COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT
No. 19-P-779

MIDDLESEX, ss

MORGAN HELFMAN,
Plaintiff-Appellant

v.

NORTHEASTERN UNIVERSITY, KATHERINE ANTONUCCI, ROBERT JOSE, BRIANA R. SEVIGNY, MARY WEGMANN & MADELEINE ESTABROOK,
Defendants-Appellees

ON APPEAL FROM A SUMMARY JUDGMENT OF THE SUFFOLK SUPERIOR COURT

PLAINTIFF-APPELLANT'S APPLICATION FOR DIRECT APPELLATE REVIEW

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REQUEST FOR DIRECT APPELLATE REVIEW

Morgan Helfman, the Plaintiff-Appellant, hereby requests this Honorable Court to assume direct appellate review of the instant appeal, pursuant to G.L.C. 211A, §10 and Mass. R. App. P. 11.

STATEMENT OF PRIOR PROCEEDINGS

On March 8, 2019, the Superior Court, Gordon, J., granted summary judgment to all of the defendants on Morgan Helfman, the plaintiff's claims of negligence, negligent infliction of emotional distress, breach of contract, violations of Title IX of the Educational Amendments of 1972, 20 U.S.C. §§1681, *et. seq.*, and the Massachusetts Equal Rights Act, G.L. c. 93, §102, arising from Ms. Helfman's rape by a fellow student after a Halloween Party during her freshman year at defendant Northeastern University ("Northeastern," "University" or "NU"), the defendants' negligence in creating and failing to stop or ameliorate the situation which led to her rape, and mishandling of the disciplinary proceedings that followed. Judgment entered that day.

Ms. Helfman timely filed her Notice of Appeal in the Superior Court on April 5, 2019. She received notice of assembly of the Superior Court record on May 13, 2019, and timely docketed her appeal in the Appeals Court on May 28, 2019, the first business day after Memorial Day. She timely seeks direct appellate review by this Honorable Court.

STATEMENT OF FACTS RELEVANT TO APPEAL

A. NORTHEASTERN UNIVERSITY RESIDENCE LIFE GOVERNANCE

Defendant Northeastern required freshmen to live on campus in 2013, including Morgan Helfman. NU operated a Residence Life Department, which employed and trained staff to monitor and supervise campus residential life. NU developed a Code of Student Conduct ("CSC") which students were required to follow and Residence Life staff were obliged to enforce, and operated an Office of Student Conduct and Conflict Resolution ("OSCCR"), which adjudicated and disciplined CSC infractions. A General Expectations provision required NU students to obey federal, Massachusetts and other laws, and students understood the CSC to incorporate the law. The CSC was designed,

in part, to ensure that students lived safely while attending NU and that staff kept students safe by enforcing the Code. Failing to enforce CSC provisions could increase the risk of harm to students. Defendant NU represented to current and prospective students and their parents that Residence Life staff and programs were intended to enhance the quality of life at NU.

The CSC prohibited underage students from drinking or possessing alcohol on campus and from being in the presence of alcohol unless the alcohol was in possession of a roommate older than 21, prohibited older students from furnishing alcohol to underage students, and prohibited excessive alcohol consumption regardless of age.

NU employed Residence Assistants ("RAs") to serve as "paraprofessional" members of the defendant's Residence Life Office. RAs signed an employment agreement ("Resident Assistant Agreement") and received financial compensation. RAs were engaged, trained and supervised by NU's professional staff. RAs were required to comply with the CSC like any other NU student, but RAs had additional obligations and

could be terminated from employment if they fail to carry out their employment obligations, regardless of whether they were disciplined for CSC violations. RAs were held to a higher standard of accountability, personal conduct, and integrity because they represented NU.

RAs' employment responsibilities included being familiar with NU's CSC and Guide to Residence Hall Living, enforcing NU's policies and rules without bias or favoritism, performing periodic rounds in assigned buildings, serving as residence hall proctors,[1] intervening if students violated community norms or created a community problem, remaining sober and drug free while on duty, and upholding and maintaining high standards of personal conduct and integrity in order to

[1] Proctors serve as a form of "security" at some dormitory front doors. Proctors are required to report any incidents in buildings at which they serve, and to stop and report any student who appears intoxicated and is trying to enter her dormitory. Proctors, including RAs Patrick Ward and Stacey Anderson, were trained to call the Northeastern University Police Department ("NUPD") whenever a student who appeared intoxicated tried to enter a residential building by a proctor's station, so that NUPD professionals could assess the student's condition and need for further professional assessment and treatment.

serve as role models. RA Patrick Ward testified that residence assistants were to "insure safety and security, and be a good representation of [NU]." RA Stacey Anderson testified that she was responsible for monitoring the "safety and wellbeing" of students in her assigned building, which at the time of these events was 97 St. Stephen Street, Boston, a property NU leased for student housing.

An RA's employment responsibility to serve as a role model continued whether the RA was technically "on duty" or "off duty." For that reason, while an RA who was older than 21 might consume alcohol "off duty," the RA could not get drunk, give the appearance of having consumed alcohol, nor drink alcohol while on duty.

When they observed CSC infractions, including alcohol consumption in violation of the Code, RAs were required to intervene and report violations to their Residence Life supervisors, even if the violation occurred in a building to which the RA was not assigned as part of his/her employment duties. The RA's duty was not simply to report possible CSC violations but to confront and intervene to stop such violations, to

provide assistance to students in need if the RA could do so safely, and to obtain assistance, including from the NUPD if necessary, to stop Code violations. RAs were required to report alleged sexual assaults. Failing to intervene when minors were drinking alcohol, obtain assistance for students in need, and report CSC violations would be considered violations of an RA's employment duties, as would serving alcohol to and playing alcohol drinking games with minors.

Defendant Robert Jose, Associate Dean for Cultural, Residential and Spiritual Life, was also the Director of NU's Residence Life Office, responsible for hiring, training, and overseeing Residence Life staff, and ensuring that NU policies were enforced. Jose had supervisory authority over Residence Directors and Area Coordinators, including defendant Katherine Antonucci. Defendant Jose was the person in overall charge of the residence assistant training program when RAs Anderson and Ward were trained. Yet, he never read the Code, was not familiar with its provisions, and did not know which conduct violated it, testifying: "I have never taken the time to go through this." Defendant Jose did

not know whether NU or its CSC prohibited excessive alcohol consumption. Jose never trained residence assistants to recognize signs of excessive alcohol consumption and did not recall any Residence Life staff saying they had discussed questions related to alcohol consumption with RAs. Jose could not say that RAs were trained to intervene and report to their supervisors if they observed a minor drinking alcohol, or a student vomiting, stumbling, displaying slurred speech, or other signs of excessive alcohol consumption.

Defendant Jose personally participated in the training program, providing instruction to RAs which included ambiguous advice that could be interpreted either as a warning to obey the CSC or advice not to get caught violating it. Among remarks he made as part of his presentation to RAs was: "Don't become the problem at the party." History suggests Jose was advising RAs not to get caught because during the Spring 2013 semester, the semester immediately preceding the Halloween Party and rape which give rise to this action, Jose ignored a Residence Life investigation which found that RAs routinely were not

performing their assigned tasks, particularly in NU's leased properties where the incident at bar originated. After Residence Life Associate Director Brianna McCormick terminated the employment of several RAs for breaching their employment agreements, Jose overruled her and reinstated all of the discharged RAs, thereby ratifying the RAs' misconduct and condoning their contract violations. Jose's actions were reported in *The Huntington News* student newspaper. His willingness to ignore RA misconduct and employment contract violations was known to NU's student body, including future RAs Ward and Anderson.

Defendant Katherine Antonucci, RA Anderson's immediate supervisor, was responsible for training RAs in general and Anderson in particular. Antonucci also trained RA Ward. Although Antonucci had been elevated to Area Coordinator to take on training functions, she admitted that she did not complete her training responsibilities before she abruptly left NU.

RAs were not adequately trained to understand their obligations to serve as role models, to understand CSC provisions, and to intervene to stop CSC

violations which occurred in their presence when they were technically "off duty" or out of the "jurisdiction" to which they had been assigned, despite allegedly receiving training.[2] RAs were not trained to recognize "impaired motor skill(s)," which the CSC identified as a behavioral sign of intoxication. RAs Anderson and Ward testified that they did not understand their duties. Anderson had no memory of receiving training concerning excessive alcohol consumption. No one ever tested her after she completed RA training to determine whether Anderson understood her duties. Defendant Antonucci never gave RA Anderson a written or verbal job performance evaluation. Antonucci did not remember ever giving any training materials to RAs she supervised or providing any tests to RAs to assess their understanding of their responsibilities. Antonucci, Anderson's supervisor, could not say that Anderson had been properly trained.

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[2] Although the defendants insist that they provided training to RAs, the defendants produced no documents substantiating such training, notwithstanding discovery requests seeking the defendants' training materials.

RA Ward did not remember receiving training in NU's alcohol or sexual assault policies, which were contained in the CSC, as part of his RA training. Ward drank alcohol while off duty, when he was a minor, with other students who were under the age of 21, both before and after the incident which gives rise to this action, in violation of the CSC and his employment contract. RA Ward did not know what defendant NU's Medical Amnesty policy was; a policy designed to allow students who had consumed alcohol to excess, or who had served excessive amounts of alcohol to students, to call for assistance without fear of being prosecuted for CSC violations, in order to ensure that the endangered student received proper professional assessment and treatment. Although Ward learned of the policy during freshman orientation, he received no further training in it. Following the 2013-14 academic year, defendant NU "revamped" its RA training program to address several of these deficiencies. Ward had a better understanding of his RA responsibilities after the training program was revamped, he testified.

B. THE HALLOWEEN PARTY AND RAPE OF MORGAN HELFMAN

NU employees Anderson and Ward hosted a Halloween Party in Anderson's assigned housing at 97 St. Stephen Street. Anderson and Ward were both sophomores younger than 21. Both were in the six month probationary period of their Residence Assistant Agreements. They invited freshmen and other classmates that they knew to be younger than 21, including Morgan Helfman and the student who would later rape her, both of whom had studied with Anderson and Ward and had socialized with them before. No studying was to occur and NU students who had not studied with Anderson and Ward were invited to the party. Morgan went in costume. Morgan and the rapist arrived at the party around 9:00 p.m. Lily Meyer and Emma Lambert, Ward's invitees, arrived after them, meeting RA Anderson at the party for the first time. Everyone at the party was younger than 21.

Anderson was on RA duty, and left the party at times to attend to her rounds and office duties, returning when she finished. Anderson left party attendees in her room without providing instructions

when she performed her rounds. Although Ward was not "on duty," his obligations to role model and enforce the CSC continued.

NU employees Anderson and Ward hosted, were present, observed, shared, and participated as NU students that they knew to be younger than 21 brought alcoholic beverages to Anderson's room, drank alcohol in their presence, played alcohol drinking games, got intoxicated from excessive alcohol consumption, and vomited in Anderson's bathroom from consuming alcohol. Neither Anderson nor Ward intervened to stop the drinking nor reported the drinking, but participated in the drinking and drinking games, instead. The conduct could not have surprised Anderson or Ward because they drank alcohol socially with the same students on previous occasions.

Morgan Helfman became very intoxicated and vomited several times in Anderson's bathroom. Lily Meyer and Emma Lambert stayed there with Morgan. Neither Ward nor Anderson identified themselves as RAs nor tried to provide greater assistance to Morgan than did Meyer and Lambert. Despite their alleged RA training, neither

Anderson nor Ward called NUPD so that professionals could assess Morgan's condition. Neither discussed NU's Medical Amnesty policy although RA Ward was aware of it. Anderson admitted that she violated her RA duties by not checking on Morgan, who was sick in her bathroom. Anderson did not volunteer and did not ask anyone at the Halloween Party to take Morgan back to her dorm, which she acknowledged also violated her RA duties. Neither did Ward offer to escort Morgan back to her dorm room or ask anyone to take her there. Meyer and Lambert wanted to walk Morgan back to her dorm but did not believe that the proctors would allow Morgan to enter in her visibly intoxicated state and were concerned that the proctors would discipline Meyer and Lambert for being with Morgan in her condition. The rapist, who was drunk but lived in the same dorm as Morgan, offered to take Morgan back to their dormitory.

Security camera footage showed Morgan unsteady, stumbling, relying on her rapist for physical support, and holding him close as they returned to their dorm from the Halloween Party. The rapist told NUPD officers that Morgan stumbled and caused him to fall.

He took her cell phone and identification from Morgan en route. Video showed Morgan supporting herself on the proctor's desk as the proctor reviewed their identification. The proctor allowed Morgan and her rapist to enter, thus failing to perform his employment duty to notify NUPD when an intoxicated student tried to go to her dormitory so that NUPD could evaluate the student's condition and determine whether the student required further professional assessment or treatment. Morgan walked unsteadily to the elevator.

Whatever her rapist's intentions when he offered to walk Morgan home from the Halloween Party, NUPD Sergeant Detective Adam Keenan concluded that those intentions changed en route. Instead of taking Morgan to her room, the rapist took her to his. There, he performed sex acts on Morgan and tried to force her to perform sex acts on him. Morgan was "numb and did not feel anything at that point." She tried to cover herself with the rapist's blanket, refused to perform some acts he attempted, made sounds to indicate displeasure, and again vomited in the bathroom during sex. She was "scared" to leave, "thought he would hurt

me, not let me leave; make worse whatever he was already doing to me."[3]

The rapist left his room in the early morning, after which, Morgan returned to her room. Morgan broke down crying as she told her roommate what had happened. They discussed her condition and lack of consent. Her roommate was concerned, in part, because Morgan was bleeding from her vagina. Morgan sustained pelvic lacerations and vaginal bleeding. Morgan went to NUPD to report the rape and to the hospital, which performed a rape kit.

C. NUPD INVESTIGATION AND OSCCR DISCIPLINARY PROCEEDINGS

NUPD conducted an investigation upon receiving Morgan's report, but did not interview any of the party attendees other than Morgan and her rapist, not even the RAs, although all were identified in the NUPD report. Nor did NUPD document Lily Meyer's statement when Meyer reported on her own initiative. The rapist admitted to investigators that he was very intoxicated that night, had never been so intoxicated, performed

[3] Morgan later requested unsuccessfully that NU transfer the rapist out of her dormitory and classes because she felt unsafe around him.

sex acts he would not have performed sober, was too intoxicated to know better and to control his behavior, and should not have had sex that night. He admitted his guilt, and stated that he should be punished.[4]

NUPD provided a copy of its report to OSCCR. Defendant NU knew of the underage drinking by its minor NU employees and students in RA Anderson's room because NUPD was so informed and provided a copy of its report to defendant OSCCR Director Mary Wegmann, who shared it with defendant OSCCR Assistant Director briana Sevigny and other OSCCR staff, and with defendant Associate Vice President of Student Affairs Madeleine Estabrook. All of them knew that Anderson and Ward participated in the provision and consumption of alcoholic beverages by students younger than 21 during a Halloween Party held in Anderson's assigned housing unit, that those RAs had not intervened to stop or report the CSC violations but had participated in them instead. Yet, none of those

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[4] The rapist obtained counsel to assist him with the NU disciplinary proceedings and provided a "supplemental" statement to the OSCCR Board, in which he recanted. NU was aware that the rapist was being assisted by counsel when he recanted. The Student Conduct Board which adjudicated the rape did not question him about his recantation or the conflicts between his statements.

defendants took any measures to discipline RAs Anderson or Ward for their violations of the CSC or their employment contracts, not even informing their Residence Life supervisors or defendants Antonucci or Jose, nor even requiring their retraining to ensure future compliance with their student and employment responsibilities. Neither NU nor NUPD nor OSCCR ever prosecuted any CSC violation charges against Anderson or Ward, who were subject to discipline for their violations of the CSC and their employment agreements.

Moreover, after learning that Morgan reported the rape to NUPD, RA Ward[5] told his supervisor, Residence Hall Director ("RD") Kevin Dillon, that minor students drank alcohol at a party in an NU student's residence on the night that Morgan reported being raped, and that both Morgan and her rapist attended the party. Dillon never passed the information to his Residence Life supervisors or coworkers, including defendants Jose or Antonucci. None of the defendants ever investigated or sanctioned their employees' misconduct.

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[5] Anderson never wrote an incident report or reported the events in her room to her supervisor that night or at any time before the instant action was filed almost three years later.

OSCCR commenced disciplinary proceedings against the alleged rapist, charging him with "sexual assault with penetration."

Disciplinary proceedings were adjudicated before a Student Conduct Board ("Board") comprised of students under the supervision of an OSCCR staff member. OSCCR Assistant Director Brooke Tempesta supervised these proceedings. Board decisions were subject to appeal to a different, three person "Appeals Board," whose decisions were "final."

Student Conduct Board members reportedly received OSCCR training.[6] Whatever training the Board may have received failed to instruct Board members to identify, consider and weigh those facts that would be most relevant to determining issues of consent, which were the heart of the CSC provision prohibiting Sexual Misconduct and Sexual Assault. "Consent" was defined:

> Consent means a voluntary agreement to engage in sexual activity proposed by another and requires mutually understandable and communicated words and/or actions demonstrating agreement by both parties to

[6] Again, notwithstanding the plaintiff's request for documents related to the selection, training and supervision of OSCCR Board members, no such documents were produced in discovery except the Student Handbook, which included the Student Conduct Code.

> participate in all sexual activities. [¶] Consent may never be given by … those who are incapacitated as a result of alcohol … consumption (voluntary or involuntary) …. *** Incapacitation is a state where one cannot make a rational, reasonable decision because they lack the ability to understand the who, what, when, where, why, or how of their sexual activities. [¶] "Without consent" may be communicated by words and/or actions demonstrating unwillingness to engage in proposed sexual activity. [¶] Additional clarifying notes for consent: *** [·] The person who is the object of sexual advances is not required to physically or otherwise resist; [·] Silence … may not, in themselves, be taken to imply consent[.]

Stephanie Katsos, who chaired the Board which adjudicated the charges against the alleged rapist, could not explain how she was trained to determine whether a student met the CSC definition of "incapacitation." She testified that "intoxication" means having alcohol in your system and is the same as "being drunk." Katsos could not recall being trained in the meaning of "incapacitation," how to ask questions to elicit information to determine whether a person was incapacitated, and could not explain what facts she was trained to consider to determine whether a student was incapable of giving consent to sexual conduct, which was the key issue before the Board.

Defendant OSCCR director Wegmann, who trained Board members and OSCCR staff, could not distinguish "intoxication" from "incapacitation," and trained Board members only about "incapacitation" but not "intoxication." Defendant Sevigny did not provide examples of behaviors that might indicate intoxication to Board members that she trained. Board members were not trained to seek facts concerning or understand the significance of intoxication, the effect of intoxication on judgment, facts which determined "incapacitation," witness credibility, or other facts and considerations essential to reaching a proper outcome. Ms. Tempesta testified that neither she nor Board members were trained to understand rape kit results and neither understood their significance in the instant proceedings. Tempesta did not understand the significance of questions placed to the rapist during the hearing to test his credibility, and could not have properly trained Board members to understand credibility issues.

Ms. Tempesta conducted pre-hearing meetings separately with Morgan and the alleged rapist.

Tempesta had Morgan sign a form acknowledging their review, which contained a definition of consent prepared by NU's Violence Support Intervention Outreach Network ("ViSION"), which differed from the Code's: "wasted means no [consent]." Although, a reasonable student reading the OSCCR procedures would expect the definition OSCCR provided to her, which had been prepared and published by an NU department, to be followed in disciplinary proceedings,[7] Tempesta

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[7] Defendant NU's University Health and Counseling Services published another definition:

> Consent is an agreement reached by both partners to engage in a specific activity. Engaging in sexual activity with a person who has not given or cannot give her/his consent is an act of sexual violence. In MA, it is illegal to have sex with someone who is incapable of giving consent because: [t]hey are intoxicated, someone who is drunk, . . may not be able to give consent to a sexual act. Submission is not necessarily consent.

Defendant NU's Office of Fraternity and Sorority Life trained fraternity and sorority members that an intoxicated student could not consent to sex, that a student who vomited after drinking alcohol could not consent to sex, and that a person demonstrating behavioral symptoms of intoxication could not consent to sex. Further, the CSC provided a non-exhaustive list of behaviors indicative of incapacity, which did not exclude intoxication. The 2014-15 Student Conduct Code definition of "consent" was revised to state explicitly that a person who was intoxicated could not consent. Notwithstanding that revision, OSCCR staff

considered this definition "propaganda," which the Board did not consider. Tempesta told Morgan that the Board would focus on sexual penetration, ignored the significance of intoxication on the consent issue, and told Morgan that there was no reason to introduce evidence that would be derived from the rape kit analysis (when it concluded), because neither Tempesta nor the Board had been trained to understand rape kit results and did not understand them, and because Tempesta believed that the rape kit results would not prove consent or lack thereof.

During the hearing, Ms. Tempesta "ruled on evidence" in the sense that she determined whether questions would be allowed and whether answers would be required or permitted. She also determined how questions could or would be phrased, going so far as to meet with the alleged rapist and his advisor and Board Chair Katsos outside the hearing room, out of the presence of Ms. Helfman and her advisor, to advise the

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continued to train Student Conduct Board members that intoxication did not render a person incapable of giving consent.

alleged rapist how to phrase questions.[8] Not surprisingly given the inadequate training, the Board did not ask questions about Morgan's intoxication, did not question her condition at and after RA Anderson's Halloween Party, her vomiting at the party and in the rapist's room, and whether the passage of time improved or worsened her condition and intoxication level. The Board did not view the surveillance tapes of Morgan walking to and from the Halloween Party at RA Anderson's, which showed the effects of alcohol on Morgan's motor functions. The Board did not question the contradictions between the rapist's statements to NUPD and the written recantation that his counsel had him submit. When NUPD Detective Sergeant Keeling asked questions about the rapist's alleged use of a condom, which challenged his credibility, Tempesta did not

[8] Morgan identified this *ex parte* communication as one of the procedural errors listed in her second appeal of the Board's decision, which followed defendant Estabrook's improper and unauthorized reversal of the Appeals Board's determination that there had been procedural error and order for a new Conduct Board hearing before a different panel. The audio recording of the hearing where the question was asked was destroyed before the plaintiff's second appeal, which then constituted part of the basis of her second appeal.

understand the purpose of the questions. The Board did not examine medical evidence which demonstrated sexual violence, and did not address those facts and issues during deliberations. Rather, questions focused on the sex acts performed on Morgan. The Board did not pursue facts relevant to determining whether Morgan was capable of consenting to those sex acts. Chair Katsos had not been trained to frame such questions.

During deliberations, the Board ignored the contradictions between the rapist's various statements because it felt that he had "more to lose." The Board "could not come to a more likely than not determination that [he was] responsible[.]" Records of the deliberations and vote were destroyed. Although the CSC required the chair to write the Board's rationale for its decision, a copy of which would be provided to the charged student but not to the complaining student, Katsos testified that the language which appeared on the rationale given to the alleged rapist was not the rationale that she wrote after the Board decision. The rationale is a compilation of the main points discussed

in deliberations. This rationale did not mention "incapacitation" or "intoxication."

Ms. Helfman timely appealed the Board's decision, alleging procedural error and new information which was not available at the time of the hearing (rape kit results). The CSC provided that an Appeals Board comprised of three voting members and the OSCCR director serving *ex officio* without voting rights would review the Board proceedings and decision and decide whether to grant the appeal. "All decisions of the Appeals Board are final."

The Appeals Board reached a "final" decision that the Student Conduct Board committed "procedural error[s] that impaired [Morgan's] right to a fair opportunity to be heard," based upon review of the appeal, the case packet, and the opportunity to review the hearing recording. Defendant Wegmann, *ex officio* member of the Appeals Board, approved the Appeals Board's "final" decision by notifying Ms. Helfman and the rapist that her appeal had been granted. Neither the Appeals Board nor defendant Wegmann's notice identified the procedural error(s) that sustained the

appeal. They were not required to identify them. However, the types of errors Morgan implicitly identified in her appeal (reaching a decision contrary to uncontested evidence of intoxication and incapacity to consent, ignoring the rapist's contradictory statements, improperly weighing credibility and uncontested information, reaching a decision based on considerations of the wrong facts) were the types of mistakes that could sustain an Appeals Board decision that there had been "procedural error(s)" in the Student Conduct Board hearing. OSCCR scheduled a new hearing before a new Student Conduct Board panel.

Two days before the new hearing, defendant Madeleine Estabrook, Associate Vice President for Student Affairs, overruled the Appeals Board, denied the appeal, and cancelled the new Student Conduct Board hearing, alleging that Morgan had not sufficiently stated the grounds of her appeal and the rapist had not been given an opportunity to contest the appeal. However, defendant Estabrook had no authority to overrule the final decision of the Appeals Board. Defendant Estabrook admittedly did not know what

error(s) the Appeals Board found, but even if she disagreed with the Appeals Board's "final" decision, she lacked the authority to overrule it. The CSC gave "the Director/Vice President for Student Affairs, or designee" the right to approve determinations made by the Student Conduct Board, but not by the Appeals Board. The defendants admit that the Student Appeals Process did not give the rapist any right to challenge Morgan's appeal before the Appeals Board reviewed it. The Title IX procedure which allowed a student charged with a Title IX violation to contest an appeal of a Title IX decision before the appeal proceeded did not exist at the time of Morgan's appeal; it was adopted in 2017.[9] Nor did the letter notifying Morgan of her appellate rights tell her that the accused had a right to challenge her appeal before the Appeals Board reviewed it. No one but the rapist was told that a charged student could challenge an appeal before the Appeals Board heard it. Defendant Estabrook only

[9] The defendants did not produce a Title IX policy which purportedly was in effect in the 2013-14 academic year, notwithstanding the plaintiff's request for such documents. The Title IX policy in effect during the 2014-15 academic year did not modify the CSC; it just referenced it.

reviewed the Appeals Board decision because it ordered the defendants to conduct a new Student Conduct Board hearing in a sexual assault case for the first time.

As a sop, defendant Estabrook offered Morgan an "opportunity" to resubmit her appeal. Estabrook demanded an exaggerated level of legal precision from Morgan Helfman, a 19 year old college freshman who had been diagnosed as suffering "acute stress" from having been raped only two months after school started. The only meaningful way to identify precisely which Student Conduct Board questions and/or which testimony of the rapist and/or which procedural decisions by Board Chair Katsos and/or presiding administrator Tempesta constituted "procedural error" to satisfy the demands of defendant Estabrook was to review the audio recording of the Student Conduct Board hearing. However, the recording was destroyed when the appeal period ended with the Appeals Board decision granting the appeal. The "opportunity" Estabrook offered Morgan was meaningless. Morgan did submit a new appeal. A new Appeals Board panel denied it on procedural grounds but allowed her to submit rape kit results to the

original Student Conduct Board in a second hearing which would consider only that new evidence to see whether it would change the original decision.

Inasmuch as neither the Student Conduct Board members nor Tempesta were trained to understand rape kit results,[10] the second hearing before the Board was a futile exercise whose outcome was predetermined. Morgan did not attend the second Board hearing because she felt "traumatized, retraumatized, from the original hearing, and [] didn't want to go through it again." As expected, the Board reaffirmed its decision.

STATEMENT OF THE ISSUES OF LAW RAISED BY THE APPEAL

1. Whether the Superior Court committed reversible error by granting summary judgment to the defendants on

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[10] Properly evaluated, the rape kit results raised credibility issues which should have affected how the Board weighed the conflicting evidence of what occurred in the rapist's room. However, Board members and Tempesta were not trained and did not understand rape kit results. Board Chair Katsos did not understand why the rape kit results were relevant to the Board's deliberations or even what evidence had been collected and why. For just such reasons, the U.S. Department of Education's Office of Civil Rights recommended as "best practices" that forensic evidence should be reviewed by "a trained forensic examiner." U.S. Department of Education Office of Civil Rights, "Dear Colleague Letter," April 4, 2011 at 12.

the plaintiff's negligence and negligent infliction of emotional distress claims, holding that the defendants owed no legal duty to protect resident students from the criminal acts of third parties, based upon the Court's unduly restrictive interpretation of governing law and the facts at bar?

2. Whether the Superior Court committed reversible error by granting summary judgment on the plaintiff's breach of contract and Massachusetts Equal Rights Act claims?

3. Whether the Superior Court committed reversible error by granting summary judgment on the plaintiff's Title IX claim?

All of the issues were properly raised and preserved in the Superior Court.

ARGUMENT

A. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR BY HOLDING THAT THE DEFENDANTS OWED NO LEGAL DUTY TO PROTECT RESIDENT STUDENTS FROM THE CRIMINAL ACTS OF THIRD PARTIES BASED UPON AN UNDULY RESTRICTIVE INTERPRETATION OF GOVERNING LAW AND THE FACTS AT BAR.

The Superior Court took an unduly restrictive view of the leading Massachusetts appellate cases which recognized the "special relationship" between students and their universities, *Nguyen v. Massachusetts Institute of Technology*, 479 Mass. 436, 450 (2018) and *Mullins v. Pine Manor College*, 389 Mass. 47, 51, 56 (1983), all but confining them to their facts and disregarding their pathbreaking significance in the development of tort liability. The Court refused to recognize the foreseeability of sexual assault upon the intoxicated female student, usurping the jury's role in weighing facts and minimizing the defendants' role because of the Court's fixation on the plaintiff's voluntary alcohol consumption.

"Although there is a 'general proposition that there is no duty to protect others from the criminal or wrongful activities of third persons,' there are exceptions to this proposition and many situations to

which it does not apply." *Jupin v. Kask*, 447 Mass. 141, 148 (2006), *quoting Mullins*, 389 Mass. at 50. Massachusetts law developed citing *Mullins*, and now may be summarized as the foregoing proposition does not apply when the defendant's conduct creates a situation in which a third person might avail himself of the opportunity created to commit a crime, the defendant realized or should have realized that his conduct might create such a situation, and the defendant has a relationship with the victim, perpetrator or both.

The SJC recognized "the distinctive relationship between colleges and their students" which imposes an "obligation to protect resident students from the criminal acts of third parties" in *Mullins*, 389 Mass. at 51, 56. Recognizing "the imposition of a duty of care is firmly embedded in a community consensus," 389 Mass. at 51, the SJC held that colleges "must [] act 'to use reasonable care to prevent injury' to their students 'by third persons whether their acts were accidental, negligent, or intentional.'" *Id.*, 389 Mass. at 54, *quoting Carey v. New Yorker of Worcester, Inc.*, 355 Mass. 450, 452 (1969). The Court confirmed

the "special relationship" between a school and its students, Restatement (Third) of Torts, §40(b)(5), in *Nguyen*, 479 Mass. at 450. The SJC "conclude[d] that a university has a special relationship with a student and a corresponding duty to take reasonable measures [even] to prevent his or her suicide in [identified] circumstances," *id.* at 451, a duty heretofore limited.

Nguyen recognized that universities "sponsor and have special relationships with their students regarding … potentially dangerous activities," 479 Mass. at 450, involve themselves "widely in[] aspects of student life," are property owners "responsible for their students' physical safety on campus," *id.*, and "provide a discrete *community* for their students." *Id.* at 451 (emphasis in original). "Students are adults but often young and vulnerable; their right to privacy and their desire for independence may conflict with their immaturity and need for protection." *Id.* at 452.

Trial court decisions which refused to impose a duty on a university to prevent students from consuming drugs or alcohol did not involve situations where the University's employees participated in the illegal

consumption and provision. The misconduct of NU's employees distinguishes the instant case from *Bash v. Clark University*, 22 Mass. L. Rptr. 84 at *4 (Worcester Super. Ct. 2006), *DeStefano v. Endicott College*, 34 Mass. L. Rptr. 579 at *2 (Essex Super. Ct. 2017) and *Blavackas v. Worcester State College*, 6 Mass. L. Rptr. 23, 1996 Mass. Super. LEXIS 295 at *2, *8 (Worcester Super. Ct. 1996), where the allegedly negligent college employees were not present when students consumed drugs or alcohol, and from *Doherty v. Emerson College*, 2017 WL 4364406 (D.Mass. 2017) and *Doe v. Emerson College*, 153 F.Supp.3d 506 (D.Mass. 2015) where no college employees were involved in the incidents which gave rise to the claims. Moreover, the alleged sexual assaults in the last case occurred off campus on unaffiliated properties. 153 F.Supp.3d at 514-15.

Here, NU employees Anderson and Ward invited Ms. Helfman to a party where alcohol was to be brought and shared by minors, where Morgan was served alcohol until intoxicated and sick, on NU property, during RA Anderson's on-duty hours, at an event limited to NU students invited by NU employees, in which those

employees allowed and participated in illegal alcohol consumption and drinking games in violation of NU's CSC, which the employees were hired and trained to enforce. NU's employees were "on duty" with respect to some, if not all, of their employment responsibilities when they set and hosted the party. NU's employees did not intervene or enforce NU's CSC and did not report violations. Neither the NU employees at the party nor the one who proctored International Village when Morgan returned visibly intoxicated escorted by her rapist, initiated notification protocols to ensure that qualified professionals determined whether the intoxicated student needed assistance. The University can be held "vicariously liable for the torts of [] a student employee committed within the scope of that employment." *Kavanagh v. Trustees of Boston Univ.*, 440 Mass. 195, 198 n.4 (2003). The defendants ratified Anderson's and Ward's misconduct by refusing to discipline them for their CSC and contract violations.

The defendants had and breached legal duties to train and supervise their employees to ensure that they understood and carried out their obligations. *Roe No.*

1 v. Children's Hospital Medical Center, 469 Mass. 710, 714-15 (2014); *Foster v. The Loft, Inc.*, 26 Mass. App. Ct. 289, 290-91 (1988); *Doe v. Brandeis Univ.*, 177 F.Supp.3d 561, 613-14 (D. Mass. 2016); *supra* at 13-17.

The facts distinguish this case from cases where there was no evidence of employee knowledge, participation, or ability to control alcohol, as there was here.[11] The law the Superior Court cited does not accurately reflect Massachusetts law on these facts.

Although the defendants did not raise the issue, the Superior Court held the rape unforeseeable as a matter of law, calling the circumstances leading to the rape "commonplace[,]" "routine and unexceptional." Decision at 19 and 21. Indeed, it is the "routine and unexceptional" link between college alcohol abuse and rape that makes rape a foreseeable consequence of campus intoxication, and alcohol abuse "a major public health problem" identified by U.S. college presidents

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[11] To the extent *Bash* and *DeStefano* considered the imposition of a duty of care "impractical," "unreasonable" or "unrealistic," *DeStefano*, 34 Mass. L. Rptr. 579 at *3, *5, *Bash*, 22 Mass. L. Rptr. 84 at *4, *5, this Court ruled in *Nguyen*, 479 Mass. at 455-56, that although "[t]he burden on the university is not insubstantial," other considerations demand recognition of the duty.

"as their number one campus-life problem." U.S. Dep't. Of Health & Human Services Task Force of the National Advisory Council on Alcohol Abuse & Alcoholism, HIGH RISK DRINKING IN COLLEGE: WHAT WE KNOW AND WHAT WE NEED TO LEARN v (April 2002) ("Task Force"). Studies show that the majority of the one out of five undergraduate women who experience attempted or completed sexual assaults are then incapacitated due to substance use, primarily alcohol. *Infra.*, 53-55. The Superior Court decision leaves a large percentage of Massachusetts' college population, overwhelmingly female, at "greater risk of sexual assault." Task Force at 16.

Measures NU took to address campus alcohol abuse and sexual assault show that the dangers were not only foreseeable but were "actually foreseen." *Mullins*, 389 Mass. at 55. Materials NU distributed to students and parents recognized the link between alcohol and rape. "[D]efendant reasonably could foresee that [it] would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from the failure to do so." *Nguyen*, 479 Mass. at 452, *quoting Irwin v. Ware*, 392 Mass. 745, 756 (1994).

The Superior Court applied the same rationale to dismiss the negligence and negligent infliction of emotional distress claims against defendants NU, Jose, and Antonucci, and similar reasoning against the other defendants. As Ms. Helfman demonstrated facts to show the defendants' negligence, this Court should reverse the Superior Court, recognize the duty of care, and reinstate those claims.

B. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT ON THE PLAINTIFF'S BREACH OF CONTRACT AND MASSACHUSETTS EQUAL RIGHTS ACT CLAIMS.

The Superior Court grudgingly accepted NU's position that it had a contract with Ms. Helfman, challenged Morgan's right to claim contract breach due to CSC violations because "the Court questions whether a *complainant* ever has an affirmative right sounding in contract to challenge a college's process for adjudging and disciplining an accused student," Decision at 30 n.10, and held that NU did not breach. The Court ignored explicit CSC language and allowed defendants NU and Estabrook to create requirements that did not exist in the written contract and concoct false "appellate

errors" that the Appeals Board, the only authority the CSC authorized to review the appeal, had not found.

The Trial Court decision violated the "reasonable expectation" standard for interpreting university-student contracts and principles of basic fairness. *Schaer v. Boston Univ.*, 432 Mass. 474, 478, 481 (2000), *quoting Cloud v. Trustees of Boston Univ.*, 720 F.2d 721, 724, 725 (1st Cir. 1983); *Doe v. Brandeis Univ.*, 177 F.Supp.3d at 601. The defendant "could not assign to the contract the meaning he now claims it has" because the contract language does not provide for the procedure alleged. *Schaer*, 432 Mass. at 479. "[I]f the university puts forth rules of procedure to be followed in disciplinary hearings, the university should be legally obligated to follow those rules. To do otherwise would allow [NU] to make promises to its students that are nothing more than a 'meaningless mouthing of words.'" *Id*, 432 Mass. at 485 (Ireland, J., *dissenting*), *quoting Tedeschi v. Wagner College*, 49 N.Y.2d 652, 662, 427 N.Y.S.2d 760, 404 N.E.2d 1302 (1980).

NU breached the contract by failing to train Conduct Board members to properly adjudicate issues brought for resolution, allowing defendant Estabrook to reverse the "final" decision of the Appeals Board without authority, deny Morgan the CSC procedural rights NU provided which she reasonably expected, and afford the rapist "special treatment," *Doe v. Trustees of Boston College*, 892 F.3d 67, 87 (1st Cir. 2018), which the rules did not allow.

The Superior Court dismissed Ms. Helfman's MERA claims for the same reasons it dismissed her contract claims. Both should be reinstated.

C. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT ON THE PLAINTIFF'S TITLE IX CLAIM.

The Superior Court dismissed Ms. Helfman's Title IX claim, holding that her psychologic injuries from NU's response to her rape do not constitute Title IX damages, her vulnerability to ongoing harassment is not actionable unless her rapist continues to abuse her, the disciplinary proceedings were proper, and Estabrook's appellate interference was fair and appropriate. To reach these conclusions, the Court

ignored 12 decisions cited or referenced in a required briefing, which hold that a student sexual assault victim may contest improperly conducted university disciplinary proceedings against her abuser. The Tenth Circuit upheld one of the cited cases days after the decision at bar, writing: "The Supreme Court has already answered the legal question presented here [and by the Superior Court], ruling, as Plaintiffs allege, that a funding recipient's 'deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it.'" *Weckorst v. Kansas State Univ.*, No. 17-3208, *aff'd. sub. nom. Farmer v. Kansas State Univ.*, 918 F.3d 1094, 1097 (10th Cir. 2019), citing *Davis v. Monroe City Bd. of Ed.*, 526 U.S. 629, 644-45 (1999).

The Superior Court viewed Ms. Helfman's damages as insufficient to trigger Title IX, although her damages were of the type suffered by many of the plaintiffs mentioned. The decision treats the only damages worth considering as those suffered by the rapist from the accusation, effectively ruling that NU satisfied Title IX simply by giving Morgan a forum to voice her

complaints. Title IX decisions in disciplinary cases are to the contrary. *See e.g., Simpson v. Univ. Colorado Boulder*, 500 F.3d 1170, 1178 (10th Cir. 2007); *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994), *endorsed by Doe v. Trustees*, 892 F.3d at 90. *See also Doe v. Columbia Univ.*, 831 F.3d 46, 57 (2d Cir. 2016). The decision should be reversed.

STATEMENT OF REASONS WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

Since the creation of the Appeals Court, it has been the policy of Massachusetts appellate courts to ensure that each appeal receives a single, complete review. D. Johnedis, *Massachusetts Two Court Appellate System: A Decade of Development*, 67 MASS. L. REV. 103, 110 (1982). In accordance with the policy reflected in G.L. c. 211A, §10(A) and Mass. R. App. P. 11(a), this Court has assumed review of most cases raising novel questions of law and matters of first impression. *Id.*; B. Finkelman, *Further Appellate Review in Civil Cases: How the Court Decides What Cases to Take*, 69 MASS. L. REV. 108, 116 n. 8 (September 1984). The case at bar satisfies the guidelines of G.L. c. 211A, §10(A)(1) and

(3), and Mass. R. App. P. 11(a)(1) and (3). Therefore, this Court should assume direct appellate review.

THE QUESTIONS RAISED ON APPEAL ARE OF SUCH PUBLIC INTEREST THAT JUSTICE REQUIRES A FINAL DETERMINATION BY THE SUPREME JUDICIAL COURT.

The Superior Court decision, holding rape an unforeseeable consequence of campus alcohol abuse, places female college students without the protection afforded by the "special relationship" of students and their universities recognized in *Mullins* and *Nguyen*, and at "greater risk of sexual assault." C.P. Krebs, et. als., *The Campus Sexual Assault (CSA) Study*, NAT'L. INST. JUST. 1-1 (October 2007) ("CSA"). The defendants did not proffer such arguments in support of their summary judgment motion. Documents published by NU recognized the relationship between campus rape and alcohol abuse. R. Turrisi, *A Parent Handbook for Talking With College Students About Alcohol*, NORTHEASTERN U. O.P.E.N. (2010) at 7, 17, 18, 21, 24 ("Over half of all college sexual assaults involve alcohol and alcohol is the number one drug used to facilitate sexual assault. … [C]onsent is not valid if someone is intoxicated or incapacitated by alcohol.");

NORTHEASTERN U. O.P.E.N., *Alcohol and Sex* (undated). The measures adopted by the defendants to prevent alcohol abuse at NU and to protect students from its consequences would make no sense were the relationship not foreseeable.

The Superior Court decision discourages universities from adopting and enforcing measures to protect students from alcohol abuse and its consequences, including alcohol enabled rapes. By limiting *Mullins* and *Nguyen* and eliminating liability for campus rapes except in a handful of unusual circumstances (stranger rapes resulting from breaches of negligently designed and maintained campus physical security systems), the Superior Court has immunized universities from negligence liability and eliminated their incentive to adopt and implement safety measures to reduce campus alcohol abuse and campus rapes. The decision runs counter to decisions this Court reached when it successfully sought to reduce the number of alcohol related highway deaths by holding bars and public agencies liable for negligently implementing alcohol laws. *See e.g., Nunez v. Carrabba's Italian*

Grill, Inc., 448 Mass. 170, 175-76 (2007); *Irwin v. Ware*, 392 Mass. 745 (1994); *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 501 (1968).

This Court has not examined the foreseeability of rape as a proximate result of campus alcohol abuse. The Superior Court relied upon federal trial court decisions and a California intermediate appellate decision. Almost twenty years ago, our Appeals Court refused to hold a tavern liable for the rape of an intoxicated patron, rejecting "the inference, simply from the general vulnerability of drunks, that they will likely be targeted by criminals … here, a rapist" because recognizing that foreseeability would acknowledge the reality "that most persons who drink alcoholic beverages are, to some extent, temporarily impaired, even if only slightly" and would premise liability upon the jury's determination of how impaired a server of alcohol had allowed its consumer to become. *Westerback v. Harold F. LeClair Co.*, 50 Mass. App. Ct. 144, 148, *further app. rev. denied*, 432 Mass. 1111 (2000). Yet, since *Westerback*, this Court has continued to review archaic decisions based on status

and courts' refusal to recognize the reality of modern conditions and the need to encourage safety measures enforceable through tort law. *See Nguyen* (holding that university may be held liable for student suicide in certain circumstances); *Papadopolous v. Target Corp.*, 457 Mass. 368, 369 (2010)(discarding natural/unnatural snow and ice accumulation rule).

"It is estimated that each year … 70,000 college students aged 18 to 24 are victims of alcohol-related sexual assault or date rape." Task Force at 13, *citing* R.W. Hingson, et. als., *Magnitude of Alcohol Related Mortality and Morbidity Among U.S. College Students Ages 18-24*, 63(2) J. STUD. ALCOHOL 136-144 (2002). "At least 50 percent of college student sexual assaults are associated with alcohol use. Typically, both parties in such situations have been drinking when the sexual assault occurs. Alcohol-related sexual assault is underreported." Task Force at vii, 15 *citing* 12 studies. "Sexual assaults most frequently occur among individuals who know each other, in the context of a … party[,] at the woman's or man's home (e.g., residence hall …)," *id.* at 16, exactly the context in this case.

"[S]tudies suggest that university women are at greater risk [of alcohol enabled sexual assault] than women of a comparable age in the general population." CSA at 1-1.

> One out of five undergraduate women experience an attempted or completed sexual assault during their college years, with:
>
> • the majority of sexual assaults occuring when women are incapacitated due to their use of substances, primarily alcohol;
>
> • freshman and sophomores at greater risk for victimization than juniors and seniors; and
>
> • the large majority of victims of sexual assault being victimized by men they know and trust, rather than strangers.

Id. at xviii.

As the Superior Court's use of the words "commonplace" "routine and unexceptional" suggest, "[a]lcohol-related sexual assault is a common occurrence on college campuses." Task Force at 15. For that reason, it is far from "unforeseeable." Indeed, the Task Force study quoted was prepared to assist college presidents and administrators address the problem a decade before Morgan Helfman was raped. In the year 2000, the Justice Department estimated that 35 of every 1,000 undergraduate females were sexually

assaulted annually, equating to 3,500 female Boston college students annually. I. Seidman & S. Vickers, *Beyond Prosecution: Sexual Assault Victim's Rights in Theory and Practice Symposium*, 38 SUFFOLK U. L. REV. 478 (2005), *citing* B. Fisher, et. al. U.S. Dep't. Just., THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 23 (2000). This is "a major public health problem." Task Force at v. The Superior Court decision exacerbates it. The problem is of such public importance that this Court should address it, rather than an Appeals Court panel.

THE INSTANT APPEAL RAISES ISSUES OF FIRST IMPRESSION AND NOVEL QUESTIONS OF LAW.

The instant action is the first Massachusetts case to address the relationship between campus alcohol abuse and rape, an issue not raised by the defendants' summary judgment submissions but gratuitously raised by the Superior Court, relying upon foreign decisions. The issue is one of first impression in this Commonwealth and of great public importance.

Further, the Superior Court commented several times upon the lack of appellate guidance on issues at bar. Decision at 29 n.9 (questioning whether college

handbooks give students contractual rights), 30 n.10 (questioning whether a rape victim ever may challenge a college's process for adjudging and disciplining an accused student rapist), 35-37 (same under Title IX). In the absence of binding precedent, the Superior Court reached extreme results, at odds with several of this Court's decisions, including *Mullins*, *Nguyen*, and *Schaer*, 432 Mass. at 485 (Ireland, J., *dissenting*), and numerous Title IX decisions.

Moreover, the Title IX issues raised in the Superior Court and inadequately addressed above due to lack of space, are issues of first impression in Massachusetts appellate courts. Indeed, they are novel in many federal circuits. This Court should resolve such issues.

CONCLUSION

For all of the above reasons, Morgan Helfman, the Plaintiff-Appellant, respectfully requests this Honorable Court to assume direct appellate review of the instant appeal.

Respectfully Submitted,
The Plaintiff-Appellant,
By her Attorneys,

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Dated: July 18, 2019

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

APPEALS COURT
No. 19-P-779

MORGAN HELFMAN,
Plaintiff

v.

NORTHEASTERN UNIVERSITY, KATHERINE ANTONUCCI, ROBERT JOSE, BRIANA R. SEVIGNY, MARY WEGMANN & MADELEINE ESTABROOK,
Defendants

PLAINTIFF-APPELLANT'S CERTIFICATIONS

CERTIFICATION OF COMPLIANCE

I hereby certify that the above Application for Direct Appellate Review complies with the rules of court that pertain to the filing of such applications, including, but not limited to: Mass. R. App. P. 16(a)(13), 16(e), 18, 20, and 21, subject to the Plaintiff-Appellant's Motion to Exceed Page Limit By Approximately One Page. Compliance with Mass. R. App. P. 20 was determined by using Courier New 12 point monospaced font, totaling approximately 11⅓ pages of non-excluded text.

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Skip to main content

1684CV03335 Helfman, Morgan vs. Sanders, Paris et al

- Case Type
- Torts
- Case Status
- Open
- File Date
- 10/31/2016
- DCM Track:
- F - Fast Track
- Initiating Action:
- Other Negligence - Personal Injury / Property Damage
- Status Date:
- 10/31/2016
- Case Judge:
- Next Event:

All Information | Party | Event | Tickler | Docket | Disposition

Docket Information

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
10/31/2016	Attorney appearance On this date Mark F Itzkowitz, Esq. added for Plaintiff Morgan Helfman		
10/31/2016	Case assigned to: DCM Track F - Fast Track was added on 10/31/2016		
10/31/2016	Original civil complaint filed.	1	
10/31/2016	Civil action cover sheet filed. ($25,000.00)	2	
10/31/2016	Demand for jury trial entered.		
01/30/2017	Service Returned for Defendant Wegmann, Mary: Service made at last and usual;	3	
01/30/2017	Service Returned for Defendant Sevigny, Briana R: Service made at last and usual;	4	
01/30/2017	Service Returned for Defendant Sanders, Paris: Service made at last and usual;	5	
01/30/2017	Service Returned for Defendant Northeastern University: Service through person in charge / agent;	6	
01/30/2017	Service Returned for Defendant Jose, Robert: Service made at last and usual;	7	
02/08/2017	Defendants Paris Sanders, Robert Jose, Briana R Sevigny, Mary Wegmann, Madeleine Estabrook, Northeastern University's Joint Motion to file a response of pleading	8	
02/13/2017	Attorney appearance On this date Daryl J Lapp, Esq. added for Defendant Northeastern University		
02/13/2017	Attorney appearance On this date Elizabeth H. Kelly, Esq. added for Defendant Northeastern University		
02/13/2017	Attorney appearance On this date Daryl J Lapp, Esq. added for Defendant Paris Sanders		
02/13/2017	Attorney appearance On this date Elizabeth H. Kelly, Esq. added for Defendant Paris Sanders		
02/13/2017	Attorney appearance On this date Daryl J Lapp, Esq. added for Defendant Robert Jose		
02/13/2017	Attorney appearance On this date Elizabeth H. Kelly, Esq. added for Defendant Robert Jose		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
02/13/2017	Attorney appearance On this date Daryl J Lapp, Esq. added for Defendant Briana R Sevigny		
02/13/2017	Attorney appearance On this date Elizabeth H. Kelly, Esq. added for Defendant Briana R Sevigny		
02/13/2017	Attorney appearance On this date Daryl J Lapp, Esq. added for Defendant Mary Wegmann		
02/13/2017	Attorney appearance On this date Elizabeth H. Kelly, Esq. added for Defendant Mary Wegmann		
02/13/2017	Attorney appearance On this date Daryl J Lapp, Esq. added for Defendant Madeleine Estabrook		
02/13/2017	Attorney appearance On this date Elizabeth H. Kelly, Esq. added for Defendant Madeleine Estabrook		
02/14/2017	Endorsement on Motion to Extend Time to Answer or Otherwise Plead (#8.0): ALLOWED to March 10, 2017 (dated 2/10/17) notice sent 2/13/17		Image
02/21/2017	Attorney appearance On this date Kenneth I Kolpan, Esq. added for Plaintiff Morgan Helfman		
03/10/2017	Received from Defendants : Answer with claim for trial by jury;	9	Image
08/07/2017	Plaintiff Morgan Helfman's Joint Motion to Extend Tracking Order Deadlines Applies To: Helfman, Morgan (Plaintiff); Sanders, Paris (Defendant); Jose, Robert (Defendant); Sevigny, Briana R (Defendant); Wegmann, Mary (Defendant); Estabrook, Madeleine (Defendant); Northeastern University (Defendant)	10	
08/09/2017	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 08/09/2017 10:31:02		
08/10/2017	Endorsement on Motion to Extend Tracking Order Deadlines (#10.0): ALLOWED The clerk shall issue an Amended Tracking Order, enlarging the deadlines to complete discovery and serve Rule 56 motions by four months, respectively (dated 8/8/17) notice sent 8/10/17 Judge: Gordon, Hon. Robert B		Image
08/28/2017	Event Result: The following event: Final Pre-Trial Conference scheduled for 01/10/2018 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties		
08/31/2017	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 08/31/2017 09:15:21		
10/12/2017	Application for Defendants Northeastern University, Paris Sanders, Robert Jose, Briana R. Sevigny, Mary Wegmann and Madeline Estabrook for hospital records from Beth Israel Deaconess Medical Center, Christine Civiletto, PHD, Jennifer Berz, PHD, Boston Area Rape Crisis Center, Advocare Moorestown Pediatrics, Virtua Memorial Hospital and Teresa C. McNally, CSW, with affidavit of notice in compliance with SC rule 13. filed 10/2/2017 and allowed by the court (Hallal,J.,) 10/11/2017 (orders shall follows) Applies To: Helfman, Morgan (Plaintiff)	11	
10/12/2017	ORDER issued on application/motion (#11.0) to allow to inspect hospital records regarding Morgan Helfman (DOB 04/11/1995) from Beth Israel Deaconess Medical Center. entered 10/11/2017 Judge: Hallal, Hon. Mark A	12	Image
10/12/2017	ORDER issued on application/motion (#11.0) to allow to inspect hospital records regarding Morgan Helfman (DOB 04/11/1995) from Christine Civiletto, PHD,. entered 10/11/2017 Judge: Hallal, Hon. Mark A	13	Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
10/12/2017	ORDER issued on application/motion (#11.0) to allow to inspect hospital records regarding Morgan Helfman (DOB 04/11/1995) from Jennifer Berz, PHD,. entered 10/11/2017 Judge: Hallal, Hon. Mark A	14	Image
10/12/2017	ORDER issued on application/motion (#11.0) to allow to inspect hospital records regarding Morgan Helfman (DOB 04/11/1995) from Boston Area Rape Crisis Center. entered 10/11/2017 Judge: Hallal, Hon. Mark A	15	Image
10/12/2017	ORDER issued on application/motion (#11.0) to allow to inspect hospital records regarding Morgan Helfman (DOB 04/11/1995) from Advocare Moorestown Pediatrics. entered 10/11/2017 Judge: Hallal, Hon. Mark A	16	Image
10/12/2017	ORDER issued on application/motion (#11.0) to allow to inspect hospital records regarding Morgan Helfman (DOB 04/11/1995) from Virtua Memorial Hospital. entered 10/11/2017 Judge: Hallal, Hon. Mark A	17	Image
10/12/2017	ORDER issued on application/motion (#11.0) to allow to inspect hospital records regarding Morgan Helfman (DOB 04/11/1995) from Teresa C. McNally, CSW. entered 10/11/2017 Judge: Hallal, Hon. Mark A	18	Image
10/30/2017	Attorney appearance On this date Katherine A Guarino, Esq. added for Defendant Paris Sanders		
10/30/2017	Attorney appearance On this date Katherine A Guarino, Esq. added for Defendant Robert Jose		
10/30/2017	Attorney appearance On this date Katherine A Guarino, Esq. added for Defendant Briana R Sevigny		
10/30/2017	Attorney appearance On this date Katherine A Guarino, Esq. added for Defendant Mary Wegmann		
10/30/2017	Attorney appearance On this date Katherine A Guarino, Esq. added for Defendant Madeleine Estabrook		
10/30/2017	Attorney appearance On this date Katherine A Guarino, Esq. added for Defendant Northeastern University		
11/20/2017	Plaintiff Morgan Helfman's Joint Motion to Extend Tracking Order Deadlines	19	
11/22/2017	Event Result: Judge: Hallal, Hon. Mark A The following event: Final Pre-Trial Conference scheduled for 05/16/2018 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties		
11/22/2017	The following form was generated: Notice to Appear Sent On: 11/22/2017 14:46:33		
11/22/2017	Endorsement on Motion to extend tracking order deadlines (#19.0): ALLOWED Notice Sent : 11/24/2017 Judge: Hallal, Hon. Mark A		Image
04/17/2018	Plaintiff Morgan Helfman's Motion to extend tracking order deadlines (w/opposition)	20	
04/17/2018	Affidavit of Daryl J. Lapp	21	Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
04/23/2018	Plaintiff Morgan Helfman's Request for leave to file reply longer than five pages to opposition to motion to extend tracking order deadlines Notice Sent: 04/19/2018 (Dated: 04/18/2018) DENIED Plaintiff shall file a reply brief of five (5) pages. Judge: Squires-Lee, Hon. Debra A	22	
05/07/2018	Endorsement on Motion to extend tracking order deadlines (#20.0): Other action taken After review, the court will not grant a five month extension in the tracking order where there have been multiple extensions to date. The tracking order will be extended Only as follows with No Further Extensions. Discovery to be completed by May 31, 2018. Motions for Summary Judgment served by June 29, 2018 and filed by July 27, 2018. Dated: 4/25/18 Notice sent 5/4/18 Judge: Squires-Lee, Hon. Debra A		Image
05/07/2018	Event Result: Judge: Squires-Lee, Hon. Debra A The following event: Conference to Review Status scheduled for 05/22/2018 02:00 AM has been resulted as follows: Result: Canceled Reason: Joint request of parties		
05/07/2018	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 05/07/2018 15:35:50		
05/08/2018	Plaintiff(s) Morgan Helfman motion filed for Letters Rogatory (w/o opposition)	23	
05/10/2018	Endorsement on Motion for (#23.0): ALLOWED issuance of letters rogatory Allowed without opposition Letters rogatory to issue Notice sent 5/15/18 Judge: Squires-Lee, Hon. Debra A		Image
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05/10/2018	Letters Rogatory Deposition of Patrick Ward Notice Sent 5/15/18 Judge: Squires-Lee, Hon. Debra A Judge: Squires-Lee, Hon. Debra A	27	Image
05/10/2018	Letters Rogatory Deposition of Stephanie Demetra Katsos Notice sent 5/15/18 Judge: Squires-Lee, Hon. Debra A Judge: Squires-Lee, Hon. Debra A	28	Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
05/10/2018	Letters Rogatory Deposition of Jennifer L Cordero Notice sent 5/15/18 Judge: Squires-Lee, Hon. Debra A Judge: Squires-Lee, Hon. Debra A	29	Image
05/10/2018	Letters Rogatory Deposition of Catherine A Maronski Notice sent 5/15/18 Judge: Squires-Lee, Hon. Debra A Judge: Squires-Lee, Hon. Debra A Judge: Squires-Lee, Hon. Debra A	30	Image
05/17/2018	Event Result: Judge: Squires-Lee, Hon. Debra A The following event: Final Pre-Trial Conference scheduled for 08/01/2018 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties		
05/17/2018	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 05/17/2018 09:41:48		
05/24/2018	Event Result: Judge: Gordon, Hon. Robert B The following event: Final Pre-Trial Conference scheduled for 09/10/2018 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties		
05/24/2018	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 05/24/2018 09:14:27		
05/24/2018	Morgan Helfman's Motion for leave to substitute newly identified Administrator, Katherine Antonucci, for Defendant Paris Sanders (w/partial opposition)	31	
05/25/2018	Plaintiff Morgan Helfman's EMERGENCY Motion to shorten the time to formally notice depositions and serve deposition subpoenas	31.1	Image
05/29/2018	Defendants Northeastern University's EMERGENCY Motion to quash Subpoenas and for a Protective Order and Opposition to Plaintiff's emergency motion to shorten the time to formally notice depositions and serve deposition subpoenas	32	
05/29/2018	Affidavit of Katherine A. Guarino	33	
05/30/2018	Endorsement on Motion to shorten the time to formally notice depositions and serve deposition subpoenas (#31.1): Other action taken Allowed in part and Denied in part. See Order dated May 25, 2018. Dated: 5/25/18 Notice sent 5/29/18 Judge: Squires-Lee, Hon. Debra A Applies To: Helfman, Morgan (Plaintiff)		
05/30/2018	Endorsement on Motion to quash subpoenas and for a protective order and opposition to plaintiff's emergency motion to shorten the time to formally notice depositions and serve deposition subpoenas (#32.0): Other action taken Allowed in part and Denied in part. See Order dated May 25, 2018 Notice sent 5/29/18 Judge: Squires-Lee, Hon. Debra A Applies To: Helfman, Morgan (Plaintiff)		Image
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05/31/2018	Endorsement on Motion for (#31.0): ALLOWED lv to amend complaint At this time the court cannot conclude as a matter of law that Ms Antonucci did not owe a duty of care to the plff or that her alleged failure to carry out her duties did not cause the plff's harm This ruling does not prejidoce deft right to bring a 5/29 property supported motion for summary judgment on this issue Amended Complaint shall be deemed to be filed as of today's date Notice sent 6/1/18 Judge: Squires-Lee, Hon. Debra A		Image
05/31/2018	Amended: amended complaint filed by Morgan Helfman & jury demand	35	Image
06/07/2018	General correspondence regarding Subpoena Duces tecum- out of County	36	Image
06/11/2018	Received from Defendant Northeastern University: Answer with claim for trial by jury;	37	Image
07/27/2018	Defendant Northeastern University's Motion for summary judgment, MRCP 56 in its favor on Count I, IV, V, VI, VII, VIII, and IX of the Amended Complaint (w/opposition)	38	
07/27/2018	Defendants Katherine Antonucci (as amended), Robert Jose, Briana R Sevigny, Mary Wegmann, Madeleine Estabrook's Motion for summary judgment, MRCP 56 in their favor on Counts II, III, VI, VII and VIII of the Amended Complaint (w/opposition)	39	
07/27/2018	Attorney appearance On this date Daryl J Lapp, Esq. added for Defendant Katherine Antonucci (as amended)		
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07/27/2018	Defendants Northeastern University, Katherine Antonucci (as amended), Robert Jose, Briana R Sevigny, Mary Wegmann, Madeleine Estabrook's EMERGENCY Motion to strike Plaintiff's Summary Judgment Papers in their Entirety	40	
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08/03/2018	Endorsement on Motion to Strike Plaintiff's Summary Judgment Papers in their Entirety (#40.0): Other action taken See Procedural Order of today's date (dated 8/2/18) notice sent 8/3/18 Judge: Gordon, Hon. Robert B		Image
08/03/2018	ORDER: Procedural Order (see P#42) (dated 8/2/18) notice sent 8/3/18 Judge: Gordon, Hon. Robert B	42	Image
09/06/2018	Event Result:: Final Pre-Trial Conference scheduled on: 10/03/2018 02:00 PM Has been: Rescheduled For the following reason: Joint request of parties Hon. Robert B Gordon, Presiding Appeared: Staff: Paul Kenneally, Assistant Clerk		
09/06/2018	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 09/06/2018 11:22:41		
09/07/2018	General correspondence regarding Letter to the court from the Defendants requesting leave to file memorandum up to 35 pages Before approving this request, the Court wishes to be advised as to the parties' intentions regarding the length of the Rule 9A(b)(5) statement. The court expects that this statement will be dramatically reduced in length before it will entertain the giving of leave to file a lengthier legal memoranda (dated 9/6/18) notice sent 9/7/18 Judge: Gordon, Hon. Robert B	43	Image
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11/05/2018	Endorsement on Motion to extend the time for plaintiff to respond to defendant's motion for summary judgment; (#44.0): ALLOWED dated(10/31/18) notice sent 11/05/18 Judge: Squires-Lee, Hon. Debra A		Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
11/30/2018	Plaintiff Morgan Helfman's Request for Leave to File 40 page Memorandum in Opposition to Defendants' Motion for Summary Judgment: ALLOWED (dated 11/29/18) notice sent 11/30/18	45	Image
12/07/2018	Defendants Northeastern University, Katherine Antonucci (as amended), Robert Jose, Briana R Sevigny, Mary Wegmann, Madeleine Estabrook's Motion for summary judgment, MRCP 56 on Counts I, IV, V, VII, and VIII of the Amended Complaint, as to Northeastern, and on Counts II, III, VII, and VIII as to the Individual Defendants	46	
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12/07/2018	Brief filed: Reply In Support of Defendants' Motion for Summary Judgment Applies To: Jose, Robert (Defendant); Sevigny, Briana R (Defendant); Wegmann, Mary (Defendant); Estabrook, Madeleine (Defendant); Northeastern University (Defendant); Antonucci (as amended), Katherine (Defendant)	48	
12/11/2018	The following form was generated: Notice to Appear Sent On: 12/11/2018 09:59:17		
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01/29/2019	Event Result:: Rule 56 Hearing scheduled on: 01/29/2019 02:00 PM Has been: Held as Scheduled Hon. Robert B Gordon, Presiding Appeared: Staff: Paul Kenneally, Assistant Clerk		
02/21/2019	ORDER: Procedural Order (dated 2/19/19) notice sent 2/21/19	49	Image
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03/12/2019	MEMORANDUM & ORDER: OF DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT: CONCLUSION AND ORDER - For the foregoing reasons, Defendants' Motion for Summary Judgment is ALLOWED. Judgment shall enter for the Defendants on all claims. SO ORDERED. Dated: March 8, 2019 Notice sent 3/12/19 (See P#52 for complete decision) Judge: Gordon, Hon. Robert B	52	Image
03/14/2019	SUMMARY JUDGMENT for Defendant(s), Northeastern University, Katherine Antonucci (as amended), Robert Jose, Briana R Sevigny, Mary Wegmann, Madeleine Estabrook against Plaintiff(s), Morgan Helfman, without statutory costs.It is ORDERED and ADJUDGED: Defendants' Motion for Summary Judgment is ALLOWED. Judgment shall enter for the Defendants on all claims entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d)	53	Image
04/05/2019	Notice of appeal filed. Notice sent 4/5/19 Applies To: Helfman, Morgan (Plaintiff)	54	Image
04/19/2019	Plaintiff's Certification that Plaintiff has not and will not order Transcript	55	Image
05/09/2019	Notice of assembly of record sent to Counsel		
05/09/2019	Notice to Clerk of the Appeals Court of Assembly of Record		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
05/29/2019	Notice of Entry of appeal received from the Appeals Court In accordance with Massachusetts Rule of Appellate Procedure 10(a)(3), please note that the above-referenced case (2019-P-0779) was entered in this Court on May 28, 2019.	56	Image

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION
NO. 16-03335-C

MORGAN HELFMAN
Plaintiff

v.

NORTHEASTERN UNIVERSITY, KATHERINE ANTONUCCI,
ROBERT JOSE, BRIANA R. SEVIGNY,
MARY WEGMANN & MADELEINE ESTABROOK
Defendants

PROCEDURAL ORDER

In connection with its consideration of the Defendants' pending Motion for Summary Judgment, the Court confronts an issue presented in the case that has not been briefed by either side. Accordingly, the Court here requests the parties submit supplemental briefing addressed to the following question.

Many of the Plaintiff's claims in this case – whether they arise in contract or tort – depend for their substance on the allegation that Northeastern (and its individual administrators) failed to apply the University's Code of Student Conduct appropriately, conducted a flawed investigation thereunder, erred in the manner in which they carried out the alleged assailant's disciplinary hearing(s), and ultimately reached an erroneous conclusion in exonerating this individual of the sexual offense of which he had been accused. The Court is moved to ask whether, and on what theory of law, an *accuser* such as the Plaintiff has standing to press these kinds of claims. There

would appear to be a substantial argument that, beyond the University's contractual duty to afford an accuser a place to bring her complaint and a process for having such complaint addressed, all of the rights to due process conferred by the Code of Student Conduct attach to the *accused.* Defects in the investigation and/or disciplinary hearings conducted by a school obviously threaten an accused person with the loss of substantial rights – in his record, in his reputation, and in his standing with the educational institution. An accuser who activates this process with a charge against a fellow student would not appear to be invested with any of these rights, or threatened with any of the corresponding deprivations thereof. This is not to minimize the criticality of an alleged victim's role in a college disciplinary process, or the importance she will naturally attach to its outcome. But it is not evident to the undersigned that the nature of an accusing party's interest in a campus disciplinary proceeding will (or even should) endow her with civil causes of action in the event of process failure.

The Court recognizes, of course, that a college or university may respond inadequately to a charge of sexual harassment (*e.g.*, fail to carry out a satisfactory investigation, fail to conduct a proper hearing, and the like), and thereby leave a dangerous predator free to harm his victim further. In that event, the Court has no difficulty seeing that the school can and should be held accountable (in contract or tort) for such foreseeable harm to an accusing party whom it has failed to protect in circumstances where it knew or should have known protection to be required. Relief is awarded, however, *not* for the failure of the investigative/disciplinary process *itself*, but for the *ensuing harm* that the Plaintiff suffered and that was allowed to occur because of the school's negligence.

The undisputed facts of this case, as acknowledged by counsel for both sides during the

hearing held several weeks ago, is that the Plaintiff had no contact with and suffered no harm from the alleged assailant following the filing of her internal complaint. The University's "no contact" order was fully respected. Beyond a psychic desire to see disciplinary justice served, therefore, the Plaintiff does not appear to have been injured in any cognizable way by Northeastern's failure to treat with the accused in the particular manner she desired. And it would certainly not appear that the University's claimed negligence in its handling of this alleged assailant can render the school liable, *nunc pro tunc*, for the underlying offense of which this individual was originally charged.[1] Is this right; and, if the Plaintiff contends it is not, what is the precise nature of the contractual harm or personal injury she claims to have suffered at the hands of Northeastern?

The Court would be grateful if the parties addressed this issue within ten days of the date hereof, and with citation to any case authorities that may have addressed it, in briefs no longer than five pages per side.

Robert B. Gordon
Justice of the Superior Court

Dated: February 19, 2019

[1]One sees this situation with some regularity in the context of employee-on-employee harassment under G.L. c. 151B. An employer will ordinarily not be held liable for a non-supervisory employee's harassment of another employee, unless the employer had *prior* notice of same and then failed to take adequate preventive or corrective action. In that event, the employer can be held liable for any *recurrence* of the harassment that its failure to intercede enabled. The employer is not, however, liable for the investigation it conducted or failed to conduct, but rather for the *consequences* that followed same. More importantly, if there are no such follow-on consequences, an inadequate investigation will not render the employer retroactively responsible for the original harassment of which it had no prior knowledge or notice.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION
NO. 16-03335-C

MORGAN HELFMAN
Plaintiff

v.

NORTHEASTERN UNIVERSITY, KATHERINE ANTONUCCI,
ROBERT JOSE, BRIANA R. SEVIGNY,
MARY WEGMANN & MADELEINE ESTABROOK
Defendants

MEMORANDUM OF DECISION AND ORDER
ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Morgan Helfman (the "Plaintiff") alleges that, while she was a student at Northeastern University ("NU" or the "University"), she was sexually assaulted by another student in that student's dormitory room. Plaintiff brings against action against NU and several of its employees, Katherine Antonucci, Robert Jose, Briana R. Sevigny, Mary Wegmann, and Madeleine Estabrook (collectively, the "Defendants"), alleging that they failed to protect her against the assault and inadequately handled her ensuing complaint. Plaintiff asserts claims for negligence, negligent infliction of emotional distress, and violation of the Massachusetts Equal Rights Act (the "MERA") against all Defendants, as well as claims for breach of contract and violation of Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* ("Title

IX") against NU.[1] Presented for decision is the Defendants' Motion for Summary Judgment. Following a hearing and for the reasons which follow, the Defendants' motion shall be **ALLOWED**.

FACTUAL BACKGROUND

The following facts are taken from the summary judgment record and the statement of undisputed material facts filed jointly by the parties under Superior Court Rule 9A(b)(5). The Court reserves further recitation of the facts for its discussion below.

I. The Parties

NU is a non-profit, charitable corporation that offers undergraduate and graduate education degrees. Plaintiff was a student at NU from the fall of 2013 until she graduated in December, 2017.

NU operates a Department of Residential Life (the "Department"), which employs and trains staff to supervise campus residential life. During the relevant time period, Defendant Jose was NU's Associate Dean of Cultural, Residential and Spiritual Life, and the Director of NU's Residence Life Office. Jose was tasked with general oversight of the Department, including the hiring, training and overseeing its staff, and with ensuring that NU campus policies were enforced. Jose had supervisory authority over Defendant Antonucci, who served as an Area Coordinator at NU. Antonucci was responsible for training and directly overseeing the work of certain resident assistants ("RAs").

NU operates a Student Conduct and Conflict Resolution ("OSCCR") program, which

[1] Plaintiff is no longer pursuing her claims for intentional infliction of emotional distress (Count VI) and misrepresentation (Count IX). The Court, therefore, shall enter judgment in favor of the Defendants on these counts of the Complaint.

administers disciplinary proceedings against students alleged to have violated the University's Code of Student Conduct (the "Code"). Defendant Estabrook was NU's Associate Vice President for Student Affairs, and oversaw OSCCR. Defendant Wegmann was NU's Director of OSCCR, and was charged with enforcing the Code and other University policies, as well as supervising, hiring and training Student Conduct Board and Appeals Board members. Defendant Sevigny was NU's Assistant Director of OSCCR, and provided training to both Residential Life staff and members of the Student Conduct Board.

II. Relevant NU Policies

A. The Code

At all relevant times, the Code prohibited underage students from drinking or possessing alcohol on campus, including in residence halls, and prohibited all students from furnishing alcohol to underage students. Underage students were prohibited from even being in the presence of alcohol, unless such alcohol was in the possession of a roommate who was age 21 or older. The Code further prohibited excessive alcohol consumption and sexual assault. Students who violated the Code could be subject to discipline by NU.

B. NU's Security and Supervision of Residence Halls

NU engages certain students as RAs to serve as role models for the University's undergraduate community. RAs are "paraprofessional" members of NU's Residence Life Office. They are required to sign a "Resident Assistant Agreement," and receive financial compensation in the form of on-campus housing in exchange for their service. RAs are engaged, trained and supervised by NU staff.

NU requires its RAs to be familiar with the Code, to perform periodic rounds in their

assigned buildings, to serve as resident hall proctors, to intervene if students violate community norms, to remain sober and drug-free while on duty, and to maintain high standards of personal conduct and integrity. RAs also are required to take corrective action and report any violation of the Code to their supervisors, even if the violation occurs when the RA is "off duty" or in a building to which the RA is not ordinarily assigned. The failure of an RA to intercede when students under 21 years old are drinking alcohol, to obtain assistance for students in need, and to report Code infractions are all violations of an RA's duties under the Code. Such violations could serve as a basis to dismiss the RA from that role.

III. The Events of October 31, 2013

In the fall of 2013, Plaintiff was a freshman at NU. NU required that all freshman students live on campus. Plaintiff lived in International Village, one of the University's residence halls. Another freshman student ("the assailant"), who was Plaintiff's classmate and part of her student study group, also lived in International Village.[2]

On October 31, 2013, Plaintiff and the assailant were invited to attend a Halloween party hosted by a sophomore student, Stacey Anderson, in Anderson's dorm room at 97 St. Stephen Street, a property leased by NU for student housing. Plaintiff, the assailant, Anderson, and Patrick Ward, another sophomore student attending the party, were classmates and had socialized on prior

[2] The other student will be referred to as "the assailant" (rather than by his name) because this student is not a party to the action, the nature of the allegations are sensitive, and other courts have followed the same procedure. See, e.g., Doherty v. Emerson Coll., No. 1:14-CV-13281-LTS, 2017 WL 4364406, at *2 n.1 (D. Mass. Sept. 29, 2017) (Sorokin, J.). This other student has not, in fact, been found responsible for committing the sexual assault at issue by any internal or external adjudicatory body. Nevertheless, because Rule 56 requires the undersigned to view the record in the light most favorable to the Plaintiff, the Court accepts the factual premise of the claimed assault as true, and will accordingly refer to this other student as "the assailant" throughout.

occasions. These four students, as well as all of the other attendees at the party, were under the age of 21.

That evening, Plaintiff and the assailant consumed alcohol in Plaintiff's dorm room, and then made their way to the party at around 9:00 p.m. Once at the party, Plaintiff and the assailant consumed rum and Coke that they had brought with them in a Coca Cola bottle; and the assailant additionally provided Plaintiff with Fireball whiskey that he obtained from another party-goer (not Anderson or Ward). Plaintiff also played drinking games with some or all of the party participants.

Anderson was an RA on duty on the evening of the party. She left the party at times to attend to her rounds, but always returned to the room when she was finished. Ward was also an RA, but served in another dorm and was not on duty at the time of the party.

At some point during the evening, Plaintiff became very intoxicated and vomited several times in Anderson's bathroom. Two female NU students who also were at the party stayed with Plaintiff in the bathroom to lend support to her. The two wanted to take Plaintiff back to her dorm room, but did not believe that the proctors who signed residents into the dormitory would allow Plaintiff to enter the building in her visibly intoxicated state, and might even seek to discipline them on account of Plaintiff's condition. The assailant, who was also intoxicated, volunteered to take Plaintiff home, because they lived in the same dormitory and he needed to get up early for crew practice.

Despite their awareness that party attendees were under the age of 21, RAs Anderson and Ward observed many attendees drink alcohol to the point of intoxication, personally consumed alcohol themselves, and played drinking games with other party-goers. During the time that

Plaintiff was at the party, neither Anderson nor Ward assisted Plaintiff by calling NU police to assess her condition, by offering her safe transport home (as was available pursuant to the University's Medical Amnesty policy), or by volunteering to escort Plaintiff back to her dorm room.

Plaintiff and the assailant departed the party at around 11:20 p.m., and Plaintiff texted her roommate to let her know that she was on her way home. Plaintiff relied on the assailant for support as the two walked and, at one point, Plaintiff stumbled and fell, causing the assailant to fall himself. At some point during the walk, the assailant took the Plaintiff's cell phone and identification from her. The two students also kissed during the course of the walk. When they arrived at their dormitory, Plaintiff leaned on the proctor's desk as the proctor checked her and the assailant's identification. Plaintiff was unsteady on her feet as she left the proctor's desk and approached the elevators in the dorm.

The assailant then told Plaintiff that he needed to get something from his room, and invited Plaintiff to come with him while he retrieved the item. Plaintiff agreed, and accompanied the assailant to his room. Once inside the room, the assailant kissed Plaintiff, and the two eventually ended up undressed in the assailant's bed. The assailant then initiated sexual relations with Plaintiff. Plaintiff said "ouch" several times, and further informed the assailant that she was a virgin. The assailant then told Plaintiff that he would get a condom. Plaintiff did not respond or say that she did not want to have sex, but recalls today that she was very uncomfortable at the time. The assailant also guided Plaintiff's head down to his groin in an attempt to prompt her to perform oral sex on him, but told her she could stop when she said, "I have never done this before." At certain points during the encounter, Plaintiff rolled over and pulled the blanket up

over her head; and, at least at one other point, Plaintiff vomited in the assailant's bathroom. Plaintiff was afraid to leave the dorm room, because she thought that the assailant would not let her do so or that he might hurt her. Ultimately, the assailant and Plaintiff had oral, anal, and vaginal sex over the course of several hours.

When Plaintiff returned to her own dorm room the next morning, she cried and confided to her roommate what had occurred. The roommate asked whether Plaintiff would have stopped the encounter had she been sober, and Plaintiff replied that she would have. With Plaintiff's consent, the roommate told their RA about the alleged sexual assault. Plaintiff also disclosed the sexual assault to her mother, who accompanied Plaintiff to the NU Police Department ("NUPD") to report the incident. NUPD then accompanied Plaintiff and her mother to the Emergency Room at Beth Israel Hospital for an assessment, and the hospital thereupon performed a rape kit.

IV. NU's Response to Plaintiff's Report

A. Interim Measures Offered to Plaintiff

NU extended Plaintiff certain interim protective measures following her report of this incident. Specifically, the University issued a "no contact" order which precluded the assailant and Plaintiff from directly or indirectly communicating with one other. The assailant fully adhered to the no contact order. NU additionally offered Plaintiff the option to transfer out of the lone class that she was then taking with the assailant and to move out of International Village, but Plaintiff declined. Plaintiff requested instead that NU transfer the assailant out of her class and dormitory. The University declined to do so, however, because the assailant had not been found responsible for any policy violation, and because the University had not yet determined whether failing to take such actions would create a hostile environment for the Plaintiff.

B. NUPD's Investigation and Report

NUPD promptly investigated Plaintiff's report by collecting evidence, reviewing surveillance footage, and interviewing Plaintiff, the assailant, and Plaintiff's roommate. The NUPD then generated a report (the "NUPD Report") that identified other party attendees, including Anderson and Ward. NUPD did not, however, interview any of these other party attendees. One of the two female students who stayed in the bathroom with Plaintiff when she was sick at the party provided an account to NUPD on her own initiative, but NUPD did not document her statement.

C. Anderson and Ward

The NUPD Report was furnished to Defendant Wegmann, the OSCCR Director, who shared it with Defendant Sevigny, the OSCCR Assistant Director, and Defendant Estabrook, the Associate Vice President of Student Affairs. Although the Report revealed that Anderson and Ward had consumed alcohol with NU students who were under 21 years of age, Wegmann, Sevigny and Estabrook did not discipline Anderson or Ward for their violations of the Code and their agreement as RAs; nor did they inform the University staff responsible for their supervision, including Defendants Antonucci or Jose, of these violations. Ultimately, Anderson and Ward were never investigated, disciplined or sanctioned for their conduct on October 31, 2013.

After learning of Plaintiff's report, Ward told his supervisor, a Residence Hall Director ("RD"), that minor students (including Plaintiff and the assailant) had consumed alcohol at a party at a student's residence on the night that Plaintiff reported being sexually assaulted by the assailant. The RD did not convey this information to his supervisors, including Defendants Antonucci or Jose.

D. Disciplinary Proceedings

Based on the NUPD Report, OSCCR charged the assailant with a Code violation of "sexual assault with penetration." Disciplinary proceedings were conducted before a Student Conduct Board (the "Board") comprised of five students who operated under the supervision of an OSCCR staff member. In this instance, Brooke Tempesta ("Tempesta"), an Assistant Director of Student Conduct, assembled the five-person Board and oversaw its hearings into the charge brought against the assailant. Tempesta's role was to ensure that the hearing procedures outlined in the Code were followed, and to answer any procedural questions that arose.

In order to become a Board member, NU students first needed to meet eligibility requirements and to be interviewed by OSCCR staff. Selected Board members were further required to complete a four-hour training module conducted by OSCCR, the Office of the General Counsel, and other campus partners, and to observe one full OSCCR proceeding. In order to serve on a sexual assault case, Board members were additionally required to complete a three- to four-hour specialized training in which Defendants Wegmann and Sevigny assisted. This training focused on sexual misconduct charges, the definitions of consent and incapacitation, and the implications of drug and alcohol consumption in matters of sexual assault.

At the time of the decision, the Code provided:

> **CONSENT:** Appropriate sexual behavior requires consent from all parties involved. Consent means a voluntary agreement to engage in sexual activity proposed by another and requires mutually understandable and communicated words and/or actions demonstrating agreement by both parties to participate in all sexual activities.
>
> Consent may never be given by ... those who are incapacitated as a result of alcohol or other drug consumption (voluntary or involuntary).... A person who knows or should reasonably have known that another person is incapacitated may not engage in sexual activity with that person. Incapacitation is a state where one cannot make a rational,

> reasonable decision because they lack the ability to understand the who, what, when, where, why or how of their sexual activities.

(J.A., Ex. 8 at 20.).

On November 21, 2013, the matter proceeded to a disciplinary hearing before the Board. Plaintiff and the assailant both had hearing advisors present to assist them during this proceeding. The Board heard opening and closing statements from NUPD Officer Adam Keeling, the Plaintiff, and the assailant. The Board then asked questions of each individual and, per Plaintiff's request, the questions were posed through the Board Chair.

After the hearing, the Board deliberated and determined by a vote of 4-1 that the assailant was not responsible for the Code violation of sexual assault with penetration. The following day, November 22, 2013, Tempesta issued a letter to the assailant, informing him of the Board's decision. Plaintiff also received notification of this decision; but, in accordance with NU's policy at the time (and to which she consented), Plaintiff was not provided with the rationale for the Board's decision. In the notification letter transmitted to the assailant, Tempesta explained:

> The Board determined that you and the complainant had consumed alcohol on the night of the incident and engaged in sexual activity. Throughout the hearing you relayed to the Board actions that occurred with the other party that you believed to have communicated consent. The Board considered your account along with the account provided by the complainant. The Board then considered whether a "reasonable person" would consider the words and/or actions expressed by the complainant during the incident to indicate consent to each sexual activity.
>
> Due to the severity of the alleged violation, members of the Board spent a substantial amount of time reviewing all information presented. The Board considered Northeastern University's Code of Student Conduct definition for Sexual Assault and consent. Upon review of the information as it relates to the charge of Sexual Assault with penetration, the Board could not come to a more likely than not determination that you are responsible for this violation.

(J.A., Ex. 24 at 1.).[3]

Plaintiff appealed the Board's finding to the University's Appeals Board. The Appeals Board was overseen by Defendant Wegmann, and consisted of one student, one administrator from Student Affairs, and one administrator from Academic Affairs. In preparing her request for appeal, Plaintiff was afforded the opportunity to review the audio recording of the Board hearing, but declined to do so. On December 4, 2013, Wegmann notified Plaintiff that the Appeals Board had determined that a procedural error occurred during the original hearing, but did not specify the nature of that error. As a result, the Appeals Board remanded the matter to be reheard *de novo* by a different Board. (See J.A., Ex. 28.)

On January 8, 2014, Defendant Estabrook informed Plaintiff and the assailant that, in preparing for the rehearing, NU had determined that Plaintiff did not cite either the specific procedural error or the new evidence that was the basis for her appeal, and the assailant had likewise not been provided with a copy of Plaintiff's request for appeal or afforded an opportunity to respond thereto. As a result of these "appellate error[s]," Estabrook provided Plaintiff an opportunity to amend her request for appeal to identify both the alleged procedural error and the new evidence upon which she sought to rely, and then afforded the assailant an opportunity to respond to same. Estabrook explained that the amended request and any response thereto would be considered anew by the Appeals Board. (See J.A., Ex. 29.). Plaintiff submitted an amended request, but was at this point unable to review the recording of the original Board hearing because

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[3]NU's Code prescribes a more victim-protective preponderance of the evidence standard for proving sexual assault than that provided for in the disciplinary handbooks of many other colleges and universities. Nonetheless, the Board found the evidence insufficient to demonstrate the assailant's guilt under even this less rigorous standard of proof.

it had been destroyed per standard NU procedure when the appeals period passed.

On February 7, 2014, the Appeals Board rendered its decision on Plaintiff's amended request for appeal. The Appeals Board first found that there had been no procedural error, because "[t]he procedures outlined in the Code of Student Conduct were followed during the hearing and pre-hearing process." (J.A., Ex. 30.). The Appeals Board next found that the results of the rape kit that Plaintiff had offered as one of the bases for her appeal constituted new evidence, and remanded the matter to the original Board to evaluate whether consideration of that information would alter its previous findings. (See id.).

On February 25, 2014, Tempesta notified Plaintiff that the Board had determined its original decision should stand. Tempesta explained that the Board's perspective did not change in light of the new evidence, because "[t]he Board determined that during the original hearing both parties stated that various sexual activities had taken place over a period of time, and that semen would be likely to be present in rape kit results." (J.A., Ex. 53.).

Following disposition of the assailant's disciplinary hearing, Plaintiff remained a full-time student at NU and continued her education program at the University without interruption. Plaintiff had no further interactions with the assailant, and experienced no harassment or mistreatment of any kind.[4]

DISCUSSION

In this lawsuit, Plaintiff alleges that the Defendants were negligent, negligently inflicted emotional distress upon her, and violated the MERA. Plaintiff additionally claims that NU

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[4]These latter facts were confirmed by counsel during the summary judgment hearing, and in their follow-on submissions responsive to the Court's Procedural Order.

breached its contract with Plaintiff as its student, and violated Title IX. For the reasons which follow, the Defendants are entitled to summary judgment on all claims.

I. Legal Standard

"Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Godfrey v. Globe Newspaper Co., Inc., 457 Mass. 113, 118-19 (2010). In determining whether the moving party is entitled to judgment as a matter of law, the evidence is viewed in the light most favorable to the non-moving party. Harrison v. NetCentric Corp., 433 Mass. 465, 468 (2001). "Where the party opposing the motion bears the burden of proof at trial, the moving party will prevail only if it demonstrates that the nonmoving party has no reasonable expectation of proving an essential element of the case." Cabot Corp. v. AVX Corp., 448 Mass. 629, 637 (2007) (citing Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991)). "A complete failure of proof concerning an essential element of the non-moving party's case renders all other facts immaterial." Kourouvacilis, 410 Mass. at 711. "Conclusory statements, general denials, and factual allegations not based on personal knowledge are insufficient to avoid summary judgment." Madsen v. Erwin, 395 Mass. 715, 721 (1985) (internal modifications and quotations omitted).

II. Merits of Plaintiff's Claims

A. Negligence Against NU (Count I)

Plaintiff alleges that NU was negligent in failing to protect her from a sexual assault perpetrated against her by another student. This negligence claim is premised on three distinct theories of institutional liability: (1) NU breached its duty to protect Plaintiff from the criminal acts of third parties; (2) NU is vicariously liable for the acts and omissions of its RAs on the

evening of the sexual assault; and (3) NU was otherwise negligent in training and supervising its RAs. (See Pl.'s Mem. In Opp'n to Def.'s Mot. Summ. J., at 22-29.). NU counters that Plaintiff's claim under each of these theories fails, because the University owed Plaintiff no legal duty to protect her from the sexual assault of a fellow student in the circumstances presented.

In order to prevail on a negligence claim, a plaintiff must show the existence of an act or omission in violation of a duty owed to her by the defendant. See Roe No. 1 v. Children's Hosp. Med. Ctr., 469 Mass. 710, 713 (2014). If a duty exists, its scope is limited to protecting against only those harms that are reasonably foreseeable. See Kavanagh v. Trustees of Boston Univ., 440 Mass. 195, 203 (2003). "[T]he existence of a duty is a question of law, and is thus an appropriate subject of summary judgment." Jupin v. Kask, 447 Mass. 141, 146 (2006).

1. **NU's Duty to Protect Students from Crimes Committed by Other Students**

As a general rule, there is no duty to protect another from the criminal or wrongful acts of third parties. See, e.g., Jupin, 447 Mass. at 148; Kavanagh, 440 Mass. at 201. There are exceptions to this general rule, however, when there exists a special relationship between the defendant and the injured party that gives rise to a duty, see Kavanagh, 440 Mass. at 201, or when the defendant voluntarily assumes a duty to the victim, see Mullins v. Pine Manor College, 389 Mass. 47, 52 (1983). The general rule is likewise inapplicable when an actor realizes or reasonably should realize that his act or omission "involves an unreasonable risk of harm to another through the [criminal] conduct of ... a third person," *viz.*, when the actor *creates* the situation by his own conduct that exposes another to a recognizably high degree of harm, including at the hands of a third party perpetrator of a crime. See Jupin, 447 Mass. at 148

(quoting Restatement (Second) of Torts § 302B). None of these circumstances exist here.

a. *Special Relationship*

Plaintiff first argues that a special relationship exists between her and NU, such that the University had a duty to protect her from the assailant's criminal acts. Plaintiff rests this argument on the Supreme Judicial Court's decisions in Mullins v. Pine Manor College, 389 Mass. 47 (1983), and Nguyen v. Massachusetts Institute of Technology, 479 Mass. 436 (2018). Plaintiff's argument, however, depends for its viability on a reading of those cases that is far too expansive to withstand scrutiny.

In Mullins, the SJC recognized that a college has a duty to implement adequate security measures, including the provision of door locks and security guards, to protect its students in on-campus housing from the criminal acts of third party intruders. The SJC found the existence of this duty under two tort principles. First, the SJC located a source of the duty in "existing social values and customs," in light of evidence that there was a consensus among colleges that it was their responsibility, and not that of resident students who live in their dorms for a relatively short period of time, to provide an adequate level of security on campus. See Mullins, 389 Mass. at 51-52. Second, the SJC found that the college defendant had voluntarily assumed a duty to provide adequate security on its campus by posting guards, erecting a fence, and furnishing locks on the residential buildings. Having thus voluntarily assumed a duty to furnish students with security, therefore, the university was required to carry out that duty with due care. See id. at 52-54.

In Nguyen, a case involving a graduate student who committed suicide on his university's campus, the SJC expressly recognized that a school might have a "special relationship" with its students that could give rise to a duty to rescue. See Nguyen, 479 Mass. at 449-50 (citing

Restatement (Third) of Torts: Liability for Physical and Emotional Harm §§ 40(a) and (b)(5)). The SJC cautioned, however, that the potential existence of a special relationship between a student and university was "the beginning and not the end of the analysis," Nguyen, 479 Mass. at 450, because such analysis involves "a complex mix of competing considerations," id. at 452. The SJC then went on to consider the nature of the university-adult student relationship, explaining that, since Mullins, "[t]here is universal recognition that the age of in loco parentis has passed, and that the [university's] duty, if any, is not one of a general duty of care to all students in all aspects of their collegiate life." Id. at 451 (quoting Massie, "Suicide on Campus: The Appropriate Legal Responsibility of College Personnel," 91 Marq. L. Rev. 625, 640 (2008)) (citing Mullins, 389 Mass. at 52; Bradshaw v. Rawlings, 612 F.2d 135, 139 (3d Cir. 1979); Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 610 (W.D. Va. 2002)). Ultimately, the SJC determined that a university has a special relationship with a student and a corresponding duty to take reasonable measures to prevent his suicide *only* if the university has either actual knowledge of the student's previous suicide attempt (either while enrolled at the school or shortly before the student's matriculation) or of the student's declared plan or intent to commit suicide. See Nguyen, 479 Mass. at 453.[5] The SJC explained, however, that the duty was "*definitely not* a

[5] In determining whether a duty existed in those circumstances, the SJC considered a number of factors customarily used to delineate duties in tort law: *viz.*, whether the university could reasonably foresee that it would be expected to take action to protect the student and could anticipate harm to the student from its failure to do so; whether the student's reasonable reliance on the university impeded other persons who might seek to provide aid; the degree of certainty of harm to the student; the burden on the university to take reasonable steps to prevent the injury; the existence of any kind of mutual dependence between the student and the university, including the financial benefit that may flow from the student to the university; the moral blameworthiness of the university's conduct in failing to act; and the social policy considerations involved in placing an economic burden of loss on the university. See Nguyen, 479 Mass. at 452.

generalized duty to prevent suicide," and emphasized the "limited circumstances creating the duty ...[that] hinge[] on foreseeability." Id. at 455 (emphasis added).

It is clear from Mullins and Nguyen, therefore, that, in *limited* circumstances, a special relationship does exist between a university and its adult students, such that the university owes its students a duty of reasonable care with regard to risks that arise within the scope of their relationship. See id. at 449-50. Indeed, as NU rightly acknowledges in this case, the University has an affirmative duty to prevent harm to students resulting from sexual assault either when it has actual knowledge that a particular person presents a foreseeable risk of committing an assault, or, like in Mullins, when the University has itself placed the student in harm's way and then thereafter fails to mitigate the risk of harm when it is in a position to do so. (See Defs.' Mot. for Summ. J. at 17-19.). None of those narrow circumstances that would give rise to a special duty of care are present in the case at bar.

In the present action, Plaintiff voluntarily consumed alcohol in her dorm room and then again at a party hosted by an on-duty RA in that RA's room. After she became intoxicated and was escorted by the assailant back to the dormitory where they both lived, the assailant sexually assaulted Plaintiff in his dorm room. As NU argues, and the Court agrees, universities do not occupy a special relationship with their adult students such that they have a legal duty to protect such students (like Plaintiff) from harms that follow or result from underage drinking. This is so, regardless of whether the drinking itself is illegal or otherwise prohibited by University policy. See Doe v. Emerson Coll., 153 F. Supp. 3d 506, 514 (D. Mass. 2015) ("Massachusetts does not impose a legal duty on colleges or administrators to supervise the social activities of adult students, even though the college may have its own policies prohibiting alcohol or drug abuse.");

Doe v. Northeastern Univ., No. MICV15-04200, slip op. at 9 (Mass. Super. Ct. Sept. 18, 2018) (Sullivan, J.) (university has no duty to protect students from harms associated with the consumption of drugs or alcohol as a matter of law); Bash v. Clark Univ., 22 Mass. L. Rptr. 84, 2006 WL 4114297, at *4 (Mass. Super. Ct. Nov. 20, 2006) (Agnes, J.) (university does not have a duty to protect students from the voluntary use of drugs and alcohol). Indeed, courts have widely recognized that imposing such a duty on universities would be both "impractical and unrealistic." Doe v. Emerson Coll., 153 F. Supp. 3d at 514. See Bash, No. 06745A, 2006 WL 4114297, at *5 (quoting Crow v. California, 222 Cal. App. 3d 192, 209 (1990)) ("[A] university cannot prevent [students' voluntary consumption of drugs and alcohol] from occurring 'except *possibly* by posting guards in each dorm room on a 24-hour, 365-day per year basis.'"); Beach v. University of Utah, 726 P.2d 413, 419 (Utah 1986) ("It would be unrealistic to impose upon an institution of higher education the additional role of custodian over its adult students and to charge it with responsibility for preventing students from illegally consuming alcohol and, should they do so, with responsibility for assuring their safety and the safety of others."). Nor does a university have a legal duty to educate its students regarding the potentially heightened risk of sexual assault due to drinking. See Doherty v. Emerson Coll., No. 1:14-CV-13281-LTS, 2017 WL 4364406, at *10 (allowing summary judgment on negligence claim premised on college's failure to educate students, including plaintiff, about the increased risk of sexual assault due to drinking).

Plaintiff argues that the facts of this case are distinguishable because, as in Mullins, the University RAs' acts and omissions placed her in harm's way and thereby created the very situation that caused her harm. This argument both misapprehends the essential teaching of

Mullins,[6] and misapplies its holding to materially different facts. Notably, none of the RAs provided Plaintiff with the alcohol that she consumed that night, nor did they ignore signs that would have alerted them that the assailant might sexually assault Plaintiff. The RAs' presence at the party, their participation in underage drinking, and their failure to assist Plaintiff once she was intoxicated did not, taken singly or together, impose a duty on NU to safeguard Plaintiff from a sexual assault that might occur after she became voluntarily intoxicated. Nor do these facts demonstrate that NU itself caused the situation that led to the Plaintiff's harm. The sexual assault was committed by a third party, in a different place, and in private. The University's failure to put a stop to Plaintiff's drinking that evening cannot be considered to have placed her in harm's way in the manner contemplated by Mullins. See, e.g., Freeman v. Busch, 349 F.3d 582, 587-89 (8th Cir. 2003) (university could not be held liable after on-duty RA failed to assist an intoxicated guest at a dorm party, when that guest was later sexually assaulted by the party host who was also an off-duty student security guard); Beach, 726 P.2d at 419 (university did not have duty to protect underage students from their voluntary off-hours intoxication during a school-sponsored field trip, even where a tenured professor was present and drinking). At the very most, Plaintiff has demonstrated *not* that NU was the cause of her harm in any legal sense, but only that it tolerated underage drinking by adult students. As discussed above, however, the University has no affirmative duty to *prevent* such commonplace conduct. See Nguyen, 479 Mass. at 451 ("[T]he

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[6] Contrary to Plaintiff's assertion that Mullins recognizes a college's broad duty to protect students in all circumstances from sexual assault, cases since Mullins have made clear that the case's holding is more narrow and situation-based. See, e.g., Nguyen, 479 Mass. at 450 (citing Mullins as supporting the proposition that universities are "property owners and landlords responsible for their students' physical safety on campus"); Doe v. Trustees of Bos. Coll., 892 F.3d 67, 94 (1st Cir. 2018) (recognizing that the Mullins court imposed narrow legal duties on colleges based on their voluntary assumption of care) (collecting cases).

modern university-student relationship is respectful of student autonomy and privacy.").

Moreover, and unlike in Nguyen, there is no evidence in the record to suggest that NU had any knowledge that the assailant posed a foreseeable risk of assaulting other students. It is undisputed that the NUPD was aware of no incident reports or allegations that the assailant had ever assaulted, sexually or otherwise, anyone previously. Further, it is undisputed that "[t]here was no reason for anyone at [NU] to be concerned about [the assailant] as of October 31, 2013." (SMF ¶ 33.). Compare Schaefer v. Fu, 272 F. Supp. 3d 285, 288-89 (D. Mass. 2017) (university may be negligent when plaintiff informed two professors of assailant's disruptive behavior targeted at her, and one professor acknowledged familiarity with assailant's behavior prior to the assault). In the present case, Plaintiff arrived at the party in the company of the assailant, and then left with him willingly. No one else at the party expressed any doubts or concerns about permitting the assailant, with whom Plaintiff was obviously acquainted, to walk her back to the dorm where they both lived. There is no evidence in the record that the assailant was touching Plaintiff inappropriately at the party, or that he engaged in any another conduct that might reasonably have given rise to a concern for Plaintiff's safety. Accordingly, NU lacked the requisite fore-knowledge of the assailant's potential for abusive conduct such as would impose a duty on it to prevent the Plaintiff's harm.

For all of these reasons, the Court concludes that no special relationship between Plaintiff and NU existed such that the University can be held liable for the sexual assault perpetrated by another student. See Doe v. Brown Univ., 304 F. Supp. 3d 252, 261 (D. R.I. 2018) (no special relationship existed between university and student such that university could be held responsible for sexual assault committed by another student after plaintiff was drugged at an on-campus

fraternity party).

b. *Foreseeability*

Plaintiff's negligence claim fails for the additional reason that wholly absent from the record is evidence that the assailant's abuse was reasonably foreseeable (to anyone) before the assault occurred inside the assailant's dorm room. The fact that two undergraduate students who were acquainted with one other were drinking at a party, one became intoxicated, and the other offered to walk her home is a routine and unexceptional occurrence on today's college campuses. The law cannot rationally be stretched so far as to impose liability on colleges to prevent all instances of this sort, merely in consideration of the *possibility* that one student may sexually assault another. See Facchetti v. Bridgewater Coll., 175 F. Supp. 3d 627, 644 (W.D. Va. 2016) (college could not have foreseen sexual assault when plaintiff invited assailant to stay in her room and assailant had no prior history of committing assaults); Murrell v. Mount St. Clare Coll., No. 3:00-CV-90204, 2001 WL 1678766, at *4 (S.D. Iowa Sept. 10, 2001) (Pratt, J.) ("A college, or any other kind of landlord, is incapable of foreseeing an acquaintance rape that takes place in the private quarters of a student or tenant, unless a specific student or tenant has a past history of such crimes."); Tanja H. v. Regents of Univ. of California, 228 Cal. App. 3d 434, 438 (Cal. Ct. App. 1991), disapproved on other grounds by Regents of Univ. of California v. Superior Court, 413 P.3d 656 (Cal. 2018) (sexual assault committed after students consumed alcohol is not sufficiently foreseeable in the legal sense such that it should give rise to duty for college to protect against such assaults). See also Hernandez v. Baylor Univ., 274 F. Supp. 3d 602, 619 (W.D. Tex. 2017) ("Courts across the country have determined ... that the general foreseeability of sexual assault on campus is insufficient to warrant negligence liability."). NU thus did not have a duty to protect

Plaintiff from a sexual assault perpetrated against her by another student. This follows both because the University was not in a special relationship with Plaintiff in these circumstances, and because the harm that Plaintiff actually suffered was not reasonably foreseeable to NU or its agents.

The lack of foreseeable harm in this case likewise demonstrates that Plaintiff cannot establish another essential element of her negligence claim, *viz.*, that any acts or omissions of NU were the *proximate cause* of her injuries. See, e.g., Davis v. Westwood Grp., 420 Mass. 739, 743 (1995) (in order to succeed on negligence claim, plaintiff must demonstrate that breach of a legal duty was the proximate cause of his injuries). See also Dubuque v. Cumberland Farms, Inc., 93 Mass. App. Ct. 332, 347 n.25 (2018) ("The question of foreseeability relates to both duty of care and proximate cause."); R.L. Currie Corp. v. East Coast Sand & Gravel, Inc., 93 Mass. App. Ct. 782, 784 (2018) (issue of proximate cause may be resolved as a matter of law at summary judgment stage when plaintiff has no reasonable expectation of proving that the injury was a foreseeable result of defendant's negligence). Here, the sexual assault perpetrated against Plaintiff by the assailant cannot be considered a foreseeable consequence of NU's failure to prevent her from consuming alcohol or its failure to intervene once aware that she was intoxicated. See Freeman v. Busch, 150 F. Supp. 2d 995, 1003-04 (S.D. Iowa 2001), aff'd on other grounds, 349 F.3d 582 (8th Cir. 2003) (RA's failure to assist an intoxicated guest was not the proximate cause of a sexual assault later perpetrated against her by a resident in that RA's dormitory). See also Doherty v. Emerson Coll., No. 1:14-CV-13281-LTS, 2017 WL 4364406, at *10 (plaintiff could not prove that university's alleged failure to properly educate students about issues of consent, sexual assault, the high correlation between alcohol and sexual assault, and their Title IX rights

was the proximate cause of the sexual assault perpetrated against her by another student).

In sum, Plaintiff's negligence claim – premised on NU's alleged failure to protect Plaintiff from the criminal acts of third parties – fails as a matter of law both because NU had no such duty in these circumstances, and because any failures on the part of the University to this effect were not the proximate cause of foreseeable harm suffered by the Plaintiff.

2. **NU's Vicarious Liability for the Acts or Omissions of its RAs**

Plaintiff's argument that NU can be held vicariously liable for the acts or omissions of its RA fares no better. (See Pl.'s at Def.'s Mot. Summ. J., at 25-26.). Plaintiff contends that RAs at NU qualify as "student employees," and that the University can thus be held vicariously liable for the torts they commit within the scope of their employment. Even if Plaintiff were correct as to this point, her claim still fails for the same reasons as described above.[7]

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[7] The Court questions whether RAs do in fact meet the criteria of "employees" such that vicarious liability could attach to NU in these circumstances. The law is by no means settled in this regard. See Freeman v. Busch, 150 F. Supp. 2d at 1001 (assuming without deciding that vicarious liability would attach to university, but finding its on-duty RA was not negligent in failing to intervene when intoxicated guest was later sexually assaulted by the student with whom she was staying); L.B. Helms, C.T. Pierson, & K.M. Streeter, The Risks of Litigation: A Case Study of Resident Assistants, 180 Ed. Law Rep. 25, 28-29 (2003) ("Courts appear somewhat reluctant to hold institutions liable for students who voluntarily abuse alcohol. Courts seem to reach the same conclusion even when RAs are aware of these drinking behaviors and fail to intervene.") (collecting cases). Cf. Marshall v. Regis Educ. Corp., 666 F.2d 1324, 1327-28 (10th Cir. 1981) (RAs are not employees under Fair Labor Standards Act, but rather are "more like students in other campus programs receiving financial aid"). In the case at bar, the record reflects that sophomore RAs like Ward and Anderson serve as a resource and mentor to other students, monitor their activities when on duty (see J.A., Ex. 32 at I.A.-D, II.B), and receive modest financial assistance in exchange for same, *viz.*, a dorm room, 19 meals per week and $120 in "Dining Dollars" each semester (see J.A., Ex. 32 at III.H). That said, the Court finds that the existing record is insufficient to decide the issue of whether they are employees for all legal purposes at the summary judgment stage. See Kavanagh, 440 Mass. at 198 (quoting Dias v. Brigham Med. Assocs., Inc., 438 Mass. 317, 322 (2002)) ("In determining whether an employer-employee relationship exists, various factors are to be considered, including 'the method of payment (*e.g.*, whether the employee receives a W-2 form from the employer), and

Assuming that Anderson and Ward breached their duties under the "Resident Assistant Agreement" (the "Agreement") by hosting a party where underage drinking occurred and by failing to assist the Plaintiff once she was observed to be intoxicated, these actions and inactions were in all events *not* the proximate cause of the ensuing sexual assault. At most, Anderson and Ward permitted Plaintiff to become inebriated and then allowed her to leave a party with an acquaintance. That she was later sexually assaulted by that acquaintance in the privacy of his dorm room is not the foreseeable consequence of these Defendants' arguably negligent conduct. Such lack of foreseeability is fatal to any negligence claim Plaintiff might raise based on the RAs' conduct and, coextensively, to any cause of action asserted against NU under a vicarious liability theory arising out of that same conduct. See Elias v. Unisys Corp., 410 Mass. 479, 481 (1991) ("The liability of the principal arises simply by the operation of law and is only derivative of the wrongful act of the agent."); James-Brown v. Commerce Ins. Co., 85 Mass. App. Ct. 1111, 2014 WL 1325663, at *1 (2014) (Rule 1:28 decision) (quoting Mamalis v. Atlas Van Lines, Inc., 364 Pa. Super. 360, 364-65 (Pa. Super. Ct. 1987)) ("A claim of vicarious liability depends on the life of the claim from which it derives.").

Accordingly, Plaintiff's negligence claim against NU, premised on the theory that the University can be held vicariously liable for the acts or omissions of its RAs, fails as a matter of law.

3. **NU's Duty to Adequately Train and Supervise its RAs**

Plaintiff next alleges that NU was negligent in the training and supervision of its RAs, who participated in underage drinking on the evening in question and failed to report such Code

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whether the parties themselves believe they have created an employer-employee relationship.'").

violations or obtain assistance for Plaintiff when she was visibly intoxicated. This negligence theory as applied to NU fails for many of the same reasons discussed above.

"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.'" Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 613 (D. Mass. 2016) (quoting Vicarelli v. Business Int'l, Inc., 973 F. Supp. 241, 246 (D. Mass. 1997)). "In such circumstances, employers are responsible for exercising reasonable care to ensure that their employees do not cause foreseeable harm to a foreseeable class of plaintiffs." Roe No. 1, 469 Mass. at 714.

Plaintiff's negligent training and supervision claim thus fails for each of two independently sufficient reasons. First, as discussed *supra*, see Section II.A.1.b., it is not foreseeable as a matter of law that, standing alone, permitting underage drinking (even to the point of intoxication) would lead to a sexual assault, or that permitting an intoxicated person to walk home with an acquaintance would lead to such an assault. See Nelson v. Salem State Coll., 446 Mass. 525, 538 (2006) (essential element of negligent supervision claim is a causal relationship between the breach of duty and the harms suffered). Second, Anderson testified without contradiction that she was aware that excessive alcohol use violated the Code, and both Anderson and Ward testified that they had in fact received training on excessive alcohol consumption. (See J.A., Ex. 11, at 146:21-147:8, 167:8-21, 196:11-16; J.A., Ex. 12, at 137:5-21. See also SMF ¶¶ 9-14.). Whether these students neglected to utilize the skills they were taught during that training, or failed to acquire the necessary skills in the first instance, will not, without more, permit the inference that NU was negligent in providing the training itself. Moreover, to the extent that

Plaintiff's claim is premised on the supervisory conduct of these two particular individuals, there are no facts in the record to suggest that there was any basis upon which NU knew or should have known that there were problems (or failures of skill acquisition) with Anderson's or Ward's performance as RAs prior to the incident at issue. This deficit in the evidence is fatal to the Plaintiff's negligent supervision claim. See Doe v. Brandeis Univ., 177 F. Supp. 3d at 614 (under negligent supervision theory, plaintiff must demonstrate facts that would show that university knew or should have known there were problems with employee indicating her unfitness to serve in role, and then failed to take appropriate action).

In sum, NU is entitled to summary judgment on Count I. This follows because the University had no legal duty to Plaintiff to prevent the harm that occurred, because the University cannot be held vicariously responsible for the acts and omissions of two student RAs on the facts of this case, and because the sexual assault committed was neither proximately caused by nor the foreseeable consequence of any of NU's own conduct (including the conduct of its RAs).

B. Negligence Claim Against Defendants Antonucci and Jose (Count II)

Plaintiff brings a negligence claim against Defendants Antonucci and Jose that also arises out of these RAs' conduct on the night in question. Plaintiff asserts that Antonucci may be held liable, because she was personally responsible for training Anderson and Ward and for supervising Anderson; and Jose may be held liable for "creating an atmosphere where RAs were able to violate their employment obligations and [Code] rules with impunity, as well as for his personal failures to properly train and supervise RAs, including Anderson and Ward." (Pl.'s Opp'n to Defs.' Mot. For Summ. J., at 37.). As discussed *supra*, see Section II.A.3., the undisputed evidence of record permits no reasonable inference that Anderson and Ward were

negligently trained or supervised. Likewise, and as discussed *supra,* see id., the evidence in this case permits no reasonable inference that the sexual assault Plaintiff suffered at the hands of the assailant was a foreseeable consequence of (and thus proximately caused by) the negligence of these RAs. The negligence claim asserted against Defendants Antonucci and Jose thus fails as a matter of law.

C. Negligence Claim Against Defendants Sevigny, Wegmann and Estabrook (Count III)

Plaintiff brings a negligence claim against Defendants Sevigny, Wegmann and Estabrook, on the grounds that they negligently administered and supervised the disciplinary proceedings against the assailant, and in this connection failed to properly train their staff and Board members on the Code.[8] Plaintiff fails to present a cognizable negligence claim, because a university has no duty in tort to its students to conduct disciplinary proceedings with due care. See Doe v. Trustees of Bos. Coll., 892 F.3d at 94-95 (university had no duty of care to an accused student to conduct disciplinary proceedings in a particular manner where contracts between the university and its students outlined the process to be followed); Doe v. Emerson Coll., 153 F. Supp. 3d at 515 (dismissing negligence claim of student who accused another of sexual assault, on the grounds that "Massachusetts does not ... impose a common-law or statutory duty on administrators to enforce university policies.").

The claim fails for the additional reason that the undisputed evidence shows that the Board

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[8] To the extent that any of Plaintiff's negligence claims are premised on the failure to discipline Anderson and Ward for their conduct after the fact, such a claim fails as a matter of law. Plaintiff has not demonstrated or even alleged any harm that flowed to her based on NU's and its employees' disciplinary response to these Defendants' conduct. An essential element of a negligence claim is thus lacking. See Jupin, 447 Mass. at 146.

members who served during the assailant's disciplinary proceeding had received both a generalized training and a training focused on sexual misconduct charges, the definitions of consent and incapacitation, and the implications of alcohol and drug consumption in sexual assault cases. (See SMF ¶¶ 62-65.). Moreover, as discussed *infra*, see Sections II.E.and II.F, Plaintiff has identified no procedural errors in the handling of her complaint. In point of fact, it is clear that the Board *did* consider the definition of "consent" and the effect of intoxication on Plaintiff's ability to give consent to sex during their deliberations, notwithstanding Plaintiff's contentions to the contrary. See *infra* notes 18-19.

Sevigny, Wegmann and Estabrook, therefore, are entitled to summary judgment on Count III. Plaintiff has no claim sounding in negligence against these Defendants based on the disciplinary proceedings against the assailant, and has failed to identify any deficiencies in the training or supervision of the Board members or staff who were involved in this disciplinary process.

D. Negligent Infliction of Emotional Distress Claim Against All Defendants (Count VII)

Plaintiff alleges that the same conduct underlying her negligence claims caused her to suffer emotional distress. In order to prevail on a claim for negligent infliction of emotional distress, a plaintiff must prove: "(1) negligence; (2) emotional distress; (3) causation; (4) physical harm manifested by objective symptomatology; and (5) that a reasonable person would have suffered emotional distress under the circumstances of the case." Sullivan v. Boston Gas Co., 414 Mass. 129, 132 (1993) (quoting Payton v. Abbott Labs, 386 Mass. 540, 557 (1982)). For the reasons discussed *supra*, see Sections II.A through C, the Plaintiff's claim is deficient as to the

first and third elements. Plaintiff has failed to identify evidence from which a jury could reasonably find that these Defendants were negligent, or caused her to suffer a sexual assault, based on the cited conduct. See Doherty v. Emerson Coll., No. 1:14-CV-13281-LTS, 2017 WL 4364406, at *10 (claim for negligent infliction of emotional distress must fail when negligence claim based on same conduct fails). Accordingly, the Defendants are entitled to summary judgment on Count VII.

E. **Breach of Contract Claim Against NU (Count IV)**

Plaintiff brings a common law breach of contract claim against NU. This claim is premised on the assertion that Estabrook was not permitted to deny her appeal after the appeal had already been granted, and that, as a result, there was a lack of "basic fairness" in the subsequent proceedings because the audio-recording from the original Board hearing had been destroyed. NU counters that the Plaintiff has failed to demonstrate any breach of her contract with the University. The Court agrees.

The terms of the claimed contract at issue in this case are those set forth in the portion of the Code that covers disciplinary proceedings.[9] "In reviewing a student's breach of contract claim against his or her university, [courts] employ a reasonable expectations standard in interpreting the relevant contracts." Doe v. Trustees of Bos. Coll., 892 F.3d at 80. "Under this reasonable

[9] NU does not dispute the existence of such a contract for the purposes of summary judgment. Thus, as other courts faced with the same circumstances have done, this Court assumes without deciding that such a contract exists. See, e.g., Walker v. President & Fellows of Harvard Coll., 840 F.3d 57, 61 n.5 (1st Cir. 2016) ("[W]hile courts have treated student handbooks as contracts between students and schools, the question of whether such a document always constitutes a contract is, arguably, an unsettled issue under Massachusetts law."); Bleiler v. College of Holy Cross, No. CIV.A. 11-11541-DJC, 2013 WL 4714340, at *14 n.7 (D. Mass. Aug. 26, 2013) (Casper, J.) (collecting cases).

expectation standard, courts ask, in interpreting the contractual terms, 'what meaning the party making the manifestation, the university, should reasonably expect the other party [, the student,] to give it.'" Walker, 840 F.3d at 61 (quoting Schaer v. Brandeis Univ., 432 Mass. 474, 478 (2000)). "In the context of disciplinary hearings, [courts] 'review the procedures followed to ensure that they fall within the range of reasonable expectations of one reading the relevant rules.'" Doe v. Trustees of Bos. Coll., 892 F.3d at 80 (quoting Cloud v. Trustees of Bos. Univ., 720 F.2d 721, 724-25 (1st Cir. 1983)). "[I]f the facts show that the university has failed to meet [the student's] reasonable expectations, the university has committed a breach." Doe v. Trustees of Bos. Coll., 892 F.3d at 80 (quoting Walker, 840 F.3d at 61-62) (internal quotations omitted). Moreover, the courts must "'examine the hearing' afforded to the student 'to ensure that it was conducted with basic fairness.'" Doe v. Brandeis Univ., 177 F. Supp. 3d at 594 (quoting Cloud, 720 F.2d at 725).[10]

Plaintiff first contends that Estabrook's action in requiring her to submit an amended request for appeal after the original appeal had been allowed by the Appeals Board was contrary to

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[10] The "reasonable expectation" and "basic fairness" framework has been employed almost exclusively to analyze the contractual rights of the *accused* during disciplinary proceedings. See, e.g., Schaer, 432 Mass. at 478-82; Doe v. Trustees of Bos. Coll., 892 F.3d at 80-89; Doe v. Amherst Coll., 238 F. Supp. 3d 195, 215-20 (D. Mass. 2017). While the Court questions whether a *complainant* ever has an affirmative right sounding in contract to challenge a college's process for adjudging and disciplining an accused student, and will await appellate guidance on the point, there is at least some case law suggesting (albeit in circumstances not present in those cases) that such a claim might potentially lie. See Shank v. Carleton Coll., 232 F. Supp. 3d 1100, 1116-17 (D. Minn. 2017) (no breach of contract based on broad promise of "fair" and "supportive" process for addressing reports of sexual misconduct, when college allegedly failed to adequately investigate and take appropriate disciplinary actions against two students who sexually assaulted plaintiff); Theriault v. University of S. Maine, 353 F. Supp. 2d 1, 15 (D. Me. 2004) (dismissing breach of contract claim, because plaintiff had no reasonable expectation under the student code to challenge the involvement of a faculty advisor during a disciplinary proceeding against student who sexually assaulted her).

the Code's directive that "[a]ll decisions of the Appeals Board are final." (J.A., Ex. 8 at 31.). In essence, Plaintiff's position is that, once her first appeal was allowed, Estabrook was required to permit the new Board hearing to proceed notwithstanding the errors Plaintiff had identified with the review process. This position simply cannot be reconciled with what could have been Plaintiff's (or the assailant's) reasonable expectations when reading the Code.

Although Plaintiff argues that Estabrook had no authority whatsoever to alter the Appeals Board's decision once it was issued to her, the "Decision-making Authority" section of the Code provides:

> The Vice President of Student Affairs is responsible for the overall administration of the Code of Student Conduct as well as the Student Conduct Process. Under the oversight of the Vice President for Student Affairs, the Director in the Office of Student Conduct and Conflict Resolution has been charged with the day-to-day responsibility for administering the Code of Student Conduct and the Student Conduct Process.

(Id. at 14.). Estabrook, the Associate Vice President for Student Affairs, was the person at NU designated to oversee the Appeals Board's decision-making during the relevant time period, and that Code-conferred oversight necessarily included the authority to rectify errors in the process. (See J.A., Ex. 2 at 246:3-18.). Plaintiff cites to no evidence in the record conflicting with or casting doubt upon such a common-sense reading of the Code.

Estabrook supportably identified two errors in the Appeals Board's decision to allow the Plaintiff's appeal. First, Plaintiff had not identified a proper basis upon which an appeal could be granted. The Code only affords a complainant in a case involving alleged sexual violence a right to appeal a Board decision based on: (1) "a procedural error that impaired ... her right to a fair opportunity to be heard;" (2) the availability of new information "that could not reasonably have been made available during the original hearing and may be sufficient to alter the original Student

Conduct Board ... decision;" or (3) a request to review the sanction "because of extraordinary circumstances." (J.A., Ex. 8 at 30.). Here, Plaintiff's appeal did not reference any of the above grounds, and was on this basis deemed deficient.[11]

Second, Estabrook noted that the assailant had received no notice of Plaintiff's request for an appeal, and was likewise afforded no opportunity to respond to it before the Appeals Board reached its decision. Plaintiff argues that the assailant's lack of notice was not an error, because the Code does not *expressly* provide that the charged student must receive notice of a request for an appeal. While Plaintiff is correct that the Code then in effect lacked an express requirement that notice of an appeal be given to the assailant, that omission obviously did not prohibit NU from requiring that such elementally fair notice be given.[12] To conclude that Plaintiff was entitled to an *ex parte* appeal of a disciplinary decision concerning another student would defy logic, the due process-informed spirit of the procedures set forth in the Code, and any *reasonable* expectation of a complainant reviewing the Code. Where the charged student is the one who may be subject to sanctions as a result of disciplinary proceedings, notice to him is – as a matter of fundamental fairness inherent in any college process – essential prior to the Board hearing and any related appeal. See Doe v. Western New England Univ., 228 F. Supp. 3d 154, 175 (D. Mass. 2017) (insufficient notice of the charged misconduct that could result in a student's discipline

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[11] In her original appeal, Plaintiff pointed out only substantive issues with the Board's decision (*i.e.*, discrepancies between the assailant's statements to NUPD and his statement to the Board at hearing that, she maintained, demonstrated his lack of credibility), and argued that the Board improperly concluded that Plaintiff was capable of giving consent to the sexual encounter. (See generally J.A., Ex. 25.)

[12] The 2014-2015 version of the Code (post-dating the events at issue) now expressly requires that a charged student be given notice of any appeal and an opportunity to respond thereto. (See J.A., Ex. 41 at 26.)

violates fundamental fairness of proceeding).

Estabrook's action in response to these two errors was plainly appropriate. She did not deprive Plaintiff of her right to appeal the Board's decision, but merely afforded Plaintiff an opportunity to amend her request for an appeal and thereby ensure that the assailant received proper notice thereof. Plaintiff could not have held any reasonable expectation that she was entitled to more based on the procedures outlined in the Code. As such, no breach of contract claim can rest on Estabrook's exercise of her broad authority over the administration of NU's student disciplinary process.

Plaintiff's related argument that the hearings following Estabrook's decision lacked basic fairness is similarly unavailing. Plaintiff expressly declined the opportunity to review the audio-recording of the Board's initial hearing prior to filing her request for appeal. Nevertheless, Plaintiff argues now that, had the recording been available to her while preparing her amended request, she could have identified procedural errors that would have given rise to a meritorious appeal. While the Court agrees that destroying the audio-recordings of disciplinary hearings prior to the exhaustion of all appeals therefrom is not best practice, the Court does not agree that such practice renders all subsequent proceedings fundamentally unfair. See Schaer, 432 Mass. at 482 ("A university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts."). Plaintiff herself actively participated in the Board hearing. Thus, to the extent the Board committed any *procedural* errors, such failures would have been clear to Plaintiff based on her own first-hand knowledge of the handling of her complaint and a review of the Code. The record in this case in all events demonstrates that the Board did, in fact, follow the procedures required by the University's Code;

and the only argument Plaintiff has advanced to the contrary concerns actions taken *after* the Board reached its exonerating decision concerning the assailant.[13] The Court, therefore, cannot conclude that NU's disciplinary proceedings in this case lacked fundamental fairness to the Plaintiff.

Plaintiff's breach of contract claim fails for the additional reason that Plaintiff seeks only to recover damages for the emotional distress that she suffered during the disciplinary proceedings, and for the remainder of her freshman year when she continued to live uneasily in the same dormitory with the assailant. As NU rightly notes, "damages for mental suffering are generally not recoverable in an action for breach of contract." John Hancock Mut. Life Ins. Co. v. Banerji, 447 Mass. 875, 888 (2006). Such damages are only recoverable in the limited instances where emotional harm results from physical injury, or when it is "the result of intentional or reckless conduct of an extreme and outrageous nature." Id. Here, Plaintiff does not allege that she suffered any physical harm from the University's process in addressing her complaint against the assailant; nor does she allege any intentional or reckless conduct on the part of NU during the handling of her claim or thereafter. Thus, Plaintiff does not seek to recover damages that are cognizable in a breach of contract claim.

For all these reasons, NU is entitled to summary judgment on Count IV.

F. Title IX Claim Against NU (Count V)

Plaintiff next asserts that the manner in which NU conducted its disciplinary proceedings

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[13] To the extent Plaintiff's breach of contract claim is premised on the Board's allegedly inadequate training on the issue of consent, this argument fails for the reasons discussed *supra*, see Section II.C, and *infra*, see Section II.F. The record demonstrates that Board members did receive training on the definition of "consent," and did apply that definition during their disciplinary proceedings in this case.

violated Title IX. To demonstrate liability under Title IX, a plaintiff must show "(1) that [she] was a student, who was (2) subjected to harassment (3) based upon sex; (4) that the harassment was sufficiently severe and pervasive to create an abusive educational environment; and (5) that a cognizable basis for institutional liability exists." Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 66 (1st Cir. 2002). "To satisfy the fifth part of that standard, a plaintiff must show that a school official authorized to take corrective action had 'actual knowledge' of the sexual harassment and either failed to act or exhibited 'deliberate indifference' to it." Doe v. Emerson Coll., 271 F. Supp. 3d 337, 354 (D. Mass. 2017). "Deliberate indifference in the case of student-on-student harassment requires that the school's 'response (or lack thereof) is clearly unreasonable in light of the known circumstances.'" Doherty v. Emerson Coll., No. 1:14-CV-13281-LTS, 2017 WL 4364406, at *7 (quoting Porto v. Tewksbury, 488 F.3d 67, 73 (1st Cir. 2007)). A university will not be held liable if it takes "timely and reasonable measures to end the harassment." Wills v. Brown Univ., 184 F.3d 20, 26 (1st Cir. 1999).

At the outset, the Court questions whether Title IX affords the Plaintiff, as the accuser, a right to press a claim in the absence of any post-report harassment or mistreatment. See Davis, 526 U.S. at 645 ("[D]eliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it.").[14] Two federal district court recently certified this precise question to their respective circuit courts of appeal after recognizing the absence of clear authority on the issue and the existence of colorable arguments on both sides. See Kollaritsch v. Michigan State Univ. Bd. of Trustees, 285 F. Supp. 3d 1028 (W.D. Mich. 2018)

[14]The evidence is undisputed in this case that, following her report of sexual assault to NU, Plaintiff experienced no further harassment or mistreatment of any kind.

(certifying question of whether "a plaintiff [must] plead, as a distinct element of a Title IX claim, that she suffered acts of further discrimination as a result of the institution's deliberate indifference, rather than alleging mere vulnerability to further acts of discrimination"); Weckhorst v. Kansas State Univ., No. 16-CV-2255, 2017 WL 3701163, at *6 (D. Kan. Aug. 24, 2017) (certifying question of whether a plaintiff must show "as a distinct element of her Title IX claim, that the [university's] deliberate indifference caused her to suffer actual further harassment, rather than alleging that [the university's] post-assault deliberate indifference made her 'liable or vulnerable to' harassment").[15]

Some courts have found in circumstances similar to those at issue here that a plaintiff left open or "vulnerable" to harassment or assault due to a university's deliberate indifference has an actionable Title IX claim even if no *further* harassment or assault in fact occurs. See Weckhorst, 241 F. Supp. 3d at 1171-75 & nn.92-93 (holding that a plaintiff must allege that a university's "alleged deliberate indifference left her 'liable or vulnerable to' further assault or harassment, [even if plaintiff does not] additionally allege that post-report assault or harassment actually occurred") (collecting cases). It is the undersigned's view, however, that no such claim can properly lie. The Court recognizes that a college or university may respond inadequately to a charge of sexual harassment (*e.g.*, fail to carry out a satisfactory investigation, fail to conduct a proper hearing, and the like), and thereby leave a dangerous predator free to harm his victim further. In the event such harm at the hands of the accused comes to pass, the Court has no

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[15] These appeals remain pending before the United States Courts of Appeals for the Sixth and Tenth Circuits. See Kollaritsch v. Michigan State Univ. Bd. of Trustees, 298 F. Supp. 3d 1089 (W.D. Mich. 2017), appeal docketed, No. 18-1715 (6th Cir. Jun 25, 2018); Weckhorst v. Kansas State Univ., 241 F. Supp. 3d 1154 (D. Kan. 2017), appeal docketed, No. 17-3208 (10th Cir. Sept. 26, 2017).

difficulty seeing that the school can and should be held accountable for the further and foreseeable injury to an accusing party whom it has failed to protect in circumstances where it knew or should have known protection to be required. Relief is awarded, however, *not* for the failure of the investigative/disciplinary process *itself*, but for the *ensuing harm* that the Plaintiff suffered and that was allowed to occur because of the school's failures in process. This, of course, is consistent with the elemental requirements of proximate cause and foreseeability of harm in all civil tort actions.[16] But where, as here, there is no ensuing harm that flows from the University's actions or inactions, no claim should logically avail based on an accuser's dissatisfaction or discomfort with the manner in which the school administered its disciplinary proceedings.

Given that the question concerning the necessity of demonstrating post-report harassment "is difficult and has little direct precedent," see Kollaritsch, 285 F. Supp. 3d at 1031, the Court does not (and need not) render its ruling on this ground alone. Plaintiff's Title IX claim in all events fails as a matter of law, because Plaintiff has not and cannot prove that NU exhibited

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[16] It is likewise consistent with the established law in analogous statutory contexts. For instance, under G.L. c. 151B and Title VII, an employer is absolved of liability for employee-on-employee sexual harassment if it takes remedial and preventive action "reasonably calculated to end the harassment and reasonably likely to prevent the conduct from recurring." Modern Continental/Obayashi v. MCAD, 445 Mass. 96, 109-10 (2005) (quoting Berry v. Delta Airlines, Inc., 260 F.3d 803, 813 (7th Cir. 2001)). See Sarin v. Raytheon Co., 905 F. Supp. 49, 54 (D. Mass. 1995) (allowing summary judgment where employer conducted investigation, verbally warned harassers, and harassment did not recur); Messina v. Araserve, Inc., 906 F. Supp. 34, 38 (D. Mass. 1995) (allowing summary judgment against harassment claim where employer timely reprimanded offending coworker and harassment did not recur). Conversely, no claim will lie based on the alleged inadequacy of an employer's process if there is no actual harm to the plaintiff that eventuates as a consequence of such inadequacy. See, e.g., Walton v. Johnson & Johnson Servs., 347 F.3d 1272, 1288 (11th Cir. 2003) (holding that "where the substantive measures taken by the employer are sufficient to address the harassing behavior, complaints about the process under which those measures are adopted ring hollow").

"deliberate indifference" to her report of sexual assault. See Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 649 (1999) (court may determine at summary judgment if a university's response was not clearly unreasonable as a matter of law). In the case at bar, the record demonstrates that NUPD promptly responded to Plaintiff's complaint of sexual assault by accompanying her to the hospital for an examination, and then by initiating an investigation of the assailant. At the conclusion of NUPD's investigation, approximately three weeks after Plaintiff first made her complaint, disciplinary proceedings against the assailant commenced, and Plaintiff was afforded an opportunity to be heard at those proceedings. The Board then notified Plaintiff of its decision, and Plaintiff exercised her right to appeal that decision. Throughout the NUPD investigation, the ensuing disciplinary proceedings, and thereafter, NU imposed a "no contact" order between Plaintiff and the assailant which neither party violated during the entirety of Plaintiff's tenure at the University. NU additionally offered Plaintiff the option to move to a different dorm, and to transfer out of the lone class she was then taking with the assailant. Plaintiff declined these protective measures, and her counsel acknowledged at hearing that they proved to be unneeded.[17] See Leader v. President & Fellows of Harvard Coll., No. 16-10254, 2018 WL 3213490, at *4 (D. Mass. June 29, 2018) (Casper, J.) ("Harvard provided [plaintiff] with a range of options, including removing herself from the shared house [with her harasser]; although [plaintiff] ... would have preferred that the putative harasser be required to move instead, Harvard's conduct does not rise to the level of deliberate indifference because it did not provide that option.").

NU's response to Plaintiff's complaint was timely and appropriate and, therefore, does not

[17] Throughout her time at NU, the University apprised Plaintiff of the assailant's class schedule and on-campus living arrangements so that she could avoid coming into any kind of contact with him if she so chose.

fail Title IX's "clearly unreasonable" standard as a matter of law. See, e.g., Tubbs v. Stony Brook Univ., 343 F. Supp. 3d 292, 316 (S.D.N.Y. 2018) (disciplinary procedure not clearly unreasonable when university met its notice requirements, conducted an investigation, and arranged for a hearing, even if the hearing was "flawed and imperfect" because alleged assailant was permitted to question complainant); Facchetti, 175 F. Supp. 3d at 637 (university's response to sexual assault complaint was not clearly unreasonable, when school quickly interviewed alleged assailant, held a hearing, and took disciplinary action against him even when plaintiff was afforded no notice of the hearing or the university's decision); Butters v. James Madison Univ., 208 F. Supp. 3d 745, 762 (W.D. Va. 2016) (university's response to claimed assault was not clearly unreasonable when school initiated disciplinary proceedings upon receipt of a formal complaint and ultimately disciplined assailants).

Plaintiff points to what she contends are two specific deficiencies in NU's handling of the assailant's disciplinary proceedings; but neither rise to the level of deliberate indifference or manifest unreasonableness. See Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 174 (1st Cir. 2007), rev'd on other grounds, 555 U.S. 246 (2009) ("Title IX does not require educational institutions to take heroic measures, to perform flawless investigations, [or] to craft perfect solutions."); Butters, 208 F. Supp. 3d at 763 ("[W]hether [a university] could have designed a more victim-friendly system, whether it could have taken steps to protect [the complainant] better, or even whether [the university] followed its own policy to the letter, are not dispositive" of the issue of whether the university's response was clearly unreasonable).

Plaintiff first argues that Board members were improperly trained on the definition of "consent," and on the effect of one's incapacitation on his or her ability to furnish consent to sex.

It is clear from the record, however, that all students who sat on the Board *did* receive such training, and that students who participated in sexual assault-based disciplinary hearings were required to complete supplemental training tailored to sexual assault. (See J.A., Ex. 23, at 62:5-16.)[18] Moreover, the students who sat on the Board during the disciplinary proceedings at issue in this case did, in fact, consider the issue of whether Plaintiff could provide proper consent given her state of intoxication at the time.[19] While inadequate training may give rise to a Title IX claim in certain limited circumstances, this is not a case where "a reasonable juror could conclude on the evidence that any inadequacies in training were so deficient that they constituted 'encouragement of the [harassing] conduct' or otherwise amounted to deliberate indifference." Doe v. Emerson Coll., 271 F. Supp. 3d at 357 (quoting Simpson v. University of Colo. Boulder, 500 F.3d 1170, 1177 (10th Cir. 2007)) (no deliberate indifference when students received training on issues related to Title IX, including on sexual harassment and student conduct proceedings).

Plaintiff next contends that Estabrook for some reason lacked the authority to deny her appeal after it had been initially granted by the Appeals Board. As discussed *supra*, however, see

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[18] The student who served as the chair of the Board specifically recalled her own participation in an in-person training that was administered, at least in part, by a representative of the Boston Area Rape Crisis Center, and likewise recalled receiving training on the relationship between alcohol and sexual assault. (See J.A., Ex. 23, at 38:14-39:9, 41:12-15, 54:6-19.)

[19] The Board chair thus testified that she "always" read off the essential terms of the Code during deliberations; and, while she had no specific recollection of doing so in this case, she was "confident in saying that [the Board] would have looked at the definition of 'incapacitation' and discussed it." (See J.A., Ex. 23, at 86:4-12, 178:16-18.) Moreover, Tempesta, the OSCCR staff member who oversaw the Board proceedings at issue here, specifically testified that she remembered that the Board "talked about the fact that [Plaintiff] vomited and whether or not she had capacity at the time of the sexual encounter." (J.A., Ex. 21, at 225:1-12.) Finally, Tempesta noted in her letter to the assailant concerning the Board's decision that the Board had expressly considered the Code's definition of "consent" when arriving at its determination. (See J.A., Ex. 24 at 1.)

Section II.E, Estabrook's action was not a violation of NU policy. Estabrook articulated two reasonable bases for her decision: Plaintiff had not specifically identified either a procedural error or new evidence that could serve as a basis for allowing an appeal; and the assailant had not received fair notice of the appeal or an opportunity to respond to it. Furthermore, Estabrook's decision did not have any preclusive effect on the Plaintiff's appeal, as Plaintiff was allowed to resubmit her request for Board review (albeit on more limited grounds). The Court discerns no transgression of either the University's Code or basic fairness in any of this.[20]

Plaintiff obviously takes strong exception to the outcome of NU's disciplinary proceedings, and believes that the University should have found sexual misconduct and expelled the assailant. Even in the context of Rule 56, however, the facts of record make clear that Plaintiff's dissatisfaction with NU's handling of her complaint cannot give rise to a cognizable Title IX claim. See Davis, 526 U.S. at 648 (Title IX complainant "lacks [the] right to make particular remedial demands."); Roe v. Pennsylvania State Univ., No. 18-2142, 2019 WL 652527, at *11 (E.D. Pa. Feb. 15, 2019) (Kelly, J.) (recognizing that Title IX vests no right in a complaining party to challenge the allegedly erroneous outcome of disciplinary proceedings initiated against another student).[21] This is so because "[f]ederal law gives school officials wide

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[20] Even assuming, *arguendo,* that Estabrook did violate an NU policy, this would still not give rise to a Title IX claim. A university's failure to follow its own policy will not, without more, suffice to demonstrate deliberate indifference. See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 291-92 (1998) (school district's failure to comply with its own regulations does not establish deliberate indifference); Doe v. Board of Educ. of Prince George's Cty., 982 F. Supp. 2d 641, 657 (D. Md. 2013) ("[T]he failure to follow sexual harassment grievance procedures does not prove deliberate indifference under Title IX."); Facchetti, 175 F. Supp. 3d at 638 (same).

[21] Even if Plaintiff had standing under Title IX to challenge the allegedly erroneous outcome of the assailant's disciplinary proceeding, a jury could not reasonably infer deliberate

discretion in making disciplinary decisions, especially as they have to balance the interests of all concerned." Doe v. Galster, 768 F.3d 611, 621 (7th Cir. 2014).[22] In the absence of deliberate indifference, and such is the case here, "courts should refrain from second-guessing the disciplinary decisions made by school administrators." Id. at 617 (quoting Davis, 526 U.S. at 648). See also Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 996 (5th Cir. 2014) (recognizing that "[j]udges make poor vice principals" in the context of evaluating disciplinary decisions in the Title IX framework); S.B. ex rel. A.L. v. Board of Educ. of Harford Cty., 819 F.3d 69, 77 (4th Cir. 2016) (internal quotations and citations omitted) ("[A]dministrators are entitled to substantial deference when they calibrate a disciplinary response to student-on-student ... harassment, ... and a school's actions do not become 'clearly unreasonable' simply because a

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indifference from the outcome of the University's process in this instance. (See Pl.'s Opp'n to Defs.' Mot. for Summ. J., at 33-34 (citing Yusuf v. Vassar Coll., 35 F.3d 709, 715 (2d Cir. 1994)). The Board undeniably (and on multiple occasions) considered the evidence before it, and reached a decision that was altogether supportable based on that evidence. That Plaintiff may have been intoxicated on the evening in question does not, without more, render her sexual activity with the assailant a rape. Cf. Commonwealth v. Blache, 450 Mass. 583, 590 (2008) (in a criminal rape prosecution, consent does not turn not on whether complainant consumed alcohol or was intoxicated; the issue is "whether, as a result of the complainant's consumption of drugs, alcohol, or both, she was unable to give or refuse consent"). Even if, as Plaintiff contends, the result of the assailant's disciplinary hearing should have been different, there is no evidence whatsoever to suggest gender bias or gender-based indifference on the part of the Board. See Yusuf, 35 F.3d at 715 (plaintiff must point to "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding").

[22] As one court recognized, "[t]here has been much debate in recent times about the most effective method for addressing the formidable problem of sexual assault on college campuses. College administrators, politicians, academics and students alike have clashed on how best to balance the interests and rights of complainants with those of the accused." Yu v. Vassar Coll., 97 F. Supp. 3d 448, 460-61 (S.D.N.Y. 2015). For an extremely thoughtful analysis of the competing rights of accuser and accused in college disciplinary matters, see E. Gerstmann, Campus Sexual Assault: Constitutional Rights and Fundamental Fairness (Cambridge Univ. Press 2018).

victim or his parents advocated for stronger remedial measures.").

Plaintiff's Title IX claim also fails for the additional reason that she has not demonstrated that any actions or inactions of the University related to her claimed sexual assault had "the *systemic* effect of denying [Plaintiff] equal access to an educational program or activity." Roe v. Pennsylvania State Univ., No. 18-2142, 2019 WL 652527, at *5 (quoting Davis, 526 U.S. at 652) (emphasis added) (noting that the Supreme Court expressly recognized this standard in cases involving a single instance of student-on-student sexual harassment). See Davis, 526 U.S. at 653 ("By limiting private damages actions to cases having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored."). Plaintiff has cited the Court to records reflecting that, during counseling, she expressed distress and frustration over the interim measures afforded to her by NU and over the University's disciplinary proceedings more generally. (See Ex. to Pl.'s Br. in Resp. to Court's Procedural Order). Plaintiff has not, however, demonstrated that this distress and frustration had any effect on her *education*, including on her grades, class attendance, ability to graduate, and the like. Plaintiff's claimed psychological discomfort alone will not suffice to trigger a Title IX violation. See Gabrielle M. v. Park Forest-Chicago Heights, IL. Sch. Dist. 163, 315 F.3d 817, 823 (7th Cir. 2003) (no concrete, negative effect on education when plaintiff was "diagnosed with some psychological problems" following harassment).

In accordance with the foregoing, NU is entitled to summary judgment on Count V of the Complaint. Plaintiff has not and cannot demonstrate deliberate indifference on the part of the

University in connection with her report of sexual assault, a fact fatal to her claim under Title IX. Nor can she demonstrate that the isolated conduct at issue had the systemic effect of denying her educational access, an adequate and independent ground for dismissing this claim.

G. Massachusetts Equal Rights Act Claim Against All Defendants (Count VIII)

Finally, Plaintiff brings a gender discrimination claim against all Defendants under the MERA. In relevant part, the MERA provides: "All persons within the commonwealth, regardless of sex ..., shall have ... the same rights enjoyed by white male citizens, to make and enforce contracts, ... and to the full and equal benefit of all laws ...." G. L. c. 93, § 102(a). Plaintiff again rests her claim on the contention that Estabrook improperly denied her the benefits of her contractual relationship with NU, and that NU inadequately trained its Board and professional staff to handle her sexual assault complaint. (See Pl.'s Mem. in Opp'n to Def.'s Mot. Summ. J., at 39-40.) As discussed *ante*, Plaintiff has not demonstrated either a breach of contract based on Estabrook's actions, or based on the inadequate training of University staff. Plaintiff's MERA claim, therefore, premised as it is on the same conduct, must also fail. The Defendants are entitled to summary judgment on Count VIII.

CONCLUSION AND ORDER

For the foregoing reasons, Defendants' Motion for Summary Judgment is **ALLOWED**. Judgment shall enter for the Defendants on all claims.

SO ORDERED.

Robert B. Gordon
Justice of the Superior Court

Dated: March 8, 2019

NOTIFY

56

SUMMARY JUDGMENT MASS. R. CIV. P. 56	Trial Court of Massachusetts The Superior Court
DOCKET NUMBER 1684CV03335	Michael Joseph Donovan, Clerk of Court
CASE NAME Morgan Helfman vs. Paris Sanders et al	COURT NAME & ADDRESS Suffolk County Superior Court - Civil Suffolk County Courthouse, 12th Floor Three Pemberton Square Boston, MA 02108

JUDGMENT FOR THE FOLLOWING DEFENDANT(S)

Northeastern University
Antonucci (as amended), Katherine
Jose, Robert
Sevigny, Briana R
Wegmann, Mary
Estabrook, Madeleine

JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S)

Helfman, Morgan

NOTIFY 3/4/19 MFE KEK DJV BHK LAG

This action came before the Court, Hon. Robert B Gordon, presiding, upon Motion for Summary Judgment of the named above, pursuant to Mass. R. Civ. P. 56. The parties having been heard, and/or the Court having considered the pleadings and submissions, finds there is no genuine issue as to material fact and that the defendant is entitled to a judgment as a matter of law.

It is ORDERED and ADJUDGED:

Defendants' Motion for Summary Judgment is ALLOWED. Judgment shall enter for the Defendants on all claims.

JUDGMENT ENTERED ON DOCKET mar 14 '19
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a)
AND NOTICE SEND TO PARTIES PURSUANT TO THE PRO-
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

DATE JUDGMENT ENTERED	~~CLERK OF COURT~~ / ASST. CLERK
03/08/2019	X

Date/Time Printed: 03-08-2019 15:33:39

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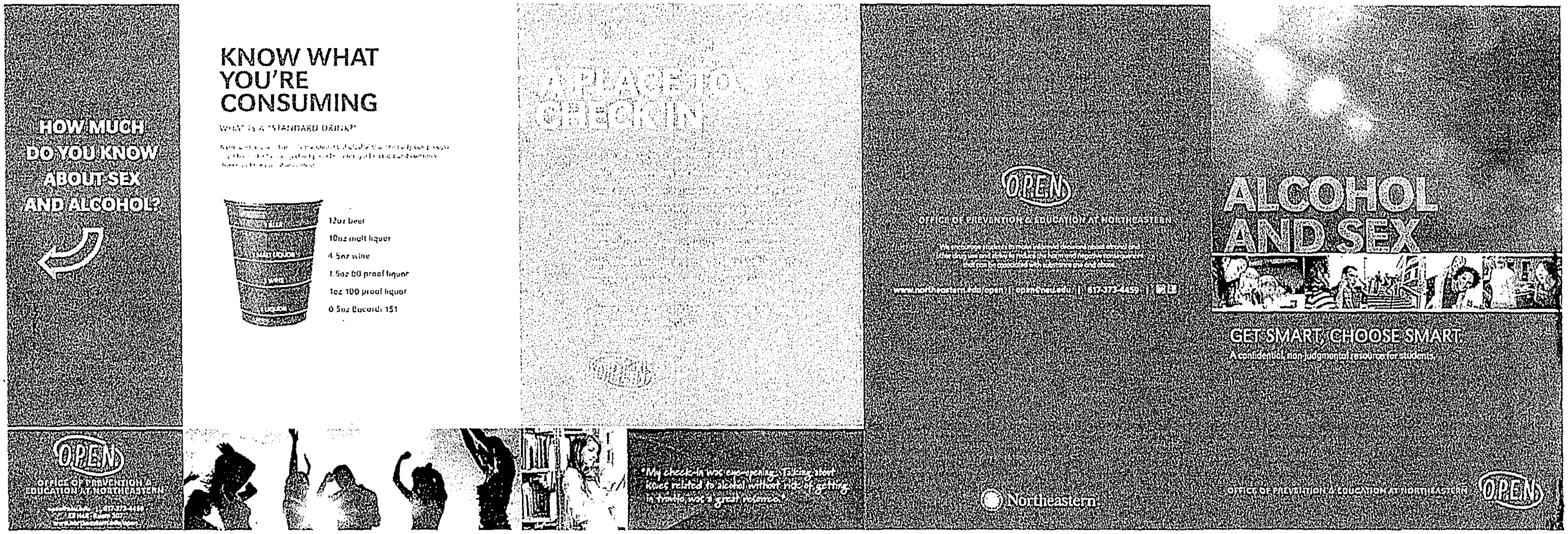
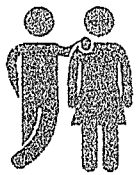

HOW MUCH DO YOU KNOW ABOUT SEX AND ALCOHOL?
O.P.E.N.
OFFICE OF PREVENTION & EDUCATION AT NORTHEASTERN
KNOW WHAT YOU'RE CONSUMING
12oz beer
10oz malt liquor
4.5oz wine
1.5oz 80 proof liquor
1oz 100 proof liquor
0.5oz Bacardi 151
A PLACE TO CHECK IN
"My check-in was eye-opening. Talking about ... related to alcohol without ... of getting in trouble was a great resource."
O.P.E.N.
OFFICE OF PREVENTION & EDUCATION AT NORTHEASTERN
Northeastern
ALCOHOL AND SEX
GET SMART, CHOOSE SMART
A confidential, non-judgmental resource for students
OFFICE OF PREVENTION & EDUCATION AT NORTHEASTERN
O.P.E.N.

HOW CAN ALCOHOL AFFECT YOUR ACTIONS?

Alcohol DOES NOT make sex more enjoyable

Drinking DOES NOT enhance sexual experience

HOW DOES ALCOHOL AFFECT DECISION MAKING?



DID YOU KNOW...

Alcohol is the most common drug used to perpetrate sexual assault and rape

DID YOU KNOW...

MAKING CLEARLY INFORMED CHOICES

UNPLANNED SEXUAL ACTIVITY

ALCOHOL AND SEXUAL ASSAULT

DID YOU KNOW

OTHER HELPFUL RESOURCES

VISION (Violence Support, Intervention, and Outreach Network)

UHCS (University Health and Counseling Services)

NU Public Safety

WEBSITES

DID YOU KNOW...

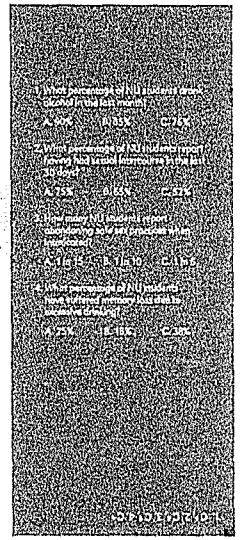
Alcohol can make talking and listening more difficult and impact communication around the decision to have sex.

NORTHEASTERN STUDENTS

WEIGH-IN

"My meeting at O.P.E.N. was very helpful and interesting. I didn't feel like I needed to withhold information because they weren't going to get me in trouble or scold me for my habits. Definitely a good program."

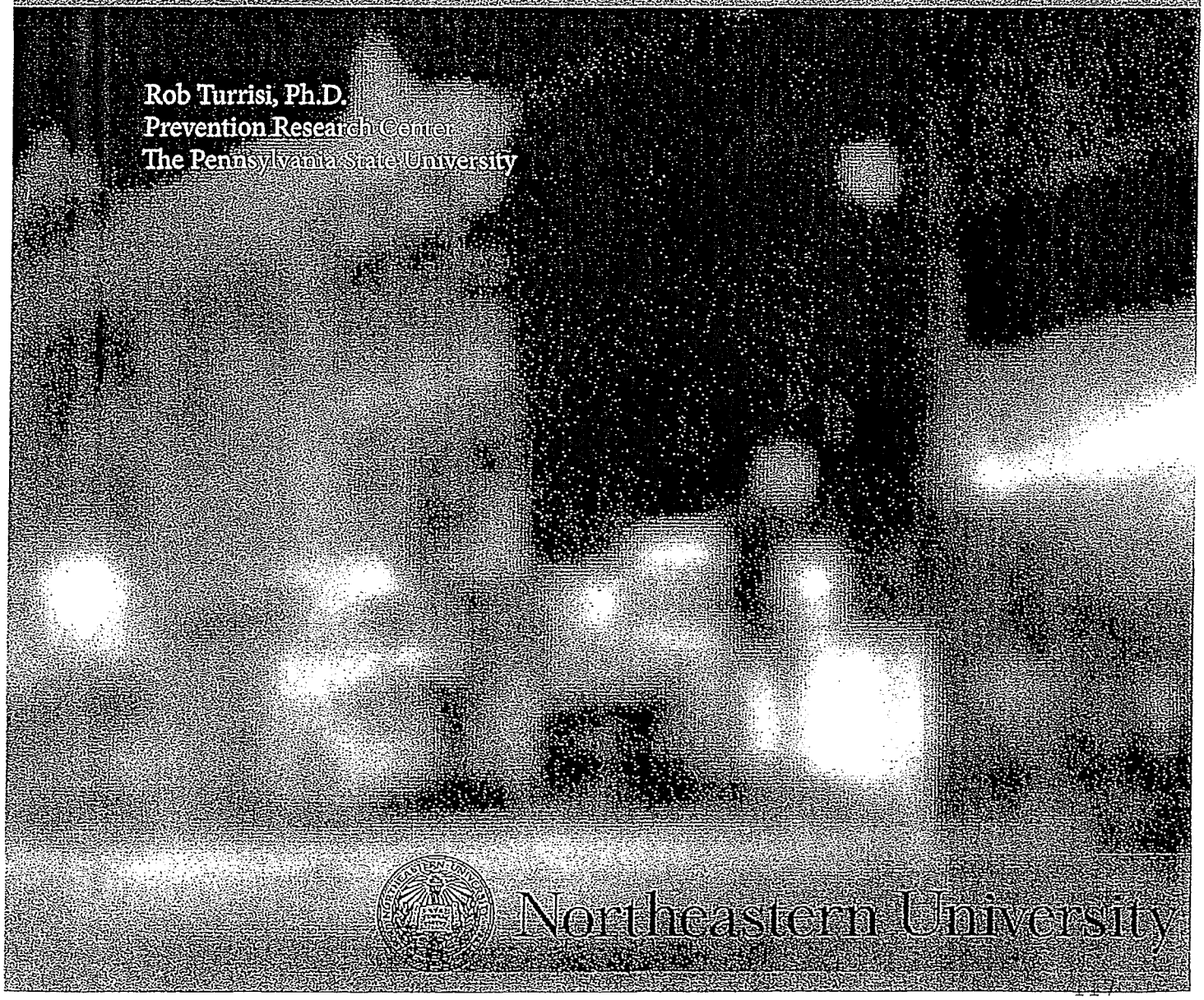
"O.P.E.N. is a way for students to reflect on habits that may affect short term and/or long term goals. Walking out of the appointment I felt like my time was truly my own and that I was on the right path not only with my education and starting a career, but also with how I deal with and control certain desires or distractions."



O.P.E.N. is here for you

a parent handbook for

Talking with College Students About Alcohol



Rob Turrisi, Ph.D.
Prevention Research Center
The Pennsylvania State University

Northeastern University

a parent handbook for

Talking with College Students About Alcohol

A Compilation of Information from
Parents, Students, and The Scientific Community

Northeastern University

Rob Turrisi, Ph.D.
Prevention Research Center
The Pennsylvania State University

Table of Contents

Introduction

The Problem of Alcohol Consumption and Binge Drinking in College-Age Students

Alcohol is the most misused and misunderstood drug in our society. Although college-age students are under the legal age for drinking alcohol, it is important to remember that alcohol is the most widely used drug by this age group. *(See box at left.)*

NATIONAL SURVEYS SHOW:

9 out of 10
experiment with alcohol

7 out of 10
drink regularly, and

3 out of 10
will be problem drinkers

By the time males are 18 years old, 1 in 4 of them are considered to be binge-type heavy drinkers (they drink once a week or more and have five drinks at one time).

One of the results of the misuse of alcohol in this age group is binge drinking. Sure, we have all heard about "frat parties" and crazy spring break trips and assume that these are just another part of the college experience. Although part of the college experience, binge drinking has been consistently associated with higher incidences of unplanned sexual activity, sexual and physical assaults, date rape, injuries, trouble with campus and local police, and alcohol-related driving injuries and fatalities. For example, consider this account from a college freshman:

"My friend had a drinking contest with her boyfriend. They each had five shots of Wild Turkey, two beers, and then started a 'power hour' or 'century' - one shot of beer per minute for 60 minutes. My friend began falling down and looked ill. She laid down to go to sleep and began throwing up for two hours straight. She rolled over and almost choked on her vomit."

This account from a college student is more common than you may believe. Episodes such as this can be avoided through parents helping their students as they attend college. Time and time again we have heard some parents say, "There is just no use – they will do what they want anyway and don't care what we say." This grossly underestimates the influence that parents can have – **YOU CAN MAKE A DIFFERENCE!**

Families are quite different from one another and we have written this handbook to reach a wide audience. Consequently, there may be some sections of the handbook that you can relate to better than others. This is okay. Not all families are the same and we tried to respect those differences.

By reading this handbook and talking with your son or daughter, you have the opportunity to reduce the likelihood he or she will experience the negative consequences associated with binge drinking.

Improving Communication in General

In this chapter, we discuss general issues about communicating effectively with your son or daughter. In all communication processes there are two important aspects: the style in which the material is presented and the content of the material. You may find that some parts of the chapter apply more to you than other parts.

Beginning A Dialogue

The first step in effectively talking with your student is simply getting the talking started. Such conversations will not necessarily occur in a single sitting, but often will evolve over multiple times. As a parent you must take active steps to establish the dialogue that is so important to both you and your student. When the time is right, you will want to suggest to your student that you would like to talk with her or him. Don't expect your student to agree. In fact, many students will respond with a negative reaction.

Here are some common negative reactions that students have when parents try to open a dialogue about sensitive topics and a few ways other parents find useful in dealing with them:

FEAR OF HEARING A LECTURE

Many students are open to talking but the last thing they want to hear is a one-way lecture from their parents about right and wrong. *Studies show more drinking goes on in teens who come from homes where parents tend to lecture too much.*

Student Objection:
"I know what you will do if we talk. You'll lecture me like you always do. Then if I argue you will interrupt me."

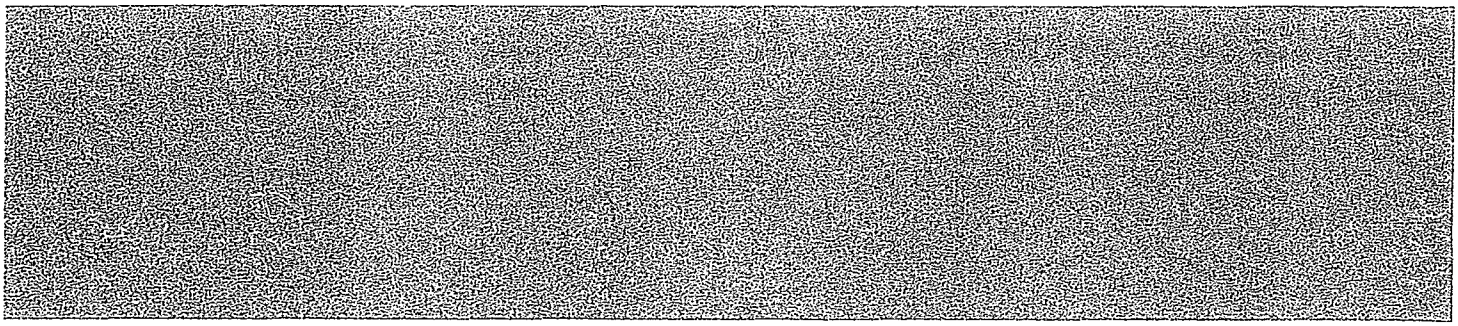
Parental Response:
"You're right. This time I won't lecture. I will listen to what you think. I want to change things now that you are heading to college."

ANGER ABOUT NOT BEING TRUSTED

Some students interpret a request to talk as a sign that you do not trust them. *Studies show that when teens feel they can trust their parents and are trusted by them they tend to drink less.* You will need to offer reassurance that you are not suspicious and are doing this to help them, not attack them.

Student Objection:
"What's the matter, don't trust me?"

Parental Response:
"I trust you. But this is a very important issue and I think we need to pool the information we know to make sure you deal with everything effectively and that you know what to expect and what to do. To do that, we need to talk to each other."



FEAR OF PUNISHMENT

Another common objection focuses on fear of being punished. *Studies show that when teens fear punishment they communicate less often with their parents.* In turn, these teens tend to drink more often and are more likely to experience alcohol-related consequences.

Student Objection:
"Sure, talk with you and you won't let me go out. Forget it."

Parental Response:
"I promise that I won't be that way. I will listen to you. I'll take what you say seriously. I'll be straight with you and you be straight with me."

THE STUDENT THINKS THEY ALREADY KNOW IT ALL

Some students don't want to talk because they think they already know everything there is to know about a topic. Even though students think they know everything, they often do not. Don't let this objection deter you in your pursuit of communication.

Student Objection:
"I've heard it all before. We don't need to talk."

Parental Response:
"You probably already know quite a bit. It would make me ***feel*** better if we talked it through. Besides, it would help me to better understand how things are different from when I was your age."

ADDITIONAL CONSIDERATIONS

There are other objections that you might get, although these are the major ones. Sometimes you will hear more than one of them from your son or daughter. The central themes in your response should be that of ***caring*** about the student, wanting to ***understand*** the student, and wanting to ***help*** the student, while at the same time ***respecting*** the student's privacy and desire to be independent. The example parental responses we gave illustrated these themes. They may not work well for your particular son or daughter and you may need to adapt them to his or her particular personality. But if you have open communication channels, you are more likely to help your student. Most of all, be constructive in your responses, not defensive or angry.

Some Communication Pointers

Here Are Some Do's and Don'ts Studies Have Shown Make A Difference in How Students Respond:

LISTEN
Permit the person to speak without interruption. Listen to what he or she says. Sometimes, it is good to paraphrase. "Let me see if I understand you. It sounds like you feel that..." With paraphrasing, you don't agree or disagree, you interpret.

VERBALIZE RESPECT
Whenever you can and it is appropriate to do so, convey respect to the other individual (e.g., "I admire what you have done and how you are coping"). People want to be respected and will be more willing to talk to those who respect them. Tell your son or daughter you are proud of them for being able to handle these tough situations.

CHOOSE A GOOD TIME
Choose an optimal time to bring up and discuss problems. Don't do it when the other person is rushed or has a commitment elsewhere. Wait until you both can have a relaxed, calm discussion. Perhaps you could take your child to lunch or out for some ice cream where you could both sit down to talk and listen to one another.

COMMUNICATE DIRECTLY
Don't talk about important things while absorbed in another activity, such as reading the newspaper, watching television, or doing the dishes.

TRY TO APPEAL TO COMMON GOALS
Students need to be reminded that you are on their side. Whenever possible, common goals should be emphasized and should serve as the basis for your guidance and recommendations (e.g., You both want them to be healthy and safe).

AVOID COMMUNICATION "STOPPERS"
There are single statements that will close anyone down (e.g., "Anyone who drives drunk is crazy;" "No one in this family would ever consider doing that").

CONFLICT IS NATURAL
Realize that conflict is natural. We are not identical to one another. We all have different beliefs and values, therefore disagreement is a natural thing. We should use conflict as an opportunity for growth and for learning about each other rather than treating it as a negative experience.

AGREE TO DISENGAGE
Agree to temporarily stop if things don't go well. Wait until both individuals can talk in a calm, direct fashion.

USE APPROPRIATE BODY LANGUAGE
How you position yourself as you talk can send important messages about your attitudes or possibly convey something you are not trying to convey.

AVOID DEBATE MODE
Sometimes conversations become structured so that people feel they must "defend" their position. The entire conversation turns to a mini-debate. If you sense the conversation has turned into a debate, try suggesting that you both approach matters from a different angle. Also avoid statements that begin with "you" ("You did this..."). They often make the other person feel attacked.

The Initial Conversation

Most students have heard comments like "kids getting drunk is terrible" from other adults and from the media. You should NOT start your conversation with statements such as this. Keep your comments short and remember that you don't have to say everything. This is the beginning of a conversation. It probably is best to begin with a statement that conveys open-mindedness and then ask your son or daughter questions and his or her experiences. Talk about your own experiences and opinions about how they have changed over the years. As you tend to open-up, so will your son or daughter. Keep distinctions between facts and opinions: "My opinion is...This opinion is based on facts. This opinion is based on these experiences. This opinion is based on these observations."

Ask your son or daughter what he or she thinks. Listen while trying to understand, without defensiveness. Suspend critical judgment. Even if your student says what you want to hear (e.g., "I don't drink now, let alone drink to get drunk") don't think that this means you don't have to talk. Your goal is not just to reassure the student through talking but to help expand your student's thinking. You want to help him or her deal with the range of experiences that your son or daughter is likely to encounter in college.

Try to think of thought provoking questions that can be asked in a supportive, non-threatening way. For example: Do you know kids who drink a lot? How has it affected them? Have you ever been offered alcohol by someone you knew? (If so) what did you say? (If not) what would you say? What if someone really pushed you? What would you say if they said... Is there another side to this view? Do you see any risks? Do you have any concerns? Ask questions; don't lecture! This is probably the single most important aspect of communication. People like to talk about themselves and their opinions. People like to explore logic and details.

They do not like to be told what to think!

Be Prepared to Answer Questions About Your Own Behavior

If you truly establish a dialogue with your son or daughter, then he or she will probably ask you questions about your past behavior. Did you drink alcohol when you were a student? If it was okay for you to do, why isn't it okay for me to do? Did you ever get drunk? You need to be prepared to answer such questions and in ways that the student will not decide that it is permissible to drink.

Before initiating a discussion with your son or daughter, you should take some time to think about the kinds of questions he or she is likely to ask you and what your responses will be.

Communication: The Short Response

A number of parents who we have interviewed express frustration at their inability to get their son or daughter to talk at length on any issue. They swear that their son or daughter has a vocabulary comprised mostly of "Okay, Mom," "I dunno," "Whatever," "If you want," "Sure, okay," "Not now," when it comes to parental conversation. Some students use these responses when they don't feel like talking because they are busy, tired, or simply not in the mood. Maybe the student thinks he or she is just going to hear yet another lecture from the parent. Maybe the student thinks that the parent will start nagging at him or her, yet again. The student may think the parent just doesn't understand them.

Parents need to respect this and not force communication at a bad time. Let it drop and bring it up later. Try to structure a time to talk when the student is apt to be open to it. Students are often tired at the end of a hard school day or an athletic event, and this may not be the best time to try to start a conversation. Or the student may be preoccupied with something else. Think about your student's schedule and how you can create a time where you will have his or her undivided attention. Perhaps taking him or her out to a quiet dinner or some other place where a "one-on-one" conversation can be effectively initiated will work.

Developing Assertiveness

When your son or daughter begins college it is likely that they will form entirely new social groups. The most influential reason why new students drink is because of social reasons. Friends can influence your son or daughter in two major ways. First, there is active social influence, which occurs when a friend explicitly suggests that your son or daughter engage in some behavior (e.g., "Let's go get drunk"). Second, there is passive influences such as when they think everyone is doing it and that it is an acceptable thing to do. Part of reducing social pressure is not only helping your son or daughter resist active influence attempts but also helping your student to put into perspective the fact that (1) not everyone is necessarily doing it, (2) even if people were, this does not make it right or a good thing to do, and (3) friends may respect your son or daughter for not drinking.

There may be times when your son or daughter may be put in situations where he or she is pressured by one or more peers to perform behaviors she would rather not engage in. For example, he or she may be pressured by someone to have a drink when your son or daughter doesn't want to. Students need to develop skills to resist such pressure and affirm their own values, beliefs, and attitudes.

COMMON PRESSURE LINES

Students are exposed to a wide range of pressure lines to try to get them experiment with drugs or alcohol. Here are some examples of what they might hear:

Come on, everyone has tried it.

If you won't drink with us, then why are you hanging out with us?

It's all part of growing up and being in college.

We drank once before, so what's the problem now?

You will love it!

You'll have an incredible time if you do.

Come on, take a drink. It will get you in the mood.

Everyone is doing it.

You've been working too hard. You deserve to go party.

You can study tomorrow.

Students need to develop adequate responses to such pressure lines. What they need most are simple but effective "one liners" that will diffuse the pressure without making a big scene or issue about it. It is difficult for parents to provide such responses to the student because parents usually are not aware of the current language that students use with one another. It is probably more useful for parents to tell their students that they will probably be exposed to pressures to drink and for the student to try to think of short yet effective responses to pressure attempts. Often such simple phrases as "It's just not for me, it's not what I want" or "I don't drink" will work quite effectively. We have evaluated a wide range of possible responses and students clearly prefer simple, straightforward "outs" to the pressure situation. Encourage the student to think about such "one liners" beforehand to be prepared if he or she finds himself or herself in an uncomfortable situation.

Talking About Alcohol

Alcohol is the most misused drug in our society, although most people do not even consider alcohol to be a drug. *It takes only a single episode of intoxication to experience life-changing consequences, accidents, arrests, etc.* We are not so naïve that we think that parents talking with their sons and daughters about alcohol use will put an end to alcohol consumption in college students. However, you should do everything in your power to minimize odds of them being at risk.

PARENTAL RELUCTANCE TO TALK WITH STUDENT ABOUT DRINKING

MYTH	FACT
My son or daughter is not interested in drinking.	Over 90% of students try alcohol outside the home before graduating from high school.
My son or daughter has learned about the negative effects of alcohol in school.	Although most students do learn about alcohol in their classes on health, we have found that many important issues never got covered.
At this point my son or daughter should know better.	Unfortunately, the reality is that many students at this point in their lives are still uninformed about how powerful a drug alcohol can be.
My son or daughter won't listen at this point.	The results of the American College Health Survey revealed that parents were the number one source that students turned to for important information.

IN YOUR TALKS THERE ARE SEVERAL TOPICS THAT YOU SHOULD BE SURE TO ADDRESS

First, you should talk about how drinking affects the body. Students need to know how drinking on a given occasion will affect them.

Second, you should make clear your own position concerning your student's drinking, exactly what is okay and what is not.

Third, students drink for a variety of reasons. If you address this directly, then he or she will be better able to think through the choices she/he makes when confronted with "positive" motivations.

Fourth, you need to discuss reasons for **NOT** drinking and the many negative consequences that can result from drinking.

Finally, you need to make clear your willingness to help your son or daughter find constructive alternatives to drinking.

How Alcohol Works in the Body

Alcohol is a drug that is absorbed into the bloodstream from the stomach and the small intestine. It is broken down by the liver and then eliminated from the body. **There are limits to how fast the liver can break down alcohol and this process cannot be sped up.** Until the liver has had time to break down all of the alcohol, the alcohol continues to circulate in the bloodstream, affecting all of the body's organs, including the brain. Nothing can speed this up. Not exercise, drinking coffee, etc. Nothing.

In the media it is suggested that most individuals can have one drink per hour and maintain sobriety. Unfortunately, this is a dangerous rule. For individuals weighing over 200 pounds this might be true, but for most females and males, even ½ drink per hour could lead to intoxication and the bad things that go along with it (fights; accidents).

As alcohol reaches the brain, a person begins to feel drunk. The exact nature of this feeling can vary considerably from individual to individual and even within the same individual from situation to situation.

What is common to all individuals and all situations is that alcohol depresses the brain and slows down major functions such as breathing, heart rate, and thinking. This is one reason why alcohol is so dangerous. **If an individual drinks too much alcohol, his or her breathing or heart rate can reach dangerously low levels or even stop.**

Physical and Psychological Effects

Alcohol is measured in terms of blood alcohol content. In popular press, you may see reference to terms such as BAC or BAL. A BAC of 0.1 percent means that 1/1000 of the fluid in the blood is alcohol. This may seem very small, but it does not take much to achieve this level. For example, a 150-pound female who consumes 5 drinks in 2 hours will have a BAC near 0.1. A 115-pound female who consumes 4 drinks in 2 hours will have a BAC near 0.1. **At a BAC of 0.1, most students will be very drunk. Their thinking, vision, hearing, reaction time, movement and judgments of speed and distance will be seriously impaired.** It is likely that the brain will not form new memories even though the person is completely conscious and speaking. This is what is known commonly as a "black-out". The person is awake, but the brain is focusing on other more important tasks such as breathing and keeping the heart and blood going.

Most students DO NOT know how drinks influence the blood alcohol level. In fact, they have many misconceptions about how drinking affects BAC. Students tend to think that the impact on BAC of additional drinks is smaller after more drinks have been consumed. This is wrong. Each additional drink adds the same amount of alcohol to the blood whether or not that drink is the first or fifth drink.

People are notoriously bad at estimating how drunk they are. In cases where they are very drunk, it is indeed obvious. But more often than not, people get to the point where they are impaired but do not realize it. Study after study has demonstrated that people are extremely poor at guessing how sober they are.

Many accidental deaths occur from mixing alcohol with other drugs. Even drugs that you can buy without a prescription, such as aspirin or cold remedies, can change the way alcohol acts on the body.

ALCOHOL *(beer, wine, liquor)* MIXED WITH:	EFFECTS:
Antibiotics	Extreme drowsiness, decreases effectiveness
Antihistamines	Extreme drowsiness, causes temporary depression
Aspirin	Stomach and intestinal bleeding
High Blood Pressure Medicines	Dangerously lowered blood pressure
Narcotics	Extreme slowing of brain activities, breathing slowed down or stopped
Non-Narcotic Pain Killers	Stomach and intestinal irritation or bleeding
Sedatives & Tranquilizers	Extreme slowing of brain activities, breathing slowed down or stopped, heart slowed or stopped

Some parents allow their sons or daughters to drink a controlled amount on certain occasions, such as holidays and family functions. Still other parents believe it is all right for students to drink small amounts of alcohol, as long as he or she does so in a responsible fashion. **Your own orientation as a parent is a matter of your own values.** However, if you are going to permit your son or daughter to drink alcohol in certain contexts, then you must **be clear** about exactly what these contexts are and what constitutes responsible behavior. **Studies consistently show that when parents permit their sons or daughters to drink they tend to drink more often and heavier outside the home.**

HERE ARE BELIEFS THAT MANY STUDENTS HOLD WHICH ARE NOT TRUE:

Black coffee will help you become sober

Exercise will help you become sober

Eating food will help you become sober

Taking a cold shower will help you become sober

Fresh air will help you become sober

A quick walk will help you become sober

Going from dark lighting to bright lighting will help you become sober

Drinking milk before drinking will allow you to drink as much as you want

Putting a penny in your mouth will lower your BAC

These myths are important to dispel because students may decide to drive drunk after engaging in such activities, thinking that the activity has "sobered them up." In fact, the activity only creates a temporary illusion of sobering up and in some instances increases drunkenness.

Reasons Why Students Drink

It is important for parents to recognize that there will be "positive" reasons (at least from the student's perspective) for why they choose to drink. If parents only choose to focus discussions on the negative aspects of drinking, ignoring the positive aspects, they run the risk of losing credibility in their son's or daughter's eyes. Also, you need to help your son or daughter put these "positive" motivations in perspective so that they do not start to drink because of them. Here are some of the major ones that research has shown impact drinking behavior.

ADDS TO A CELEBRATION

Some students believe that drinking is one way to celebrate a special occasion. For example, a friend may suggest to your son or daughter that they have a few beers after finishing an important assignment. It is important that you talk with your son or daughter about alternative ways of celebrating such as: (1) suggesting that your son or daughter go shopping for something special (e.g., clothes, music, sporting goods); (2) suggesting an outing, such as dinner, that would include a few special friends; and/or (3) offering to have friends over for a small dinner party (without alcohol). Encourage your student to tell you about significant things that happen in his or her life and then try to help him or her celebrate positively.

MAKES YOU FEEL SEXIER, ENHANCES SEXUALITY

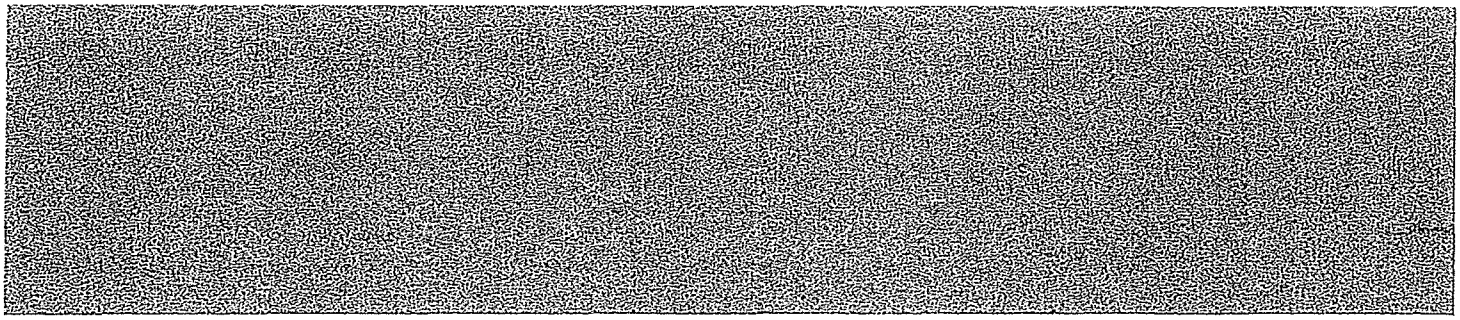
Some students believe that drinking alcohol adds to sexual experiences, but it is important to warn your son or daughter about the dangers in mixing alcohol and sex. First, because alcohol impairs judgment, students may do things that they may regret later on, such as have sex with someone that, if sober, they would choose not to, or going further sexually than they are interested. Second, perpetrators of sexual assault use alcohol to render their victims incapacitated and unable to fight back. Alcohol might prevent them from being able to recognize red flag behavior in perpetrators. Finally, there is considerable scientific evidence to indicate that students are much more likely to engage in unprotected intercourse if they have been drinking, thereby increasing the chances of an unintended pregnancy or a sexually transmitted disease, such as AIDS.

LOWERS STRESS

Another reason students give for drinking is that alcohol helps reduce worries. Parents should talk with their sons or daughters to find out about what worries them and help the student directly confront these worries in a realistic fashion. Parents can also point out the need to confront problems directly rather than avoid them and note that the problem does not go away because you drink (and, in fact, it may become worse).

MAKES IT EASIER TO EXPRESS FEELINGS/LESS INHIBITED

Another reason students give for drinking is that they believe that alcohol helps make it easier to express feelings or talk with people to whom they are attracted. Parents need to be sensitive to how difficult it is for students to communicate in a new environment where they are unlikely to know anybody. Parents should point out that while often releasing inhibitions, alcohol actually could cloud judgments, making students think that they are communicating better when, in fact, they are not. Often times alcohol interferes with communication about what is okay and what is not. We know that sexual assault is almost never a miscommunication but a deliberate choice on the perpetrator's part.



PEER PRESSURE

Another important reason why students drink is the influence of friends. Your son or daughter may feel pressured to drink. This pressure can be direct, as in the form of someone handing him a beer at a party, or it can be indirect, such as when he or she wants to be part of a group and that group experiments with alcohol. Parents CANNOT choose their student's friends for them. However, parents can help their son or daughter understand the dynamics of peer pressure and stress the importance of being his or her own person. Finally, parents and students can talk about situations that could come up, such as a friend introducing alcohol at a party, so that students can anticipate how to react.

FITTING IN

Often the highlight of the day after drinking are the post-party war stories about who drank the most shots, who blacked-out, and who had the worst hangover. Although some students view these outcomes as badges of honor, our findings suggest that hangovers, black-outs, and heavy drinking are associated with accidents, unsafe sex, arrests, missed work, failed courses, and general victimization. It is important to understand that the data shows that perpetrators of sexual assault target people who are incapacitated by alcohol.

HELPS MOOD

Many students believe that alcohol will help them get in a better mood. They should know that it is normal to feel sad and stressed at times. They should also find alternate ways to regulate their mood without alcohol or other drugs (e.g., caffeine). Exercise is always a good alternative to help improve one's mood. It is also important to explain to your son or daughter that the "high" from alcohol is accompanied by extreme lows as well.

SOMETHING TO DO

Some students get bored and turn to alcohol as a means of getting excitement out of their lives. To confront this, you can offer alternatives that your son or daughter can pursue. Some examples include getting involved in sports, hobbies, music, dance, games, reading, and school clubs. Students could also become involved in volunteer activities that are associated with causes they really care about, such as protecting the environment or promoting literacy. This is a good way to meet others with similar interests and also to feel good about themselves. Many students go to parties or have parties as a means of entertainment. Drinking frequently occurs in such settings and it is important that you provide suggestions on how students can enjoy themselves without alcohol.

HERE ARE SOME SUGGESTIONS

1. Try to meet three new people.
2. Try to find individuals who share common interests other than drinking.
3. Try to think about topics for conversation before going to the party to keep the focus of the conversation away from drinking or not drinking.
4. Never drink from a glass that has been out of your sight. Unfortunately there are some predators who use drugs to facilitate committing sexual assault.

Why Students Do Not Drink

Many students choose not to drink and the reasons they cite for not doing so can form the cornerstone of your conversations about the disadvantages of drinking. Before discussing these, we must interject a word of caution. If you try strong scare tactics with students by inducing a great deal of fear about negative consequences, then your efforts might actually backfire. Research has shown that when faced with highly fear arousing information, some people will often "turn off" to it and not pay as much attention to it. This is because such information and thoughts are anxiety provoking and people are motivated to avoid anxiety. Why think about something when it is unpleasant to do so? In addition, strong scare tactics will often result in a loss of credibility. If you paint a picture based solely on the dire consequences of drinking and a student fails to see such consequences materialize when he, she, or a friend drinks, then the student will infer that you were wrong or you were exaggerating the consequences. Discuss the negative consequences in a matter of fact, honest, and straightforward fashion.

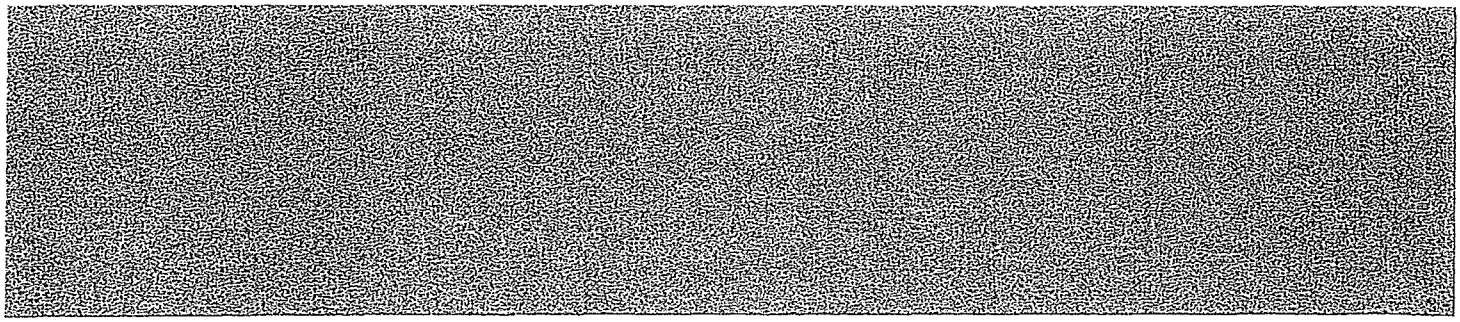
DRINKING IS ILLEGAL

Students generally know that drinking alcohol under the age of 21 is illegal. However, the general perception is that they will not get caught by the authorities and suffer any legal consequences. The fact is there is some truth to this perception. If, as a parent, you try to convey to your student the idea that there is a high probability of being caught when in fact there is not, then you will probably lose credibility. Instead of taking such a position, we have found it useful simply to remind students about the many ways that they may get caught. Drinking at parties often leads to public disturbances and complaints to police, who will arrest all at the scene who are intoxicated.

What happens if authorities catch a student? This varies from community to community and judge to judge. However, there generally will be substantial costs in legal fees. There will be family embarrassment, since many such arrests are routinely reported in newspapers (not as headlines, of course, but in smaller sections labeled "Police Reports"). The student will also probably experience embarrassment, as he or she is publicly associated through the newspapers with getting caught for alcohol consumption. Prosecution in court may require the parent to take time off from work, thus costing the family money. Our experience has shown that students rarely have thought about even half of the above consequences and that making them more aware of the implications of an arrest may have deterrent value.

DRINKING MAKES YOU SICK OR PASS OUT

Alcohol is an irritant to the lining of the digestive system. If too much is consumed, an individual will vomit and the effects on the system can be felt for days (frequently referred to as a "hangover"). Nobody at a party or a social function likes being around someone who is sick. This is complicated by the fact that the sickness one experiences often happens suddenly and with little warning.



DRINKING CAN LEAD TO PREMATURE DEATH

Excessive alcohol consumption can have serious negative physical effects. Among other things, it causes damage to the liver, kidneys, brain, and cardiovascular system, which are all long term in nature. There are however, countless instances of students that have had fatal accidents or unsafe sex and contracted a sexually transmitted disease following a single night of heavy drinking. Unfortunately, it is also not uncommon for individuals who vomit from heavy drinking to choke to death.

DRINKING MIGHT LEAD TO BEING AN ALCOHOLIC

Most students have negative images of alcoholics and most do not want to become alcoholics. Most students are also convinced that they can control their drinking and will not become alcoholics. Experts distinguish between three types of drinkers: social drinkers, problem drinkers, and alcoholics:

EXAMPLES OF SIGNS THAT MAY BE INDICATIONS OF A DRINKING PROBLEM INCLUDE:

- Needing A Drink To Have Fun
- Forgetting What Happened While Drinking
- Drinking To Feel Better About Oneself
- Bragging About Tolerance
- Drinking Fast or "Guzzling" Drinks
- Drinking In The Morning
- Using Alcohol To Help Solve Problems
- Sneaking Drinks
- Finding Reasons to Continue Drinking
- Having Difficulty Stopping
- Ability To Socialize Only When Drinking

Some individuals pass through stages from social drinking to problem drinking to alcoholism. For others, the addiction may occur after only a few drinks. Some students are genetically disposed towards alcoholism and can become problem drinkers relatively easily. Many students cannot articulate the differences between a social and problem drinker.

Binge Drinking: Drinking to Get Drunk

Binge drinking refers to individuals who set out to get drunk on a given occasion by drinking five or more drinks in the course of a short period of time (e.g., over the course of two hours). Binge drinking is quite common in both high schools and colleges. Almost 30% of high school students have engaged in binging. Many colleges report rates as high as 60%. There are times when individuals will plan to binge drink (e.g., Let's go out and get hammered!). However, there are numerous occasions where individuals will only plan on having a drink or two, but get carried away by drinking games, parties that get out of hand or someone buys a round of drinks, etc. **Binge drinking has serious risks. Consider these quotes from a sample of college students:**

"I went to a fraternity party off campus. I had at least 12 shots of liquor and two mixed drinks. That night, I went home with this guy I did not know ... The guy and his roommates carried me home. I went to the hospital for alcohol poisoning and rape. I blacked out. I never pressed charges because he used the condom in my wallet."

"I was having a great night. I drank at least 15 beers. Then I blacked out. This is not unusual for me. Another time, I became violent, smashed bottles and got in tons of trouble."

"A girl I know got so drunk that a friend and I had to carry her for several blocks, trying to keep her from burning us with a cigarette. Since then, she has gotten as drunk every weekend."

"In a crowded party, I accidently nudged someone. I apologized but the guy hit me anyway, making my mouth bleed."

These accounts sound shocking, but chances are they have happened to your son or daughter or someone he or she knows. These experiences alone should convince you of the potential risks of binge drinking. Binge drinkers are more likely to have been insulted by others, been in a serious argument or quarrel, been pushed, hit or assaulted, had one's property damaged, put themselves in situations where they are more susceptible to sexually transmitted diseases such as HIV, been injured or had life threatening experiences, driven while intoxicated or rode in a car with an intoxicated driver. We also know that perpetrators target individuals that are incapacitated by alcohol. No one deserves to be sexually assaulted no matter how much they drink.

You need to emphasize to your son or daughter how powerful a drug alcohol can be and how quickly binge drinking can lead to dangerous results. By discussing the reasons why students drink, why students choose not to drink, and the basis of good relationships, and by providing your son or daughter with skills on how to resist pressures from others, you will be helping your student develop the foundations that are necessary to reduce the probability of binge drinking.

RESEARCH SUGGESTS THAT INDIVIDUALS TEND TO BINGE DRINK FOR MANY REASONS. SOME OF THESE INCLUDE:

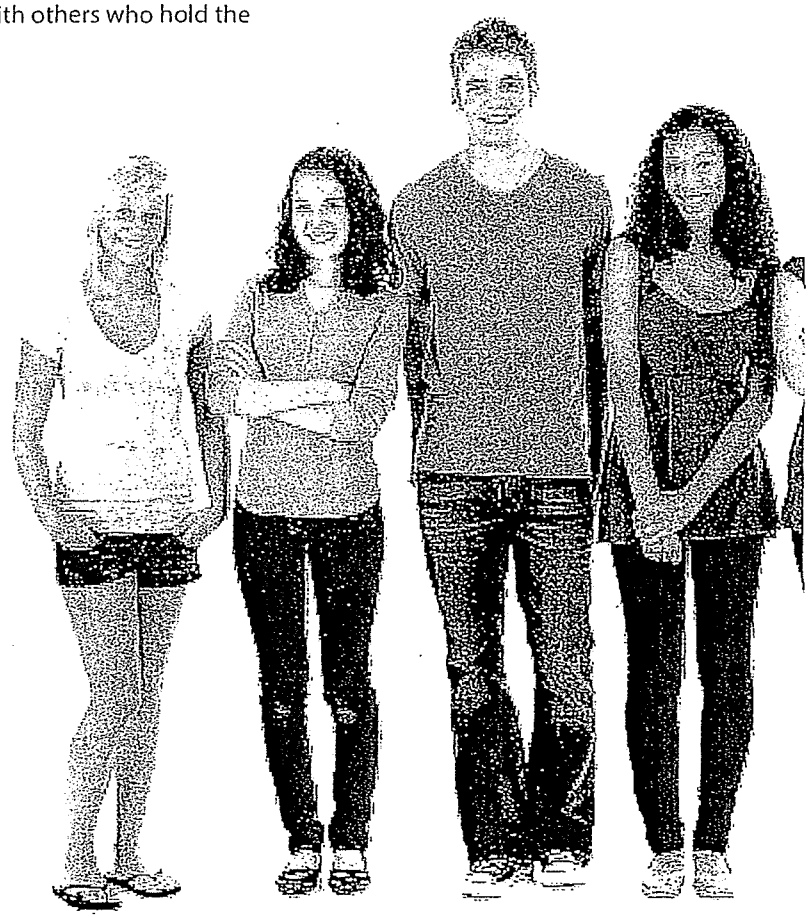
Binge drinkers tend to have generally positive expectations about the types of activities where binge drinking is more likely to take place (e.g., bars, fraternity/sorority parties). Some of the more commonly held beliefs include: I will be able to meet new people, I might meet potential sexual partners, and I will get to hang out with my friends.

Binge drinkers tend to agree with many of the reasons why students drink indicated earlier (e.g., drinking adds to a celebration, improves mood).

Binge drinkers tend to disagree with many of the reasons why some students do not drink indicated earlier (e.g., drinking makes you sick).

Binge drinkers tend to believe that there is nothing else to do, but go get drunk on weekends and associate with others who hold the same belief.

Binge drinkers tend to associate with others who tend to binge drink (e.g., Everyone at my age is doing it, My friends will think I am strange if I do not drink, It can't be that bad if everyone is doing it).



Did You Drink When You Were a Student?

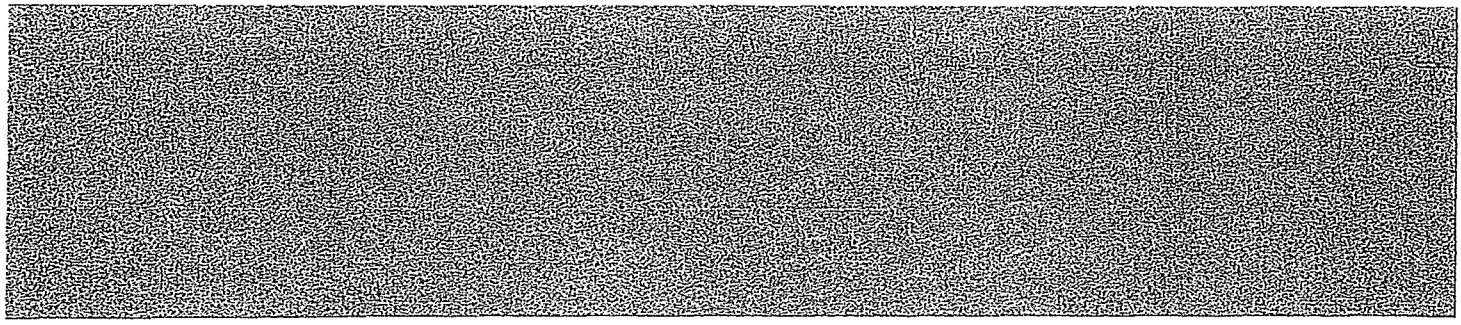
It is highly likely that in the course of your discussions with your son or daughter, you will be asked if you ever drank as a student. The fact is that most parents did drink in their youth, which creates a dilemma. If you answer no, then you are not being honest with your son or daughter. If you answer yes, then you are being hypocritical. At the same time you are telling your son or daughter not to drink, you admit that you did. You are, in an indirect way saying it is permissible to drink because you did it. And if you drank as a student, how can you turn around and punish your son or daughter for drinking? How should you answer questions about your own drinking as a student?

We believe that honesty is important and that you should not lie to your student. Ultimately, this can undermine effective communication. Some parents establish a "ground rule" at the start of their discussion: They will talk about anything but will not answer questions about their own use of drugs or alcohol as a student. The parent tells the student that this rule does not mean that the parent drank alcohol as a teenager nor does it mean that the parent did not. Rather, the parent's behavior as a student is not relevant to a careful consideration of the issues surrounding the student's current use of alcohol. This strategy works well in some families but not others.

Students may be convinced that their parents are hiding something and resent the fact that the parent won't talk about it. How can the parent expect the student to talk about his or her behavior when the parent refuses to talk about the parent's behavior as a student?

While this strategy may work for some families, it may prove to be ineffective for others. An alternative approach is to admit use, but to state in unambiguous terms that it was a mistake. Use your experiences as an opportunity to discuss some of the negative things that happened. Relate how drinking led to an embarrassing moment or an unpleasant consequence for the parent, making salient the fact that drinking has negative consequences that the parent has personally experienced. Stress that just because the parent behaved foolishly and was lucky enough to escape serious consequences does not mean that the same fortune will befall the student.

Unfortunately, there is no good scientific data about how best to handle this issue and psychologists are divided on what they recommend. You should use your own judgment about what you think will work best given your own past and your knowledge of your son or daughter.



WARNING SIGNS OF A POTENTIAL PROBLEM

Most parents underestimate the drinking activity of their sons or daughters. If you think your son or daughter might have a drinking problem, here are some suggestions for ways in which you can help:

- Do not turn your back on the problem.
- Be calm when discussing the problem.
- Let your son or daughter know that you are concerned and are willing to help.
- Do not make excuses or cover up for your son or daughter.
- Do not take over your student's responsibilities but provide him or her with the means to take responsibility for himself or herself.
- Do not argue with your son or daughter if he or she is drunk.
- If your child stays out late, stay awake for them when possible, to show you care and are interested in what they are doing.

RIDING WITH A DRUNK DRIVER

Even if your student never drinks, she/he may be faced with a situation where a decision must be made whether or not to ride with someone who has been drinking. This is just as dangerous as driving drunk. As a rule your son or daughter should not get into a car with someone who has been drinking and should be knowledgeable about effective alternatives (e.g., calling a taxi, asking someone else for a ride home). You should develop an explicit agreement with your son or daughter that he or she never rides home with someone who has been drinking. Again, it is almost impossible to judge how drunk or sober someone is once the person has been drinking, so it is best not to ride with someone regardless of the number of drinks that person has had or how sober the person seems to be. The student should be aware that the techniques for "sobering up" (e.g., drinking coffee) do not work (see our earlier discussion) and that they should not rely on these to make a friend a "safe and sober" driver. Make sure your son or daughter always has enough money for a taxi ride or for public transportation. Encourage them to ride with other non-drinking friends or call home.

PREVENTING A FRIEND FROM DRINKING AND DRIVING

Your son or daughter may also be faced with a situation where his or her best friend has been drinking and intends to drive. In these cases, your son or daughter should try to stop his or her friend from driving. Many students are reluctant to do so because they feel that it might prove to be embarrassing or that an argument might ensue, or even a physical confrontation. Our research suggests that less resistance will result if:

- Students do not try to take their friends' keys away
- Students try to arrange for a friend to drive
- Students arrange for their friend to stay over
- Students try to reason with their friend

ALCOHOL AND SEXUAL ASSAULT

Talking to you child about alcohol use is also a good time to have a conversation about sexual assault. Over half of all college sexual assaults involve alcohol and alcohol is the number one drug used to facilitate sexual assault. Perpetrators use alcohol as a weapon to incapacitate potential victims and intentionally target people who have been using alcohol. We often teach our children to avoid strangers in alleys, however 85% of all assaults are committed by someone the victim knows. Talk to your kids about consent. Make sure to emphasize that consent must be asked for and received before sexual activity occurs and consent is not valid if someone is intoxicated or incapacitated by alcohol.

For More Information

If you would like more information about alcohol and drug use in young adults, you can contact the following organizations for many useful materials:

National Institute on Alcohol Abuse and Alcoholism
niaaa.nih.gov

NIAAA College Drinking Changing the Culture
collegedrinkingprevention.gov

National Council on Alcoholism and Drug Dependence
ncadd.org

Alcoholics Anonymous
alcoholics-anonymous.org

Substance Abuse and Mental Health Services Administration
samhsa.gov

OFFICE OF PREVENTION AND EDUCATION AT NORTHEASTERN (OPEN)

northeastern.edu/open

OPEN; the Office of Prevention and Education at Northeastern provides programming and education on topics related to alcohol and other drugs and sexual violence prevention. We seek to provide supportive, accessible and non-judgmental services to students as well as to engage our community on wellness-related topics.

OTHER NORTHEASTERN UNIVERSITY RESOURCES & SERVICES

University Health and Counseling Services (UHCS)
northeastern.edu/uhcs

Violence Support, Intervention and Outreach Network (ViSION)
northeastern.edu/vision

Northeastern Police Department (NUPD)
northeastern.edu/nupd

Office of Student Conduct and Conflict Resolution (OSCCR)
northeastern.edu/osccr

Residential Life
northeastern.edu/housing

Office for Gender Equity and Compliance
northeastern.edu/titleix

Notes

Notes

Northeastern University

O.P.E.N.

(PRO) Health Lab
Edna Bennett Pierce Prevention Research Center
The Pennsylvania State University
Biobehavioral Health Building
University Park, PA 16802-6504

Blavackas v. Worcester State College

Superior Court of Massachusetts, At Worcester

August 2, 1996, Decided

95-02333

Reporter
1996 Mass. Super. LEXIS 295 *; 6 Mass. L. Rep. 23; 1996 WL 1348995

William *Blavackas* v. Worcester State College and others [1]

Disposition: [*1] Defendants' motion to dismiss ALLOWED.

Core Terms

resident, intoxicated, negligent hiring, contends

Case Summary

Procedural Posture
Defendants, a college, board of trustees, board of regents, college police department, an officer, and others, filed a motion to dismiss plaintiff student's personal injury complaint on the ground that it failed to state a claim upon which relief could be granted, pursuant to Mass. R. Civ. P. 12(b)(6).

Overview

The student alleged that another student became intoxicated at an unauthorized dorm room party, left the party, drove his vehicle from the college campus, entered the wrong lane of traffic, and collided with the student's vehicle, seriously injuring him. He alleged that the college's resident assistant took no steps to prevent the students at the party from becoming intoxicated, and the campus police failed to prevent the intoxicated student from driving away. The college and others contended that the complaint was barred by the public duty exception to the Massachusetts Torts Claims Act, codified at *Mass. Gen. Law. ch. 258, §§ 10(h), 10(j)*. The court ordered that the motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6), be allowed. The court found that the student could not prove that the resident assistant or the college police "originally caused" the situation; the situation was the self-inflicted intoxication of another student. The court also found that no evidence supported the student's claim that the college negligently hired and supervised its resident assistant and college police.

Outcome
The court ordered that the college's motion to dismiss be allowed.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Motions to Dismiss, Failure to State Claim**

When evaluating the sufficiency of a complaint pursuant to Mass. R. Civ. P. 12(b)(6), the court must accept as true the well pleaded factual allegations of the complaint as well as any inferences that can be drawn in plaintiff's favor. The complaint should not be dismissed unless it appears certain that plaintiff can prove no set of facts to support the claim which would entitle plaintiff to relief. A complaint is not subject to dismissal if it could support relief under any valid theory of law.

Administrative Law > Sovereign Immunity

Governments > State & Territorial Governments > Claims By & Against

[1] Board of Trustees of State Colleges, Board of Regents of Higher Education, Trustees of Worcester State State College, Dr. Kalyan Gosh, Worcester State College Police Department, Officer Jarvia, Officer Kellie DiLiddo, Officer David Cormier, Officer Lee Boykin, and John Doe (Resident Assistant at Worcester State College).

Torts > Public Entity
Liability > Immunities > General Overview

HN2[] Administrative Law, Sovereign Immunity

The public duty exception to the Massachusetts Torts Claims Act (MTCA) codified at *Mass. Gen. Law. ch. 258, § 10(h)* and *§ 10(j)*, state that the provisions of the MTCA abrogating the common law doctrine of absolute sovereign immunity, shall not apply to: (h) any claim based upon the failure to provide adequate police protection, prevent the commission of crimes, investigate, detect or solve crimes, identify or apprehend criminals or suspects, arrest or detain suspects, or enforce any law, but not including claims based upon the negligent operation of motor vehicles, negligent protection, supervision or care of persons in custody, or as otherwise provided in clause (1) of subparagraph (j); (j) any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer.

Education Law > Civil Liability > Negligence

Torts > Business Torts > Negligent Hiring, Retention & Supervision > Elements

Education Law > Civil Liability > General Overview

Torts > Business Torts > Negligent Hiring, Retention & Supervision > General Overview

HN3[] Civil Liability, Negligence

An employer whose employees are brought into contact with the public has a duty to exercise care in the selection and retention of employees or the employer may be liable to an injured third party under a theory of negligent hiring or negligent retention.

Judges: Regina L. Quinlan, Justice of the Superior Court.

Opinion by: REGINA L. QUINLAN

Opinion

Memorandum and Order of Decision on Defendants' Motion to Dismiss

The plaintiff, William *Blavackas* ("*Blavackas*") filed suit for personal injury arising out of an automobile accident on November 10, 1992. Defendants Worcester State College ("College"), Board of Trustees of State Colleges ("Board of Trustees"), Board of Regents of Higher Education ("Board of Regents"), Trustees of Worcester State College ("Trustees"), Dr. Kalyan Gosh, Worcester State College Police Department ("college police") and Officer David Cormier move, pursuant to Mass.R.Civ.P. 12(b)(6), to dismiss the plaintiff's complaint on the grounds that it fails to state a claim upon which relief can be granted. The defendants contend that the complaint is barred by G.L.c. 258, 10(h) and (j). For the reasons stated below, the defendants' motion to dismiss is allowed.

BACKGROUND

Blavackas alleges that Michael Heffernan ("Heffernan"), a student at the college became "obviously intoxicated" at an unauthorized party held in a student's dorm room. *Blavackas*, also a student at the college, [*2] was seriously injured when Heffernan left the party intoxicated and drove his vehicle from the college campus into the wrong lane of travel and collided with a vehicle operated by *Blavackas*.

Blavackas further alleges that the resident assistant employed by the college on the evening of November 20, 1992, occupied the dorm room immediately adjacent to the dorm room in which the college students and guests, including Heffernan were consuming alcohol. *Blavackas* contends that the resident assistant took no steps to prevent the students and guests from becoming intoxicated even though the Tuesday night party was in clear violation of college rules and regulations.

Heffernan then left the party and against the advice of other students attempted to enter his vehicle and to operate it. Students at the party notified the college police to intervene and prevent Heffernan from operating the vehicle. When the college police arrived at the parking lot, they observed Heffernan start the vehicle and drive out of the parking lot.

DISCUSSION

HN1[] When evaluating the sufficiency of a complaint pursuant to Mass.R.Civ.P. 12(b)(6), the court must accept as true the well pleaded factual allegations [*3]

of the complaint as well as any inferences that can be drawn in the plaintiff's favor. *Eyal v. Helen Broadcasting Corp., 411 Mass. 426, 429, 583 N.E.2d 228 (1991)* (citations omitted). The complaint should not be dismissed unless it appears certain that the plaintiff can prove no set of facts to support the claim which would entitle the plaintiff to relief. *Spinner v. Nutt, 417 Mass. 549, 550, 631 N.E.2d 542 (1994)*; *Nader v. Citron, 372 Mass. 96, 98, 360 N.E.2d 870 (1977)*, quoting *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. A complaint is not subject to dismissal if it could support relief under any valid theory of law. *Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 89, 390 N.E.2d 243 (1979)*.

The defendants contend that the complaint is barred by ***HN2***[↑] the public duty exception to the Massachusetts Torts Claims Act ("MTCA") codified at G.L.c. 258, 10(h) and (j). *Sections 10(h)* and *10(j)* state that the provisions of the MTCA abrogating the common law doctrine of absolute sovereign immunity, shall not apply to:

> (h) any claim based upon the failure . . . to provide adequate police protection, prevent the commission of [*4] crimes, investigate, detect or solve crimes, identify or apprehend criminals or suspects, arrest or detain suspects, or enforce any law, but not including claims based upon the negligent operation of motor vehicles, negligent protection, supervision or care of persons in custody, or as otherwise provided in clause (1) of subparagraph (j).
>
> (j) any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer . . .

G.L.c. 258, 10 (h) and (j).

Heffernan contends that the college is liable under 10(j) because the resident assistant, as agent of the college "originally caused" the situation by failing to prevent the party from taking place on the campus. Heffernan claims that the college police are also "originally liable" under 10(j) by failing to prevent the intoxicated student from driving off the campus. Justice O'Connor stated in her concurrence in *Cyran v. Ware, 413 Mass. 452, 597 N.E. 2d 1352 (1992)*, a decision that predated [*5] the recent amendments to the MTCA, that public employers should not be liable for situations "in which the plaintiff has been harmed by a condition or situation which was not originally caused by the public employee, and is attributable to the employee only in the sense that the employee failed to prevent or mitigate it." *Cyran, supra at 467*. Law Professor Joseph Glannon argues that "Justice O'Connor's statement that there be *something more* than the pure failure to alleviate a private harm should be helpful in determining the scope of subsection (j)." Joseph W. Glannon, Liability for "Public Duties" Under the Tort Claims Act: The Legislature Reconsiders the Public Duty Rule, 79 Mass.L.Rev. 17, 26 (1994) (emphasis in original). Professor Glannon argues that 10(j) "requires *some* involvement of a public employee in creating the initial injury-causing scenario, not simply a failure to respond adequately after it arises." *Id.* (emphasis in original).

In the case at bar, after drawing all inferences in the ***Blavackas***' favor, it appears beyond doubt that ***Blavackas*** cannot prove that the resident assistant or the college police "originally caused" the situation. The "situation" [*6] which caused ***Blavackas*** to suffer injury was Heffernan's own self-inflicted intoxication. The claim that the resident assistant's failure to prevent the unauthorized party or respond adequately after the party occurred is specifically excluded from liability. Likewise, the claim that the college police failed to prevent the accident by allowing Heffernan to drive off the campus is also specifically excluded from liability. See *Makynen v. Mustakangas, 39 Mass. App. Ct. 309, 655 N.E.2d 1284 (1995)* (officer who stopped an intoxicated driver for speeding on school property but took no further action was held not liable for an auto accident caused by the driver shortly afterwards).

Blavackas next contends that the college police are liable under 10(j)(2) which provides that tort immunity shall not apply to "any claim based upon intervention of a public employee which causes injury to the victim or places the victim in a worse position than he was in before the intervention." ***Blavackas*** contends that the arrival of the college police to the scene where Heffernan's vehicle was parked and their failure to stop Heffernan from driving away caused Heffernan to leave the scene in an expedited [*7] manner and placed ***Blavackas*** in a worse position than he would have been in before the college police arrived. However, it is the opinion of this court that ***Blavackas*** can prove no set of facts to support this claim. Accordingly, the exemption provided by 10(j)(2) is not applicable to the present case.

Finally, *Blavackas* contends that the college is liable for the negligent hiring and negligent supervision of its resident assistant and its college police. *HN3*[↑] An employer whose employees are brought into contact with the public has a duty to exercise care in the selection and retention of employees or the employer may be liable to an injured third party under a theory of negligent hiring or negligent retention. *Foster v. Loft, Inc., 26 Mass. App. Ct. 289, 526 N.E.2d 1309 (1988)*.

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Blavackas cites *Doe v. Blandford, 402 Mass. 831, 525 N.E.2d 403 (1988)*, to support his contention that the college is liable for the negligent hiring and training of its college police and housing staff, specifically the resident assistant. In *Blandford*, the school district's guidance counselor pled guilty to indecent assault and battery on a female student. *Id. at 833*. The student's suit against [*8] the school district for, *inter alia*, negligent hiring and negligent supervision survived the defendant's motion for summary judgment where the evidence showed that the guidance counselor had been placed on probation for the assault and battery of another female student at a Connecticut school where he had been previously employed. *Id.* Further, the student alleged that the school district was negligent in failing to investigate several complaints from female pupils against this guidance counselor. *Id.*

None of the facts in *Blandford* are present in the instant case. The fact that an unauthorized party took place in a dorm room in which a student voluntarily became intoxicated is insufficient to support the claim that the college was negligent in hiring a resident assistant who was not present at the party. Also the fact that the college police arrived on the scene as Heffernan was leaving the parking lot and did not stop him is also insufficient to support a claim for negligent hiring of the college police. This court concludes that there is no evidence to suggest that the College, the Board of Regents, the Board of Trustees or the Trustees negligently hired or negligently [*9] supervised the college police or the resident assistant.

ORDER

For the foregoing reasons, it is hereby ORDERED that the defendants' motion to dismiss be ALLOWED.

Regina L. Quinlan

Justice of the Superior Court

Cited
As of: June 18, 2019 7:26 PM Z

Destefano v. Endicott Coll.

Superior Court of Massachusetts

December 18, 2017, Decided

Opinion No.: 139091, Docket Number:1777CV00152

Reporter
2017 Mass. Super. LEXIS 237 *; 34 Mass. L. Rep. 579; 2017 WL 7693451

Dillon *Destefano* v. *Endicott* College et al.[1]

Core Terms

alcohol, special relationship, negligent supervision, social host, motion to dismiss, damages, drinking, friends, indictment, assault, campus, allegations, consumed, battery, reasons, fight, host

Case Summary

Overview
HOLDINGS: [1]-A college could not be held liable for negligence under a social host theory to a student who became intoxicated on campus and assaulted three persons, which led to the student's criminal convictions. The court refused to extend the limits of social host liability to a college or university, as imposition of such a duty would have been impractical and unreasonable; [2]-The college could not be held liable to the student based on a special relationship, as it was not appropriate to ground the existence of a legal duty on the part of university officials and staff on the basis of unrealistic expectations about their ability to protect their students from the dangers associated with the voluntary use of illegal drugs or alcohol; [3]-The college could not be held liable for negligent supervision, as the student sought to recover damages he himself caused.

Outcome
Motion to dismiss allowed.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Evidence > Judicial Notice > Adjudicative Facts > Judicial Records

HN1[] **Motions to Dismiss, Failure to State Claim**

A court may take judicial notice of the records of other courts when determining a motion to dismiss under *Mass. R.Civ.P. 12(b)(6)*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[] **Motions to Dismiss, Failure to State Claim**

To survive a motion to dismiss pursuant to *Mass. R.Civ.P. 12(b)(6)*, a complaint must set forth the basis of the plaintiff's entitlement to relief with more than labels and conclusions. While factual allegations need not be detailed, they must be enough to raise a right to relief above the speculative level based on the assumption that all the allegations in the complaint are true (even if doubtful in fact). At the pleading stage, *Mass. R.Civ.P. 12(b)(6)* requires that the complaint set forth factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief.

Torts > ... > Types of Negligence Actions > Alcohol Providers > Social Hosts

[1] Richard Wylie, in his capacity as President of *Endicott* College.

HN3[] Alcohol Providers, Social Hosts

In McGuiggan v. New England Tel. & Tel. Co., the Massachusetts Supreme Judicial Court first recognized that common-law tort liability may be imposed on social hosts, stating that the court would recognize a social host's liability to a person injured by an intoxicated guest's negligent operation of a motor vehicle where a social host who knew or should have known that his guest was drunk, nevertheless gave him or permitted him to take an alcoholic drink and thereafter, because of his intoxication, the guest negligently operated a motor vehicle causing third person's injury. Massachusetts appellate courts, however, have been cautious about expanding on the duty identified in McGuiggan. Mindful of public policy considerations, the courts are reluctant to impose a duty of care in the absence of clear existing social values and customs supporting such a step. For those reasons, social host liability attaches in very limited circumstances. Liability attaches only where a social host either serves alcohol or exercises effective control over the supply of alcohol.

Torts > ... > Types of Negligence Actions > Alcohol Providers > Social Hosts

HN4[] Alcohol Providers, Social Hosts

Policy considerations support the imposition of a duty on social hosts only in cases where the host can control and therefore regulate the supply of liquor. Historically, the courts have refused to extend liability to persons who merely owned or controlled property where drinking occurred.

Education Law > Civil Liability > Alcohol Related Claims

Torts > ... > Types of Negligence Actions > Alcohol Providers > Social Hosts

HN5[] Civil Liability, Alcohol Related Claims

The Massachusetts Superior Court refuses to extend the limits of social host liability to a college or university. No Massachusetts court has ever applied social host liability theory to a college or university. All the relevant cases addressing social host liability involve the excessive consumption of alcohol at someone's home. The principle behind imposing social host liability on homeowner is quite simple—a homeowner has control over the alcohol she furnishes during social gatherings at her home. In essence, the homeowner acts as a bartender who can shut off a patron who is showing signs of excessive drinking. To impose such a duty on a college or university that may have thousands of students as well as multiple buildings and units to house such students, would be impractical and unreasonable.

Torts > ... > Elements > Duty > Foreseeability of Harm

Torts > ... > Duty > Affirmative Duty to Act > Types of Special Relationships

HN6[] Duty, Foreseeability of Harm

The Massachusetts Supreme Judicial Court set forth the criteria for determining the existence of a special relationship in Irwin v. Town of Ware, stating special relationships are based to a large extent on a uniform set of considerations. The most significant of these being whether a defendant reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from the failure to do so.

Education Law > Civil Liability > Alcohol Related Claims

Torts > ... > Affirmative Duty to Act > Types of Special Relationships > Schools

HN7[] Civil Liability, Alcohol Related Claims

No Massachusetts case has ever determined that a special relationship exists between a college or university or its officials and its students that would impose a duty to protect students from the voluntary use of drugs or alcohol. The doctrine of in loco parentis has no application to the relationship between a modern university and its students. Most college students have attained the age of majority by the time they enroll as freshmen and are responsible for their own conduct. The burden of protecting against risks associated with the illegal uses of drugs or alcohol is far more like the burden associated with maintaining the moral well-being of students than it is like the burden of protecting the physical integrity of dormitories. And, it is not appropriate to ground the existence of a legal duty on

the part of university officials and staff on the basis of unrealistic expectations about their ability to protect their students from the dangers associated with the voluntary use of illegal drugs or alcohol.

Torts > Business Torts > Negligent Hiring, Retention & Supervision > Elements

Torts > Negligence > Types of Negligence Actions

HN8[] **Negligent Hiring, Retention & Supervision, Elements**

Negligent supervision is a relatively new theory of tort liability and is typically referenced in the context of an employer/employee relationship where an employer is alleged to have negligently hired, retained, or supervised and employee. This is not to suggest, however, that a claim for negligent supervision can only survive in the context of an employer/employee relationship.

Torts > Business Torts > Negligent Hiring, Retention & Supervision > Elements

Torts > Negligence > Types of Negligence Actions

HN9[] **Negligent Hiring, Retention & Supervision, Elements**

All the negligent supervision cases the Massachusetts Superior Court has found involve injuries to a third party. In essence, a person was injured by the conduct of another, and sued the party the individual believes to be responsible for the supervision of the person who caused the injury. The court is aware of no case where a Massachusetts court has entertained a claim of negligent supervision where a plaintiff argues that the defendant has a duty to protect him from himself.

Torts > ... > Duty > Affirmative Duty to Act > Types of Special Relationships

HN10[] **Affirmative Duty to Act, Types of Special Relationships**

A special relationship, derived from principles recognized under common law, is predicated on a plaintiff's reasonable expectations and reliance that a defendant will anticipate harmful acts of third persons and take appropriate measures to protect the plaintiff from harm.

Judges: [*1] Salim Rodriguez Tabit, Associate Justice of the Superior Court.

Opinion by: Salim Rodriguez Tabit

Opinion

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS (PAPER #8)

INTRODUCTION

This action arises out of an unusual set of circumstances where an underage student attending ***Endicott*** College ("***Endicott***") in Beverly, Massachusetts, became intoxicated and assaulted three individuals over the course of the evening on February 1, 2014, and the early morning of February 2, 2014. That student, Dillon ***Destefano*** ("***Destefano***"), subsequently pleaded guilty to three counts of assault and battery and was sentenced in Essex County Superior Court. ***Destefano*** has now brought a three-count negligence complaint against ***Endicott*** and its President, Richard Wylie (collectively, the "Defendants"). ***Destefano*** contends that but for the Defendants' negligence, he would not have committed the assault and batteries to which he pleaded guilty, and would not have suffered the damages that have resulted from those convictions. This matter is currently before the court on the Defendants' Motions to Dismiss. For the reasons that follow, the Motion to Dismiss is *ALLOWED*.

BACKGROUND

The following facts are taken from the Complaint [*2] and are presumed true for the purposes of the Motion to Dismiss. The court has also considered court documents from Essex County Superior Court case No. ESCR2014-00269.[2] Some facts are reserved for discussion below.

On the evening of February 1, and the early morning of February 2, 2014, ***Destefano***, a nineteen-year-old sophomore at ***Endicott***, became extremely intoxicated

[2] ***HN1***[] A court may take judicial notice of the records of other courts when determining a motion to dismiss under *Mass.R.Civ. P. 12(b)(6)*. *Jarosz v. Palmer, 436 Mass. 526, 530, 766 N.E.2d 482 (2002)*.

while at a "dorm party" and at a senior house on campus called the "Farm House." At approximately 1:00 a.m. on February 2nd, ***Destefano*** left the "Farm House" with two friends in search of food. Along the way, ***Destefano*** engaged another individual in a fight. After the fight, ***Destefano*** and his two friends continued to a location known as the "Lodge" to eat. After eating, ***Destefano*** and his friends headed to another campus party located at the "Yellow House." While on their way to the "Yellow House," ***Destefano*** engaged a second individual in a fight. After the second fight, ***Destefano*** and his friends continued *en route* to the "Yellow House." ***Destefano*** and his friends never made it to the "Yellow House." On the way, ***Destefano*** engaged yet a third individual in a fight. Thereafter, the three friends abandoned their plan to go the [*3] "Yellow House" and, instead, returned to the "Farm House."

Following the events of February 1st and 2nd, a criminal investigation ensued, resulting in ***Destefano***'s indictment on two charges of assault and battery causing serious bodily injury and one charge of assault and battery. On August 5, 2014, ***Destefano*** pleaded guilty to all three indictments and was sentenced to two years committed to the Massachusetts House of Correction on indictment number ESCR2014-269-001, two years committed to the Massachusetts House of Correction on indictment number ESCR2014-269-002, from and after indictment number ESCR2014-269-001, and three years of probation on indictment number ESCR2014-269-003, from and after indictment number ESCR2014-269-002.

DISCUSSION

I. Standard of Review

HN2[↑] To survive a motion to dismiss pursuant to *Mass.R.Civ.P. 12(b)(6)*, a complaint must set forth the basis of the plaintiff's entitlement to relief with "more than labels and conclusions." *Iannacchino v. Ford Motor Co., 451 Mass. 623, 636, 888 N.E.2d 879 (2008)*, quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. While factual allegations need not be detailed, they "must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . ." *Id.*, quoting [*4] *Bell Atl. Corp., 550 U.S. at 555*. At the pleading stage, *Mass.R.Civ.P. 12(b)(6)* requires that the complaint set forth "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief . . ." *Id.*, quoting *Bell Atl. Corp., 550 U.S. at 557*.

Here, ***Destefano*** asserts three claims seeking damages from the Defendants. While the Complaint alleges three separate counts, the action is in essence a negligence action, in which ***Destefano*** seeks to establish that the Defendants owed him a duty of care under three distinct theories of liability—social host liability, liability based on the existence of a special relationship, and liability premised upon negligent supervision. Because none of the theories ***Destefano*** presents plausibly suggest the Defendants owed him a duty of care based on the facts alleged, the Motion to Dismiss must be allowed.

II. Analysis

A. Social Host Liability

First, ***Destefano*** suggests that the Defendants should be held responsible for damages he sustained, as result of his own criminal behavior, under a theory of social host liability.[3] ***Destefano*** essentially argues that the Defendants had a duty to protect him from his own conduct.***HN3***[↑] In *McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152, 496 N.E.2d 141 (1986)*, the Supreme Judicial Court first recognized that common-law tort liability may be imposed on social [*5] hosts, stating:

> We would recognize a social host's liability to a person injured by an intoxicated guest's negligent operation of a motor vehicle where a social host who knew or should have known that his guest was drunk, nevertheless gave him or permitted him to take an alcoholic drink and thereafter, because of his intoxication, the guest negligently operated a motor vehicle causing third person's injury.

Id. at 162.

Our appellate courts, however, have been cautious about expanding on the duty identified in *McGuiggan*. See *Juliano v. Simpson, 461 Mass. 527, 532, 962 N.E.2d 175 (2012)*. Mindful of public policy considerations, the courts are reluctant to impose a duty of care in the absence of "clear existing social values and customs" supporting such a step. See, e.g., *Remy v. MacDonald, 440 Mass. 675, 678, 801 N.E.2d 260 (2004)* (discussing pregnant woman's legal duty of care

[3] It is difficult to decipher with any accuracy what damages ***Destefano*** seeks. At the hearing on the Motion to Dismiss, ***Destefano*** suggested that his "reputation" was damaged. Meanwhile, in the Complaint, he seeks "compensatory damages" for being expelled from school, criminal prosecution, loss of his good name and reputation, and severe physical pain and mental anguish.

to unborn child). For those reasons, social host liability attaches in very limited circumstances. "Liability attaches only where a social host either serves alcohol or exercises effective control over the supply of alcohol." *Juliano, 461 Mass. at 528, 532-39*.

Here, there is no allegation that the Defendants served or supplied the alcohol ***Destefano*** consumed. At most, the facts alleged demonstrate that ***Destefano*** was allowed to consume alcohol at the "Farm House." There are, however, [*6] no factual allegations suggesting the Defendants purchased, served, or controlled the flow of alcohol ***Destefano*** consumed. Further, despite ***Destefano***'s assertion that ***Endicott*** campus security observed students that were drinking who were "obviously under-age," there is nothing in the record to support the conclusory statement that it was "obvious[ ]," to campus security, that the students who were drinking alcohol at the "Farm House" were under age.

HN4[↑] "Policy considerations support the imposition of a duty only in cases where the host can control and therefore regulate the supply of liquor." See *Ulwick v. DeChristopher, 411 Mass. 401, 406, 582 N.E.2d 954 (1991)* (declining to extend social host liability to individual who hosted drinking party at his house, but who never served or provided alcohol to guest who drank vodka while at house, and who was subsequently involved in serious accident injuring third party). Historically, the courts have refused to extend liability to persons who merely owned or controlled property where drinking occurred, as is the case here. See *Juliano, 461 Mass. at 534-35*; *Cremins v. Clancy, 415 Mass. 289, 290-91, 294, 612 N.E.2d 1183 (1993)*.

Even if this court were to conclude that the facts ***Destefano*** alleges were adequate to demonstrate that the Defendants exercised sufficient control over the supply of alcohol, to support [*7] social host liability, for the same policy consideration detailed in *Ulwick*, ***HN5***[↑] the court refuses to extend the limits of such liability to a college or university. *Id. at 406*.

No Massachusetts court has ever applied social host liability theory to a college or university. All the relevant cases addressing social host liability involve the excessive consumption of alcohol at someone's home. See *Juliano, 461 Mass. at 530* (defendant "invited several friends . . . to a party at her home"); *Cremins, 415 Mass. at 290-91* (stating friend "arrived at the defendant's home" with "two cases of beer," which were "brought into the defendant's residence" and, thereafter, consumed by defendant and four friends); *Ulwick, 411 Mass. 401, 582 N.E.2d 954* (involving "Bring Your Own Booze" party at "the home of the defendant"); *Langemann v. Davis, 398 Mass. 166, 166-67, 495 N.E.2d 847 (1986)* (stating alcohol was consumed at defendant's home during party hosted by defendant's underage daughter). The principle behind imposing social host liability on homeowner is quite simple—a homeowner has control over the alcohol she furnishes during social gatherings at her home. In essence, the homeowner acts as a bartender who can "shut off" a patron who is showing signs of excessive drinking. See *Ulwick, 411 Mass. at 406*. To impose such a duty on a college or university that may have thousands of students [*8] as well as multiple buildings and units to house such students, would be impractical and unreasonable.

B. Special Relationship

Next, ***Destefano*** argues that a special relationship existed between the Defendants and himself due to his status as a student, such that the Defendants owed him "a heightened duty of care to insure" his safety while on campus. ***Destefano*** maintains the Defendants knew that underage drinking occurred on campus, despite rules and regulations prohibiting such a practice. He claims the Defendants had a duty to enforce the policies and procedures prohibiting these practices and that the failure to do so constitutes a breach of the duty they owed him as a result of their special relationship.

HN6[↑] The Supreme Judicial Court set forth the criteria for determining the existence of a special relationship in *Irwin v. Town of Ware*, stating special relationships "are based to a large extent on a uniform set of considerations." *392 Mass. 745, 756, 467 N.E.2d 1292 (1984)*. The most significant of these being "whether a defendant reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from the failure to do so." *Id. at 756*. Although this court can [*9] find no case with an analogous set of facts to the current one in which a Massachusetts court has determined a special relationship existed between a college and student, several cases are instructive. See *Mullins v. Pine Manor College, 389 Mass. 47, 51-52, 449 N.E.2d 331 (1983)* (recognizing special relationship between college and university and students, especially female students, and imposing a responsibility to safeguard students from physical harm resulting from criminals intruding into unlocked or inadequately locked dormitories); *Adamian v. Three Sons, Inc., 353 Mass. 498, 500, 233 N.E.2d 18 (1968)* (special relationship

existed in addressing liability of private party to members of general driving public where alcohol and driving were involved).

HN7[↑] No Massachusetts case, however, has ever determined that a special relationship exists between a college or university or its officials and its students that would impose a duty to protect students from the voluntary use of drugs or alcohol. In *Bash v. Clark University, 2006 Mass. Super. LEXIS 657, 22 Mass. L. Rptr. 84, 2006 WL 414297 (Mass.Super.Ct., Nov. 20. 2006)* (Agnes, J.), the court thoughtfully expressed the reasons for the courts' reluctance to find such a special relationship and impose such a duty. This court adopts this reasoned analysis and likewise refuses to find a special relationship between the Defendants and **Destefano**.

As stated in *Bash*:

> The doctrine of *in loco parentis* has no [*10] application to the relationship between a modern university and its students . . . Most college students have attained the age of majority by the time they enroll as freshman and are responsible for their own conduct . . . The burden of protecting against risks associated with the illegal uses of drugs [or alcohol] is far more like the burden associated with maintaining the moral well-being of students than it is like the burden of protecting the physical integrity of dormitories.

*2006 Mass. Super. LEXIS 657, [WL] at *4* (internal citations omitted). And, "it is not appropriate to ground the existence of a legal duty on the part of university officials and staff on the basis of unrealistic expectations about their ability to protect their students from the dangers associated with the voluntary use of illegal drugs [or alcohol]." *2006 Mass. Super. LEXIS 657, [WL] at *5* (internal citations omitted).

C. Negligent Supervision

Finally, **Destefano** argues that the Defendants owed him a duty of reasonable care to supervise his behavior to ensure he did not drink alcohol to excess. This theory is novel indeed.

HN8[↑] Negligent supervision is a relatively new theory of tort liability and is typically referenced in the context of an employer/employee relationship where an employer [*11] is alleged to have negligently hired, retained, or supervised and employee. See *Foster v. Loft, Inc., 26 Mass.App.Ct. 289, 291, 526 N.E.2d 1309 (1988)* (employer sued for the negligent hiring and retention of a bartender who assaulted a customer). This is not to suggest, however, that a claim for negligent supervision can only survive in the context of an employer/employee relationship. See, e.g., *Worcester Mut. Ins. Co. v. Marnell, 398 Mass. 240, 241, 496 N.E.2d 158 (1986)* (contending negligent supervision of party was proximate cause of auto accident).

In *Cooke v. Lopez*, the Appeals Court provided an avenue for a plaintiff to pursue a claim of negligent supervision against a parent whose fifteen-year-old daughter had taken her mother's car and gotten into an accident, injuring the plaintiff. *57 Mass.App.Ct. 703, 705-06, 785 N.E.2d 1247 (2003)*. Although the court ultimately found there was insufficient evidence to support a finding of negligence, it detailed the elements a plaintiff needed to prove to seek damages for negligent supervision against a parent for the conduct of a child. Therefore, this court sees no reason why, in theory, **Destefano** could not bring a claim for negligent supervision simply because no employer/employee relationship existed between the Defendants and **Destefano**.

Simply because a plaintiff may bring a claim for negligent supervision outside the context [*12] of an employer/employee relationship, however, does not mean that **Destefano** is entitled to rely on such a claim in this instance. HN9[↑] All the negligent supervision cases the parties reference (and the court found) involve injuries to a third party. In essence, a person was injured by the conduct of another, and sued the party the individual believes to be responsible for the supervision of the person who caused the injury. See *Nelson v. Salem State College, 446 Mass. 525, 538-39, 845 N.E.2d 338 (2006)*; *Kavanagh v. Trustees of Boston University, 440 Mass. 195, 203-04, 795 N.E.2d 1170 (2003)*; see also *First Security Ins. Corp. v. Pilgrim Ins. Co., 83 Mass.App.Ct. 812, 816, 990 N.E.2d 86 (2013)*; *Cooke, 57 Mass.App.Ct. at 705-06*; *Phoenix Ins. Co. v. Churchwell, 57 Mass.App.Ct. 612, 614-15, 785 N.E.2d 392 (2013)*. The court is aware of no case, and the parties have cited none, where a Massachusetts court has entertained a claim of negligent supervision where a plaintiff argues that the defendant has a duty to protect him from himself. Unlike every other meritorious negligent supervision claim where a plaintiff seeks to recover damages caused by someone's conduct, here, **Destefano** seeks to recover damages he himself caused.

Destefano cites *Kavanagh* as authority for his suggestion that a college or university may be held accountable for failing to properly supervise a student. This reliance is misplaced. *Kavanagh* involved a basketball player who brought an action against an opposing player and coach after being punched during an interscholastic basketball game. [*13] *440 Mass. at 196-98*. The plaintiff argued that the university breached a duty to protect him from the allegedly foreseeable assault and battery of its student. *Id. at 201*. The Supreme Judicial Court, however, rejected the argument, on among other grounds, the fact that no "special relationship" existed between the plaintiff and the university that would extend to a plaintiff who has no relationship to the university, "special or otherwise." *Id. at 201-03*.

Although this court is cognizant of the fact that unlike in *Kavanagh*, *Destefano* was a student at *Endicott*, for reasons already stated, this court has determined that no special relationship existed between the Defendants and *Destefano* that would create a duty on the part of *Endicott* in this instance. *HN10*[↑] A special relationship, derived from principles recognized under common law, as is the case here, "is predicated on a plaintiff's reasonable expectations and reliance that a defendant will anticipate harmful acts of third persons and take appropriate measures to protect the plaintiff from harm." *Luoni v. Berube, 431 Mass. 729, 732, 729 N.E.2d 1108 (2000)*. Here, the harmful acts alleged are not those of a third person and, it is not reasonable to expect the Defendants to monitor the actions of an adult when it comes to his voluntary intake [*14] of alcohol on a large college campus.

ORDER

For the reasons explained, it is hereby *ORDERED* that the Motion to Dismiss is *ALLOWED*.

Salim Rodriguez Tabit

Associate Justice of the Superior Court

Dated: December 18, 2017

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Doherty v. Emerson College

United States District Court for the District of Massachusetts

September 29, 2017, Decided; September 29, 2017, Filed

No. 1:14-cv-13281-LTS

Reporter
2017 U.S. Dist. LEXIS 161602 *

JILLIAN DOHERTY, Plaintiff, v. EMERSON COLLEGE et al., Defendants.

Core Terms

assailant, deliberate indifference, sexual assault, e-mail, campus, summary judgment, confirm, rape, accommodations, harassment, interview, alcohol, Sexual, training, responded, notified, remember, asserts, infliction of emotional distress, investigator, contacted, assault, emotional distress, resources, witnesses, colleges, sex, first hearing, circumstances, conversation

Counsel: [*1] For Jillian Doherty, Plaintiff: David P. Angueira, LEAD ATTORNEY, Kathryn J. Wickenheiser, Swartz & Swartz, Boston, MA.

For Emerson College, Lee Pelton, Ronald Ludman, David Haden, Michael Arno, Defendants: Harold W. Potter , Jr., LEAD ATTORNEY, Paul G. Lannon , Jr., Holland & Knight, LLP, Boston, MA; Katrina N. Chapman, Holland & Knight (B), Boston, MA.

Judges: Leo T. Sorokin, United States District Judge.

Opinion by: Leo T. Sorokin

Opinion

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOC. NO. 101) AND MOTION TO STRIKE (DOC. NO. 116)

SOROKIN, J.

Jillian Doherty sued Emerson College and Michael Arno, individually and as Emerson's Title IX investigator, asserting four claims: violation of Title IX against Emerson; and negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress against Emerson and Arno. Doc. No. 39. The claims arise from Emerson's response to a report by Doherty that she had been sexually assaulted on campus by another student. Defendants have moved for summary judgment on all counts, Doc. No. 101, Doherty has opposed, Doc. No. 111, and Defendants have replied, Doc. No. 115. The Court held a motion hearing on September 19, 2017. Doc. No. 123. For the reasons [*2] stated below, the Motion for Summary Judgment is ALLOWED. Defendants' Motion to Strike, Doc. No. 116, is DENIED AS MOOT.

I. FACTS

The Court describes the undisputed facts established by the record evidence and draws all reasonable inferences in Doherty's favor. When material facts are in dispute, the Court accepts Doherty's facts.

A. Doherty's Report and Emerson's Initial Response

Doherty entered Emerson College as a freshman in the fall of 2011. Doc. No. 103-2 at 4. She attended Emerson's orientation and received a copy of the student handbook. Id. at 5. The student handbook included information on Emerson's sexual assault policies, including safety measures, reporting violations, and the student disciplinary process; it also contained Emerson's alcohol policy. Doc. No. 103-6 at 5-6.

Doherty completed her freshman year and went home for the summer. Doc. No. 103-2 at 14. She spent the fall semester of her sophomore year studying abroad as part of an Emerson program. Id. at 15. She returned to Emerson's campus for the spring semester. Id. at 15.

At 1:00 AM on March 2, 2013, Doherty sent an e-mail to Robert Ludman, Dean of Students; Lee Pelton, President of the College; and Sharon Duffy, Associate Dean of Students, [*3] the relevant portions of which follow:

To Whom It May Concern:

> It has come to my attention that Emerson College has not taken significant action to protect the students of the Emerson Community. . . . I, as a member of the Emerson Community, demand that you and the college take immediate action to protect the students of this community. . . .
> Also, I, too, have been raped on campus. I didn't say anything because I was too afraid, but the fact still stands that the statistics on rape and sexual assault at Emerson College are grotesque and severe. Please help us stop this.
> Thank you for your time,
> Jillian Doherty

Doc. No. 103-10 at 2. Doherty's e-mail was the first report she made to Emerson about the sexual assault. Doc. No. 103-2 at 18. Ludman responded at 11:04 AM the same day, about ten hours after Doherty's e-mail, offering support and advising Doherty of Emerson's resources that were available to her, including the Counseling Center, Center for Health and Wellness, and Campus Police. Doc. No. 103-10 at 2. Additionally, Ludman forwarded Doherty's e-mail to several administrators, including Arno and Alexa Jackson, Associate Vice President of Human Resources and Title IX Coordinator. Id. [*4] Jackson responded within a few hours to set up a meeting among the administrators to discuss Emerson's response to Doherty's e-mail. Doc. No. 103-11 at 2.

Michael Arno was designated by Emerson to investigate Doherty's report. On March 5, 2013, he e-mailed Doherty:

> Dear Jillian,
> I hope this email finds you well. My name is Mike Arno and I work in the conduct office. I am contacting you today because Dean Ludman informed me that you reported being sexually assaulted on campus. I'm so sorry to hear that you had to experience this awful event.
> Given the nature of the information you shared, I would like to invite you to meet with me. I would like to meet just to make sure you are doing ok and to make sure you are aware of the services at Emerson that can support you. It would be great if you could propose a time that is convenient for you to meet with me after you return from break. If you are around this week and would like to meet that would be great as well.
> It is important to me and the College that we touch base, even if you wish not to share any details of your experience.
> I look forward to hearing from you.
> Sincerely,
> Mike Arno

Doc. No. 103-12 at 2. Doherty responded the next day, stating: [*5] "Thank you for reaching out to me. It means a lot that the Emerson community and faculty are being so supportive and responsive." Id. She noted her availability, and Arno responded to schedule a meeting for the following week, on the first Monday after the school break. Id.

On March 11, 2013, Doherty and Arno met in Arno's office. Arno explained to Doherty that, while she was encouraged to share the name of the assailant,[1] she was not required to do so. Doc. No. 103-2 at 20. Doherty shared the assailant's name with Arno, but said she did not want to pursue criminal charges or school conduct charges against him. Id.; Doc. No. 103-13 at 2. Doherty stated she did not feel threatened by the assailant. Doc. No. 103-13 at 2. She noted he was on a semester abroad and asked that Emerson meet with him before he returned to campus. Id. Arno reminded Doherty of the resources available to her at Emerson. Doc. No. 103-2 at 20.

The same day, Arno sent Doherty an e-mail summarizing their meeting and asking her to confirm that the summary was accurate. Doc. No. 112 at 13. She responded with two clarifications—the spelling of a witness's name and an additional detail—and confirmed that the meeting [*6] notes were otherwise accurate. Id. at 13-14; Doc. No. 103-2 at 21. Arno confirmed with Doherty that she did not feel threatened by the assailant at that time and that she was comfortable with the assailant having guest access to her dorm. Doc. No. 103-2 at 21. He also informed her that Emerson would begin a Title IX investigation, id., and that a Stay Away Directive would be put in place between Doherty and the assailant, Doc. No. 112 at 15. Arno forwarded his meeting summary to Ludman and Jackson. Id.

B. Emerson's Title IX Investigation

On March 26, 2013, Arno met with Doherty to update her on the status of the Title IX investigation. Doc. No. 103-2 at 22. He confirmed that Doherty was willing to cooperate in the investigation and explained Emerson's

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[1] The Court refers to the other Emerson student as "the assailant," instead of by name, given the nature of the allegations, that the assailant is not a party to this litigation, and the practice of other courts in similar situations. E.g., *Theriault v. Univ. of S. Me., 353 F. Supp. 2d 1, 5 (D. Me. 2004).*

student conduct disciplinary process. Doc. No. 112 at 15. He verified that Doherty felt safe on campus at that point and that she believed she would feel safe when the assailant returned to campus. Id.

The next day, Doherty sent Arno two Facebook conversations, the first from April 16, 2012, in which the assailant invited Doherty to his room,[2] and the second from April 26, 2012, in which Doherty confronted the assailant.[3] Doc. No. 103-7. Doherty told [*7] Arno that one of the assailant's roommates had seen her and the assailant after the incident, but that she could not remember the witness's name. Doc. No. 112 at 16. Arno e-mailed Doherty to set up a time to look at photographs of the assailant's roommates at the time to identify the witness; she subsequently reviewed the photos and identified the individual she recalled seeing. Id.; Doc. No. 103-2 at 23.

On April 12, 2013, Arno e-mailed Doherty to update her on the investigation and confirm that he would interview the individual she had identified. Doc. No. 112 at 16. He notified her of the date on which he planned to inform the assailant of Doherty's report and the pending investigation, and said he would meet with the assailant

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[2] The text of the April 16, 2012 conversation was:

Assailant: Youuuu

Doherty: meeee?

Assailant: Come have sex with me

Doherty: you're in new york

Assailant: No I'm in my room

Doherty: you said you were in new york

Assailant: Ya I too a buss home

Doherty: are you drunk? Hahaha

Assailant: So drunk come over

Doherty: hahahaha are you sure?

Assailant: Yes

Doherty: what room are you again?

Assailant: 1304 prow

Doherty: ok be there soon

Doc. No. 103-7 at 3-4 (all misspellings and other errors in original).

[3] The text of the April 26, 2012 conversation was:

Doherty: i really need to talk toy ou to you*

Assailant: whats up

Doherty: do you remember what happened that night that i came over last?

Assailant: Vaguely

Doherty: [Assailant], by definition you raped me

Assailant: what?

Doherty: im not gonna do anything about it but do you not remember?

Assailant: i remember us having sex...

Doherty: after the sex

Assailant: not really no

Doherty: well. by definition, you anally raped me ...[Assailant]? [*8]

Assailant: What

Doherty: did you get my last im?

Assailant: yes i dont know what to say to that

Doherty: im not gonna do anything i just wasnt sure if you rememebred remembered* do you remember that part at all?

Assailant: no i just that's not me you know thats not me

Doherty: it was because you were drunk i know, that's why im not gonna do anything about it i just wanted to let you know so that you dont drink that much again

Assailant: im so sorry

Doherty: its ok

Assailant: no it's definitely not

Doherty: well like what do you want me to say?

Assailant: i don't know what do you want ME to say

Doherty: you said you were sorry i've been sexually assaulted before in the past and he didnt say he was sorry so sorry means a lot to me

Assailant: ok i dont want to make excuses but you know that's not the kind of person i am

Doherty: no, i know

Assailant: i combined drinking with a lot of anger and sadness and i guess thats what i got

Doherty: yeah just promise me you'll try and keep your drinking at a safer level not just for my sake, but for yours you know?

Assailant: yeah i know

Doherty: you dont have to worry about me hating you or anything because i dont i know that the guy that did that wasnt you it was [*9] really just a lot of alcohol and other

when he returned to Boston the following week. Id.

Arno contacted the assailant on April 15, 2013, informing him that a report had been made about his conduct and asking to meet when he returned to Boston. Id. The assailant responded that he would be in Boston for only one day, on April 17, 2013. Id. On that date, Arno met with the assailant and gave him a copy of the Stay Away Directive, which prohibited the assailant from communicating with Doherty and barred him from entering Doherty's residence hall. Id. at 17. Arno also sent Doherty a Stay Away Directive. Id. The assailant left campus for the semester after meeting [*10] with Arno. Id.

On April 19, 2013, Arno e-mailed Doherty to tell her he had met with the assailant, that they had a "positive" conversation, and that the assailant had left campus for the semester. Doc. No. 103-22 at 2. Arno wrote a summary of his investigation and shared it with Ludman and Jackson. Doc. No. 112 at 17. Arno questioned the veracity of Doherty's account of the events because Doherty's own witnesses, according to Arno, did not seem to support her account,[4] and, although the assailant did not deny the event, he claimed not to remember it. Doc. No. 103-24 at 2. Arno ultimately determined, after consulting Jackson, that a conduct hearing was warranted. Doc. No. 112 at 17-18.

C. The First Conduct Board Hearing

On April 24, 2013, Arno e-mailed Doherty to inform her that Emerson had decided to move forward with a conduct board hearing. Id. at 18. He told her the hearing would be scheduled after finals, at the start of May. Id. The same day, Doherty called Arno and said she had incorrectly identified which one of the assailant's roommates had seen her and the assailant after the incident. Id. Doherty identified a different roommate as the witness, and Arno interviewed that person. Id.

The [*11] following day, Doherty contacted Arno to identify her friend as another witness, identified for purposes of the investigation as Witness 5. Id. at 19. Arno tried once to contact Witness 5 to request a meeting, but Witness 5 did not respond. Id. Doherty later asked Witness 5 to reply to Arno. Id.

On April 29, 2013, Arno sent Doherty a summary report of the meetings the two had about the incident and asked her to confirm the document was accurate. Id. at 19. Doherty sent no corrections. Id. The next day, Arno met with Doherty to discuss setting a hearing date. Id. He allowed her to choose between a Skype hearing over the summer or an in-person hearing in the fall. Id. Doherty said she preferred a Skype hearing. Id. Shortly after her finals, Doherty flew home to California. Id. at 20.

On May 2, 2013, Arno wrote to Doherty offering dates for the hearing. Id. On May 10, 2013, he sent her an e-mail confirming the planned date of May 17, 2013, and attaching information about the conduct board hearing. Id. The attachments notified Doherty that the hearing would proceed according to the Special Conduct Board Procedures for Sexual Misconduct and Sexual Harassment Complaints. Id. The attachments also explained Doherty could [*12] notify Emerson if she did not wish to participate in the hearing; Doherty informed Arno that she wanted to participate. Id. The three members of the Conduct Board were identified in the attachments, which informed Doherty she could object to the designated members. Id. Doherty raised no objections. Id.

Arno attached a copy of his Title IX investigation report to his May 2, 2013 e-mail, id. at 22, along with a letter from David Haden, the Associate Dean and Director of Housing and Residence Life, id. at 21. Haden's letter informed Doherty that she could have an advisor, including an attorney, work with her before the hearing and attend the hearing with her. Id. Doherty chose not to have an advisor present for the hearing. Id. Haden's letter also advised Doherty that she should provide the names of any additional witnesses she wished to present at the hearing. Id. Doherty provided no other names. Id. Haden encouraged Doherty to meet with him before the hearing if she had any questions. Id.

On May 13, 2013, Arno e-mailed Doherty to confirm that, during the hearing, Doherty would communicate with the assailant through the Board Chair, and to explain that Doherty could write down any questions she

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shit

Assailant: it's been a long few weeks and thats not an excuse i just want you to know

Doherty: no, i understand it has been for me. too i didnt mean to upset you.. but i just needed to say something

Assailant: ok

Doc. No. 103-7 at 4-8 (all misspellings and other errors in original).

[4] Arno noted that one of Doherty's witnesses knew of the incident but did not know Doherty said she had not consented, and another witness was not aware of the incident. Doc. No. 103-24 at 2.

had for [*13] the assailant, and the Board Chair would read them aloud. Id. at 23. Arno confirmed that Doherty was comfortable with that procedure. Id.

On May 15, Witness 5 contacted Arno to provide her witness account. Id. Arno interviewed Witness 5 and, on May 16, sent Doherty and the assailant an updated Title IX investigation report that included a summary of the new interview. Id.

The Conduct Board hearing was held on May 17, 2013. Id. at 24. Doherty participated by Skype from California. Id. She did not request any disability accommodations for the hearing. Id. at 25. The Board consisted of three members, David Griffin, Seth Grue, and Tikesha Morgan. Id. at 24. All three were Emerson Administrators who had participated in previous student conduct board hearings, including some involving allegations of sexual harassment or sexual discrimination. Id. at 24. Morgan was a trained Title IX investigator, id., although Doherty disputes whether her training was adequate, id. at 25. Griffin served as the chair. Id. at 26.

Before the hearing, the Board received a copy of Arno's investigation report, including an update after his interview with Witness 5. Id. Arno sent Griffin a script to follow at the hearing, based on Emerson's Special Conduct Board Procedures for [*14] Sexual Misconduct and Sexual Harassment Complaints. Id. at 26.

Doherty and the assailant signed confidentiality statements and presented facts supporting their positions. Id. During the hearing, the Board read a statement from a female student that included a personal reference for the assailant; Doherty interpreted the statement as a personal attack on her. Id. at 26-27. Arno summarized his investigation report during the hearing without providing his opinion on whether the assailant was responsible for a policy violation. Id. at 28. The hearing lasted approximately one hour. Id. Doherty and the assailant each were given the option to submit a final statement in writing after the hearing, or to deliver a final statement orally. Id. Doherty chose to make an oral statement. Id.

D. The First Decision and Doherty's Appeal

After the hearing, the Board met to determine the outcome. Id. Morgan and Grue would vote with Griffin voting only if the other members could not reach a consensus. Id. Morgan and Grue — the two voting members — agreed the evidence was insufficient to find the assailant responsible for a policy violation. Id. Griffin agreed but did not vote. Id. at 28-29.

The practice at the time was for the Board to draft an explanation [*15] of the basis for their determination, and to submit the document to the Dean of Students. Id. at 29. The Dean of Students would review the rationale and identify anything requiring clarification. Id. The parties do not dispute that this process occurred: the Board drafted a rationale document that was submitted to Ludman, who reviewed it and asked for clarifications. Id. Doherty asserts that the process was "highly unusual" because the rationale was "written and rewritten six times before the final draft," and the drafting process involved Haden and Arno. Id. The Board's conclusion did not change during this process. Id. at 30.

Arno e-mailed Doherty on May 29 and June 5, 2013 to update her on the status of the deliberations and reiterate that she would be notified of the Board's decision as soon as it was issued. Id. In the June 5th e-mail, Arno stated: "I apologize that this process has taken so long." Doc. No. 103-43 at 3.

On July 3, 2013, Emerson notified Doherty by letter that the Board had found the assailant "not responsible" for violating the student Code of Conduct. Doc. No. 112 at 30-31. The letter noted that one of the reasons the Board for the Board's determination was that Doherty's hearing [*16] testimony was inconsistent with an account she had provided to her roommate the day after the incident. Doc. No. 103-44 at 4; Doc. No. 112 at 31.

Arno contacted Doherty on July 10th to ensure that she had received the decision. Doc. No. 112 at 31. Emerson granted Doherty's request for additional time to appeal. Id. Doherty submitted her appeal on July 19, and Ludman confirmed its receipt on July 22. Id. In her appeal, Doherty stated that one of the assailant's suitemates — "Witness 4" — had additional information. Doc. No. 103-47 at 3. Specifically, Doherty alleged the assailant had changed his account of the incident to say he was awake when Doherty left; Doherty believed Witness 4 would confirm that the assailant had been asleep. Doc. No. 112 at 32. Arno had conducted a second interview with Witness 4 between the first hearing and the Board's decision. Id. at 33. On August 9, 2013, Ludman granted Doherty's appeal, based in part on the information from Witness 4 that had not been available before the first hearing. Doc. No. 103-49 at 3; Doc. No. 112 at 31-32. His decision meant that a new conduct board hearing would occur to permit consideration of the second interview of Witness 4 and

any [*17] related testimony. Doc. No. 112 at 32.

In September 2013, Arno conducted an annual training for conduct board members. Id. at 33. The training covered how to handle reports of sexual assault. Id. All of the members selected for the second conduct board hearing had attended the Fall 2013 conduct board training. Id. at 33-34.

E. The Second Conduct Board Hearing

On September 9, 2013, Emerson notified Doherty that the new Conduct Board hearing would be on October 9, 2013, and provided her with information on the procedures and Board members. Id. at 34. On September 17, Doherty provided Ludman with documents and names of witnesses she wanted to submit for the second hearing. Id. Ludman responded on September 20, specifying which evidence would be presented to the Board and why certain evidence was not permitted. Id. at 34-35. Ludman rescheduled the hearing for October 16th after Doherty became ill. Id. at 35. Before the hearing, Doherty and the assailant were permitted the opportunity to inspect the information that the Board would review. Id. On October 11, Ludman advised Doherty to come to his office before the hearing to minimize the chance that she would see the assailant on her way to the hearing. Id. at 35-36. Doherty did so. Id. at 36.

During the October [*18] 16, 2013 hearing, Doherty was assisted by an attorney acting as her advisor. Id. The hearing lasted about four hours and included live witness testimony. Id. Arno testified that, based on additional training he had received since the first hearing, he now believed the "scales were tipped in Doherty's favor." Id. Doherty disputes whether Arno had sufficient training, but she does not remember Arno telling her his training at the time of the first hearing was inadequate. Id. at 36-37.

After the second hearing, the Board found the assailant responsible for sexually assaulting Doherty, and Emerson expelled him. Id. at 37. Doherty received written notice of the Board's decision on October 22, 2013. Id. The letter explained the Board's reasoning and the sanctions against the assailant: the assailant was immediately expelled and was prohibited from entering or attempting to enter any Emerson building or residence hall and from attending any Emerson-sponsored activity or event. Id. Doherty was instructed to notify the Emerson police if the assailant failed to comply with any of the restrictions. Id. She never did so. Id.

The assailant appealed the determination of the second Conduct Board. Id. Ludman provided Doherty [*19] with a copy of the appeal, informed her of the date by which Emerson would resolve it, and offered to meet with her to discuss it. Id. On November 14, 2013, Ludman notified Doherty that he had denied the appeal. Id. at 38.

F. Relevant Post-Hearing Events[5]

The assailant did not sexually assault or threaten Doherty after the April 2012 incident. Id. Doherty and the assailant had no in-person conversations after the April 2012 incident. Id. They neither had nor attempted to have contact with one another after the imposition of the Stay Away Directive in April 2013. Id. at 39. They had classes in the same building twice a week in the fall of 2013, and Doherty saw the assailant "regularly." Id. at 38. At some point after the second hearing, Doherty saw the assailant and he glared at her, an encounter she found "very frightening" to the point of requiring the assistance of a friend. Id. at 38-39. Doherty did not report these interactions to Emerson. Id.

After the assailant's expulsion, Doherty did not see him on campus. Id. at 39. Doherty suspects he hacked into her Gmail account and leaked a copy of her Department of Education complaint in June 2014. Id. Doherty further suspects he may have attended hockey games or had other interactions [*20] with the Emerson hockey team after his expulsion. Id. at 40. She did not report her suspicions to Emerson because she says Emerson did not instruct her on what to do if other students saw the assailant on campus, only if she saw him herself. Id. at 37, 40.

Doherty sought accommodations from Emerson throughout her time there. The Court need not recount each and every request and response related to Doherty's accommodations; it suffices for present purposes to note there was a lengthy back-and-forth between Doherty and her family and the school, and that Emerson offered Doherty some, but not all, of the accommodations she sought. See id. at 40-44.

Doherty withdrew from Emerson in the spring of 2014. Id. at 44.

II. DISCUSSION

The Court applies the familiar summary judgment

[5] Doherty and Emerson disagree over the characterization of her interactions with the assailant, but the basic facts are not in dispute and, where they are, the Court accepts Doherty's facts.

standard to the defendants' motion. Fed. R. Civ. P. 56(a). Because no genuine dispute exists as to the facts material to any of Doherty's four claims, the defendants are entitled to judgment as a matter of law. Id.

A. Title IX

It is well-established that Title IX protects against discrimination on the basis of sex, and that sexual assault is a form of sex discrimination. To demonstrate liability under Title IX, Doherty must show: (1) that she "was a student, who was (2) subject to harassment [*21] (3) based upon sex; (4) that the harassment was sufficiently severe and pervasive to create an abusive educational environment; and (5) that a cognizable basis for institutional liability exists." Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 66 (1st Cir. 2002). Only the fifth element is contested here. "To satisfy the fifth part of this formulation, the plaintiff[] must prove that a school official authorized to take corrective action had actual knowledge of the harassment, yet exhibited deliberate indifference to it." Id. Deliberate indifference in the case of student-on-student harassment requires that the school's "response (or lack thereof) is clearly unreasonable in light of the known circumstances." Porto v. Tewksbury, 488 F.3d 67, 73 (1st Cir. 2007).

It is not enough for a plaintiff to show "that the school system could or should have done more." Id. In the educational setting, a plaintiff must establish that the school had notice of the harassment and "either did nothing or failed to take additional reasonable measures after it learned that its initial remedies were ineffective." Id. at 74. "[T]he fact that measures designed to stop harassment prove later to be ineffective does not establish that the steps taken were clearly unreasonable in light of the circumstances known by [a defendant] at the time." [*22] Id. Title IX "does not require educational institutions to take heroic measures, to perform flawless investigations, to craft perfect solutions, or to adopt strategies advocated by [complainants]." Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 174 (1st Cir. 2007), rev'd on other grounds, 555 U.S. 246, 129 S. Ct. 788, 172 L. Ed. 2d 582 (2009).

It bears noting at the outset that Doherty has not suggested Emerson had reason to know—before she reported her assault and disclosed the assailant's name—that the assailant, in particular, posed a danger to Doherty or anyone else. Instead, she advances several more general arguments she asserts establish Emerson's liability under Title IX.

First, Doherty contends that "Emerson had an obligation to educate its students about the issues of consent, sexual assault, the high correlation between alcohol and sexual assault[,] and their Title IX rights." Doc. No. 111 at 15. She urges that the alcohol- and sexual-assault-related education and training Emerson provided to its students were so inadequate as to demonstrate a deliberate indifference to her sexual assault.[6] However, Doherty has not supplied evidence that would justify such a conclusion here. The undisputed evidence establishes that Emerson provided all students with information about sexual assault risks, alcohol [*23] risks, and resources available related to such risks. Doc. No. 103-2 at 5; Doc. No. 103-6 at 5-6. That these resources did not specifically link the associated risks of alcohol use and sexual assault to one other is insufficient to support a finding of deliberate indifference, at least where Emerson educated students on these topics, and there is no evidence suggesting Emerson knowingly ignored alleged deficiencies in this regard.[7] Doherty's assertions amount to an argument that Emerson was generally aware of the problem of sexual assault and alcohol use on campuses nationwide, and that it could have done more to educate its students on those topics. Even if Doherty's assertion is correct, it is legally insufficient to establish deliberate indifference.[8] See Thomas v. Bd. of Trs. of the Neb. State Colls., 667 Fed. Appx. 560, 2016 WL 3564252, at *1-2 (8th Cir. 2016) (holding that a college's knowledge of a dropped rape charge and accusations of sexual harassment against a student were insufficient to establish that the college had actual knowledge of a risk of harm); cf. Shank v. Carleton Coll., 232 F. Supp. 3d

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[6] The Court agrees with Defendants that a rescuer theory of liability does not apply in light of Emerson's statutory obligation. See Mullins v. Pine Manor, 389 Mass. 47, 449 N.E.2d 331, 336 (Mass. 1983).

[7] Additionally, Doherty affirmed at her deposition that she knew in April 2012 that she could have reported her rape to Emerson. See Doc. No. 103-2 at 14 ("Q. At that time in April 2012, did you have an understanding that you could have reported it to Emerson College? A. Yes."). This fact undermines Doherty's assertion that the information Emerson provided its students did not adequately inform her of her rights pursuant to Title IX.

[8] As Doherty concedes, Emerson was not "obligated to eradicate sexual assault or alcohol use from campus," Doc. No. 111 at 15, and the question here is not whether Emerson offered the best possible education on these matters, Fitzgerald, 504 F.3d at 174.

1100, 1109 (D. Minn. 2017). ("Tolerating students' misuse of alcohol—even with knowledge that such misuse increases the risk of harmful behaviors such as sexual assault—is simply not the same thing as actual knowledge of sexual assault.").

Second, [*24] Doherty asserts that Emerson's response to her rape was so inadequate, and demonstrated such bias against her, that it constituted deliberate indifference. Doc. No. 111 at 16-17. The record not only fails to support this contention, it proves otherwise. The evidence before the Court establishes that Emerson promptly and seriously responded to Doherty's report, commenced an investigation, issued a stay-away order, offered Doherty counseling, and, ultimately, expelled the assailant. Doherty correctly points out that Arno, at the time of the first hearing, questioned her account. However, an investigator's honest and open-minded evaluation of the evidence gathered in the course of a Title IX investigation is not evidence of either bias or deliberate indifference. Arno's skepticism of Doherty's claim after his first round of investigation does not establish deliberate indifference by Emerson where the undisputed facts establish that he undertook a prompt and generally complete investigation, articulated non-frivolous reasons for his conclusion, and did not render the ultimate decision on behalf of Emerson. To the extent Doherty suggests Arno failed to follow up with one witness, and that [*25] such failure establishes deliberate indifference, there is no evidence supporting such a finding. Rather, the record shows Arno contacted every witness Doherty identified. Although Witness 5 failed to respond to Arno's interview request, she eventually contacted him in time to be interviewed before the first Conduct Board hearing. Arno included a summary of that interview in his final report to the Board. Under these circumstances, Doherty's second theory provides no basis for finding deliberate indifference. See Wyler v. Conn. State Univ. Sys., 100 F. Supp. 3d 182, 194 (D. Conn. 2015) (finding a "careless" investigation is insufficient to establish deliberate indifference).

Third, Doherty argues the investigation and adjudication of her complaint establish deliberate indifference. Doc. No. 111 at 17-19. To survive summary judgment, Doherty must show that Emerson's response to her report was "clearly unreasonable." Porto, 488 F.3d at 73. Emerson's reaction was anything but unreasonable. Emerson first learned of Doherty's rape on March 2, 2013. Within a day, she had received a response advising her of the resources available to her, and school administrators met to discuss an appropriate response. Within two days, a Title IX investigator reached out to her. Even while Doherty [*26] was maintaining that she did not want the assailant to get into trouble, Emerson was working to find out who he was and formulate an appropriate response. Emerson issued Stay Away Directives and banned the assailant from Doherty's dorm. Doherty received a Skype hearing, as requested, was later granted an appeal, and then had a second, in-person hearing. That Doherty did not receive the result she wanted after the initial hearing does not establish deliberate indifference by Emerson.

Fourth, Doherty asserts Emerson was deliberately indifferent in its dealings with her after she reported the assault. Doc. No. 111 at 20-21. This section of Doherty's Opposition is notably devoid of case law or developed argument supporting her position. Emerson expelled the assailant, banned him from Emerson's buildings and events, and instructed Doherty on how to contact Emerson police if she saw him.[9] Doherty has not advanced sufficient evidence to permit a jury to find deliberate indifference on this theory.

Finally, Doherty alleges Emerson offered her inadequate accommodations on her coursework, ultimately leading to her withdrawal from the college. Doc. No. 111 at 21-22. Emerson was not deliberately [*27] indifferent in discussing accommodations with Doherty. Doherty's own account of the accommodations she was given reveal that Emerson considered her requests, and that she was offered accommodations, just not every accommodation she wanted. Id. at 21.

The extensive back-and-forth between Emerson and Doherty belies an assertion of deliberate indifference. The sum of these parts leads to no different result under the deliberate indifference standard. Even considering all of the individual alleged shortcomings Doherty highlights, the evidence fails to provide a basis upon which a reasonable jury could conclude that Emerson

[9] To the extent Doherty is arguing that the instruction to contact the Emerson police was inadequate to the point of deliberate indifference because she was not told that she could contact the Emerson Police if she heard from others that the assailant was on campus (rather than if she saw him there herself), her argument fails. The letter following the second Conduct Board hearing stated that Doherty should "please let the College's Chief of Police or Dean of Students know immediately if the Respondent fails to comply with these terms so that we can take prompt and immediate action." Doc. No. 103-58 at 4. Nothing in that instruction limited what Doherty could report to her own sightings of the assailant on campus.

was deliberately indifferent here. Accordingly, the Motion for Summary Judgment is ALLOWED as to Count I.

B. Negligence

Doherty next asserts Emerson was negligent "in failing to provide a safe environment for its students, including the plaintiff, and violating its duty to comply with Title IX." Doc. No. 111 at 22. Doherty's negligence claim is based not on a risk specific to the assailant, nor on an argument that Emerson must attempt to eradicate drinking on campus to properly discharge its duties.[10] Id. Rather, her claim is that "Emerson failed to properly educate students, including [*28] her, to identify rape under circumstances like Doherty's assault, about the increased risk of sexual assault due to drinking, or about their Title IX rights." Id.

To establish negligence under Massachusetts law, a plaintiff must show (1) that the defendant owed her a legal duty, (2) that the defendant breached that duty, and (3) that the breach is the proximate cause of the her injuries. *Davis v. Westwood Grp., 420 Mass. 739, 652 N.E.2d 567, 569 (Mass. 1995)*. In Massachusetts, colleges have a duty "to protect their resident students against the criminal acts of third parties." *Mullins v. Pine Manor Coll., 389 Mass. 47, 449 N.E.2d 331, 336 (Mass. 1983)*. This duty requires colleges "to use reasonable care to prevent injury . . . by third persons." Id. The duty extends only to acts by third parties that are "reasonably foreseeable" to the college. *Kavanagh v. Trs. of Bos. Univ., 440 Mass. 195, 795 N.E.2d 1170, 1178 (Mass. 2003)*. Massachusetts law, however, "does not impose a legal duty on colleges or administrators to supervise the social activities of adult students, even though the college may have its own policies prohibiting alcohol or drug abuse." *Doe v. Emerson Coll., 153 F. Supp. 3d 506, 514 (D. Mass. 2015)* (citing *Bash v. Clark Univ., No. 06745A, 2006 Mass. Super. LEXIS 657, 2006 WL 4114297, at *5 (Mass. Super. Ct. Nov. 20, 2006)*). Doherty has not established the existence of the specific duty she seeks to impose, nor provided sufficient evidence to permit a jury to find in her favor on any of the elements of her negligence claim.

Insofar as Doherty's negligence claims relate to [*29] Title IX, they fail for a further reason. Doherty claims Emerson negligently implemented Title IX, in informing its students about the law and through its investigation and adjudication of her complaint. However, neither Title IX specifically, nor federal law generally, give rise to a cause of action for negligent implementation of Title IX. Federal law limits damage liability claims to deliberate indifference. See *Frazier, 276 F. 3d at 66*. Doherty has cited no Massachusetts law establishing a state common-law duty to implement Title IX in a non-negligent manner. Indeed, a negligence claim framed in this manner, with the duty itself arising from a federal law, likely would raise federal preemption concerns.[11] Accordingly, the Motion for Summary Judgment is ALLOWED as to Count II.

C. Negligent Infliction of Emotional Distress

To state a claim for negligent infliction of emotional distress under Massachusetts law, a plaintiff must establish: (1) negligence, (2) emotional distress, (3) causation, (4) physical harm manifested by objective symptomatology, and (5) that a reasonable person would have suffered emotional distress under the same circumstances. *Payton v. Abbott Labs, 386 Mass. 540, 437 N.E.2d 171, 181 (Mass. 1982)*. As described above, Doherty has not produced evidence from [*30] which a jury could find that Emerson was negligent. Thus, she cannot establish the first element of negligent infliction of emotional distress. See *Urman v. S. Bos. Sav. Bank, 424 Mass. 165, 674 N.E.2d 1078, 1083 (Mass. 1997)*. The Motion for Summary Judgment is ALLOWED as to Count III.

D. Intentional Infliction of Emotional Distress

To state a claim for intentional infliction of emotional distress ("IIED") under Massachusetts law, a plaintiff must establish: (1) that the defendant intended to inflict emotional distress or knew that emotional distress was likely to result, (2) that the defendant's conduct was extreme and outrageous, (3) that the actions of the defendant were the cause of the plaintiff's emotional distress, and (4) that "the emotional distress suffered by the plaintiff was severe and of such a nature that no reasonable person could be expected to endure it." *Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456, 681 N.E.2d 1189, 1197 (Mass. 1997)*. Conduct is "extreme and outrageous" if it is "beyond all possible bounds of decency and utterly intolerable in a civilized community." Id. This is a high bar. "Liability cannot be

[10] The Court does not understand Doherty to be asserting that Emerson's security procedures were inadequate, such that Emerson negligently caused her rape.

[11] Doherty has not advanced a developed argument under Massachusetts law supporting an extension of recognized Massachusetts common-law duties to create any of the particularized duties she advances.

predicated on mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities, nor even is it enough that the defendant has acted with an intent which is tortious or even criminal, or that [*31] he has intended to inflict emotional distress, or even that his conduct has been characterized by malice, or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." *Polay v. McMahon, 468 Mass. 379, 10 N.E.3d 1122, 1128 (Mass. 2014)* (quotation marks omitted); accord *Tetrault, 681 N.E.2d at 1197*.

Doherty has not identified extreme or outrageous behavior by Emerson that was targeted at her. She points to no case law suggesting Emerson's actions here—in the materials it distributed, its response to her complaint, its handling of the investigation and adjudication of her case, or the accommodations it offered her thereafter—exceeded the bounds of decency or are intolerable in a civilized community.[12] See *Doe, 153 F. Supp. 3d at 518* (dismissing a case where "the complaint's allegations largely rest on Doe's dissatisfaction with Emerson's policies and procedures, what she perceived to be their inadequate sensitivity to her issues, and the results of the various investigations"); *Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 247 (D. Vt. 1994)* ("A College's decision, when confronted with a female student's accusation of rape, to confront the male student with the charges, hold a hearing, and support the findings of the initial tribunal on appeal, even where various procedural errors are alleged, cannot form the basis of an IIED claim."). [*32] The Motion for Summary Judgment is, therefore, ALLOWED at to Count IV.

III. CONCLUSION

Defendants' Motion for Summary Judgment, Doc. No. 101, is ALLOWED. Defendants have filed a Motion to Strike Exhibits 73 and 78, Doc. No. 116. The Court concludes that, even considering these exhibits, summary judgment in Defendants' favor is warranted. Thus, the Motion to Strike is DENIED AS MOOT.

SO ORDERED.

/s/ Leo T. Sorokin

Leo T. Sorokin

United States District Judge

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[12] To be clear, what the assailant did to Doherty was "extreme and outrageous": it was "beyond all possible bounds of decency and utterly intolerable in a civilized community." In dismissing Doherty's claims against Emerson and Arno, the Court is neither questioning nor minimizing the assault Doherty suffered in April 2012.

CERTIFICATE OF SERVICE

I hereby certify that I served one copy of the foregoing Application for Direct Appellate Review, upon the attorney of record for each party by email, on July 18, 2019, as follows:

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