IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN DOE,	:	
Plaintiff,	:	
v.	:	**CIVIL ACTION**
SWARTHMORE COLLEGE,	:	**NO. 14-532**
Defendant.	:	

ORDER

AND NOW, this ____ day of _____, 2014, upon consideration of Defendant Swarthmore College's Motion to Dismiss All Counts of Plaintiff's Complaint, it is hereby ORDERED that Defendant's Motion is GRANTED. All counts of Plaintiff's Complaint are DISMISSED WITH PREJUDICE.

BY THE COURT:

_____
Stewart Dalzell, U.S.D.J.

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SWARTHMORE COLLEGE,	:	**NO. 14-532**
	:	
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	:	

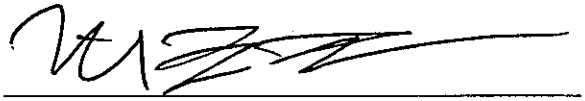
DEFENDANT SWARTHMORE COLLEGE'S
MOTION TO DISMISS ALL COUNTS OF PLAINTIFF'S COMPLAINT

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Swarthmore College ("Swarthmore") moves to dismiss the Plaintiff's Complaint with prejudice for failure to state a claim upon which relief may be granted. The reasons supporting this motion are set forth in the accompanying Memorandum of Law, which is fully incorporated herein.

WHEREFORE, Swarthmore respectfully requests that this Court dismiss all six counts in Plaintiff's Complaint with prejudice.

Date: March 21, 2014

Respectfully submitted,



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DEFENDANT SWARTHMORE COLLEGE'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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I. INTRODUCTION

On May 31, 2013, after a day-long hearing, including extensive testimony from both John Doe and Jane Doe, a Swarthmore College disciplinary panel found it more likely than not that Plaintiff sexually assaulted Jane Doe and expelled him. Unhappy with the result of the hearing, Plaintiff seeks to re-litigate the case in federal court. His Complaint offers no basis for doing so. While Plaintiff claims that Jane Doe offered "conflicting accounts" of the assault and otherwise calls into question her credibility, he does not dispute – because he cannot – that he presented all of these arguments to the disciplinary panel. The panel did not believe him.

Under Pennsylvania law, a plaintiff challenging a private college's decision to expel him must show that the college failed substantially to comply with its policies and procedures. In other words, a plaintiff must show a breach of those procedures and that the breach could have had some effect on the outcome on the disciplinary decision. Here, Plaintiff tries (but fails) to show various breaches of Swarthmore's policies by misstating those policies or omitting critical provisions. Even if he could identify actual deviations from Swarthmore's policies, he does not allege that any of them affected the outcome of the proceeding. He points to no key evidence of his innocence that was excluded, no damning irrelevant evidence that was improperly admitted, no corruption of the fair, deliberative process of the panel, nor even any new evidence that was unavailable to the panel suggesting his innocence. And, while he complains about the sanction, he was clearly informed by Swarthmore's published policies that expulsion was a potential sanction. At the end of the day, he simply thinks that the panel should have believed him and not Jane Doe. That does not establish a breach of contract.

Unable to contest the substance of the disciplinary panel's findings, Plaintiff invokes Title IX and baseless notions of conspiracy. The Title IX claim should be dismissed because he fails plausibly to allege that Swarthmore intentionally discriminated against him

because he is a man. Plaintiff pleads no facts at all showing any discrimination. Instead, Plaintiff suggests that Swarthmore "re-opened" his case in light of a public discussion about Swarthmore's sexual assault policies and Department of Education investigations so that Swarthmore could make him "the whipping boy that Swarthmore needed to demonstrate its new 'zero tolerance' standard to deal with allegations of sexual misconduct." (Compl. ¶160.) But this imagined scheme is neither plausible nor true. Under Swarthmore's published policies, the victim of sexual assault generally had the autonomy to decide whether and when he or she wished to pursue a formal disciplinary hearing against his or her alleged assailant. Plaintiff's hearing took place when it did because that was when ***Jane Doe*** first requested a disciplinary hearing. Further, the five-member panel who heard the case – composed of faculty, staff and students – is not alleged to have had any involvement with pending investigations or the College's response to these investigations. Plaintiff's suggestion that Swarthmore sought to make an example of him makes no sense as Plaintiff does not (and cannot) allege that the College ever spoke publicly about the confidential proceedings or the outcome of the hearing.

Finally, Plaintiff's promissory estoppel, equitable relief, and tort claims fail because this case is a matter of contract law, and Plaintiff has not set forth sufficient facts to allow these claims to proceed.

Notwithstanding the Complaint's hyperbole, this is a simple breach of contract case. Even accepting the well-pleaded allegations in the Complaint as true for purposes of this motion as Swarthmore must, as a matter of law the Complaint fails to state a claim. While Plaintiff continues to maintain his innocence, all of his arguments were fully and fairly considered by the panel. There is no basis for litigating these issues a second time here. The Complaint should be dismissed.

II. STANDARD OF REVIEW

On a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the Court must accept as true all well-pleaded allegations in the complaint. *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 (3d Cir. 1994). But a plaintiff must plead more than "labels and conclusions," and "a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007) (court is "not compelled to accept unsupported conclusions and unwarranted inferences, or a legal conclusion couched as a factual allegation.") Instead, the plaintiff must "set out 'sufficient factual matter' to show that the claim is facially plausible." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009) ("[A] complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts."); *see also Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level.").

"Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 550 U.S. at 563; *accord Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2007). However, where a plaintiff's factual allegations or legal conclusions are flatly contradicted by documentary evidence, the court is not required to presume them as true or even accord them any favorable inference. *Muti v. Schmidt*, No. 03-1206, 2004 U.S. App. LEXIS 7933, at *11 n.2 (3d Cir. Mar. 25, 2004); *Byers v. Intiut, Inc.*, No. 07-4753, 2009 U.S. Dist. LEXIS 33363, at *7 (E.D. Pa. Mar. 18, 2009); *U.S. Claims, Inc. v. Flomenhaft & Cannata, LLC*, 519 F. Supp. 2d 515, 520 (E.D. Pa. 2006).

In this regard, in considering a motion to dismiss, a district court reviews the facts stated in the complaint or incorporated in the complaint by reference, the attached exhibits, and matters of public record. *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir. 1994). A court

also is permitted to consider any document, even if not attached or incorporated by reference, where the complaint "relies heavily upon its terms and effect," thus rendering the document "integral" to the complaint. *U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 388 (3d Cir. 2002) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997)).

Accordingly, this Court may consider the policies and procedures in the Student Handbook attached to the Complaint as Exhibit A, as well as the documents Defendant has attached that Plaintiff relies upon in his Complaint. If this documentary evidence contradicts Plaintiff's factual allegations or legal conclusions, this Court is not required to give Plaintiff's allegations any favorable inference. *See, e.g., Muti*, 2004 U.S. App. LEXIS 7933 at *11 n.2.

III. THE ALLEGATIONS IN THE COMPLAINT

A. Jane Doe Alleges that John Doe Sexually Assaulted Her in Spring of 2011

Plaintiff John Doe and the woman who ultimately charged him with sexual assault, Jane Doe, enrolled as freshmen at Swarthmore College in the fall of 2010. In the spring of 2011, they engaged in a series of physical encounters that led to the disciplinary proceeding at issue in this lawsuit. (Compl. ¶¶61, 62.)

Both students agreed that their physical relationship was comprised of three events – "one kiss, one sexual interaction without intercourse, and one act of intercourse." (Compl. ¶62.) They also agree that after the second physical encounter, they discussed an email sent to Plaintiff from Jane Doe's long-distance boyfriend in which he accused Plaintiff of having "taken advantage of [Jane Doe]" while she was intoxicated and engaging in conduct "tantamount to rape." (Compl. ¶72.) John Doe's entire response was: "I read your message, and I agree with

it. I also called [my girlfriend] last night (around 2:00 AM, my time) letting her know what happened."[1]

According to Plaintiff's Complaint, Jane Doe was a willing participant in the first two encounters, and indeed, initiated sexual intercourse during the third encounter. (Compl. ¶¶63, 67, 73.) But according to Jane Doe's May 14, 2013 statement she prepared as part of her complaint to the College Judiciary Committee (referenced in the Compl. ¶¶114, 116-117), she said "'Stop' loudly, clearly, and multiple times" during their first encounter and was forced to engage in oral sex and digital penetration that caused her to bleed during the second encounter.[2]

B. Jane Doe Reports John Doe's Sexual Misconduct and the Title IX Coordinator Investigates Consistent with Swarthmore's Student Handbook

On November 24, 2012, while studying abroad, Jane Doe emailed Swarthmore Title IX coordinator Sharmaine LaMar and reported Plaintiff's sexual misconduct for the first time. (Compl. ¶79.) Under Swarthmore's policies in effect at the time, "[o]nce a report of sexual misconduct is made to the Title IX Coordinator, she will then oversee an investigation of the complaint . . . ." *See* Compl. Ex. A (Student Handbook) at 21-22. The Handbook also mandates that investigations will not "last longer than 60 days," and will culminate in the issuance of "a report setting forth the factual findings of the investigation." (*Id.* at 22.) The investigation report is to "be factual in nature and will not make a finding as to the student's guilt

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[1] This May 1, 2011 email exchange between Plaintiff John Doe and Jane Doe's boyfriend is discussed at ¶¶69-72 of Plaintiff's Complaint and thus may be considered on this motion. *See Higgins*, 281 F.3d at 388. A redacted version of the email is attached here as Exhibit A.

[2] Jane Doe also described a fourth encounter in which she came back to her dorm room to find Plaintiff sleeping in her bed, "roused him angrily" and told him to leave, but he then entered her room again, leaving only after she yelled and stamped "to attract attention." This formed the basis of the "illegal entry" charge against Plaintiff at his disciplinary hearing. To protect Jane Doe's identity and privacy, which she has not put at issue in this lawsuit, Swarthmore does not wish to put this May 14, 2013 document, referenced in ¶114-117 of Plaintiff's Complaint – or her November 24, 2012 email, discussed below and referenced in ¶79 of the Complaint – on the public record. If the Court wishes, Swarthmore suggests that it provide them for *in camera* review or that they be filed under seal.

or innocence, which is reserved exclusively for a Dean's Adjudication or the College Judiciary Committee Panel hearing the case." (*Id.*)

Swarthmore followed its policies and conducted an investigation. The investigation was opened on November 28, 2012. (Compl. ¶83.) The investigators asked for additional information and a statement from Jane Doe; they also contacted Plaintiff and informed him of the allegations. (Compl. ¶85.) They interviewed Plaintiff via Skype, as Plaintiff was studying abroad that semester, and asked him to provide a written statement detailing his encounters with Jane Doe. (Compl. ¶¶88, 90.) They later reached out for a second and third interview with him. Plaintiff was informed after the investigation was concluded within 60 days on January 25, 2013. *See* Compl. ¶95. Under the published procedures in the Student Handbook, Plaintiff had a right to review and respond to the report if he desired. (Compl. Ex. A (Student Handbook) at 22.)

C. Jane Doe Requests a Formal Hearing in May 2013 and the College Provides One in Accordance with its Student Handbook

While Plaintiff's Complaint attempts to merge the Title IX investigation process and the student judicial process, they were in fact distinct and separate aspects of Swarthmore's policies and procedures. The Student Handbook stated that the Title IX coordinator would generally investigate ***any*** report of sexual misconduct. But reporting to the Title IX Coordinator did "not obligate a person to file a formal complaint initiating judicial procedures." (Compl. Ex. A (Student Handbook) at 14.) Thus, after the Title IX investigation was completed, the accusing student had the option, but not the obligation, to proceed with a formal disciplinary complaint at any time thereafter. *Id.*[3] "When a formal complaint is filed against a student of the College, the

[3] Consistent with Department of Education guidance, absent a risk to the campus community, Swarthmore generally allowed victims of sexual misconduct discretion as to whether they wished to bring a disciplinary proceeding or not. *See* United States Department of Education Office of Civil Rights, Dear

complaint should be filed in accordance with the Judicial Procedures outlined in another section of the Student Handbook." (*Id.* at 23.)

The Judicial Procedures were initiated when the student brought a formal complaint. (*Id.* at 36) ("To initiate the judicial process, a written complaint must be completed by the complaining individual(s) . . . .") When a student came forward with charges, the College was required to provide a hearing on those charges as soon as possible:

> The hearing shall be held as expeditiously as possible, while providing sufficient time for both sides to prepare for the hearing. An effort is made to schedule the hearing when the accused and complainant can reasonably attend. . . Hearings are scheduled when classes are in session and not during college breaks. In the event that a complaint is filed during a break period or within the final week prior to a break, the Associate Dean in consultation with the Dean, will determine whether the hearing will be scheduled when classes resume or if the complaint should be referred to a dean or other appropriate office for more immediate adjudication.

(Compl. Ex. A (Student Handbook) at 37.)

Pursuant to Swarthmore's policies, the College Judiciary Committee became involved only when ***Jane Doe*** initiated proceedings by requesting a disciplinary hearing – the College did not determine the timing of this decision. As the Complaint notes, Ms. Gallagher contacted Plaintiff on May 9, 2013, and on May 14, 2013, the Associate Dean for Student Life, Myrt Westphal, emailed Plaintiff, informing him formal charges had been made. (Compl. ¶¶100, 102-03.) Pursuant the published Student Handbook, the potential sanctions included, among other things, "probation, suspension, and immediate and permanent expulsion from the College." (Compl. Ex. A (Student Handbook) at 40.)

Colleague Letter, April 4, 2011, attached to this Motion as Exhibit B ("If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation.").

Initial plans called for Jane Doe to appear via Skype at the hearing. (Compl. ¶105.) To ensure that the both parties had adequate time to prepare and to avoid the burdens associated with holding the hearing by Skype, however, the school postponed the hearing until May 30, 2013, when both parties could appear in person before the disciplinary panel. (Compl. ¶106.)

In an email to Plaintiff on May 22, 2013, eight days before the hearing, Associate Dean Westphal explained the procedures associated with the hearing. (May 22, 2013 Email from Associate Dean Westphal to Plaintiff, referenced at Compl. ¶109, and attached in redacted form to this Motion as Exhibit C.) Among other things, she offered to meet with Plaintiff to answer any questions he had about the process. She also explained the process. She asked him to confirm whether he wished to call any witnesses, and asked for "the name of your support person," offering transportation, room and board to Plaintiff as well as any support person he might choose. (*Id.*) She explained that the charges had not been changed, but that Plaintiff should expect to "receive a new charge letter once the panel and place are established." (*Id.*) In other correspondence Associate Dean Westphal had with Plaintiff, she urged him to review the Student Handbook policies regarding sexual misconduct and College Judiciary Committee hearings. (May 24, 2013 Charge Letter, referenced at Compl. ¶129, and attached to this Motion as Exhibit D ("I urge you to read [the Student Handbook] carefully and to consult with me if you have any questions about them.")). Although the May 22, 2013 email and others showed that Associate Dean Westphal – who usually serves as the Observer to the proceedings – provided Plaintiff with an explanation of the process and procedures ahead of the hearing and was available to answer any questions (*see* Compl. Ex. A (Student Handbook) at 38), she noted that she would not attend the hearing, and that the Observer at the hearing would be Swarthmore's

Vice President for Facilities and Services. *See* Associate Dean Westphal Email at Ex. C. Plaintiff is not alleged to have raised any issues with respect to any of these matters prior to the finding of the disciplinary panel.

Swarthmore's Student Handbook states that "[t]he formal charge letter shall be presented in writing including the names of the appointed panel, the time, date, and location of the hearing typically 24 hours in advance of the hearing." (Compl. Ex. A (Student Handbook) at 37-38.) On May 24, 2013, well before the 24-hour notice required in the Student Handbook, Plaintiff was sent a formal charge letter listing the charges of sexual assault, harassment through communication, and illegal entry, as well as the time and location of the hearing. (Ex. D, Charge Letter.) It emphasized, yet again, Plaintiff's opportunity to bring witnesses, a supporter, and to review materials on May 28, 2013. The letter also identified the names of the members of the College Judiciary Committee panel, which included a Convener, an Observer, two faculty members, a staff member, a student, and an assistant dean. Plaintiff is not alleged to have raised any concerns in response to this letter, nor to have responded by objecting to the participation of any of the identified panel members as he was entitled to do. *See* Compl. Ex. A (Student Handbook) at 38-39.

On May 28, 2013, as the Complaint alleges, more than 24 hours before the hearing, the formal charge letter was corrected to conform the charges to the actual evidence at issue in the case, restating the "harassment through communication" charge to "sexual harassment." (Amended Charge Letter, referenced in Compl. ¶108, and attached in redacted form to this Motion as Exhibit E.) The lead charge of "sexual assault" remained and was not changed. Plaintiff is not alleged to have raised any issue with this change prior to the hearing. In accordance with the Student Handbook, Plaintiff arrived 48 hours before the hearing to review

a copy of the hearing materials, but apparently chose not to provide a written response to the report as the Student Handbook said he was entitled to do. (Compl. ¶121.)

The hearing was held on May 30, 2013. Pursuant to the Student Handbook, "[t]he judicial procedures of Swarthmore College are administrative ones, and neither the College Judiciary Committee, the President, nor the Dean is bound to observe procedural or evidential rules required in a formal court of law." (Compl. Ex. A (Student Handbook) at 36.) The Convener of the hearing is given discretion as to what evidence will be allowed at the hearing. (*Id.* at 38-39.) The Student Handbook provides that each party should provide "a list of witnesses they plan to call at the hearing" prior to the hearing, but there is nothing in the Student Handbook that prohibits the disciplinary panel from calling witnesses at the hearing. (*Id.*)

During the day-long hearing, Plaintiff presented an approximately 90-minute opening statement for the assembled panel, and the Complaint does not allege that Plaintiff was prevented from providing any evidence he wanted at the hearing.

Plaintiff alleges that the Title IX Coordinator provided testimony at the hearing regarding an email between her and Jane Doe, (Compl. ¶¶134-135), but he does not allege how her testimony affected the hearing in any way, nor does he allege that she was called by Jane Doe (rather than the panel). Plaintiff also complains that Jane Doe left the room for a period of time while John Doe was testifying, although he does not explain how he was harmed by Jane Doe's decision to give up her right to be present during John Doe's testimony. (Compl. Ex. A (Student Handbook) at 39) ("***Normally***, all evidence presented at a hearing by either party shall be introduced in the presence of the other party."). The Convener, who the Student Handbook charges with "the discretion to exclude any questions, evidence, or witness, or any other material that is irrelevant, highly prejudicial, cumulative, privileged, or confidential," (*Id.*), allowed Jane

Doe to testify about certain comments Plaintiff made about his sexual experiences during one of his physical encounters with Jane Doe, as these comments were part of the sexual harassment charges. (Compl. ¶138; *see also* Ex. E.)

The panel reconvened on Friday, May 31, 2013 for its deliberations. At the conclusion of the hearing, the panel determined that it was "more likely than not" that Plaintiff was guilty of sexual assault, sexual harassment, and illegal entry. (Compl. ¶145.) In a telephone call that day and a follow-up letter dated June 3, 2013, the College Judiciary Committee panel Convener notified Plaintiff that the sanction the panel had decided on was expulsion from Swarthmore, a sanction specifically contemplated in the Student Handbook. (June 3, 2013 Findings Letter, referenced at Compl. ¶146, and attached to this Motion as Exhibit F.).

D. Swarthmore Considers and Denies John Doe's Appeal Pursuant to its Policies

The Student Handbook states that "[e]ither party may request an appeal in writing, addressed to the President, within ten days following the written decision by the College Judiciary Committee." (Compl. Ex. A (Student Handbook) at 40.) On June 7, 2013, Plaintiff appealed, identifying six "procedural irregularities" that he argued required review of the panel's decision. (Compl. ¶147.) Although new evidence is a ground for appeal, Plaintiff does not allege that he offered any new evidence of his innocence that was not considered by the disciplinary panel. Jane Doe was given an opportunity to respond to Plaintiff's appeal, and did so by letter dated June 15, 2013; Plaintiff submitted a reply to Jane Doe's response on June 23, 2013. (Compl. ¶¶149, 150.)

By letter dated July 16, 2013, President Rebecca Chopp denied Plaintiff's appeal. (July 16, 2013 response to Plaintiff's appeal from President Chopp, referenced at Compl. ¶153, and attached to this Motion as Exhibit G.) President Chopp addressed the six procedural

deficiencies raised by Plaintiff in his appeal, as well as two other issues he discussed in his reply, and determined that they did not "constitute violations of the Student Handbook." *See* Ex. G; *see also* Compl. Ex. A (Student Handbook) at 40 ("The appeal shall be limited to considering new evidence or procedural error by the Hearing Panel."). She also stated that Plaintiff had failed to "articulate how any of the identified actions could have materially affected the outcome of the proceeding or somehow deprived you of fundamental fairness." (*Id.*)

* * *

The proceedings before the disciplinary board are confidential. (Compl. Ex. A (Student Handbook) at 40-41.) Plaintiff does not allege (nor could he) that the College publicly discussed any aspect of the hearing or that it promoted the panel's findings to the press or anyone else. Plaintiff enrolled at another university to complete his undergraduate education. (Compl. ¶167.) This lawsuit followed.

IV. ARGUMENT

The Supreme Court of the United States has emphasized that "courts should refrain from second guessing the disciplinary decisions made by school administrators." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999). Pennsylvania law also discourages such suits, deferring to colleges to manage their own affairs and disciplinary processes. *See, e.g., Schulman v. Franklin and Marshall Coll.*, 538 A.2d 49, 52 (Pa. Super. Ct. 1988) ("The courts have been very reluctant to interfere with college proceedings concerning internal discipline. . . In this case, particularly with the necessary concern on college campuses as to student activities in the sexual area . . . the need of the college to protect its students is manifested by actions taken here."). Plaintiff's Complaint pleads no basis for deviating from this rule.

A. Pennsylvania Law Requires a Plaintiff to Show a Substantial Deviation from Its Policies to Challenge a Disciplinary Decision

The Pennsylvania Supreme Court has said that courts are not to review disciplinary or other internal decisions made by a private college except in limited circumstances. *See Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 422, 434 (Pa. 2001) ("[Q]uestions as to whether [plaintiff] engaged in serious misconduct . . . have been conclusively and finally decided."); *accord Boehm v. Univ. of Pa.*, 573 A.2d 575, 579 (Pa. Super. Ct. 1990) ("Generally, it has been said that courts are more reluctant to interfere in the disciplinary proceedings of a private college than those of a public college."). A court will not overturn a college's disciplinary decision where the school substantially complied with its own policies and thus did not breach the agreement between the parties. *Boehm*, 573 A.3d at 579; *Reardon v. Allegheny Coll.*, 926 A.2d 477, 481 n.2 (Pa. Super. Ct. 2007); *Swartley v. Hoffner*, 734 A.2d 915, 919 (Pa. Super. Ct. 1999).

To show a breach, a plaintiff must plead and prove a substantial deviation from the schools policies and procedures. According to the Superior Court in *Boehm v. University of Pennsylvania*, 573 A.3d at 579, "[t]he general rule . . . has been that where a private university or college establishes procedures for the suspension or expulsion of its students, ***substantial compliance*** with those established procedures must be had before a student can be suspended or expelled." (emphasis added). In *Boehm*, veterinary students challenged the university's compliance with its policies after a disciplinary panel found them guilty of conduct compatible with cheating during an exam, particularly where (1) the conduct they engaged in was not prohibited by the school's Honor Code; (2) the students received a copy of the panel's findings of fact, but not its recommended penalty; (3) the dean imposed a more severe punishment than the disciplinary panel recommended because he believed the students had in fact cheated; and (4)

he consulted with colleagues in deciding upon a punishment. *Id.* at 583-85. The Superior Court overturned the trial court's decision enjoining the university from enforcing its disciplinary sanctions, and held that "[t]here was in the disciplinary proceedings ***no substantial departure*** from the procedure established by the school." *Id.* at 585 (emphasis added); *see also id.* at 586 (explaining the trial court should not have interfered "with the legitimate authority of the school to sanction students who, after compliance with established procedure, had been found guilty of violating the school's Honor Code by engaging in conduct incompatible with academic integrity").

Decisions of this Court have followed *Boehm*. *See Johnson v. Temple Univ.*, No. 12-515, 2013 U.S. Dist. LEXIS 134640, at *38 (E.D. Pa. Sept. 19, 2013) ("Plaintiff cannot plausibly maintain that any of [the contract's] ***essential terms*** were breached by Temple, under the circumstances presented here.") (emphasis added); *Blum v. Univ. of Pa.*, No. 12-313, 2013 U.S. Dist. LEXIS 85685, at *18 (E.D. Pa. June 18, 2013) (finding an administrator's "adversarial" comments in an ongoing college disciplinary dispute did "not amount to a material breach" of a settlement agreement between the parties, noting "these comments were not long, and together likely constituted at most a minute or two of a six-and-a-half-hour proceeding."); *Linson v. Trs. of Univ. of Penn.*, No. 95-3681, 1996 U.S. Dist. LEXIS 12243, at * (E.D. Pa. Aug. 21, 1996) (finding that an administrator did not breach a section of the student handbook requiring confidentiality because other sections of the university's policy allowed him to inform faculty of a student's sexual harassment allegation against a fellow professor).[4]

[4] Cases from outside Pennsylvania likewise focus on whether a university substantially complied with its disciplinary hearing policies. *See Fraad-Wolff v. Vassar Coll.*, 932 F. Supp. 88, 91 (S.D.N.Y. 1996); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 243 (D. Vt. 1994); *see also Cloud v. Tr. of Boston Univ.*, 720 F.2d 721, 726 (1st Cir. Mass. 1983) ("Since we find [plaintiff's]challenges to his disciplinary hearing insubstantial, we uphold the grant of summary judgment on his breach of contract claim."); *Jones v. Tr. of Union Coll.*, 937 N.Y.S.2d 475, 477 (3d Dept. 2012) ("[W]hen a disciplinary

These cases are in accord with Pennsylvania's contract law doctrine of "substantial compliance" – if a party has "substantially performed its obligations under the contract, then the nonperformance is not considered to be material." *Sabatini v. Its Amore Corp.*, 455 Fed. Appx. 251, 256 (3d Cir. 2011); *see also First Mortg. Co. of Pa. v. Carter*, 452 A.2d 835, 837 (Pa. Super. Ct. 1982) ("The equitable doctrine of substantial performance is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contracts in all material and substantial particulars."); *Fort Washington Res., Inc. v. Tannen*, 901 F. Supp. 932, 940 (E.D. Pa. 1995) (explaining "mere technical, inadvertent, or unimportant omissions or defects" are insufficient to show material breach"). For a breach to be material, "it must go to the essence of the contract." *Norfolk S. Ry. Co. v. Basell USA Inc.*, 512 F.3d 86, 92 (3d Cir. 2008); *see also Int'l Diamond Imp., Ltd. v. Singularity Clark, LP*, 40 A.3d 1261, 1271 (Pa. Super. Ct. 2012) (citing the Restatement (Second) of Contracts § 241 (1981) and explaining

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dispute arises between the student and the institution, judicial review of the institution's actions is limited to whether the institution acted arbitrarily or whether it substantially complied with its own rules and regulations."). In weighing the significance of an alleged departure from procedure, some courts look to the degree of prejudice alleged by the plaintiff. *See, e.g., Bleiler v. Coll. of the Holy Cross*, No. 11-11541, 2013 U.S. Dist. LEXIS 127775, at *32 (D. Mass. Aug. 28, 2013) (noting plaintiff "cites no significant prejudice as to the testimony about virginity, intoxication, or Bleiler's right to remain silent, and the evidence in the record regarding these matters suggests otherwise").

In a similar case, *Routh v. Univ. of Rochester*, the Western District of New York granted a motion to dismiss where a male student who engaged in bondage-style sexual activities with a female student (which he alleged were consensual) was found guilty of rape and strangulation, and ultimately expelled. He alleged the disciplinary hearing panel impermissibly deviated from university procedures and was therefore liable for breach of contract. *See Routh*, No. 11-cv-6606, 2013 U.S. Dist. LEXIS 158433 (W.D.N.Y. Nov. 5, 2013). The court explained that "the issue as to this cause of action is whether Routh has plausibly pleaded that, with regard to the notice that the University gave him regarding his disciplinary charges, the University acted arbitrarily or failed to ***substantially comply*** with its own rules and regulations." *Id.* at *52-53 (emphasis added). Like John Doe, Routh sought to argue that outside influence – in Routh's case, a comment from an administrator "that the university could definitely improve how it wrote its disciplinary charges" in general – affected the disciplinary panel's decision. The court rejected this argument, and focused on Routh's hearing alone, holding that "the pleading and other documents which the Court is considering on this motion clearly indicate that Routh was given reasonably specific notice of the charges against him." *Id.* at *56-57.

that "if the breach is an immaterial failure of performance, and the contract was substantially performed, the contract remains effective") (internal citations omitted).

Thus, a substantial or material violation of the Student Handbook is one that might have affected the outcome of the disciplinary hearing and thus deprived him of the benefit of his bargain. Restatement (Second) of Contracts § 241 cmt. b ("[A]n important circumstance in determining whether a failure is material is the extent to which the injured party will be deprived of the benefit which he reasonably expected from the exchange.").

B. Plaintiff's Complaint Fails to State a Claim for Breach of Contract

Plaintiff asserts that there were ten impermissible variations from Swarthmore's Student Handbook during his disciplinary hearing. (Compl. ¶13a-j.)[5] Even accepting all of the allegations in the Complaint as true, none of them constitutes a substantial deviation from Swarthmore's Student Handbook.

1. Swarthmore Completed Its Title IX Investigation Within 60 Days As Provided in the Student Handbook

Plaintiff alleges that Swarthmore violated the Student Handbook by "re-opening" its Title IX investigation in May of 2013, and thus failing to complete the College's investigation within the 60 days provided in the policy. (Compl. ¶¶13a, 120.) Plaintiff is conflating two sections of the Student Handbook – the Title IX investigation in response to a report of Sexual Misconduct, and the Judicial Procedures that are initiated by a student complaint. The Student Handbook provides that after a student makes a report of sexual assault, the College first conducts an investigation into the allegations, to be completed in 60 days. (Compl. Ex. A

[5] Later in his Complaint, Plaintiff asserts there were seven procedural violations during the "reopened investigation" and five procedural violations during the College Judiciary Committee panel hearing itself, although he lists only four. (Compl. ¶¶120-139.) Because these eleven alleged violations appear to be duplicative of the list of alleged violations in ¶13, Defendant will address Plaintiff's arguments as outlined in ¶13.

(Student Handbook) at 22.) Plaintiff's own Complaint states that Swarthmore completed its investigation on January 28, 2013, less than 60 days after it was opened on November 28, 2012. (Compl. ¶¶83, 95.) The investigation was not "reopened" in May; instead, a disciplinary proceeding was initiated in May under the Judicial Procedures of the Student Handbook, and there is no time limit in the policy on when a victim like Jane Doe may initiate such a proceeding.[6] (Compl. Ex. A (Student Handbook) at 36.)

Moreover, even if Plaintiff were correct that the investigation "clock" should run from November until May 30, 2013 – and he is not – he identifies no prejudice caused by the five-month period between January 28, 2013 and his May 30, 2013 hearing. Plaintiff was aware of the allegations in January 2013, and he points to nothing that could have affected the outcome of the hearing due to the fact that it was held in May, instead of January.[7]

2. Plaintiff Was Given Timely Notice of the Charges Against Him

Plaintiff alleges that the College failed to provide him with timely notice of the charges against him by changing one of the charges from "harassment through communications" to "sexual harassment" on May 28, 2013 at 2:00 pm. (Compl. ¶13b.) Not so. The Student Handbook provides that a "formal charge letter shall be presented in writing . . . ***typically 24 hours*** in advance of the hearing." (Compl. Ex. A (Student Handbook) at 37-38.) Plaintiff was sent a formal charge letter for the first time on May 24, 2013. The amended charge letter was

[6] That some additional interviews and investigation was conducted to prepare for the actual disciplinary hearing in May 2013 does not change the fact that the Title IX investigation was completed within 60 days.

[7] Plaintiff claims that the "19-month lapse between the incident in question and Jane's first complaint" in November 2012 deprived him of the ability to gather evidence. But this "19-month lapse" was a function of when Jane Doe first reported the incident to the College, not any policy violation. By January 2013, the investigation had been completed, and John does not and cannot point to any evidence that could have been lost between January 2013 and May 2013.

sent on May 28, 2013, two days before the May 30, 2013 hearing. *See* Ex. D, E (Charge Letters); *see also* Compl. ¶¶108, 129. As Plaintiff was provided with the final, formal charge letter "24 hours in advance of the hearing," the Student Handbook was complied with.

Nor does Plaintiff say how changing the charge of "harassment through communications" to "sexual harassment" several days before the hearing could have affected its outcome. While Plaintiff characterizes the charge as "more serious," he was already charged with ***sexual assault***, a charge which potentially subjected him to expulsion. No new or different conduct was put at issue by the amended charge. Plaintiff fails to plead or explain how this change in wording could possibly have affected the outcome of the hearing.

3. The Timing of the Hearing Was Consistent With Swarthmore's Student Handbook

The Student Handbook provides that hearings are "scheduled when classes are in session and not during college breaks." (Compl. Ex. A (Student Handbook) at 37.) As the College Bulletin attached as Exhibit B to Plaintiff's Complaint demonstrates, graduation was held on June 2, 2013; the hearing was held on May 30, 2013, before summer break began. Moreover, the Student Handbook also requires hearings to be held "as expeditiously as possible," and authorizes the Dean's office to hold hearings during break periods where it deems it appropriate to do so. (Compl. Ex. A at 37.) Thus, there was no violation of the policy.

And moving the hearing date a week later could not possibly have prejudiced Plaintiff. If anything, moving the hearing to a later date benefited John Doe by providing him with ***more*** time to prepare his case.[8] John Doe does not explain how this alleged error could have affected the outcome of the hearing.

[8] While John states that he "was forced to rush back to an empty campus, without time or means to locate potential witnesses who might support his testimony . . . .," he does not state who these witnesses might have been or how he was prevented from locating them. To the contrary, as the email

4. The Student Handbook Provided John Doe With Notice of His Right to Respond in Writing to the Allegations

The Student Handbook provides that "the accused and the accuser will have the opportunity to file a written response to the investigator's report, which will also be included in the evidence." (Compl. Ex. A (Student Handbook) at 22.) Although Plaintiff asserts (inaccurately) that he was not told that he was able to respond in writing to the Title IX report, he fails to plead that the College did anything to deprive him of his right to do so. Indeed, the emails and letters cited in the Complaint show that Plaintiff was repeatedly told to review the Student Handbook policies, which set forth this right – he simply chose not to exercise it. *See* Charge Letters at Ex. D, E.

Nor does Plaintiff allege how this alleged breach could have affected the outcome of the hearing. To the contrary, in addition to having the right to submit something in writing (which he chose not to exercise), John was given every opportunity to explain his position to the panel during the hearing (which he did exercise).

5. Plaintiff Was Provided With Everything the Student Handbook Says the Observer Will Provide

Plaintiff alleges that Swarthmore violated the Student Handbook because he was "not given the opportunity to confer with the Observer that had been assigned to the hearing." (Compl. ¶129.) He claims that he was "advised" by Associate Dean for Student Life Myrt Westphal in preparing for the hearing, rather than by the person who actually served as the Observer during the hearing, the Vice President for Facilities and Services. (*Id.*)

Swarthmore's Student Handbook states:

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cited above and others show, Associate Dean Westphal repeatedly asked John whether he intended to call any witnesses, and he responded that he did not.

> The Observer is the person responsible for seeing that the procedures are followed and that there is impartiality in the proceedings. The Observer does not speak at the hearing except concerning procedure and does not vote. Generally, this role is held by the Associate Dean for Student Life. If the Associate Dean is unable to serve as Observer, the Dean shall appoint a dean or CJC members to serve in this capacity.

(Compl. Ex. A (Student Handbook) at 39.) Associate Dean Westphal, who typically served as Observer for hearings, was not able to serve during this hearing, and another CJC member, the Vice President for Facilities and Services, served that role instead. As shown by an email relied upon in the Complaint, Associate Dean Westphal advised Plaintiff that this would the case, and Plaintiff did not object. *See* Associate Dean Westphal Email at Ex. C. While the Student Handbook elsewhere states that "[t]he Observer will meet separately with both the complainant(s) and the accused to explain procedures and give all a chance to ask questions about the judicial process," there is no prohibition from one person serving the Observer's role before the hearing, and a different person at the hearing. (Compl. Ex. A (Student Handbook) at 38.)

But even if having two individuals fill these roles was a technical departure from the Student Handbook, it was not a substantial one that could have changed the outcome in any way. To the contrary, it is undisputed that Associate Dean Westphal, an experienced Observer, met with Plaintiff, answered his questions, and explained the procedures. (Compl. ¶129.) Plaintiff received the benefit that the policy provided, and it does not matter that Associate Dean Westphal provided this advice, rather than the individual who served the Observer role at the hearing. Nor does Plaintiff allege that he requested to meet with the Vice President of Facilities or Services prior to the hearing.[9]

[9] Plaintiff alleges that "instead of providing John with counsel from an impartial Observer, John had to turn to the very individual responsible for charging him." But the Associate Dean always was

6. Plaintiff was Provided Jane Doe's Witness Statements at Least 48 Hours In Advance of the Hearing, As Provided in the Student Handbook

Plaintiff alleges that he was not provided with Jane Doe's written statements to be offered at the hearing "until 48 hours before the hearing." (Compl. ¶123.) But that is exactly what the Student Handbook provides: "both the accused and the complainant shall be shown a copy of the materials that will be present in the hearing in sufficient time before the hearing (normally 48 hours in advance) to prepare their cases." (Compl. Ex. A (Student Handbook) at 37.) The Complaint acknowledges Plaintiff reviewed the written materials – which contained all of Jane Doe's written complaint statements presented to the disciplinary panel, including her May 14, 2013 statement referenced in Plaintiff's Complaint – 48 hours in advance. (Compl. ¶¶114-17, 121.) There is no breach.

Nor did the timing affect Plaintiff's ability to "complete a similar statement responding to the charges," as he alleges. At the time Plaintiff was reviewing the material, he was finished with classes and had two full days to provide a written response if he chose to do so – the precise time provided for in the policy. (Compl ¶131). That Plaintiff chose not to do so is not the College's fault. Moreover, Plaintiff was given ample opportunity to respond to the charges orally at the hearing, which he did.

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responsible for preparing the charge letter as well as serving as the Observer to the proceedings. *Compare* Compl. Ex. A (Student Handbook) at 36: ("The Associate Dean or designee shall define the relevant charges") *with id.* at 39: ("Generally, this role [of Observer] is held by the Associate Dean for Student Life."). Therefore, even if Associate Dean Westphal had served as the Observer during the proceeding as Plaintiff apparently says she should have, she still would have been responsible for charging him.

7. There Was Nothing Improper with the Panel Questioning Jane Doe About an Email She Sent to the Title IX Coordinator

Plaintiff alleges it violated policy for the panel to ask Jane Doe about a statement she testified that she sent to the Title IX Coordinator via email. Contrary to his allegations, the Student Handbook allows for questioning of the parties and does not mandate that questions be limited to the written materials shared with the panel and the parties. (Compl. Ex. A (Student Handbook) at 39 ("Next both parties are questioned by the panel. The Convener and the Observer shall also attempt to ensure that all questions are relevant to the specific case before the Committee and are asked in as fair and neutral a manner as possible.".) In this case, as discussed below, the panel decided to inquire into the veracity Jane Doe's statement as part of its role in assessing the parties' credibility.

8. There Was Nothing Improper with the Panel Calling the Title IX Coordinator to Answer a Single Question During the Hearing

Plaintiff alleges a number of supposed policy deviations based on the fact that the Title IX coordinator appeared briefly at the hearing to answer a question form the panel about an email that Jane Doe had testified to. *See* Compl. at ¶¶124-25, 133, 134-37. While the parties are required to identify witnesses prior to the hearing, there is no prohibition on the panel calling its own witnesses. While Plaintiff characterizes the Title IX Coordinator as a "surprise" witness and suggests she offered evidence which was not previously disclosed, he does not allege that any documents were offered into evidence or that the Title IX Coordinator offered substantive testimony as to any issue in the case. Nor does the Complaint explain why whatever (unplead) evidence the Title IX Coordinator offered somehow prejudiced him or affected the outcome of the hearing.[10]

[10] In fact, the Title IX Coordinator's testimony lasted less than five minutes. As explained in President Chopp's denial of John's appeal, Jane Doe had testified at the hearing about a point which she

9. Allowing Jane Doe to Leave the Hearing for a Portion of John Doe's Testimony Did Not Violate Swarthmore's Policies

Plaintiff asserts that there was a procedural irregularity when Jane Doe was permitted to leave the proceedings for a period of time. While the Student Handbook generally provides a ***right*** for each party to be present during the hearing to hear all the evidence, it creates no such obligation. (Compl. Ex. A at 36-37.) The Complainant was well within her rights to leave during a portion of Plaintiff's testimony if she wished to do so. Moreover, there is no conceivable prejudice to Plaintiff. If anyone suffered by not hearing all of the evidence offered, it was Jane Doe, not Plaintiff.

10. Allowing the Limited Testimony Regarding Comments John Doe Had Made About Other Sexual Encounters Did Not Violate Swarthmore's Policy

Plaintiff complains that the disciplinary panel was permitted to hear evidence from Jane Doe "concerning John [Doe's] alleged sexual history." (Compl. ¶13j.). Specifically, Plaintiff alleges that Jane Doe was permitted "to testify concerning statements John allegedly made to her about his previous sexual encounters." (Compl. ¶138.) But these were the very statements that were at issue in Jane Doe's sexual harassment charge and were also relevant to show her state of mind and explain her conduct during the alleged assault. While Swarthmore's policy states that the parties shall have the right "to have past sexual history excluded from the hearing process," the policy is speaking to excluding past sexual history offered to show promiscuity, not evidence that is relevant as the basis of the charge at issue. (Compl. Ex. at

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said she had already told the Title IX Coordinator. The Title IX Coordinator was called by the disciplinary panel simply to confirm that Jane Doe had provided an email to the Title IX Coordinator as she had told the panel. She provided no substantive testimony, she simply confirmed that Jane Doe had previously told her what she already substantively testified to during the hearing. At most, she (accurately) rebutted any inference that Jane Doe had misled the panel when she said that she had previously emailed the Title IX coordinator about this issue. *See* Ex. G.

(Student Handbook) at 37.) And, once again, John fails to allege how admission of this evidence had any effect on the outcome of the proceeding.

11. Swarthmore's Student Handbook Policies Cannot Be Challenged on the Basis of 'Fundamental Fairness'

Plaintiff also alleges that Swarthmore's policies "fail to afford students accused of serious sexual misconduct with fundamental due process rights," including the right to legal counsel and the right to cross-examination. (Compl. ¶143.) As discussed below, Title IX does not provide a private right of action for alleging due process violations. The Pennsylvania Supreme Court has held that these due process arguments likewise have no place in a state-law breach of contract action against a private university. *Murphy*, 777 A.2d at 428 ("Upon careful reflection, we can discern no principled basis for reviewing a breach of contract action that involves private conduct according to principles that arise out of the Fourteenth Amendment, and which govern state action."). In *Reardon*, the Superior Court noted that previous student disciplinary cases had addressed due process questions in the context of a breach of contract action when considering the "fundamental fairness" of universities' disciplinary proceedings. *See* 926 A.2d at 481 n.2 (citing *Boehm*, 573 A.2d at 580). The *Reardon* Court held that because a breach of contract action against a private university should be considered like any other breach of contract claim, "appellant's attempts to invoke due process concerns and questions of fundamental fairness are misplaced as our review is not guided by due process concerns." *Id.* Plaintiff's due process arguments fail in the context of this breach of contract action against a private college.

C. Plaintiff's Complaint Fails to State a Gender Bias Claim Under Title IX

Title IX to the Higher Education Amendment Act of 1972 provides in pertinent part: "No person in the United States 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." 20 U.S.C. § 1681(a). The statute itself does not provide for a private right of action. Nevertheless, the Supreme Court of the United States has implied a private right of action in "certain limited circumstances" – where a recipient of federal funding engages in intentional discrimination that violates the clear terms of the statute. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642-43 (1999). Here, Plaintiff fails to plead a plausible claim that Swarthmore intentionally discriminated against him based on his sex, and the Title IX claim should be dismissed.

1. The Title IX Claim Should Be Dismissed Because It Does Not Allege How Gender Affected the Outcome of His Disciplinary Proceedings

To establish a claim under Title IX, a plaintiff "must show that (1) she was excluded from participation in, denied the benefits of, or subjected to discrimination in an educational program; (2) that the program receives federal financial assistance; and (3) that her exclusion was on the basis of her gender." *Tingley-Kelley v. Trs. of Univ. of Pa.*, 677 F. Supp. 2d 764, 775 (E.D. Pa. 2010). Although the Third Circuit has not articulated the elements of a private Title IX claim in the context of a student disciplinary matter, district courts in the Third Circuit and throughout the country have relied upon the Second Circuit's decision in *Yusuf v. Vassar College*, 35 F.3d 709, 714 (2d Cir. 1994) and the Sixth Circuit's decision in *Mallory v. Ohio University*, 76 Fed. App'x. 634, 638 (6th Cir. 2003). *See, e.g., Tafuto v. N.J. Inst. of Tech.*, No. 10-4521, 2011 U.S. Dist. LEXIS 81152, at *6-8 (D.N.J. July 25, 2011) (relying on both *Yusuf* and *Mallory*). In *Yusef*, the Second Circuit categorized Title IX claims against universities arising from disciplinary hearings into two types: "erroneous outcome" claims where "the plaintiff was innocent and wrongly found to have committed an offense," and "selective enforcement" claims, where regardless of the plaintiff's guilt or innocence, "the severity of the

penalty was affected by the student's gender." *Yusuf*, 35 F.3d at 715. ***Both claims require proof of intentional gender bias.*** *Id.* Although Plaintiff's Complaint does not clarify which of these theories he intends to pursue, he fails to allege sufficient facts to proceed under either standard.

a. Plaintiff Cannot State an "Erroneous Outcome" Claim

"Plaintiffs who claim that an erroneous outcome was reached must allege ***particular facts*** sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding" and "***particular circumstances*** suggesting gender bias was a motivating factor behind the erroneous finding." *Yusuf*, 35 F.3d at 715 (emphasis added). Mere "allegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss." *Id.*

The Complaint here is precisely the type of claim that *Yusef* says should not be allowed. No particularized facts are offered to suggest that gender bias had anything to do with the outcome of Plaintiff's hearing. The theory that Swarthmore made Plaintiff the College's "whipping boy" is supported by no particularized facts whatsoever, and is simply a "conclusory allegation of gender discrimination." *Id.*; *see* Compl. ¶160. As explained above, none of the alleged procedural irregularities in fact violate the Student Handbook, and none are alleged to have affected the outcome in any way. For this reason alone, this claim should be dismissed.

Moreover, plaintiff pleads nothing to suggest "intentional conduct" by Swarthmore to rig the outcome so as to ensure that he would be found responsible because he is a man. *Doe v. Univ. of the South*, 687 F. Supp. 2d 744, 756 (E.D. Tenn. 2009) ("Plaintiffs have not pled sufficient facts to support a finding under the 'erroneous outcome' standard, namely that the outcome of the University's disciplinary proceeding was erroneous because of a sexual bias."). Outside the fact that Plaintiff calls them "biased," (Compl. ¶174), without more, the

panel of five faculty, staff and students who heard the case is not alleged to have had any incentive to reach any particular outcome in the proceeding, let alone any incentive to discriminate against him on the basis of his sex. Faced with evidence of sexual assault, the panel simply believed Jane Doe and not John Doe. Nor is Swarthmore alleged to have publicized the results of the proceedings or used the hearing in any way to rebut the alleged public scrutiny it was under, so they had nothing to gain by supposedly making an example out of John Doe.

Plaintiff does not and cannot plead a plausible claim that the outcome of the proceeding was the result of gender discrimination. Accordingly, his Title IX claim based on "erroneous outcome" should be dismissed.

b. Plaintiff Does Not Plead a "Selective Enforcement" Claim

With respect to his "selective enforcement" claim, a plaintiff must set forth specific factual allegations indicating the educational institution's disciplinary process was motivated by his gender, and that a similarly situated woman would not have been treated the same. *Mallory*, 76 Fed. Appx. at 641. Plaintiff's Complaint fails to satisfy that standard. All he asserts is that Swarthmore's disciplinary procedures "afford varying rights to women and men as in virtually all cases of alleged sexual misconduct at Swarthmore, the accused student is a male and the accusing student is a female." (Compl. ¶175.) But if women complain of sexual harassment or sexual violence committed against them by men more often, then necessarily, men will more often be subjected to a university's disciplinary proceedings. This does not and cannot provide evidence that the outcome of these proceedings is impermissibly motivated by gender. *See, e.g., Dempsey v. Bucknell Univ.*, No. 4:11-cv-1679, 2012 U.S. Dist. LEXIS 62043, at *61 (M.D. Pa. May 3, 2012) (dismissing Title IX claim where plaintiff alleged, without more, that plaintiff "was accused of sexual misconduct, that most of the people accused of sexual misconduct are males, and that the way in which Defendant Bucknell deals with sexual

misconduct accusations is unfair"); *accord Franchi v. New Hampton Sch.*, 656 F. Supp. 2d 252, 261 (D.N.H. 2009) (dismissing Title IX complaint where student alleged that she was excluded on the basis of her eating disorder, and eating disorders primarily affect females). Moreover, several courts have held that a Plaintiff must specifically allege that a college had actual knowledge of the discriminatory effect of its disciplinary processes, knew that similarly situated women were treated differently, and yet failed to remedy the violation. *See, e.g., Horner v. Ky. High Sch. Athletic Ass'n*, 206 F.3d 685, 692-93 (6th Cir. 2000); *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1362 (M.D. Ga. 2007).

Plaintiff pleaded no facts or provided the Court with any evidence that the University's actions against John Doe were motivated by his gender, or that a similarly situated woman would not have been subjected to the same disciplinary proceedings. To the contrary, the Student Handbook is explicitly gender neutral: "Anyone can be subject to and can be capable of sexual misconduct. It can occur between two people, whether or not they are in a relationship, in which one has power over the other, or are of different sexual identities." (Compl. Ex. A (Student Handbook) at 17.) Accordingly, his Title IX claim fails to meet the pleading requirements of either the "erroneous outcome" or "selective enforcement" theories under the statute and should be dismissed.

2. Swarthmore's Student Handbook Policies and Procedures Are Based on U.S. Department of Education Guidance and Are Consistent With Pennsylvania Law

Plaintiff's attempt to use Title IX as a vehicle for alleging due process and equal protection violations that are otherwise unavailable to students at a private college like Swarthmore similarly fails. (Compl. ¶177 (alleging Swarthmore's policies denied Plaintiff "basic due process and equal protection rights as they do not allow for the presence of legal counsel to aid in the defense of sexual misconduct charges and deny a student accused of sexual

misconduct the right to confront and/or cross-examine his accuser").) Although U.S. Department of Education Title IX regulations require all higher education institutions to have sexual assault policies and procedures that "accord[] due process to both parties involved," they do not confer a private right of action. *See* 66 Fed. Reg. 5512 at 22; *Univ. of the South*, 687 F. Supp. 2d at 758 (rejecting Plaintiff's claim that the University's sexual assault policies violate Title IX because he was not afforded sufficient due process) (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291-92 (U.S. 1998) ("the implied right of action under Title IX" does not provide for the "recovery in damages for violation of those sorts of administrative requirements")). Thus, Plaintiff's due process and equal protection arguments cannot save his Title IX claim from dismissal.

Further, most of the "due process" concerns plaintiff posits are either expressly recommended or compelled by the Department of Education. For example, while Plaintiff complains that the disciplinary panel used a "preponderance of evidence" standard, the United States Department of Education has expressly told schools to do just that. *See* U.S. Department of Education's "Dear Colleague" Letter, attached as Ex. B, at 11 (mandating a "preponderance of the evidence standard to evaluate complaints," and noting that a higher standard, such as "clear and convincing" evidence, is "not equitable under Title IX"). Similarly, the Department of Education has rejected John Doe's suggestion that it is somehow improper to "prohibit students accused of sexual misconduct from challenging the accuser through cross- examination," by telling schools that it "strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing." *Id.* at 12. The Department has also

affirmed that schools are not required to "permit parties to have lawyers at any stage of the proceedings . . . ." *Id.*[11]

Plaintiff's gripes with Swarthmore's policies are also inconsistent with case law applicable to both private and public universities. "The general consensus on a student's right to an attorney is that 'at most the student has a right to get the advice of a lawyer; the lawyer need not be allowed to participate in the proceeding in the usual way of trial counsel, as by examining and cross-examining witnesses and addressing the tribunal.'" *Johnson v. Temple Univ.*, No. 12-515, 2013 U.S. Dist. LEXIS 134640 at *26 (E.D. Pa. Sept. 19, 2013) (citing *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993)); *accord* Compl. Ex. A (Student Handbook) at 37, 39 (the accused may consult a lawyer, but only may be accompanied at a disciplinary hearing by a "supporter," who "must be a member of the Swarthmore College community"). Nor is there an established right to cross-examine parties; many colleges do not even offer the right to cross-examine witnesses, or only allow parties to field questions through a mediator. *See Johnson*, 2013 U.S. Dist. LEXIS 134640 at *26 (citing *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) ("[S]uffice it to state that the right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases.")); *accord* Compl. Ex. A (Student Handbook) at 39 ("The complainant and the accused generally are not allowed to question each other," but "either party shall have the opportunity to question any witnesses.").

[11] Using screens or room dividers is not specifically addressed in Swarthmore's policies, but because the "Dear Colleague" Letter (Ex. B) notes that student disciplinary proceedings may be "traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment," many schools employ these techniques during hearings. *See* Association of Title IX Administrators, Gender Based and Sexual Misconduct Model Policy, *available at* http://www.atixa.org/documents/ATIXAModelPolicy_000.pdf (recommending use of closed-circuit testimony, Skype, room dividers, or using separate hearing rooms).

Swarthmore's policies and procedures are thus rooted in the U.S. Department of Education's guidelines and consistent with case law.

D. Plaintiff's Remaining State Law Claims Are Baseless

The remaining claims also should be dismissed:

First, Plaintiff's promissory estoppel claim fails because this action sounds in contract. Indeed, Plaintiff's Complaint appears to recognize this, styling both that claim and his negligence claim as subsidiary causes of action explicitly prefaced on the court failing to find a contract. *See, e.g.*, Compl. ¶202 ("However, in the event the Court were to find that no such contracts exist, Swarthmore, through but not limited to its regulations, standards, procedures and policies, made representations to John. . ."). An action for promissory estoppel is not cognizable where, as here, there is a binding contract between the parties. *Carlson v. Arnot-Ogden Mem'l. Hosp.*, 918 F.2d 411, 416 (3d Cir. 1990) (promissory estoppel is applied to enforce a promise only where there is no binding contract); *Bosum Rho v. Vanguard OB/GYN Assocs., P.C.*, No. 98-167, 1999 U.S. Dist. LEXIS 5345, at *6 (E.D. Pa. Apr. 15, 1999) (where parties have formed an enforceable contract, relief under a promissory estoppel claim is unwarranted).

Second, Plaintiff's negligence claim is barred because Swarthmore cannot be liable in tort for duties imposed by the Student Handbook. Plaintiff's theory is contrary to Pennsylvania's gist of the action doctrine. The gist of the action doctrine maintains the distinction between breach of contract claims and tort claims by precluding recovery in tort in any of four situations:

> (1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breaches where grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of the contract claim.

eToll v. Elias/Savion Adver., Inc., 811 A.3d 10, 19 (Pa. Super. Ct. 2002). When a party to a contract seeks relief based upon an alleged breach of that contract, the party cannot simultaneously seek relief under a tort theory based on the same breach. *Hart v. Arnold*, 884 A.2d 316, 339-40 (Pa. Super. Ct. 2005).

Third, the gist of the action doctrine also bars Plaintiff's negligent infliction of emotional distress claim, as the cause of action represents another attempt to recover in tort for an action that stems from a contract. *See Oehlmann v. Metro. Life. Ins. Co.*, 644 F. Supp. 2d 521, 535 (M.D. Pa. 2007). The claim fails for an additional reason: Plaintiff has not alleged a physical injury as required by Pennsylvania law. *Id.* (dismissing negligent infliction of emotional distress claim based on gist of the action doctrine, but also noting that a plaintiff must allege a physical injury to state a claim); *see also Michtavi v. United States*, No. 07-628, 2009 U.S. Dist. LEXIS 18926, at *24 (M.D. Pa. Mar. 4, 2009) (dismissing negligent infliction of emotional distress claim because plaintiff failed to allege immediate and substantial physical harm as required by Pennsylvania law).

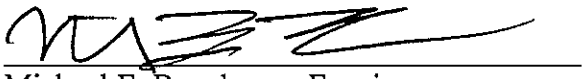
Fourth, Plaintiff asserts a claim for equitable relief unrelated to any other cause of action. (Compl. ¶¶206-08.) Courts in the Third Circuit have held that equitable relief is a remedy, not an independent cause of action. *See Hammer v. Vital Pharms., Inc.*, No. 11-4124, 2012 U.S. Dist. LEXIS 40632, at *13 (D.N.J. Mar. 26, 2012); *see also Westway Holdings Corp. v. Tate and Lyle PLC*, No. 08-841, 2009 U.S. Dist. LEXIS 41022, at *8 (D. Del. May 13, 2009) ("This Court recognizes that a claim for injunctive relief is not a separate cause of action in the Complaint, but an equitable remedy.").

V. CONCLUSION

Plaintiff's case was fully and fairly considered by a disciplinary panel that followed Swarthmore's policies in all material respects. There is no basis for interfering with the panel's findings. The Complaint should be dismissed.

Date: March 21, 2014

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant Swarthmore College's Motion to Dismiss All Counts of Plaintiff's Complaint and the Memorandum of Law in support thereof was served this 21st day of March, 2014, by electronic filing on this Court's ECF system, and in accordance with the parties' agreement, by email upon:

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