UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN DOE, Plaintiff, v. WILLIAMS COLLEGE, Defendant.	)	CIVIL ACTION NO. 3:16-CV-30184-MAP

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF ITS MOTION FOR TEMPORARY STAY

Defendant Williams College (the formal name of which is The President and Trustees of Williams College) submits this memorandum in opposition to plaintiff's motion for a preliminary injunction and in support of its motion to stay.

Introduction

As discussed in greater detail below, the College disciplinary proceedings at issue are still ongoing. Subsequent to filing his Complaint and requests for injunctive relief in this case, plaintiff "John Doe" exercised his right under the College's policies to request an appeal from the Hearing Panel's decision to expel him. The ultimate outcome of Doe's disciplinary case, and the bases for that outcome, thus remain to be determined. Moreover, having demanded that the College grant him an appeal from the Panel's decision, Doe cannot be heard to argue that the College be enjoined from doing just that. Instead of enjoining the College's disciplinary process, or granting any other injunctive relief, the Court should allow the College to complete its

handling of Doe's case, including his appeal, and should stay any further proceedings in this case until that happens.

Relevant Facts

The plaintiff "John Doe" attended Williams from September 2011 to June 2016. Compl. ¶ 15.[1] He completed the academic requirements for his degree, *id.* ¶ 26, but the degree was withheld pending the outcome of the conduct proceedings now at issue in this case. *Id*. ¶ 98.

Beginning in October 2013, Doe was in an intimate relationship with a female student at the College, now identified in the Complaint as "Susan Smith." *Id*. ¶ 19. Smith graduated from the College in the spring of 2015; she then worked for one year in the Alumni Office, until the spring of 2016. *Id*. ¶¶ 19-20, 38.

The relationship between Doe and Smith was troubled and ultimately resulted in each of them asserting formal complaints of misconduct against the other. *Id*. ¶¶ 38, 79, 93, 165-66. Among the many allegations on both sides was Smith's claim that on September 1, 2014, Doe penetrated her sexually without her consent. *Id.*

The College investigated the claims of both parties, which then were presented to a Hearing Panel of three College administrators. Investigation Rpt. (Dkt. No. 1-13); Compl. ¶ 162. The Panel, among other findings, determined it was more likely than not that Doe engaged in non-consensual sexual intercourse with Smith in violation of the College's sexual misconduct policy. Compl. ¶¶ 164-66; Decision Letter (Kelly Decl. Exh. B) at 1-2. On November 21, 2016, the Panel informed Doe and Smith of its findings and the fact that a further hearing would be held on the issues of sanctions. *Id*. at 2.

Doe filed his Complaint in this case, along with his motions for injunctive relief, on November 23, 2016. Doe's Complaint purports to assert numerous statutory and common law

[1] Citations to "Compl." herein refer to the Amended Complaint filed on December 19, 2016, Dkt. No. 28.

claims for relief, which essentially involve two sets claims: (1) the College's disciplinary process was procedurally flawed, unfair, and biased against men (Counts I – VIII, X); and (2) the College is vicariously liable for Smith's allegedly tortious conduct against Doe (her alleged assault, harassment and defamation of Doe) because Smith was an employee of the College when that conduct occurred (Count IX).

The hearing on sanctions was held on December 1, 2016, at which it was noted that Doe had been found responsible for nonconsensual sex during his freshman year, for which he had been suspended two semesters; he had been found responsible for significant academic misconduct during his sophomore year, the sanctions for which were failure of the course at issue and two years of disciplinary probation; and he had been warned that any further conduct violations almost certainly would result in his expulsion. *See* Sanction Letter (Kelly Decl. Exh. C) at 1. As a result of Doe's history of conduct violations and the seriousness of the new finding of nonconsensual sex, Doe was expelled. *Id*.

On December 11, 2016, Doe exercised his right under the College's policies to appeal the Panel's decision, citing alleged procedural deficiencies in the conduct proceedings, including the supposed failure to provide a fair and unbiased process and the Panel's reference to certain policies, or versions of policies, that Doe claimed did not apply to him. *See* Appeal Email (Kelly Decl. Exh. D). Doe's appeal incorporates by reference all of the procedural arguments advanced in his 64-page Complaint in this case. *Id*. His appeal includes hyperlinks to "Dropbox" files, which contain the Complaint and its numerous exhibits. *Id*.

On December 13, 2016, the Court denied Doe's motion for an emergency temporary restraining order, finding no significant need for an immediate hearing. Dkt. No. 23.

Doe's Requests for Injunctive Relief

Doe's motion for a preliminary injunction ask the Court to: (1) enjoin the College "from adjudicating and imposing a sanction on Plaintiff"; (2) order "the College to allow Plaintiff to earn his degree"; (3) order the College to "expunge Plaintiff's disciplinary records from all College records"; (4) enjoin the College "from violating Plaintiff's right to privacy under the Family Educational Rights and Privacy Act (FERPA) and Massachusetts Privacy Act (M.G.L. c. 214, § 1B"; and (5) order the College to represent "Plaintiff's good standing to third parties." Pl. Motion (Dkt. No. 4) at 1-2.

Argument

I. THE COURT SHOULD DENY DOE'S REQUESTS FOR "PRELIMINARY" INJUNCTIVE RELIEF.

A preliminary injunction is an "extraordinary and drastic remedy." *Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc.*, 645 F.3d 26, 32 (1st Cir. 2011) (quoting *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008)). Such relief should be awarded only where the moving party has demonstrated that he has a likelihood of success on the merits; he likely will suffer irreparable harm if the injunction is denied; the hardship to the non-movant if enjoined outweighs the hardship to the movant if no injunction issues; and the effect (if any) on the public interest weighs in favor of injunctive relief. *Bl(a)ck Tea Society v. City of Boston*, 378 F.3d 8, 11 (1st Cir. 2004) (internal citations and quotations omitted). "[T]he burden of providing a factual basis sufficient to justify a preliminary injunction rests with the party seeking the injunction." *U.S. Elec. Serv., Inc. v. Schmidt*, No. 12- 10845-DJC, 2012 WL 2317358, at *1 (D. Mass. June 19, 2012). Doe has not met that burden, especially in light of the fact that his motion seeks mandatory and permanent injunctive relief, as distinct from an injunction that only would preserve the status quo.

A. Doe Has Failed to Meet His Burden to Justify a Mandatory Injunction.

Preliminary injunctions typically are "permissible only to preserve the status quo," i.e., to enjoin the non-moving party from taking some action. *Braintree Labs., Inc. v. Citigroup Global Markets, Inc.*, 671 F. Supp. 2d 202, 207 (D. Mass. 2009), *aff'd in part, appeal dismissed in part*, 622 F.3d 36 (1st Cir. 2010) (quoting *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 151 (1st Cir. 1998)) (internal quotation marks omitted); *see also Keogh v. Field & Sons HVAC, Inc.*, No. CV 12-10203-MLW, 2012 WL 12884870, at *1 (D. Mass. June 25, 2012). "Mandatory" injunctions, in contrast, "disturb rather than preserve the status quo by affirmatively mandating action by the non-moving party." *Braintree Labs.*, 671 F. Supp. 2d at 207 (internal quotation marks omitted).

Mandatory injunctions are disfavored. *See L.L. Bean, Inc. v. Bank of Am.*, 630 F. Supp. 2d 83, 89 (D. Me. 2009) (collecting cases); *accord, Lu v. Hulme*, No. CA 12-11117-MLW, 2013 WL 1331028, at *10 (D. Mass. Mar. 30, 2013). A party seeking mandatory injunctive relief must meet an "elevated" burden, demonstrating that "the exigencies of the situation demand such relief." *Braintree Labs.*, 671 F. Supp. 2d at 207 (quoting *Mass. Coal. of Citizens with Disabilities v. Civil Defense Agency*, 649 F.2d 71, 76 n.7 (1st Cir. 1981)); *see also NBA Properties, Inc. v. Gold*, 895 F.2d 30, 33 (1st Cir. 1990) ("courts may be more reluctant to grant mandatory injunctions than prohibitory ones"); *Robinson v. Wall*, C.A. 09-277-S, 2013 WL 4039027, at *2 (D.R.I. Aug. 7, 2013) (motion for injunction that "disturbs the status quo subject to heightened scrutiny; a mandatory injunction should not issue unless the facts and the law clearly favor the moving party"); *Strahan v. Roughead*, 08-CV-10919-MLW, 2010 WL 4827880, at *10 (D. Mass. Nov. 22, 2010) (requests for mandatory injunctive relief "warrant[] extra scrutiny" (quoting *L.L. Bean*, 630 F. Supp. 2d at 89 (D. Me. 2009)).

Nearly all of the relief Doe seeks is mandatory injunctive relief – the one exception being his request to enjoin the College from completing the disciplinary process in Doe's case. Doe has failed to meet his burden to justify mandatory injunctive relief – ordering the College to award him his degree, expunge his records, and (falsely) represent Doe's "good standing" to third parties. There are no special "exigencies" that favor the granting of such extraordinary relief. Nor does "the law clearly favor the moving party." To the contrary, as discussed below, Doe's has no likelihood of success on the merits.

B. Doe's Motion Seeks Permanent, not "Preliminary," Relief.

Doe's motion for a "preliminary" injunction seeks nothing of the sort. Rather than seeking some interim remedy, Doe's motion seeks only permanent injunctive relief. There is nothing "preliminary" about enjoining the College from ever completing its disciplinary process, ordering the College to grant Doe a degree, ordering the College to expunge Doe's disciplinary records, and ordering the College to represent to third parties that Doe is in good standing.

None of the relief Doe seeks would merely preserve the status quo pending trial on the merits. In fact, now that Doe has been expelled – which occurred after Doe filed his Complaint and Motion for Preliminary Injunction – allowing the requested relief would do just the opposite. Simply put, the relief Doe seeks properly can be had only if he were to succeed at trial on the merits – a scenario that will never come to pass.

C. Doe Has Not Demonstrated a Likelihood of Success on the Merits.

For the reasons stated in the Defendant's Memorandum in Support of its Motion to Dismiss, which the College incorporates by reference, Doe is unlikely to succeed on the merits of any of his claims. Indeed, his Complaint, assuming its non-conclusory factual allegations to be true, fails to state a claim upon which relief can be granted.

D. Doe Has Not Demonstrated a Likelihood of Irreparable Harm if an Injunction is Not Granted.

"[P]erhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." *Voice of the Arab World, Inc.*, 645 F.3d at 32 (citing 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1, at 139 (2d ed. 1995)). "Irreparable harm is 'a substantial injury that is not accurately measurable or adequately compensable by money damages.'" *Hearst Stations Inc. v. Aereo, Inc.*, 977 F. Supp. 2d 32, 40 (D. Mass. 2013) (citing *Ross–Simons of Warwick v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996)). Moreover, "[a] finding of irreparable harm must be grounded on something more than conjecture, surmise, or a party's unsubstantiated fears of what the future may have in store." *Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004).

Doe has failed to meet his burden to show that, without injunctive relief, he likely will suffer immediate irreparable substantial injury that is not adequately compensable by money damages. Doe claims he "will face severe and increasing mental and emotional anguish if forced to seek redress against Defendant's unlawful actions to clear his name…." Pl. Mem. (Dkt. No. 6) at 17. He claims he will suffer "missed educational opportunities and career opportunities," "damages to his reputation," and "past and future economic losses." *Id.* These allegations are insufficient on multiple grounds.

As an initial matter, Doe's claims are entirely speculative insofar as the disciplinary proceedings remain ongoing. As noted above, Doe recently filed an appeal from the Hearing Panel's decision to expel him. The appeal may result in Doe's favor. Doe's claims of "irreparable" harm accordingly are premature, and a preliminary injunction is inappropriate, on

that basis alone. *See B.P.C. v. Temple Univ.*, No. CIV.A. 13-7595, 2014 WL 4632462, at *4 (E.D. Pa. Sept. 16, 2014) (denying preliminary injunction where respondent's disciplinary proceeding was not completed).

Doe's claims of "irreparable" harm also fail because the contemplated harms all are compensable with monetary damages in any event. As noted above, Doe claims that a final, adverse outcome in his disciplinary case will cause him to suffer emotional harm and lost educational and career opportunities. Such harms are entirely compensable with money damages. *See Doe v. Amherst Coll.*, No. 14-cv-30114-MGM (D. Mass July 28, 2014) (attached hereto as Exhibit 1) at 4 (denying preliminary injunctive relief to a student challenging a college's disciplinary proceedings because anticipated emotional harm and missed educational or career opportunities are compensable with money damages) (citing *Powell v. City of Pittsfield*, 221 F. Supp. 2d 119 (D. Mass 2002)); *see also Phillips v. Marsh*, 687 F.2d 620, 622 (2d Cir. 1982) (vacating preliminary injunction which required a military academy to graduate the plaintiff because "no irreparable harm … would accrue to her in allowing her graduation to await the outcome of the trial on the merits; any damages to her from deferring her career as a military officer in that period of time would surely be compensable by monetary damages").

This case is easily distinguished from *Doe v. Middlebury College*, No. 1:15-cv-192-JMG (D. Vt. Sept. 16, 2015), on which Doe relies, which involved "a unique situation." Dkt. No. 6-3 at p. 6. The college in that case attempted to reinvestigate a case in which the plaintiff already had been exonerated, notwithstanding that the college's policy did not allow for a second investigation. *Id.* at 7. Moreover, the plaintiff demonstrated that if the reinvestigation were allowed to proceed, thereby delaying his graduation, he permanently would lose a specific job offer. *Id.* at 6. This case, in contrast, involves no clear policy violation by the College and Doe

identifies no specific opportunity that he permanently will lose unless the College is enjoined from completing its disciplinary process. Indeed, now that Doe has been expelled and he has appealed from that decision, just the opposite is true. Doe benefits only from a successful outcome to his appeal, not a preliminary injunction that preserves the status quo.

E. The Balance of Harms and the Public Interest Weigh Against Injunctive Relief.

The College has a strong interest in enforcing its student conduct policies, including its prohibition against sexual misconduct. Courts should not discount the harm resulting from an injunction that undermines a college's authority to address such misconduct. *See Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 827 (7th Cir. 1998) (vacating preliminary injunction where allowing a student to remain enrolled undermined the school's authority to take disciplinary action). *See generally Guckenberg v. Boston Univ.*, 974 F. Supp. 106, 150-51 (D. Mass 1997) ("Courts should be slow to intrude into the sensitive area of the student-college relationship, especially in areas of curriculum and discipline.").

Moreover, there is a strong public interest in having colleges such as Williams timely and effectively address reported instances of sexual assault on campus. *See, e.g.*, 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; "Not Alone: The White House, First Report of the White House Task Force to Protect Students from Sexual Assault" dated April 2014, available at https://www.justice.gov/ovw/page/file/905942/download; 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. This public interest includes protecting both a respondent's and a complainant's right to a prompt and fair sexual assault proceeding. *See* "Dear Colleague Letter" *supra* at 9; "Questions

and Answers on title IX and Sexual Violence," *supra*, at 26. Doe's attempt to subvert the College's disciplinary process is contrary to the public interest and tramples on the rights of the complainant, who also has an interest in the adjudication of her complaint.

II. THE COURT SHOULD STAY THESE PROCEEDINGS PENDING THE OUTCOME OF DOE'S APPEAL.

The Court's discretionary authority to issue a stay is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North Am. Co.*, 299 U.S. 248, 254-55 (1936). "A stay is appropriate where it is 'likely to conserve judicial and party time, resources, and energy.'" *Bank of America v. WRT Realty*, 769 F. Supp. 2d 36, 39-40 (D. Mass. 2011) (quoting *Diomed, Inc. v. Total Vein Solutions, LLC*, 498 F. Supp. 2d 385, 387 (D. Mass. 2007)).

That is the case here. Doe filed his Complaint in this case prematurely, before exhausting the contractual remedies available to him. Then, after filing his motions for preliminary injunctive relief – which seek among other things to enjoin the College from completing its disciplinary proceedings – Doe petitioned the College to do just the opposite by filing an appeal. As a result of Doe's paradoxical maneuvering, in which he both implores the College to revisit the Panel's decision and asks the Court to enjoin the College from completing its work, the issues in this case are now a moving target for both the College and the Court. We do not know the ultimate outcome of Doe's disciplinary case. If the final outcome is favorable to Doe, his claims in this case will be largely if not entirely moot. If the final outcome remains unfavorable to Doe, his Complaint inevitably will be amended to address the handling of his appeal. A third possibility is that his appeal is allowed, and the matter is remanded to the Hearing Panel, in which case Doe will have to amend his Complaint to address the handling of that remand, regardless of the outcome.

Nor will Doe be prejudiced by a temporary stay. The worst that happens from his perspective is that this case will be stayed for a modest period of time while the College addresses his appeal. Any harm to Doe resulting from that modest delay would be entirely compensable for the reasons discussed above.

Conclusion

The College requests that the Court enter an order denying Doe's motion for a preliminary injunction and staying these proceedings pending the outcome of Doe's appeal.

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