

5799297, at *23. Moreover, as discussed in section II.C above, the College afforded Doe a process that easily meets the test of "fundamental" or "basic" fairness.

VIII. COUNT VIII FAILS TO STATE A CLAIM UNDER THE MASSACHUSETTS CIVIL RIGHTS ACT.

To establish a claim under the Massachusetts Civil Rights Act, M.G.L. c. 12 § 11H, "a plaintiff must prove that (1) the exercise or enjoyment of some constitutional or statutory right; (2) has been interfered with, or attempted to be interfered with; and (3) such interference was by threats, intimidation, or coercion." *Glovsky v. Roche Bros. Supermarkets*, 469 Mass. 752, 762, 17 N.E.3d 1026, 1035 (2014) (citations omitted). Doe has failed to plead any "threats, intimidation, or coercion" by the College. Moreover, the College is not liable for any such alleged conduct by Smith. *See Armstrong v. Lamy*, 938 F. Supp. 1018, 1042 (D. Mass. 1996) (citing *Lyons v. National Car Rental Systems, Inc.*, 30 F.3d 240, 247 (1st Cir. 1994) ("the doctrine of respondeat superior does not apply to an action brought under the MCRA")).

IX. COUNT IX FAILS TO STATE A CLAIM FOR ASSAULT, DEFAMATION AND INVASION OF PRIVACY.

In Count IX, Doe claims that the College is vicariously liable as Smith's employer for her alleged conduct in assaulting and defaming him and invading his privacy. The claim fails for the simple reason that Smith's alleged conduct was not committed within the scope of her employment. *See Merlonghi v. United States,* 620 F.3d 50, 54–55 (1st Cir. 2010) ("Under the doctrine of respondeat superior, 'an employer, or master, should be held vicariously liable for the torts of its employee, or servant, committed within the scope of employment."). In determining whether conduct occurred within the scope of employment, the court considers "(1) "whether the conduct in question is of the kind the employee is hired to perform," (2) "whether it occurs within authorized time and space limits," and (3) "whether it is motivated, at least in part, by a

purpose to serve the employer." *Id.* (citations omitted). There are no such allegations here. To the contrary, Smith's allegedly tortuous conduct all occurred in the context of the parties' personal relationship, having nothing to do with her employment in the Alumni Office.

X. COUNT X FAILS TO STATE A CLAIM FOR DECLARATORY JUDGMENT.

Count X, which seeks a declaratory judgment, fails because Doe has failed to state a violation of any legal right or obligation. *See Brown v. Rhode Island*, 511 F. App'x 4, 6 (1st Cir. 2013) "'[D]eclaratory judgment is unavailable where . . . there is no ongoing legal violation.'… In other words, 'declaratory judgment is meant to define the legal rights and obligations of the parties in anticipation of some future conduct, not simply to proclaim liability for a past act.'").

CONCLUSION

The Court should dismiss Doe's Complaint with prejudice and enter judgment in favor of the College.

WILLIAMS COLLEGE,

/s/ Elizabeth H. Kelly

Daryl J. Lapp (BBO No. 554980)
daryl.lapp@lockelord.com
Elizabeth H. Kelly (BBO No. 672277)
liz.kelly@lockelord.com
LOCKE LORD LLP
111 Huntington Avenue
Boston, MA 02199
617.230.0100

December 22, 2016

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This document was served electronically upon all counsel of record by filing through the ECF system on December 22, 2016.

/s/ Elizabeth H. Kelly
Elizabeth H. Kelly

AM 60957460.1