13

D

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX COUNTY SUPERIOR COURT

JOHN AND JANE DOES 1-37,
Plaintiffs
v.
TRUSTEES OF BOSTON COLLEGE, BLAKE JAMES, and REGGIE TERRY,
Defendants

Civil Action No: 2381CV02900

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

INTRODUCTION

Plaintiffs' claims in this case all rest on two demonstrably false premises: (1) that Boston College can impose a suspension of Swim and Dive Team activities only after a full, adjudicative process conducted by the Office of the Dean of Students pursuant to Boston College's Student Code of Conduct, and (2) that team activities were suspended without any determination that hazing involving the team had occurred. That is wrong on both counts. Plaintiffs ignore completely the authority of Boston College Athletics to take action with respect to athletes and teams pursuant to the policies that Boston College Athletics administers, separate and apart from disciplinary proceedings administered by the Dean's office pursuant to the Student Code of Conduct. Pursuant to that authority, Boston College Athletics suspended the team's formal activities after an initial investigation involving interviews of 20 team members revealed not only that team activities involving hazing recently had occurred, but also that members of the team had been found responsible for hazing the previous year. It is entirely consistent with Boston College's policies, and well-settled principles of Massachusetts law, that Boston College Athletics could suspend team activities in this context.

Injunctive relief is an extraordinary remedy, which should be granted only if the moving party has made a clear showing of entitlement thereto. *Student No. 9 v. Board of Ed.*, 440 Mass. 752, 762 (2004). The moving party must demonstrate that it has a substantial likelihood of success on the merits; it will suffer irreparable harm absent injunctive relief; and granting the injunction imposes no substantial risk of harm to the opposing party. *Packaging Industry Group, Inc. v. Cheney*, 380 Mass. 609, 617 & n.12 (1980) (citing *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977), and cases cited).

Plaintiffs cannot meet any part of this test, much less all of it, and accordingly their motion should be denied. In support of this opposition, Boston College submits the accompanying affidavits of Blake James and Corey Kelly.

RELEVANT FACTS

Boston College is private, Jesuit, Catholic university with approximately 15,000 undergraduate and graduate students. Kelly Aff. ¶ 2.[1] It maintains a vibrant athletics program, in which approximately 700 students participate on 31 varsity sports teams and hundreds more participate on 29 club teams. James Aff. ¶ 2. The individual defendants, Blake James and Reggie Terry, are respectively the Director of Athletics and Senior Associate Director of Athletics. *Id.* ¶¶ 1, 3.

Boston College has a Student Code of Conduct, which establishes certain conduct standards for all students and procedures for addressing potential violations of those standards. Kelly Aff. ¶ 3. The Student Code of Conduct is administered by the Office of the Dean of Students. *Id.*

[1] The university's formal, corporate name is Trustees of Boston College.

Student-athletes at Boston College also are subject to additional standards of conduct, separate from the Student Code of Conduct, which are established by Boston College Athletics and individual teams. *Id.* ¶ 4; James Aff. ¶ 4. Both individual athletes and teams can be subject to consequences for violation Boston College Athletics or team rules. James Aff. ¶ 4.

Standards applicable to all student-athletes are set forth in a Student-Athlete Handbook; the Athletic Department Policies for Student-Athletes, *id.* Ex. 1; individual team rules; and NCAA rules. *Id.* ¶ 5. The Athletic Department Policies for Student-Athletes include a Student-Athlete Code of Conduct, pursuant to which student-athletes "understand and accept that participation in intercollegiate athletics at Boston College is a privilege and not a right," and accordingly they "will comply with all University and Athletic codes of conduct and policies and will behave in a manner that is consistent with the principles of Boston College." *Id.* Ex. 1 at 1. The Student-Athlete Code of Conduct emphasizes "the right of the coach and Boston College Athletics to suspend or terminate a student-athlete from participation in Boston College Athletics ***for any reason*** if permissible by the NCAA and applicable law." *Id.* Ex. 1 at 1 n.1 (emphasis added). The Swim and Dive Team rules also provide that any "[v]iolation of team rules will result in suspension or removal from the team." *Id.* Ex. 2 at 1. The team rules include compliance with the University's Code of Conduct, *Id.* Ex. 2 at 1, which prohibits hazing. Pl. Motion Ex. 45 at 38. The hazing policy also is set forth in the Athletic Department Policies for Student-Athletes, James Aff. Ex. 1 at 6, and the Student-Athlete Compliance Packet, James Aff. Ex. 4. The team rules and other policies applicable to student-athletes, including the strict prohibition against hazing, are among the topics covered in a meeting each team has with its coach and its Sport Administrator, a member of the Athletics staff, at the beginning of the year. James Aff. ¶ 8 & Ex. 3. In addition, in remarks at a beginning-of-the-year event for all student-

athletes on August 27, 2023, the Director of Athletics specifically emphasized that no hazing would be tolerated in any aspect of the Boston College Athletics program. James Aff. ¶ 8.

Boston College and Boston College Athletics, as reflected in the Policies for Student Athletes, strictly prohibits hazing, James Aff. Ex. 1 at 6-8, which is a crime in Massachusetts. G.L. c. 269, § 17. The statute broadly defines hazing to include "any conduct or method of initiation into any student organization ... which willfully or recklessly endangers the physical or mental health of any student or other person," including but not limited to conduct involving the "consumption of any food, liquor, beverage, drug or other substance." *Id.* The statute makes clear what should be obvious in light of the inherent nature of hazing – that "consent" by a person subjected to hazing is not a defense. *Id.* The statute makes it a crime for any person who is at the scene of hazing to not report the hazing "to an appropriate law enforcement official as soon as reasonably practicable," if the "person can do so without danger or peril to himself or others." G.L. c. 269, § 18. The statute also requires all schools such as Boston College to issue a copy of the statute annually to every student group including athletic teams; requires all such groups to distribute the statute to all members and applicants for membership; and requires each group to attest that it has done so and that all members of the group will comply with the law. G.L. c. 269, § 19.

Boston College provides the statute to all student-athletes as part of a comprehensive Compliance Packet, which each student-athlete must complete and sign each year. James Aff. ¶ 10 & Ex. 4. The Compliance Packet includes not only the Massachusetts hazing statute but also Boston College's Hazing Policy promulgated by the Office of the Dean of Students. *Id.* Ex. 4 at 7-10. That policy, as set forth in the Compliance Packet, broadly defines hazing to include "any activity or abuse of power by a member of an organization and/or group used against any

individual or group of individuals as a condition to affiliate with … (or to maintain full status in [the] group), that humiliates, degrades, or risks emotional and/or physical harm, regardless of the subject's willingness to participate." *Id.* Ex. 4 at 7.[2] All of the plaintiffs completed and returned the Compliance Packet. James Aff. ¶ 11. As noted above, hazing is further prohibited in the Athletic Department Policies for Student-Athletes, which cross-references both "University Policy and Massachusetts State Law." *Id.* Ex. 1 at 6-7.

On September 5, 2023, Boston College received credible information about potential hazing activity involving the Swim and Dive Team over the preceding Labor Day weekend. *Id.* ¶ 12; Kelley Aff. ¶ 5. Boston College promptly conducted an initial investigation, which included interviews of 20 team members and the collection of evidence including photos, videos, and messages exchanged over a team "group chat." Kelly Aff. ¶ 6. The initial investigation confirmed that hazing involving power dynamics and excessive consumption of alcohol in fact had occurred. *Id.* ¶ 7. The information gathered confirmed, among other facts, that:

- A team party on September 2 involved underage drinking.
- On September 3, team members conducted a "Frosh" event with a series of organized and directed activities for freshmen on the team – activities involving excessive drinking.
- Freshmen were instructed to engage in coordinated tasks, various drinking games, and binge drinking.
- The freshmen were given bags to wear around their necks for vomit and a number of them did vomit. Other students passed out.

[2] The policy further makes clear that "[f]or activities to be considered hazing, forced or mandated participation is not required; hazing may also involve implied coercion. Behavior may constitute hazing if an individual reasonably feels that he or she will not be considered a fully participating member of the group or that he or she would be ostracized for not participating in the behavior (for example, alcohol use). *Id.* Ex. 4 at 7.

- Older students on the team instructed the freshmen what to do, while other older students were "taking care of" the freshmen who were sick or otherwise overly intoxicated.

- This "Frosh" event is an annual tradition on the Swim and Dive team, which is conducted to bring freshmen onto the team.

- On September 4, a third team event involving underage drinking occurred, at which students were encouraged to participate in a drinking game tournament.

Id. ¶ 8.

Based upon the information obtained in this initial investigation, two things happened: First, on September 19, 2023, the Office of the Dean of Students initiated conduct proceedings involving all 53 of the upperclassmen on the team. *Id.* ¶ 9. Each such student received notice of potential violations of the Student Code of Conduct, including but not limited to hazing. *Id.* Attorneys from outside Boston College were retained to interview all 68 team members and other witnesses, collect additional evidence, and prepare a comprehensive report of the investigation. *Id.* The process will culminate in individual hearings for each student. *Id.*

Second, separate and apart from the conduct process administered by the Dean's office, Boston College Athletics determined to suspend team activities including practices and intercollegiate competitions for a period of time to be determined. James Aff. ¶ 17. The Director of Athletics met with the team to inform them of the suspension on September 20, 2023. *Id.* The decision to suspend team activities was based upon information gathered in the initial investigation, which established that team hazing activities involving the initiation of freshmen to the team occurred over Labor Day weekend. *Id.* ¶¶ 15-17. In addition, team members had been found responsible for hazing just last year – in the spring of 2022. *Id.* ¶ 16.

Also on September 20, 2023, Boston College Athletics issued a statement that the Swimming and Diving program had been "placed on indefinite suspension, after University

administrators determined that hazing had occurred within the program." *Id.* ¶ 18. That statement was true; the evidence gathered in the initial investigation was sufficient for Boston College Athletics to determine that hazing had occurred, which warranted the team suspension. *Id.* ¶ 19. Boston College Athletics and the Dean's office subsequently issued additional statements to make clear that matters of individual student discipline would be adjudicated "through the student conduct process." *Id.* ¶ 20; Kelly Aff. ¶ 10.

That process, unlike the team suspension, could result in an individual finding of responsibility and sanction(s) that become a part of a student's individual conduct record and, in some circumstances, may be noted on the student's transcript. Kelly Aff. ¶ 11. The team suspension does not become part of a student's individual conduct record and is not noted on a student's transcript, nor does it limit or restrict a student's access to the university's classes, facilities, or resources. *Id.* ¶ 12. Among those resources are counseling and other support from University Counseling Services, Athletics Sports Counseling, and the Office of the Dean of Students, which Boston College repeatedly has offered to all members of the Swim and Dive team. *Id.* ¶ 13. The Dean's Office also repeatedly has encouraged team members to report any instances of retaliation against them and has followed up on all such reports. *Id.* ¶ 14.

Although formal team activities have been suspended, members of the Swim and Dive team remain free to use Boston College's athletic facilities to work out and practice on their own, as well as make use of other resources offered by Athletics, including athletic trainers. James Aff. ¶ 21. In fact, team members are meeting regularly to conduct practice on their own. *Id.*

The decision to suspend team activities had nothing to do with the fact that the team is co-ed. *Id.* ¶ 22. Nor is there any case involving "similar circumstances" involving an all-male team known to the University. *Id.* ¶ 23. Boston College has not had occasion to consider

evidence of repeated hazing incidents in relation to an all-male team. *Id.*

ARGUMENT

I. PLAINTIFFS CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS ON THE MERITS OF THEIR CLAIMS.

A. Breach of Contract and Basic Fairness – Counts I and II

1. Controlling principles of Massachusetts law

The university-student relationship is contractual in nature, taking into account the unique context of that relationship. *Massachusetts Inst. of Tech. v. Guzman*, 90 Mass. App. Ct. 1102, 2016 WL 4395356, *5 (2016) (Rule 1:28); *Driscoll v. Bd. of Trs. of Milton Acad.*, 70 Mass. App. Ct. 285, 293 (2007). The terms of the contract can be found in university handbooks and policies, to the extent such documents contain specific promises – as distinct from statements that are vague and general or merely aspirational in nature. *G. v. Fay Sch.*, 931 F.3d 1, 12 (1st Cir. 2019); *Wu v. Ma*, No. CV 22-30033-MGM, 2023 WL 6318831, at *9 (D. Mass. Sept. 28, 2023); *Guckenberger v. Bos. Univ.*, 974 F. Supp. 106, 152 (D. Mass. 1997); *Driscoll*, 70 Mass. App. Ct. at 293; *Guzman*, 2016 WL 4395356 at *5; *Morris v. Brandeis Univ.*, 60 Mass. App. Ct. 1119 n.6, 2004 WL 369106, *3 (2004) (Rule 1:28); *Shin v. Massachusetts Inst. of Tech.*, No. 020403, 2005 WL 1869101, at *7 (Mass. Super. June 27, 2005). In construing the contract, a court applies a standard of reasonable expectation – what meaning the university reasonably should expect a student to give the language at issue. *Schaer v. Brandeis Univ.*, 432 Mass. 474, 478 (2000).

In matters of student disciplinary proceedings, a university is obliged to follow its own procedures and to observe "basic fairness," which means not taking an action that is arbitrary and capricious or in bad faith. *Coveney v. Pres. & Trs. of Coll. of Holy Cross*, 388 Mass. 16, 20 (1983); *Schaer*, 432 Mass. at 478; *Driscoll*, 70 Mass. App. Ct. at 295; *see also Doe v. Stonehill Coll., Inc.*, 55 F.4th 302, 317 (1st Cir. 2022); *Cloud v. Trs. of Bos. Univ.*, 720 F.2d 721, 725 (1st

Cir. 1983). "The basic fairness requirement appears chiefly concerned with whether the school 'act[ed] in good faith and on reasonable grounds.'" *Doe v. Stonehill Coll., Inc.*, 55 F.4th at 331 (quoting *Coveney*, 388 Mass. at139). Fairness, as promised in a student handbook, focuses on ensuring compliance with the express contractual promises. *Id.* (citing *Doe v. Trs. of Bos. Coll.*, 892 F.3d 67, 88 (1st Cir. 2018)).

The concept of "basic fairness," like the implied covenant of good faith and fair dealing on which it rests, means a student – or in this case a team – is entitled to whatever protections university policy affords, but does not mean a court may impose requirements or standards different from or in addition to what university policy provides. *See Doe v. Trs. of Bos. Coll.*, 942 F.3d 527, 535 (1st Cir. 2019); *Doe v. Trs. of Bos. Coll.*, 892 F.3d at 88. Courts may not impose restrictions on the actions of university administrators that are not found in university policies. *See Havlik v. Johnson & Wales Univ.*, 509 F.3d 25, 35 (1st Cir. 2007) (appeal officer's consultation with an administrator about a student was not improper where the handbook did not prohibit it); *Doe v. Trs. of Bos. Coll.*, No. 15-CV-10790, 2016 WL 5799297 (D. Mass. Oct. 4, 2016) (consulting administrators during an appeal involved no breach of contract where disciplinary procedures did not limit how an appeal should be reviewed), *aff'd in part, vacated in part*, 892 F.3d 67 (1st Cir. 2018); *see also Pollalis v. Pres. & Fellows of Harvard Coll.*, 95 Mass. App. Ct. 1103, 2019 WL 1261472, *2 (2019) (Rule 1:28) ("We hesitate to read in restrictions when the language of a university handbook fails to explicitly limit an administrative action."); *Berkowitz v. Pres. & Fellows of Harvard Coll.*, 58 Mass. App. Ct. 262, 273-74 (2003) ("In the absence of handbook language expressly limiting the docket committee's powers of inquiry, we are reluctant to read in restrictions that limit the university's discretion.").

It also is well-settled that "courts should refrain from second-guessing the disciplinary

decisions made by school administrators." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999); *see also Havlik*, 509 F.3d at 35 (courts must accord a school some measure of deference in matters of discipline); *Morale v. Grigel*, 422 F. Supp. 988, 1005 (D.N.H. 1976) ("courts do not sit in judgment of the wisdom of school administrators").

2. Plaintiffs Have No Likelihood of Success on Their Contract Claims

Applying the foregoing principles to the facts of this case, plaintiffs have no likelihood of success on their contract or basic fairness claims. This is for several reasons.

The university-wide Student Code of Conduct, on which all of plaintiffs' contract and fairness claims rest, does not apply. The team suspension was imposed by Boston College Athletics, pursuant to the rules and policies that Boston College Athletics administers and was within its discretion in administering an intercollegiate athletics program. The Athletics Policies make clear that participation in intercollegiate activities is a privilege, not a right, which Boston College Athletics can suspend "for any reason" other than one that would be unlawful (e.g., unlawful discrimination) or in violation of NCAA rules. *See Knelman v. Middlebury Coll.*, 570 F. App'x 66, 68 (2d Cir. 2014) (disciplinary procedures in a student handbook applied only to conduct proceedings conducted pursuant to the handbook and did not apply to, or preclude, a coach's decision to suspend an athlete from team participation for the rest of the season; while "harsh," it was no breach of contract and not for the court to set aside).

It is beyond dispute that the suspension decision was not arbitrary and capricious. To the contrary, it was made only after an extensive, initial investigation, which included interviews of 20 team members. That investigation confirmed hazing activity involving the initiation of freshmen to the team had occurred over the Labor Day. Moreover, findings of hazing involving several team members had been made just last year. In light of these facts, no member of the

Swim and Dive Team reasonably could expect that Boston College Athletics lacked authority to suspend team activities.

Nor is there any merit to the argument that the team suspension is improper because it preceded a determination as to which athletes personally participated or were complicit in the hazing activity. Boston College Athletics suspended the team because the hazing was part of a team activity, designed to bring freshmen onto the team. Such hazing, by its very nature, implicates the team as a whole. The hazing was done in the name of the team to serve the team's (misguided) purposes. The fact that hazing is inherently a team activity and that other hazing had been found to occur just last year amply justifies the action by Boston College Athletics in relation to the team. Were it otherwise – if BC could take action only against individuals, and only after specific findings against them – every athlete on the team would have the incentive to build a wall of silence around their comrades, refuse to provide information, and thereby protect everyone against any consequence. For just such reasons, action against an entire team for serious misconduct is not uncommon[3] and passes judicial muster. *See, e.g., Justice v. Nat'l*

[3] For example: The University of Western Kentucky suspended its swimming and diving team for five years after an investigation confirmed a report of hazing activity. https://bleacherreport.com/articles/2430547-western-kentucky-swim-team-suspended-5-years-after-hazing-allegations.

Dartmouth suspended its women's swimming and diving team upon determining that the team engaged in hazing activity, even though no drinking or other physically dangerous activities were involved. https://nypost.com/2017/07/20/dartmouth-womens-swim-team-busted-for-sexual-power-point-hazing/.

The University of Vermont canceled an entire season for its men's hockey team after determining that several team members lied during an investigation of hazing. https://www.nytimes.com/2000/01/15/sports/hockey-vermont-cancels-season-in-player-hazing-scandal.html.

New Mexico State suspended its men's basketball team indefinitely based upon reports of hazing activity. https://www.si.com/college/2023/02/11/new-mexico-state-basketball-hazing-allegations-season-suspended-per-report.

Collegiate Athletic Ass'n, 577 F. Supp. 356, 370 (D. Ariz. 1983) (sanctions which effectively "punish innocent" athletes for the conduct of others is not uncommon and serves as a meaningful deterrent to future violations).

Nor is this a case in which basic fairness required any process different from what occurred before the team suspension was imposed. Massachusetts courts have upheld the right of school administrators to impose discipline, even expulsion, without any formal hearing or other process where that is allowed by school policy. In *Driscoll, supra*, the Appeals Court upheld a student's expulsion where the school's handbook allowed the head of school to determine a disciplinary response without a live hearing before a disciplinary committee. 70 Mass. App. Ct. at 295. The student was given an opportunity to explain his behavior and the head's decision was not arbitrary or capricious. *Id.* Similarly in this case, the Student-Athlete Code of Conduct makes clear "the right of … Boston College Athletics to suspend or terminate a student-athlete from participation in Boston College Athletics ***for any reason***," without any requirement of a formal hearing. Moreover, the suspension was imposed after 20 team members were interviewed, several of whom admitted that the team initiation activities involving excessive drinking and other conduct had occurred.

Significantly, the team suspension does not constitute discipline of any individual student. None of the plaintiffs have been suspended or expelled from Boston College. All of them remain students in good standing. There is nothing on their transcript or in their official student record that would reflect the team suspension. Nor have they been deprived of any other rights and privileges enjoyed by all BC students.

Because plaintiffs are unlikely to succeed on the merits of their central claims for breach of contract and basic fairness, they are not entitled to preliminary injunctive relief. *See Fordyce*

v. Town of Hanover, 457 Mass. 248, 266 (2010).

B. Estoppel – Count III

Recovery under a quasi-contract theory such as equitable or promissory estoppel is not available where, as in this case, a written contract governs the parties' relationship. *Malden Police Patrolman's Ass'n v. City of Malden*, 92 Mass. App. Ct. 53, 60 (2017) ("promissory estoppel implies a contract in law" only "in the absence of a contract in fact"). Plaintiffs' estoppel claim is based upon BC's Student Code of Conduct, Compl. ¶ 71, which Plaintiffs claim is part of an "express contract" with BC. *Id.* ¶¶ 114-15. In fact, the relevant contract documents are those promulgated by Boston College athletics. Either way, the estoppel claim in Count III thus fails as a matter of law.

C. Defamation – Count IV

Plaintiffs allege that the defendants defamed them when Boston College Athletics published the September 20, 2023 statement that the team "had been placed on indefinite suspension, after University administrators determined that hazing had occurred within the program." Compl. ¶ 184. Plaintiffs allege that the statement was false, because University administrators had not yet determined that hazing occurred; defendants James and Terry knew or should have known the statement was false; and the statement has harmed Plaintiffs "particularly with respect to their reputations." *Id.* ¶¶ 186-88. Plaintiffs have no likelihood of success on their defamation claim for several reason.

First and foremost, the claim fails because the statement at issue was true. When the statement was issued, university administrators ***had*** determined that hazing had occurred within the Swim and Dive Team. Those administrators were in Boston College Athletics. They made that determination based upon information gathered in the initial investigation – including

interviews of multiple team members who confirmed team conduct and activities over the Labor Day weekend that constitute hazing.

Second, assuming for the sake of argument that the statement at issue was false (which it was not), it fails to support plaintiffs' defamation claim in any event because it was not "of and concerning" any of the plaintiffs individually. *See Ellis v. Kimball*, 33 Mass. 132, 135 (1834) (when a defamatory statement is "published against a class or aggregate body of persons, an individual member [who is] not specially included or designated [in the statement], cannot maintain an action" for defamation; "among other reasons," although the group may have acted wrongfully, the "individual may have been in the minority and may have opposed the [group conduct] alluded to."). The statement said that "hazing had occurred within the program." The statement did not name which individuals, or subset of individuals, perpetrated or were complicit in the hazing – a determination that will be made in the conduct process administered by the Dean's office. The statement did not say that all team members committed or were complicit in the hazing. The team has 68 members. No person reading the statement reasonably could infer that any particular athlete perpetrated or was complicit in the hazing. *See Eyal v. Helen Broad. Corp.*, 411 Mass. 426, 430 n.6 (1991) ("an individual member of the [allegedly] defamed class cannot recover for defamation unless 'the group or class is so small that the matter can reasonably be understood to refer to the member, or ... the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member.'") (quoting RESTATEMENT (SECOND) OF TORTS, § 564A (1965)).

D. Intentional Infliction of Emotional Distress – Count V

"The standard for making a claim of intentional infliction of emotional distress is very high." *Polay v. McMahon*, 468 Mass. 379, 385 (2014) (quoting *Doyle v. Hasbro, Inc.*, 103 F.3d

186, 195 (1st Cir. 1996), citing *Agis v. Howard Johnson Co.*, 371 Mass. 140, 144-145 (1976)). The plaintiff must demonstrate that the defendant engaged in conduct that was extreme and outrageous, which means conduct that "go[es] beyond all possible bounds of decency, and [is] regarded as atrocious, and utterly intolerable in a civilized community." *Roman v. Trs. of Tufts Coll.*, 461 Mass. 707, 718 (2012) (quoting *Foley v. Polaroid Corp.*, 400 Mass. 82, 99 (1987)). It is "not enough 'that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.'" *Tetrault v. Mahoney, Hawkes & Goldings*, 425 Mass. 456, 466 (1997) (quoting Foley, 400 Mass. at 99 (quoting RESTATEMENT (SECOND) OF TORTS, § 46 comment d (1965)).

Plaintiffs cannot meet this "very high" standard. Their claim in Count V is predicated upon the defendants' actions in suspending the team and releasing the statement about that suspension. Compl. ¶¶ 198-99. Both of those actions were entirely lawful and appropriate, for the reasons set forth above. Assuming for the sake of argument that the defendants erred in taking those actions (which they did not), it cannot be said that their actions were so "extreme and outrageous" as to be "utterly intolerable in a civilized community."

E. Title IX – Count VI

A student claiming selective enforcement in violation of Title IX must show that the decision to initiate the disciplinary proceeding and/or the severity of the penalty imposed was affected by his or her sex. *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56, 74 (1st Cir. 2019). To meet that burden, a student must show (1) that a student of the opposite sex in "sufficiently similar" circumstances – i.e., one accused of, or found responsible for, similar conduct – was treated more favorably and (2) that gender bias caused the discrepancy. *Id.*; *Doe*

v. St. Joseph's Univ., 832 F. App'x 770, 773 (3d Cir. 2020); *Mallory v. Ohio Univ.*, 76 F. App'x 634, 641 (6th Cir. 2003); *Austin v. Univ. of Oregon*, 925 F.3d 1133, 1138 (9th Cir. 2019). Bias may be inferred from disparate treatment only if that different treatment involves persons "similarly situated in material respects" to the plaintiff. *Perkins v. Brigham & Women's Hosp.*, 78 F.3d 747, 751 (1st Cir. 1996). "[T]he proponent of the evidence must show that the individuals with whom he seeks to be compared have 'engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the [defendant's] treatment of them for it.'" *Id.* (emphasis added) (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992)).

Plaintiffs allege "upon information and belief" that all-male teams at Boston College "have engaged in conduct that could amount to an alleged violation of the College's Code [of Conduct]" involving "similar circumstances," but were not suspended "without an investigation process." Compl. ¶¶ 223-25. Plaintiffs further claim "upon information and belief" that the decision to suspend the Swim and Dive Team "was likely motivated by the fact that the … Team is a co-ed program … ." Pl. Mem. at 15.

Specific evidence, not "tenuous inferences," is necessary to overcome the judicial presumption that university officials, including those involved in student conduct matters, act without bias. *Doe v. Trs. of Bos. Coll.*, 892 F.3d 67, 84 (1st Cir. 2018) (addressing a claim of gender bias under Title IX). Plaintiffs cite no such evidence. Assertions based solely "upon information and belief" fail to justify the extraordinary remedy of preliminary injunctive relief. *Marshall Durbin Farms, Inc. v. Nat'l Farmers Org., Inc.*, 446 F.2d 353, 357 (5th Cir. 1971); *Bowles v. Montgomery Ward & Co.*, 143 F.2d 38, 42 (7th Cir. 1944); *see also Eaton v. Fed. Nat. Mrtg. Ass'n*, 462 Mass. 569, 590 (2012); 11A Wright & Miller, FED. PRAC. & PROC. CIV. § 2949

(3d ed. 2002).

Nor does any evidence supporting this claim exist. The decision to suspend the team had nothing to do with the fact that it is co-ed. James Aff. ¶ 22. Nor is there any case involving "similar circumstances" and an all-male team known to the University. *Id.* ¶ 23. Boston College has not had occasion to consider evidence of repeated incidents of hazing in relation to an all-male team. *Id.*

II. PLAINTIFFS HAVE NOT DEMONSTRATED A LIKELIHOOD OF IRREPARABLE HARM IF AN INJUNCTION DOES NOT ISSUE.

Even if Plaintiffs had demonstrated some likelihood of success on the merits, which they have not, they have failed to demonstrate that they will suffer irreparable harm in the absence of preliminary injunctive relief. The risk of such harm must be "substantial." *Packaging Indus. Group*, 380 Mass. at 617. If the harm can be adequately compensated by money damages, the plaintiff cannot obtain a preliminary injunction. *Id.* at 621. "Speculative harm cannot justify an injunction." *Bos. Sci. Corp. v. Takaahashi*, No. SUCV201702976BLS2, 2017 WL 5985293, at *2 (Mass. Super. Sept. 26, 2017); *see also Shaw v. Harding*, 306 Mass. 441, 449-50 (1940) (the harm must be "reasonably imminent"). Moreover, the risk of irreparable harm to the plaintiffs must be weighed against the risk of harm to BC in the event an injunction is issued and in light of the plaintiffs' chance of success on the merits. *Packaging Indus. Group*, 380 Mass. at 617.

Plaintiffs' declarations of harm overstate the actual effect of the team suspension – suggesting that it prohibits them from continuing to enjoy swimming and continuing to train for future competitions, whether those will be at Boston College or elsewhere. That is not the case. Plaintiffs remain fully able to use Boston College athletic facilities, including the pool, and weight-room, individually or in a group, and in fact group practices have continued. James Aff. ¶ 21.

The only actual loss at present is the plaintiffs' ability to train with a Boston College coach and to compete with other colleges. Courts are split on the question whether the loss of such an experience is an irreparable harm. *Doe v. Haverford Coll.*, No. CV 23-299, 2023 WL 2025033, at *7 (E.D. Pa. Feb. 14, 2023) (citing cases). While plaintiffs cite cases on one side of that split, many others hold that a loss of athletic team experiences does not warrant the extraordinary remedy of a preliminary injunction. *See, e.g. Equity in Athletics, Inc. v. U.S. Dep't of Educ.*, 291 F. App'x 517, 521 (4th Cir. 2008) (affirming denial of preliminary injunction to prevent elimination of teams where student athletes did not lose their scholarship funding and were free to transfer to other colleges offering their chosen sport); *Doe v. Trs. Of Dartmouth Coll.*, 1:19-cv-00013-JL (D.N.H. Jan. 2019), Dkt. Nos. 17 & 29 (denying expelled Division I athlete's motions for a TRO and preliminary injunction); *Mattison v. E. Stroudsburg Univ.*, No. 3:12-CV-2557, 2013 WL 1563656, at *5-6 (M.D. Pa. Apr. 12, 2013) (suspension from varsity college baseball team not irreparable harm); *see also Doe v. Blake Sch.*, 310 F. Supp. 3d 969, 983 (D. Minn. 2018); *St. Patrick High Sch. v. New Jersey Interscholastic Athl. Assn.*, No. CIVA 10-CV-948 (DMC), 2010 WL 715826, at *4 (D.N.J. Mar. 1, 2010).

Some plaintiffs claim that they may miss an opportunity to compete in the Olympics. That assertion is based only on conjecture and surmise. *See Mattison*, 2013 WL 1563656, at *5-6 (possibility of interest from Major League Baseball teams too speculative to establish likelihood of irreparable harm). There is no evidence that any of the plaintiffs likely would qualify for the Olympics Trials or compete in the Olympics. Their declarations are self-serving and do not establish any real likelihood of irreparable harm, as distinct from mere hopes of future possibilities. Moreover, if any plaintiff believed they had a realistic shot at the Olympics, they not only can continue to train at Boston College but also can train with a private coach.

Plaintiff's alleged reputational and emotional harm also is insufficient to warrant preliminary injunctive relief. Plaintiffs claim that the statement about the team suspension caused them to be ridiculed on social media and on campus and has caused them emotional harm. To the extent such injury has occurred – and it is attributable to some fault of the defendants – that harm already has occurred, is compensable by monetary relief, and will not be cured by a court order requiring Boston College to provide a coach and allow the plaintiffs to compete with other schools. *See Doe v. Haverford Coll.*, 2023 WL 2025033 at *7 ("It is difficult to see how an order of this Court inserting itself into the affairs of a college athletic team will provide such relief, as [other students] can still express their views [about the plaintiffs] in a variety of ways well beyond the control of the Court.").

III. THE BALANCE OF HARMS WEIGHS AGAINST INJUNCTIVE RELIEF.

Boston College has a strong interest in enforcing its student conduct policies, including its prohibition against hazing. There is a significant interest in "allowing colleges to govern their internal affairs." *Doe v. Haverford Coll.*, 2023 WL 2025033, at *8. Courts also should not discount the harm resulting from an injunction that undermines a college's authority to address misconduct. *See Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 827 (7th Cir. 1998) (vacating preliminary injunction where allowing a student to remain enrolled undermined the school's authority to take disciplinary action).

Allowing Boston College to maintain a safe environment, free from hazing, also is a significant interest that weighs in favor or denying the injunction. *See* G.L. c. 269 §§ 17-19; *Doe v. The Ohio State Univ.*, 136 F. Supp. 3d 854, 871 (S.D. Ohio 2016) (citing *Bonnell v. Lorenzo*, 241 F.3d 800, 822 (6th Cir. 2001)). It is well-settled that courts should not lightly interfere with the judgments of school administrators in matters pertaining to student conduct. *See Davis*, 526

U.S. at 648; *Havlik*, 509 F.3d at 35; *Morale*, 422 F. Supp. at 1004-05. The balance of harms thus weighs against injunctive relief. *See Z.H. v. Kentucky High Sch. Athletic Ass'n*, 359 F. Supp. 3d 514, 526 (W.D. Ky. 2019) (while the plaintiff athlete would suffer "some irreparable harm," a preliminary injunction was not warranted because there was an equally strong interest in avoiding the harm that would be suffered by others should the plaintiff be permitted to play basketball).

CONCLUSION

The Court should deny plaintiffs' motion for preliminary injunctive relief.

TRUSTEES OF BOSTON COLLEGE, ET AL.,

/s/Daryl J. Lapp
Daryl J. Lapp (BBO No. 554980)
daryl.lapp@lockelord.com
Elizabeth H. Kelly (BBO No. 672277)
liz.kelly@lockelord.com
LOCKE LORD LLP
111 Huntington Avenue
Boston, MA 02199
617.230.0100

Certificate of Service

I certify that per the parties' agreement, I served a copy of the foregoing document upon counsel of record for the plaintiffs by email on October 23, 2023

/s/ Daryl J. Lapp
Daryl J. Lapp