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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN DOE,)	
)	
Plaintiff)	
)	
vs.)	No. 15-11557-FDS
)	
BRANDEIS UNIVERSITY,)	
Defendant)	

BEFORE: THE HONORABLE F. DENNIS SAYLOR, IV

MOTION HEARING

John Joseph Moakley United States Courthouse
Courtroom No. 3
1 Courthouse Way
Boston, MA 02210

October 5, 2015
11:00 a.m.

Valerie A. O'Hara, FCRR, RPR
Official Court Reporter
John Joseph Moakley United States Courthouse
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1 APPEARANCES:

2 For The Plaintiff:

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7 For the Defendant:

8 Rose, Chinitz & Rose, by ALAN D. ROSE, SR. and
9 ANTONIO MORIELLO, ESQ., One Beacon Street, 23rd Floor,
Boston, MA 02108.

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PROCEEDINGS

THE CLERK: All rise. Thank you. Please be seated. Court is now in session in the matter of John Doe vs. Dean of Academic Services, Civil Action Number 15-11557.

Will counsel please identify themselves for the record.

MS. HAMILL: Good morning, your Honor, my name is Patricia Hamill, and I'm here for Plaintiff John Doe.

11:01AM

THE COURT: Good morning.

MR. SCHNEIDER: Michael Schneider also for John Doe.

MR. ROSE: Good morning, your Honor, Alan Rose here for the Defendant Brandeis University.

MR. MORIELLO: Good morning, your Honor, Anthony Moriello, also for Brandeis University.

THE COURT: Good morning. This is a hearing on defendant's motion to dismiss. Mr. Rose, are you going to take the lead?

11:01AM

MR. ROSE: Thank you, your Honor, and may it please the Court, we're here on Brandeis University's motion to dismiss under Rule 12(b)(6). There is a substantial record before the Court owing to the fact that the complaint in the case is very long, very

1 detailed, refers to a large number of documents, which
2 we have submitted as attachments to affidavits from
3 Mr. Moriello, and those include three documents which
4 are particularly important, a 25-page report by the
5 special examiner hired by Brandeis University to
6 interview the witnesses and to prepare a summary and to
7 make certain findings.

8 That report of the special examiner is
9 Exhibit B to the first affidavit filed by Mr. Moriello.
10 11:03AM The document 2013-2014 *Rights and Responsibilities* is
11 Exhibit A to that same affidavit. There's also referred
12 to in the complaint a summary of the special examiner's
13 report prepared by Dean Boes.

14 That summary is at Exhibit A to the second
15 Moriello affidavit, and the third Moriello affidavit
16 includes as Exhibit B the final and anonymous decision
17 of the University Appeals Board.

18 THE COURT: Let me stop you there.

19 MR. ROSE: Yes, your Honor.

20 11:03AM THE COURT: Ms. Hamill, is there any dispute
21 that I can consider those four documents properly as
22 part of the record?

23 MS. HAMILL: There is not, your Honor.

24 THE COURT: Okay. Thank you. Mr. Rose.

25 MR. ROSE: Now, your Honor, this case is

1 similar to another case which our office handled and
2 which is not cited in Ms. Hamill's brief but is cited
3 prominently in our papers. That's the case of *Schaer*
4 *vs. Brandeis University* in which also arose on
5 Rule 12(b)(6), motion to dismiss, and the SJC affirmed
6 the superior court's dismissal of the complaint on
7 Rule 12(b)(6).

8 The case had been taken by the SJC on
9 further appellate review from a decision that was
10 11:04AM adverse to Brandeis by the Appeals Court, but the SJC
11 took the case on further appellate review, considered
12 the arguments, reviewed an earlier, obviously, decision,
13 reviewed an earlier version, I should say, of *Rights and*
14 *Responsibilities*.

15 *Rights and Responsibilities*, which is the
16 governing document, the handbook, the student handbook
17 between Brandeis University and its students, which may
18 be modified from year to year, as I said, is Exhibit A
19 to the Moriello affidavit.

20 11:05AM And the courts uniformly say that in
21 considering disciplinary matters, disciplinary conduct
22 decisions made by universities, the courts are very
23 reluctant to interfere in university decision-making.

24 That said, the courts have also said that in
25 instances where the university does have a handbook with

1 rules, those rules obviously must be followed, but the
2 review by courts seems limited in the sense that
3 universities are owed substantial deference into how
4 they interpret and apply their decisions and also with
5 respect to the ultimate outcomes that are made in those
6 cases.

7 I should also mention another case, *Driscoll*
8 *vs. Milton Academy*, although that arises in the private
9 school context, the Appeals Court's decision by
10 Justice Kafker cites with approval the *Schaer vs.*
11 *Brandeis decision*, so what do we have here?

11:06AM

12 We have a situation where the plaintiff,
13 John Doe, and his accuser were both former students at
14 Brandeis. After a 21-month relationship, which
15 obviously went sour, the accuser, who's identified in
16 the complaint as J.C. filed what's called a community
17 standards report alleging that Doe had sexually harassed
18 and assaulted him at times during their relationship.

11:07AM

19 Under the 2013-2014 version of *Rights and*
20 *Responsibilities*, Brandeis because of the fact that
21 there was a claim under the community standards report
22 of sexual assault or sexual harassment hired a
23 third-party special examiner.

24 That's a process which is used in any case
25 arising out of the community standards report in which

1 any of the allegations concern sexual assault or sexual
2 harassment.

3 So that special examiner process went
4 forward. The special examiner, Ms. --

5 THE COURT: I'm sorry to interrupt.

6 MR. ROSE: Yes.

7 THE COURT: Is it true, Mr. Rose, I may have
8 the detail wrong here, but my understanding is the
9 initial accusation was two sentences, 29 words long,
10 there was a more detailed accusation that came later,
11 and the plaintiff, John Doe, was not permitted to see
12 that accusation?

11:08AM

13 MR. ROSE: He did not see the more detailed
14 report. The way --

15 THE COURT: Can I just say as an aside,
16 we're all lawyers here, I'm a Judge, the case is
17 probably going to rise and fall on what the contract
18 said, but I don't understand how a university, much less
19 one named after Louis Brandeis, could possibly think
20 that that was a fair procedure to not allow the accused
21 to see the accusation. I mean, Mr. Rose, surely that
22 gives you some pause.

11:08AM

23 MR. ROSE: No, your Honor, it does not,
24 certainly does not, and the reason it does not is
25 because one must look at the entire record of this case,

1 and the entire record reflects that John Doe was
2 interviewed four times, his accuser was interviewed four
3 times.

4 THE COURT: But does Doe know precisely what
5 the accuser says because he has a chance to be
6 interviewed, but, you know, our Constitution -- I'm
7 telling you things you already know. Our Constitution
8 provides for a right of confrontation, a public
9 proceeding in which you confront your accuser, the right
10 of cross-examination.

11:09AM

11 It's carved on the walls of this building
12 how important the right of cross-examination is, and
13 part of that, of course, is knowing the charge, knowing
14 precisely what it is you're responding to, and I just
15 don't understand. It's not just Brandeis, it's, you
16 know, most of these schools have this one-sided
17 procedure.

18 I don't understand how a college could set
19 this up. I don't understand it. Again, I'm not going
20 to decide the case, -- I'm going to decide the case on
21 the law, and if it's contractual provisions that govern
22 and the contract wasn't violated or there's no tort,
23 then that's that, but I just find it astonishing that
24 you could set up a procedure like this. I don't
25 understand it. I don't understand how lawyers could

11:09AM

1 allow this to happen.

2 MR. ROSE: If I could explain, your Honor.

3 THE COURT: Yes.

4 MR. ROSE: The reason that the special
5 examiner process was set up was in reaction to and in
6 response to and in conformity to the various guidance
7 letters and policy statements.

8 THE COURT: Dear Colleague letters?

9 MR. ROSE: Yes, in April of 2011, and I will
10 -- the only confession, if you will, that I will make is
11 that when lawyers, and I'm one of them, saw the Dear
12 Colleague letter and saw the various pronouncements
13 issued by the Department of Education, the Office of
14 Civil Rights, we were indeed surprised at some of the
15 provisions.

16 THE COURT: I mean, it's closer to Salem
17 1792 than Boston, 2015.

18 MR. ROSE: Well, I won't acknowledge that,
19 your Honor, given the array of procedural rights that
20 John, you know, that John Doe and all accused students
21 at Brandeis are given, but, again, the reason that this
22 special examiner process was created in which you set up
23 a special examiner and the special examiner interviews
24 by himself or herself the accused, the accuser, again,
25 it's in response to the Dear Colleague letter and the

1 other guidance issued by the Office for Civil Rights.
2 That's the reason that there is a special examiner
3 process.

4 THE COURT: If we had a time machine, I
5 would be interested in Justice Brandeis' view of that
6 procedure, but go on, Mr. Rose.

7 MR. ROSE: Well, your Honor, I think I might
8 have been --

9 THE COURT: A man famous for talking about
10 sunshine and how it's both enlightening and a
11 disinfectant.

12 MR. ROSE: A disinfectant, the best
13 disinfectant.

14 THE COURT: Yes.

15 MR. ROSE: But here, after all, your Honor,
16 it's not as if the allegations are made and the special
17 examiner goes off and simply speaks to the accuser and
18 never gives the accused a chance. In fact, in the
19 opinion, I'm sorry, in the complaint, John Doe says that
20 the first time that he found out what the allegations
21 were was when he was interviewed by the special
22 examiner, and the complaint goes on to say that after
23 being interviewed initially by the special examiner, the
24 special examiner interviewed both the accused and the
25 accuser two or three more times, so this was clearly an

1 evolving process in which the accused at the time that
2 he's interviewed by the special examiner learns all
3 about the allegations that have been made against him,
4 and, in fact, if you read the 25-page single-spaced
5 report issued by Ms. Singhavi, it's very clear that
6 John Doe not only learned what the allegations were, he
7 was able to provide his side of the story, and the
8 report accepts his version of events as to many of the
9 incidents that happened during the course of this
10 21-month long relationship.

11:13AM

11 THE COURT: I think it's Felix Frankfurter,
12 I may have that wrong, but I think it's
13 Justice Frankfurter who said that there's never been a
14 method better devised for ascertaining the truth than
15 cross-examination, and there was no cross-examination of
16 the accuser, correct, that's not what the rules provide?

17 MR. ROSE: My understanding was that under
18 the special examiner process, there is no
19 cross-examination of the accuser by -- of the accuser by
20 the accused, yes, that is certainly true, and that's the
21 way it's set up under the special examiner process in
22 the governing document, and, as I said, that's the way
23 it was done in response to the guidance from the Office
24 for Civil Rights in these kinds of cases, so one of the
25 many allegations that is made is that after the special

11:14AM

1 examiner made her report, which is, as I said, is in the
2 record, 25 pages, single-spaced, the matter then went to
3 Dean Boes and under Brandeis's procedure, it's in the
4 record, the next thing that happened was that Dean Boes
5 prepared a summary, her own summary of the findings that
6 have been made by the special examiner.

7 The complaint reflects that Dean Boes met
8 with John Doe and read to him from the summary of those
9 findings and invited him to make any further submission
10 that John Doe wanted, and the record reflects that in
11 response to that, according to the amended complaint,
12 John Doe provided an affidavit and the names of certain
13 witnesses.

14 He had also given the names of witnesses to
15 the special examiner, and I think that at least three of
16 those witnesses were people whom the special examiner
17 interviewed.

18 So it appears that John Doe not only had a
19 chance to say his peace to whatever he wanted to say to
20 the special examiner, had the chance to provide the name
21 of witnesses, those witnesses were also interviewed by
22 the special examiner, and he was then given a chance to
23 respond to the summary of the findings of the special
24 examiner.

25 Now, one of the allegations in the complaint

11:15AM

11:16AM

1 is that Brandeis allegedly breached the provisions of
2 *Rights and Responsibilities* by going to what's called
3 the deliberations phase, and since this provision of
4 *Rights and Responsibilities* is so prominently mentioned
5 in the complaint in the case, I would just like to, if I
6 could, walk the Court through the language in *Rights and*
7 *Responsibilities*.

8 THE COURT: Hold on.

9 MR. ROSE: That is in the --

11:17AM

10 THE COURT: I didn't print out everything.
11 I may not have that here, hold on.

12 MR. ROSE: That's in the affidavit of
13 Mr. Moriello, the first affidavit, which is Docket
14 Number 21. It's contained in the 2013-2014 *Rights and*
15 *Responsibilities*.

16 THE COURT: I don't have that with me here,
17 but that's fine, why don't you walk me through it. I
18 have read it.

11:17AM

19 MR. ROSE: All right. This is in
20 Section 22.6 of *Rights and Responsibilities*, and it
21 discusses the special examiner's report, the special
22 examiner's report according to *Rights and*
23 *Responsibilities*, it says, Upon conclusion of all
24 interviews and collection of all known documents, the
25 special examiner will assemble a report that summarizes

1 undisputed and disputed facts, offers conclusions about
2 the credibility of testimony and makes a findings about
3 whether the accused is responsible or not responsible
4 for any or all charges.

5 There is then a so-called discussion phase
6 which provides that this phase of the special examiner's
7 process provides the accuser and the accused with
8 separate meeting opportunities with the senior student
9 affairs officer to hear and respond to the findings made
10 by the special examiner, so we say that that process was
11 clearly followed in this case, but there is then
12 language which says, "The parties in separate meetings
13 will listen to the Brandeis' officials summary of
14 findings and engage in dialogue about these findings."
15 That occurred according to the amended complaint.

11:18AM

16 Each party will then have two business days
17 within which to provide new pertinent information. That
18 was done according to the amended complaint, and then
19 22.6, Section 22.6 goes on to say that, "if the accused
20 is found responsible for one or more charges, a special
21 examiner's process will progress to the deliberations
22 phase."

11:19AM

23 Now, in the deliberations phase, it says,
24 "This involves a panel of three university
25 administrators and/or faculty appointed by the senior

1 student affairs officer who will receive the special
2 examiner's report and make recommendations."

3 Then it says, "The panel will consult the
4 special examiner's report and will be entitled to
5 interview the special examiner. The panel will not,"
6 however, that word however is mine, "the panel will not
7 interview the parties', witnesses or other experts or
8 individuals."

9 It goes on to say that, "The senior student
10 affairs officer will render the final decision as to any
11 outcomes."

12 Now, their claim in the amended complaint is
13 that no deliberations panel was set up by Brandeis that
14 could act as an additional fact-finder, but that's not
15 what the deliberations phase language says.

16 In fact, the deliberations phase only arises
17 in the event that the special examiner believes that the
18 accused is "responsible for one or more charges."

19 THE COURT: But does that mean that there is
20 no review of factual findings for error? In other
21 words, putting aside sanctions or consequences, the
22 special examiner makes a finding and that's that, the
23 three-person panel has to accept those facts? They
24 can't say no, no, no, we disagree, we think you've made
25 a clear error?

1 MR. ROSE: No, your Honor, it does not mean
2 that. In fact, at the deliberations phase, it says the
3 SSAO, that's senior student affairs officer, will render
4 the final decision as to any outcomes, and beyond that
5 there is an appeals mechanism, so, yes, your Honor,
6 there is the opportunity for the senior special affairs
7 officer to consider the special examiner's report and to
8 make his or her own findings.

9 Now, in this particular instance, the senior
10 special affairs officer did indeed accept the findings
11 by Ms. Singhavi, but we submit she was entitled to do so
12 under *Rights and Responsibilities*.

13 There was then an appeal and the appeals
14 report found unanimously that the decision made by the
15 senior student affairs officer should be accepted, and
16 as a result of this entire procedure, John Doe was then
17 given the lightest possible sanction, which was a
18 disciplinary warning.

19 So, your Honor, again, although the record
20 is long, we're talking about a long procedure here, we
21 do believe that when carefully scrutinized, Brandeis
22 followed its procedures and that the claims of breach of
23 those procedures alleged by Ms. Hamill on behalf of
24 John Doe simply do not carry water.

25 I'm sensitive, your Honor, to the fact that

1 we're here on a 12(b)(6) motion, but, similarly, your
2 Honor, we were before the SJC on a 12(b)(6) motion with
3 an extensive record, and I point out that the only
4 criticism that the SJC leveled at Brandeis was that the
5 report there was a mere 13 lines long, and the SJC
6 suggested that the report should have been more
7 extensive.

8 Here we have a 25-page single-spaced report.
9 We have a 7- or 8-page single-spaced summary of the
10 findings by Dean Boes, and we have an extensive report
11 by the three member appeals panel, which was set up, so
12 I believe the record is very clear that John Doe was
13 granted extensive procedure in accordance with *Rights*
14 *and Responsibilities*, and we believe that given all
15 that, that the claims of breach of contract should be
16 dismissed.

17 There's also a claim in the case that one of
18 the members of the appeals panel was tainted by a
19 conflict of interest. There's a reference to Brandeis'
20 general conflict of interest policy, however, our
21 position is that the complaint really does not
22 adequately set forth exactly what the conflict says.

23 The argument that's made on behalf of
24 John Doe is that because Dean Boes told John Doe that
25 the members of the appeals panel had been "vetted"

1 that that somehow becomes a contract right of his or
2 that Brandeis should be estopped because John Doe relied
3 on the statement that members of the appeals panel had
4 been vetted when, according to Ms. Hamill, one of the
5 members of the three-member appeals panel had a
6 conflict, the facts for which are not really set forth.

7 Your Honor, there are other claims in the
8 case including --

9 THE COURT: Let me ask a question about the
10 tort claims taken as a whole. In your view, does it
11 rise and fall on the contract claim? In other words,
12 suppose Brandeis just got this 180 degrees wrong, the
13 student is just out of luck, there is no possible
14 procedure in which he can right the wrong, in which he
15 could file a claim of any kind against anyone? I know
16 they're not a state actor, they're not a government
17 actor, but he would just be out of luck?

18 MR. ROSE: If the procedures are followed,
19 and if, and this is something which the courts, it's a
20 bit unusual, but the courts also say should be done, the
21 courts also review the record for fairness. That's
22 something which the courts do, you know, in reviewing
23 these cases.

24 The SJC did it in the *Coveney* case, it did
25 it in the *Schaer* case, I believe it did it in one other

1 case, the *Morris v. Brandeis* case which is also cited in
2 the papers. I think it's also done in the *Driscoll vs.*
3 *Milton Academy* case, so, yes, the courts do review for
4 what the courts call fairness.

5 THE COURT: Is it a contract doctrine, a
6 tort doctrine? Where does that doctrine come from?

7 MR. ROSE: The courts don't cite. In other
8 words, you can review, it's one of those situations
9 where you can review those statements and try to find
10 the origin of it, and, frankly, the trail disappears,
11 but it is something which the courts have done, and, as
12 I said, they did it in the *Schaer vs. Brandeis* case.

13 Having in mind that courts are reluctant to
14 intrude into the affairs of universities, and that's a
15 doctrine which comes down, the Court mentioned
16 Justice Frankfurter, I don't know if it was he or some
17 other justice who said what the Court said, but
18 Justice Frankfurter in his opinion in *Sweezy vs.*
19 *New Hampshire* was I think one of the first Justices of
20 the Supreme Court to recognize what became known as sort
21 of the universities for rights of academic freedom, the
22 right to decide on academic grounds who may teach, how
23 it will be taught, and who may attend, and the Courts
24 routinely cite that case and some of the other due
25 process cases, the *Ewing* case, the *Horowitz vs.*

11:27AM

11:28AM

1 *University of Michigan* case, which arises in the medical
2 school context.

3 There's a long line of cases where the
4 Supreme Court and Court of Appeals and U.S. District
5 Courts and State Courts have all recognized this
6 principle that Courts need to be reluctant, need to be
7 "cheery" is the word that some courts use in intruding
8 into the internal affairs of universities, and I suggest
9 that this Court in reviewing *Rights and Responsibilities*
10 and reviewing the entire record of the case, including
11 the outcome, the lightest possible sanction possible
12 under *Rights and Responsibilities* should have in mind
13 Brandeis' right to make its own decisions about how its
14 students should be punished.

11:29AM

15 THE COURT: I certainly, excuse me, I
16 certainly understand and accept the principle, you know,
17 that the Courts should be cherry of interfering with the
18 affairs of a university, and I certainly understand the
19 reasons for the rule.

11:30AM

20 Having said that, there's also a -- well,
21 there's now been a recent and sorted history of
22 universities just fouling this up considerably, the *Duke*
23 *Lacrosse* case, and, you know, multiple cases thereafter
24 of universities committing injustice in the name of --
25 for reasons of political correctness or who knows why

1 but universities not getting it right with real life
2 consequences for young men and women, and it may be that
3 the Courts have no role, as you say, other than to make
4 sure the contract was enforced or that it was followed
5 rather, but it's troubling.

6 It's quite troubling, and I think any parent
7 of college-aged students would be nervous about this,
8 about what happens if your child is falsely accused, how
9 do you defend yourself?

11:31AM

10 MR. ROSE: I don't doubt any of what the
11 Court has said, and, indeed, there is an ongoing
12 national dialogue about the handling of these cases. I
13 was reading an article in *The Chronicle of Higher*
14 *Education* just last week where people seem to be split
15 50-50 about whether police departments, you know, local
16 police departments or universities should be the ones
17 who are, you know, adjudicating these, and, of course,
18 that's an overly simplistic way of defining the problem
19 because society has its own way of dealing with criminal
20 cases, obviously.

11:31AM

21 THE COURT: That developed over centuries
22 with many protections for the accused.

23 MR. ROSE: No question. I mean, there was a
24 day, your Honor, when the justice that was meted out for
25 students was so-called dean's justice, the dean would

1 hear what the allegation was, he might or might not
2 invite the student in for a chat and then make a
3 decision, and, you know, that was it, no hearing, no
4 nothing.

5 And I can tell you as someone who has been
6 advising colleges and universities for a long, long time
7 that colleges and universities across the country are
8 struggling with how to deal with just these kinds of
9 issues, and, to boot, while they're struggling with it,
10 11:32AM along comes OCR and says here's how we think all
11 allegations on your campus concerning sexual assault
12 should be handled procedurally, and the big stick, of
13 course, is that if colleges and universities are not
14 seen as the OCR, Office of Civil Rights, the Department
15 of Education, if they're seen as noncompliant, the big
16 stick is you're out of luck on federal financial aid and
17 student loans, and what university wants to be caught
18 into, you know, into that kind of a problem, and so,
19 uniformly, they are trying to revamp their procedures to
20 11:33AM deal with all the guidance that comes from the Office
21 for Civil Rights from the Department of Education.

22 To go back to a question the Court raised
23 earlier I think about the negligence claim, all the
24 other claims in the case, your Honor, we believe should
25 be dismissed for the reasons which are set forth in our

1 35- or 36-page memorandum, I appreciate the chance to be
2 given so many extra pages, and also in our reply
3 memorandum.

4 I think that the leading count in the case
5 now before there was a Title 9 claim, the Title 9 claim
6 has been dismissed. There's a certain irony in the fact
7 that when the case was first brought, there was a
8 Title 9 claim because Title 9, as interpreted by the
9 Office for Civil Rights, demands the special examiner
10 process.

11:34AM

11 That claim is now out of the case, so we're
12 dealing with various breach of contract claims, but the
13 negligence claim, the intentional affliction of
14 emotional distress claim, negligent infliction claim,
15 defamation claim, they all are found either on the fact
16 that there are insufficiently pled facts in support or a
17 lack of any case law support in Massachusetts for these
18 claims or both.

19 Your Honor, I'm happy to answer any other
20 questions.

11:34AM

21 THE COURT: All right. Let me hear
22 Ms. Hamill, are you taking the lead?

23 MS. HAMILL: Thank you, your Honor.

24 THE COURT: Before you get too excited,
25 Ms. Hamill, it seems to me you have a steep uphill climb

1 here for breach of contract, so let me hear from you.

2 MS. HAMILL: I appreciate that, your Honor,
3 and I figured you'd ask me some tough questions, too.
4 Before I began, I did before the argument, I gave
5 Mr. Rose a binder that I'd like to hand up to you as
6 well, which I think might help us get through the breach
7 of contract discussion.

8 MR. ROSE: I welcome that submission, your
9 Honor. I think it helps the Court.

11:35AM 10 THE COURT: Okay.

11 MS. HAMILL: And, your Honor, obviously from
12 what has already been said here today, we all understand
13 that this case involves serious consequences to a real
14 life situation for a young man, and that's certainly why
15 we're here on behalf of John Doe.

16 We believe we've alleged plausible claims
17 all across the board. Obviously, the breach of contract
18 is a core claim, but we believe that we've alleged
19 plausible claims as to everything that we've brought
11:35AM 20 forward today.

21 What we have here is a process that was
22 inherently unfair, that was applied unfairly, that
23 replaced a process that allowed for cross-examination
24 for greater notice, for greater participation that was
25 not simply a tweak, and, even so, the process that was

1 put into place through the *Rights and Responsibilities*
2 handbook in 2013 and 2014 was not followed by Brandeis.

3 One of the things that I think we need to
4 start with, and this is where I'll get into the binder
5 that I handed up to your Honor, I'm going to go through
6 the --

7 THE COURT: Let me, if I can interject.

8 MS. HAMILL: Sure.

9 THE COURT: I'm assuming the student was at
10 Brandeis for four years, and there are multiple
11 iterations of the handbook. Isn't it the case that if
12 you're there for a particular year that particular
13 handbook governs what happens that year? In other
14 words, if it is a contractual relationship, you
15 re-enroll as a sophomore, as a junior, whatever it is,
16 and aren't you bound by or isn't the governing
17 contractual document that year's *Rights and*
18 *Responsibilities*?

19 MS. HAMILL: I think there's two responses
20 to that, your Honor. One is that the conduct that was
21 alleged occurred over the course of several handbook
22 iterations, so our argument is that when you have to
23 look at what procedures were in place at the time the
24 alleged conduct occurred, and the other is that Brandeis
25 took upon itself in its handbook to say it would only

1 tweak, not wholesale replace, not radically change
2 through their own contract.

3 THE COURT: That's a word I hope I don't
4 have to define, but maybe I do, what "tweak" is supposed
5 to mean. Go ahead.

6 MS. HAMILL: And then I think the --

7 THE COURT: Well, I'm sorry, before you go
8 ahead, so if two handbooks apply to an ongoing course of
9 conduct, which one is the university supposed to apply,
10 the one that's most favorable to the student, the one
11 that's most lenient, the one that comes first or last?
12 How does the university decide what to do?

11:38AM

13 MS. HAMILL: I think in this instance, the
14 university, because there is such a radical change
15 between the procedures that would have been followed
16 under the former handbook, which would have allowed a
17 hearing, which would have allowed cross-examination,
18 which would have allowed a whole panoply of rights, that
19 it was incumbent upon the university to apply the
20 procedures that were in place at the time the accused
21 student -- the conduct is alleged to have occurred, and
22 otherwise you're abrogating his rights.

11:38AM

23 This is a different situation. A lot of
24 these situations arise with, you know, a single
25 instance, a drunken encounter, but this is a unique

1 case, and I think that permeates the entire case is the
2 fact that this was a 21-month relationship, the fact
3 that when a community standards report is 29 words long
4 and says over the course of 21 months, there were
5 numerous unconsented to sexual contacts, it started this
6 whole process rolling that is tainted from the very
7 beginning, as your Honor was pointing out with asking
8 Mr. Rose, the fact that the university got more
9 information than those 29 words and then declined to
10 share that information with Mr. Doe, who then goes into
11 this special examiner's process at a distinct
12 disadvantage.

11:39AM

13 He's trying to figure out because as far as
14 he was concerned and as far as their friends were
15 concerned, this was a relationship that was happy, that
16 certainly ran its course, but he's left to dig himself
17 out of a hole by walking into this special examiner's
18 process without full notice of what he's really being
19 alleged to have done.

11:39AM

20 And I know Mr. Rose has said a lot about the
21 OCR and being force into this special examiner's
22 process, and I guess I have a couple of responses to
23 that, and then I do want to get to the contract
24 provisions, but for one thing, one of the most
25 significant changes about the Dear Colleague letter is

1 that it changed the standard of proof to preponderance
2 of the evidence, reducing it from clear and convincing,
3 and there are many colleges around the country who have
4 figured out ways to build in more protections for the
5 accused as a result of that diminished standard of proof
6 than what Brandeis put in place.

7 A special examiner's process is not mandated
8 by OCR, it's what Brandeis decided to put in place in
9 part in response to that, but that doesn't mean that
10 they can't build into it various protections for the
11 accused, and, in fact, we think the language of the
12 *Rights and Responsibilities* handbook from 2012-2013 did
13 have an extra layer of protection at deliberations phase
14 where the panel could have looked at the underlying
15 findings, and that's one of the things I want to talk to
16 you about with respect to the contract provisions.

17 THE COURT: All right.

18 MS. HAMILL: So, your Honor, taking up the
19 binder of what we think are the key provisions with
20 respect to the breach of contract, which I've handed up
21 to your Honor, and I'm just going to go through this in
22 order because I think it's somewhat logical, but we
23 start with tab 1, which is just a basic proposition
24 that -- and this is at page 42 of the *Rights and*
25 *Responsibilities* handbook, which is a basic proposition

11:40AM

11:41AM

1 that Brandeis is committed to acknowledging and
2 preserving the *Rights and Responsibilities* of all its
3 students through all of its disciplinary procedures, so
4 that's a general guiding principle.

5 We then get to tab 2, and this is the
6 statements phase of the process that's put in place, and
7 this gets started because J.C. filed a community
8 standards report. We've already talked about the fact
9 that it's just 29 words, and it encompasses a long
10 21-month relationship.

11:42AM

11 With respect to tab 3, that is the
12 statements phase as set forth in the *Rights and*
13 *Responsibilities* handbook, it says that if the accuser
14 does not -- basically if the contents of the initial
15 report do not represent a full account, then the
16 university encourages that student or suggests that
17 student to basically flesh out the initial allegation.

18 As we've alleged in your complaint, in this
19 instance, the university itself got a fuller explanation
20 by J.C. filling out those 29 words, giving detail that
21 then the college did not share with Mr. Doe, and the
22 statements phase allows the respondent to fully respond
23 to the accusation, but if you're not told, if Mr. Doe in
24 this case wasn't told what is the full accusation, what
25 is really at issue here, he had no opportunity to

11:42AM

1 respond other than to say, "I did nothing wrong" or to
2 ask, "What is it that I did wrong," and that information
3 was not given to him, and the school violated this
4 provision of the *Rights and Responsibilities* handbook by
5 not giving him that fuller explanation.

6 The next part of this, your Honor, and this
7 is a little bit out of order, but I'm going to go
8 through it because it's in the order of the handbook, is
9 the breach with respect to not providing the full
10 report, the full special examiner's report to Mr. Doe.

11:43AM

11 Your Honor has talked about the fact that
12 this process with a single person investigating the
13 matter where the respondent, Mr. Doe, he never gets to
14 hear what any of the witnesses are saying, he never gets
15 to hear what J.C. is saying.

16 All he has at the end of this process
17 possibly is a report written by the special examiner,
18 and I do want to address Mr. Rose said he was
19 interviewed four times, but the reality is he started
20 out in that process without a clue as to what he was
21 being accused of, and from there he had to dig himself
22 out of a hole.

11:44AM

23 The special examiner found several
24 inconsistent statements he made over the course of four
25 interviews because, frankly, she didn't say to him,

1 "J.C. says you did this" right from the start, "What do
2 you say to that," he had to try to figure out what it
3 was he was being accused of, and then at the end of this
4 whole process, the school denied him when he requested
5 under FERPA, which is in their handbook, they say, "We
6 are guided by FERPA," and FERPA allows a student to
7 request an educational record, and Mr. Doe, in the whole
8 course of this process, once the special examiner's
9 report was out and realized he wasn't getting a copy of
10 it, he made a request through the proper procedures to
11 get the report.

11:45AM

12 It was never provided to him, and instead
13 what he got was a summary which initially was just read
14 to him, so, in other words, you're not even hearing what
15 witnesses are saying, now you're getting this diluted
16 summary of a summary of witness statements that you've
17 never even heard yourself.

18 THE COURT: So the FERPA point is you say
19 once the document is created, once the accusation is
20 submitted to the special examiner, that then becomes an
21 educational record, and the student has the right to
22 obtain it, is that the idea?

11:45AM

23 MS. HAMILL: Yes, the special examiner's
24 report is an educational record.

25 THE COURT: Okay.

1 MS. HAMILL: And, in fact, today it is
2 provided in the process, but that wasn't clear at the
3 time.

4 Then, your Honor, this is I think crucial
5 with respect to the deliberations phase where we
6 probably have the biggest disagreement perhaps with
7 Brandeis over this, but, again, Brandeis, and what we're
8 guided by here is the drafter of this policy, Brandeis,
9 is they are the ones who have to be -- if there's any
10 ambiguity, it's got to be construed against them, and
11 also as the drafter of this, they have to basically make
12 manifest what would be the reasonable expectation of
13 someone who reads this policy, this contract, as to what
14 his rights would be.

11:46AM

15 THE COURT: Why would that be so? I mean,
16 ordinarily -- I mean, it's peculiar to call this a
17 contract because it's by no means clear there's any kind
18 of meeting of the minds, but what is the source of that
19 principle that the university has to consider the
20 reasonable expectations of the person reading it?

11:47AM

21 MS. HAMILL: It's very well -- it's in the
22 cases that we cited, it's in *Schaer, Coveney, Cloud*.
23 It's a very well-accepted principle in the case law.

24 So the basic point here is that Brandeis is
25 saying that this panel that was convened after the

1 special examiner's report is done, it gets handed off to
2 the SSAO/D, who then has the discussion phase, and then
3 if there's a finding of responsibility, and in this
4 case, Ms. Singhavi found responsibility, it then goes to
5 the deliberations phase, and that's what the tabs 5
6 through 15 are in this binder that I've handed up.

7 With respect to -- and I'm going to parse
8 through the language here because this is a contract and
9 we have to look carefully at the language as to what
10 Brandeis should have expected someone who's going
11 through this process would have thought their rights
12 were and what the review would have been of these
13 findings of responsibility by Ms. Singhavi, so we start
14 at tab 5 with the roles and terms, and at the second
15 page of that tab, it talks about what the senior student
16 affairs officer, what that person's role is.

17 And it says, "The SSAO/D conducts the
18 discussion phase conversations with the parties and
19 communicates findings to the parties made by the special
20 examiner and the panel." The SS -- so and the panel,
21 and I think that's very important, the panel is
22 referring to this deliberations phase panel. "The
23 SSAO/D is also responsible for rendering the final
24 decision as to any outcome for the accused." Again,
25 outcome is the final, final piece of this based on the

11:48AM

11:48AM

1 recommendations of the panel.

2 There's no limitation in terms of what this
3 panel is going to be doing that says, oh, it's only
4 sanctions. What the clear meaning of this is that both
5 the special examiner and the panel are going to be able
6 to -- are contributing to the analysis of what the
7 findings will be with respect to responsibility.

8 At tab 6, with respect to the special
9 examiner's report, it says, "Upon conclusion of all
10 interviews and the collection of all known documents,"
11 et cetera, "the special examiner will assemble a report
12 for the SSAO/D that summaries the undisputed and
13 disputed facts, offers conclusions about the credibility
14 of testimony and makes a finding about whether the
15 accused is responsible or not responsible for any or all
16 charges," so, again, the term "finding," and what we're
17 discussing here is the difference between finding,
18 sanction, outcome, and it's very clear that in this
19 *Rights and Responsibilities* handbook, and this contract
20 has to be interpreted as a whole, that the word
21 "finding" has a special meaning with respect to the
22 conduct at issue, it's not a sanction.

23 Then the next with respect to, let's see,
24 tab 7 is the standard of evaluation, and, again, that
25 talks about a preponderance of the evidence standard and

1 it talks about whether it supports a finding that the
2 conduct occurred. So, again finding is linked to
3 conduct, it has nothing to do with the sanction.

4 Then we get to tab 8, and it talks about the
5 deliberations phase. "This phase of the special
6 examiner's process involves a panel of three university
7 administrators and/or faculty appointed by the SSAO/D,
8 who will receive the special examiner's report and make
9 recommendations as to the outcomes for the accused."

11:51AM

10 Now, "Upon voting, the panel will
11 communicate --" and this is the highlighted language I'm
12 reading -- "Upon voting, the panel will communicate its
13 recommendations about the outcomes for the accused to
14 the SSAO/D, the SSAO/D will render the final decision as
15 to any outcomes."

11:51AM

16 So when you look at this part of the *Rights*
17 *and Responsibilities*, outcomes refers to both findings
18 and sanctions. It's the entire, the end result of this
19 process, and so that what we think and what we believe
20 this language should have allowed for Mr. Doe is a layer
21 of review. If you're going to have this very serious
22 finding of responsibility, it's not just the special
23 examiner who gets to unilaterally make this decision
24 with one other person at the university, there's a layer
25 of review through this deliberations panel.

1 Then with respect to tab 9 with the outcome
2 notification, the senior student affairs officer or
3 designee will communicate the final outcome decision in
4 writing to the accuser and the accused, and then the
5 accuser will be informed of any sanctions that relate to
6 them.

7 Again, there's a distinction here between
8 sanctions is not just generally outcome sanctions, it's
9 not findings, they have very distinct meanings, and it
10 matters here because Mr. Doe was denied under this
11 contract as written, as Brandeis should have put into
12 effect, was denied a layer of review by this
13 deliberations panel that frankly indicated its disbelief
14 with the special examiner's report and the findings, or
15 it certainly questioned it by just issuing a
16 disciplinary warning here, and we believe they should
17 have been able to review the underlying findings as
18 well.

19 If there can be any doubt as to whether the
20 deliberations phase should have allowed for the panel to
21 look at the findings, make recommendations as to whether
22 the Singhavi findings should have remained in effect.

23 If you look at the appeals procedures, and I
24 think this is very, very key here, it says, "The
25 accuser --" this is tab 10, "The accuser and the accused

1 are entitled to appeal the final decision by the panel
2 in the special examiner's process to the University
3 Appeals Board," and then it lists four areas which are
4 the bases for an appeal.

5 The next page says, "Appeals shall not be
6 based or granted due to dissatisfaction with an imposed
7 sanction." So, if, as Brandeis is now arguing, the
8 deliberations panel was only to issue a sanction or make
9 a recommendation about a sanction and allows you to
10 appeal from a panel decision but tells you you can't
11 complain about the sanction, it makes no sense, and,
12 therefore, the way that this policy and procedure has
13 been drafted, what they were required to follow should
14 have allowed the deliberations phase panel to not just
15 issue a sanction or decide not to issue a sanction, but
16 to actually look at the underlying findings, and I think
17 that's one of the key breaches here with respect to
18 Mr. Doe's rights through this disciplinary process.

19 I know you can kind of get a headache from
20 looking at all of this. Do you have any questions?

21 THE COURT: No, I followed your argument.
22 Thank you.

23 MS. HAMILL: Okay. Thank you, your Honor.
24 Then I think the other part with respect to the breach
25 is the conflict of interest on the university Appeals

11:54AM

11:54AM

1 Board, and those are -- that's at tab 16 and 17 of the
2 binder that I handed up.

3 The amended complaint alleges that the panel
4 chair, who was the only tenured faculty member on the
5 three-person university Appeals Board had a -- basically
6 had contact with J.C.'s advisor while this SEP process
7 and the appeals were going on.

8 They also served on a committee together
9 regarding sexual assault and violent procedures at
10 Brandeis, and the university, first of all, Mr. Doe was
11 not advised of this relationship between the chair and
12 J.C.'s advisor.

13 The university in a letter, an e-mail from
14 Lisa Boes to Mr. Doe stated that the panel had been
15 vetted for conflicts prior to being selected and also
16 said that the members of the UAB do not interact with
17 either party or their advisors about the process or
18 appeal materials.

19 Now, Brandeis is saying that's not in the
20 contract, it's a signed e-mail. I think whatever way
21 you look at it, first of all, the handbook does say that
22 the university will communicate about the procedures
23 through university e-mail. This is a university e-mail.
24 They're using the e-mail system.

25 The second is whether you determine that

1 that is part of the contract, and certainly there are
2 cases, and I think your Honor, you have Bloomer vs. I
3 can't remember the defendant in that case, but your
4 Honor did find that handbooks, brochures, things like
5 that can form a contract between a university and its
6 students, but, regardless, we've either got a promissory
7 estoppel, detrimental reliance claim or a breach of
8 contract based on this language.

9 What we have alleged is that if you look at
10 what the Appeals Board referenced in their decision,
11 they make a reference to the issue of minimum sanctions
12 having to be imposed as well as they talk about a
13 completely unrelated manner having to do with no contact
14 orders that wasn't even before them, and certainly we
15 have alleged it's plausible that J.C.'s advisor spoke
16 with the panel chair through the course of their work on
17 this other committee, and, frankly, discussed this case,
18 which then found its way into this Appeals Board
19 decision.

11:57AM 20 I think we've alleged enough certainly to
21 make a plausible claim that there is a violation here
22 and there was a conflict of interest.

23 THE COURT: All right.

24 MS. HAMILL: And then with respect to the
25 hearing process breach that we've alleged, that's tab 18

1 of the binder, and this is, you know, that we've been
2 talking about today that this is a Brandeis grown and
3 nurtured process that is constantly evaluated and
4 tweaked by the community every year, and we have
5 extensive briefing, both sides, on what the meaning of
6 "tweak" is, but I don't think anybody could say that a
7 wholesale supplanting of a hearing process with the
8 special examiner's process, a radically different
9 procedure, which curtails a lot of the due process
10 that's not a tweak at all, and, therefore, that's a
11 breach of contract as well.

11:59AM

12 THE COURT: All right.

13 MS. HAMILL: And then with respect to the
14 hearing process, the physical harm, invasion of privacy
15 breach, we believe, first of all, we've made the point
16 that we believe the hearing process should have applied,
17 this shouldn't have gone to the SEP process, but even if
18 it were to go, that way, first of all, the handbook does
19 not make clear, and at tab 19 we've included both
20 sections of the *Rights and Responsibilities* handbook,
21 one which talks about a 22.6, the special examiner's
22 process and one which talks about the procedural
23 standard in the student conduct process.

11:59AM

24 They both refer to cases. Brandeis makes
25 the argument that if there's at least a couple of, one

1 or two claims that relates to special conduct, then it
2 automatically goes to the special examiner's process,
3 but this is a case that involves three that were under
4 this sexual misconduct policy and two that were not.
5 There's nothing in the handbook that determines that the
6 SEP process somehow trumps, that it must go to the SEP
7 process.

8 The other thing is at the very least, the
9 two invasion of privacy and physical harm allegations
10 should have gone through the hearing conduct process,
11 which has a higher standard of proof. It's clear and
12 convincing evidence. At the very least, they should
13 have followed it for those two allegations if they
14 weren't going to allow the entire process to go through
15 with that.

16 Finally, your Honor, at tab 20, with respect
17 to the breach is the fact that we've alleged that there
18 was a leak of information regarding this process. It
19 underpins the defamation claim, it underpins the
20 invasion of privacy claim, but it also has elements
21 which we believe constitute a breach of the contract
22 here, and that is that the university takes upon itself,
23 as it should, through its own rights and through FERPA
24 to keep educational records confidential. That did not
25 happen here.

1 We had alleged that somehow, and, of course,
2 J.C. did some of his own trumpeting of what occurred
3 here, but we also have alleged credibly that Mr. Doe had
4 two job opportunities. One was a current position on
5 which he was working where he had been -- had
6 expectation and promise that he would be hired after
7 graduation to continue on there.

8 It is alleged in our complaint there were
9 connections between Brandeis, and it was a political, a
10 candidate, political candidate, there were connections
11 between members of Brandeis administration and the
12 political candidate, and the second was an internship at
13 a company that also had close ties with Brandeis and the
14 one where he was currently working, they fired him and
15 said they had heard from numerous sources about the
16 situation at Brandeis and fired him, and the other
17 basically stopped responding and had been in very active
18 contact with him and stopped.

19 THE COURT: What is the possibility that
12:02PM 20 Brandeis did that as opposed to J.C.?

21 MS. HAMILL: The plausible allegation is
22 that there were connections between -- the two employers
23 had connections between the one was a PR firm that had,
24 that basically got Brandeis' account, and after that
25 time, Mr. Doe, even though they had been saying he had

1 an internship there previously and had said if we get
2 the Brandeis account, we'll consider hiring you, and
3 once the Brandeis account was gotten and these
4 allegations started to surface, they -- and when I say
5 started to surface, you have to remember, Mr. Doe's name
6 has not been out in the public record.

7 Even though J.C. has been blasting his
8 attacker, his rapist, he has not put Mr. Doe's name out
9 there, so there are students on campus certainly have
10 learned about this through J.C.'s trumpeting, but with
11 respect to these two outside entities, who are not
12 Brandeis, you know, entities but have Brandeis
13 connections, we believe it's plausible that there were
14 communications. Somehow information leaked out either
15 through somebody's intrepid comments about Mr. Doe, and
16 we are entitled to, first of all, we think it's a breach
17 of the confidentiality provisions of the *Rights and*
18 *Responsibilities* handbook.

19 Mr. Rose will say, oh, it's just the
20 documents that get protected. Well, it's absolutely the
21 entire process needs to be confidential, the information
22 that's contained in those records needs to be
23 confidential, FERPA requires that, and somehow, and we
24 believe we've plausibly at least articulated a way that
25 this could have been a Brandeis-connected leak, and

12:03PM

12:04PM

1 we're entitled to discovery to determine what really
2 happened here.

3 Your Honor, I guess and you had talked
4 with -- so those are really, those are the key breach
5 provisions or breaches that we would be focusing on in
6 our breach of contract part of the case.

7 Do you have specific questions? I don't
8 just want to be necessarily going through the elements
9 of defamation, if you want me to, I certainly will, but
10 are there elements or something you'd like me to address
11 with respect to the tort claims that would help you make
12 your decision?

12:05PM

13 THE COURT: No, I think -- I don't think I
14 have any questions at this time. Mr. Rose, do you want
15 to respond?

16 MS. HAMILL: Thank you, your Honor.

17 MR. ROSE: Just very briefly, your Honor,
18 taking them I think in reverse order, the Court inquired
19 of Ms. Hamill as to what is the plausible allegation
20 that Brandeis was the source of the leak? I have not
21 heard anything by way of an allegation, plausible or
22 not, that Brandeis itself was responsible for any of the
23 publicity that occurred, and as the Court knows from the
24 litigation we engaged in over the pseudonym motion that
25 was filed, John Doe filed an affidavit with the Court on

12:05PM

1 June 2 of this year, and Exhibit A is a copy of the
2 letter which J.C. received from Brandeis on May 30, 2014
3 informing J.C. of the outcome of the claims that he had
4 made against John Doe, and the letter recites what the
5 allegations were.

6 It recites the allegations -- I'm sorry, the
7 letter, I'm sorry, the letter was the letter which was
8 directed -- may I have one moment, your Honor?

9 I'm sorry, the letter was the letter which
10 was directed to J.C. informing him of the outcomes, and
11 J.C. then took that letter and crossed out the names but
12 put it out on the Internet, I think on Facebook, along
13 with his commentary referring to John Doe as his
14 attacker and then writing a note which says: "Is a
15 disciplinary warning proper punishment for multiple
16 forms of rape, sexual assault, invasion of privacy,
17 physical harm and harassment but would actually do
18 nothing to combat these issues on college campuses? The
19 Brandeis administration seems to think so."

12:07PM 20 So my point is Brandeis had no control over
21 what J.C. did with that letter. Once it went to J.C.,
22 as I said, it was out on the Internet, out on Facebook
23 using the term "rape," a term which Brandeis did not use
24 at all in connection with its handling of this matter.

25 But, again, your Honor, there's no

1 allegation I don't think, plausible or otherwise, about
2 any particular person at Brandeis who was responsible
3 for, you know, publication, you know, widespread
4 publication of anything about the disciplinary process.

5 Your Honor, as to the conflict point, the
6 rules say that appeals members are from the university
7 faculty, so it's not at all surprising that there would
8 be some level of contact between the students who were
9 involved in this process and university faculty members.

12:09PM

10 There's no indication in the rules that says
11 that faculty members will be disqualified from being
12 members of an appeal panel simply because they happen to
13 have had some discussions with the accused or the
14 accuser.

15 Your Honor, analogously, there are
16 situations where lawyers, for example, who practice
17 before the Court are put on panels. They sometimes meet
18 with Judges. Can an inference be drawn from the fact
19 that lawyers who appear before certain Judges in this
20 court are, you know, members of certain advisory panels?

12:09PM

21 I, for example, was on the First Circuit
22 Rules Advisory Panel consulting with Judges about rules.
23 Does that mean an inference can be drawn that I had a
24 discussion with a Judge about a particular case? I
25 don't think so, your Honor, I don't think any plausible

1 inference like that can be drawn.

2 As to the deliberations argument that
3 Ms. Hamill makes, again, there is no such creature as a
4 deliberations panel. It's an outcomes panel, which is
5 described in the language of *Rights and Responsibilities*
6 that deals with the so-called deliberations phase of the
7 case.

12:10PM

8 As to her point about FERPA, the Court will
9 note that the reference to FERPA in *Rights and*
10 *Responsibilities* appears at Section 17.4. This is a
11 general statement about students' rights with regard
12 student records.

13 The next section of *Rights and*
14 *Responsibilities* is entitled "*The Student Conduct*
15 *Process*," which outlines what gets shown to people who
16 are accused of some type of student misconduct.

12:11PM

17 There's no -- in other words, there's no
18 reference in the very specific and detailed portions of
19 *Rights and Responsibilities* describing the student
20 conduct process to FERPA, and I believe that in *CSX*
21 *Transport, Inc. vs. ABC&D Recycling*, one of this Court's
22 opinions, the Court said in a case where there was a
23 similar claim that the contract, "The contract's
24 language must clearly communicate that the purpose of
25 the reference is to incorporate the referenced material

1 into the contract."

2 The contract we're talking about here, which
3 Ms. Hamill is complaining about certain breaches, is the
4 portion of the contract that is set forth in student
5 conduct process, which says nothing about FERPA.
6 Furthermore, as the Court knows, FERPA does not create
7 any kind of a private cause of action.

8 Finally, your Honor, with regard to the
9 issue about procedures which change over time, the SJC
10 said in the Coveney case is that universities are
11 entitled to modify their procedures in order to
12 discharge their educational responsibility.

12:12PM 13 It's very clear. You know, each one of
14 these handbooks is labeled "Handbook 2011-2012,"
15 "2012-2013," et cetera, and, you know, what would the
16 university do in a situation whereas here, you have
17 allegations that spread over two or sometimes I suppose
18 conceivably could be even more academic years, the
19 university has to make a decision about which set of
12:13PM 20 rules it's going to apply, and what the university does
21 is very similar to what I suggest this Court would do in
22 the event that one of the Federal Rules of Civil
23 Procedure were changed during the course of a case, even
24 a case that's filed three, four, five, six, seven years
25 ago.

1 My understanding is the Court applies the
2 rule. Substantive law may be different, there may be
3 issues about retroactivity, but when you're talking
4 about the procedure that the Court follows, I mean, for
5 example, take the expert disclosure rules, which if
6 memory serves me right, were radically changed in
7 December of I think it was 2013, it may have been 2012,
8 I can't recall which.

9 THE COURT: I know we're both old enough,
10 Mr. Rose, to remember when there was no expert discovery
11 at all.

12 MR. ROSE: Well, I'm of that age certainly,
13 your Honor, but my point is that the Court is certainly
14 familiar with the concept that when procedural rules
15 change, the Courts apply the procedural rules that are
16 in effect whenever the motion comes up, you know,
17 whenever the case is heard, whenever the case is tried.

18 THE COURT: Although that asks then the
19 question is the burden of proof in your procedural rule
20 or not, should it be retroactive? In other words, if
21 you've lowered the burden of proof, if Congress tomorrow
22 were to say the standard in criminal cases is no longer
23 proof but clear and convincing evidence, could that be
24 applied retroactively to crimes that occurred? I don't
25 know the answer to that.

1 MR. ROSE: I don't know the answer, and
2 there would be a further Supreme Court case as to
3 whether or not -- that substantive change in the law, I
4 would argue that's a substantive change as to the
5 operative law.

6 Here, as I understand the argument, your
7 Honor, we're talking about a complaint about the
8 procedure that was filed, whether it's going to be the
9 special examiner process or the hearing board process
10 where there's cross-examination.

12:15PM

11 I don't hear any argument that the
12 definition of consent, the definition of harassment, the
13 definition of sexual assault, the definition of physical
14 harm is any different as between what happened in 2011
15 or the definition under the 2011 handbook and the 2013
16 handbook. That's the point I'm simply trying to make.

17 If the Court has questions, I'm happy to try
18 to answer them.

19 THE COURT: I'll let Ms. Hamill have the
20 last word if you want it.

12:15PM

21 MS. HAMILL: Thank you, your Honor, and I
22 will be very brief. I think Mr. Rose agreed you need to
23 be reviewing the record for fairness here and *Coveney*
24 and other decisions as well, and the issue of fairness
25 here is frankly if Brandeis took something on, and in

1 this case, they've established a procedure, they
2 certainly can't do it, they have to do it with due care,
3 they can't do it arbitrarily and capriciously, and they
4 certainly need to follow their own procedures, and they
5 did none of the above here, and we've aptly laid that
6 out in our amended complaint. Thank you, your Honor.

7 THE COURT: Thank you. I'm going to take
8 the matter under advisement. Thank you. It was well
9 argued on both sides, as you can tell from my questions.
10 I don't view this as an easy set of issues by any means,
11 but thank you.

12 THE CLERK: All rise.

13 (Whereupon, the hearing was adjourned at
14 12:16 p.m.)

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12:16PM

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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I do hereby certify that the foregoing transcript, Pages 1 through 52 inclusive, was recorded by me stenographically at the time and place aforesaid in Civil Action No. 15-11557-FDS, JOHN DOE vs. BRANDEIS UNIVERSITY and thereafter by me reduced to typewriting and is a true and accurate record of the proceedings.

Dated this October 19, 2015.

s/s Valerie A. O'Hara

VALERIE A. O'HARA
OFFICIAL COURT REPORTER