1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
2 ------------------------------x

3 JOHN DOE,

4 Plaintiff,

5 v. 16 Civ. 3531 (WHP)

6 WEILL CORNELL MEDICAL COLLEGE
OF CORNELL UNIVERSITY,
7
Defendant.
8
------------------------------x
9 New York, N.Y.
May 20, 2016
10 4:30 p.m.

11 Before:

12 HON. WILLIAM H. PAULEY III,

13 District Judge

14 APPEARANCES

15 SUSAN KAPLAN
CHARLES CARNICAS
16 Attorneys for Plaintiff

17 WARD GREENBERG HELLER & REIDY
Attorneys for Defendant
18 BY: THOMAS S. D'ANTONIO
JOSHUA AGINS
19 -and-
SHERYL A. ORWEL
20
ALSO PRESENT: JAMES KAHN
21 GARY KORETZKY

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23

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1 (Case called)

2 MS. KAPLAN: Good afternoon, your Honor, Susan Kaplan

3 from the Kaplan Law Office and my partner, Charles Caranicas.

4 THE COURT: Good afternoon to both of you. Have you

5 filed an appearance in this matter?

6 MS. KAPLAN: I did not file an appearance. This is an

7 eleventh-hour appearance, but I gave the clerk my

8 identification.

9 THE COURT: You'll file an appearance later today on

10 ECF or first thing Monday morning.

11 MS. KAPLAN: Thank you. Yes.

12 THE COURT: You're admitted to practice --

13 MS. KAPLAN: I admitted to practice in these courts.

14 THE COURT: Welcome.

15 MS. KAPLAN: Thank you.

16 MR. D'ANTONIO: Your Honor, Thomas D'Antonio from Ward

17 Greenberg Heller & Reidy; my colleague, Joshua Agins; and

18 Cheryl Orwel from University Counsel at Weill Cornell.

19 THE COURT: Now, Chief Judge Preska earlier, when this

20 matter was first filed, authorized the filing under seal. I've

21 reviewed the papers that have been submitted in connection with

22 this matter and accordingly I think it is in the best interests

23 of the parties that this matter continue to remain under seal

24 to protect the educational privacy rights of the individuals

25 who are involved.

1 To that end I note that counsel for Cornell is here.
2 Who are the other individuals in the courtroom? Because I am
3 going to seal the courtroom. Gentlemen, I would like you to
4 identify yourselves
5 MR. KAHN: My names is James Kahn. I'm counsel for
6 Weill Cornell.
7 THE COURT: You're in-house?
8 MR. KAHN: That is correct.
9 MR. KORETZKY: My name is Gary Koretzky. I am the
10 dean of the graduate school at Weill Cornell and the vice dean
11 for research of the medical college.
12 THE COURT: Gentlemen, if you wish to come and sit at
13 counsel table with the defendant's attorneys, you are free to
14 do so. I am going to direct my deputy to seal the courtroom.
15 THE DEPUTY CLERK: Your Honor, the courtroom is now
16 sealed.
17 THE COURT: This is a proceeding in connection with
18 the pro se plaintiff's application for a preliminary
19 injunction. I'm glad that he is now represented by counsel for
20 this proceeding. I have read all of the papers. Do you wish
21 to be heard?
22 MS. KAPLAN: Yes, your Honor, we do. Would you like
23 me to stand at the lecturn?
24 THE COURT: Why don't you take the podium, yes.
25 MS. KAPLAN: Thank you, your Honor, for hearing us.

1 I am going to address these issues under a large
2 heading of asking leave of the Court to amend the plaintiff's
3 complaint. I note that Cornell made a footnote that they were
4 not going to make a motion to dismiss at this time, so I don't
5 think there would be any prejudice to do so.
6 And as I go through my argument, not only will I be
7 aligning the proposed amendments to the argument, but there are
8 also some other federal questions that have come to light that
9 also may be relevant.
10 It seems to me that we are here only for the
11 preliminary injunction and not really to deal with arguments
12 relevant to dismissal. So we then have to begin with the
13 relevant four factors in the Second Circuit. And irreparable
14 harm being the most urgent and immediate and perhaps the
15 heartbeat of this whole action.
16 is today completed has class.
17 THE COURT: For the purpose of this proceeding I think
18 it best that you refer to the plaintiff as John Doe.
19 MS. KAPLAN: Of course.
20 THE COURT: To the extent anyone refers to the
21 complainant in the proceedings at Cornell, refer to her as Jane
22 Doe.
23 MS. KAPLAN: I apologize. You're absolutely correct.
24 Mr. Doe completed his last class of his medical degree
25 at Cornell just before arriving to court today. Cornell

1 permitted him to attend his classes after the appeal
2 punishment. Cornell permitted him to not only attend classes
3 but to complete rotations after the first panel review
4 punishment that determined the punishment he is now under
5 punitive. The punishment he is now under imposes a one-year
6 suspension, apparently starting today on gaining his degree.
7 He has earned it vis-a-vis class work. But he needs his
8 degree.
9 THE COURT: And the graduation or hooding ceremony is
10 when.
11 MS. KAPLAN: Wednesday, I believe. I believe it's
12 next Wednesday. And on June 1, which I believe is more or less
13 a week from next Wednesday, is when he is supposed to begin his
14 residency. Mr. Doe earned one of 200 seats in the entire
15 country as a resident in He was planning on his
16 residency is located in The name escapes me, but a
17 public hospital in It's a seven-year residency with a
18 salary.
19 I also want to add that Mr. Doe was one of maybe two
20 or three African American students in his class. The harm here
21 is comparable to *Doe V. Middlebury College*, which is a college
22 in Vermont. It was attended to by the District Court of
23 Vermont which is in the Second Circuit. In that case a
24 preliminary injunction was granted a student. He was a
25 graduating senior who had a job lined up, a nice job, and the

1 Court determined that a suspension at that point could not be
2 remedied economically as the defendants here suggest that this
3 is a tremendous gutting of the young man's future career. I
4 would say the same is here.
5 Without this residency -- and a career in
6 cannot be measured just in money, though of course there is
7 income involved that could be tallied and estimated. But this
8 is a calling. This is a life choice. This is the alpha and
9 the mega of his life and his interests and his goals and his
10 motives. If he is not permitted to go to his residency on June
11 1, one wonders where he may be able to wind up. It certainly
12 will not be in program. The damage that that
13 kind of failure to participate in puts him back in the pool and
14 his future is utterly speculative, totally taken off course.
15 The defendants argue that the harm is greater to the
16 public than to Mr. Doe in a very I think creative expansion of
17 what their mandate is. Cornell is mandated under Title IX
18 vis-a-vis the DOE, the Department of Education, and the OCR,
19 the Office of Civil Rights, 2011 dear colleague letter.
20 Under Title IX, their whole job is to deal with sexual
21 harassment on campus so that the student is not deprived of
22 educational benefits. Cornell seems to be arguing that they
23 are somehow permitted to deprive patients in a public hospital
24 of medical attention from Mr. Doe. This is way beyond their
25 mandate. Their mandate is limited and so is the due process

1 under which they exercise the discipline that they mete out.
2 I have serious problems with the due process that
3 Cornell provides. It's a private institution. They apparently
4 believe that they only have to adhere to the prescriptions in
5 the dear colleague letter. I'm not arguing that they have to
6 adhere to the Fourteenth Amendment. But even under the 2011
7 dear colleague letter, they come up short.
8 If they want to protect society from Mr. Doe, as they
9 seem to suggest, the patients who he may care for in it
10 would seem to me that that's a liberty and property interest
11 that would be more protected by the Fourteenth Amendment, that
12 even a private institution limited to a Title IX mandate makes
13 sure there is no sexual harassment on campus, makes sure that
14 whatever is alleged as sexual harassment has risen to the level
15 of depriving someone of an educational benefit. They have now
16 said, where there is limited due process may work it out, they
17 are saying, no, we need to protect the public. That's the job
18 of the criminal justice system. That's not the job of Cornell.
19 They do not have that mandate and they did not follow a single
20 due process procedure that would justify that expansion,
21 unilateral expansion of their mandate.
22 As was argued or as the Court in the Middlebury case
23 pointed out, the balance of hardships issue would also favor
24 Mr. Doe. Again, the hardship to Weill Cornell is perhaps that
25 their determinations and their rules and their punishment was

1 not followed. But, again, that would mean for that to be
2 adhered to, Mr. Doe would have to be deprived of his future
3 career and perhaps even a future. We don't know what kind of
4 bottomless pit this would leave him in really.
5 The Court there, as well as other courts that have
6 allowed preliminary injunctions for students in cases like
7 this, *DePaw University* in Indiana, another district court
8 granted it on even less demanding things. They thought that
9 the student there being suspended for a year, having to endure
10 a gap year and having to explain for the rest of his life that
11 this was as a result of being found to be a sexual predator, as
12 I believe the language was in that case, also gave it.
13 Here, it's a much more higher thing and they decided
14 that Cornell Weill could endure the momentary abridgement of
15 following its punishments and its rules until the Court can
16 determine what actually happened, that the balance of hardships
17 goes to the student who has to endure the loss of his future.
18 I also discussed a little bit of the disservice to the
19 larger community, which is another factor of the four factors
20 determining a preliminary injunction in that Cornell is trying
21 to say that this saves the community at large, which is a
22 jurisdiction that they don't have.
23 But beyond that, the community's only interest is that
24 the rules of Cornell are followed, that there is no sexual
25 harassment on campus. The community does not turn to Cornell

1 Weill to ensure that patients that appear at a public hospital
2 in are not being treated by someone who has gone through
3 their disciplinary program. So the disservice issue is well
4 addressed under the same criteria that the *Middlebury* court and
5 the *DePaw* court in Indiana of, the school can withstand a
6 suspension of their rules until it settled, and the community
7 at large would not be damaged.
8 Finally, we get to the likelihood of success. I'll
9 deal with the federal questions first. Mr. Doe introduced a
10 Title IX claim. It appears he is following the sensibility of
11 *Yusuf v. Vassar*, which is a Second Circuit case which allowed
12 for two approaches to gender discrimination under Title IX,
13 claiming that there was an erroneous outcome here because of
14 his gender and/or selective enforcement.
15 I add to the *Yusuf v. Vassar* sensibility another case,
16 *Doe v. Brown University*, which also addressed *Yusuf v. Vassar*,
17 and they pointed out that Title IX cases should follow Title
18 VII standards, that allegations in a Title VII case, which is
19 on information and belief and which you don't even get to the
20 comparables until discovery, that if you just allege, well, I
21 was discriminated against, I believe I was discriminated
22 against and make allegations of what it was, normal standards
23 for Title VII, I think what *Doe v. Brown* was arguing is that
24 Title IX, Title VII, they are comparable statutes. We really
25 shouldn't be dismissing these kinds of allegations early on

1 without allowing the discovery for comparables.

2 I think that Mr. Doe could achieve something along

3 those lines. We have a serious problem in this case in that in

4 one decision Cornell Weill found in the first decision, panel

5 decision, Cornell Weill administered a handful of punishments

6 and expressly moved away from suspension because they

7 themselves categorized suspension as too punitive under the

8 circumstances. That's their language. You wouldn't need to

9 put that label on it. It is obviously punitive. The

10 consequences here are extreme and offensive to the conscience

11 of society. To deprive someone who has finished his medical

12 training and achieved this tremendous gain going into the

13 residency is just appalling.

14 They determined it was too punitive. They let him

15 stay on campus. They let him do rounds. They let him have

16 hands-on interaction with patients. They didn't see him as

17 harmful, which now he can't touch patients that aren't even

18 under their purview. Yet they have to now spread their wings

19 to that extent.

20 The second ground they imposed, what they previously

21 called punitive, without much more explanation.

22 THE COURT: What's the difference between the role of

23 the review panel and the appeals committee?

24 MS. KAPLAN: That's a good question because from what

25 I could tell, the appeals committee, just looking at the

1 timeline, could not have studied this 400-plus page detailed
2 investigation without -- it seems to me that whatever their
3 role is, it is not a more intense granular deliberation of the
4 facts. If it were, this incredible detailed series of
5 contradictions that the complainant, referring to the accuser
6 in the initial -- in the on-campus disciplinary action, and I
7 referred the judge to Mr. Doe's previous attorney who I believe
8 the letters that she had written were submitted to the Court.
9 That attorney has a criminal attorney background. And I
10 thought she did a very detailed account of addressing the
11 numerous contradictions that the complainant had.
12 Now, if you just read them casually, which I can't
13 imagine the appellate panel could have done much more, it kind
14 of sounds like, yeah, a lot of the little details keep
15 repeating themselves. But if you graph it out, if you create a
16 continuum of her claims from one end of the continuum to the
17 other, you have a drastically different story with a cluster of
18 familiar details in the center.
19 And from one end of the continuum to the other you
20 have a story that completely occurs vertically, not on a bed,
21 with a toe stomping, and at the other end we have either being
22 pulled to a bed or tossed to a bed, but some activity on the
23 bed. In one version both of them are facing the wall.
24 The contradictions are legion here. To the extent
25 that a detective, one of many or several at least, that the

1 complainant reported her story to on information and belief,
2 this detective not only did not believe the complainant had a
3 set of events that would rise to, granted, criminal standards
4 of review, which are different, but this detective also
5 believed that she was being retaliatory, that this detective
6 was making a judgment different from, you just don't have a
7 case based on our standards. She was saying, this person is
8 motivated not by her case but other standards. That was not
9 investigated.
10 As I'm sure the Court is aware, this is a hot issue at
11 the moment. The issues are being addressed across the country.
12 There was a wonderful case decided in a case *Doe v. Brandeis*
13 *University* where the Court said, this did not involve an
14 injunction. But the Court said, if a college student is to be
15 marred for life as a sexual predator, it is reasonable to
16 require that he be provided a fair opportunity to defend
17 himself and an impartial arbiter to make that decision. I
18 don't know what this appeal panel did, but it certainly did not
19 enhance the scope of its inquiry, and it did not follow through
20 on the very effective claims of retaliation and combined with
21 very contradictory details in this complainant's story.
22 In addition, the school violated Title IX and OCR
23 directives. One of the things that they rely on is, well, the
24 investigator recommended suspension. We are just going back to
25 that. That's a big mistake.

1 The OCR has specifically identified that when you have
2 an investigator, as we did in this case, who does an
3 investigation, who also weighs the facts, as this investigator
4 did, which is to say, acts like a jury or a judge, and also
5 recommends a sentence that you have deprived that violence,
6 that 2009 dear colleague letter, and I'm referring to an OCR
7 allegation which actually prohibits that, the fact that that's
8 their safety net. But the investigator said that. The
9 investigator was not following OCR regulations or the dear
10 colleague letter and that recommendation was out of line.
11 THE COURT: I understand your point. Do you agree
12 that the individual Jane Doe named by the plaintiff in this
13 case is not a sueable person under Title IX?
14 MS. KAPLAN: Right. Title IX is against the
15 institution. I saw your notation. That's absolutely correct.
16 THE COURT: I think I have your arguments.
17 MS. KAPLAN: I want to mention one other thing then.
18 This is to the extent that the Court grants the preliminary
19 injunction and allows us to proceed with an amended complaint.
20 Second federal question would be a violation of Title VI. It
21 has come to my attention that --
22 THE COURT: Can we put that to the side. I'll tell
23 you why. First of all, under the federal rules, you can amend
24 your complaint as of right.
25 MS. KAPLAN: Yes.

1 THE COURT: Because the issue has not been joined. We
2 can deal with all of that later. I would prefer to deal with
3 the record that I have before me now on the narrow question
4 relating to a preliminary injunction.
5 MS. KAPLAN: Just a footnote to that, however. To the
6 extent, and I'm sure Cornell Weill are going to argue very
7 extensively that he may not be able to win on the merits under
8 Title VIII. I actually think he has a stronger case under
9 Title VI because of evidence of very severe and pervasive
10 discrimination that is documented in an e-mail from his mentor
11 while he was working in a lab and that he actually even
12 reported to the school and they were indifferent to the claim.
13 THE COURT: Is that e-mail part of the record?
14 MS. KAPLAN: I do. It's not part of the record. I
15 brought a copy.
16 THE COURT: Let's put that to the side for the moment.
17 MS. KAPLAN: Thank you.
18 THE COURT: Mr. D'Antonio.
19 MR. D'ANTONIO: Thank you, your Honor. May it please
20 the Court. I know the Court has reviewed the papers, so I will
21 not propose to spend a lot of time rehashing the material
22 that's before it.
23 THE COURT: I would ask one thing. Where in the
24 record is the letter that Jane Doe sent to Weill Cornell
25 objecting to the Weill Cornell March 28 determination? I

1 didn't see it in my review of the papers. Is it in the record?
2 MR. D'ANTONIO: I don't believe it is, your Honor.
3 THE COURT: Is there some reason why it would not be?
4 MR. D'ANTONIO: Other than the fact that we simply
5 chose to give the Court the investigator's report and the two
6 subsequent determinations by the review panel --
7 THE COURT: Her letter was an objection.
8 MR. D'ANTONIO: Correct.
9 THE COURT: What did she say that so persuaded the
10 university that they should essentially reverse the
11 determination by the review panel?
12 MR. D'ANTONIO: Honestly, Judge, I don't have that
13 information right in front of me. I don't know. Dr. Koretzky
14 is here. He was a member of the appeals committee. And I can
15 ask him.
16 THE COURT: I can ask him. Dr. Koretzky, what did she
17 say that was so persuasive? Just click the button. It says
18 push.
19 MR. KORETZKY: Yes. So the letter that we received
20 was a letter of appeal from Jane Doe and she felt very strongly
21 that the punishment that was being meted out by the review
22 committee was inadequate or was inappropriate for the violation
23 of Title IX. She asserted that essentially there was really no
24 punishment, that the individual, John Doe, performed this act.
25 It was found by the committee that he had violated

1 Title IX and, as a consequence, he was completing his medical
2 degree, moving on to residency and leaving Weill Cornell to
3 then go on to the rest of his career with essentially no
4 consequence whatsoever.
5 The consequences were that he was barred from living
6 in the dorm and that there was a no contact order between that
7 individual and Jane Doe, and that came to the office that was
8 pursuing this investigation. They felt that the appeal had to
9 be heard. So I chaired a committee of three members -- I'll be
10 happy to tell you what we did because that's obviously an issue
11 at this hearing. But I can tell you how we adjudicated and how
12 we made our decision. But what the argument was from her was
13 that the penalty was not commensurate with the violation. I'll
14 tell you more later.
15 THE COURT: You're represented by counsel here and I
16 am going to let your attorney speak and obviously as this
17 matter develops that letter is going to need to come to light.
18 MR. D'ANTONIO: There is certainly no reason why,
19 Judge, you can't have a copy of it. It certainly wasn't
20 intended that we would not provide the Court with full
21 information. But, obviously, we were sued on Monday. We got
22 our papers in yesterday. We put together as much as we could
23 as quickly as we could.
24 In terms of the assessment, though, I wanted to kind
25 of go back because I think that counsel glossed over a couple

1 of factors. With regard to the likelihood of success on the
2 merits, the fact is that the Second Circuit has made clear that
3 with regard to these Title IX claims, the plaintiff has to
4 establish in order to prevail either that there was some
5 selective enforcement, and there is no evidence whatsoever that
6 Cornell enforced this policy vis-a-vis female complainants
7 differently than male complainants or female respondents
8 differently vis-a-vis male respondents.
9 And with regard to the erroneous outcome, which is the
10 other prong of the challenge that the plaintiff can bring, here
11 if you boil down all of the allegations in the papers that are
12 before the Court, and even listening to counsel's argument, the
13 argument is that the investigator just got it wrong, that the
14 investigator made a judgment that they disagree with and
15 disagree with vehemently.
16 And there is really no question that Jane Doe's
17 version of events and John Doe's version of events are markedly
18 different one from another, but that's why we have a model that
19 permits an investigation, a review panel, and, upon an appeal,
20 a review by the appeals committee.
21 Judge, you asked what's the difference between a
22 review panel and the appeals committee, and frankly it's in
23 Exhibit E to the Koretzky declaration, and that's the report of
24 the appeals committee. So the way that the process is set up,
25 there is an investigator who is responsible for investigating

1 the allegations and making an assessment of both credibility,
2 gathering documents, and doing the kind of things that you and
3 juries do regularly.
4 THE COURT: Why would the investigator make a
5 recommendation then of punishment?
6 MR. D'ANTONIO: That's the policy. The policy 6.4,
7 which is Exhibit A to the Murray declaration that's before the
8 Court, permits -- not only permits it, requires it. And it's
9 the review committee, which is an independent three-member
10 panel of Cornell faculty or staff, sits in review of that
11 assessment and in this case not only reviewed the assessment
12 but also took testimony or heard from both Jane Doe and John
13 Doe and John Doe's lawyer so that there were two separate times
14 when John Doe got to present to the fact finder with regard to
15 people that would make an assessment of responsibility.
16 And the assessment of responsibility, by the way, it
17 should not be lost on this Court, was consistent. There was
18 not a single person sitting in review that disagreed with the
19 responsibility outcome, finding John Doe responsible. No one
20 agreed with John Doe. There is clearly a disagreement with
21 regard to the sanction. Again, the Koretzky declaration speaks
22 to that.
23 Basically, the appeals committee, if you take a look
24 at Exhibit E, page 2, the following are the allowable grounds
25 for appeal. And point 1 is, the sanction is not commensurate

1 with the violation or is unjust. That and prong 4, which is
2 the remedial actions awarded the complainant, are not
3 commensurate with the injury or are unjust, essentially the
4 same thing, just looking at it from either the complainant or
5 respondent's perspective. Those two things were revealed by
6 the appeals committee, as well as No. 5, which is the
7 investigator or reviewer rendered a decision clearly against
8 the evidence. So they looked at all of that.
9 And there has been some supposition on the part of
10 John Doe's counsel that how could the appeal committee possibly
11 have looked at this appeal carefully. How could they possibly
12 have looked at the 350 pages that are the investigation report
13 carefully. They had four weeks, more than four weeks,
14 actually. The determination was issued by the review panel on
15 March 14 and the appeals committee decided the matter on April
16 28. And Dr. Koretzky is here and can tell you -- I don't have
17 to speak for him. He read every single page, every single
18 page. So this is not a situation where I think that a credible
19 claim can be established with regard to erroneous outcome.
20 We have put in our papers that beyond the
21 nonspeculative there is really nothing. And even if they got
22 it wrong, under Title IX they have to get it wrong because they
23 are driven by a bias-based bond gender, and there is no
24 evidence of that, none. There is a suggestion in the papers
25 that Cornell had it out for the respondent, John Doe, because

1 he is male. The only fact that they put in the record, the
2 only fact they pleaded that allows that court to come to that
3 conclusion is, he is in fact male. That's not enough.
4 With regard to the irreparable injury --
5 THE COURT: What about the contract claims?
6 MR. D'ANTONIO: Well, interestingly enough, Judge, the
7 contract claim would be that we failed to follow our own
8 process. Where? If you read policy 6.4, we laid it out for
9 the Court. There is no place that the medical college failed
10 to follow its own process. That's all he gets. He has a right
11 to the process. I know the Court is well aware of those cases
12 that basically say that when a court makes a determination that
13 in fact the process has been followed, that's essentially the
14 scope of the inquiry, and we submit that the process was
15 followed.
16 THE COURT: Doesn't the process require a prompt
17 investigation?
18 MR. D'ANTONIO: Yes.
19 THE COURT: I'm kind of stunned, quite frankly, by the
20 record that I read here where a complaint is made in September
21 and an investigator, at a relatively leisurely pace, conducts
22 interviews, conducts a couple of interviews in September, a few
23 interviews in early October, and then a few more in early
24 November, and then doesn't even issue a report until the middle
25 of January when a medical student is in the middle of his

1 studies with this hanging over his head. That just doesn't
2 strike me as a prompt investigation.
3 MR. D'ANTONIO: Your Honor, respectfully, I have to
4 disagree. I understand that the Court looked at the kind of
5 the beginning and the end of the timeline. I submit that there
6 were a number of situations -- again, I think that the report
7 itself speaks to that. There were delays that were forwarded
8 to the respondent because his lawyer made a request for
9 additional time. This is a process that obviously they went
10 through it carefully and they wanted to get it right. The
11 investigation reveals they spoke with nine different people,
12 including the police officer who was charged with
13 responsibility for investigating the criminal complaint.
14 Obviously, what the law enforcement people do with their
15 burdens of proof and what an institution are supposed to do
16 under Title IX are vastly different, and the DCL recognizes
17 that right up front.
18 I don't think this was a situation where the process
19 was strung out by Weill Cornell in order to try to prejudice
20 the respondent. In fact, to the contrary. As a good example,
21 the only appeal that was taken from the review panel's
22 determination was by the complainant.
23 THE COURT: I thought that was rather remarkable.
24 You're faulting John Doe for not taking an appeal.
25 MR. D'ANTONIO: I don't think I'm faulting him. I'm

1 just pointing out the reality.
2 THE COURT: The appeals committee in their decision
3 essentially faults him for not having pursued an appeal when
4 perhaps he just wanted to move on at that point because he
5 wasn't confronted with a draconian penalty.
6 MR. D'ANTONIO: Judge, I don't know that I think you
7 can read that into what happened here. We had a situation --
8 THE COURT: I can read into it based on the papers
9 that I've got. What does Cornell think that John Doe is going
10 to do for the next year?
11 MR. D'ANTONIO: Judge, let me speak to that for a
12 minute, please.
13 THE COURT: I'm anxious to hear about that.
14 MR. D'ANTONIO: That's fine. One of the things that
15 often happens, John Doe learned of this allegation in
16 September, in mid-September. That's the time when the ability
17 to apply for residency training programs opens. So you can't
18 actually even apply to a residency training program under the
19 match system until mid-September.
20 One option would have been for John Doe to wait for
21 this process to conclude.
22 THE COURT: I can't believe you are going to make that
23 argument. Please. Don't insult my intelligence. Would you do
24 that? If you were in medical school would you say, you know
25 what, I'll put my life on hold because a former girlfriend with

1 whom I had an intense sexual relationship that I broke off is
2 now making a claim against me and the university is
3 investigating and she has gone to the police several times and
4 the police have rejected her claims? And I recognize there is
5 a different standard. You know what. Detectives are awfully
6 good at assessing credibility.
7 MR. D'ANTONIO: Judge, I'll tell you that the issue is
8 many medical students opt, for example, to work in a postdoc
9 year, to work in a lab, to do a number of things.
10 THE COURT: To put their life on a hold for a year.
11 What does Cornell expect him to do if the suspension remains in
12 place? He won't graduate next week.
13 MR. D'ANTONIO: Correct.
14 THE COURT: What should he do? Should he go out and
15 get a job in a delicatessen.
16 MR. D'ANTONIO: I suspect with his training, Judge,
17 that he would do more than get a job at a delicatessen.
18 THE COURT: Tell me what he would do.
19 MR. D'ANTONIO: He can work in a lab. He can work in
20 a postdoc.
21 THE COURT: What happens with his student debts, his
22 loans? Are they put in suspense?
23 MR. D'ANTONIO: Judge, I have no idea what his student
24 loans are.
25 THE COURT: They are in the record.

1 MR. D'ANTONIO: No, they are not. I don't think they
2 are.
3 MS. KAPLAN: They are, Judge.
4 THE COURT: I saw something just shy of $400,000
5 someplace in the record.
6 MR. D'ANTONIO: Judge, I don't know. If it is in the
7 record, it is in the record.
8 THE COURT: It scares me if I know the record better
9 than the lawyers who are before me because I have not had this
10 case any longer than you have. Tell me what he's supposed to
11 do.
12 What I find so remarkable, they say, he's a threat to
13 the Cornell community, so we are not going to let him graduate.
14 His life is going to be in suspense. Maybe he will stay around
15 Cornell Weill trying to do odd jobs.
16 MR. D'ANTONIO: First of all, Judge, I don't know what
17 he would do. I know that he's obviously a highly educated
18 individual who will have options.
19 THE COURT: Would you say that those options are
20 dramatically narrowed by a suspension?
21 MR. D'ANTONIO: I would say that they are postponed
22 for a year.
23 THE COURT: Do you really think he could go back to
24 the ____________________ when ______ learns that he didn't
25 get his degree and he was suspended for a year?

1 MR. D'ANTONIO: Your Honor, what if in fact --
2 THE COURT: Could you just answer that question.
3 MR. D'ANTONIO: I am trying to answer the question. I
4 don't know what would do. But I can tell you this. If
5 in fact the investigative report and the review panel and the
6 appeals committee, all of whom agreed that he violated Title
7 IX, are correct, what is Cornell supposed to do with that? And
8 what is supposed to do with that? Those are findings
9 that were made pursuant to a process that gave him more than
10 adequate opportunity to participate and be heard. He wound up
11 not prevailing in that process. He was found responsible. I
12 don't think we can dismiss that.
13 So what is Cornell to do? Cornell, when it issues a
14 degree, is supposed to be confident that the person that
15 receives that degree, there is an imprimatur that they have the
16 requisite character and professionalism as well as the
17 requisite training.
18 Again, if you presume that in fact everybody is wrong
19 and John Doe is correct --
20 THE COURT: What is it that will occur between next
21 Wednesday and a year from now that will assure Cornell that
22 John Doe has the requisite training and professionalism to
23 receive a coveted degree from Cornell Weill?
24 MR. D'ANTONIO: Among other things, Judge, one of the
25 sanctions was that he was supposed to go and get some

1 counseling on both anger management and on domestic violence.
2 And I believe that part of the recommendation was that those
3 reports are going to be shared with the university. And I
4 would assume that one of the things that would make them more
5 comfortable is that in fact he's a person that has the
6 requisite professionalism and character and they get a
7 satisfactory report in that regard. They won't have that
8 between now and next Wednesday.
9 THE COURT: What else?
10 MR. D'ANTONIO: Your Honor, you've seen our
11 argument --
12 THE COURT: They want to monitor his psychotherapy.
13 Is that it?
14 MR. D'ANTONIO: Your Honor, I believe --
15 THE COURT: Is that it?
16 MR. D'ANTONIO: I wouldn't --
17 THE COURT: Let me ask this. Are they monitoring the
18 psychotherapy of Jane Doe?
19 MR. D'ANTONIO: I believe, Judge, that the record
20 suggests that Jane Doe came forward and was having some serious
21 problems and I believe they tried to counsel with her, but of
22 course --
23 THE COURT: Is Jane Doe continuing to be enrolled at
24 Cornell?
25 MR. D'ANTONIO: Yes, your Honor.

1 THE COURT: Cornell doesn't have any problem with her?
2 MR. D'ANTONIO: She wasn't accused of violating Title
3 IX, Judge.
4 THE COURT: Did you read some of the lascivious
5 texts --
6 MR. D'ANTONIO: Judge, I do a lot of Title IX work and
7 I have to tell you, those texts unfortunately are more common
8 than I can believe. I don't think those texts amount to the
9 Title IX violations that we are talking about. I think that
10 the only person who was alleged to have committed an act of
11 sexual battery was John Doe. The only person who wound up with
12 a broken toe and in the emergency room for treatment of that
13 broken toe was Jane Doe. I know that the Court obviously seems
14 to have a point of view with regard to this.
15 THE COURT: No. I have a perspective based upon what
16 I have read, and I'm looking to you to tell me why such a harsh
17 penalty should be imposed. And so far you have only told me
18 that Cornell wants to monitor and receive reports for a year
19 relating to his psychotherapy before it might decide to give
20 him a degree.
21 MR. D'ANTONIO: No, Judge. I think actually even
22 Dr. Koretzky said it just now, a little while ago, and he will
23 be happy to say it again and it's in his declaration.
24 In addition to that, I believe that the reason that
25 the sanction was issued is because the appeals committee

1 determined that, in fact, the sanction was appropriate based on
2 the findings of what he did.
3 THE COURT: Where is the letter? Do you have the
4 letter objecting from Jane Doe here today? I'd like to see it
5 right now. Do you have it, Dr. Koretzky?
6 MR. KORETZKY: I don't have the document with me.
7 THE COURT: How about you, counsel. Do you have it?
8 MR. KAHN: I do not have it.
9 THE COURT: I bet Cornell is trying to protect itself
10 here from Jane Doe.
11 MR. D'ANTONIO: Your Honor, I think that's speculative
12 and I think you are wrong.
13 THE COURT: A determination was reversed based upon a
14 letter objection from the complainant, you omit it from the
15 record, and you don't bring it to Court.
16 MR. D'ANTONIO: I don't think that's a fair
17 characterization of what occurred.
18 THE COURT: It's a statement of fact.
19 MR. D'ANTONIO: I didn't omit it --
20 THE COURT: It's not here.
21 MR. D'ANTONIO: That's correct, Judge.
22 THE COURT: And you've argued that it was based upon
23 that letter that the appeals committee decided that there had
24 to be a more severe punishment.
25 MR. D'ANTONIO: Judge, I think what Dr. Koretzky said

1 was not based on the letter. He said that the circumstances
2 were such that the complainant felt that there was really no
3 punishment, and then they independently reviewed and came to a
4 determination, and here is the finding: We find that the
5 one-year suspension is commensurate with the seriousness of the
6 violation the respondent was found to have committed, sexual
7 battery, sexual misconduct, and domestic violence, as
8 recommended in the investigative report. 2. We disagree with
9 the rationale of the review panel for allowing the respondent
10 to graduate in May 2016. In particular, the appeals committee
11 finds that allowing the respondent to graduate would minimize
12 the gravity of the violation of policy 6.4, particularly given
13 the undisputed physical injuries suffered by the complainant
14 during the September 17, 2015 incident.
15 What the appeals committee also said and what
16 Dr. Koretzky said is that if in fact this violation had
17 occurred and John Doe was in his first year or second year or
18 third year, there would be no question with regard to the
19 issuance of a one-year suspension. The fact that he was in his
20 fourth year, the committee felt, while it recognized that that
21 was a potential problem for the respondent, the respondent
22 engaged in the conduct and was found responsible and they
23 didn't feel that they could simply dismiss the fact that it
24 occurred in his fourth year.
25 THE COURT: You read a finding like that, carefully

1 crafted by Dr. Koretzky and probably some lawyers. But I go
2 back to her statement, what she told the Title IX investigator
3 on September 18. So you want to quote from the record, I'll
4 quote from the record. "Jane Doe declined his propositions but
5 reluctantly agreed to one hug. She claims that at one point he
6 tried to forcefully pull her over toward him to cuddle and in
7 doing so she lost her balance and fell forward, where her foot
8 crashed into his foot. Her fourth toe was broken (ER visit
9 later that day). She was in pain and yelling and a roommate
10 was also there and heard it. She wanted Doe to leave." That's
11 Exhibit C at page 136. That's what she said. But the appeals
12 committee has machined it into something else.
13 MR. D'ANTONIO: Judge.
14 THE COURT: Do you have anything else? We are going
15 to take five minutes and then I'm ruling.
16 MR. D'ANTONIO: Your Honor, I'm happy to have
17 Dr. Koretzky talk with you if you have questions of him.
18 I'll quickly summarize, Judge. I don't think there is
19 a likelihood of success on the merits in this case. We briefed
20 that extensively. I believe that there is an absence of
21 irreparable injury.
22 THE COURT: We certainly disagree on that.
23 MR. D'ANTONIO: Yes, we do. And even if we do, that's
24 only one prong of the test.
25 THE COURT: It is.

1 MR. D'ANTONIO: And with regard to the balance of the
2 equities, we point out that the equities vis-a-vis John Doe do
3 not tip decidedly in his favor. And we pointed out that the
4 public is certainly not well served while this situation still
5 remains to be adjudicated. A preliminary injunction, all that
6 would do is obviously prohibit the institution from instituting
7 the suspension. It doesn't vitiate the finding and it doesn't
8 constitute an ultimate determination.
9 THE COURT: No. But we are talking about graduation
10 next Wednesday and a hooding ceremony.
11 MR. D'ANTONIO: Yes, your Honor. That's what we are
12 talking about.
13 THE COURT: Anything else?
14 MR. D'ANTONIO: No. Thank you.
15 THE COURT: We will take two minutes.
16 (Recess)
17 THE COURT: Over the last several days this Court has
18 reviewed all of the lengthy submissions that have been made in
19 connection with plaintiff's motion for a preliminary
20 injunction, and I have listened to counsel's arguments. There
21 is an immediate need for this application for a preliminary
22 injunction to be resolved and I'm prepared to rule at this
23 time.
24 Plaintiff brings this action under Title IX of the
25 United States Education Amendments of 1972 and applicable New

1 York state law alleging that Weill Cornell Medical College and
2 Jane Doe violated university policies on investigating Title IX
3 complaints and violated his right to be free from
4 discrimination in a federally funded education program.
5 To obtain preliminary injunctive relief, a plaintiff
6 must demonstrate irreparable injury, a balance of hardships
7 tipping in his favor, and a likelihood of success on the merits
8 or sufficiently serious questions going to the merits to make
9 them a fair ground for litigation and a balance of hardships
10 tipping decidedly in plaintiff's favor, and that the public
11 interest would not be disserved by issuing an injunction.
12 *Benihana, Inc. v. Benihana of Tokyo*, 784 F.3d 887 at 895 (2d
13 Cir. 2015).
14 Here, plaintiff has amply demonstrated irreparable
15 injury, that a balance of the hardships is in his favor and
16 that the public interest would not be disserved from issuing an
17 injunction. I find Cornell's arguments, which I considered
18 largely ridiculous in the motion papers, to have those
19 arguments repeated here is mind boggling to me. Suspending
20 plaintiff after he has completed all course work, preventing
21 him from graduating and proceeding to his postgraduation
22 fellowship will either destroy or impose substantial harm to
23 his future career as a doctor, a . And Weill
24 Cornell has articulated no reason why permitting plaintiff to
25 graduate would impose substantial harm to it.

1 Under New York law, an implied contract is formed when
2 a university accepts a student for enrollment. If the student
3 complies with the terms prescribed by the university and
4 completes the required courses, the university must award him a
5 degree. *Papelino v. Albany College of Pharmacy of Union*
6 *University*, 633 F.3d 81, 93 (2d Cir. 2011). The terms of the
7 implied contract are contained in the university's bulletins,
8 circulars and regulations made available to the student.
9 Implicit in the contract is the requirement that the
10 institution act in good faith in its dealings with its
11 students. *Papelino*, 633 F.3d at 81. When a private college or
12 university has adopted a rule or guideline establishing the
13 procedure to be followed in relation to suspension or expulsion
14 of a student for nonacademic reasons, that procedure must be
15 substantially observed. *Fraad-Wolff v. Vassar College*, 932
16 F.Supp., 88, 91 (S.D.N.Y. 1996). A plaintiff is likely to
17 succeed on such a contract claim when the record demonstrates
18 that the disciplinary proceeding concluded in a manner that was
19 "illegal, arbitrary, or capricious," or illustrates that the
20 plaintiff was treated in bad faith. *King v. DePaw University*,
21 2014 WL 4197507 at *11 (S.D. Ind. Aug. 22, 2014).
22 Here, Cornell University's policy 6.4 guarantees that
23 an individual accused of sexual misconduct has certain rights
24 guaranteed by the university. Specifically, Cornell guarantees
25 the right to a "prompt and fair investigation and

1 adjudication/disciplinary process that adheres to legal and
2 policy requirements of due process." That's in the rights of
3 individuals throughout a sexual misconduct proceeding.
4 Additionally, all students receive the right to participate in
5 a process that's fair, impartial, and provides adequate notice
6 and a meaningful opportunity to be heard. That's in Cornell
7 university's Bill of Rights.
8 Here, Weill Cornell conducted an extensive, protracted
9 investigation into the complainant's allegations. The
10 comprehensive investigative report concluded that neither
11 party's version of the events could be credited wholesale.
12 Indeed the investigative report and accompanying papers
13 demonstrated that the complainant's accountants of the incident
14 were contradictory. In an initial review by Title IX
15 investigators and an assistant district attorney, the
16 complainant described the incident as "horse play" and as an
17 awkward "hug" in the course of which the plaintiff stepped on
18 her toe. The record evidence provided substantial reason to
19 doubt the complainant and her motivations in several instances
20 in which the complainant herself aggressively propositioned the
21 plaintiff for sex. But the investigative report dismissed any
22 inconsistencies as attributable to the complainant's anxiety
23 and concluded that plaintiff should be sanctioned by suspending
24 him at the moment the academic year ended so that he would not
25 graduate from medical school. The complainant wanted the

1 plaintiff expelled. On March 14, 2016, Cornell's review panel
2 also found against the plaintiff but concluded that the
3 suspension was "unduly punitive" and would only prolong the
4 amount of time plaintiff spent on campus, precisely one of the
5 things that Cornell wanted to avoid with their purported claim
6 of protecting the Cornell community.
7 Nonetheless, the complainant, who initially sought
8 plaintiff's expulsion, appealed and argued that Weill Cornell
9 should reimpose the sanction of preventing the plaintiff from
10 graduating. Weill Cornell gave a threadbare explanation for
11 suddenly reversing course, stating that it would "minimize the
12 gravity" of plaintiff's university policy violation if he were
13 "allowed to graduate" from a medical school at which he had
14 completed all applicable case work and was prepared to proceed
15 to a fellowship program. Talk about bureaucratese.
16 And the appeals committee was quick to point out that
17 the plaintiff didn't appeal, so they were considering that.
18 The plaintiff didn't appeal because he was prepared to live
19 with the sanction that the review panel had imposed, perhaps
20 even if he disagreed with it, so that he could get back to his
21 medical career. The only thing that changed between the review
22 panel and the appeals committee was a letter objecting from the
23 complainant. Notably, just about everything else has been
24 produced in the record, but not that letter. The plaintiff
25 suggests in his papers that the complainant is very vindictive

1 and it will be interesting to see what the relationship is
2 between the complainant and Cornell at the current time. One
3 might be able to fairly infer, though I don't need it for this
4 decision, that the complainant has threatened Cornell with
5 litigation as she pursues her campaign against the plaintiff,
6 who ended the relationship with her.
7 There is at the end of the day something called the
8 rule of law and in this Court's view Cornell's proceeding
9 failed to comply with the basic requirements of fairness for
10 the accused and afforded inappropriate solicitude to the
11 complainant's demands that the review panel's determination was
12 not enough.
13 Accordingly, this Court is enjoining Weill Cornell
14 Medical College from halting plaintiff's graduation and
15 directing that Cornell include him in the hooding ceremony next
16 week.
17 I'll simply note that although this Court finds it
18 unnecessary at this juncture to address the Title IX to reach
19 this conclusion, this Court notes that plaintiff's Title IX
20 claims appear to be substantially stronger than those of
21 analogous actions in this district. Given Weill Cornell's
22 contradictory and inconsistent approaches to alleged sexual
23 advances by the plaintiff and sexual advances by the
24 complainant, it's plausible that a court could also find
25 grounds for a preliminary injunction on that basis, but I'm not

1 going that far.

2 This constitutes the decision of this Court.

3 Anything further?

4 MS. KAPLAN: Thank you, your Honor.

5 MR. D'ANTONIO: No, your Honor.

6 THE COURT: Why don't you sit down and talk about

7 resolving this case before it goes further. Quite frankly, I'm

8 appalled by what I see in this record and it would be good to

9 resolve the matter because it could wind up being unsealed at

10 some point with the identities, of course, redacted. And if it

11 goes much further I likely will do that because I don't believe

12 in sealing matters except for minors and classified

13 information, and neither of those matters pertain here. And it

14 could certainly be an issue of significant public interest in

15 New York about what a leading medical school is doing. Try to

16 resolve it because otherwise it's going to come out.

17 I will get you in for a conference in a couple of

18 weeks if you have not resolved the case, so prepare a 26(f)

19 report so that I know what you are proposing. And if you are

20 going to amend the complaint, when are you going to do that?

21 MS. KAPLAN: Your Honor, like I told your clerk, I was

22 an eleventh hour appointee.

23 THE COURT: Try resolving the case first.

24 MS. KAPLAN: I will.

25 THE COURT: Have a good afternoon. (Adjourned)