

13

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

**SUPERIOR COURT
CIVIL ACTION
No. 2277CV00084-B**

**JOHN DOE, JANE DOE, and JAMES DOE,
Plaintiffs**

vs.

**GOVERNOR DUMMER ACADEMY d/b/a
THE GOVERNOR'S ACADEMY,
Defendant**

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

The plaintiff, James Doe (James), was a student at The Governor's Academy (the School), a private high school in Byfield, Massachusetts.¹ In December 2021, James was expelled for engaging in non-consensual sexual activity with another student, identified in the pleadings and herein by a pseudonym, Jill Roe (Jill). The activity occurred during the summer break of 2021 at a party thrown by a classmate of James and Jill. In November 2021, Jill reported to the School that, while engaging in consensual sexual activity with James in the attic of the classmate's house during the summer party, James sexually assaulted her by penetrating her with his penis without first obtaining her consent. Following an investigation of the allegation by the School, James was dismissed. He and his parents have brought suit against the School, advancing four causes of action: breach of contract, that being the School's Student Handbook (the Handbook) (Count I); breach of the covenant of good faith and fair dealing

¹ The Does are James Doe and his parents, John and Jane Doe. With court authorization, they are prosecuting this action under pseudonyms.

(Count II); violation of Title IX's prohibition against gender discrimination (Count III); and violation of the Massachusetts Equal Rights Act's (MERA) prohibition against gender discrimination in the enforcement of contracts (Count IV). The School has moved, pursuant to Mass. R. Civ. P. 12(b)(6), to dismiss all four counts for failure to state a claim. The court held a non-evidentiary hearing on the motion on June 28, 2022. For the reasons that follow, the School's motion to dismiss is **DENIED**.

II. GOVERNING LEGAL PRINCIPLES

In considering a motion to dismiss, “the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor, are to be taken as true.” *Nader v. Citron*, 372 Mass. 96, 98 (1977). To survive a motion to dismiss, a complaint does not need detailed factual allegations, but it must provide grounds for entitlement to relief that transcend mere labels and conclusions. *Iannacchino v. Ford Motor Company*, 451 Mass. 623, 636 (2008), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). What is required is factual allegations that raise a right to relief above the speculative level, i.e., allegations plausibly suggesting, and not merely consistent with, an entitlement to relief. *Id.* See also *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”).

A reviewing court deciding a Rule 12(b)(6) motion may consider, in addition to the factual allegations in the complaint, “matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint[.]” *Schaer v. Brandeis University*, 432 Mass. 474, 477 (2000). The court may also consider documents, even if not appended to the complaint as exhibits, if “the plaintiff had notice of [the extrinsic] documents and relied on them

in framing the complaint.” *Golchin v. Liberty Mutual Insurance Co.*, 460 Mass. 222, 224 (2011). In this case, the Handbook is just such an extrinsic document.²

III. FACTUAL ALLEGATIONS

A. The Handbook

A “Non-Discrimination Policy” is set forth in the “Introduction” section of the Handbook. The Handbook states that “[t]he Academy does not discriminate on the basis of . . . gender . . . in the administration of its . . . programs.”

The majority of the other material provisions of the Handbook are contained in two other sections that are entitled, “Expectations for Interpersonal Student Relationships” and “Disciplinary Guidelines.” In a subsection of the former, captioned “Sexual Intimacy and Consent,” the Handbook states that, in accordance with Massachusetts law, the School “prohibits students from engaging in non-consensual sexual activity, considering it to be egregious misconduct and a major disciplinary violation.” That subsection goes on to explain that consent “should be the basis for every sexually intimate encounter” and that consent means “the voluntary, positive agreement to engage in specific sexual activity.” In further explanation, the Handbook goes on to state: consent is ongoing and may be withdrawn at any stage of an encounter; consenting to one behavior does not obligate a person to consent to another behavior; and permission must be asked and verbal consent, by a clear “yes,” given to progress to new, different, or more intimate activity.

In an untitled preamble of sorts to the Disciplinary Guidelines section, the Handbook

² The School has appended a copy of the Handbook to its motion, with an affidavit of counsel averring that it was the operative Student Handbook for 2021-2022. Three of the Does’ claims are based, in whole or part, on the Handbook. The court therefore appropriately considers that document when determining whether the Does have stated viable causes of action.

states that “[i]n more serious first-offense cases and in all second-offense cases, the student . . . should expect to appear before the Discipline Committee.³ At the end of that preamble provision, the Handbook states, “In any situation, the Head of School may impose disciplinary action at the Head of School’s sole discretion, including, but not limited to, dismissing a student from the Academy, regardless of whether the Disciplinary (sic) Committee was convened and regardless of the Discipline Committee’s recommendation.” In an immediately succeeding subsection, entitled “Discipline,” the Handbook states that “[a] student may be required to appear before the Discipline Committee for serious acts of misconduct” That subsection goes on to state that the Discipline Committee is “typically” comprised of four students and four faculty members and is chaired by the Dean of Students or his designee (who may change the composition at any time and for any reason), and that, after a hearing at which a student is required to appear, the committee votes on a recommendation for disciplinary action that is given to the Head of School.

In a subsection entitled, “Disciplinary Action,” the Handbook states that acts of misconduct that may result in dismissal include improper sexual conduct. After the all-in-capitals word, “NOTE,” the Handbook states that “[i]t is likely that students will be dismissed from the Academy on the first offense for sexual assault”⁴

B. The Sexual Encounter and Investigation

At the time of the events in question, James and Jill were both 17 years old and students

³ According to the Handbook, the Discipline Committee is “typically” comprised of four students and four faculty members, it is chaired by the Dean of Students (who may change the composition at any time and for any reason), and, after a hearing, it votes on a recommendation for disciplinary action and gives the recommendation to the Head of School.

⁴ Some additional Handbook provisions are cited in the court’s discussion of the School’s motion to dismiss.

at the School. On July 4, 2021, while on the summer school break, they both attended an overnight party at the house of a fellow classmate in New Hampshire. Several other students observed Jill enthusiastically seeking to engage in sexual contact with James. At some point, Jill led James, who was intoxicated, into a bathroom and performed oral sex on him. Overnight, James and Jill shared an attic room with a number of other students. James first lay down on the floor of the room by himself, under a comforter, but Jill then lay down beside him. Jill disrobed, got on top of James under the comforter, and began rubbing her vagina on his penis. At one point, due to Jill's movements, James's penis slipped into Jill's vagina. Jill pulled back, but she continued to rub her vagina against James's penis. The two of them then fell asleep. Nothing seemed untoward between them the next morning, and Jill smiled at another girl in the attic room and joked about James's snoring during the night.

Over the following several weeks, James and Jill exchanged friendly communications on social media. James then started seeing another girl and stopped returning Jill's messages. He began openly dating the other student in October 2021.

On November 12, 2021, Jill made a formal complaint to the School that James had had non-consensual sexual contact with her at the July 4 party. That same day, James was called into the office of the Dean of Students, Jed Wartman, and notified that Jill had made a complaint against him. James was told that he was forbidden to be on campus while the school was investigating the complaint.

On November 15, Dean Wartman interviewed James in the presence of his father, John Doe. James related his account of the attic encounter to Wartman, explaining that it was Jill's own movements that caused the brief penile penetration. Dean Wartman also interviewed Jill on November 15. On November 17, Dean Wartman informed the Does by telephone that James's

and Jill's accounts were too far apart for the School to resolve, and so the School would be bringing in a third-party investigator to conduct factfinding. In that call, Dean Wartman described Jill's account of the sexual encounter in general terms, stating that Jill had consented to James inserting his fingers in her vagina, but that he had "replaced" his fingers with his penis on three separate occasions. Wartman told the Does that the investigator would complete her investigation by November 26, the day after Thanksgiving.

The investigator the School appointed was Sarah Worley, who holds herself out as a mediator and expert in Title IX investigations. She interviewed James on November 21 by videoconference. James's father was once again present. James repeated his account of the encounter and his contention that Jill's actions, and not his own, had caused the brief penile penetration.

The Does' attorney engaged an investigator, who interviewed five other students who had been present in the attic room. Five of them signed written statements. They all agreed that Jill made her interest in sexual contact with James obvious from early in the evening. According to their statements, none of them heard Jill voice any objection to James' conduct, none of them noticed that anything was amiss between James and Jill, and at no time that night or the next morning did Jill appear to be upset. To these students, Jill seemed happy and comfortable with James, even after the encounter.

On November 24, Dean Wartman advised John Doe that Worley had completed her investigation, which consisted of interviewing James, Jill, and the student at whose house the July 4 party was held (that student had not been present in the attic room at the time of the incident). Dean Wartman said Worley would report her findings to the school on November 26, the day after Thanksgiving. On that date, the Does' attorney provided Wartman with the five

witness statements his investigator had obtained. The School then informed the Does that Worley would interview the five witnesses.

On December 3, the Does' counsel sent a letter to counsel for the School, demanding detailed information about the allegations against James and a meaningful opportunity to respond to any potential findings in advance of any decision. The letter also stated that the evidence strongly suggested that the School was engaging in gender discrimination.

On December 7, Worley conducted a brief follow-up interview with James. She requested some documentation, posed a clarifying question, and asked James why he had not stated in his November 21 interview that his family had hired a private investigator to speak to students at the July 4 party (James responded that no question had been posed that would have elicited such information).

By an emailed letter dated December 16, the Head of School (the Head) informed James that he had been found "responsible for engaging in non-consensual sexual activity" and was therefore being dismissed from the School. The letter stated that the dismissal was based solely on the fact that James had "acknowledged that [he] did not ask for, nor [was he] given, affirmative consent for penile penetration." The School provided James with a "summary" of Worley's investigation findings but not her full report.

Worley's summary stated that the Does had "complicated and corrupted" her investigation and interfered with it by making efforts to orchestrate witness statements. The summary also provided Jill's account of the encounter. According to the summary, Jill related that James attempted to penetrate her three times with his penis: the first time, she moved away; the second time, she said "No, stop;" and the third time, James pulled her on top of him and, while inserting three fingers in her vagina, held it open and penetrated her with his penis. At one

point, the summary states that, at all times, Jill was wearing a shirt, pants, and underwear; at another, it states that she was wearing shorts. Worley did not resolve the credibility conflict between James's and Jill's versions of the encounter. Instead, she concluded that, even under James's version of events, he had violated the School's policy, stating that James had acknowledged that "he did not seek consent before he penetrated [Jill] with his penis. Therefore, the undisputed fact is that [James] penetrated [Jill] with his penis without consent."

Prior to the School's decision to expel James, he was never offered an opportunity to appear before the School's Discipline Committee, and the Discipline Committee was never convened to consider the allegation against him.

IV. DISCUSSION

A. The Contract Based Claims (Counts I, II, and IV)⁵

The School makes a preliminary general argument in support of its requested dismissal of the Does' three contract based claims, i.e., breach of contract, breach of the good faith covenant, and their MERA claim: that the Handbook is not a contract. In support of that contention, the School points to language on the very first page of the Handbook: "This Handbook is for informational purposes only. This Handbook is not intended to create, nor does it create a contract or part of a contract in any way, including, but not limited to, between the Governor's Academy and any parent, guardian or student The Academy may add, revise, and/or delete school policies before, during, and after the school year." The School asserts that that express disclaimer is fatal to the Does' contract claims. The court disagrees.

⁵ The court considers these three counts together. The breach of contract and implied covenant claims are closely related to one another. As for the MERA claim, it too is intertwined with the first two counts because MERA prohibits discrimination in the enforcement of contracts. *See Thurdin v. SEI Boston, LLC*, 452 Mass. 436, 452-455 (2008).

The same standard that the Supreme Judicial Court has applied to college and university handbooks applies as well to private secondary schools like the School. *See Driscoll v. Board of Trustees of Milton Academy*, 70 Mass. App. Ct. 285, 293 (2007). That standard was set forth in *Schaer*, 432 Mass. at 482, and it directs the court to look to what meaning the School should reasonably have expected the Does to give to the Handbook and the provisions in question. *See also Helfman v. Northeastern University*, 485 Mass. 308, 328 (2020). The court agrees with the Does that, despite the disclaimer language on which the School relies, the court cannot say as a matter of law that the Does' stated belief that the Handbook established contractual obligations on the part of the school was objectively unreasonable.

Focusing next on the specific provisions of the Handbook that the Does allege the School breached, the School asserts that none of the claimed breaches gives rise to a plausible claim under Counts I, II, or IV. The court will briefly address the relevant provisions *seriatim*.

First, the Does assert that the School breached the Handbook's contractual promise to conduct an impartial investigation of James's alleged violation of the School's policy against non-consensual sexual activity. The pertinent allegations include the following: the School banned Doe from campus based on Jill's complaint and prior to any investigation of it, despite that the incident was months old at that time, there had been no apparent issues between James and Jill since the new school year had started, and James had no prior disciplinary history; the outside investigator's statement that James, his parents, and their investigator had interfered with and corrupted her investigation and orchestrated witness statements could be construed as reflective of a bias on the investigator's part; and, most importantly (and as further discussed in Part IV(B) below), the investigator's determinative characterization of James's version of events as an admission on his part of unconsented-to penile penetration was a distortion of his account

and position, which was that Jill was the sexual aggressor, that it was her actions that had caused the brief penile penetration, and that such penetration was, for him, inadvertent and unintended. The court finds that the complaint allegations make out a plausible claim under Counts I, II, and IV that the School's investigation was not an impartial one as promised by the Handbook.

The Does next allege that the School breached James's right under the Handbook for a Discipline Committee hearing. Based on a plain reading of the material Handbook provisions, however, this contention is untenable. The Handbook does not promise such a hearing in every case, but instead expressly gives the Head of School the discretion to forgo it ("In any situation, the Head of School may impose disciplinary action at the Head of School's sole discretion, including, but not limited to, dismissing a student from the Academy, regardless of whether the Disciplinary (sic) Committee was convened and regardless of the Discipline Committee's recommendation."). The Does' argument is not persuasive that the quoted provision concerns only the authority to decide and impose discipline, and not a student's right to a hearing in a serious first-offense case.

Nor can the court credit the Does' alternative assertion that, at the very least, the Handbook is ambiguous as to whether a student charged with a serious first-offense is entitled to a Discipline Committee hearing. There is no ambiguity. *See Suffolk Constr. Co. v. Illinois Union Ins. Co.*, 80 Mass. App. Ct. 90, 94 (2011) ("The initial determination whether the disputed term in the contractual language contains an ambiguity presents a question of law."). Aside from the quoted provision vesting the Head of School with discretion whether to convene a Discipline Committee hearing, all of the other related provisions that speak of such a hearing do so in permissive, rather than mandatory, terms. For example, the Handbook states, "At the discretion of the Head of School, the Discipline Committee *may* be convened to investigate and make

recommendations. The Head of School . . . will consider any recommendations from the Discipline Committee *if it convenes . . .*” (emphasis added). Likewise, the Handbook states, “A student *may* be required to appear before the Discipline Committee for serious acts of misconduct . . .” (emphasis added). Even the provision on which the Does rely is written in precatory terms: “In more serious first-offense cases and in all second-offense cases, the student . . . *should expect* to appear before the Discipline Committee” (emphasis added).

The court concludes that no objective reading of the relevant Handbook provisions could give rise to a reasonable belief by a student or parent that a student charged with a serious first-offense had a right to a Discipline Committee hearing. That being so, to the extent that Counts I, II, and IV are premised on an alleged breach of James’s right to a Discipline Committee hearing, that theory of liability cannot survive under any of those causes of action.

The Does allege that the School’s act of summarily suspending James and banning him from campus as soon as Jill lodged her complaint against him violated his reasonable expectation that no such action would be taken before at least some investigation had been conducted and a preliminary determination had been made that the complaint was valid. This breach claim is not based on any express language or provision of the Handbook, but rather on its statement that, when a complaint is brought to the attention of the School, “an assessment is made to determine the initial steps appropriate to protect the well-being of the students involved (including both the alleged targets and aggressors) and to prevent disruption of the learning environment while the investigation is undertaken.” The Does also rely on the implied covenant of good faith and fair dealing. The School cites the very same Handbook provision in support of its contention that it had the discretion to take such an action. Indeed, the very next sentence in the Handbook states, “The Academy may use strategies, such as increased supervision, *stay-away mandates* and

personal safety plans, as may be appropriate to prevent bullying, witness interference and/or retaliation during the course of and after the investigation” (emphasis added). In light of such language, the court concludes that the Handbook does not support a reasonable expectation on the Does’ part that the School would not suspend James based on an allegation that he had engaged in non-consensual sexual activity with another student.⁶ So, this theory of liability for Counts I, II, and IV is not viable and must be dismissed.⁷

Separate and apart from their Title IX claim, the Does allege that the School breached the Handbook provision that states that, in all of its actions, the School does not engage in gender discrimination. For the same reasons that the court finds adequately pleaded the Does’ claim that the School breached the Handbook promise to conduct an impartial investigation, it comes to the same determination regarding this breach claim. It therefore denies the motion to dismiss as to this theory of liability for Counts I, II, and IV.

Lastly, as to those three counts, the court considers the Does’ allegation that the School violated its independent legal obligation of basic fairness in its procedures. *See Schaer*, 432 Mass. at 481 (“In addition to reviewing the allegations of breach of contract, “[w]e . . . examine the hearing to ensure that it was conducted with basic fairness.’ ”), quoting *Cloud v. Trustees of*

⁶ In support of this particular breach claim, the Does cite *Doe v. Brown University*, 166 F.Supp.3d 177, 193 (D.R.I. 2016), a case in which the court denied a motion to dismiss a breach of contract claim that was based on the plaintiff’s immediate removal from campus after a sexual assault complaint had been made against him but before any investigation of the complaint had been conducted. But there the court relied on a Brown University Student Code of Conduct (Code) provision that stated that one accused of wrongdoing was assumed not responsible until proven otherwise (as well as on another Code provision that gave the plaintiff the right to enjoy use of the university’s facilities). *Id.* at 183, 193. The Does point to no such like provision in the Handbook.

⁷ To be clear, the court views the summary suspension of James to be potentially relevant as evidence that might support the Does’ various claims, but it is not, in and of itself, actionable.

Boston University, 720 F.2d 721 (1st Cir. 1983). This is a claim of unfair process. As the School notes, a fair degree of process was afforded to James: he was immediately notified of the complaint; he was interviewed in his father's presence by the Dean of Students; he was interviewed twice more in his father's presence by the outside investigator; the outside investigator considered the materials he submitted, and she expanded the scope of her investigation to interview the students from whom the Does' investigator had obtained statements; and, he was provided with a copy of the outside investigator's summary report. Nevertheless, where James had no chance to respond to the outside investigator's findings or to appeal them, especially in light of what he alleges was an unfair mischaracterization of his version of events, and where the claimed mischaracterization became the basis for the investigator's crucial determination that it was undisputed that James had engaged in verbally unconsented-to penetration, his allegations are sufficient to state a claim that he was deprived of a fair and reasonable opportunity to defend himself. Consequently, the motion to dismiss is also denied as to this fair process component of Counts I, II, and IV.

B. The Title IX Claim

That brings the court to Count III, the Does' Title IX claim. The court's denial of the School's motion to dismiss as to the Does' claims of breach of the impartiality and non-gender discrimination provisions of the Handbook, and the School's independent fair process obligation, support denial of the motion to dismiss the Title IX count as well. But the court will provide further explanation of its reasoning.

If the outside investigator had concluded that, based on her interviews of James and Jill (and on whatever other information she may have obtained and considered), she credited Jill's account of Jill's sexual interactions with James in the attic and not James's, and that, as a

consequence, she found that James's had engaged in non-consensual penile penetration, James's various causes of action would stand on a very different and far more tenuous footing. But the investigator did not. Instead, she determined that, by James's own account, he had admitted to a violation of the School's policy on interpersonal student relationships. In its reply memorandum, the School elaborates on this reasoning in a way that illustrates the crux of the Does' claim that the School has applied its policies in a gender-biased manner.

The School states that the Does "cannot avoid the consequences of James's admission that his penis 'briefly' penetrated Jill in the absence of affirmative consent." It further states that the Does wrongly presume that Jill's verbal consent was not necessary because, according to James, Jill caused the penetration to occur. But, the School asserts, that "theory" is inconsistent with the Handbook's stated requirement that a verbal request and a responsive verbal assent be obtained before a progression to more intimate activity occurs, regardless of who initiated the contact. That assertion strikes the court as the antithesis of a gender neutral application of the policy. If the court accepts as true (as it must for purposes of its Rule 12(b)(6) review) James's allegation that it was Jill who, by her movements, caused penetration to occur, and that she initiated such escalated intimacy without asking for or obtaining James's consent, she would, between the two, seemingly be the party who violated the policy.⁸ Nevertheless, the school's application of the policy to put the onus on James, even under his version of the events, to obtain consent for an act that, by his account, he neither intended, initiated, nor caused, rather than on

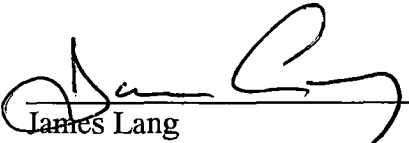
⁸ To the court's reading, the Handbook makes clear that the party initiating a progression to more intimate sexual contact is required to obtain the consent of the other party before doing so, even if it was the other party who initiated the present level or some prior level of sexual contact. That being so, the School's apparent position that, even if Jill initiated the acts that resulted in penetration, James was still required to obtain her consent before that occurred, can reasonably be construed to be a gender-biased interpretation of the Handbook's policy on interpersonal relationships.

Jill, supports the claimed violation of Title IX. In other words, there is the appearance of applying the School's policy in a way that always requires the male participant in sexual activity to obtain the consent of the female participant for any progression in the level of intimacy regardless of whether it is the actions of the female participant that are the cause of any such progression.

V. ORDER

For the foregoing reasons, the defendant's motion to dismiss is **ALLOWED in part and DENIED in part**. It is **ALLOWED** as to the Does' theories of liability for Count I (breach of contract), Count II (breach of the implied covenant of good faith and fair dealing), and Count IV (violation of MERA) that are premised on: (1) the defendant's failure to afford James Doe a hearing before his dismissal; and (2) the defendant's summary suspension of James Doe upon receipt of Jill Roe's complaint against him. The motion to dismiss is otherwise **DENIED** as to Counts I, II, and IV for claims that are premised on: (1) the School's breach of the Handbook's alleged contractual promise to conduct an impartial investigation; (2) the School's breach of the Handbook's alleged contractual promise not to engage in gender discrimination; and (3) the School's violation of its independent legal obligation of basic fairness in its procedures. The School's motion to dismiss is also **DENIED** as to Count IV (violation of Title IX).

SO ORDERED.


James Lang
Associate Justice, Superior Court

Dated: June 30, 2022