UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITIES
(MEMORANDUM INCORPORATED)

Pursuant to L.R. 7.1(b)(3), Plaintiff John Doe[1] ("Plaintiff") hereby respectfully requests leave to file supplemental authorities in support of its Opposition to Defendant's Motion for Summary Judgment (Dkt. 125) and in support of its Motion for Partial Summary Judgment. (Dkt. 122).

Local Rule 7.1(b)(3) gives the court general authority to consider additional filings, such as the filing of a supplemental memorandum. "[S]upplemental filings should direct the Court's attention to legal authority or evidence that was not available to the filing party at the time that that party filed the original brief to which the subsequent supplemental filing pertains." *Girard v. Aztec RV Resort, Inc*., No. 10-62298-CIV, 2011 WL 4345443, at *2 (S.D. Fla. Sept. 16, 2011). Beyond that, supplemental filings should do nothing more. *Id*. In particular, they should not make legal arguments. *Girard*, 2011 WL 4345443, at *2-3; *Pellegrino*, 2008 WL 4753726, at *2 n. 2. See also *Atkins v. Capri Training Center, Inc.*, No. 2:13-cv-06820, 2014 WL 4930906, *10 (D.N.J. Oct. 1, 2014) ("Generally, if pertinent and significant authorities come to a party's attention after the party's brief has been filed, the party may advise the court of the relevant authority through a Notice of

[1] Plaintiff refers to himself as "John Doe" throughout the pleadings.

Supplemental Authority; however, a Notice of Supplemental Authority should not advance new arguments that were absent from the movant's complaint."); *United Broad. Corp. v. Miami Tele-Comms., Inc.*, 140 F.R.D. 12, 13 (S.D. Fla. 1991); *US v. Khorozian*, 333 F.3d 498, 506 n.7 (3d Cir. 2003) (28G) context).

The cases attached to this Motion are appropriate for submission to this Court. This Motion directs the Court's attention to legal authority that was not available to Plaintiff at the time it filed the original brief to which the subsequent supplemental filing pertains. Specifically, summary judgment argument was heard on December 11, 2018; while one case's ruling was issued March 29, 2019 and the other case's order was issued June 14, 2019. Thus, the ruling and order could not have been known to exist at the time of summary judgment pleadings and argument. As such, they constitute new legal authority, do not advance new legal arguments, and should be allowed. *Girard*, 2011 WL 4345443, at *3.

Plaintiff states as follows relative to the two authorities:

I. On March 29, 2019, three months after the summary judgment argument, the District Court for the District of Connecticut issued a ruling in *Montague v. Yale University*, Case No. 3:16-CV-00885(AVC) (copy attached as Exhibit A) that bears on issues currently before this Court. The ruling granted in part and denied in part Defendant's motion for summary judgment. The relevant portions of the ruling include, but are not limited to:

   A. Yale argues that courts "require only that an educational institution has 'substantially complied' with its rules and regulations" and that judicial review of its actions is limited to whether the institution acted arbitrarily, capriciously, or in bad faith. While the cases cited by Yale demonstrate that courts refrain from interfering with discipline arising out of academic related issues and decisions which involve professional judgment, they do not provide authority on cases involving discipline arising from sexual misconduct. Exhibit A at 19.

   B. When an expulsion is "not grounded in academic, but disciplinary reasons . . . the court need not confer . . . the type of deference that is appropriate within the context of an academic, rather than a contractual dispute, which falls squarely within the court's competency." *McCarty v. Yale University*, CV 166063796S, 2017 WL 4508771 at 4 (Sup. CT Aug. 29, 2017). Because Montague's expulsion was based on sexual misconduct, and not "a genuinely

academic decision," this court need not confer deference to Yale on the breach of **c**ontract claims. *Id.* at 20.

C. [Relative to a violation of preponderance of the evidence claim] Yale states that the UWC properly fulfilled its duty to look at the evidence and determine credibility…According to Yale, the UWC panel deliberated and identified specific reasons to credit Roe's version of the events over Montague's version and properly found Roe's account more credible. Montague argues in opposition that the fact-finder and the UWC II panel were biased in their collection, consideration, and reporting of the evidence.[56] Specifically, Montague argues that they failed to seek exculpatory evidence, cast Roe's inconsistencies as consistencies, placed unfair weight on a supposed inconsistency in Montague's recollections, failed to probe Roe's motive,[57] and transformed and obliterated undisputed evidence to remove facts[58] which raised questions about whether Roe consented.[59] Montague also argues that there was pressure on Yale to be tough on perpetrators of sexual misconduct and the Title IX office was trying to use his popularity as the captain of the basketball team to show that Yale was being tough on sexual misconduct. *Id.* at 40-41. [T]he court concludes that there is a genuine issue of material fact with respect to the impartiality of the hearing. *Id.* at 42.

D. Yale argues that they provided Montague with a fair, thorough, and impartial hearing, and did not act arbitrarily or capriciously in their decision to expel Montague. Montague argues in his opposition that Yale's conduct with respect to the UWC II proceedings, considered as a whole, deprived him of basic fairness. Specifically, Montague argues that "Yale promises a sexual misconduct adjudicatory process which is fair, thorough, and impartial." Montague also argues that Yale breached its duty of fairness by breaching the UWC procedures and argues that Yale failed to provide him with adequate notice of the complaint, failed to provide him with an opportunity to respond to the recommended penalty in advance, and arbitrarily and capriciously decided on an expulsion rather than a reprimand as a penalty. Montague argues that, as captain of the basketball team, "his fate was virtually guaranteed." Since the court concludes that there are genuine issues of material fact regarding the previously articulated breaches of contract claims based on the UWC procedures and Montague bases this claim and argument on those claims,65 summary judgment is not warranted with regard to count VIII [duty of fairness]. *Id.* at 48-49.

II. On June 14, 2019, six months after the summary judgment argument, the District Court for the Western District of Tennessee issued an order in *John Doe v. Rhodes College,* Case No. 2:19-cv-02336-JTF-tmp, (copy attached as Exhibit B) that bears on issues currently before this Court. The order granted in part and denied in part Plaintiff's request for a temporary restraining order against Rhodes College, a private college. The relevant portions of the order include, but are not limited to:

A. Plaintiff shows a substantial likelihood that he can meet the first element of an erroneous outcome claim regarding articulable doubt because, in the least, Defendant decided Plaintiff's fate without seeing or hearing live testimony from C.S. and did not provide Plaintiff an opportunity to cross-examine C.S., despite credibility being at stake in his

case. "The pleading burden as to the first element—articulable doubt—is 'not heavy' and can normally be met by alleging 'particular procedural flaws affecting the proof.'" *Z.J. v. Vanderbilt Univ.*, 355 F. Supp. 3d 646, 679 (M.D. Tenn. 2018) (quoting *Yusuf*, 35 F.3d at 715). When a disciplinary decision relies on any testimonial evidence in a case where credibility is in dispute and material to the outcome, due process requires an assessment of credibility through cross-examination. *See Doe v. Baum*, 903 F.3d 575, 583–84 (6th Cir. 2018); *see also Doe v. Ohio State Univ.*, 219 F. Supp. 3d 645, 659–660 (S.D Ohio 2016). In cases involving sexual misconduct, an accused student must have the right to cross-examine adverse witnesses. To adequately assess credibility, which concerns both the accused and the accuser, there must be some form of live questioning of the accuser in front of the fact-finder; written statements of the accuser will not suffice. *Baum*, 903 F.3d at 582–53; *see also Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401–04, 406 (6th Cir. 2017). Even more, the accused, specifically, has the right to confront his or her accuser through cross-examination, via an agent or otherwise. *Baum*, 903 F.3d at 583. Exhibit B at 8.

B. …the Panel resolved credibility issues without seeing or directly hearing from C.S. Moreover, with C.S. never appearing and presenting live testimony, Plaintiff was never given an opportunity to cross-examine her directly, through his agent or otherwise. *Baum*, 903 F.3d at 583; *Cincinnati*, 872 F.3d 393, 401–02, 406. Thus, Plaintiff presents facts sufficient to cast some articulable doubt on the accuracy and reliability of the disciplinary proceeding's outcome and satisfies the first consideration of an erroneous outcome claim under Title IX. *Id.* at 9.

C. …the public attention caused by the protests and social media posts of Culture of Consent apparently lodged at fraternity members (which are necessarily male) at Rhodes that play for the school's football team, may have put pressure on Defendant to confirm that it took sexual misconduct allegations seriously. *Baum*, 903 F.3d at 586. Indeed, as an institution subject to Title IX, Defendant could lose federal aid if they are found non-compliant with Title IX. *Id.* Although "all of this external pressure alone is not enough to state a claim that the university acted with bias in this particular case[], . . . it provides a backdrop that, when combined with other circumstantial evidence of bias in [Plaintiff]'s specific proceeding, gives rise to a plausible claim." *Id.*; *see also Doe v. Miami Univ.*, 882 F.3d 579, 593–94 (6th Cir. 2018). *Id.* at 9-10.

D. The record tends to show that Defendant credited exclusively female testimony from "C.S.'s witnesses" and rejected all male testimony from Plaintiff and/or his witnesses. *Baum*, 903 F.3d at 586. *Id.* at 10.

The undersigned certifies that he has conferred with Defendant's counsel in a good faith attempt to resolve the issue, but no agreement was reached.

Respectfully submitted,

Date: June 18, 2019

JOHN DOE, PLAINTIFF

By: /s/ Stacey Elin Rossi

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CERTIFICATE OF SERVICE

This document was served electronically upon all counsel of record by filing through the ECF system on June 18, 2019.

_/s/ Stacey Elin Rossi_____
STACEY ELIN ROSSI