UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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STANDARD OF REVIEW

Summary judgment is appropriate when (1) there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court views the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 158-59 (1970). The movant bears the initial burden of asserting the basis of his motion and may do so by demonstrating that there is "an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 325 (1986). The burden then shifts to the nonmovant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 257 (1986). When facing cross motions for summary judgment, the court typically "will consider each motion separately, drawing inferences against each in turn." *Showtime Entm't, LLC v. Town of Mendon*, 769 F.3d 61, 69 (1st Cir. 2014) (internal quotations omitted).

DOCUMENTS INCORPORATED BY REFERENCE

Plaintiff incorporates by reference: (1) Plaintiff's Statement of Material Facts in Support of Plaintiff's Motion for Partial Summary Judgment (Dkt. 124) (attaching Exs. 1-166) ("PFs"); and (2) Plaintiff's Responses to the Statement of Material Facts in Support of Defendant's Motion for Summary Judgment and Further Statement of Material Facts (filed herewith) ("PC-Fs"). Plaintiff also incorporates by reference its Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment (Dkt. 123) ("P. Memo"). Other documents have been incorporated by reference as needed below. The numbered exhibits below refer to the exhibits filed herewith this document.

ARGUMENT

I. JOHN DOE IS ENTITLED TO PREVAIL ON CLAIMS FOR WHICH THERE ARE CROSS-MOTIONS FOR SUMMARY JUDGMENT (COUNTS I, II, III, AND VI).

A. Williams College's Violations of Title IX (COUNT I).

1. Selective Enforcement (aka Disparate Treatment). Defendant recycles its argument from its motion to dismiss -- that Plaintiff's claim fails because there is no evidence that a female student in similar circumstances was treated more favorably than he was. However, the similarly situated comparator need be a comparator of the opposite sex, not necessarily a "student":

> …to make out a claim of selective enforcement or disparate treatment, Doe would have to allege and prove that regardless of his actual "guilt or innocence," the decision to initiate a disciplinary proceeding or the severity of the penalty "was affected by [his] gender." *Yusuf v. Vassar Coll.,* 35 F.3d 709, 715 (2d Cir. 1994). To do that, Doe must demonstrate that "a female was in circumstances sufficiently similar to [his] and was treated more favorably by the University." *Mallory v. Ohio Univ.*, 76 F. App'x 634, 641 (6th Cir. 2003); *see also Doe v. Case W. Reserve Univ.*, No. 1:14CV2044, 2015 WL 5522001, at *6 (N.D. Ohio Sept. 16, 2015) (plaintiff has the burden to identify "a comparator of the opposite sex who was treated more favorably by the educational institution when facing similar disciplinary charges"). (Dkt. 55 at 13.)

As argued in Plaintiff's Opposition to Defendant's Motion to Dismiss, Susan Smith and John Doe certainly stand in comparison to each other with Smith the similarly situated female compared to John. The two do not need to be in the exact same circumstances or status to be considered similarly situated. In fact, the very concept of the "similar situation" doctrine is based on a lack of exactness or sameness but similarity instead. (Dkt. 60 at 14.) Contrary to Defendant's argument, the precedents on this subject do not require similarly situated comparators to have the exact same status, e.g. students.

A defendant seeking summary judgment in a disparate treatment case must first demonstrate the absence of evidence in the record supporting the plaintiff's case. *Doe v. Columbia Univ.,* 831 F.3d 46 (2d Cir. N.Y. 2016). Smith's December 2015 striking of John's face to her academic claim and then her harassment/stalking of him to his complaint against her then her sexual misconduct counter-complaint against him must be seen in their whole, as a single affair: two parties to a deteriorating relationship making misconduct allegations against the other. Viewed in the context of what happened here, Smith is, in fact, appropriately compared and Williams' blatant favoritism toward her is evidence of gender discrimination. Plaintiff provides sufficient evidence to convince a rational jury that Smith was treated more favorably than was John.

A discrimination defendant must then also satisfy the second burden of articulating a legitimate, nonbiased reason for its decision once plaintiff has shown that a prima facie case of discrimination exists. Following "a series of cases beginning with *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, (1973) [a summary judgment case]," until Defendant furnishes a nonbiased reason for the adverse action it took against Plaintiff, Plaintiff needs to present only minimal evidence supporting an inference of discrimination in order to prevail. *Columbia Univ., supra*. As discussed below, Defendant does not meet this burden as there is sufficient evidence in the record that Williams did not have a legitimate reason for its favorable treatment of Smith compared to its grossly unfair treatment of John.

2. Erroneous Outcome. In an erroneous outcome case, "the claim is that the plaintiff was innocent and wrongly found to have committed an offense." *Doe v. Brown Univ.,* 166 F. Supp. 3d 177, 185, 2016 U.S. Dist. LEXIS 21027, *15-16 (D.R.I. 2016) quoting *Yusuf*, *supra*, at 715. It is important to note that in order to prevail in his Title IX erroneous outcome claim, Plaintiff is not expected to prove that he is innocent; he need only supply evidence of "articulable doubt" as to the outcome of the proceeding. *See Brown*, *supra*. This low bar can be met in a number of ways including: "(i) pointing to procedural flaws in the investigatory and adjudicative processes, (ii) noting inconsistencies or errors in the adjudicator's oral or written findings, or (iii) challenging the overall sufficiency and reliability of the evidence." *Doe v. Marymount Univ*., 297 F. Supp. 3d 573, 584-585, 2018 U.S. Dist. LEXIS 43164, *18-20 (E.D. Va. Mar. 14, 2018). Examples of procedural irregularities found to have undermined the legitimacy of a school's determination of guilt include:

- Unresolved inconsistencies in statements by the accuser or statements by the accuser which are contradicted by other evidence in the case[1]: PC-Fs ¶¶ 20, 126;
- Denying the accused the opportunity to identify and interview potential witnesses and to gather exculpatory evidence[2]: PC-Fs ¶¶ 19-20;

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[1] *Doe v. Marymount Univ.,* 297 F. Supp. 3d 573, 584-585, 2018 U.S. Dist. LEXIS 43164, *20 (E.D. Va. Mar. 14, 2018) (evidence that the accuser was "happy and giddy" following an allegedly violent encounter, ignored by the investigator, undermined the validity of the investigation.); *Doe v. Miami Univ.,* 882 F.3d 579, 593, 2018 U.S. App. LEXIS 2075, *24, 2018 WL 797452 (6th Cir. Ohio Feb. 9, 2018).

[2] *Id.* at 19.

- Significant facts either not brought to the adjudicator's attention or ignored by the adjudicator[3]: PFs ¶¶ 295-303, PC-F ¶ 149;
- The investigator's failure to seek out contemporary text messages (exculpatory evidence)[4]: PFs ¶¶ 147-149;
- Failure to seek out and interview witnesses potentially favorable to the accused[5]: PFs ¶¶ 158-164;
- Reaching conclusions contrary to the weight of the evidence[6]: PC-F ¶ 126;
- Unexplained discrepancies in the adjudicator's finding of fact[7]: PFs ¶¶ 256-258, PC-F ¶ 126 and 134;
- Use of an erroneous definition from the school's misconduct policy[8]: PFs ¶¶ 1,2,6,28,118-134, 136, 274, 276, 284-285, 290, 300-303, PC-Fs ¶¶ 11-13, 147, 149, and 152-154;
- Manipulation of the investigative report such that certain exculpatory material was either left out of the report or was never investigated[9]: PFs ¶¶ 165-166, 207, and 237-239 (evidence of Smith's retaliation would be exculpatory, etc.).

There is sufficient evidence in the record to convince a rational jury that all of the examples of procedural errors showing articulable doubt listed above were present in this case. The procedural deficiencies throughout John's investigation and adjudication plus the paucity of the evidence against him cast articulable doubt on the outcome of the College's case. *Brown, supra*, at *16-17 (allegations school had ignored exculpatory evidence sufficient to show procedural inadequacies under erroneous outcome theory). The investigation and adjudication of the sexual misconduct claims were so riddled with procedural flaws, factual inconsistencies, and twisted interpretations of Williams' own policies, it would have been shocking if it **had** come to a correct outcome.

The 6th Circuit recently found that "the unresolved inconsistency in Jane's statement, the unexplained discrepancy in the hearing panel's finding of fact, and the alleged use of an erroneous definition of consent create 'some articulable doubt' as to the accuracy of the decision." *Doe v. Miami*

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[3] *Id.* at 18-20.
[4] *Doe v. Amherst College*, 238 F. Supp. 3d 195, 2017 U.S. Dist. LEXIS 28327, 2017 WL 776410 (D. Mass. 2017).
[5] *Rolph v. Hobart & Williams Smith Colls*., 271 F. Supp. 3d 386, 396, 2017 U.S. Dist. LEXIS 153838, 2017 WL 4174933 (W.D.N.Y. Sep. 20, 2017); *Doe v. Columbia Univ.,* 831 F.3d 46, 56-57, 2016 U.S. App. LEXIS 13773, *32-33 (2d Cir. N.Y. 2016).
[6] *Id.*
[7] *Miami Univ., supra.*
[8] *Id.*; *Doe v. Brown Univ.,*166 F. Supp. 3d 177 2016 U.S. Dist. LEXIS 21027, (D.R.I. 2016); *Doe v. Western New England University*, 228 F.3d 154, (D. Mass 2017).
[9] *Marymount, supra*, at *19.

Univ., 882 F.3d 579, 593, 2018 U.S. App. LEXIS 2075, *24, 2018 WL 797452 (6th Cir. Ohio Feb. 9, 2018). The evidence in this case shows all three – unexplained inconsistencies in Smith's statements, inconsistent findings of fact, and incorrect readings of the College's policies – and more. The Panel did not explore the inconsistencies in Smith's statements nor John's exculpatory rebuttals. Plaintiff contends that the evidence actually proves John's innocence; but, at a minimum, it solidly casts articulable doubt on the Panel's conclusion that John had, in Defendant's counsel's words, "raped" Jane and Smith. Williams never advised John of the claim against him in 2012 and failed to provide meaningful notice of the specific alleged policy violations in 2016. Williams investigation and adjudication of the claims against John gave him no opportunity to defend himself, virtually guaranteeing his conviction, as discussed further below. This is exactly the type of wrong courts have sought to redress in erroneous outcome cases.

In addition to casting doubt on the Panel's determination of John's guilt, evidence shows that gender bias was a factor connected to the erroneous outcome. The *Yusuf* Court stated that evidence of gender bias might include such things as statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender. *Yusuf, supra*, at 715. Plaintiff need not show both inculpatory statements and biased patterns of decision-making; either, without the other, could establish gender bias.[10] Courts considering the question also have not found the indicia identified in *Yusuf* to be an exhaustive list. Gender bias can be evidenced in the statements and behavior of one significant decision-maker[11], or it can be suffused throughout the school setting. It can be found in one significant piece of evidence or it can manifest in

[10] *See, e.g., Saravanan v. Drexel Univ*., 2017 U.S. Dist. LEXIS 193925, *10, 2017 WL 5659821 (E.D. Pa. Nov. 24, 2017) (Plaintiff need not point to arguably inculpatory statements by a university representative to establish gender bias).

[11] *Columbia, supra*, at 58-59 and cases cited therein for the proposition that an institution will be found biased, even in the absence of illegitimate bias on the part of the ultimate decision-maker, where "a biased person endowed with institutional influence 'played a meaningful role in the process.'" *Id*., *32-33, *quoting Holcomb v. Iona College*, 521 F.3d 130, 131 (2nd Cir. 2008); see also *Staub v. Proctor Hosp*., 562 U.S. 411, 422, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011).

a patchwork of gender-infused statements, beliefs, and decisions that ultimately cover a school's disciplinary proceedings with a blanket of bias.

Evidence of gender bias is by its nature situational, fact specific, and sometimes very subtle. Courts generally look to specific examples of officials' statements and decisions which, when viewed in light of one another, show influence of gender. Examples include:

- Disciplinary procedures which operate to favor complainants, who are almost always female, and disfavor respondents, who are almost always male[12]: PFs ¶¶ 94, 95, 97, 100, 101, 111-114, PC-F ¶ 126;
- Evidence a school's disciplinary policies and procedures in sexual misconduct cases grew out of concern about being charged with Title IX violations by females[13]: PC-Fs ¶¶ 21(a-m);
- Gender biased comments and/or decisions[14]: PFs ¶¶ 101, 104-105, 108-110, PC-F ¶ 21(k-m);
- Evidence that only the male participant is disciplined for participating in the same act(s)[15]: PC-Fs ¶¶ 20;
- Evidence that school procedures operated to hamper accused student's ability to identify potential witnesses and prepare a defense[16]: PFs ¶¶ 151-153, 167-174, PC-Fs ¶¶ 19-20, 84, and 156-160;
- Training materials and procedures that encourage panelists to believe the accuser and presume the accused student's guilt[17]: PFs ¶¶ 111-114, 246-248, PC-F ¶ 126;
- Evidence that the school failed to recognize or address accuser's potential or motivation to make a false allegation[18]: PFs ¶¶ 26, 91,165-166, 234-239, 266, PC-Fs ¶¶ 126, and 130(f);

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[12] *Marymount, supra*, at 586-587, *23-28; *see also Harris v. St. Joseph's Univ*., No. 13-3937, 2014 U.S. Dist. LEXIS 194438, 2014 WL 12618076, at *2 n.3 (E.D. Pa. 2014).

[13] *Id*.; *see also Columbia, supra*, and *Doe v. Syracuse Univ*., 2018 U.S. Dist. LEXIS 157586, *31-2 (N.D.N.Y. Sep. 16, 2018) (while these issues standing alone 'may not necessarily support an inference of bias on account of gender,' *Rolph*, 271 F. Supp. 3d at 402, Doe, like the plaintiffs in *Columbia University* and *Rolph*, has coupled his factual allegations with the allegations of public pressure on the University to more aggressively prosecute sexual abuse allegations. Like in these other cases, Doe's disciplinary proceeding occurred in the context of public criticism of the University's handling of sexual abuse complaints against males. A reasonable inference could be drawn that the Investigator, the University Conduct Board, the Appeals Board, and the University official who ultimately decided the appeal were 'motivated to refute [public] criticisms [of Syracuse's handling of sexual abuse allegations] by siding with the accusing female and against the accused male.')

[14] *Marymount, supra*.

[15] *Doe v. Case Western Univ.,* 2017 U.S. Dist. LEXIS 142002, *20-21, 2017 WL 3840418 (N.D. Ohio Sep. 1, 2017). *See also Amherst, supra*, and *Rossley v. Drake Univ*., Case No. 4:16-cv-00623-RGE, Dkt. 153 (S.D. Iowa Oct. 12, 2018) (Exhibit 1).

[16] *Marymount, supra*, at 586-587, *23-28.

[17] *Doe v. Univ. of Pennsylvania,* 270 F. Supp. 3d 799, 823-824, 2017 U.S. Dist. LEXIS 148086, *49-51, 2017 WL 4049033 (E.D. Pa. Sep. 13, 2017) (training materials encouraged school employees to presume the accused's guilt, combined with possible pro-complainant bias on the part of University officials set forth sufficient circumstances suggesting inherent and impermissible gender bias to support a plausible claim that Defendant violated Title IX); *Doe v. Regents of the University of California*, *Santa Barbara*, Case No. 17CV03053, Superior Court of the State of California (Aug. 10, 2018) (university held in contempt for employing guilt-presuming procedures and reaffirming its original finding when ordered to reconsider the case) (Exhibit 2); *see also Saravanan v. Drexel Univ., supra*, at *9.

[18] *Case Western Univ., supra,* at *18-19 (allegation that the school failed to recognize Jane Doe's potential to report a false allegation against Plaintiff in order to obtain a Title IX accommodation to permit her to withdraw at the end of

- Evidence that the school accepted the accuser's allegations at face value, notwithstanding inconsistent statements and contradictory evidence[19]: PFs 208 ¶¶ and 246, PC-Fs ¶¶ 126;
- Evidence that investigator ignored evidence tending to diminish accuser's credibility and/or exculpate the accused[20]; PFs ¶¶ 158-166, PC-Fs ¶¶ 20.

The question of whether procedures structurally biased against the accused violate Title IX is something that remains open to debate, and is not, despite Williams' suggestion, settled law. Policy biased against accused students "may well run afoul of Title IX" by "depriving students accused of sexual assault of the investigative and adjudicative tools necessary to clear their names even when there are no due process requirements." *Doe v. Marymount Univ*., 297 F. Supp. 3d 573, 584 n.17 (E.D. Va. 2018). Williams' procedures, including, but not limited to, trauma-informed anti-male training of the Panel received to unquestioningly taking the accuser's statements at face value, as gospel, shows that the Panel presumed John to be guilty and was gender biased. *Doe v. Case Western Univ.,* 2017 U.S. Dist. LEXIS 142002, *18-19, 2017 WL 3840418 (N.D. Ohio Sep. 1, 2017).

The nexus of the evidence of bias and unfairness by Dean Sarah Bolton to Meagan Bossong to Dean Marlene Sandstrom to Toya Camacho to Allyson Kurker to Leticia Haynes to ultimately the Panel demonstrating favor towards Susan Smith and against John constitutes a continuing violation. All the allegations, from the very first time Bolton rushed to judge John in May 2012 to continuous overprotection of and solicitousness toward Smith to the Panel's training and prejudgment of John in 2016, paint a picture of an ongoing discriminatory pattern of conduct that suffices to bring Plaintiff's claims within the continuing violation doctrine. *Doe v. Brown Univ*. Case No. 17-191-JJM-LDA, Dkt. 29, Aug. 27, 2018. (Exhibit 3).

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the semester from a class she was failing was sufficient to aver gender bias); *see Neal v. Colo. State University-Pueblo*, 2017 U.S. Dist. LEXIS 22196, *25-33, 2017 WL 633045 (D. Colo. Feb. 16, 2017) (university's failure to consider physical or documentary evidence, motivation of one party not to be disciplined, failure to question certain witnesses before completing the investigation, combined with evidence that the university's enforcement of 2011 Dear Colleague Letter became gender-skewed against men are more than adequate to plead gender bias.).

[19] *Case Western Univ., supra,* at *18-19 (allegation that school accepted accuser's allegations at face value – notwithstanding inconsistent statements and contradictory evidence, showed a presumption that the accused was guilty and were sufficient to aver gender bias).

[20] *Id.* (allegations that the investigator overlooked any evidence tending to diminish Jane Doe's credibility and/or exculpate Plaintiff sufficient to aver gender bias).

3. Deliberate indifference. As this Court rightfully recognized in *Amherst*, a school's obligations "do not commence only upon filing of a formal complaint, but whenever a school 'knows, or reasonably should know, about possible harassment' of a student, regardless of whether the harassed student actually makes a complaint." *Doe v. Amherst College*, 238 F. Supp. 3d 195 (D. Mass. 2017). Plaintiff incorporates by reference its discussion of deliberate indifference in its P. Memo, proffer of PFs ¶¶ 61-63, 76, and DC-Fs ¶¶ 44(f), 48.

As there is sufficient evidence in the record to convince a jury that Williams discriminated against John based on his gender, this Court should grant summary judgment on Plaintiff's Title IX claim.

B. Williams College's Breach of Contract (COUNT II). Plaintiff incorporates by reference its discussion of the College's breaches of contract in its P. Memo, proffer of PFs and DC-Fs. As there is more than sufficient evidence in the record to convince a jury that Williams breached its contract, this Court should grant summary judgment on Plaintiff's breach of contract claim.

C. Williams College's Breach of Covenant of Good Faith and Fair Dealing (COUNT III).

John, who in the Complaint had reasserted the allegations set forth above Count III, actually claims that Williams breached the covenant of good faith and fair dealing that is implied in its contractual relationship by the "conduct alleged herein" referring to the factual history in the Complaint. (Dkt. 76 ¶¶ 243 and 247.) John's reference to Williams' "nefarious employment of a non-existent sexual misconduct policy indicates bad faith and unfair dealing" refers to the application of a sexual misconduct policy not in effect, i.e. non-existent, at the time in question. *Id.* ¶ 246. PFs ¶ 133-134, 175-176, 199, 200, 205, 210-215, 219, 231-233, 284-285, 290, 295-303 and PC-Fs ¶ 10-12, 88-90, 102-106, 126, 135, 145, 147, and 152-154. As there is sufficient evidence in the record to convince a rational jury that the college failed to meet its obligations in relation to student conduct proceedings, this Court should grant summary judgment on the claim for breach of the implied covenant of good faith and fair dealing.

D. Williams College Violated Its Duty of Basic Fairness (COUNT VI).

Defendant asserts that student disciplinary proceedings are conducted with basic fairness if the student has notice of the allegation against him and an opportunity to be heard, i.e., to present his version of events and offer supporting evidence, and cites some cases for support. The only recent case cited by Defendant, the *Harvard* case, involved an academic violation. *Walker v. Harvard College*, 840 F.3d 57 (1st Cir. 2016). As discussed in Plaintiff's Opposition to Defendant's Motion to Dismiss, Defendant again inappositely employs a standard that applies for academic affairs and not for non-academic matters such as sexual misconduct proceedings. (Dkt. 60 at 25-26.) Noticeably absent from Defendant's list of precedents is *Doe v. Brandeis* and this Court's own decision in *Amherst*, both which employed a much broader conception of fairness. *Doe v. Brandeis Univ.*, 2016 WL 1274533, 177 F.Supp.3d 561 (D. Mass. 2016); *Amherst*, *supra*. The *Boston College* Court held "that the implied covenant of good faith and fair dealings imposed on every contract by Massachusetts law, applied in the context of school disciplinary proceedings, creates an independent duty to provide basic fairness." *Doe v. Boston Coll.*, 892 F.3d at 87, 2018 WL 2752608 (1st Cir. 2018). Defendant's counsel himself asserted that basic fairness also requires that a Panel be free from external influences and that a Panel not refuse to hear exculpatory evidence. PC-Fs ¶¶ 126(qq) and 176.

On these said two bases alone, Williams' proceedings were not conducted with basic fairness. The Panel was far from free from external influences including, but not limited to biased training by Bossong, to the omission of the correct sexual misconduct policy, and to the inculcation of an understanding of consent that was not in effect at the time of the alleged incident. Sandstrom influenced the Panel to avoid John's claim that Smith retaliated against John with her Title IX counter-complaint and even removed its finding that Smith had falsely reported the honor code violations from its letter. PFs ¶¶ 234-243, 263-266. PC-Fs ¶¶ 130 and 176.

Regarding the doctrine that student disciplinary proceedings are conducted with basic fairness if the student has notice of the allegation against him and an opportunity to be heard, the College fell woefully short. In both sexual misconduct cases, Williams did not provide John an opportunity to be

heard. In 2012, John received no notice of the allegation against him. PC-Fs ¶¶ 19-20. Since there was no notice or hearing, John never knew what the accuser or the accuser's witnesses actually said, but only knew what the Dean - the sole fact-finder and adjudicator - decided and the basis for her decision. John was not even given any notice at all that an allegation was made against him. *Id.* John never had the opportunity to confront his accuser, question witnesses, or present a defense at a hearing. As such, Williams subjected John to an inquisitorial star chamber process that grossly violates standards of basic fairness and Defendant incredibly wants this Court to believe that Williams allowed a "rapist" to return to campus after a two-semester suspension.

In the 2016 case, John was not provided meaningful notice of Smith's non-consensual sex allegation. PF ¶¶ 90, 144-146, and 151-152. PC-Fs ¶¶ 76, 77, and 84. Notice of "abusive behavior for past two years," too cursory to furnish John with an adequate opportunity to prepare and respond, failed to identify any specific portion of the College's policy allegedly violated or the nature of misconduct of which John was accused. John also was not provided a fair opportunity to respond to the investigator about the non-consensual sex claim as she indicated that she was finished speaking with him at the time she informed him of it. PF ¶ 153. PC-F ¶ 84. An accused cannot reasonably respond to allegations without adequate notice of what those allegations are. "In being given an opportunity to explain his version of the facts that this discussion, the student [must] first be told what he is accused of doing and what the basis of the accusation is." *Doe v. White*, *et al.,* Case No. BS168476, Superior Court of the State of California, County of Los Angeles (July 12, 2018) at 18 citing *Goss v. Lopez,* 419 U.S. 565, 582 (Exhibit 4).

Contrary to Defendant's claim, the determination whether John or Smith had violated the College's policies was not made by the Panel of three College administrators. PFs ¶¶ 234-243, 264, 266, 270 and 292. PC-Fs ¶¶ 130 and 176. They were trained with biased trauma-informed materials to disregard exculpatory evidence such as inconsistency in statements, to believe an incorrect understanding of consent as **active**, and to consider only the definition of one key term in isolation from the rest of the

policy. PFs ¶¶ 120-123, 208, 246-248, 251, and 259-262. PC-Fs ¶¶ 125 126 149, 152, and 153. On appeal, which was arbitrarily and capriciously limited, the Panel unfairly applied the one key term to rationalize and reaffirm its previous determination "to be consistent between the two and have the same outcome." PFs ¶¶ 1, 2, 28, 120-134, 274, 276, 281, 284-285, and 288. PC-Fs ¶¶ 145-149, 152, and 154. One panelist had no experience in sexual misconduct cases and had only been at the College a few months when the Panel was convened. The same lack of experience applied to Sandstrom. PF ¶ 227.

The Panel spent only 90 minutes deliberating – under four minutes per allegation. PC-F ¶ 122. The Panel did not apply the College's "preponderance of the evidence" standard in making its findings. PC-F ¶ 126. It only said it did. These investigation and disciplinary processes fail the test of basic or fundamental fairness and constitute a continuing violation of John's rights.

Contrary to Defendant's assertion that there is no merit to the argument that the College's "affirmative consent" policy is fundamentally unfair, this argument relates to paragraph 266 of the Complaint which contends a basic unfairness in shifting the burden on the initiators of the sexual activity, i.e. the would-be accused students. (Dkt. 76.) Notwithstanding the fact that an affirmative consent policy was not in place during the times of the 2012 and 2014 alleged incidents and never should have been applied to John, Plaintiff demonstrates the unfairness that accompanies this kind of policy as it was what the Panel applied. "Affirmative consent effectively shifts the burden of proof to the accused, making him or her guilty until proven innocent," wrote Judge Carol McCoy who ordered the reinstatement of a student expelled under such a standard. *Mock v. University of Tennessee*, Case No. 14-1786-II, Chancery Court of Davidson County, TN (Exhibit 5). The case involved a senior whom the university had found responsible for sexual misconduct because he was unable to prove that he had obtained consent from a woman who said she was too drunk at the time to remember clearly what had happened. "The question," Judge McCoy added, "is no longer whether or not someone actually consented to a sexual act; it's whether the accused can prove that they received such consent—and short of a videotape of the entire encounter, that proof is unlikely to exist." *Id*. Here, John also was

guilty until proven innocent as given the balance of evidence, or more aptly lack thereof, plus the trauma-based rationalizations of Smith's inconsistent statements, the Panel used an impossible standard that expected Plaintiff to be able to prove he received consent.

Contrary to Defendant's argument that the Panel's decision was not arbitrary and capricious, the Panel's decision in this case had no "rational explanation" supported by "reasonable grounds." The statements in support of Defendant's argument to the contrary grossly misrepresent the record. Smith did not state that she "gave no such approval or agreement" referring to the definition of the one key term "effective consent." Smith actually had stated, instead, **that she did not express to John that she did not want to be having sex.** PF ¶ 210. Smith told the cited "three witnesses" widely inconsistent versions of the alleged event. PF ¶ 208(c,e,f). PC-F ¶ 66-67. Smith also told one of these witnesses that John, "'[has] never done that. He doesn't do that' when asked if John ever abused her physically or engaged in nonconsensual sex with her." In May 2016, after the investigation started, Smith told this witness a different story, evidencing Smith's witness grooming. PF ¶ 208(c). PC-F ¶ 67(b).

Smith claimed to have told a fourth and final witness at a time closest to the index event about the alleged incident: "she felt really uncomfortable when she and John had been having sex because 'it was a really different position…'"; but this good friend of Smith's could 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). PC-F ¶ 67(i-l). For further evidence in the record that Defendant's account distorts the facts, Plaintiff incorporates by reference PC-F ¶ 65, 126, and 134. Lastly, Defendant ignores, as did the Panel, the fact that both the policy in effect at the time of the alleged incident and even the one effective October 2014 provided, "Both parties have the obligation to communicate consent or the lack of consent." PF ¶ 1, 6, 9b, 210, and 259-260. PC-F ¶ 11 and 13.

A decision is arbitrary and capricious when every piece of exculpatory evidence, including the College's own policy, is flat out ignored by the Panel. A decision is irrational when the Panel: 1) ignores substantive policy, including, but not limited to "Both parties have the obligation to

communicate consent or the lack of consent"; 2) uses an incorrect understanding of "consent" as active participation; 3) disregards the fact that the policies were "different," the differences were "not trivial," and were "substantive enough to have [] significantly affected the outcome of the initial hearing"; 4) believes all non-consensual sex is traumatic; 5) assumes the accuser alleging non-consensual sex was traumatized; 6) rationalizes the accuser's inconsistent statements as "post trauma" and, therefore, only inculpatory evidence deserves its attention.

A decision is outrageous when the mere allegation of rape with no percipient witnesses is adjudicated under Williams' quiet policy of treating all allegations of rape as allegations of trauma virtually guaranteeing that an accused student would have no ability to defend himself against the charges. As such, Williams allowed the Panel to arbitrarily find John responsible for non-consensual sex no matter what the evidence or lack thereof in this "he said, she said, they [the Panel] said" case.

Defendant states that the Panel's credibility determinations are not for a court to second-guess. However, Defendant's argument, recycled from its motion to dismiss in this case and unsuccessfully used in *Boston College*, oversimplifies the role of the courts. Defendant states that a private college or university is not required to provide constitutional due process or an adversarial hearing. However, a degree of due process, including equivalents of evidentiary rules, is indeed required even in private schools. *Cloud v. Trs. of Bos. Univ*., 720 F.2d 721 (1st Cir. 1983). The *Schaer* opinion Defendant cites furnishes no support for the degree of deference it seeks. The *Schaer* opinion emphasized that the "[r]reluctance of courts to become involved in student discipline diminishes as the subject matter graduates from academic issues to misconduct." *Schaer v. Brandeis Univ*., 48 Mass. App. Ct. 23, 26 (1999), *rev'd by* 432 Mass. 474 (2000) (citations omitted). According to Justice Kass:

> If a student is disciplined for defacing college property or postgame brawling, the degree of deference will still be very considerable because this involves concerns peculiar to the educational institution. Should the student, however, be suspended or expelled for misconduct, such as theft or – as here – rape, the subject matter is not only familiar to courts but mars the record of the student in a manner that is likely to have serious consequences for the student in admission for graduate study or competition for a job. *Id.* at 27.

In this case, it is undisputed that the student in question was expelled for rape. In short, Defendant appears to have intentionally misrepresented the *Schaer* opinion in support of a desperate place for more deference than the law provides.

Defendant argues that Plaintiff "offered no evidence that Smith 'indicated' consent 'by words or conduct'" as it claims "the College's policy requires" in relation to the allegation in the Complaint at paragraph 175 and goes on to say that "that argument depends on ignoring the actual facts of the case." (Dkt. 76 ¶ 175.) Defendant further argues that Plaintiff alleged "that the panel could not properly infer the absence of consent based merely on the fact that the sex occurred in a position 'unusual' for Doe and Smith to start in and the panel's conclusion that the sex was 'rough.'" However, paragraph 175, misrepresented and taken out of context by Defendant, actually attacked the Panel's erroneous use of an "affirmative consent" concept, one that requires active participation as "only yes means yes,"[21] which led to the Panel's finding that the alleged incident was non-consensual solely based on two "clear indicators" – an unusual sexual position and roughness during the incident in question. *Id.* Compl ¶ 168. The *arguendo* questions in paragraph 175 pose hypothetical scenarios to demonstrate the absurdity and fundamental unfairness of affirmative consent policies. Regarding the facts, Plaintiff incorporates by reference herein PFs ¶¶ 208 and 249-258 and PC-Fs ¶¶ 65 and 134.

Williams attempts to hoodwink this Court into accepting a false understanding of its policy as did the Panel in this case. Under a correct understanding of the policy in effect at the time of the alleged incident, Smith did not have to **do** anything for consent to be present. Besides, Plaintiff repeatedly pointed out **conduct** by Smith, e.g. passively going along with the sex by not expressing lack of consent, that did convey consent was present. (Dkt. 124-28 at 11, 39, 40, 41, 43, and 45.) This was ignored by the Panel, of course, as it disregarded every statement and piece of exculpatory evidence John provided and

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[21] According to the College, an affirmative consent policy is an 'only yes means yes policy'; "that consent is only present in the presence of affirmatively or positively stated yes." (Dkt. 124-6 Bossong Dep. Vol. II Excerpts 15:19-16:1. PF ¶ 131.)

believed actions were necessary. Williams wants this Court to ignore these facts as well as the policy which did not state "Consent may not be inferred by silence or passivity" until October 2015. PF ¶ 9b.

Plaintiff does not have to prove his innocence and the burden is on the College to show absence of consent by a preponderance of the evidence. If the College begins with the presumption that an accuser alleging non-consensual sex has been traumatized, the accused student is not presumed innocent. Given the mutual obligation to clarify intentions in the sexual misconduct policy and the fact that Smith did not express non-consent, John's conduct was not non-consensual under the pre-October 2014 policy.

Contrary to Defendant's assertion that there is no evidence that Williams failed to follow its procedures as it reasonably would expect John to understand them, there is sufficient evidence in the record to convince a rational jury otherwise. The College's sexual misconduct policy calls for a "prompt, fair, and impartial investigation and resolution" of sexual misconduct complaints. Plaintiff alleges that the College did not adhere to this policy by treating John in a disparate manner compared to Smith; by failing to follow its timeline; and by other grossly unfair treatment. Despite what Defendant argues, there is evidence of bias and disparate treatment. Unfairness and bias on the part of Bolton in relation to earlier proceedings together with coordinated efforts with Bossong and then from Bossong to Sandstrom infected Williams' treatment of John. Such evidence does support a breach of contract claim in the ultimate proceeding at which John was expelled. As there is sufficient evidence to convince a jury that Williams was unfair to John, this Court should grant summary judgment on the claim that Williams breached the implied covenant of good faith and fair dealing.

II. JOHN DOE IS ENTITLED TO PROCEED TO TRIAL ON HIS MASSACHUSETTS EQUAL RIGHTS ACT (M.G.L. C. 93 §102) CLAIM (COUNT IV).

Massachusetts Equal Rights Act prohibits discrimination based on sex. There is sufficient evidence in the record to convince a jury that Williams discriminated against John as a male as discussed above. Therefore, this Court should deny Defendant's motion for summary judgment on this count.

III. JOHN DOE IS ENTITLED TO PROCEED TO TRIAL ON HIS NEGLIGENCE CLAIM (COUNT V).

Defendant argues that Plaintiff's negligence claim fails "because the College does not owe him any duty other than those arising from the parties' contractual relationship" by citing *Boston Coll.*, *supra,* at 94. There, the court found no independent duty of care in the context of the College's voluntary assumption of a duty to conduct sexual misconduct disciplinary processes with due care based on acceptance of federal funds. *Id*. Defendant further argues that Plaintiff's claim for negligent training and supervision also fails because an employer is liable for failure to exercise reasonable care in retaining and supervising an employee only when the employer knows or **should know** of problems with the employee that indicate her unfitness for her position and the employer fails to take action, thereby exposing third parties to an unreasonable risk of physical harm.

While the torts of negligent hiring, retention, and supervision ordinarily relate to situations where employees are brought into contact with members of the public in the course of an employer's business, the existence of a private contractual relationship between the parties, however, does not necessarily mean that the plaintiff is no longer a member of the "public" for the purposes of a negligent retention or supervision claim. *Brandeis*, *supra*, at *43 citing *Vicarelli v. Business Int'l, Inc.*, 973 F. Supp. 241, 246 (D. Mass. 1997) (quoting *Foster v. The Loft, Inc. et al.*, 26 Mass. App. Ct. at 290, 526 N.E.2d 1309) and *Copithorne v. Framingham Union Hosp.*, 401 Mass. 860, 520 N.E.2d 139 (1988). In *Brandeis*, Judge Saylor rejected the argument that plaintiffs have no cause of action in tort because the relationship between a student and a university is essentially contractual in nature and ruled that plaintiff was entitled to pursue a claim of negligent retention and supervision of employees. *Brandeis Univ.*, *supra*, at *42-43, 46. John's status as a student does not necessarily preclude his negligence claim which is in addition to and independent of Williams' breaches of contractual obligations.

Negligence claims in this context are in concert with the duty of care that runs throughout Massachusetts law: "[A]s a general principle of tort law, every actor has a duty to exercise reasonable care to avoid physical harm to others," provided that the risk of harm is foreseeable. *Jupin v. Kask*, 849 N.E.2d 829, 835 (Mass. 2006) (citations and internal quotation marks omitted). In addition, "[a] duty

finds its source in existing social values and customs" and "thus imposition of a duty generally responds to changed social conditions." *Id.* (citations and internal quotation marks omitted). These bedrock principles come together here. How can one seriously argue that the College did not have a common-law duty of care in its conduct of a rape trial that posed the risk that John could erroneously be branded a sexual predator for life?

The standard of care for a negligence claim is how a person of reasonable prudence would act in similar circumstances. *E.g., Commonwealth v. Angelo Todesca Corp.*, 842 N.E.2d 930, 939 (Mass. 2006). *See also* Restatement (Second) of Torts § 298 cmt. b (1965). "[T]he amount of care that the prudent person would exercise varies with the circumstances, the care increasing with the likelihood and severity of the harm threatened." *Angelo Todesca Corp., supra,* at 939 (quoting *Goldstein v. Gontarz*, 309 N.E.2d 196, 201 (Mass. 1974)). *See also* Restatement, *supra,* §§ 283, 298. This duty of care applies to corporations and other entities and to their employees and agents as well. *E.g., Mullins v. Pine Manor College*, 449 N.E.2d at 341-42 (employee of charitable institution can be liable for negligence); *Morrison v. Lennett*, 616 N.E.2d 92, 95-96 (Mass. 1993) (same); *Scott v. Mage, LLC*, 2014 WL 1118013, at *15-16 (Mass. Super. Ct. 2014) (employees owed duty of care).

When the defendant is a corporation, courts determine the scope of a particular standard of care by reference to (1) the entity's own internal procedures or standards (sometimes called "company work rules"); (2) the custom and practice of the field or industry; (3) relevant statutes, regulations, standards, and codes; and (4) case law. *See Bourassa v. County of Hampden*, 2006 WL 1699728, at *3 n.6 (Mass. App. Ct. 2006); *Resendes v. Boston Edison Co.*, 648 N.E.2d 757, 766 (Mass. App. Ct. 1995) and cases cited therein; Restatement, *supra,* §§ 285, 295A (1965).

An employee's violation of the defendant entity's own internal procedures, standards, or rules "is evidence of the employee's negligence, for which the employer [and the employee] may be held liable." *Angelo Todesca Corp., supra,* at 940. *See also Lev v. Beverly Enters.-Mass., Inc.*, 929 N.E.2d 303, 313 (Mass. 2010) (same); *Resendes*, *supra,* at 767 (affirming judge's instruction that jury could consider

violations of defendant-company's internal standards as evidence of negligence). The standard of care applicable to the College includes: Williams' own policies and procedures; Title IX, its regulations, and the significant guidance documents and other policies promulgated by OCR; and relevant case law including a common law duty of basic fairness.

Defendant argues that because John has not suffered physical injury or property damage, his claim is barred by the economic loss doctrine. The economic loss doctrine generally provides that purely economic losses are unrecoverable in tort and strict liability actions in the absence of personal injury or property damage. *Johansen et al. v. Liberty Mutual Group et al.,* Case 1:15-cv-12920-ADB, Doc. 123. (D. Mass. 2016). *See also Patriarca v. Ctr. for Living & Working, Inc.*, No. 99689B, 1999 WL 791888, at *5, n.6 (Mass. Super. 1999) citing *FMR Corp. v. Boston Edison Co.*, 415 Mass. 393, 613 N.E. 2d 902, 903 (1993). Plaintiff seeks more than just economic damages. He seeks equitable relief in the form of an injunction and declaratory judgment so that Williams reverses its errors and he receives the degree he is owed. He also seeks statutory damages, attorneys' fees and costs, and other court ordered relief.

Massachusetts courts have upheld tort claims to recover economic losses from negligent breach of contractual duties; and although the duty arises out of the contract and is measured by its terms, negligence in the manner of performing that duty as distinguished from mere failure to perform it, causing damage, is a tort. *Johansen, supra*, citing *Abrams v. Factory Mutual Liability Ins. Co*., 298 Mass. 141, 144 (1937). Williams staff were unfit and negligently supervised in the context of John's sexual misconduct discipline. As early as 2013, Defendant became aware or should have become aware of problems with Bolton that indicated her unfitness and failed to act. When Bolton left Williams in June 2016, Sandstrom took her position as Dean of the College in the middle of this case. She was not supervised, but was instead guided by subordinate Bossong, as the Dean's supervisor, the College President, "does not follow the cases as they develop." PF ¶ 96. (Dkt. 124-62 at 15:6-7.)

Bossong's conflict of interest in being Smith's partial support/advisor should have precluded her from providing Sandstrom guidance on this case. The conflict should also have precluded her from

training the Panelists and from consulting with one who had only been at the College for a couple months when she first served on the Panel. When Camacho looked for the policy that was in effect during September 2014, College Counsel provided her the patently untrue statement that the College did not have a sexual misconduct policy at the time in question. College President Adam Falk was outgoing during most of this case and left at the end of 2017 before the appeal. The President supervises the Dean of the College who reports directly to him or her. (Dkt. 124-62 at 33:19-21.) Sandstrom never had any written communications about this case with President Falk or the interim College President who presided during the time of the appeal. No documentary evidence shows interim College President was ever apprised of the case by the Dean's Office which had run amok.

The outside investigator, Allyson Kurker, was inadequately supervised and was led by Defendant to produce a biased report. The documentary evidence shows that Kurker, upon direction by Williams, interviewed an excessive number of Smith's witnesses, one in particular (Elanie Wilson) in direct contrast to John's (Charles Chirinos). Evidence shows that Kurker included but then withheld the policy titled, "Potentially Coercive Relationships Between Students and Faculty or Staff" and failed to investigate John's claim of Smith's retaliation. Kurker also removed the footnote evidencing she actually did have the pre-October 2014 sexual misconduct policy during August 2016 discussions with Camacho about policies. Williams, including College Counsel, had notice of the error from John's September 24, 2016 Response that the September 2014 policy was not in the September 13, 2016 report before it was finalized October 11, 2016. Williams did not take any steps to correct the error. Plaintiff provides sufficient evidence in the record to convince a rational jury that the omission was a deliberate and successful attempt to influence the Panel.

In addition to inadequate training and supervision at the higher levels of the organization, the Panelists were inadequately trained and supervised. The Panel allowed Sandstrom to change its findings relative to her rewriting of its findings letter and her removal of Smith's false honor code reporting. The Panel also allowed Sandstrom to direct itself away from a finding that Smith retaliated

by filing her Title IX counter-complaint. The Panel was inculcated to pay attention only to the one key incorrectly described definition of consent and to believe that it required active agreement. PFs ¶¶ 118-122. The Panel continued to use this incorrect understanding even after it was informed that it had applied the wrong policy. PFs ¶¶ 274-276, 284-303. This inadequate training and supervision led to erroneous findings at the primary adjudication stage and on appeal and caused damage to John.

Under Massachusetts law, *Doe v. Emerson Coll.*, No. 14-cv-14752-FDS, 2015 WL 9455576, at *6 (D. Mass. 2015), a plaintiff must prove that (1) he or she is owed a legal duty by the defendant; (2) there was a breach of that duty; (3) actual damage or injury occurred; and (4) there is causation between the breach and the damage. *Id.* (citing *Jorgensen v. Massachusetts Port Auth.*, 905 F.2d 515, 522 [1st Cir. 1990]). Williams owed John the duty of care to follows its own policies and procedures including care in the manner of carrying out its sexual misconduct discipline of John. Williams did not follow its own policies and procedures relative to the status of Smith as a college employee. Williams committed other gross breaches resultant of inadequate training and supervision as listed above. Severe harm to John occurred, including - but not limited to - erroneous findings and his expulsion. The damages were direct consequences of Williams failure to exercise due care. As Williams was negligent in the manner of performing its contractual duties in addition to its failure to perform them, this Court should deny Defendant's motion for summary judgment on this count.

IV. JOHN DOE IS ENTITLED TO MAINTAIN HIS CLAIM FOR INJUNCTIVE RELIEF AND DECLARATORY JUDGMENT (COUNT X) AND CONCLUSION.

As set forth above, Plaintiff has presented sufficient evidence in the record that Williams violated a number of John's legal rights. Plaintiff requires Defendant to take all actions requested in his claim for injunctive relief and declaratory judgment or else Williams will continue to cause John damages. As such, this Court should grant partial summary judgment to Plaintiff and order Williams to vacate its sanction of expulsion and to give John his degree as well as declare Williams' policies, procedures, and actions to be in violation of good faith and fair dealing, fundamental fairness, and Title IX.

Date: October 28, 2018

JOHN DOE, PLAINTIFF

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CERTIFICATE OF SERVICE

This document was served electronically upon all counsel of record by filing through the ECF system on October 28, 2018.

_/s/ Stacey Elin Rossi_______
STACEY ELIN ROSSI