IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

* * * * * * * * * * * * * * * * * * * *	C.A. NO. 18-106JJM
JOHN DOE	
VS.	MAY 14, 2018
	2:00 P.M.
JOHNSON & WALES UNIVERSITY	
* * * * * * * * * * * * * * * * * * * *	PROVIDENCE, RI

BEFORE THE HONORABLE JOHN J. McCONNELL, JR.,

DISTRICT JUDGE

(Motion to Dismiss)

APPEARANCES:

FOR THE PLAINTIFF: JAMES P. EHRHARD, ESQ.
Ehrhard & Associates, P.C.
250 Commercial Street, Suite 410
Worcester, MA 01608

FOR THE DEFENDANT: STEVEN M. RICHARD, ESQ.
Nixon Peabody LLP
One Citizens Plaza, Suite 500
Providence, RI 02903

Court Reporter: Karen M. Wischnowsky, RPR-RMR-CRR
One Exchange Terrace
Providence, RI 02903

14 MAY 2018 -- 2:00 P.M.

THE COURT: Good afternoon, everyone. We're here this afternoon in the case of John Doe versus Johnson & Wales University, Civil Action 18-106.

Would counsel identify themselves for the record, please.

MR. EHRHARD: Hello, your Honor. James Ehrhard on behalf of the Plaintiff.

THE COURT: Good afternoon, Mr. Ehrhard.

MR. EHRHARD: Thank you.

MR. RICHARD: Good afternoon, your Honor. Steven Richard on behalf of Johnson & Wales University, and with me today is the general counsel of the university, Bud Remillard.

THE COURT: Great. Welcome, Mr. Remillard, and welcome back, Mr. Richard.

Before we get started, it dawned on me as I was preparing for this over the weekend that I am a contributor to Johnson & Wales University. I have been I think for the last two or three years.

They have a scholarship fund that my wife and I contribute to I think for -- maybe for two years now, and we attend two dinners of the scholarship fund people a year at Johnson & Wales. We just had one I think about a month ago.

I don't believe in any way it affects my ability to sit impartially on this case; but Mr. Ehrhard particularly or I suppose Mr. Richard, too, I need to inform you of that and see if you have any objection to me proceeding.

MR. EHRHARD: As I sit here right now, your Honor, I can't say that I do. I have no reason to question you. Without speaking to the family, I can't say; but as I sit here right now, I have no opposition to going forward today.

THE COURT: Okay. Great.

MR. RICHARD: None, your Honor. I would just note for counsel that in other cases for Brown University, you're a Brown grad as well to hear those cases.

THE COURT: Well, I do hear many of those cases, by the same named Plaintiff, it seems; but truth be told, I don't give anywhere near as much money to Brown as I have to Johnson & Wales, for what it's worth.

MR. REMILLARD: We thank you.

THE COURT: Mr. Richard, it's your motion.

MR. RICHARD: Thank you, your Honor. Your Honor, Steven Richard on behalf of Johnson & Wales University. As the Court knows, there has been a proliferation nationally of cases filed by John Doe

Plaintiffs, male students, challenging the result of campus sexual misconduct proceedings. Two cases have rendered decisions -- have been subject of decisions in this Court which I made reference, both of which involved Brown University. The first is *John Doe v. Brown University*, cause of action number 15-144-S, before Judge Smith.

In that case, which is still pending, his Honor partially granted my motion to dismiss, partially denied it. It's a Title IX and breach of contract case that's still pending. I'll call that case *John Doe I* to the extent that I refer to it.

The second case that this Court has decided is another Brown University case, *John Doe v. Brown University*, cause of action 16-17. That case actually went to trial. It was a breach of contract case. That is *John Doe II*.

THE COURT: Also with Judge Smith.

MR. RICHARD: All with Judge Smith. Your Honor, as we made clear in our papers, we are not challenging at this stage the contract claims, Counts I and II. And we made that decision carefully and thoughtfully in light of this Court's rulings in both of the John Doe cases that I cited.

In *John Doe I*, Judge Smith allowed the breach of

contract claim to survive in substantial part, and in *John Doe II* we actually went to trial in that case because it was so fact specific. Whether this case reaches that point will be subject to summary judgment. We'll see. But for purposes of today at the Rule 12(b)(6) stage, we're not challenging Counts I and II.

And the reason is that the Complaint has sufficiently pled alleged procedural errors. We don't agree with them, but we must accept them as true.

Where we're really focusing on is the Title IX component of this, your Honor. Not every alleged procedural breach equates to a Title IX cause of action.

There's a distinct difference between a breach of contract claim and a Title IX claim, namely there has to be a showing of discriminatory intent to support a Title IX claim.

THE COURT: It has to be gender-based --

MR. RICHARD: Gender-based, correct, and it can't be disparate impact. It has to be discriminatory intent.

The Court ruled in the *John Doe I* case that the First Circuit hasn't addressed the applicable standard to evaluate these types of claims but looked, at most

Courts have, to the Second Circuit ruling in the *Vassar* case, the 1994 case. And in that particular case, *Yusuf v. Vassar College*, the Second Circuit delineated two distinct theories that John Doe Plaintiffs could pursue to challenge a disciplinary action under Title IX, the first being erroneous outcome and the second being selective enforcement. And those two theories were acknowledged by Judge Smith in the *John Doe I* case.

The issue here is the Complaint does not delineate which of the two theories the Plaintiff is even proceeding under.

THE COURT: Well, you concede in your reply that you read the Plaintiff's opposition to set forth the erroneous outcome matter, so it's at least now clear in your mind which avenue they're pursuing.

MR. RICHARD: And I agree with that, your Honor. It certainly could not possibly support a selective enforcement claim because there's no identification of a comparable female student, but the issue under erroneous outcome is really an issue of causation.

The *Vassar College* case delineates a two-pronged analysis at the motion to dismiss stage, the first being there has to be a showing of an erroneous outcome, something about the decision was wrong. And,

again, for purposes of today's hearing only, we'll concede that that first prong has been met; but what we're really focusing on is the second prong and the most important, the causation prong.

THE COURT: Right. And the Plaintiff in effect, as I read their papers, points to two matters. One I'm sure you're ready to talk about, and that's the allegation about training and gender-based training, so to speak.

And then the second is this theory that absent some other explanation for why the body ruled the way that it did, that the Plaintiff at this stage can rely on gender being the motivating force when there's no other logical explanation as to why, I'll just use the pronoun, she was believed and he wasn't.

MR. RICHARD: Well, your Honor, on the first part, the training, and it's solely a single paragraph that's pled upon information and belief, and this was an issue in the *John Doe I* case where I challenged on behalf of Brown pleadings, allegations upon information and belief.

THE COURT: And Judge Smith said?

MR. RICHARD: But the meat there was substantially more than what's on this particular Complaint.

THE COURT: But he said you can plead on -- you can rely on upon information and belief --

MR. RICHARD: He did.

THE COURT: -- allegations in the Complaint.

MR. RICHARD: But Courts here and nationally have said that there has to be some level of specificity. All that's alleged here is a belief that the training must have been biased. There's not -- and you don't need a smoking gun at this stage, your Honor, but there has to be some factual predicate to support the allegation.

THE COURT: But, Mr. Richard, what else could the -- absent a stray comment by somebody, what else could the Plaintiff know at this stage to the degree that you're asking them to have knowledge of that without having -- when you control all of the information, all of the cards, so to speak?

MR. RICHARD: Well, your Honor, it is true that most of the information in these types of cases rests with the universities and that certainly discovery can lead to it; but that's one of the issues that the Courts have addressed nationally, is what's the threshold to open up the discovery doors.

Having litigated many of these cases, the discovery can be expansive, expensive and really, in my

view, many times leading to gross fishing expeditions.

THE COURT: Right, but the examples that you give of that have to do not with an allegation that the disciplinary process here is -- that the people are trained within the disciplinary process here discriminatorily in favor of women in this case, and that's a relatively finite area that one could concede discovery could produce; that is, if it's limited to the disciplinary hearings, I would assume, let's say, there's, I don't know, a couple dozen of them over a certain time period, and --

MR. RICHARD: There is nothing pled here other than the boilerplate allegation of any factual occurrence in the process that supports the contention.

THE COURT: Right.

MR. RICHARD: So that's the issue we have here, is that you're trying to open the door based on speculation, not a factual predicate, which may not be entirely clear; but there has to be something more than counsel's speculation to support the information and belief.

The issue, your Honor, about the process itself and the assumption that something must have been gender-based for it to have reached this result, the Courts have really looked at this and held that alleged

allegations in favor of the complainants as opposed to respondents in these processes is not evidence of gender discrimination.

There has to be something to suggest that the university had some type of bias against males as opposed to females.

THE COURT: Well, we're at the stage -- I want to underscore this. We're at the stage where the allegations alleged in the Complaint are believed.

MR. RICHARD: Correct.

THE COURT: I can't for the life of me find any other explanation for why this -- why John Doe was disciplined based on the allegations that are set forth in that Complaint.

And the only possible inference one could draw from it is that there was some element of gender-based decisionmaking that went on there because if all of the allegations are believed, there's no other explanation that is before the Court for that.

MR. RICHARD: Well, your Honor, I would submit, and we've cited some of the cases, that there is a distinction that is drawn between a pro-complainant philosophy and the gender discrimination viewpoint; that if the university is assumed to be pro-complainant and anti-respondent, that, per se, is not evidence of

gender discrimination.

THE COURT: No, but one could conceive of sufficient evidence being presented that would make that more obvious.

MR. RICHARD: Well, I would submit, your Honor, in this particular Complaint that it hasn't passed the threshold. And Courts are, you know, frankly evolving in their standards of review, and we cite the Second Circuit decision and the Sixth Circuit. And Judge Smith, I believe, in the *John Doe I* case came really more in the middle in saying that there has to be something.

THE COURT: That's his way.

MR. RICHARD: Excuse me?

THE COURT: That's his way. He always looks for the middle ground.

MR. RICHARD: Respectfully, your Honor, I would submit that this Complaint doesn't have the factual predicates to show gender discrimination. There's a lot of smoke here.

The allegations, particularly in the response of this alleged viral hysteria nationally, and there has been a lot of discussion nationally and college campuses are addressing this issue, but there's nothing tying that so-called viral hysteria to any alleged --

THE COURT: You know, now that you've used it twice, I realize you're quoting directly from the Plaintiff's Complaint, but my younger law clerk pointed out to me that the use of the term "hysteria" is a rather sexist term.

MR. RICHARD: I'm just using what they do.

THE COURT: I know. Unbeknownst to me, it derives from the Latin term for a woman's sexual organs and has sexual -- sexist connotations that go with it. I was going to wait and tell that to the Plaintiff; but seeing you've now done it, I'd appreciate it if we didn't --

MR. RICHARD: Your Honor, in fairness, I didn't know that either. So I'll simply say the national debate on campus sexual misconduct issues and the discussions that have ensued and the publications that have resulted certainly has proliferated since the 2011 issuance by the Obama Administration of the Dear Colleague Letter; but there's nothing that indicates that any of these points, discussions, viewpoints in any way permeated, impacted or affected anything in this particular disciplinary process.

THE COURT: But the Plaintiff also adds to it, seeing you brought it up, which was the original Dear Colleague Letter that was in effect at the time that I

think John Doe came before the disciplinary board before the new administration and the new Dear Colleague Letter, why can't the Court consider that a piece as well at this stage?

MR. RICHARD: Well, two points. The Northern District of New York in the *Doe v. Colgate* case that I cite indicates that a change in a guidance document during the course of a case does not in any way change the university's compliance with the guidance document that it was subject to at the time of the action.

Also, your Honor, we have to be clear that these guidance documents, per se, do not allow for private causes of action under them. The Supreme Court is very clear in the *Davis* and *Gebser* Title IX cases that there's no cause of action for alleged administrative violation of regulations or guidance documents. It has to be based on the standards that the Courts delineate under Title IX.

THE COURT: Right, but why can't it be looked on as evidence to meet the Plaintiff's burden of potential gender-based discrimination if one were --

MR. RICHARD: Because there's nothing factually pled or even upon information and belief in this Complaint tying any of those concerns or impacts to what happened here.

This is a Plaintiff who strongly, and I respect his viewpoint, disagrees with the result; and certainly he can have his day in court going forward on the contract claim. I didn't challenge that. Your Honor probably knows I challenge it in other cases. I did not challenge it here because it was sufficiently pled.

But this Title IX cause of action which we now put in the erroneous outcome column in my view, your Honor, has not met the required causation standard that is required under *Yusuf v. Vassar College* which this Court adopted in the *John Doe I* case.

There has to be something more than what's pled here, and simply saying upon information and belief in one paragraph I think the training was biased, that is not enough; and there's nothing factually tying any of these alleged external influences or discussions to anything that happened at Johnson & Wales University.

So focusing on the second prong of the *Yusuf v. Vassar College* causation analysis, it's our position that the Complaint as pled and clarified in the opposition to this motion still does not pass muster and sufficiently plead a Title IX cause of action.

Your Honor, focusing on the remaining counts, which are common law counts under state law --

THE COURT: Yeah, talk to me about the intentional infliction of emotional distress because when I read the Plaintiff's opposition on that particular matter, I thought they made a pretty strong argument on this Plaintiff being squarely within the zone of danger; and then in your reply, you showed a level of disdain for that argument -- "disdain" is not the right word. I didn't mean that pejoratively, but you came close to saying that's a pretty stupid argument. And I'm thinking, well, geez, I kind of thought it was a pretty good one. Tell me why this --

MR. RICHARD: Well, I think your Honor -- first my response is, I would never, obviously, say that to an opposing counsel; but the zone of danger analysis actually applies to the negligent infliction of emotional distress.

THE COURT: I apologize. That's the one I meant.

MR. RICHARD: Okay. We have Judge Smith's decision in a Jane Doe case, *Jane Doe v. Brown University*, where he dismissed at the Rule 12(b)(6) stage a negligence cause of action based on negligent infliction of emotional distress.

Certainly it's not a case of bystander liability.

THE COURT: Right.

MR. RICHARD: I would submit that this is not within the zone of danger; but I believe there's another reason why dismissal is proper here, is that if you read the *John Doe I* case that Judge Smith decided, he dismissed the negligence count at the 12(b)(6) stage of the proceeding ruling that when you have a contract claim, when you have a claim that the process did not follow the handbook, the contract, that supersedes and negates a negligence cause of action.

THE COURT: I understand that as your argument on the promissory estoppel count, but how does that negate a negligent infliction of emotional distress?

MR. RICHARD: Because Judge Smith ruled that any negligence cause of action that is concurrently premised on a contract, and this is *John Doe I*, cannot survive because the Plaintiff should proceed under the contract and the duties delineated there and that the separate cause of action for negligence in that case was properly dismissed.

THE COURT: But what about the right to plead in the alternative?

MR. RICHARD: Your Honor, there was a decision of this Court, and I would submit that I'm not sure how John Doe was within the zone of danger here.

THE COURT: So tell me that. That's what I can't understand, how he could not be in the zone of danger when he was the subject of the disciplinary hearing and that's the danger and the zone that is complained of in this Complaint.

How is he not in the zone of danger? Who would be in the zone of danger in this case?

MR. RICHARD: I don't view it as a zone of danger, your Honor. I view it as a process that's proceeding under a contract.

So what I'm saying globally is I think if you read the *John Doe I* decision by Judge Smith, negligence causes of action in this type of litigation is essentially jamming a square peg into a round hole because the cause of action is contractually based and nothing more.

THE COURT: Unless the jury were to not find in favor of that but found that Johnson & Wales acted negligently to inflict emotional distress.

MR. RICHARD: But there is a contract here, and that's undisputed, and we don't dispute that at all. And the contract in the process controls based upon my reading of *John Doe I* and what the judge there ruled as the grounds for dismissing the negligence cause of action, and this is a negligence cause of action, to

say that when you are proceeding under contract, and there are Rhode Island cases delineating this precise point that Judge Smith cites, the negligence cause of action is not a properly stated cause of action in this type of proceeding.

So I would submit to your Honor looking at that and when I'm talking about the zone of danger, it's essentially saying, and respectfully I acknowledge I should have been clearer in my papers, but in *John Doe I*, Judge Smith did, in fact, say that negligence is not a proper cause of action when you have a contractually based claim that the disciplinary process was procedurally flawed.

THE COURT: I just read on the front page of Rhode Island Lawyers Weekly that Judge Smith and I came to absolute opposite conclusions in an employment case where I had originally ruled on the very same employment contract that it was not subject to arbitration, and Judge Smith apparently mustn't have read my opinion because he obviously would have agreed with it if he had, on the same contract issued a ruling that it was subject to arbitration. So I guess the First Circuit will eventually figure that part out.

MR. RICHARD: That's my argument on the negligent infliction of emotional distress, your Honor.

THE COURT: I've got your other arguments.

MR. RICHARD: Okay. And on the intentional infliction of emotional distress, I do want to briefly respond, and I know your Honor's read the papers. It's important to note here that a university such as Johnson & Wales has to respond to an alleged sexual assault. That's its obligation under Title IX.

And to hold a university liable for intentional infliction of emotional distress on alleged procedural errors would really undermine and impact a university's responses adversely.

The universities, as the Courts have consistently held, are obligated to respond; and even if there was a procedural violation, which we'll litigate in this case, that does not equate to the type of behavior that shocks the conscience, that's extreme and outrageous.

And certainly, your Honor, Courts have consistently rejected that type of claim when pled in a disciplinary challenge.

And the last point I would make, your Honor, is on the injunction. That's a cause of action. It's just housecleaning. And Plaintiff also makes the point here that there was some uncertainty on their end because the case was filed in Massachusetts that Rhode

Island law applies now that we're here.

I would submit, your Honor, Rhode Island law has always applied to this proceeding because it would have applied if we were in Massachusetts. So the common law cause of actions don't get another day in court or another chance because the Plaintiff thought he was subject to Massachusetts law.

A clear reading of the facts of this case indicate that Rhode Island law has always controlled; and under controlling Rhode Island law, we submit, your Honor, that the common law counts should be dismissed.

THE COURT: Great. Thanks, Mr. Richard.

Mr. Ehrhard.

MR. EHRHARD: Your Honor, James Ehrhard. It is my pleasure to be here today.

THE COURT: Welcome.

MR. EHRHARD: I've never practiced in Rhode Island court before.

THE COURT: I'm glad we can be your first.

MR. EHRHARD: I know I fought the movement; but when I came down, I told my client, well, I get to practice in Rhode Island. And I appreciate the lenient admission rules. The Federal Court made things easier on my office.

THE COURT: Good.

MR. EHRHARD: I'm not sure how the Court wants me to argue. I think the papers in this case for both sides were pretty well done and quite extensive.

THE COURT: All right. So let's get right to the --

MR. EHRHARD: I guess what stuck out to me most, and I guess I'm going to focus on the Title IX claims because I guess that's where I think the meat of this discussion is going, is Johnson & Wales in its motion to dismiss relies heavily on the Doe case versus Brown University where they -- Brown's motion to dismiss was denied and also relied upon -- which relied upon the *Yusuf* case in the Second Circuit.

So I took that *Yusuf* case, and my response was, okay, then let's talk about that case. And the Second Circuit expanded upon it because in the *Doe v. Brown* case and then the *Yusuf* case, they said that, well, Title IX may not be exactly Title VII, but there's a middle ground here where you can show some facts. As you said previously in oral argument, well, what other reason could there possibly be based on these facts than bias?

The Second Circuit took *Yusuf* and took it further and said explicitly that Title IX cases had the same *McDonnell Douglas* analysis as Title VII, which is

employment discrimination, which says facts appoint a minimal plausible inference of discriminatory intent.

And this honorable Court in Rhode Island looked to the Second Circuit in the *Yusuf* case and used it as guiding precedent.

And then in the reply, Johnson & Wales said, oops, our mistake. Let's go look to the Sixth Circuit because we don't like what the Second Circuit said.

THE COURT: But where is the connection between your -- what you know of the case right now and what you allege was inappropriate Title IX bias and gender-based discrimination?

What can you point to that leads to that conclusion other than the inference part that I told --

MR. EHRHARD: I would argue that inference is enough to get me there; but if we need to go further, we do that in that -- well, we go as far as we possibly can. We say that the training materials are gender-biased.

THE COURT: Hold on for a second. Tell me what support you have for saying that.

MR. EHRHARD: And this is where our support comes from. It's not in the Complaint because you can't put things in the Complaint you don't know to be true or believe to be true in terms of specific facts.

I specifically asked, and I say this in my Complaint in a footnote, I specifically asked Johnson & Wales during the appeals process to the procedure. I asked Johnson & Wales counsel for -- provide me with a delineation of the training they received, the panelists, to become panelists as indicated in the conduct review process.

I asked for that material before -- during my appeals process because I wanted to see the training materials because I believed they were biased.

The response we received from Johnson & Wales' general counsel, who is here with us today, was that my outside counsel advises me that we should provide only what was provided to the student in the normal course of proceedings.

So as indicated in the *Yusuf* case, which is indicated in the *Brown* case, which is indicated in the *Columbia* case in the Second Circuit, how can a Plaintiff in a Title IX case plead beyond basic -- upon information and belief when all information he needs is in the hands of the Defendants?

What makes my case very unique is that I actually asked for the training materials and was explicitly denied, and I think I know why.

The current Title IX officer, or they call it

something different, is Betsy Gray. Betsy Gray took over for a woman named -- give me a moment here. Took over for a woman named Claire Hall. Claire Hall was on the trauma -- was a faculty member for the Trauma-Informed Sexual Assault Investigation and Adjudication Institute.

Trauma-informed training is specifically sexual assault training which presumes that the complainant is not lying and that females are open to assault by males. And the Wall Street Journal itself just did an editorial about trauma-induced training is inherently biased against males.

And so we had a sense of that when we look at the history of Betsy Gray, the Johnson & Wales Title IX coordinator, because we tracked it back; but we knew that -- well, my office knew that we couldn't necessarily say that in the Complaint without having evidence of it. We asked for it. It was denied.

So this Court questions -- says why should I -- what can Mr. Ehrhard do, the Plaintiff, to give me more? He says in the Complaint I asked for the training materials. I was denied it.

I sit here in oral argument to you here today, and I'm happy to show counsel, but Claire Hall was -- I believe was the preceding officer to Betsy Gray, and we

have the materials that show she was a faculty member at the Trauma-Informed Sexual Assault Investigation and Adjudication Institute.

We believe if the motion to dismiss is denied and we move to a very limited discovery stage, we're going to get those materials and those materials are going to track exactly what we've seen nationwide, that the training materials are inherently biased to a belief that males are sexual offenders.

And if that's, indeed, the case, then that shows the panelists were biased against Mr. Doe because of his gender.

Now, you say, well, Mr. Ehrhard, you say that most of these people who are punished are men. You just gave a perfunctory statement. Well, if I can't get training materials before I file a Complaint, how am I ever going to get statistical analysis of how many complaints were filed and their gender? I'm not going to get that.

And the only way to do a Complaint, what the Defendant would like me to do is give statistic analysis, specific examples. It cannot be done. And that is why the *Columbia* case in the Second Circuit said minimal plausible inference of discriminatory intent.

And to give your Honor credit, as you said, based on the facts as I've written them, and those are the facts, you could not find in favor of the complainants against Doe unless you were biased.

And I want to quote, if I may, from -- directly from the *Columbia University* case. As you said, the Second Circuit said "chose to accept an unsupported" -- the alleged fact that the hearing panel, in this case Johnson & Wales, our case, chose, quote, "to accept an unsupported accusatory version over Plaintiff's and declined even to explore the testimony of Plaintiff's witnesses, if true, gives plausible support to the proposition that they were motivated by bias in discharging their responsibilities to fairly investigate and adjudicate the dispute."

And that's important because in my Complaint I reference witnesses who would have supported Mr. Doe's argument that I didn't assault her. One of them was a roommate who was in the room where it happened, supposedly, but was sleeping. The panel never talked to that witness. The panel never brought them in.

Well, the argument would be, well, he's responsible to do it. He's a junior in college without a right to counsel, without a list of what he can and can't do. How is he supposed to know he's supposed to

bring the witnesses in?

If it's not biased, if it's not based on gender, then the panel should have sought out those witnesses, brought in the roommate and said, Mr. Smith, you know, the claim is that she was assaulted in the bathroom, and you were in the room. What did you hear? Did that happen? Is it true she said goodbye that morning and was in a good mood?

None of these things happened because the training materials, the procedure underlying all of it is biased against gender.

But we're here on a 12(b)(6) motion to dismiss. My facts are assumed to be correct, and we have listed in our Complaint as much as we possibly can facts under even the expanded *Columbia University* standard or the standard before *Columbia University* which this Court, I believe Judge Smith, supported. We have given the instance of it.

But we even went beyond that. We explained in the Complaint we asked for materials, but we didn't get it. We give an explanation as to why we've only gone that far.

And we also use the word of a viral atmosphere of sexual assault. I don't think we can go further than that. I mean, we put them on notice of what we

mean by that. And after we move to discovery, they can then do summary judgment; but when we go to discovery, as we indicate in our Complaint, we know it's a bias -- we strongly believe it's biased training materials, but they wouldn't give it to me.

But that alone, your Honor, that fact alone, and I can put in evidence if we need to, if you want me to for hearing purposes, where the e-mail says, I will only give -- I can attest and the Court can see the e-mails where Johnson & Wales would not give me those materials. That alone should put us over the edge.

For Johnson & Wales to come in this court and say, well, under *Yusuf* and the Sixth Circuit, never mind *Columbia University*, Second Circuit, they should be denied because they haven't pled specific facts. Well, the Court can say, well, too bad, so sad. They asked for it. You wouldn't give it to them.

So I believe the case law is moving in the direction of where this Court, the Rhode Island District Court, went in the *Brown University* case following the Second Circuit.

The Second Circuit took us further making Title IX into Title VII, which we clearly, under Title VII, get past the motion to dismiss. Indeed, to deny -- to allow the motion to dismiss is to move the

Rhode Island District Court in the opposite direction of where it was headed and, indeed, does a great injustice to this young man to be able to make his case which he has given Johnson & Wales notice, beyond notice, the specifics of what he thinks was wrong.

And, therefore, I would ask this Court based upon the case law which guided I think Judge Smith, I believe it was, in the *Brown* case, the *Yusuf* case, which is now the *Columbia University* Second Circuit case, and even the Sixth Circuit which they referenced still supports our case.

I can't see under any factual legal precedent why this motion to dismiss should be allowed on Title IX.

Now I get into the state law claims which requires me to dig a little deeper into Rhode Island law than I expected to; but I believe in my response -- I always hesitate to rely on the papers, as they say, but I think my papers do a pretty good job of explaining where we are at.

One of them says -- one of them, the title, if I may open my notes here, your Honor.

THE COURT: Sure.

MR. EHRHARD: Title V, the intentional infliction of emotional distress, which says, well, if

you have a contract, you can't have that. Well, I say I think pleading in the alternative, that's the negligent infliction.

THE COURT: Johnson & Wales made two arguments in that. One was promissory estoppel.

MR. EHRHARD: Promissory estoppel. He's not wrong. Defendant's not wrong. You can't have a contract and then estoppel, but we're at the pleading stage. We don't know what --

THE COURT: No, but in that instance, Mr. Ehrhard, unlike, and we'll talk about it in a second, the negligent infliction, in that case doesn't Johnson & Wales' concession that a contract exists period, whether it's breached or not or whether you can recover under it or not, negate a promissory estoppel claim?

Because once they have acknowledged and conceded that there is a valid, applicable contract, then unless there's some argument outside of that contract that would represent a promise that this Court should estop them from breaching, which you haven't alleged, everything that you've alleged promissory estoppel-wise seems to fall into the contract violation, that query whether in light of that you've now pled a proper promissory estoppel.

MR. EHRHARD: I would argue as a procedural matter, they haven't answered the Complaint. They've given all concessions to this Court, and in the response they concede the contract claim. I appreciate that.

But until an Answer is filed, we don't know exactly what their positions are going to be. So a promissory estoppel may be, may be on a summary judgment or post-Answer Complaint open to dismissal.

But I would also argue the nature of what happened to Mr. Doe in this case, we do have our contact with a student at the university under the code of conduct and so forth, which is very important in this case, is core along with Title IX; but I think there's more -- the relationship between a student and a university and the experience of the student and the obligation of the university to that student is contractual at its core, but there's also more to it.

I think the relationship between a student and university is contractual, but there's more to it than that. I think this may be a case, and I'm not going to go to the mat on it, but I think this is a case where promissory estoppel and contract claims together can move forward at the same time.

It's not as if you hired me to sue someone for a

personal injury case or something like that. I have an obligation under the rules of ethics and so on to do certain things, like contractual obligation, or more appropriately I ask you to fix my air conditioner and you fail to fix my air conditioner. Okay? Okay.

But the relationship between the university and a student is contractual in nature, but it's more than that, too. And I would argue that the relationship between a university and a student is one of those unique circumstances where you could have parallel claims of estoppel and contract based upon that relationship.

I don't think the motion to dismiss stage is the point of where a Court would dismiss the estoppel until we move forward and examine further that relationship.

I think the -- yeah. That's right. And as for intentional and negligent infliction of emotional distress --

THE COURT: So on the intentional infliction of emotional distress, Johnson & Wales makes two arguments. One is one Mr. Richard talked about, which is he didn't think that the activities arose to the extreme and outrageous level that's required; but in his papers, though I don't think he mentioned it this morning, he argues that it requires -- under Rhode

Island law requires, you know, medically established physical symptomatology and that you haven't pled that.

Your response to that was, well, we'll see how discovery proceeds; but the problem with that argument is, that's in your wheelhouse. You can -- you know now whether or not there is such medically established physical symptomatology or not, and why shouldn't you have to live with more specificity in the Complaint on that on a factor that's known to you?

MR. EHRHARD: I don't disagree with the underlying argument that you have some physical consequences of it and it is not pled. I think at the motion to dismiss stage, once again I keep coming back, I don't think it's necessary.

And, indeed, we talk about, you know, physical symptoms. I can say with good measure this boy has suffered. I mean, this boy has suffered in meaningful ways.

Do I have emergency room records? No, I don't have that type of stuff, but I believe as discovery -- I mean, they'll ask me, please provide all documentation regarding medical records regarding this boy's history. That's what's going to happen.

We'll provide what we can, be it, you know, under seal, therapeutic, psychological and so on.

That's something we can get into.

But to have to lay out, even though it's a John Doe Complaint, specific victimology, physical symptoms of it, which could be deeply embarrassing to the young man, we're not there.

So I think dismissal at this stage is presumptive, and I think that we pled enough even under Rhode Island law to get us where we need to go on that.

I don't deny you have to have physical symptoms to back it up, but I don't think you have to plead the specific symptoms on the Complaint itself specific in a case like this where the symptoms wouldn't necessarily be a broken arm or a damaged bone, they're more psychological and therapeutic in nature, which the Court I think would be inclined to say, okay, you know, you can dig a little bit deeper in the discovery stage and send it under seal or private.

So I appreciate where they came. I was like, okay, let's -- when the dismissal came, it was like let's see if I can go with his Rhode Island claims; but I think even taking the Worcester Complaint, I think I fulfilled those under Rhode Island law.

And it is notice pleading. Those complaints are notice pleading, the intentional infliction, negligent infliction, and breach of contract. So I think I've

clearly overcome the notice pleading stage.

Title IX is where we talk about notice pleading versus a higher level of information. So I think with knowledge in my head, the state law claims which I thought were Massachusetts but are Rhode Island, I'd -- clearly there isn't a notice pleading stage and on breach of contract, which they've conceded.

Title IX, I actually went further, and I believe -- I was looking under the middle ground stage. I was glad to see the Second Circuit took it a little bit easier on me.

So I would argue that none of the claims that are being sought to be dismissed are appropriate or ripe for dismissal as we stand here today. It may be without conceding anything after discovery some of them would go away in summary judgment. It may be so. But to allow it now on any of the claims I think doesn't follow the guidance of case law and, in turn, does a disservice to the Plaintiff to have his proverbial day in court.

The Plaintiff has pled, he responded to the motion to dismiss, provided an experienced Court with the information it needs and the Defendant needs to respond, and I would allow the case to move forward. I just don't think dismissal is appropriate at this time.

Any other questions I can answer for you?

THE COURT: No. Thank you.

MR. RICHARD: Your Honor, may I very briefly?

THE COURT: Sure.

MR. RICHARD: First, your Honor, I appreciate the Court mentioning an aspect of the intentional infliction of emotion distress argument that I briefed but omitted in my presentation this afternoon.

THE COURT: You argued a lot more things that we haven't discussed, Mr. Richard, so don't feel badly about that.

MR. RICHARD: One of the points I want to make, and this Court has heard me and will hear me in other cases, that this particular motion was purposefully and narrowly drafted and that the Plaintiff is entitled to his day in court, and I have not in any way engaged in a full frontal assault on this Complaint as I have in others where I think they're glaringly deficient.

THE COURT: I believe I've agreed with you in the past on some of them.

MR. RICHARD: And the issue of notice pleading, your Honor, is essentially what notice did this Complaint give to Johnson & Wales. And assuming the facts in it to be true, that's what we're here today to address.

But what we aren't here today to address are the many extraneous comments that I heard this afternoon about things that are not pled in this Complaint that I could go one by one and tell all the factual errors that were said to the Court; but the issue is, I just respectfully want to say that counsel's presentation went far beyond the notice that was given to us on paper.

And to the extent that the effort today was to supplement, my question is, why wasn't that pled in the first case?

And many of these arguments about titles people had which were incorrectly stated or positions about communications which aren't pled are not in any way entitled to presumption of truth and nor are they in any way part of the notice that was given to us in this pleading.

THE COURT: Thanks, Mr. Richard.

MR. EHRHARD: If I may, your Honor. I don't believe any -- respectfully, this is a motion to dismiss hearing in which the Court's responsibility is to delve deep into the arguments and what facts we're trying to bring forward.

And when I -- the only facts I discussed that were not in the papers was the Wall Street Journal

issue about trauma-induced and about the materials themselves.

And I brought that up because I say in my Complaint I asked for materials which I couldn't get, and you'll notice in my Complaint I specifically say I couldn't get it. They don't deny that. They have not in any way in their papers denied that I asked for material and couldn't get it.

And then the Court implied where do we go from here with that, and I explained what we thought the materials were but we didn't put in the Complaint for that reason.

But the facts I gave about the training materials and how we tracked it down, I did not give any incorrect statements to the Court about Ms. Hall or what her job -- I think it was assistant general counsel she was at Johnson & Wales, and she worked on the training. We believe we're correct about that; but if we're wrong, let's answer the Complaint and do some discovery.

So just for the record, I did not mislead this Court in any way, nor did I expand it out to bring in more than we discussed in the Complaint or the papers.

THE COURT: Thanks, Mr. Ehrhard.

I think it was Mr. Richard who said that the

briefing was extensive and well done. Maybe it was Mr. Ehrhard. I couldn't agree with you more. I have come to expect it from Mr. Richard, sadly for him because I always have high expectations. He met it again here.

Mr. Ehrhard, your work on behalf of your client was also exemplary and noteworthy.

Let's look at each of the counts and the titles. As to Count IV, which is the Title IX, I agree in many respects that the Complaint is thin in certain areas; but the Court believes that at this stage there is sufficient matters pled that the Court's going to deny the motion to dismiss as to the Title IX claim.

Mr. Doe, John Doe, has alleged, amongst other things, issues involving gender through the training process. While that is a thin allegation, the fact that Mr. Doe asked for training material during the appeals process and it wasn't obtained or given to him qualifies to me for why the Court's willing to accept less than it would otherwise expect at the pleading stage of this.

In addition, as I said earlier, I believe you can add to that the inference that, as pled, as pled, this Court can find no reason at all as to why Mr. Doe was treated -- the result was Mr. Doe's expulsion. The

only inference that one could draw from that considering all the facts is that gender played a role.

And when you combine those two with the fact that all of the information is in the Defendant's hands, it all counsels against dismissing the Title IX claim at this stage.

I'm going to grant the dismissal as to the promissory estoppel claim. Johnson & Wales' concession, whether we wait for their Answer or not, is semantics as far as I'm concerned. There is a valid contract as conceded by Johnson & Wales; and, therefore, the promissory estoppel claim has not been appropriately pled in light of that.

I'm also going to grant the motion as to the intentional infliction of emotional distress based on the fact that there is not a medically established physical symptomatology pled.

If Mr. Ehrhard has the ability to allege medically established physical symptomatology, then it can move to amend to add that claim back in.

I'm going to deny the motion as to the negligent infliction of emotional distress, however. I don't see how someone like Mr. Doe is in anything other than the zone of danger, and I don't agree that a valid contract subsumes all potential negligence claims as perhaps --

I haven't read it, but as perhaps Judge Smith has ruled. So the negligent infliction, Count VI, can proceed.

And then, lastly, Count VII should be denied just on procedural grounds; that is, the injunctive count is an element of relief, not a separate cause of action here. And the relief sought for injunction will continue, but the count will be dismissed as a separate count.

We'll stand adjourned.

MR. EHRHARD: Thank you, your Honor.

MR. RICHARD: Thank you, your Honor.

(Adjourned)

C E R T I F I C A T I O N

I, Karen M. Wischnowsky, RPR-RMR-CRR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.

May 21, 2018

Date

/s/ Karen M. Wischnowsky

Karen M. Wischnowsky, RPR-RMR-CRR
Federal Official Court Reporter