No. 19-2966

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

John Doe,

Plaintiff-Appellant,

v.

University of the Sciences,

Defendant-Appellee.

On Appeal from the Order of United States District Court for the Eastern District of Pennsylvania Granting Motion to Dismiss, Case No. 2:19-cv-00358-JS, The Honorable Juan R. Sánchez, Chief District Judge

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RESPONSIVE BRIEF OF APPELLEE, UNIVERSITY OF THE SCIENCES

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I. INTRODUCTION

John Doe ("Appellant" or "Doe") was expelled from the University of the Sciences ("USciences" or the "University") after being found responsible for two violations of the University's sexual misconduct policy with two different female students. The complaints of sexual misconduct were investigated by an independent external investigator in accordance with the University's Sexual Misconduct Policy (the "Sexual Misconduct Policy").

After interviews with Doe, the Complainants, and ten witnesses identified by Doe and the Complainants, and a review of relevant text messages and other evidence, the investigator concluded, by a preponderance of the evidence, that Doe's conduct violated the Sexual Misconduct Policy because he engaged in sexual intercourse with both Complainants "without affirmative consent." A panel of University faculty imposed the sanction of expulsion; Doe's subsequent appeal to a separate faculty panel was denied. Despite being given the University's full offering of process and fairness, Doe claims that he was treated differently because of his sex and that the University breached its contract with him.

Doe filed the present action alleging violations of Title IX under multiple theories – (i) selective enforcement, (ii) erroneous outcome, and

(iii) deliberate indifference – as well as state law claims for breach of contract, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence. The only Title IX theory at issue on this appeal is based on the selective enforcement theory; the only state law claim at issue on this appeal is for breach of contract.[1]

The District Court granted the University's Motion to Dismiss the Amended Complaint, and this appeal followed. The District Court's Order granting the Motion to Dismiss should be affirmed because Doe failed to identify a comparator who was treated differently. The District Court also properly dismissed the breach of contract claim because Doe could not identify any contractual provision that the University allegedly breached.

II. SUBJECT MATTER AND APPELLATE JURISDICTION

The United States District Court for the Eastern District of Pennsylvania had subject matter jurisdiction under 28 U.S.C. § 1331 and §

[1] Doe admits that none of the other state law claims are part of this appeal. (Appellant's Brief at 12 n.1.) Doe's failure to assert on appeal any theory under Title IX other than selective enforcement results in the waiver of those other theories, specifically erroneous outcome and deliberate indifference. United States v. Pelullo, 399 F.3d 197, 222 (3d Cir. 2005) ("It is well settled that an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal"), citing In re Surrick, 338 F.3d 224, 237 (3d Cir. 2003).

1367.[2] This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1291.

III. COUNTERSTATEMENT OF THE ISSUES

A. Whether the District Court properly granted the Motion to Dismiss Doe's selective enforcement claim under Title IX when Doe failed to identify a valid comparator or anything other than conclusory allegations to support a showing of gender bias?

Suggested Answer: Yes.

B. Whether the District Court properly granted the Motion to Dismiss Doe's breach of contract claim when Doe failed to identify any contractual provision that the University allegedly breached and Doe received more "fairness" and process than that to which he was entitled under the Sexual Misconduct Policy?

[2] Doe further claims that the District Court had subject matter jurisdiction based on diversity of citizenship. (Appellant's Brief at 9.) Citizenship, however, is determined at the time an action is commenced. Krasnov v. Dinan, 465 F.2d 1298, 1300 (3d Cir. 1972) ("It is the citizenship of the parties at the time the action is commenced which is controlling"), citing Brough v. Strathmann Supply Co., 358 F.2d 374, 376 (3d Cir. 1966) ("For purposes of federal jurisdiction, the requirement of diversity of citizenship is ordinarily determined by the situation existing at the time the action is commenced"). Since Doe was a citizen of Pennsylvania at the time of the commencement of this action and no diversity jurisdiction was alleged at that time (JA36, JA37), diversity of citizenship did not exist at that time and, therefore, cannot exist now. The District Court allowed Doe to proceed under both federal question and diversity jurisdiction. (JA8-JA9 at n.5.) To the extent no diversity jurisdiction exists over the state law breach of contract claim, the District Court could have – and this Court may – decline to exercise supplemental jurisdiction over that claim pursuant to 28 U.S.C. § 1367(c)(3) once the Title IX claim is dismissed.

Suggested Answer: *Yes.*

IV. RELATED CASES AND PROCEEDINGS

There are no related court proceedings.

V. CONCISE COUNTERSTATEMENT OF THE CASE

A. Counterstatement of the Facts

Doe alleges that he was a student at USciences, a private university, until January 18, 2019, when he was expelled. (JA93-94 at ¶¶ 2-4.) He alleges that after he had sexual encounters with the Complainants, "Jane Roe 1" and "Jane Roe 2," they made formal complaints of sexual misconduct against him on August 24 and August 30, 2018, respectively.[3] (JA 101 at ¶ 54.) At that point, and in accordance with the Sexual Misconduct Policy (attached to the Amended Complaint as Exhibit A), the University initiated a formal investigation into the allegations. (JA at ¶ 54.)

Doe admits that he was given a written Notice of Sexual Misconduct Investigation (Appellant's Brief at 21), which Notice included the names of both Complainants, the dates of the sexual encounters, the location of the sexual encounters, and the specific Sexual Misconduct Policy provisions at issue – namely, that Doe was being accused of misconduct of a sexual

[3] The District Court noted that the details of these sexual encounters did not warrant repetition in great detail because they were largely irrelevant to the issues before the District Court, which involved the fairness of the disciplinary process afforded to Doe. (JA5 at n.3.)

nature. (EDPA doc. 23-1.)[4] While Doe argued to the District Court that the notice he received of the allegations against him was insufficient and lacking in details, Doe makes no such argument in this appeal, and therefore, the notice issue should be considered abandoned and waived. See Pelullo, 399 F.3d at 222.

On September 5, 2018, the University hired an outside investigator, attorney Anne Kane of the law firm of Schnader Harrison Segal & Lewis LLP, who interviewed Doe, the Complainants, and other witnesses. (JA102-103 at ¶ 59, ¶¶ 63-65.) In connection with the investigation, the outside investigator interviewed Roe 1 (twice), Roe 2 (twice), Doe (twice), three witnesses identified by Roe 1, and seven witnesses identified by Doe. (JA154-155.) In accordance with the Sexual Misconduct Policy, Doe's advisor, attorney Zak Goldstein, was present during at least one of Doe's interviews. (JA248; JA140-JA141 at § 2.14.) In addition to conducting these interviews, the outside investigator reviewed text messages provided by the students involved in the investigation. (JA154, 160-161, 163, 228-

[4] The Notice, although referenced in Doe's Amended Complaint, was not attached to the Amended Complaint. The University, therefore, attached the Notice as Exhibit 1 to its Motion to Dismiss, which the District Court properly considered because the Notice was "integral to and relied upon" in the Amended Complaint. (JA5 at n.2.) See also In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997), cited by Rapid Circuits, Inc. v. Sun Nat'l Bank, No. 10-6401, 2011 U.S. Dist. LEXIS 47231, *3 n.2 (E.D. Pa. May 3, 2011).

232, 237, 246.) The Sexual Misconduct Policy allowed both Doe and the Complainants to submit a written response to the investigator's preliminary factual findings prior to the investigator finalizing the factual findings. (JA139 at § 2.10.9.) The outside investigator completed her report on November 13, 2018 (the "Investigation Report").[5] (JA105 at ¶ 66.) She concluded that Doe twice violated Section 1.6 of the Sexual Misconduct Policy by engaging in sexual intercourse with both Roe 1 and Roe 2 "without affirmative consent." (JA165.)

The University's Title IX Coordinator notified Doe of the investigation's conclusion the next day. (JA105 at ¶¶ 67-69.) Doe, unhappy with the result of the investigation, alleged that the "evidence does not support the report's finding." (Id. at ¶¶ 71, 73.)[6]

According to his Amended Complaint, on December 7, 2018, Doe learned that an administrative panel comprised of three faculty and staff

[5] Because Doe referenced and relied upon the Investigation Report throughout the Amended Complaint, but never attached any portion of the Investigation Report to his Amended Complaint and repeatedly misrepresented its contents, USciences properly attached the Investigation Report as an Exhibit to the Motion to Dismiss under seal. (EDPA doc. 23-1 at Exhibit 2.) Upon briefing and argument, the District Court ordered that the Investigation Report be filed of record except for three exhibits to the Investigation Report (Exhibits S, T, and U), which contained impact statements from Doe and the Complainants. (EDPA doc. 38 at n.1.) For the same reasons as set forth above in footnote 4, the District Court properly considered the Investigation Report, which was "integral to and relied upon" in the Amended Complaint.

[6] Once again, the erroneous outcome claim under Title IX has not been presented on appeal and is therefore waived.

members had convened to determine sanctions and that the sanction was to be expulsion. (JA106 at ¶¶ 74-75; JA139 at § 2.11.2.) Doe and the Complainants submitted impact statements, in accordance with the Sexual Misconduct Policy. (JA139 at § 2.11.4; Exhibits S, T, and U to the Investigation Report, which were filed under seal with the District Court, per the District Court's Order [EDPA doc. 38].) Doe submitted a written appeal, as permitted by the Sexual Misconduct Policy, which was reviewed by a separate administrative panel comprised of three members of the faculty and staff. The appeal was denied. (Id. at ¶¶ 76-78; JA141 at § 2.15.) Before the District Court, Doe criticized the University's investigation of the allegations of sexual misconduct based on (i) a lack of sufficient notice of the allegations against him (JA101 at ¶ 50), (ii) a single investigator of both Complainants' claims (JA102 at ¶¶ 56-58), and (iii) the investigator's method, manner, and conclusions of her investigation (JA102-JA103 at ¶¶ 62-65).

B. Procedural History

Doe commenced this action with the filing of a Complaint in the Eastern District of Pennsylvania on January 24, 2019, alleging violations of Title IX and state law claims for breach of contract, intentional infliction of

emotional distress, negligent infliction of emotional distress, and negligence. (JA36-JA91; EDPA doc. 1.)

On the same day, Doe filed a Motion for a Temporary Restraining Order and Preliminary Injunction. (EDPA doc. 2.) Following a two-day hearing on January 28 and 29, 2019, and the parties' submission of proposed findings of fact and conclusions of law (EDPA docs. 11 and 12), the District Court denied Doe a preliminary injunction because Doe failed to establish a likelihood of success on the merits of his claims. (EDPA docs. 13 and 14.)

On March 25, 2019, USciences filed a Motion to Dismiss the Complaint. (EDPA doc. 16.) On April 16, 2019, Doe filed an Amended Complaint. (EDPA doc. 19.) Because the Amended Complaint included new allegations of diversity jurisdiction (e.g., JA at ¶ 3) and about 10 new factual allegations, but still suffered from the same legal defects previously briefed by USciences, USciences filed a Motion to Dismiss the Amended Complaint (EDPA doc. 23). Doe filed a response to the Motion to Dismiss, and USciences filed a reply brief. (EDPA docs. 27 and 31.) The District Court held oral argument on July 10, 2019. (JA274-JA369.) On July 29, 2019, the District Court granted USciences' Motion to Dismiss in its entirety

and with prejudice. (JA3-JA31.) Doe filed this appeal on August 23, 2019. (JA1-JA2.)

C. Rulings Presented For Review

Doe has appealed the District Court's Memorandum and Order dated July 29, 2019, in which the District Court granted USciences' Motion to Dismiss. (JA3-JA31.)

VI. SUMMARY OF ARGUMENT

The District Court properly granted the Motion to Dismiss as to Doe's Title IX selective enforcement claim and breach of contract claim. Doe's claim for selective enforcement under Title IX fails as a matter of law because Doe cannot identify a valid comparator – a similarly-situated female who was treated more favorably than him. Rather, Doe attempts to compare himself to the Complainants in this case, neither of whom is similarly situated to Doe.

Second, the District Court properly granted the Motion to Dismiss the breach of contract claim because Doe failed to identify any contractual provision that the University breached. The only policy that governs the underlying conduct and process is the Sexual Misconduct Policy and not the Student Handbook at large, which Doe takes out of context and manipulates in an effort to create a cause of action.

The University followed the process set forth in its Sexual Misconduct Policy at every step, including the investigation and adjudication of the sexual misconduct. The law in this Circuit does not prohibit a single investigator from investigating claims of sexual misconduct, nor do the Courts of this Circuit require a live, judicial hearing in connection with allegations of sexual assault in the private university context.

The District Court's opinion and decision should be affirmed.

VII. ARGUMENT

A. Standard and Scope of Review With Respect to Motions to Dismiss

An appellate court's standard of review on a motion to dismiss is plenary. Kreidie v. Sec'y, Pa. Dep't of Revenue, 574 Fed. Appx. 114, 116 (3d Cir. 2014). A motion to dismiss for failure to state a claim is reviewed by the Third Circuit *de novo*. Ballentine v. United States, 486 F.3d 806, 810 (3d Cir. 2007).

The appellate court applies the same standard to a motion to dismiss as that applied by the District Court. A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure should be granted when the Complaint fails to state a claim upon which relief may be granted. Fed. R.C.P. 12(b)(6). To survive a motion to dismiss, a plaintiff must be able to plead sufficient facts to state a claim for relief that is "plausible on its face."

Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009), quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). "Conclusory allegations are insufficient to survive a motion to dismiss." Harris v. St. Joseph's Univ., No. 13-3937, 2014 U.S. Dist. LEXIS 65452, *3 (E.D. Pa. May 13, 2014) (J. Restrepo), citing Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009). The Court need not accept as true "unsupported conclusions and unwarranted inferences" or legal conclusions. Id. See also Twombly, 550 U.S. at 555 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

B. The District Court Properly Granted the University's Motion to Dismiss the Title IX Selective Enforcement and Breach of Contract Claims.

1. Doe's Selective Enforcement Claim Under Title IX Fails Because Doe Has Not Alleged and Cannot Identify a True Comparator of the Opposite Gender Who Was Treated More Favorably Than Him.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). In short, Title IX prohibits universities from discriminating against a student because of sex. Saravanan v. Drexel Univ., No. 17-3409, 2017 U.S. Dist. LEXIS 166940, *8 (E.D. Pa. Oct. 10, 2017) ("Saravanan I"). As with all claims

reviewed on a motion to dismiss, conclusory allegations are insufficient. Harris, 2014 U.S. Dist. LEXIS 65452, at *3.

The only allegations in the 141-paragraph Amended Complaint that relate to gender bias or gender discrimination are conclusory allegations that the investigator and the University engaged in "selective enforcement" by not investigating and punishing the Complainants for violating the Sexual Misconduct Policy (JA104 at ¶ 65(c), JA106 at ¶ 80, JA107 at ¶ 85, JA107 at ¶ 88) and that the University treats men (and in this case, Doe) differently from women (JA107 at ¶ 86, JA107 at 89, JA108 at ¶ 93). Doe also gratuitously uses the phrase "gender bias" in connection with his conclusory allegations. (JA108 at ¶ 90, JA108 at ¶ 91.) These conclusory allegations are insufficient to survive a motion to dismiss.

a) Doe and the Two Complainants are Not Valid Comparators.

Doe attempts to compare himself to the two Complainants in an effort to salvage his selective enforcement claim. Such efforts fail, however, because the two Complainants are not similarly-situated to Doe, and the Amended Complaint fails to establish that the purported selective enforcement was motivated by gender.

A plaintiff alleging a selective enforcement theory under Title IX must show that "regardless of the student's guilt or innocence, the severity of the

penalty and/or the decision to initiate to proceeding was affected by the student's gender." Saravanan I, 2017 U.S. Dist. LEXIS 166940, at *12, citing Yusuf v. Vassar Coll., 35 F.3d 709,715 (2d Cir. 1994). A male plaintiff alleging a selective enforcement theory under Title IX must show that a female in sufficiently similar circumstances was treated more favorably by the university. Saravanan I, 2017 U.S. Dist. LEXIS 166940, at *12. A student is "similarly situated" when the individuals have engaged in the same conduct. Saravanan v. Drexel, No. 17-3409, 2017 U.S. Dist. LEXIS 193925, *15 (E.D. Pa. Nov. 24, 2017) ("Saravanan II") ("To consider a student similarly situated, the individuals with whom a plaintiff seeks to be compared *must have engaged in the same conduct* without such differentiating or mitigating circumstances that would distinguish their conduct or the [school's] treatment of them for it") (emphasis in original; internal citations omitted). Gender bias must be shown to be the motivation for inconsistent treatment by the university. Saravanan I, 2017 U.S. Dist. LEXIS 166940, at *12.

Doe cannot show that any female involved in this case was similarly situated to him or that any such female was more favorably treated. While he complains that the Complainants generally were treated more favorably during the investigation and after the investigation (e.g., JA102-103 at ¶

63), he has not pled that either of the Complainants was "similarly situated," as neither Complainant was accused of sexual misconduct. See Saravanan II, 2017 U.S. Dist. LEXIS 193925, at *15. In addition, even if Doe's allegations on this point are assumed to be true, they "do no more than indicate a pro-victim – not an anti-male – bias." Doe v. Penn State Univ., No. 4:17-cv-01315, 2018 U.S. Dist. LEXIS 3184, *14 (M.D. Pa. Jan. 8, 2018) (citing cases for the proposition that a pro-victim policy is not equivalent to showing bias against males). Accordingly, the selective enforcement claim fails as a matter of law.

The District Court confirmed that Jane Roe 2 and Doe "are not valid comparators." (JA15.) Unlike Roe 2, who accused Doe of sexual misconduct, Doe never accused Roe 2 of sexual misconduct. (Id.) Doe's allegations make plain that Doe viewed his sexual encounter with Roe 2 as consensual. (JA15-JA16; JA99 at ¶ 44 ("John recalls Jane 2 being an active participant and her being fully engage[d] the entire time."); JA105 at ¶ 73 (disagreeing that there had been a policy violation in connection with Roe 2); Exhibit U to Investigation Report (filed under seal with the District Court, per the District Court's Order of July 31, 2019 [EDPA doc. 38]), in which Doe confirmed the consensual nature of his sexual encounter with Roe 2 and stated, among other things: "Everything we did was

consensual.") See also JA251 (Investigation Report, referencing Doe's first interview statement with the outside investigator ("After a while, she seemed fine and they started to have sex. She seemed fine and engaged in what they were doing."), JA252 ("Respondent [Doe] stated that she fully participated in the sex and he had no doubt about her consent.").) Indeed, Doe never argued to the District Court that his sexual encounter with Roe 2 was anything *but* consensual, and therefore, any such argument now should be deemed waived.[7] See DIRECTV, Inc. v. Seijas, 508 F.3d 123, 125 n.1 (3d Cir. 2007), citing Belitskus v. Pizzingrilli, 343 F.3d 632, 645 (3d Cir. 2003) (stating that it is "well established that arguments not raised before the District Court are waived on appeal"). Accordingly, Doe and Roe 2 did not engage in the same conduct "without such differentiating or mitigating circumstances that would distinguish their conduct or the [school's treatment] of them for it." (JA16, quoting Saravanan II.)

Recognizing that he has no binding authority in support of his position, Doe resorts to citing non-binding cases from outside of this Circuit. Even if those cases had any binding or persuasive effect – which they do

[7] Doe now attempts to back-pedal on this point and now feigns intoxication or incapacitation and a lack of consent by him, despite his own pleadings and statements to the outside investigator. (Compare Appellant's Brief at 30 n.4 with Doe's statement to the investigator that he was "buzzed" (JA251) and Doe's impact statement (Exhibit U to the Investigation Report, filed under seal), in which Doe stated that "Everything we did was consensual.").)

not – the cases still do not support Doe's position. The case of Doe v. Miami University, 882 F.3d 579 (6th Cir. 2018), for example, involved a public institution (unlike USciences, which is a private institution) that was accused of violating Title IX and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Sixth Circuit did not even address the Title IX selective enforcement claim because it had been waived based on the failure to raise the argument in response to the motion to dismiss. Id. at 594-95.

Moreover, in connection with the selective enforcement claim under the Equal Protection Clause, the Sixth Circuit noted that neither Jane Doe nor John Doe initiated a formal complaint against the other, but that the university chose to pursue disciplinary action against John Doe only. Id. at 596. The court found that John Doe and Jane Doe were similarly situated in that respect. Id. at 596-97. This is a key distinction between the facts of Miami University and the instant case, where Roe 2 made a formal report of sexual misconduct against Doe, and the University hired an outside investigator to investigate and adjudicate the allegations. Here, Doe never made an accusation of sexual misconduct against Roe 2 and has repeatedly claimed that their sexual encounter was consensual. (JA15-JA16; JA99 at ¶ 44; JA105 at ¶ 73; Exhibit U to Investigation Report (filed

under seal; JA251; JA252.[8] See also Haidak v. Univ. of Massachusetts-Amherst, 933 F.3d 56, 74 (1st Cir. 2019) (dismissing a Title IX selective enforcement claim on summary judgment because the complainant and plaintiff were not similarly situated when the complainant affirmatively reported the misconduct first and the plaintiff only accused the complainant of misconduct defensively and second in time).

Doe contends that Equal Protection claims and Title IX selective enforcement claims are analyzed the same way. (Appellant's Brief at 31 n.5.) But Doe cites to no Third Circuit cases holding that Equal Protection and Title IX claims should be analyzed the same way, and the elements of the two claims are different. The only Third Circuit case cited by Doe that is even related to this point is PG Publishing Co. v. Aichele, 705 F.3d 91 (3d Cir. 2013), which does not in any way discuss or analyze a Title IX

[8] Doe's citation to other cases from outside of the Third Circuit is similarly unhelpful to his case, as either the procedural posture or the facts are distinguishable from the case at bar. E.g., Mallory v. Ohio Univ., 76 Fed. Appx. 634, 641 (6th Cir. 2003) (summary judgment case where circumstances were found not to be sufficiently similar); Doe v. Cummins, 662 Fed. Appx. 437, 452 n.10 (6th Cir. 2016) (case contained no analysis of selective enforcement whatsoever, when appellant did not allege that a similarly accused female was treated differently under the school's disciplinary process); Doe v. Rollins College, 352 F. Supp. 3d 1205 (M.D. Fla. 2019) (allegations survived a motion to dismiss when both the male and female student were alleged to be "intoxicated," whereas Doe never alleged that he was "intoxicated").

claim.[9] In fact, PG Publishing dealt only with a selective enforcement claim under the Equal Protection Clause and not under Title IX, and confirmed that the elements of a selective enforcement claim under the Equal Protection Clause are not the same as under Title IX. See id. at 115 (citing the elements of a selective enforcement claim under the Equal Protection Clause).

Doe's selective enforcement claim fails as a matter of law for lack of a valid comparator.

b) Doe's Contentions that the Complainants Potentially Violated the Sexual Misconduct Policy By Disclosing Otherwise Confidential Information or by Having Sex With Him While Drinking Alcohol Are Waived and Unfounded.

Doe argues for the first time on appeal that the "Responsible Employee" provision of the Sexual Misconduct Policy required that the University, the Title IX Coordinator, and others report, investigate, and/or punish the Complainants for their alleged violations of the Sexual Misconduct Policy. (Appellant's Brief at 16, 22, 33-34.) Doe never raised this argument below or even cited the "Responsible Employee" provision or Sections 1.24, 1.24.3, or 2.3.2 of the Sexual Misconduct Policy in his

[9] Heyne v. Metro. Nashville Pub. Sch., 655 F.3d 556 (6th Cir. 2011), too, has no applicability or persuasive effect because that case involved a public school and an Equal Protection claim based on race. That case had nothing to do with Title IX.

Amended Complaint or before the District Court. Therefore, any such argument is waived. See DIRECTV, 508 F.3d at 125 n.1, citing Belitskus, 343 F.3d at 645.

Separate from Doe's waiver of the "Responsible Employee" provision is the flawed conclusion that either Complainant violated the Sexual Misconduct Policy.

(1) Doe Failed to Establish a Violation of the Sexual Misconduct Policy's Confidentiality Provisions.

Doe complains that the District Court did not address the allegations that "Roe 1 and other female students violated the confidentiality provisions of the Policy." (Appellant's Brief at 29.) Any supposed violation of the confidentiality provision, however, was not the issue before the District Court. The issue was whether Doe received sufficient notice and process under the University's Sexual Misconduct Policy.

Nonetheless, at most, the Investigation Report reflects that Witness 1 was aware of Roe 1's allegation of sexual misconduct because Roe 1 told Witness 1 about the incident after it happened, thereby corroborating Roe 1's allegations with a report contemporaneous with the incident. (JA153, JA154, JA158 ("Witness 1 confirms that Complainant 1 told her that Complainant 1 had hooked up with Respondent [Doe] the night before, that Respondent had run out of condoms, that Complainant 1 told Respondent

she did not want to have sex without a condom but that Respondent proceeded to intercourse anyway."). See also JA142 at § 2.18.1 (triggering confidentiality "[o]nce a complaint is filed.").) Witness 1 also served as a support person to Roe 1 when Roe 1 made the report of the incident to the University. (Id.)

The Sexual Misconduct Policy does not prohibit a Complainant from sharing with a friend that an incident of sexual misconduct occurred, nor does the Sexual Misconduct Policy prohibit Complainants from having support people present at the time of making a report. Furthermore, the Investigation Report confirms that Roe 1 ultimately decided to report the incident after she learned that other members of her sorority had also had problems with Doe. (JA158.)

(2) Doe Failed to Establish a Violation of the Sexual Misconduct Policy's Caution Against Sex with an Intoxicated or Incapacitated Person.

Doe attempts to argue that the University's decision to investigate and punish Doe for sexual misconduct under the influence of alcohol, while not investigating and punishing Roe 2, is evidence of gender bias because the University prohibits sex with someone who is intoxicated. Doe misses the mark on this argument and misrepresents the District Court's memorandum. During the investigation, Doe told the outside investigator

that he was "buzzed" at the time of his sexual encounter with Roe 2, meaning "being more talkative and social," as opposed to being drunk, "intoxicated," or "incapacitated." (JA251.) Doe pled in the Amended Complaint that both he and Roe 2 "consumed alcohol" prior to their sexual encounter (JA99 at ¶ 42) and that they both "had been drinking" (JA110 at ¶ 99), not that Doe was drunk or intoxicated.[10]

As aptly pointed out by the District Court, the Sexual Misconduct Policy does not proscribe sex with anyone who has had *any* amount of alcohol; rather, the Sexual Misconduct Policy "cautions" against having sex with someone who is "intoxicated" or "incapacitated." (JA131 at § 2.1.5 ("One should be cautious before engaging in sexual contact and/or sexual intercourse when either party has been drinking alcohol or using other drugs…"; JA123 at § 1.6 (defining "Sexual Assault" but not specifically referencing the consumption of alcohol); JA124 at § 1.9 (defining "Affirmative Consent" but not providing that consent is impossible when a

[10] Doe states in his brief that the "District Court acknowledged that the Amended Complaint alleges that both Doe and Roe 2 were *intoxicated* when they engaged in sexual activity." (Appellant's Brief at 29 (emphasis added).) That was not what the District Court said. If the District Court acknowledged anything, it was simply that both Doe and Roe 2 had "consumed alcohol," not that they were intoxicated. (JA15.) As recognized by the District Court, there is a distinction between consuming some amount of alcohol and the point of intoxication. (JA16 at n.11.) That distinction is meaningful where, as here, Doe never alleged that he was "intoxicated" or "incapacitated."

participant has consumed "any amount of alcohol, as alleged by Doe in ¶ 98 of the Amended Complaint.) On this point, the District Court stated:

> The plain language of the Sexual Misconduct Policy suggests there is some daylight between a single drink and the point of inebriation at which giving informed consent becomes impossible. Thus, just because Doe may have consumed some quantity of alcohol prior to the sexual encounter with Roe 2 does not mean, *ipso facto*, Roe 2 violated the Sexual Misconduct Policy.

(JA16 at n.11.) Doe cannot establish selective enforcement based on any alleged violation of the Sexual Misconduct Policy by Roe 2.

C. Doe's Breach of Contract Claim Fails Because He Cannot Point to Any Provision of the Sexual Misconduct Policy or Any Other Contract that was Breached.

The University does not dispute that its relationship with Doe is contractual in nature. Doe, however, fails to identify any contractual provision that the University breached.

1. Doe's Reliance on the Provisions of the Student Handbook is Misplaced Because the Sexual Misconduct Policy Governs the Underlying Conduct and Process.

Doe cites to the University's Student Handbook (portions of which were attached as Exhibit B to the Amended Complaint) and the Student Handbook's "guarantee of essential fairness" as a contract that USciences allegedly breached. (See JA100 at ¶ 49, JA111 at ¶¶ 109-112; JA147-150, at JA149.) Doe also points to the Student Handbook as requiring a "hearing"

as part of "due process." (Appellant's Brief at 37-38.) It is the University's Sexual Misconduct Policy, however, that applies in this case of sexual assault, and it is that policy's procedures that define what is "fair." See Powell v. St. Joseph's Univ., No. 17-4438, 2018 U.S. Dist. LEXIS 27145, *15 (E.D. Pa. Feb. 20, 2018), citing Doe v. Trs. of the Univ. of Pa., 270 F. Supp. 3d 799, 812 (E.D. Pa. 2017). See also id. at 813 (stating that notice and an opportunity to be heard are basic requirements of fundamental fairness).

Although Doe admitted in response to the Motion to Dismiss the Amended Complaint that the Sexual Misconduct Policy is a "subsection of the Student Handbook" (EDPA doc. 27 at 11 n.3), he attempts to pull portions of the Student Handbook out of context in an effort to confuse the issues, create an ambiguity that does not exist, and entitle him to more process than that which he is actually due.

The Sexual Misconduct Policy, as referenced in the Student Handbook excerpt attached to the Amended Complaint, provides:

> This policy applies to sexual or gender-based harassment that is committed by students… whenever the misconduct occurs: … Off University of the Sciences property, if: … the conduct may have the effect of creating a hostile work environment for a member of the University community.

(JA149.) The outside investigator specifically quoted this jurisdictional language and how both Complainants "reported feelings of discomfort and

distress as a result of [Doe's] conduct and his presence on campus," thereby triggering the applicability of the Sexual Misconduct Policy. (JA156.) The outside investigator also attached the Sexual Misconduct Policy to her Investigation Report because that was the applicable policy. (JA167-JA192.) The Sexual Misconduct Policy further provides that if a report of a Sexual Misconduct Policy violation also implicates potential violations of other University policies, then the investigation and adjudication will be done in accordance with the Sexual Misconduct Policy. (JA143 at § 2.19.1 and § 2.19.3.) Indeed, the very reason that Doe attached the entire Sexual Misconduct Policy to his Amended Complaint was because he knew this was the applicable policy.

As if the plain language of the Sexual Misconduct Policy is not enough, a basic canon of construction is that the "specific governs the general." Doe v. National Bd. of Med. Exam'rs, 199 F.3d 146, 154-55 (3d Cir. 1999), citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992), Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987), and Fortco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228 (1957). Here, similar to the well-established canon of construction that the specific controls the general, the Sexual Misconduct Policy, which is admittedly a subsection of the Student Handbook, is the more specific policy (specific to claims of

sexual misconduct, as are at issue here), which governs over the more general policies as set forth in the Student Handbook.

2. The University Complied with the Sexual Misconduct Policy At Every Step in the Process.

A private university's "disciplinary process does not give rise to 'fairness' obligations that are independent of, and separate from, the obligations imposed by the more specific provisions' in the parties' contract." Powell, 2018 U.S. Dist. LEXIS 27145, at *15, citing Doe v. Trs. of the Univ. of Pa., 270 F. Supp. 3d at 812. In other words, the procedures contained in the Sexual Misconduct Policy define what is "fair." Id. See also id. at 812 n. 6 ("This right to fundamental fairness does not ordinarily apply to students at private universities"). The Sexual Misconduct Policy, therefore, governs what is (and is not) required, and there are no additional requirements of "fairness" outside of the Sexual Misconduct Policy. This requires Doe to point to specific Sexual Misconduct Policy provisions that were breached in order to demonstrate a breach of contract, which Doe is unable to do.[11]

a) There is No Contractual Prohibition or Binding Case Law Against a Single-Investigator Model.

Doe takes issues with the University's "single-investigator model" to

[11] USciences will not address the allegations in the Amended Complaint related to notice, as notice is not at issue in this appeal.

investigate the allegations of both Complainants. (JA96 at ¶ 20, JA102 at ¶¶ 56-58.) The Policy, however, does not prohibit the use of a single investigator, nor does the law in the Third Circuit.

Doe points to Section 2.10.2 for the proposition that the use of a single-investigator model is inappropriate. Section 2.10.2 states: "The Title IX Coordinator will assign an investigator to the complaint." (Complaint at Exhibit A, § 2.10.2.) There is no prohibition of using a single investigator in this Policy provision when allegations are made by two different complainants about the same respondent. It should be noted that the outside investigator did not determine sanctions; she merely investigated the claims and made factual findings and conclusions. (JA152-165; JA139 at § 2.10.10 ("To the extent that the final report of the investigator concludes that a violation has occurred, the report will not contain any specific recommendations as to sanctions.").)

As the District Court stated:

> In the Amended Complaint, Doe avers that it is the University's policy to use a single-investigator model. *See [Amended Complaint]* at ¶ 58 (citing Sexual Misconduct Policy § 2.10.2 ("The Title IX Coordinator will assign an investigator to the complaint.")). In the following paragraph, he avers that that is exactly what the University did. *See id.* ¶ 59 ("On September 5, 2018, the University retained

> attorney Kane from the law firm Schnader Harrison Segal & Lewis LLP to be the sole investigator and issue a determination."). The University's decision to follow a provision of its contract with Doe cannot be considered evidence the University breached that contract.

(JA21.) Doe cannot confirm in his pleading that the University's policy allows for a single investigator and then complain when the University assigned a single investigator to investigate the allegations of misconduct.

Moreover, Doe's citation to the Department of Education's "new interim guidance" and "proposed rules" (Appellant's Brief at 14, 41-42) are of no consequence, as those proposed rules are not law and have no binding effect on this Court or any other Court. See Doe v. Princeton, No. 18-16539, 2019 U.S. Dist. LEXIS 4449, *15 (D.N.J. Jan. 9, 2019) ("proposed regulations… have no legal effect"), *24 ("the Proposed Regulations are merely proposals and do not have the force of law"). See also JA8 (reflecting the District Court finding no basis to rely upon the Department of Education's "decision to rescind non-binding guidance (after a change in administrations)".) Accordingly, the portion of Doe's breach of contract claim related to the use of a single investigator in this case should be dismissed.

b) The Investigator Conducted a Full and Fair Investigation, and No Live, Judicial Hearing was Required.

Doe complains that the investigation and lack of a "hearing" was unfair to him.

(1) Doe Fails to Establish that the Investigation was Unfair.

With respect to the investigation, Doe, in conclusory fashion, criticizes the investigator's investigation as being unfair. (JA112 at ¶ 116(2).) The Investigation Report itself, however, makes clear that the investigation was full and fair at every step in the process. (JA152-273.)

By way of example only, Doe alleges – despite having the Investigation Report in his possession at the time he filed the Amended Complaint – that "Jane 1 and Jane 2 were each interviewed by the University on more occasions than John." (JA103 at ¶ 63(e).) The Investigation Report explicitly disproves this notion, identifying two meetings with Complainant 1, two meetings with Complainant 2, and two meetings with Respondent/Doe. (JA154-155.) Moreover, the Policy provides that the investigator "will request individual interviews with the complainant, respondent, and other witnesses as appropriate." (JA138 at § 2.10.4.) There is no requirement that the investigator meet with the

complainant(s) and respondent the same number of times, and therefore, there is no breached contract provision to which Plaintiff can point. (Id.)

By way of further example, Doe contends that he was not given copies of the witness statements, but instead, was "forced to make an appointment to review the evidence, and even then he was only allowed to take notes of the evidence offered." (JA113 at ¶ 116(3)(i) and (iii).) There is no requirement in the Policy that the respondent be provided a copy of the final investigation report. All that is required under the Policy is that the Title IX Coordinator notify the complainant and respondent in writing of the final findings of the investigator. (JA139 at § 2.10.11.) Nonetheless, Doe admits that the Title IX Coordinator allowed him the opportunity to review the report and its exhibits. (JA113 at ¶ 116(3)(i) and (iii); JA152-273.) This confirms that Doe was given even more "fairness" than that which the Sexual Misconduct Policy contemplates or requires.

This case is distinguishable from Doe v. Amherst College, 238 F. Supp. 3d 195 (D. Mass. 2017), cited by Doe. In Amherst, another case that has no binding effect on this Court, additional exculpatory evidence was discovered after the student's expulsion, which raised questions about the adequacy of the investigation performed. There is no such allegation in this case. Here, Doe has never claimed that additional, exculpatory

evidence was found after the investigation was closed. The outside investigator's investigation was fair and even-handed, and Doe has failed to establish otherwise.

(2) No Live, Judicial Hearing Was Required Under the Sexual Misconduct Policy or the Law of this Circuit.

As to the lack of a "hearing," Doe laments that he was not given a "hearing before a panel," presumably so that Doe or his attorney advisor could have cross-examined the Complainants and others. (JA114 at ¶ 116(5)(iii).) In support of his position, Doe cites to Interstate Commerce Com. v. Louisville & N.R. Co., 227 U.S. 88 (1913) and Wilkinson v. Abrams, 627 F.2d 650 (3d Cir. 1980), neither of which involved Title IX or private universities or colleges adjudicating sexual assault allegations. Those cases dealt with statutes relating to commerce rates and unemployment compensation, respectively, which specifically required "hearings."

The Sexual Misconduct Policy does not require or permit a live, judicial "hearing," nor is the right to cross-examination required under the law in this Circuit. See JA122-145; Doe v. Princeton, 2019 U.S. Dist. LEXIS 4449, at **19-20 ("Plaintiff cites no authority showing that the Third Circuit or this Court has adopted the same reasoning [requiring cross-

examination] and the Court cannot identify any precedent showing the same."). See also id., at *15, * 24 (noting that the proposed DOE regulations have no legal effect or force of law). Private educational institutions such as USciences are not required to provide "a full-dress judicial hearing, with the right to cross-examine witnesses." Boehm v. Univ. of Pennsylvania School of Veterinary Medicine, 573 A.2d 575, 579 (Pa. Super. Ct. 1990); JA22.[12] See also Goss v. Lopez, 419 U.S. 565, 579, 583 (1975) (acknowledging that, for a public institution, "some kind of notice" and "some kind of hearing" are required and noting that student disciplinary proceedings need not necessarily include the opportunity to secure counsel and to confront and cross-examine witnesses); Dixon v. Alabama State Board of Education, 294 F.2d 150, 159 (5th Cir. 1961) (noting, even in the context of a public school, that a "hearing" does not require the "full-dress of judicial hearing, with the right to cross-examine witnesses" in order to comport with due process, but rather, allows both sides to be heard in considerable detail); Haidak v. Univ. of Massachusetts-Amherst, 933 F.3d 56, 67-68, 69 (1st Cir. 2019) (rejecting the expectation of cross-examination

[12] None of the cases cited by Doe from outside of this Circuit are binding on this Court, and many of the cases cited involve public universities or colleges, which may differ in the amount of due process required. E.g., Doe v. Univ. of Arkansas-Fayetteville, No. 5:18-cv-05182, 2019 U.S. Dist. LEXIS 57889 (W.D. Ark. Apr. 3, 2019) (public school); Doe v. Univ. of Michigan, 325 F. Supp. 3d 821 (E.D. Mich. 2018) (public school); Ruane v. Shippensburg Univ., 871 A.2d 859 (Pa. Commw. Ct. 2005) (involved public college).

from Doe v. Baum, 903 F.3d 575 (6th Cir. 2018) and noting that, even in the context of a public school, a "hearing" need not mirror a "common law criminal trial" and is sufficient when the plaintiff had "an opportunity to answer, explain, and defend"). Indeed, holding a hearing and subjecting a complainant to cross-examination could be detrimental to both the school and the complainants. E.g., Boehm, 573 A.2d at 575 (noting the potential disturbance to the college by holding a hearing and the "detrimental" risk to educational atmosphere). A live, judicial hearing with cross-examination could also intimidate complainants, which could chill the reporting of incidents of sexual assault, impede the school's ability to determine the truth, and make it harder for schools to protect their students and meet their educational mission. See generally Adjudicating Campus Sexual Misconduct and Assault, Controversies and Challenges (Claire M. Renzetti and Diane R. Follingstad, eds. 2019), at Chapter 5 ("Civil Rights Investigations and Comprehensive Prevention of Sexual Misconduct"), Cantalupo, Nancy Chi (discussing the harm of adversarial hearings, as compared with the benefits of an investigative model).[13] Investigative

[13] Many of the comments to the Notice of Proposed Rulemaking by the Department of Education reflect the potential harms of a live hearing and cross-examination. See, e.g., Title IX Comment from Mental Health Professionals, found at https://www.regulations.gov/document?D=ED-2018-OCR-0064-104088 (last viewed Dec. 6, 2019) at p.3 (noting that for survivors of sexual assault, a live hearing and cross-examination "means being subjected to hostile attacks on their credibility and public

models such as the one used by USciences, as opposed to adversarial, live, judicial hearings may also have benefits for the respondent. Id.

Even if due process and fundamental fairness were required here, to comport with basic notions of fundamental fairness, notice and *opportunity to be heard* are expected. Doe v. Trs. of the Univ. of Pa., 270 F. Supp. 3d at 813. Doe's own allegations, coupled with the allowances made available by the Sexual Misconduct Policy, confirm that Doe was given ample notice and opportunity to be heard. At the time he was informed of the allegations of sexual misconduct, Doe was provided a written Notice of Sexual Misconduct Investigation that included the names of both Complainants, the dates of the alleged misconduct, the location of the alleged misconduct, the nature of the allegations being sexual, and the Policy provisions that Plaintiff was accused of violating. (JA138 at § 2.10.1; EDPA doc. 23-1.)

In addition to being provided sufficient notice, the Sexual Misconduct provides – and Doe availed himself of – multiple meaningful opportunities to be heard, including:

shaming at a time, following a traumatic event, when they may feel most vulnerable. It also means being forced to relive their traumatic experiences in excruciating detail, a situation almost guaranteed to aggravate their symptoms of post-traumatic stress. For these reasons, a requirement for live cross-examination is likely to cause serious to harm victims who complain and to deter even more victims from coming forward.").)

- Doe met twice with the outside investigator, along with Doe's advisor. (JA154-155; JA138 at § 2.10.4[14]; JA140-JA141 at § 2.14.)
- Doe identified multiple witnesses to support his position, and the outside investigator interviewed them. (JA154-155; JA138 at § 2.10.4.)
- During his second meeting with the outside investigator, Doe was given the opportunity to review his first interview and correct, clarify, and confirm those statements. (JA253-JA254 (identifying Doe's "corrections" to the investigator's summary from their first interview); JA139 at § 2.10.8.)
- Doe had the opportunity to review the outside investigator's preliminary factual findings. (JA139 at § 2.10.9.)
- Doe also had the opportunity to review the outside investigator's final factual findings. (JA139 at § 2.10.11 (providing that the Title IX Coordinator will provide the complainant(s) and respondent the final findings of the investigator simultaneously in writing).)

[14] There is no requirement in the Sexual Misconduct Policy that the investigator interview the Complainant(s) and Respondent the same number of times, nor is there a requirement that the investigator must interview every witness identified by every party. See JA138 at § 2.10.4 and § 2.10.7.

- Doe had the opportunity to choose an advisor and have his advisor, a lawyer, present throughout the process. (JA140 at § 2.14; JA248 (noting that Doe's advisor, attorney Zak Goldstein, was present during Doe's interview with the outside investigator).)
- After the Investigation Report was finalized, Doe submitted an impact statement, as did the Complainants. (JA139 at § 2.11.4; Exhibit U to the Investigation Report, filed under seal.)
- After an administrative panel determined that Doe should be expelled for his misconduct, Doe submitted a written appeal to a separate three-person panel of faculty and staff, which appeal was denied. (JA141 at § 2.15; JA106 at ¶ 76.)

No live, judicial "hearing" was required under the Sexual Misconduct Policy. Even under the broadest definitions of "fairness" and "due process," Doe had sufficient notice and opportunity to be heard throughout the University's process. Since Doe is unable to point to any specific provision of the Sexual Misconduct Policy that USciences allegedly breached, the breach of contract claim fails and should be dismissed with prejudice. The District Court's dismissal of the breach of contract claim should be affirmed.

VIII. CONCLUSION

For the foregoing reasons, Appellee, University of the Sciences, respectfully requests that the Court affirm the District Court's rulings granting the Motion to Dismiss.

Respectfully submitted,

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Dated: December 6, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

John Doe, Plaintiff-Appellant, v. University of the Sciences, Defendant-Appellee.	**No. 19-2966**

CERTIFICATION OF BAR MEMBERSHIP (3d Cir. L.A.R. 28.3(d))

I, Leslie M. Greenspan, Esquire certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit. My co-counsel, Joe H. Tucker, Jr. is also a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Leslie M. Greenspan
Leslie M. Greenspan, Esquire

Date: December 6, 2019

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

John Doe, Plaintiff-Appellant, v. University of the Sciences, Defendant-Appellee.	**No. 19-2966**

CERTIFICATION OF WORD COUNT

I, Leslie M. Greenspan, Esquire certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,070 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Date: December 6, 2019

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FOR THE THIRD CIRCUIT

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John Doe, Plaintiff-Appellant, v. University of the Sciences, Defendant-Appellee.	**No. 19-2966**

CERTIFICATE OF SERVICE

I, Leslie M. Greenspan, Esquire certify that on this date, I caused a copy of Appellee's Brief to be electronically filed through the Court's ECF System and that such filing generates a notice of that constitutes service on the following counsel of record:

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I further certify that seven (7) hard copies of Appellee's Brief will be delivered via hand delivery within five (5) days of the electronic filing of Appellee's Brief to:

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