UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

> Each [campus sexual assault] case must be decided on its own merits, according to its own facts. If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision.

Doe v. Brandeis Univ., 2016 WL 1274533, at *6 (D. Mass. 2016). When Plaintiff John Doe[1] ("Plaintiff" and "John") complained that an employee of Williams College ("Defendant," "College," "Williams"), Susan Smith ("Smith") had assaulted, harassed, and stalked him, he had a right to expect that Williams would fulfill its obligation to provide him with "procedures that seek to ensure a prompt, fair, and impartial investigation and resolution" and that Williams would not facilitate a retaliatory counter complaint by employee Smith accusing him of serial rape. Those procedures, under Massachusetts law, constituted a contract between John and Defendant which Defendant breached.

John filed this lawsuit against Defendant for disciplinary action against John as claimed by Williams employee Smith. Based on the following, John is entitled to summary judgment on his claims that Williams breached its express and implied contract with its students; violated Title IX; and violated the covenants of good faith, fair dealing, and fundamental fairness.

Plaintiff incorporates by reference Plaintiff's Statement of Material Facts in Support of Plaintiff's Motion for Partial Summary Judgment (attaching Exs. 1-165) ("PFs").

STANDARD OF REVIEW

The court must view the record in favor of the nonmoving party, drawing all reasonable inferences in his favor. *RTR Techs., Inc. v. Helming*, 707 F.3d 84, 87 (1st Cir. 2013). Where, as here, a district court rules simultaneously on cross-motions for summary judgment, it must view each motion, separately, through this prism. *Blackie v. Maine*, 75 F.3d 716, 721 (1st Cir. 1996). A district court may enter summary judgment only if the record, read in this manner, reveals that there is no

[1] Plaintiff refers to himself as "John Doe" and to his Williams' College employee accuser as "Susan Smith" throughout the pleadings.

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Houlton Citizens' Coal*., 175 F.3d 178, 184 (1st Cir. 1999); see also Fed.R.Civ.P. 56(c).

KEY BACKGROUND FACTS

John (Class of 2016) and Smith began (Class of 2015) an exclusive, romantic, and sexually active relationship in October 2013. PF ¶ 32. On Labor Day, September 1, 2014, when they moved in together on campus, John and Smith allegedly engaged in sexual intercourse which, according to the Panel, was non-consensual because the sexual position and roughness during the incident in question were unusual. PF ¶ 157. The relationship continued until winter 2015-2016 sometime after Smith assaulted John December 5, 2015. PF ¶¶ 37-40.

In September 2014, "sexual misconduct (which includes rape and sexual assault)" was defined in the Williams Code of Conduct as follows, in relevant part:

> ***Non-Consensual Sexual Intercourse***: Any sexual intercourse (anal, oral or vaginal); however slight; with any object; by any person upon any other person; without effective consent.
>
> ***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.

Williams policy did not provide any definition for or clarification of the term "effective." PF ¶¶ 1-2. In October 2014, the College changed its sexual misconduct policy to an affirmative consent policy that now required clearly expressed affirmative consent for all sexual activity. PF ¶¶ 6, 286.

John gave actual notice to Williams that he had been assaulted by employee Smith (Smith began working for the College in summer 2015) on March 13, 2016 in the form of a Cease and Desist Letter to Smith. PF ¶¶ 64, 76. The day after Smith received the letter, Meg Bossong, Director of Sexual Assault Prevention and Response, referred Smith to a local rape crisis center. PF ¶ 65. Smith had never made any complaint involving physical or sexual violence by John. Two days after Smith

received said letter, with the encouragement of Bossong, Smith left the campus to go "home" to Houston indefinitely without informing her supervisor. PF ¶ 66.

When Smith learned Williams was investigating her, she lodged a counter complaint against John with the assistance of Bossong and prompting by Dean Sarah Bolton. PF ¶¶ 87-89. Bolton had demonstrated a bias towards Smith and against John in a variety of other ways including, but not limited to, initiating Honor Code proceedings against John when the procedures state that Chairs decide whether there is sufficient evidence to proceed (PF ¶¶ 47, 51); putting Smith on a "no questions asked" list with Security because John said "Good luck on Thursday" to Smith (PF ¶¶ 48-50); ensuring John was found guilty of plagiarism by nefariously excluding a professor from the Honor Code hearing, (PF ¶¶ 51-58); apprising Smith of private educational information concerning the Honor Code proceedings against John (PF ¶¶ 52, 59); and setting up a no-contact order in order to exclude John from a dance performance when Smith planned to be in the vicinity (PF ¶¶ 68-71).

Williams sanctioned the counter complaint by Smith against John who has consistently challenged its legitimacy. PF ¶¶ 90-93. The bias against John continued to infect the proceedings after Bolton was replaced by Dean Marlene Sandstrom. PF ¶¶ 156, 167-174, 177-192, 194-303.

The College's policy promises to provide students with "procedures that seek to ensure a prompt, fair, and impartial investigation and resolution." PF ¶ 10. The College's policy does not contemplate a student respondent to a staff or faculty member sexual misconduct complaint. PF ¶ 24. In fact, there has never been a case other than this one in which Williams adjudicated a complaint against a student by an employee in sexual misconduct complaint circumstances. PF ¶ 25.

In considering whether John's behavior in September 2014 constituted a violation of College policy, the Panel[2] communicated to John that they determined he "did not have affirmative consent"

[2] All references herein to "Panel" are to Ninah Pretto, Steven Klass, and Aaron Gordon.

for the interaction in question and thus was responsible for a violation of College policy, despite the fact that the language referenced by the Panel was not included in the relevant policy. PF ¶¶ 1-2, 267.

Appeal hearings at Williams are "granted only in cases where the procedural problems or new evidence are considered substantive enough to have had significantly affected the outcome of the initial hearing." PF ¶ 28. Upon John's request for an appeal on a number of procedural lapses, the College allowed John to appeal on the sole basis "of the fact that the hearing panel applied a policy not in effect at the time of the alleged misconduct." PF ¶¶ 272, 276, 281, 284. The differences between the policies were "not trivial" according to Sandstrom. PF ¶¶ 274, 285.

The appellate Panel, inexplicably comprised of the same members as the original Panel, then applied a selective position of the appropriate policy and reached an identical determination as it had in the original adjudication. PF ¶¶ 294-295. The Panel explained its decision by stating that the language in the applicable policy "express[ed] the same concept" as that of the first policy applied, i.e. the policy was essentially the same in September 2014 as it was when the new and different policy went into effect in October 2014. PF ¶¶ 300-302. The Panel made no change to either the ultimate finding or the imposed sanction. Panelist Aaron Gordon stated that the Panel felt that the "language had been changed and added to and clarified but it didn't change the fundamentals of the policy itself" and that's how they **"felt [they] could be consistent between the two and have the same outcome**." (emphasis added) PF ¶ 301.

ARGUMENT

I. JOHN DOE IS ENTITLED TO SUMMARY JUDGMENT ON HIS CLAIM UNDER TITLE IX (COUNT I).

A. Applicable Legal and Regulatory Framework. Title IX states, "[n]o person…shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[3] The

[3] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a); 20 U.S.C. § 1681-1688.

federal statute and its regulations govern the obligations of educational institutions with respect to sex and gender discrimination, which includes sexual harassment, broadly defined as "unwelcome conduct of a sexual nature" that includes sexual assault, stalking and domestic/dating violence.[4] Harassment of students by other students, school employees, or third parties is prohibited by Title IX.[5]

As a recipient of federal funds, Williams has, in accordance with Title IX's regulations, specifically agreed to operate all of its programs and activities in compliance with Title IX and the regulations thereunder.[6] The regulations – requiring each school to have, *inter alia*, "prompt and equitable" procedures for the resolution of student-on-student sexual assault allegations – "have the force and effect of law," for they affect individual rights and obligations.[7] A school's procedures must, at a minimum, 1) "ensure the Title IX rights of the complainant," but "accord due process to both parties involved,"[8] a requirement applicable to both state and private schools[9]; 2) provide an "adequate, reliable, and impartial investigation"[10]; 3) if the complainant is given a pre-hearing opportunity "to present his or her side of the story," the accused student must be given the same opportunity[11]; 4) provide the complainant and accused student "an equal opportunity to present

[4] U.S. Dep't of Education, Office for Civil Rights ("OCR"), *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties -- Title IX* (2001) at 36 n.98 (notice of publication at 66 Fed. Reg. 5512 (January 19, 2001)) ("2001 Guidance"). Dkt. 76-1.
[5] *Id*.
[6] See 34 C.F.R. § 106.4(a)-(c).
[7] *Chrysler Corp. v. Brown*, 441 U.S. 281, 295, 301-02 (1979) (regulations promulgated pursuant to notice-and-comment rulemaking that affect individual rights and obligations "have the force and effect of law"). The same is true for the 2001 Guidance, an interpretation of the regulations that was published in the Federal Register and was subject to public comment. 2001 Guidance (Dkt. 76-1) at ii. As such, it is entitled to deference, under the doctrine articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).; 34 C.F.R. § 106.8 (b); 2001 Guidance; See *Bleiler v. Holy Cross*, 2013 WL 4714340, at *3, 5 (holding that the OCR Dear Colleague Letter, as a guidance document, "does not have independent force of law but informs this Court's evaluation of whether the College's procedures were 'equitable'").
[8] 2001 Guidance (Dkt. 76-1) at 22.
[9] E.g., OCR Ruling re: Complaint #04-03-204 (Christian Brothers Univ.) (Mar. 26, 2004) at 7 ("due process protections [are] inherent in the Title IX regulatory requirements").
[10] 2001 Guidance (Dkt. 76-1) at 20.
[11] Dear Colleague Letter at 11. Dkt. 76-2.

relevant witnesses and other evidence"[12]; and 5) ensure that the factfinder and decision maker have adequate training regarding sexual harassment which includes "alleged sexual assaults.[13]

In its published guidance on Title IX, students must be made aware of what kind of conduct constitutes sexual harassment or that such conduct is prohibited sex discrimination for a school's policy and procedures relating to sex discrimination complaints to be considered effective.[14] This mandate is logical: if a college prohibits certain conduct, students must be able to understand exactly what conduct is prohibited.[15]

Four standards are available under Title IX to an accused student challenging the result of a campus sexual assault proceeding: 1) erroneous outcome; 2) selective enforcement; 3) deliberate indifference; and 4) archaic assumptions. *Bleiler v. Holy Cross*, 2013 WL 4714340, at *5 (citing *Yusuf v. Vassar Coll.*, 35 F.3d 715-16 (2d Cir. 1994) and *Mallory v. Ohio Univ.*, 76 F. Appx. 634, 638-39 (6th Cir. 2003)). See also *Doe v. University of the South*, 687 F.Supp.2d 744, 756 (E.D. Tenn. 2009) (applying all four standards). John has asserted claim under the first threes standards.

B. Williams College's Violations of Title IX.

1. Selective Enforcement (also known as Disparate Treatment). A Title IX "selective enforcement" claim is based on the premise that regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by gender.). *Yusuf, supra*, at 709. A plaintiff may state a selective enforcement claim when a female similarly situated to a male student received more lenient treatment. *Id.* Courts have held that it is sufficient for such an allegation to be based on the totality of the circumstances. *Id.* at 35. See also *Doe v. Washington and Lee Univ.*, 2015 WL 4647996, at *10.

[12] *Id.*; 2001 Guidance at 20.
[13] Dear Colleague Letter (Dkt. 76-2) at 12; 2001 Guidance (Dkt. 76-1) at 20-21.
[14] 2001 Guidance (Dkt. 76-1) at 19-20.
[15] See *Doe v. Western New England University*, 228 F.3d 154, 173-176 (D. Mass 2017).

In this case, the College ignored John's March 13, 2016 complaint about Smith's assault and harassment and did not encourage John to report the incident to law enforcement. PF ¶¶ 78-82. In striking contrast, without ever hearing John's side of the story or there being any reasonable cause for concern, Bolton and Bossong encouraged Smith to use victim resources and even to contact police and had done so even before any complaints were lodged. PF ¶¶ 41-50. Bolton also deprived John of an educational opportunity by barring him from the dance performance so that Smith could attend. PF ¶¶ 68-71. After John's counsel sent a letter on April 13, 2016 to Title IX Coordinator Toya Camacho asserting John's rights and John's meeting with Camacho on May 2, 2016, Williams finally initiated proceedings against Smith. PF ¶¶ 83-86.

Upon learning that the College was actually going to investigate the complaint that Smith assaulted John, Smith lodged a counter complaint that was encouraged by Bolton and Bossong, who, again, had never heard John's side of the story. PF ¶¶ 87-90. Not only does College policy fail to contemplate that an employee lodge a sexual misconduct complaint against a student, Title IX itself does not provide for sexual misconduct complaints by school employees against students. PF ¶¶ 22-24; Dkt 107 at 4; Dkt. 76-3 at FN1, p. 33; Dkt. 107-6. Further, the fact that Smith was an employee of Williams when she slapped John actually should have caused Williams to be less favorable to Smith, given the power differential between them.

Williams' solicitousness and bias towards Smith, a female, in a similar situation to John, a male, continued throughout the proceedings. Importantly, Smith's partial advisor, Bossong, advised and trained Sandstrom and the Panel. PF ¶¶ 100, 103, 116. Bossong availed Smith of free legal counsel, while an equivalent was unavailable to John by his College advisor. PF ¶¶ 94-95.

Williams delayed the completion of its investigation in order to add Smith's witness, Elanie. Elanie, whom Smith identified at the 11th hour, emailed investigator Kurker after the report delivery deadline. In striking contrast, Kurker did not go to remotely the same lengths to interview Charles, a witness of John's. She did not interview Charles as her attempts to reach him were feeble. PF ¶¶ 158-

164, 180-182, 187-190, 194-197, 226. Kurker neglected to elicit information relative to Smith's most serious allegation against John, the alleged incident of non-consensual sex, from John's witness. PF ¶¶ 147-149. Kurker failed to inform John that Smith accused him of non-consensual sex until the very end of his final/third interview despite the fact that Smith had raised the claim in her first interview and did not give him a meaningful opportunity to respond. PF ¶¶ 151-153. Kurker did not investigate John's claims that Smith falsely reported and retaliated against John. PF ¶¶ 165-166. Kurker deleted College policy applicable to Smith from the report. PF ¶¶ 21, 139-140, 177, 192.

The College stonewalled John's request for transcripts of the interviews and thereby prevented John from collecting evidence to prepare his defense. PF ¶¶ 167-174. Sandstrom assisted Smith with her response to the report, even offering to edit it for her. PF ¶¶ 216-217. Sandstrom interfered with the Panel so that retaliation by Smith was off the table. PF ¶¶ 234-239. She even rewrote the Panel's findings letter in Smith's favor, removing the Panel's conclusion that Smith had falsely accused John of violating the honor code. PF ¶¶ 240-243.

The Panel was trained with materials that would lead to an unfair bias against him. Bossong trains panelists to be biased against men as they are taught that sexual assault is the product of "hostile masculinity." They also receive trauma-informed training that rationalizes accuser's inconsistent statements. The Panel accepted Smith's claim that the incident in question was non-consensual despite the numerous inconsistent statements Smith made to both Kurker and her witnesses. PF ¶¶ 28, 208, 246-248. The Panel disregarded John's exculpatory arguments in his responses to the report as none were addressed in the Panel's findings letter or appeal outcome letter. PF ¶ 297. In short, the Panel took Smith's version and interpretation of the alleged event as gospel.

On appeal, the Panel, plus non-panelist Cynthia Haley who was present for deliberations, took its bias against John to the extreme in its decision to rationalize an affirmation of its original finding that the alleged incident was non-consensual. PF ¶¶ 290-303. In order "to be consistent between the two and have the same outcome," the Panel treated the pre-October 2014 sexual misconduct policy as the

same as the post-October 2014 sexual misconduct policy. *Id.* The Panel did this despite the fact that appeal hearings are "granted only in cases where the procedural problems…are considered substantive enough to have had significantly affected the outcome of the initial hearing." PF ¶ 28.

The record is sufficient to support Plaintiff's case on all elements for a selective enforcement claim; therefore, the Court should allow summary judgment on this claim.

2. Deliberate Indifference. Schools may be held liable for damages under Title IX if they have actual notice of the sexual harassment and are deliberately indifferent to it. *Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274 (1998) and *Davis v. Monroe County Bd. of Educ*., 526 U.S. 629 (1999). Schools are obligated under Title IX to take immediate and appropriate steps to investigate or otherwise determine what occurred when a responsible employee knows or reasonably should know of possible sexual [or dating] violence. Dkt. 1-16 at 15. On March 13, 2016, Williams was on actual notice of employee Smith's assault and harassment of John, but it failed to take immediate and appropriate steps to investigate John's complaint. Dkt. 60 at 14. As explained above, this indifferent treatment of John by Williams led to an emboldened Smith who proceeded to retaliate against John with the encouragement and protection of College officials, causing him grave financial, reputational, and educational harm.

The record is sufficient to support Plaintiff's case on all elements for a deliberate indifference claim; therefore, the Court should allow summary judgment on this claim.

3. Erroneous Outcome. Plaintiffs who claim an erroneous outcome must first offer evidence "sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding." *Yusuf, supra,* at 715. Such doubt may be shown by pointing to evidentiary weaknesses undermining the charges, such as a witness's motive to lie or particular procedural flaws that affected the proof. *Id*. Where a plaintiff can point to sufficient evidence to support a possible error in the disciplinary proceeding, he must then clear a second hurdle by offering proof of "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding" (*id*.)

or the disciplinary hearing process constitutes a pattern of decision-making whereby the [school's] disciplinary procedures governing sexual assault claims is discriminatorily applied or motivated by a chauvinistic view of the sexes." *Bleiler, supra*, at *5 (citations omitted).

In this case, evidentiary weaknesses undermined the charges and procedural flaws affected the proof. First and foremost, employee Smith's charge that John had engaged in non-consensual sex was based entirely on contradictory and discredited claims such as:

a) John "kind of just forced himself in, and it hurt" in her first interview; then, in her second interview, Smith stated she "did not remember removing her clothes to have sex" and "she just remembers lying on her stomach…confused about why they were having sex." PF ¶ 208(b).

b) "No, he's never done that. He doesn't do that" in response to a question whether John ever physically abused or engaged in non-consensual sex with Smith; but then, in May after commencement of the investigation, Smith told Ava that they had engaged in sex once when she was "really tired and not in the mood" and "didn't want to have sex." PF ¶ 208(c).

c) claiming she described the alleged incident of non-consensual sex to her good friend Andrea Estrada about one month afterwards as an incident during which "she felt really uncomfortable when she and John had been having sex because 'it was a really different position…'"; but Andrea did not recall Smith "confiding in her about any episode of sexual contact with John that Smith described as either non-consensual or upsetting." PF ¶ 208(d).

d) they "never…just started out from behind" (referring to the alleged incident's commencement) in her third interview but telling Elanie in June or July 2016, well into the investigation, that when intoxicated and asleep, she awoke to John having sex with her. PF ¶ 208(f).

Smith's claims comprised the total extent of the evidence. Further, the report stated, "During sexual intercourse, Smith did not express to John that she did not want to be having sex" and the policy required both parties "to communicate consent or the lack of consent." PF ¶¶ 210, 259. The Panel also disregarded these facts.

The Panel was provided trauma-informed training that presumes the complainant is not lying by Bossong who expresses an affinity for radical feminism. PF ¶ 105. The Panelists were trained to overlook accusers' inconsistent statements regarding non-consensual sex and to ask what the accuser was "feeling" not what she was doing. PF ¶¶ 28, 112-115, 208, 246-248. So long as an accuser believes the sex was non-consensual, the Panel proceeds, and proceeded in this case, to accept everything she

says about the alleged incident without question. The training materials are also inherently biased to a belief that males are sexual offenders and that sexual assault is a product of "hostile masculinity." PF ¶¶ 108-110. Thus, the Panelists in this case were biased against John because of his gender.

The Panel's complete rationale for its decision was that "both the sexual position and roughness during the incident in question were unusual, and clear indicators that [John] did not have consent." PF ¶¶ 263, 295-296. There is no credible explanation for why the Panel found that the sexual position was "unusual" when Smith reported to the investigator that she and John "never…just started out from behind" not that they never used a position such as the one described. PF ¶¶ 208(f), 252. This is no credible explanation for how the Panel found that there was "roughness" when the only discomfort Smith reported was from insufficient lubrication which, according to Panelist Pretto, wasn't a significant factor. PF ¶ 254-258. The Panel simply assumed facts not in evidence.

There is no credible explanation for the Panel to analyze Smith's fourteen other claims that John "forced" or "coerced" her to do things against her will for consistency and credibility but uphold the fifteenth one for non-consensual sex without the same analysis other than a presumption of guilt that was made at the outset of the investigation. PF ¶ 244. There is also no credible explanation for how the Panel arrived at its interpretation of the pre-October 2014 policy as being the same as the post-October 2014 policy which required "affirmative consent" for all sexual activity.

When the Court can find no reason for why John was treated in the manner he was, the only inference that one can draw from all the facts is that gender played a role. *Doe v. Johnson & Wales University*, Case No. 18-106JJM, Hearing Transcript, Exhibit A at 39-40. The record is sufficient to support Plaintiff's case on all elements for an erroneous outcome claim; therefore, the Court should allow summary judgment on this claim.

4. Other Title IX Violations. Schools are required by Title IX regulations to implement and publish a policy prohibiting sex discrimination in addition to grievance procedures for a prompt and

equitable resolution of reports of violations of the policy.[16] Schools violate this mandate if they do not have such policies and procedures in place.[17] Schools also violate this mandate if they do not apply their policy and procedures.[18] In published, topical guidance, the Department of Education Office for Civil Rights ("OCR") notes that in evaluating whether a school's procedures are prompt and equitable, OCR considers the "[a]pplication of the procedure to complaints alleging harassment."[19]

When schools fail to apply their own policies, as discussed here and below, the school acts unreasonably in light of the known circumstances and contrary to well-established Title IX guidance. Williams misapplied its own sexual misconduct policy in the appellate Panel's consideration of the underlying reported misconduct. By misapplying its own policy, the College violated Title IX.

In the original findings letter, the Panel stated, in relevant part, "based on the preponderance of the evidence…it was [more] likely than not that you did *not* have affirmative consent to have sexual intercourse with Smith during the incident in question." PF ¶ 265. John appealed the finding and the sanction imposed. In her January 30, 2017 letter to John, Vice President Leticia Haynes granted John's appeal of the finding of responsibility and related sanction. PF ¶ 284-285. Haynes noted that "[t]he college's policy changed in October 2014, the month following the alleged sexual misconduct. Under the revised policy, affirmative consent is required for all sexual activity…The two policies are different, including with respect to the requirement for affirmative consent." *Id.*

Acknowledging the procedural error, Williams sent the "claim" of non-consensual intercourse back to this same panel to remedy its mistake and apply the appropriate Code language. In her January 31, 2017 letter to John informing him that the college would reconsider the underlying

[16] 34 CFR 106.8(b).
[17] 2001 Guidance (Dkt. 76-1) at 19, citing Fenton Community High School Dist. #100, OCR Case 05-92-1104.
[18] See *Fellheimer v. Middlebury Coll.,* 869 F. Supp. 238, 246 (D. Vt. 1994) (finding that the college's deviation from the procedures it established rendered the hearing fundamentally unfair.)
[19] 2001 Guidance (Dkt. 76-1) at 20.

misconduct, Haynes noted "[w]hen the panel reconvenes…[it] will consider and weigh all the evidence before it." *Id*. In the appeal outcome letter of February 13, 2017, Sandstrom stated that the hearing panel considered the appropriate policy version. PF ¶¶ 294-295. Sandstrom articulated that "[a]lthough the version of the policy in effect at the time did not use the term 'affirmative' consent, it used other language…to express the same concept." *Id*. Sandstrom then quoted a *portion* of the policy language regarding 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." *Id*. The Panel relied on this discrete language to determine that John was responsible for misconduct and did not consider the other language of the Code describing the standard of consent. Nowhere did the appeal letter mention the rest of the policy, which articulates substantive and relevant language: "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." *Id*.

This is not adequate or impartial. Williams' use of only a selected portion of its standard of consent was unreasonable, inequitable, and unfair in a Title IX process. Further, in utilizing only a selected portion of the applicable policy, the Panel applied a much more reporting-party friendly standard. This showed bias and resulted in the male responding party being held to a fictitious, skewed, and inequitable standard. Further discussion of the College's unfairness follows.

C. Damages. John was expelled based on the Panel's decision nine months after he had "walked with his class" at graduation and having completed all the coursework and credit requirements for the degree. PF ¶ 304. He lost tuition for his four years enrolled at Williams, lost present earnings from fall 2011 when John first enrolled at the College to the conclusion of the proceedings, has suffered and will continue to suffer a lifetime of diminished earning potential as a result of the denial of his degree, and reputational injury by being branded a serial rapist.

II. JOHN DOE IS ENTITLED TO SUMMARY JUDGMENT ON HIS BREACH OF CONTRACT CLAIM (COUNT II).

A. Applicable Law. In reviewing a student's breach of contract claim against a college, the Court employs a reasonable expectations standard in interpreting the relevant contracts. *Doe v. Boston College*, No. 16-2290, 2018 WL 2752608 (1st Cir. 2018) at 16-17 citing *Walker v. President & Fellows of Harv. Coll.*, 840 F.3d 57, 61 (1st Cir. 2016). The Court must ask "what meaning the party making the manifestation, the university, should reasonably expect the other party [, the student,] to give it." *Id*. (quoting *Schaer v. Brandeis Univ*., 735 N.E.2d 373, 378 (Mass. 2000)). The Court "reviews the procedures followed to ensure that they fall within the range of reasonable expectations of one reading the relevant rules." *Cloud v. Trs. of Bos. Univ*., 720 F.2d 721, 724-25 (1st Cir. 1983) (citing *Lyons v. Salve Regina Coll*., 565 F.2d 200, 202 (1st Cir. 1977)). "[I]f the facts show that the university has 'failed to meet [the student's] reasonable expectations'" the university has committed a breach. *Walker*, supra, at 61-62 (quoting *Schaer, supra,* at 378). *Doe v. Boston College, supra,* Slip. Op. at 16-17.

B. Williams College's Flawed and Unfair Policies. Neither Doe – nor any other reasonable student - could ever have expected that Williams would apply only a portion of its own consent standard in its resolution process. By utilizing only a section of its policy, Williams students are left to wonder which policy section the College will apply and what conduct is actually prohibited. This is untenable. This misapplication of policy represents significant and glaring procedural errors.

Even if Williams had applied the full policy in the appellate Panel's consideration of John's reported conduct, the full policy has irreconcilable conflicts. Williams revised its sexual misconduct policies in October 2014. Prior to this date, the 2013-2014 Code of Conduct contained language addressing prohibitions of sexual misconduct. In October 2014, Williams adopted a Statement of Sexual Assault and Other Sexual Misconduct separate from the 2013-2014 Code of Conduct. PF ¶¶ 1-7. Accordingly, the policy applicable to the September 2014 reported misconduct is the 2013-2014

Code of Conduct. Williams failed to apply the appropriate policy initially and it granted John's appeal on this very basis. The applicable definition and explanation of consent is as follows:[20]

> 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.

The policy's confusing language in the construction of the standard of consent failed to provide notice to John as to what conduct violated College policy.

In asserting that "[b]oth parties have the obligation to communicate consent or the lack of consent," the language raises more questions than it answers. The 2013-2014 Code of Conduct does not articulate how Williams interprets silence or a lack of communication despite the fact that sexual interactions often take place with minimal verbal communication, less than explicit physical gestures, and/or other subtle indicia. From a notice perspective, this leaves the policy language as fatally vague. Williams' failure to articulate the appropriate interpretation of ambiguity, including silence or passivity, provides students with unclear boundaries of prohibited behavior. If one party communicated consent is his obligation under the policy satisfied as long as the alleged victim did not communicate non-consent? Does the alleged victim violate the policy if they did not communicate non-consent, as the policy obligates them to do so? What is passive resistance? This is not a self-defining term and is entirely subjective. A student simply could not have reasonably understood what the policy language permitted and prohibited vis-à-vis consent.

Williams attempted to address this very confusion in its October 2014 revision of the policy. PF ¶¶ 124-136. Bossong, Williams' organizational representative heavily involved in the sexual misconduct policy revision, added language to the policy "because there was a need for

[20] See 2012-2013 Williams College Student Handbook; Code of Conduct Policy (available at dean.williams.edu on August 18, 2014): this policy was in place at the time of the reported misconduct, September 2014.

clarification...we wanted to provide clarification and certainty to the Williams community that we had an affirmative consent policy." *Id*. There was a need for clarification because the language that Williams had utilized in its earlier policy was simply not clear.

The new policy, which went into effect in October 2014, now stated that "The Williams College Code of Conduct requires affirmative consent for all sexual activity." Other changes include the addition of "clearly" in the sentence defining the term consent; addition of the sentence, "In the absence of affirmatively expressed consent, sexual activity is a violation of the code of conduct"; and insertion of "In addition" prefacing the sentence, "a verbal "no" (no matter how indecisive) or resistance (no matter how passive) constitutes the lack of consent. *Id*.

Despite her testimony that the October 2014 policy was a more specific policy drafted due to a need for clarification, Bossong, when asked specifically about the issue of consent definitions in the pre-October 2014 and post-October 2014 policies at her May 15, 2018 deposition, replied that "[t]hey are essentially the same policies." PF ¶ 137. However, Sandstrom had acknowledged the materiality of the policies' differences in her email to Williams then-President, Adam Falk, below:

> In looking at John's [appeal] request, I believe there may well have been a procedural error that could possibly serve as grounds for appeal. It has to do with the a [sic] change in the way consent was defined right around the time of the incident in question. This change occurred in October 2014, a month after the alleged incident occurred in Sept 2014. Unfortunately, the panel was using the Oct 2014 definition of consent, rather than the Sept 2014 definition. The **difference in definitions is not trivial**. (emphasis added.) PF ¶¶ 274-275.

In granting John an appeal hearing, Haynes agreed with Sandstrom. In her letter to John granting an appeal of the finding and related sanction, Haynes also noted that "Under the revised [October 2014] policy, affirmative consent is required for all sexual activity… [t]he two policies are different, including with respect to the requirement for affirmative consent." PF ¶¶ 284-285.

Incredibly, College Counsel, who had worked with Bossong on the policy revisions, when asked by Title IX Coordinator Toya Camacho for the pre-October 2014 sexual misconduct policy, stated

that the "College did not have a Sexual Misconduct policy until October 2014" when it clearly did have an, albeit unclear, contradictory, and ambiguous, sexual misconduct policy. PF ¶¶ 196-200.

These key administrators should have been able to provide a clear and consistent accounting of the relevant portions of college policy. Yet these administrators had significantly different interpretations of the language used in the two versions of sexual misconduct policy and one even denied its very existence.

College policies involving students need to be clear enough for students to understand the college's parameters for permissible and prohibited behavior. Policies addressing sexual misconduct must include clear articulation of the school's interpretation of ambiguity (including silence) as the vast majority of sexual interactions to which the policies will be applied entail fact patterns where consent, communications, and intent are ambiguous to some extent. That Williams' own executive administrators, who should have been well-versed in the sexual misconduct policy, dispute the policy implications illustrates the insufficiency of Williams' position with respect to the standard of consent. If the individuals responsible for establishing and administering the policies were unclear about the meaning of key policy concepts, it is unfair and unreasonable to expect a College student to understand the same.

C. Williams College's Breaches of Contract. Williams has contractual obligations to substantially follow its policies and procedures as it would reasonably expect a student to understand them; to conduct its procedures with basic fairness; and to reach a decision that has some rational basis, i.e., one that is not arbitrary and capricious. *Cloud, supra,* 720 F.2d 721; *Coveney v. Holy Cross Coll.*, 388 Mass. 16, 445 N.E.2d 136 (1983); *Schaer* and *Boston College, supra*. Plaintiff re-alleges and reasserts the facts set forth above as if fully set forth herein.

1. Williams' Failure to Follow its Own Sexual Misconduct Policy and Unreasonableness of the Policy. The sexual misconduct policy of Williams that was in effect at the time of the reported conduct was unreasonably confusing and vague. Said sexual misconduct policy did not

provide a reasonable student with clear notice as to what behavior constituted a violation of that policy. The Panel only applied a portion of the applicable sexual misconduct policy, failing to apply the entire policy in its consideration of the underlying reported conduct, and therefore the College failed to follow its own policies.

Even if the Panel could reasonably conclude that Plaintiff did not have affirmative consent from Smith during the alleged incident, that policy was not in effect and was not part of the contract between Plaintiff and Defendant as of September 2014. Drawing reasonable inference in John's favor supports the conclusion that Williams could not reasonably expect a student who read the 2013-2014 sexual misconduct policy in September 2014 to intuit that the College intended it to mean the later, post-October 2014 more finely tuned definition of sexual misconduct that required affirmative consent for all sexual activity. *Western New England University, supra*, citing *Schaer* at 378. In any event, the pre-October 2014 policy standards regarding consent are contradictory and ambiguous, which results in its terms being construed against the College. *Id* citing *Brandeis*, 177 F.Supp.3d at 594 (D. Mass. 2016); *Suffolk Constr. Co. v. Lanco Scaffolding Co., 47 Mass.App.Ct. 726*, 716 N.E.2d 130, 133 (1999) ("Contract language is ambiguous where `an agreement's terms are inconsistent on their face or where the phraseology can support reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken'") (quoting *Fashion House, Inc. v. K Mart Corp.*, 892 F.2d 1076, 1083 (1st Cir. 1989)). The record is sufficient to support Plaintiff's claim that Williams breached its contract and violated John's rights to due process and fundamental fairness by finding John responsible for behavior that was not included in the description of prohibited conduct in effect at the time of the alleged incident.

2. Williams Investigated John in Contravention of its Policies. Williams improperly investigated and adjudicated Smith's counter complaint of "display[ing] abusive behavior" by John because Smith was an employee, not a student, when she made it and it was made in retaliation against John for his complaint against her.

Williams' "Sexual Misconduct Investigation and Adjudication Process – Employee Information" webpage designates three categories of cases: 1) Cases involving student respondents, 2) Cases involving a student and a faculty or staff member, and 3) Cases involving faculty and/or staff members only. PF ¶ 22. Since John was the complainant on March 13, 2016, with follow-up complaints in March and April 2016 and in person on May 2, 2016, this case between John and employee Smith fell in the category of "Cases involving a student and a faculty or staff member." PF ¶ 23. The "Cases involving a student and a faculty or staff member" section states, in relevant part, "A student who reports an experience of sexual assault or other sexual misconduct is called the 'complainant.' The staff or faculty member who is accused of committing sexual assault or sexual misconduct is called the 'respondent.'" The College's policy does not contemplate a student respondent to a staff or faculty member complaint. PF ¶ 24. Never in Williams' history has there been a case like this one in which the College adjudicated a complaint against a student by an employee in sexual misconduct complaint circumstances. PF ¶ 25; Dkt. 60 at 24-25.

Williams' Retaliation Policy states, "Retaliation is harmful action taken against someone who has filed a complaint, provided testimony, or in some way participated in a disciplinary investigation or process…If the actions directed at that individual would deter a reasonable person in the same circumstances from reporting misconduct, participating in a disciplinary process, or opposing behavior in violation of our Code of Conduct, it is deemed retaliatory." PF ¶ 26. Employee Smith's counter complaint was retaliatory and facilitated by the College. PF ¶ 87-93, 206-207.

The record is sufficient to support Plaintiff's claim that Williams breached its contract and violated John's rights to due process and fundamental fairness by not following its Sexual Misconduct Investigation and Adjudication Process in investigating and adjudicating employee Smith's retaliatory counter complaint against student John.

3. Williams' Breach of Obligation to Refrain from Interfering in Panel's Deliberations.

The College specifically requires that the decision about whether there has been a sexual misconduct

violation is made by the Panel. As Williams stated itself, "the determination whether conduct violates the Code of Conduct is made by the "hearing panel, not the Dean of the College…" PF ¶ 20. The College breached this provision which is intended to ensure the integrity of the Panel's deliberations and to keep those deliberations free from outside influences in at least three ways.

First, Sandstrom interfered with the Panel during its deliberations in the original adjudication so that retaliation by Smith was off the table. PF ¶¶ 234-239. Second, Sandstrom rewrote the Panel's findings letter in Smith's favor and removed the Panel's conclusion that Smith had falsely accused John of violating the honor code. PF ¶¶ 240-243. Third, non-panelist Haley was present for and involved in the appeal deliberations. PF ¶¶ 292-293.

The record contains evidence that there were other efforts by the College and the investigator to influence the Panel towards Smith's direction. The investigator removed two key components from the report shortly after communicating with the College: the footnote that stated, "The policy has been effect (sic.) since October 2014. The policy in effect prior to October 2014 defined sexual misconduct in substantially the same manner," and the policy that stated, "All faculty and many staff are potentially in a position of power with regard to students; hence, sexual relationships between employees and students are in almost all cases inappropriate." PF ¶¶ 176-177, 182-192. The investigator did not follow the College's policy that stated, "Final decisions about whom to talk with and what to ask are made by the investigator" and instead had the College dictate whether she would interview Elanie, the thirteenth of Smith's eleven witnesses, even after the report was due. PF ¶¶ 141, 158-164, 180-182, 187-190, 194-197, 226.

The record is sufficient to support Plaintiff's claim that Williams breached its contract and violated John's rights to due process and fundamental fairness by College officials' external influence on and interference with the Panel.

4. Williams' Failure to Follow its Discipline Process Outline. Williams promised to begin Panel selection within eleven (11) weeks from the time the complaint is made (March 13, 2016)

which would have been May 30, 2016 if the College was not deliberately indifferent to John's complaint and instead intent on expelling John. By specifying a timeframe, Williams was required to complete the process within that time period. *Boston College, supra*. By inexcusably exceeding - by three times - the eleven-week timeframe, Williams violated John's rights to due process and fundamental fairness as well as its contractual obligations. PF ¶¶ 17, 226.

The record is sufficient to support Plaintiff's claim that Williams breached its contract and violated John's rights to due process and fundamental fairness by failing to follow its outline.

5. Williams' Breach of Obligation to Provide a Prompt, Fair, and Impartial Investigation and Resolution. In addition to the four-month delay; biased training and interference on the Panel; biased investigation and report; and unfair policies and their biased, unfair, and discriminatory application as discussed above, Williams was unfair to John in other ways. The same Panel at the adjudication phase heard the case on appeal. Since appeal took place after this lawsuit was filed, the Panel was far from impartial. PF ¶ 290. The Panel, presumed John to be guilty and Smith to be credible despite all the evidence she was not. The Panel treated Smith's claims as gospel, ignored John's exculpatory statements, and erroneously found John responsible for non-consensual sex based on what it believed to be Smith's credible report "that both the sexual position and roughness during the incident in question were unusual, and clear indicators that [John] did not have consent." To achieve pre-determined guilt on appeal, the Panel ignored the fact that the policy it originally applied was "not in effect at the time of the alleged misconduct." PF ¶ 290. Using language remarkably similar to that used by Bossong in her Rule 30(b)(6) deposition, the Panel claimed the "language had been changed and added to and clarified but it didn't change the fundamentals of the policy itself" and **that's how they "felt [they] could be consistent between the two and have the same outcome**." PF ¶¶ 294-303.

The Panel was partial towards Smith, an employee, since it was not trained in employee policy. The Panel could not reasonably adjudicate an employee when it was entirely unfamiliar with policies

applicable to Smith nor was it provided critical sections of the policy that could exculpate John. PF ¶¶ 21-24, 139-142 177, 192.

The College's procedures provide for the Panel to make a fair assessment of the evidence and to decide whether these is a preponderance of the evidence that a violation of the sexual misconduct policy occurred. Not only was the Panel unfair to rationalize the inconsistent and discredited statements of employee Smith, but it was unfair for the Panel to find a preponderance of the evidence against John when those inconsistent and discredited statements constituted the entirety of the "evidence." Williams was further unfair to John by not providing any opportunity for an "in person" credibility assessment during the Panel's adjudication. The Panel bases its decision solely on the "report" rather than "live" testimony by students. PF ¶¶ 18, 143. The College attempted to resolve this problem in its Admissions by claiming that the Panel makes credibility assessments during the adjudication in various ways, including assessing

> the inherent credibility of the respondent's version of events, the credibility of that account relative to internal consistencies or inconsistencies, the credibility of that account relative to the accounts of the complainant or other witnesses, the credibility of that account relative to the respondent's motive to lie not to be truthful or forthcoming, and so on. PF ¶ 19.

However, not only does the record contain no evidence that the Panel made any of these assessments in this case, but the Panelists testified that they were not trained to, nor did they, look for consistency in the accuser's statements. PF ¶¶ 112-113. The Panel simply ignored the inconsistencies of employee Smith's statements and facts that discredited them, such as witnesses' denials of Smith's claims regarding the alleged non-consensual sex incident. PF ¶¶ 208(a)-(f).

"One of the most basic components of fairness is an unbiased and neutral fact-finder. Accused students are entitled to have their cases decided on the merits…and not according to the application of unfair generalizations or stereotypes because of social or other pressures to reach a certain result." *Brandeis,* 2016 WL 1274533, at *37. John's case was not fairly and impartially decided on the merits and the Panel made sure it would have the same outcome due to pressures to reach a certain result.

The record is sufficient to support Plaintiff's claim that Williams breached its contract and violated John's rights to due process and fundamental fairness by failing to provide John a prompt, fair, and impartial investigation and resolution in the underlying case.

6. Williams' Breach of Obligation to Provide Access to Educational Records. The College's procedures state that students have

> The right to inspect and review the student's education records within 45 days after the institution receives a request for access. Even though the law allows 45 days, at Williams "requests are normally honored at the time they are submitted." Students submit their requests to the persons maintaining the records to which they wish access, e.g. the registrar, dean, department chair, or other appropriate officials. PF ¶ 9.

On June 8, 2016, John requested transcripts of all the interviews from the investigation to ascertain whom Kurker had interviewed and what they alleged. PF ¶ 167. Dean Bolton promised to obtain them from Kurker for him. PF ¶ 169. After waiting 45 business days from the time of his request, John asked again about the transcripts but Sandstrom denied the request. PF ¶ 171-172. On September 16, 2016, College Counsel told John's attorney that if John "wish[ed] to make a **formal** FERPA request to review his educational records, the college will of course respond appropriately, but in the meantime the adjudication process will proceed in accordance with the college's usual procedures." PF ¶ 173. FERPA (Family Educational Rights and Privacy Act) provides students the right to inspect and review their educational records.[21] The College has no special "formal" FERPA request procedure and John's request was adequate under the College's policy. On December 20, 2016, over six months after John's initial request and one month after the Panel rendered its decision, the College allowed John to review and inspect his records after John's attorney sent a letter to College Counsel explaining the College's non-compliance with its policies and FERPA. PF ¶ 174.

[21] 20 U.S.C. § 1232g; 34 CFR Part 99.

The record is sufficient to support Plaintiff's claim that Williams breached its contract and violated John's rights to due process and fundamental fairness by failing to follow its policy regarding students' rights to access educational records.

7. Williams' Breach of Obligation that there Be Sufficient Evidence (or any Evidence) to Support the Panel's Findings. The College's standard of evidence for adjudicating sexual misconduct policy violations is preponderance of the evidence. PF ¶ 9c. The report stated that "Smith did not express to John that she did not want to be having sex." PF ¶¶ 210, 259. If at any point it stopped being consensual (which it did not) John could not have known as **Smith did not express to him that she did not want to be having sex**. The Panel still found him responsible for misconduct for which there is no evidence that he could have known he was committing. PF ¶ 269. As explained in §II(C)(5), it was unfair for the Panel to find a preponderance of the evidence against John when those inconsistent and discredited statements constituted the entirety of the "evidence." The preponderance of the evidence actually weighs against Smith and in John's favor.

The record is sufficient to support Plaintiff's claim that Williams breached its contract and violated John's rights to due process and fundamental fairness by finding John responsible for an alleged incident for which there was woefully insufficient evidence.

8. Williams' Breach of Obligation to Provide a Meaningful Right of Appeal. John was unfairly prohibited from appealing on the basis that the Panel's "decision was not supported by the evidence, or that it was otherwise unfair, unwise, or simply wrong." *Brandeis, supra*, at *36. The right to appeal at Williams "is limited to (a) significant procedural lapses or (b) the appearance of substantive new evidence not available at the time of the original decision. PF ¶ 27. Appeal hearings at Williams are "granted only in cases where the procedural problems or new evidence are considered substantive enough to have had significantly affected the outcome of the initial hearing." PF ¶ 28. Upon John's request for an appeal on a number of procedural lapses, including by not limited to application of an incorrect burden of proof, the College allowed John to appeal on the sole

basis "of the fact that the hearing panel applied a policy not in effect at the time of the alleged misconduct." PF ¶¶ 272, 276, 281, 284. John's right to appeal was wrongfully circumscribed.

As discussed in §I(B)(4) and §II(C)(5), the appellate Panel rationalized an affirmation of its original finding that the alleged incident was non-consensual. PF ¶¶ 290-303. In order "to be consistent between the two and have the same outcome," the Panel treated the pre-October 2014 sexual misconduct policy as the same as the post-October 2014 sexual misconduct policy. *Id*. The Panel did this despite the fact that appeal hearings are "granted only in cases where the procedural problems…are considered substantive enough to have had significantly affected the outcome of the initial hearing" and the fact that the Panel was informed at its appeal hearing in a handout that the Panel had "previously applied a policy not in effect at the time of the alleged misconduct." PF ¶ 28, 290. No amount of *post hoc* rationalization can transform the farce of an appeal into something resembling a fair process. The record is sufficient to support Plaintiff's claim that Williams breached its contract and violated John's rights to due process and fundamental fairness by failing to provide John a meaningful appeal.

D. Damages. The third element of a breach-of-contract claim, damages, is also satisfied here. The measure of damages for a college's breach of contract in a sexual assault case such as this one includes 1) expenses incurred[22]; 2) lost earnings as a result of the proceedings[23]; 3) diminished earning potential[24]; and 4) the reputational cost[25]. In general, the damages are designed to put the injured student "in as good a position as he would have been if had the contract been performed."[26]

[22] *Benning v. Corporation of Marlboro Coll.*, 2014 WL 3844217, at *3 (D. Vt. 2014).
[23] *Id*.
[24] *Id*.; *Brandeis*, 2016 WL 1274533, at *37 (college's unlawful conduct will "permanently scar [student's] career").
[25] *Benning*, 2014 WL 3844217, at *3; *Brandeis*, 2016 WL 1274533, at *32, 37 ("reputational injury" caused by "stigmatization as a sex offender"; convicted student faces "substantial public condemnation and disgrace").
[26] *Benning*, 2014 WL 3844217, at *3 (quoting Restatement (Second) of Contracts § 344 (1979)). Massachusetts follows this Restatement provision. e.*g.*, *Situation Mgt. Sys., Inc. v. Malouf, Inc.*, 724 N.E.2d 699, 704 (Mass. 2000).

John has suffered these elements of damages and will prove the amounts of each at trial. With regard to each: 1) he has incurred expenses during, and, as a result of, his expulsion – including, but not limited to, lost tuition for his four years enrolled at Williams in the amount of $224,000; 2) lost present earnings from fall 2011 when John first enrolled at the College to the conclusion of the proceedings estimated at $450,000; 3) diminished earning potential as a result of the denial of his degree estimated at $4,464,000; 4) reputational injury estimated at $4,000,000. PF ¶ 309.

E. Conclusion. In order to make out a breach of contract claim under Massachusetts law, a plaintiff must 1) demonstrate "existence of a valid and binding contract"; 2) breach of the contract by defendant; and 3) damages suffered by plaintiff as a result of the breach. *General Cas. Co., v. Five Star Bldg. Corp.,* 2013 WL 5297095, at *8 (D. Mass. 2013).

"It is well-established that the student-college relationship is contractual in nature." *Brandeis, supra,* at *25 (citations omitted).[27] In dismissing Plaintiff, the College, in effect, terminated the contract for the student's alleged breach thereof and should, therefore, bear the burden of justifying its action. A proper application of contract law would place the burden of proof on Williams. *Boothby v. Texon, Inc. et al*., 414 Mass. 468 (1993). Williams unjustifiably violated its contractual obligations, the guarantees of basic fairness, due process, and the implied covenant of good faith and fair dealing in numerous ways as discussed above. John has suffered catastrophic harm as a result of these violations. The record is sufficient to support Plaintiff's case on all elements for a breach of contract claim; therefore, the Court should allow summary judgment on this claim.

III. JOHN DOE IS ENTITLED TO SUMMARY JUDGMENT ON HIS BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING CLAIM (COUNT III).

A private school may not arbitrarily or capriciously dismiss a student or do so in bad faith. *Coveney, supra,* at 19. In addition to its express provisions, the student-university contract has an

[27] See also *Bleiler, supra*, at *14 n.7 (assuming, without deciding, existence of contract between college and student.)

implied covenant of good faith and fair dealing. *Bleiler, supra,* at *17. "The purpose of the covenant is to guarantee that the parties remain faithful to the intended and agreed expectations of the contract." *Id.*

Evidence points to efforts by Williams for the Panel to come to the ultimate outcome it did on appeal. In addition to solicitousness towards Smith and external influence exerted on the Panel discussed above, Williams' zeroed in on only a section of the policy - the discrete definition of the key term consent - from the very beginning. Kurker's footnote indicated that she actually had the correct policy, citing the definition of non-consensual sex prior to October 2014, but it was deleted and the report contained the later policy instead. PF ¶¶ 176, 183-192. Williams officials, including College Counsel, were alerted to the problem of the incorrect policy in the report by John in his September 24, 2016 Response, but the College took no steps to correct the error before the report went to the Panel for deliberation. PF ¶¶ 211-215. When discussing John's request for an appeal, Sandstrom cited only the "definition of consent" as under consideration. PF ¶¶ 274-275 College Counsel was heavily involved in the appeal. PF ¶¶ 282-283. Principles of fundamental fairness and the implied covenant of good faith and fair dealing require that John have not been railroaded.

IV. JOHN DOE IS ENTITLED TO SUMMARY JUDGMENT ON HIS CLAIM THAT WILLIAMS COLLEGE VIOLATED ITS DUTY OF BASIC FAIRNESS (COUNT VI).

Courts examine the disciplinary process to "ensure that it was conducted with basic fairness." *Schaer, supra,* at 481, 735 N.E.2d 373, quoting from *Cloud, supra,* at 725. College disciplinary proceedings "must be conducted with basic fairness." *Brandeis,* 2016 WL 12745533 at *31 (citations and internal quotation marks omitted). A college's "obligation to provide basic fairness in its proceedings is separate from and in addition to its contractual obligation to follow the rules it set forth in the [student] Handbook." *Id.* Whether a university has satisfied this obligation will depend on the "magnitude of the alleged violation" and the "consequences of a finding of guilt." *Id*. at *32. As Judge Saylor held in *Brandeis,* the consequences of a finding of guilt – or "responsibility" – are "substantial indeed" when the charge is an act of sexual violence, as it was in *Brandeis, id.*, and as it is here.

The First Circuit ruling in *Boston College* provides further guidance on "basic fairness" (aka "fundamental fairness") in campus disciplinary proceedings involving a breach of contract claim against a private college. The Court found that where, as here, a college promises to complete its investigation within a specified time, due process and fundamental fairness, as well as its contractual obligations, require the university to complete the process within that time period. *Boston College, supra*, Slip. Op. at 24. The Court also concluded there were issues of fact whether the College breached its contractual "obligation to provide a fundamentally fair disciplinary proceeding to Doe" including, as here, external influence on the Panel to sway its decision. *Id*. at 36.

Here, Williams was fundamentally unfair to John in numerous ways including, but not limited to, facts that closely parallel those in *Boston College* (where the 1st Circuit found that external influence on the panel constituted fundamental unfairness), *Brandeis* (where panel disregarded the context of a sexually active relationship and the raising of the allegations during later relationship deterioration and appeal was unfairly limited), and *Doe v. Brown University* (where the panelists attempted to contend that the later, more specific policy that it misapplied was essentially the same as the one in effect at the time of the alleged incident, just as in this case). Case No. 1:16-cv-00017, R.I. Exhibit B. The Court in *Brown University* did not accept the university's *post hoc* rationalizations of its determination and ordered the student to be reinstated. Each of Williams' violations of Title IX, due process, and its contract discussed above are also violations of the basic fairness duty; so Plaintiff re-alleges and reasserts the facts set forth above as if fully set forth herein. A school's departure from its own hearing rules amounts to a fundamental fairness violation when the departure "results in a procedure which itself impinges on due process rights." *Flaim v. Medical College*, 418 F.3d at 640 (quoting *Bates v. Sponberg*, 547 F.2d 325, 329–30 (6th Cir. 1976)). The record contains support for additional violations of John's right to fundamental fairness as follows.

Williams deprived John of a face to face hearing by the Panel during the adjudication. Evaluation of a person's credibility cannot be had without some form of presence, some method of compelling a

witness "to stand face to face with the [Panel] in order that it may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Doe v. Univ. of Cincinnati et al*., No. 16-4693 (6th Cir. 2017) at 12 citing *Mattox v. United State*s, 156 U.S. 237, 242–43 (1895). Exhibit C.

What implicates fundamental fairness is not that Defendant introduced hearsay evidence against John, but that the nature of that evidence posed a problem of credibility. See *Flaim*, supra, at 641. Given the parties' competing claims, lack of percipient witnesses, and lack of corroborative tangible evidence to support Smith's non-consensual sex allegation, the present case left the Panel with "a choice between believing an accuser and an accused." *Id*. Yet, the panel resolved this "problem of credibility" without actually assessing Smith's credibility. *Id.* (citation omitted).

Evaluation of a witness's credibility cannot be had without some form of presence, some method of compelling a witness "to stand face to face with the [Panel] in order that it may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox, supra*, at 242–43. A face to face hearing guarantees that the trier of fact makes this evaluation on both sides. *Flaim, supra*, at 641. A case that "resolve[s] itself into a problem of credibility" cannot itself be resolved without a mutual test of credibility, at least not where the stakes are this high. *Id* quoting *Winnick v. Manning*, 460 F.2d, 545, 550 (2d Cir. 1972). Without any face to face credibility assessment by the Panel, the accused student's "due process" rights are violated in a fundamentally unfair manner.

Here, John's interest is enormously substantial and the risk of erroneous deprivation under the procedures Williams followed at his "hearing" was unacceptably high. Allowing accused students to pose "face to face" questions to witnesses at sexual misconduct disciplinary hearings may impose administrative burdens on Williams. Yet, on the facts here, that burden does not justify imposition of severe discipline without any credibility assessment of the accuser and accused.

As in *Brandeis* and *Boston College*, Williams did not provide John meaningful notice of the charges. In the notice letter from Camacho, John was informed that the College was investigating a complaint by Smith that John "displayed abusive behavior towards [Smith] during the past two years." PF ¶ 90. Although Smith raised the allegation of non-consensual sex on May 20, 2016 at her first interview by Kurker, John was not informed of this charge at his second interview June 1, 2016. PF ¶¶ 144-146. Instead, Kurker informed him of the non-consensual sex allegation at the very end of his third and final interview July 13, 2016. PF ¶ 151. John was rendered flabbergasted and dumb-struck. PF ¶ 152. With adequate notice, the scope and content of the defense Plaintiff mounted to the charges against him may have been different. *Doe v. George Mason Univ.*, 149 F.Supp.3d at 617.

By stonewalling the request for transcripts of interviews, the College prevented John from collecting evidence to prepare his defense. John had every right to investigate and secure the statements of witnesses that could impact his case. Because John was not informed of who his accuser's witnesses were nor what they said until after the investigation was completed and the report provided, he was denied any opportunity to cross-examine his accuser's witnesses. PF ¶ 170. Williams' delay in allowing John access to his records deprived John of a fair process.

CONCLUSION

What is true in the *Brandeis* and *Boston College* cases is true here as well: "[T]his was not a criminal proceeding, and [the College] is not a governmental entity. Nonetheless, the stakes were very high. John was charged with "[a] serious offense[ ] that carr[ied] the potential for substantial public condemnation and disgrace. He was required to defend himself in what was essentially an inquisitorial proceeding that…failed to provide him with a fair and reasonable opportunity to be informed of the charges and to present an adequate defense. He was ultimately found 'responsible,' and received a penalty that may permanently scar his life and career."[28]

The Court should grant Plaintiff's motion for partial summary judgment.

[28] *Brandeis, supra,* at *37.

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Respectfully submitted,
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CERTIFICATE OF SERVICE

This document was served electronically upon all counsel of record by filing through the ECF system on September 30, 2018.

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