No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Theresa Bailey — PETITIONER
(Your Name)

vs.

New York Law School et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

the United States Court of Appeals for the Second Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

JOINT APPENDIX

Theresa Bailey
(Your Name)

232 West 116th St., Unit #354
(Address)

New York, NY 10026
(City, State, Zip Code)

(917) 444-4365
(Phone Number)

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Bailey v. New York Law School

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of November, two thousand twenty-one.

Present:

DEBRA ANN LIVINGSTON,
Chief Judge,
JOHN M. WALKER, JR.,
RICHARD C. WESLEY,
Circuit Judges.

THERESA BAILEY,

Plaintiff-Appellant,

v. 19-3473

NEW YORK LAW SCHOOL, ANTHONY CROWELL, ELLA MAE ESTRADA, DAVID SCHOENBROD, AND BARBARA JEANE GRAVES-POLLER,

Defendants-Appellees,

JEFFERY BECHERER, DEBORAH NICOLE ARCHER, HOWARD MEYERS, ERIKA WOOD, ORAL HOPE, AND VICTORIA EASTUS,

Defendants.

For Plaintiff-Appellant: THERESA BAILEY, *pro se*, New York, NY.

For Defendants-Appellees: MICHAEL JOSEPH VOLPE, Venable LLP, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Ramos, *J.*; Cott, *M.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant Theresa Bailey ("Bailey"), proceeding *pro se*, sued New York Law School ("NYLS") and four of its employees, Dean Anthony Crowell, then-Assistant Dean of Admissions and Financial Aid Ella Estrada ("Estrada"), Professor David Schoenbrod ("Schoenbrod"), and Professor Barbara Graves-Poller ("Graves-Poller," and collectively, the "Defendants-Appellees"), under, *inter alia*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*; Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*; 42 U.S.C. §§ 1983 and 1985(3); and the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law §§ 290 *et seq.*, alleging that they discriminated and retaliated against her after she reported being sexually assaulted by a classmate. The district court dismissed Bailey's claims for discrimination under Title IX, Title VI, and 42 U.S.C. §§ 1983 and 1985(3), and for fraud, breach of contract, and intentional infliction of emotional distress ("IIED"). The court then granted Defendants-Appellees' motion for summary judgment with respect to Bailey's Title IX and NYSHRL retaliation claims and her claim under New York General Business Law ("GBL") § 349. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

I. Waiver

While we "liberally construe pleadings and briefs submitted by pro se litigants, reading such submissions to raise the strongest arguments they suggest," *McLeod v. Jewish Guild for the Blind*, 864 F.3d 154, 156 (2d Cir. 2017) (per curiam) (internal quotation marks omitted), *pro se* appellants must still comply with Federal Rule of Appellate Procedure 28(a), which "requires appellants in their briefs to provide the court with a clear statement of the issues on appeal." *Moates v. Barkley*, 147 F.3d 207, 209 (2d Cir. 1998) (per curiam). We therefore "normally will not[] decide issues that a party fails to raise in his or her appellate brief." *Id.*; *see also LoSacco v. City of Middletown*, 71 F.3d 88, 93 (2d Cir. 1995). Nor will we decide issues that a *pro se* appellant raises in her brief only in passing. *See Gerstenbluth v. Credit Suisse Secs. (USA) LLC*, 728 F.3d 139, 142 n.4 (2d Cir. 2013).

Bailey's briefs fail to address several of her claims that the district court decided. Although she states that she wishes to appeal three of the district court's orders (the March 1, 2017 and December 27, 2017 orders granting Defendants-Appellees' motions to dismiss and the September 24, 2019 order granting their motion for summary judgment), she does not mention her contract or GBL § 349 claims and makes only oblique references to her IIED, § 1983, and fraud claims. Any challenges to the district court's dismissal of those claims are thus waived, and we may affirm the district court's judgment with respect to them on that basis. *See Jian Wen Wang v. Bureau of Citizenship & Immigr. Serv.*, 437 F.3d 276, 278 (2d Cir. 2006).

Moreover, even if those claims were not waived, we would still affirm the district court's judgment on them. Thus, for the sake of thoroughness, we address those claims alongside the claims Bailey did raise in her opening brief — the Title IX, Title VI, NYSHRL, § 1985(3) claims

— on the merits.

II. Merits

A. Summary Judgment

We review a district court's grant of summary judgment *de novo*. *Garcia v. Hartford Police Dep't*, 706 F.3d 120, 126–27 (2d Cir. 2013) (per curiam). "Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Doninger v. Niehoff*, 642 F.3d 334, 344 (2d Cir. 2011) (quoting Fed. R. Civ. P. 56(a)). In determining whether there is a genuine dispute as to a material fact, we "resolve all ambiguities and draw all inferences against the moving party." *Garcia*, 706 F.3d at 127.

1. Title IX Retaliation

The district court properly granted summary judgment to Defendants-Appellees on Bailey's Title IX retaliation claim. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Schools receiving federal funding are also barred from retaliating against students who complain of sex discrimination. *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 91 (2d Cir. 2011). To establish a *prima facie* case of Title IX retaliation, the plaintiff must show: "(1) protected activity by the plaintiff; (2) knowledge by the defendant of the protected activity; (3) adverse school-related action; and (4) a causal connection between the protected activity and the adverse action." *Id.*

Bailey fails to establish that Defendants-Appellees took any adverse action against her for

complaining about her male classmate. Regarding Bailey's effort to transfer from NYLS, the record reflects that Estrada met with Bailey at least twice and offered significant aid to assist her with the transfer process, including reviewing her personal statement. Although Bailey received a poor grade (a D+) in Schoenbrod's class in the fall 2015 term, the evidence shows that the grade was warranted based on Bailey's anonymous exam answers, that it was not the lowest grade given in the course, and that Schoenbrod had *raised* her grade from a D to a D+ after learning her identity. Finally, with respect to Graves-Poller's actions, the school permitted Bailey to transfer out of Graves-Poller's class without any repercussions on Bailey's transcript, and thus without Bailey suffering any adverse consequences. Bailey also offered no evidence that Graves-Poller, who was new to the school, had any knowledge of Bailey's Title IX complaints. Thus, Bailey fails to establish a Title IX retaliation claim.

2. NYSHRL

The district court also properly granted summary judgment to Defendants-Appellees on Bailey's NYSHRL retaliation claim. The same standards used in a Title IX claim also apply to claims brought under the NYSHRL. *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 n.1 (2d Cir. 2000). Therefore, for the reasons stated above, Bailey also fails to establish a retaliation claim under the NYSHRL.

3. GBL § 349

Under GBL § 349, "[d]eceptive acts or practices in the conduct of any business, trade or commerce in the furnishing of any service" are unlawful. N.Y. Gen. Bus. Law § 349(a). To establish a *prima facie* case under that provision, a plaintiff must demonstrate that "(1) the act or practice was consumer-oriented; (2) the act or practice was misleading in a material respect; and

(3) the plaintiff was injured as a result." *Electra v. 59 Murray Enters., Inc.*, 987 F.3d 233, 258 (2d Cir. 2021). Bailey contends that NYLS's website, Student Handbook, annual Campus Safety Reports, admission statistics, promotional materials, and briefs that it filed as an *amicus curiae* in various discrimination lawsuits misled her in deciding where to enroll in law school. But Bailey fails to produce or identify any of the allegedly misleading materials, while NYLS offered evidence that its materials are published in accordance with federal law. Accordingly, the district court properly granted summary judgment to Defendants-Appellees on Bailey's claim under the GBL.

4. Seventh Amendment

Bailey also contends that she was denied the right to a jury in violation of the Seventh Amendment when the district court granted Defendants-Appellees' motion for summary judgment. But there is no absolute right to a jury trial. "Where no genuine issue of material fact exists, the court may, without violating Seventh Amendment rights, grant summary judgment . . . ." *Shore v. Parklane Hosiery Co.*, 565 F.2d 815, 819 (2d Cir. 1977). As discussed above, Bailey fails to establish any genuine issue of material fact with respect to the claims at issue on summary judgment. Therefore, the district court did not violate Bailey's Seventh Amendment rights by granting summary judgment to Defendants-Appellees.

B. Motions to Dismiss

We review *de novo* the dismissal of a complaint for failure to state a claim. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). To survive a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6), a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Although a court "must accept as true all of the allegations contained in a complaint," this tenet is "inapplicable to legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

1. Title IX Discrimination

The district court properly dismissed Bailey's Title IX discrimination claim. Title IX requires, among other things, that a school adequately respond to complaints of sex discrimination. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). "Title IX's requirement of an adequate response is violated not only if school officials render no response, . . . but also if the response that is rendered amounts to deliberate indifference to discrimination." *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 751 (2d Cir. 2003) (internal quotation marks and alterations omitted). "Deliberate indifference may be found both when the defendant's response to known discrimination is clearly unreasonable in light of the known circumstances, and when remedial action only follows after a lengthy and unjustified delay." *Id.* (internal quotation marks and citations omitted). When considering the adequacy of a response, "a court must accord sufficient deference to the decisions of school disciplinarians." *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 666 (2d Cir. 2012).

Bailey fails to allege that NYLS was deliberately indifferent to her sexual assault complaint. She asserts that NYLS's investigation was untimely and inadequate and that her male classmate was not appropriately sanctioned. But these allegations are undermined by the report of NYLS's investigative panel, which demonstrates that the school began an investigation into Bailey's complaint less than a week after she reported her assault and implemented numerous

sanctions against the male classmate after concluding the investigation, including banning him from campus for a period of time and placing him on probation. *Cf. Roth v. Jennings*, 489 F.3d 499, 511 (2d Cir. 2007) ("[T]he contents of [a] document [attached to the complaint] are controlling where a plaintiff has alleged that the document contains, or does not contain, certain statements."). NYLS therefore did not delay in responding to Bailey's complaint and appropriately addressed her classmate's actions. *See Zeno*, 702 F.3d at 666 ("[V]ictims do not have a right to specific remedial measures."); *Hayut*, 352 F.3d at 751–53 (concluding that the school's response to a complaint was adequate where the evidence showed that the defendants "responded to [plaintiff's] complaint reasonably, in a timely manner, and in accordance with all applicable procedures").

2. Title VI

The district court also did not err by dismissing Bailey's Title VI claim. Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. To state a claim under Title VI, a plaintiff must allege that "the defendant discriminated against him on the basis of race, that that discrimination was intentional, and that the discrimination was a substantial or motivating factor for the defendant's actions." *Tolbert v. Queens Coll.*, 242 F.3d 58, 69 (2d Cir. 2001) (internal quotation marks and citations omitted).

Bailey alleges that Defendants-Appellees discriminated against her by giving preferential treatment to male students. But Title VI does not prohibit discrimination based on sex. 42 U.S.C. § 2000d. And to the extent that Bailey claims that her race caused her to be impacted more

severely by NYLS's sex discrimination, that allegation also fails because Title VI does not provide redress for disparate impact claims. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005).

3. Section 1985(3)

The district court did not err by dismissing Bailey's § 1985(3) claims. The four elements of a § 1985(3) claim are:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right of a citizen of the United States.

Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085, 1087 (2d Cir. 1993) (per curiam). Bailey alleges that Defendants-Appellees conspired to deny her equal protection by refusing to assist her with her application to transfer to another law school, unduly delaying their Title IX investigation, and unfairly issuing her poor grades. But Bailey fails to plead any facts suggesting that Defendants-Appellees conspired *together* to perform these acts. Her conclusory assertion that "the misconduct against [her] is also a conspiracy" is insufficient to defeat a motion to dismiss. *See Kirch v. Liberty Media Corp.*, 449 F.3d 388, 398 (2d Cir. 2006) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss." (internal quotation marks and alteration omitted)).

4. Fraud

The district court properly dismissed Bailey's common-law fraud claim. To sustain a claim for fraud under New York law, a plaintiff must allege "(1) a material misrepresentation or omission of fact (2) made by a defendant with knowledge of its falsity (3) and intent to defraud;

(4) reasonable reliance on the part of the plaintiff; and (5) resulting damage to the plaintiff." *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 13 F.4th 247, 249 (2d Cir. 2021). Bailey contends that Defendants-Appellees defrauded her when they stated that her male classmate was "good" and "[w]ell-liked," that he was not on campus during a certain period of time, and that the school had not received complaints against him in the past. But her allegations fail to support a fraud claim because each remark is either a nonactionable statement of opinion, *see Catskill Dev., LLC v. Park Place Ent. Corp.*, 547 F.3d 115, 133 (2d Cir. 2008); true, *see Manda Int'l Corp. v. Yager*, 32 N.Y.S.3d 145, 147 (1st Dep't 2016); or could not have been reasonably relied upon by Bailey to her detriment, *see Nabatkhorian v. Nabatkhorian*, 7 N.Y.S.3d 479, 481 (2d Dep't 2015). Accordingly, the district court correctly dismissed Bailey's fraud claim.

5. Breach of Contract

The district court also properly dismissed Bailey's breach of contract claim. "To state a claim for breach of contract under New York law, the complaint must allege: (i) the formation of a contract between the parties; (ii) performance by the plaintiff; (iii) failure of defendant to perform; and (iv) damages." *Edwards v. Sequoia Fund, Inc.*, 938 F.3d 8, 12 (2d Cir. 2019) (internal quotation marks omitted). While a contract can be formed when a school accepts a student for enrollment, *Papelino*, 633 F.3d at 93, a plaintiff must identify specific and discrete promises that were allegedly broken to state a breach of contract claim, *see Keefe v. N.Y. Law Sch.*, 897 N.Y.S.2d 94, 95 (1st Dep't 2010) (noting that only specific promises can establish the existence of a contract between a school and a student). While Bailey alleges that Defendants-Appellees breached assurances made in NYLS's Code of Conduct, website, and other communications, none of those statements contain discrete promises that give rise to a contractual

obligation on the part of Defendants-Appellees. In addition, even if certain statements in NYLS's Student Handbook were definite enough to create a contractual obligation, Bailey's allegations that Defendants-Appellees breached these provisions in mishandling the investigation into the assault are contradicted by the investigative report attached to the complaint. Again, we need not accept allegations in a complaint that are refuted by documents that are attached to it. *See Roth*, 489 F.3d at 511.

6. Section 1983

The district court did not err in dismissing Bailey's claim under 42 U.S.C. § 1983. To plead a claim under that statute, a plaintiff must allege that she was injured by a state actor or a private party acting under "the color of state law." *Ciambriello v. Nassau*, 292 F.3d 307, 323 (2d Cir. 2002). NYLS and its employees are all private parties. In determining whether a private party acts under the color of state law for § 1983 claims, "the fundamental question . . . is whether the private entity's challenged actions are fairly attributable to the state." *Fabrikant v. French*, 691 F.3d 193, 207 (2d Cir. 2012) (internal quotations omitted). Bailey alleges that NYLS acted under the color of state law because it was "compelled" to comply with Title IX to receive federal funding. But the mere fact that an entity receives public funding is insufficient to attribute its actions to the state. *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259, 268 (2d Cir. 2014). And although Bailey claims that Defendants-Appellees obstructed her access to a police investigation into the assault, she fails to allege that Defendants-Appellees performed the public function of the police such that they exercised a power traditionally reserved to the state. *See Sybalski v. Indep. Grp. Home Living Program, Inc.*, 546 F.3d 255, 259 (2d Cir. 2008) (per curiam). Moreover, the documents attached to the complaint demonstrate that she chose to delay

reporting the incident to the police for a reason unrelated to any alleged obstruction by Defendants-Appellees. Thus, the district court did not err in dismissing Bailey's § 1983 claim.

7. Intentional Infliction of Emotional Distress

The district court also appropriately dismissed Bailey's IIED claim. "Under New York law, . . . a claim for IIED requires a showing of: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." *Rich v. Fox News Network*, 939 F.3d 112, 122 (2d Cir. 2019) (internal quotation marks omitted). "[T]he standard of outrageous conduct is strict, rigorous and difficult to satisfy . . . ." *Id.* (internal quotation marks omitted). Bailey has failed to make this showing. She alleges that Defendants-Appellees expressed hostility toward her, lied to her, and mishandled the sexual assault investigation. But to plead an IIED claim, the challenged conduct must "go beyond all possible bounds of decency and . . . be regarded as atrocious and utterly intolerable in a civilized community." *Hughes v. Patrolmen's Benevolent Ass'n of City of N.Y., Inc.*, 850 F.2d 876, 883 (2d Cir. 1988) (internal quotation marks omitted). Here, Defendants-Appellees promptly investigated Bailey's complaint, offered her educational accommodations, and punished the other student. Those actions do not suffice to plead a claim for IIED

III. Bias

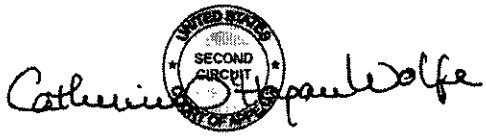
Finally, Bailey claims that the district court and magistrate judge were biased against her. Bailey first argues that the district court applied an impermissibly high standard of review to her complaints. But Bailey does not specifically point to any portion of the record that demonstrates that the district court applied the wrong standard. An adverse ruling, without more, is not

evidence of bias. *See Liteky v. United States*, 510 U.S. 540, 555 (1994).

Next, Bailey argues that the magistrate judge made inappropriate remarks at a settlement conference in July 2018. Bailey alleges that the magistrate judge stated that he would hold her in contempt, that he might "do or say something he regrets," that Bailey should "get a job," and that the district court judge would agree with him. Bailey also asserts that the magistrate judge complained that Bailey rejected fair settlement offers and that the settlement conference was too long. Even assuming that Bailey's account of the magistrate judge's comments is accurate, the statements do not provide a basis for vacatur of the district court's judgment or for the recusal of either judge. "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky*, 510 U.S. at 555. Such remarks only support a claim of bias if they stem from an extrajudicial source or have a "high degree of favoritism or antagonism as to make fair judgement impossible." *Id.* Here, the remarks at issue do not reach this high standard. As the Supreme Court has emphasized, "expressions of impatience, dissatisfaction, annoyance, and even anger" are "within the bounds" of acceptable conduct. *Id.* at 555–56.

We have considered all of Bailey's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THERESA BAILEY,

Plaintiff,

– against –

NEW YORK LAW SCHOOL, ANTHONY CROWELL, DAVID SCHOENBROD, ELLA MAE ESTRADA, and BARBARA GRAVES-POLLER,

Defendants.

OPINION AND ORDER

16 Civ. 4283 (ER)

Ramos, D.J.:

Pro se plaintiff Theresa Bailey ("Bailey") brings this action against New York Law School ("NYLS"), Anthony Crowell, David Schoenbrod, Ella Mae Estrada, and Barbara Graves-Poller (collectively, "Defendants"). Bailey alleges that NYLS engaged in allegedly misleading advertisements and marketing to induce minorities to attend NYLS and that Defendants retaliated against her for reporting a sexual harassment incident. Pending before this Court is Defendants' motion for summary judgment with respect to Bailey's Title IX and NYHRL retaliation claims against Defendants and New York General Business Law ("GBL") § 349 claim against NYLS pursuant to Federal Rule of Civil Procedure Rule 56.

For the following reasons, Defendants' motion for summary judgment is GRANTED.

I. FACTUAL BACKGROUND[1]

The Court presumes familiarity with the facts of this case, which are detailed in the

[1] The following facts are drawn in the light most favorable to the non-moving party, Bailey, from the Second Amended Complaint ("SAC") (Doc. 32), the Third Amended Complaint ("TAC") (Doc. 69), Defendant's Rule 56.1 Statement of Undisputed Material Facts ("Def.'s Stmt.") (Doc. 106), Bailey's Rule 56.1 Statement in Opposition

March 1, 2017 order ("March Order") and the December 27, 2017 order ("December Order"). Doc. 24, 58. It discusses here only those facts necessary for the disposition of the instant motion. The following facts are undisputed except where otherwise noted. Bailey is a 32-year-old woman of color who attended NYLS as an evening student from August 2012 until her graduation in May 2016. TAC ¶¶ 1-2. NYLS is a private law school located in New York, New York and a recipient of Title IX funds. *Id.* ¶ 7. The individual defendants are all affiliated with the School: Anthony Crowell is the School's Dean; Ella Mae Estrada was the Assistant Dean of Admissions and Financial Aid at all relevant times; both David Schoenbrod and Barbara Graves-Poller are law professors at NYLS. *Id.* ¶ 8; Def.'s Stmt ¶ 15.

a. The October 6, 2014 Incident[2]

Bailey's suit revolves around an incident that occurred on the campus of NYLS on October 6, 2014. That evening, Bailey encountered Stephen Nesbit, a white male student outside of the 3rd floor campus women's restroom. TAC Ex. B at 2. Nesbit allegedly trapped Bailey so that she could not pass, pushing her into a wall and sliding his body across hers. *Id.* Bailey was able to free herself, and when she turned to confront her attacker, she realized his pants were down and his butt and thighs were exposed. *Id.* According to Bailey, "His eyes were red and glazed over, he was drooling, his chest was rising and falling, he was clenching and unclenching his fists, and his shoulders were rounded in an aggressive posture." *Id.*

On October 7, 2014, Bailey reported the incident to NYLS. TAC Ex. A at 2. Three days later, on October 10, 2014, non-party Howard Meyers, the Chair of the Harassment and

("Pl.'s Stmt.") (Doc. 109), Defendant's Reply 56.1 Statement ("Def's Reply") (Doc. 110) and the parties' supporting submissions. Any citation to the parties' 56.1 Statements incorporates by reference the documents cited therein.

[2] Bailey, in her 56.1 statement, disputes Defendants' characterization of the incident and NYLS's investigation afterwards. Pl.'s Stmt ¶¶ 9-10. In response, Defendants point to the investigation report that is attached as Exhibit B to TAC. Def.'s Reply ¶¶ 9-10.

Discrimination Review Board at NYLS, convened an Investigation Panel consisting of non-party Jeffery Becherer, Assistant Dean for Career Planning, and non-party Erika Wood, Associate Professor of Law, to investigate the incident. TAC Ex. B at 1. After reviewing evidence, interviewing witnesses including Bailey, and speaking with School administrators, the Board imposed a number of sanctions against Nesbit targeted to limit his presence on campus, particularly at times when Bailey would also be there. *Id.* at 3-5. As adopted by NYLS, the Investigation Report concluded that Nesbit violated Section I.B.2 of the Non-Discrimination and Harassment Policy, which prohibits "subjecting an individual to humiliating, offensive, abusive or threatening conduct that creates intimidating, hostile or abusive work, residential or academic environment, . . . or unreasonably interferes with an individual's academic . . . performance *on the basis of the individual's Protected Classification.*" *Id.* at 1 (emphasis added). It also issued a number of sanctions against Nesbit, including: (1) prohibiting him from appearing on campus until January 11, 2015, and restricting his presence on campus thereafter to only his classes and co-curricular activities; (2) placing him on probation through his graduation at NYLS, meaning that any further Non-Discrimination and Harassment Policy violation would result in his immediate expulsion; (3) permitting him to enroll only in classes that met between 9:00 a.m. and 5:40 p.m., presumably because Bailey was a night student, thereby minimizing the likelihood that the two would come into contact; (4) preventing him from enrolling in any classes in which Bailey was enrolled; (5) requiring him to obtain approval of his schedule from the Assistant Dean for Academic Affairs; and (6) requiring him to attend a harassment training program. *Id.* Furthermore, following his graduation from NYLS, Nesbit would be permitted to appear on campus only to attend a bar review course, and upon completing the bar examination in July 2015, Nesbit would be prohibited from appearing on campus until Bailey graduated and

completed her bar examination. *Id.* Evidently dissatisfied with the outcome, Bailey later appealed the sanctions and moved for a hearing. Pl.'s Stmt ¶ 12. A hearing was later held before a neutral chairperson with no ties to NYLS or any other party. *Id.* Ever since the imposition of the sanctions, Nesbit has neither spoken nor made any physical contact with Bailey. *Id.* ¶ 13. In addition to the investigation and the hearing, NYLS also offered to tape Bailey's courses, to have a security guard escort Bailey to classes, to instruct Nesbit not to go on Bailey's preferred floor of the library, added security patrols in the evening when Bailey is on campus and postponed Bailey's constitutional law final exam. *Id.* ¶ 14. Bailey does not dispute that NYLS offered and made these accommodations, but only argues that she did not request them and never wanted to be in that position. *Id.*

b. Bailey's Attempt to Transfer

In light of the way NYLS handled the incident, Bailey decided to transfer to another law school. *Id.* ¶ 15. In April 2015, she wrote to Defendant Crowell, as well as several professors at the School, seeking assistance. TAC ¶ 29. Bailey also met with Crowell in June 2015, along with Ella Mae Estrada from the Admissions Office who was supposed to aid her transfer. *Id.* ¶ 30. At all relevant times, Estrada's position focused on the admission of new students and she had no prior experience providing transfer assistance. Def.'s Stmt ¶ 15; Doc. 105 ("Volpe's Decl.") Ex. 8 ("Estrada's Decl.") at 1. Later that day, Estrada met alone with Bailey and suggested that a spreadsheet tracking the soon approaching deadlines of her target law schools would be helpful. Estrada's Decl. at 2. Estrada subsequently prepared the spreadsheet and emailed it to Bailey on June 5, 2015. *Id.*; Volpe's Decl. Ex. 9[3]. In the email, Estrada indicated

[3]The Transfer Spreadsheet contains the relevant application deadlines of 16 law schools, their application fees and maximum number of units and whether they require full or part time attendance.

that she would review Bailey's personal statement over the weekend. *Id.* In their second meeting, Estrada went through Bailey's personal statement with her and made suggestions. Def.'s Stmt ¶ 17; Pl.'s Stmt ¶ 17; Pl.'s Stmt Ex. 3 ("Bailey's Dep.") at 170-71. Defendants assert that there was also a third meeting where Bailey indicated everything was fine. Def.'s Stmt 17. Bailey disputes that there were three meetings and denies that she ever indicated her well-being. Pl.'s Stmt ¶ 17.

In connection with her transfer process, Bailey also requested letters of recommendations from two NYLS professors, Professor Jeffery Haas and Professor Robert Blecker. TAC Ex. F at 5-6; Def.'s Stmt ¶ 19. Bailey received only one letter of recommendation from Professor Haas. Pl.'s Stmt ¶ 19; Def.'s Reply ¶ 19. Bailey ultimately did not transfer from NYLS.

c. Bailey's Fall 2015 Semester

Unable to transfer to another school, Bailey returned to NYLS for the fall 2015 semester. Pl.'s Stmt ¶ 20; Def.'s Stmt ¶ 20. That semester, Bailey received the worst grades of her law school career, including a D+ and an F.[4] TAC ¶¶ 33-37. Before October 2014, Bailey had also received a D + and C- in her Spring 2013 semester at NYLS, a C- in the subsequent Fall 2013 semester, and seven additional C grades from the School. Pl.'s Stmt ¶ 8; Def.'s Stmt ¶ 8. Bailey received the D + in Professor David Schoenbrod's Remedies class of 17 students based on an anonymously graded exam. Pl.'s Stmt ¶¶ 22-25; Def.'s Stmt ¶¶ 22-25. Prior to the semester, Schoenbrod had participated in NYLS's March 26, 2015 rehearing process concerning the October 6, 2014 Incident, which Bailey was aware of. *Id.* ¶ 20; TAC Ex. C at 1. During the semester, Schoenbrod inquired on one occasion after a class ended as to whether Bailey might

[4] In her deposition, Bailey stated that she received the F grade from a "Professor Filler" at NYLS and has no knowledge whether the F was retaliatory. Bailey's Dep. at 120-21. Bailey assert no claims against a "Professor Filler" in her pleadings and has made no allegation relating to Professor Filler other than the fact that she received the F grade. TAC ¶¶ 33-37.

also be dyslexic. Def.'s Reply ¶ 21. Bailey does not dispute that she was aware of the fact that Schoenbrod himself suffers from dyslexia, is forthcoming about it and had helped other students with dyslexia, but nevertheless argues that the inquiry is retaliatory. Pl.'s Stmt ¶ 21.

Defendants assert that the exam at issue was anonymously graded as NYLS students use only anonymous numerical identifiers on their responses on all exams. *Id.* ¶¶ 22-25. Bailey does not dispute that she used an anonymous numerical identifier and did not put her name down on the exam, but nevertheless disputes that the exam was truly anonymously graded on the basis that her grade was "arbitrarily" increased from a D initially to a D + by Schoenbrod after learning of Bailey's identity. Pl.'s Stmt ¶ 22; Bailey's Dep. at 115.

d. Bailey's Spring 2016 Semester

In her last semester at NYLS, Bailey enrolled in Professor Barbara Graves-Poller's Family Law course. Pl.'s Stmt ¶ 26; Def.'s Stmt ¶ 26. Bailey only participated in five or six classes before obtaining NYLS's permission to transfer to a pass/fail course that she ultimately passed. Pl.'s Stmt ¶¶ 27, 29; Def.'s Stmt ¶¶ 27, 29.

Defendants assert that Bailey actively sought out Graves-Poller's class because Graves-Poller likely had no knowledge of the October 6, 2014 incident and Bailey never told Graves-Poller about the incident during the semester. Def.'s Stmt ¶ 26. Bailey disputes that she sought out Graves-Poller's class and that Graves-Poller had no prior knowledge of the incident. Pl.'s Stmt ¶ 26. Defendants assert that Graves-Poller had called on Bailey some times when she volunteered to participate and had solicited responses from other students who did not volunteer in order to procure even class participation by students and to improve diversity in class conversations. Def.'s Stmt ¶ 28. Bailey admits that Graves-Poller had called on her several times and only disputes Graves-Poller's motivation behind her way of calling on students. Pl.'s

Stmt ¶ 28. Bailey also alleges that Graves-Poller failed to provide her with the necessary nameplate for attendance purposes and consistently marked her absent despite her presence for all the classes, which would have caused her to fail the course. TAC ¶ 39.

e. Marketing by NYLS

According to Bailey, NYLS publicized that it admitted more women than men between 2011 and 2014; filed five amicus briefs concerning discrimination against minority groups between 2012 and 2016; published a "Campus Safety Report" showing a lack of any serious misconduct on campus during the 2012 reporting period; lauded minority female students on its website; promoted social justice events that highlighted staff participation; partnered with the Courtroom Advocates Project, which assists victims of domestic violence through courtroom advocacy. SAC ¶¶ 42-46. NYLS also purportedly gave assurances that gender-based harassment and discrimination would not be tolerated and would be adequately adjudicated by NYLS. *Id.* ¶¶ 46, 52-53.

Contrary to the information contained in those marketing materials, however, Bailey asserts four instances of discrimination during her time at NYLS: a black female student reported a classmate for racist remarks; a black female complained about a professor's behavior towards her;[5] a Hispanic female student's books were stolen; and other female students previously reported Nesbit and he was kicked out of class by a female professor. SAC ¶ 48. In addition, Bailey alleges that she asked Crowell for help in finding employment, and was merely advised to contact Crowell's assistant and to consult the NYLS career center. TAC ¶ 29. Bailey claims that her treatment differed from the way Crowell allegedly treated two other male students. *Id.* ¶¶ 18, 20.

[5] Plaintiff does not further explain the content of this complaint.

II. PROCEDURAL BACKGROUND

On July 5, 2016, Bailey filed the first Amended Complaint against the defendants named in the original complaint: NYLS, Anthony Crowell, Deborah Archer, Howard Meyers, Jeffery Becherer, and Erika Wood. Doc. 17. As construed by this Court in the March Order, she asserted the following causes of action: (1) violation of Section 1983, (2) discrimination and retaliation under Title IX of the Education Amendments of 1972, (3) violation of New York GBL § 349, (4) breach of contract, (5) fraud, and (6) intentional infliction of emotional distress. *See* March Order at 9-22.

In the March Order, the Court permitted Bailey to proceed on her Title IX retaliation and GBL § 349 claims against NYLS, granted leave to re-plead her breach of contract and Title VI claims against NYLS, and granted leave to re-plead her fraud, intentional infliction of emotional distress, and Section 1985(3) claims against all defendants. *Id.* at 22. The Court denied all remaining claims with prejudice, including her Title IX claims against individual defendants, Title IX discrimination claim against NYLS, Section 1983 claims, and First Amendment claim. *Id.*

On March 21, 2017, Bailey requested leave to add Oral Hope and Victoria Eastus as defendants in her proposed SAC, which the Court granted on March 22, 2017. Doc. 29-31. On March 29, 2017, Bailey filed the SAC. Doc. 32. Without receiving prior consent from Defendants or approval from this Court, however, she also (1) named three additional individual defendants (Ella Mae Estrada, David Schoenbrod, and Barbara Graves-Poller); (2) asserted for the first time NYHRL claims; and (3) re-alleged the Title IX claims against individual Defendants and the Title IX discrimination claim against NYLS, which were previously dismissed with prejudice in the March Order. *Id.* Specifically, the SAC asserted the following

causes of actions: (1) violation of Title IX against all Defendants, (2) violation of NYHRL against all Defendants, (3) violation of GBL § 349 against NYLS, (4) breach of contract against NYLS, (5) fraud against all Defendants, (6) intentional infliction of emotional distress against all Defendants, (7) violation of Section 1985(3) against all Defendants, and (8) violation of Title VI against all Defendants. *Id.*

In the December Order, the Court permitted Bailey to amend her SAC to add NYHRL claims against NYLS, Crowell, Estrada, Graves-Poller and Schoenbrod. *See* December Order at 33. The Court then dismissed all of Bailey's claims with prejudice except: (1) Title IX retaliation claim against NYLS; (2) GBL § 349 claim against NYLS; and (3) NYHRL claims against NYLS, Crowell, Estrada, Graves-Poller and Schoenbrod. *Id.*

On January 16, 2018, the Court entered an order assigning this case to Magistrate Judge James L. Cott. Doc. 60. On February 13, 2018, Bailey filed the TAC. Doc. 69. On July 11, 2018, the parties appeared before Judge Cott for a conference, during which Judge Cott directed the parties to complete their document production by August 1, 2018 and warned them that they could not rely on documents not produced by them by the deadline. Doc. 84. On August 24, 2018, Defendants informed Judge Cott that Bailey stated in her cover letter attached to the documents she produced on August 1, 2018, that a complete record of evidence she relies on would be made available to Defendants by October 1, 2018. Doc. 90 at 1. On September 4, 2018, Defendants took Bailey's deposition. Doc. 90 at 2. Defendants then moved to preclude Bailey from relying upon documents she failed to provide by her deposition. *Id.* Judge Cott granted that motion. Doc. 93.

On September 19, 2018, Bailey informed the Court that she intended to file an objection to Judge Cott's Order, but could not do so because she was sick. Doc. 94. The Court granted her

an extension of time to object to Judge Cott's order to December 7, 2018. Doc. 97. Bailey filed her objection on December 7, 2018. Doc. 98. On January 9, 2019, the Court overruled Bailey's objection and affirmed Judge Cott's order in its entirety. Doc. 102.

Subsequently, Defendants filed their motion for summary judgment along with their memorandum of law ("Def.'s Mem.") (Doc. 104), Rule 56.1 statement (Doc. 106) and a sworn declaration by Defendants' counsel Michael J. Volpe (Doc. 105) in support thereof on January 18, 2019. Doc. 103. On February 20, 2019, Bailey filed her Rule 56.1 statement in opposition. Doc. 109. Defendants then filed their reply Rule 56.1 statement and memorandum of law ("Def.'s Reply Mem.") on March 7, 2019. Doc. 110, 111. As such, Defendants' motion to summary judgment has been fully briefed.

III. LEGAL STANDARD

A. Summary Judgment

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). "An issue of fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Senno v. Elmsford Union Free Sch. Dist.*, 812 F. Supp. 2d 454, 467 (S.D.N.Y. 2011) (citing *SCR Joint Venture L.P. v. Warshawsky*, 559 F.3d 133, 137 (2d Cir. 2009)). A fact is "material" if it might affect the outcome of the litigation under the governing law. *Id.* The party moving for summary judgment is first responsible for demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets its burden, "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *Saenger v. Montefiore Med. Ctr.*, 706 F.

Supp. 2d 494, 504 (S.D.N.Y. 2010) (internal quotation marks omitted) (citing *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008)).

In deciding a motion for summary judgment, the Court must "'construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant.'" *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011) (quoting *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 126 (2d Cir. 2004)). However, in opposing a motion for summary judgment, the non-moving party may not rely on unsupported assertions, conjecture or surmise. *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995). To defeat a motion for summary judgment, "the non-moving party must set forth significant, probative evidence on which a reasonable fact-finder could decide in its favor." *Senno*, 812 F. Supp. 2d at 467–68 (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 256–57 (1986)).

B. *Pro Se* Plaintiff

The Court holds submissions by *pro* se litigants to "less stringent standards than formal pleadings drafted by lawyers," *Ferran v. Town of Nassau*, 11 F.3d 21, 22 (2d Cir. 1993) (quoting *Hughes v. Rowe*, 449 U.S. 5, 9, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980)), and is obligated to liberally construe their pleadings "to raise the strongest arguments that they suggest." McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999) (citations omitted). However, *pro se* status "does not exempt a party from compliance with relevant rules of procedural and substantive law." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 477 (2d Cir. 2006) (quoting *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983)). Nor does Rule 56 "'impose an obligation on a district court to perform an independent review of the record to find proof of a factual dispute,'" even where the non-moving party is *pro se*. *Charles v. City of New York*, No. 07 CIV. 2782 (RJS) (GWG), 2011

WL 2936428, at *5 (S.D.N.Y. July 22, 2011) (quoting *Amnesty Am. v. Town of W. Hartford*, 288 F.3d 467, 470 (2d Cir. 2002)).

IV. DISCUSSION

Preliminarily, the Court notes that Defendants rely primarily on *Avillan v. Donahoe*, No. 13 Civ. 509 (PAE), 2015 WL 728169, at *6 (S.D.N.Y. Feb. 19, 2015) to contend that Bailey's failure to submit a memorandum of law in compliance with Local Civil Rule 7.1[6] of this district alone warrants granting Defendants' motion for summary judgment. *See* Def.'s Reply Mem. at 1-2. Alternatively, Defendants contend that Bailey's failure to bolster her Rule 56.1 statement with any admissible evidence also warrants dismissal. However, unlike the plaintiff in *Avillan*, Bailey is proceeding *pro se* in this action. When a *pro se* litigant is present, the same standards for summary judgment operate, but the *pro se* litigant is afforded "special latitude" in opposing a summary judgment motion. *Knowles v. N.Y. City Dep't of Corr.*, 904 F.Supp.217, 220 (S.D.N.Y. 1995); *see also Graham v. Lewinski*, 848 F.2d 342, 344 (2d Cir. 1988) (Same). A district court has broad discretion to decide whether to overlook a party's failure to comply with local rules. *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 73 (2d Cir. 2001) (citations omitted). Therefore, given Bailey's *pro se* status, the Court will exercise its broad discretion to overlook this defect and conduct a review of the record and both parties' submissions in connection with the instant motion to reach its decision.

A. Bailey's Retaliation Claims

"[R]etaliation against individuals because they complain of sex discrimination is 'intentional discrimination that violates the clear terms of [Title IX].'" *Jackson v. Birmingham*

[6] Under Local Civil Rule 7.1, all motions and oppositions thereto shall include, *inter alia*, "[a] memorandum of law, setting forth the cases and other authorities relied upon in support of the motion." *Id.*

Bd. Of Educ., 544 U.S. 167, 183, 125 S.Ct. 1497, 161 L. Ed..2d 361 (2005) (quoting *Davis v. Monroe Cnty. Bd. Of Educ.*, 526 U.S. at 642). To establish a retaliation claim under Title IX, a plaintiff must first establish a *prima facie* case by showing: (1) plaintiff engaged in protected activity; (2) defendant's knowledge of the protected activity; (3) adverse school-related action; (4) the protected activity and the adverse action are causally related. *Papelino v. Albany Coll. Of Pharmacy of Union Univ.*, 633 F.3d 81, 91 (2d Cir. 2011) (citation omitted). At the summary judgment stage, if a plaintiff produces the minimally required evidence to support the elements of the retaliation claim, the burden of production then goes to the defendant to provide a "legitimate, nondiscriminatory reason" for its actions. *Id.* at 92 (explaining that burden-shifting framework under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), applies to Title IX retaliation claims); *see also Kaytor v. Electric Boat Corp.*, 609 F.3d 537, 552 (2d Cir. 2010). If the defendant satisfies its burden, then the burden goes back to the plaintiff to show that that purported reason is "pretextual". *Papelino*, 633 F.3d at 92.

To establish a *prima facie* case of retaliation, a plaintiff must show that a reasonable person would have deemed the defendant's action "materially adverse," which means that it could have discouraged a reasonable person from making a complaint. *Williams v. Columbia Univ.*, No. 11 Civ. 8621 (WHP), 2012 WL 3879895, at *3 (S.D.N.Y. Aug. 28, 2012) (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)); *see also Papelino*, 633 F.3d at 91. The anti-retaliation law safeguards an individual not from all retaliation, but from retaliation that results in an injury or harm. *See Fincher v. Depository Trust and Clearing Corp.*, 604 F.3d 712, 721 (2d Cir. 2010) (quoting *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68, 126 S.Ct. 2405). Further, while a causal connection can be inferred from a close temporal gap between the protected activity and the adverse action, courts

in this Circuit have found a temporal gap of three to five months alone insufficient to permit such inference. *Shalom v. Hunter Coll.*, 645 Fed. App'x. 60, 63 (2d Cir. 2016) (concluding that a five-month lapse between the protected activity and the adverse action required more to establish a causal connection); *see also Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 85-86 (2d Cir. 1990) (concluding the same for a three-month gap). Defendants contend that there is simply no evidence in the record that Defendants took any materially adverse action against Bailey. Def.'s Reply Mem. at 3-8. The Court agrees.

First, Bailey has not established that the transfer assistance that she received was retaliatory. It is indisputable that Estrada met with Bailey on at least two occasions. During those occasions, Estrada provided her with a spreadsheet tracking the application deadlines for her target schools and reviewed and made suggestions regarding Bailey's personal statement. While Estrada admittedly lacks experience in providing transfer assistance, Bailey does not allege that any individual at NYLS either has more experience in providing such assistance or has received more transfer assistance that she did. Furthermore, Bailey admits that that Professor Blecker's refusal to write a letter of recommendation was neither "discriminatory [n]or retaliatory." TAC Ex. F at 6. In Bailey's own words, Professor Blecker politely refused to write a letter of recommendation for Bailey because he was also Bailey's advisor during the previous investigation of the October 6, 2014 Incident. *Id.*

Second, Bailey fails to show that Schoenbrod took any retaliatory action. It is indisputable that Schoenbrod increased Bailey's grade from a D- to a D + after learning her identity. Def.'s Stmt ¶ 22; Pl.'s Stmt 22. Bailey's unsworn and unsupported argument that this fact alone contradicts Defendants' assertion that exam was graded anonymously is simply meritless, especially given her sworn testimony that she used an anonymous identifier and did

not put down her name on the exam. *Id.*; Bailey's Dep. at 115. Bailey's assertion that Schoenbrod's single inquiry regarding dyslexia is retaliatory is unavailing in light of her admission that she was aware of Schoenbrod's own dyslexia and his efforts to help similarly affected students. Pl.'s Stmt ¶ 21. In any event, Bailey evidently does not dispute Defendants' legitimate, non-retaliatory reason that Bailey performed poorly on the exam by answering half of the multiple-choice questions incorrectly and providing incomplete answers to the essay questions. *Id.* ¶ 22.

Bailey's claims relating to Graves-Poller are similarly unavailing. Bailey only enrolled in Graves-Poller's class well over a year after her protected activity. Additionally, the record contains no evidence to show that Graves-Poller's alleged treatment of Bailey had any adverse or negative effect on Bailey. In fact, NYLS granted her special permission to transfer to another class that she passed and that Bailey's transcript contains no record of Graves-Poller's class or Bailey's grade in that class. Def.'s Stmt ¶ 29; Pl.'s Stmt ¶ 29.

Therefore, Bailey has failed to show that Defendants took any retaliatory action against her. Accordingly, the Court grants Defendants' motion for summary judgment on Bailey's Title IX retaliation claim.

The Second Circuit has held that NYHRL claims are evaluated under the same standard as analogous claims under Title IX. *See Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 n. 1 (2d Cir. 2000); *see also T.P. ex rel. Patterson v. Elmsford Union Free Sch. Dist.*, No. 11 Civ. 5133 (VB), 2012 WL 860367, at *9 (S.D.N.Y. Feb. 27, 2012) (finding that plaintiff adequately pleaded a claim for retaliation under NYHRL because the Court has found that plaintiff stated a claim for Title IX retaliation). As a result of the December Order, Bailey's only remaining NYHRL claims are a retaliation claim under NYHRL Section 296(7) against NYLS and that the

individual Defendants improperly aided and abetted NYLS's retaliation in violation of NYHRL Section 296(6). *See* December Order at 32-33. Accordingly, for the same reasons as stated above, the Court grants Defendants' motion for summary judgment on Bailey's NYHRL claims.

B. Bailey's GBL § 349 Claim

As the Court previously noted in its March Order, GBL § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." N.Y. Gen. Bus. Law § 349(a). In order to state a prima facie case under GBL § 349, a plaintiff must show that (1) Defendants engaged in an act or practice that is deceptive or misleading in a material way; (2) she was injured by reason thereof; and (3) the deceptive act or practice is "consumer oriented." *Hutter v. Countrywide Bank, N.A.*, No. 09 Civ. 10092 (NSR), 2015 Wl 5439086 at *6 (S.D.N.Y. Sept. 14, 2015) (citing *Maurizio v. Goldsmith*, 230 F.3d 518, 521 (2d Cir. 2000) (internal citations omitted)). A "deceptive act or practice" is a representation or omission "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Gaidon v. Guardian Life Ins. Co. of Am.*, 725 N.E.2d 598, 604 (N.Y. 1999) (quoting *Karlin v. IVF Am., Inc.*, 712 N.E.2d 662, 668 (N.Y. 1999)). Defendants contend that Bailey's GBL § 349 claim must fail because she has not offered any admissible evidence, except her own unsupported assertions, that identify a single publication by NYLS with any reasonable detail, much less to show that they are misleading in any way. The Court agrees.

Here, Bailey fails to provide any evidence to establish a deceptive act or practice. Bailey asserts that NYLS's representations in its website, admission statistics, amicus briefs, Campus Security Reports, and its promotional materials relating to social justice events are misleading. SAC ¶ 42-46. However, the Court notes, based on a review of the entire record, that Bailey has not produced a single document that reasonably identifies any of the allegedly misleading

publications by NYLS. Bailey also failed to identify them at her deposition with any level of detail. *See* Bailey's Dep. at 183-88. On the other hand, Defendants have produced sworn declarations by Estrada and non-party Victoria Eastus, a current NYLS law professor and former director of academic affairs, that NYLS accurately reports its admission statistics and its crime statistics. Estrada's Decl.; Volpe's Decl. Ex. 5. Additionally, Defendants have attached relevant excerpts from NYLS's campus security reports for the 2010-2011 and 2012-2013 reporting cycles that contain several reports of stolen books. Volpe's Decl. Ex. 14. As Judge Cott ordered and this Court affirmed, Bailey is precluded from producing any additional evidence that she intends to rely on. Doc. 93. As such, the Court is left with Bailey's unsupported and unsworn assertions in her pleadings and cannot properly review her GBL §349 claim against Defendants' motion for summary judgment well-supported by evidence. Accordingly, the Court grants Defendants' motion for summary judgment on Bailey's GBL §349 claim. *See e.g.*, *Crawford v. Franklin Credit Mgmt. Corp.*, 758 F.3d 473, 490 (2d Cir. 2014); *see also Hutter v. Countrywide Bank*, N.A., 710 F. App'x. 25, 27 (2d Cir. 2018).

V. CONCLUSION

For the aforementioned reasons, Defendants' motion for summary judgment is GRANTED. The Clerk of the Court is respectfully directed to terminate the motion, Doc. 103, and close the case.

It is SO ORDERED.

Dated: September 24, 2019
New York, New York

Edgardo Ramos, U.S.D.J.

S.D.N.Y.-N.Y.C.
16-cv-4283
Ramos, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of March, two thousand nineteen.

Present:

Rosemary S. Pooler,
Denny Chin,
Circuit Judges,
Eric N. Vitaliano,*
District Judge.

Theresa Bailey,

Plaintiff-Appellant,

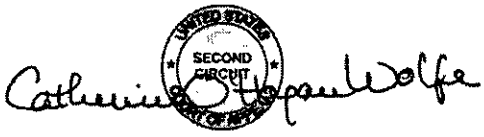
v. 18-252

New York Law School, Anthony Crowell, Jeffery Becherer, Deborah Nicole Archer, Howard Meyers, Erika Wood, Oral Hope, Victoria Eastus, Ella Mae Estrada, David Schoenbrod, Barbara Jeane Graves-Poller,

Defendants-Appellees.

Appellant, pro se, moves for free transcripts. We have determined nostra sponte that this Court lacks jurisdiction over this appeal because the district court has not issued a final order as 28 U.S.C. § 1291 requires for us to acquire jurisdiction. *See Petrello v. White*, 533 F.3d 110, 113 (2d Cir. 2008); *Ruffolo v. Oppenheimer & Co.*, 949 F.2d 33, 36 (2d Cir. 1991). Upon due consideration, it is hereby ORDERED that the appeal is DISMISSED. It is further ORDERED that Appellant's motion is DENIED as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



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* Judge Eric N. Vitaliano, United States District Court for the Eastern District of New York, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THERESA BAILEY,

Plaintiff,

– against –

NEW YORK LAW SCHOOL, ANTHONY CROWELL, DAVID SCHOENBROD, ELLA MAE ESTRADA, and BARBARA GRAVES-POLLER,

Defendants.

OPINION AND ORDER

16 Civ. 4283 (ER)

Ramos, D.J.:

In this case, Plaintiff Theresa Bailey, proceeding *pro se*, alleges that the defendants, New York Law School and members of its faculty, failed to adequately respond to her report of a sexual attack committed by another student and retaliated against her for reporting the attack. On July 11, 2018, the parties appeared before Magistrate Judge Cott for a conference to address certain discovery disputes. Doc. 88. At that conference, Judge Cott instructed the parties that they must complete their document production by August 1, 2018, and that they could not rely on documents not produced by them by the deadline. Doc. 88 17:4–11; 3:3–15. On August 24, 2018, Defendants informed Judge Cott that, in her cover letter attached to the documents she produced on August 1st, Plaintiff informed Defendants that those documents do not "contain the entire universe of facts and evidence on which [she] relies[,] but a complete record of such evidence will be made available to [Defendants] no later than the October 1, 2018 deadline [for the close of discovery]." Doc. 90 at 1; *id.* Ex. B at 1. Bailey was deposed on September 4, 2018. Doc. 90 at 2. Defendants thus moved for an order precluding Bailey from relying upon any

documents she failed to provide to them by the date of her scheduled deposition. *Id.* Judge Cott granted that motion. Doc. 93.

On September 19, 2018, Bailey informed the Court that she intended to file an objection to Judge Cott's order, but could not do so within the 14-day window under Rule 72(a) of the Federal Rules of Civil Procedure because she was sick. Doc. 94. The Court thus granted her an extension of her time to object to Judge Cott's order to December 7, 2018. Doc. 97. Bailey electronically filed an objection on December 7, 2018, but made her objections viewable only to court staff, not the public. Doc. 98. As a result, Defendants did not receive her objections. Upon order of the Court, the Clerk of the Court made Bailey's objections publicly viewable on January 7, 2019. Doc. 101.

When a party files an objection to a magistrate judge's order on a non-dispositive mater, the district judge reviewing the order must "modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a). Discovery matters are generally considered non-dispositive. *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990). An order is clearly erroneous when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Palmer v. Reader's Digest Ass'n, Inc.*, 1995 WL 686737, at *1 (S.D.N.Y. Nov. 20, 1995) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)); *see also Khaldei v. Kaspiev*, 961 F. Supp. 2d 572, 575 (S.D.N.Y. 2013). And it is contrary to law when "it fails to apply or misapplies relevant statutes, case law or rules of procedure." *Khaldei*, 961 F. Supp. 2d at 575. This is a heavy burden for the objector, especially in the context of discovery disputes. *U2 Home Entm't, Inc. v. Hong Wei Int'l Trading Inc.*, 2007 WL 2327068, at *1 (S.D.N.Y. Aug. 13, 2007).

Judge Cott's order was not contrary to law. The law grants district courts wide latitude to sanction parties for failing to obey discovery orders and deadlines, *see* Fed. R. Civ. P. 37(b)(2), latitude that includes the action taken here, precluding Bailey from relying on documents about which Defendants had no chance to depose her. Nor was it clearly erroneous. Judge Cott made it clear to the parties, and the parties agreed, that document production had to be completed by August 1, 2018, even if the deadline for the completion of all discovery was extended to October 1, 2018. *See* Doc. 88, 17:4–15, 32:4–11. It was reasonable for Judge Cott to preclude Bailey from relying on any documents that Bailey failed to submit by her deposition, weeks after the clear discovery deadline he put in place. Indeed, in her objection to Judge Cott's order, Bailey accuses Judge Cott of exhibiting prejudicial and biased behavior towards her during the discovery process,[1] but does not identify any deficiencies with the merits of Judge Cott's order.

For the foregoing reasons, Bailey's objection is overruled and Magistrate Judge Cott's order, Doc. 93, is affirmed in its entirety.

SO ORDERED.

Dated: January 9, 2019
New York, New York

Edgardo Ramos, D.J.

[1] On October 16, 2018, Bailey sent a letter complaining of misconduct by Judge Cott to the Judicial Council of the Second Circuit. Doc. 98 Ex. A.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THERESA BAILEY,

Plaintiff,

– against –

NEW YORK LAW SCHOOL, ANTHONY CROWELL, DEBORAH ARCHER, HOWARD MEYERS, JEFFERY BECHERER, ERIKA WOOD, ORAL HOPE, VICTORA EASTUS, DAVID SCHOENBROD, ELLA MAE ESTRADA, and BARBARA GRAVES-POLLER,

Defendants.

OPINION AND ORDER

16 Civ. 4283 (ER)

Ramos, D.J.:

Pro se plaintiff Theresa Bailey ("Plaintiff") brings this action against New York Law School ("NYLS"), Anthony Crowell, Deborah Archer, Howard Meyers, Jeffery Becherer, Erika Wood, Oral Hope, Victoria Eastus, David Schoenbrod, Ella Mae Estrada, and Barbara Graves-Poller (collectively, "Defendants"). Before this Court are (1) Plaintiff's motion to amend the Second Amended Complaint ("SAC") pursuant to Federal Rule of Civil Procedure 15; and (2) Defendants' partial motion to dismiss the SAC pursuant to Rule 12(b)(6).

For the following reasons, Plaintiff's motion to amend is GRANTED in part and DENIED in part, and Defendants' motion to dismiss is GRANTED in part and DENIED in part.

I. BACKGROUND

The Court presumes familiarity with the facts and procedural history of this case, which are detailed in the March 1, 2017 order ("March Order"), Doc. 24, granting in part and denying in part Defendants' motion to dismiss the First Amended Complaint ("FAC"). It discusses here

only those facts necessary for the disposition of the instant motions.

A. Defendants' Motion to Dismiss the First Amended Complaint

On July 5, 2016, Plaintiff filed the FAC against the defendants named in the original complaint: NYLS, Anthony Crowell, Deborah Archer, Howard Meyers, Jeffery Becherer, and Erika Wood. Doc. 17. As construed by this Court in the March Order, she asserted the following causes of action: (1) violation of Section 1983, (2) discrimination and retaliation under Title IX of the Education Amendments of 1972, (3) violation of New York General Business Law ("GBL") Section 349, (4) breach of contract, (5) fraud, and (6) intentional infliction of emotional distress. *See* March Order at 9-22.

On August 8, 2016, Defendants filed a motion to dismiss the FAC in its entirety. Doc. 19. Plaintiff filed her opposition brief on September 1, 2016 in which she asserted for the first time new claims under the First Amendment, 42 U.S.C. § 1985(3), and Title VI of the Civil Rights Act of 1964. Doc. 21.

In the March Order, the Court permitted Plaintiff to proceed on her Title IX retaliation and GBL Section 349 claims against NYLS, granted leave to re-plead her breach of contract and Title VI claims against NYLS, and granted leave to re-plead her fraud, intentional infliction of emotional distress, and Section 1985(3) claims against all Defendants. *Id.* at 22. The Court denied all remaining claims with prejudice, including her Title IX claims against individual Defendants, Title IX discrimination claim against NYLS, Section 1983 claims, and First Amendment claim. *Id.*

B. Second Amended Complaint[1]

On March 21, 2017, Plaintiff requested leave to add Oral Hope and Victoria Eastus as defendants in her proposed SAC, which the Court granted on March 22, 2017. Docs. 29-31. On March 29, 2017, Plaintiff filed the SAC. Doc. 32. Without receiving prior consent from Defendants or approval from this Court, however, she also (1) named three additional individual defendants (Ella Mae Estrada, David Schoenbrod, and Barbara Graves-Poller); (2) asserted for the first time New York State Human Rights Law ("NYHRL") claims; and (3) re-alleged the Title IX claims against individual Defendants and the Title IX discrimination claim against NYLS, which were previously dismissed with prejudice in the March Order. *Id.* Specifically, the SAC asserts the following causes of actions: (1) violation of Title IX against all Defendants, (2) violation of NYHRL against all Defendants, (3) violation of GBL Section 349 against NYLS, (4) breach of contract against NYLS, (5) fraud against all Defendants, (6) intentional infliction of emotional distress against all Defendants, (7) violation of Section 1985(3) against all Defendants, and (8) violation of Title VI against all Defendants. *Id.*

The core of Plaintiff's allegations in the SAC are the same as in her FAC: that on October 6, 2014, a male student at NYLS named Stephen Nesbit ("Nesbit") sexually assaulted her on campus; that Defendants purportedly failed to adequately investigate the incident or discipline Nesbit; and that Defendants retaliated against Plaintiff for reporting the attack. *Id.* ¶¶ 7-12. The SAC alleges the following facts.

1. Marketing by NYLS

Plaintiff alleges that NYLS marketed itself to prospective students as "an oasis for

[1] The following facts are drawn from allegations contained in the SAC, Doc. 32, which the Court accepts as true for purposes of the instant motion, and documents attached to the SAC. *See New York Pet Welfare Ass'n, Inc. v. City of New York*, 850 F.3d 79, 86 (2d Cir. 2017) (citation omitted).

women and minorities." *Id.* ¶ 51. NYLS publicized that it admitted more women than men between 2011 and 2014; filed five amicus briefs concerning discrimination against minority groups between 2012 and 2016; published a "Campus Safety Report" showing a lack of any serious misconduct on campus during the 2012 reporting period; lauded minority female students on its website; promoted social justice events that highlighted staff participation; partnered with the Courtroom Advocates Project, which assists victims of domestic violence through courtroom advocacy; and noted in its Code of Conduct and Student Handbook that it was committed to complying with Title IX. *Id.* ¶¶ 42-46. NYLS also purportedly gave assurances that gender-based harassment and discrimination would not be tolerated and would be adequately adjudicated by NYLS. *Id.* ¶¶ 46, 52-53.

Contrary to the information contained in those marketing materials, however, Plaintiff learned of four specific instances of discrimination when she became a student: a black female student reported a classmate for racist remarks; a black female complained about a professor's behavior towards her;[2] a Hispanic female student's books were stolen; and other female students previously reported Nesbit and he was kicked out of class by a female professor. *Id.* ¶ 48. In addition, the SAC notes that NYLS did not disclose statistics concerning the number and nature of the complaints by students who suffered discrimination, and Plaintiff claims that such information would have been relevant to deciding if she wanted to attend a law school and "if [NYLS is] worth more than $200,000." *Id.* ¶ 49.

2. Alleged Contractual Provisions

Plaintiff further alleges that NYLS made the following representations in either the Code of Conduct, the 2012-2013 Student Handbook or in its admissions letter to her:

[2] Plaintiff does not further explain the content of this complaint.

- NYLS "does not discriminate on the basis of . . . any other classification protected by federal, state, and local law, in the administration of any of its educational programs and activities." *Id.* ¶ 71 (NYLS's non-discrimination policy).

- "Conduct for which disciplinary action may be taken shall include . . . intentionally [or] . . . recklessly . . . attempting . . . or threatening . . . [to] injur[e] members of the Law School . . . [or to] [w]rongfully depriv[e] members . . . of services or opportunities." *Id.* ¶ 62 (2012-2013 Student Handbook Section 1(B)).

- "All New York Law School personnel and students are expected and encouraged to report, and to cooperate in the investigation and [h]earing of, possible violations." *Id.* ¶ 65 (2012-2013 Student Handbook Section 3(A)).

- "Refusal by any student to participate as a witness may be considered a violation of section 3F of this Code." *Id.* ¶ 67 (2012-2013 Student Handbook Section 4(C)).

- "The Fact Finder is responsible for gathering and presenting information in an impartial and thorough manner," and the investigation and the Investigation Panel "should be impartial and thorough." *Id.* ¶¶ 63, 66 (2012-2013 Student Handbook Section 2(3)).

- "The Investigation Panel shall review the report of the Fact Finder and any relevant written materials." *Id.* ¶ 66 (2012-2013 Student Handbook Section 3(D)).

- Dean Anthony Crowell "may take action to deal with situations of an emergency nature posing a threat to the safety or health of the Law School." *Id.* ¶ 59 (2012-2013 Student Handbook Section 1(C)(3)).

- Dean Anthony Crowell "may meet with the Student [at his or her request] to consider reasons why the report of the Panel should or should not be adopted before the Dean makes a determination." *Id.* ¶ 68 (2012-2013 Student Handbook Section 5(C)).

- "No seriously impaired individual should be allowed to leave the Law School premises by him/herself." *Id.* ¶ 69 (2012-2013 Student Handbook at 32).[3]

- "New York Law School is committed to providing you with the best tools available . . . [T]he benefits of your education will be substantial . . . [W]e look forward to making your education as rewarding as possible . . . [C]all, or write to [Crowell] via e-mail." *Id.* ¶ 56 (Admissions Letter from Crowell).

[3] Plaintiff claims that NYLS violated this provision because even though Nesbit was intoxicated on August 28, 2014, and had no recollection of being on campus on October 6, 2014, NYLS threw him out of campus without an escort. *Id.* ¶ 69.

3. Alleged Improper Handling of Plaintiff's Report

Plaintiff alleges that she reported the October 6, 2014 incident to Oral Hope, the Assistant Dean and Registrar, and Victoria Eastus, Assistant Dean of Academic Affairs and the Title IX Coordinator, on October 7, 2014. *Id.* ¶¶ 3, 20-21, 65. However, they allegedly failed to adequately assist Plaintiff. *Id.* ¶¶ 17, 19-22, 28, 76-78, 81, 92. Specifically, in various conversations between October 7 and October 22, 2014, Hope declined to answer whether the surveillance cameras in the hall where the incident took place were working, what the campus security protocol was for such incidents, and why security did not come for her after she was escorted to her classroom by another male student. *Id.* ¶¶ 19, 77. Instead, he simply responded that Nesbit was no longer on campus. *Id.* During conversations she had with Eastus in that same time period, Eastus answered that Nesbit was "good" and "well-liked" in response to Plaintiff's questions concerning whether she was targeted by Nesbit because she was a woman. *Id.* ¶¶ 20, 76.

Plaintiff alleges that notwithstanding their responses to her inquiries, Hope and Eastus had access to information that they did not share with her showing that Nesbit had previously targeted women on campus, and that these women reported the incidents. *Id.* ¶¶ 21-22, 78. Instead, Eastus allegedly stated that NYLS had not received other complaints about Nesbit. *Id.* ¶ 76. Plaintiff states that had she known about the other complaints, she would have concluded that NYLS was not competent to handle her complaint, and reported Nesbit to the police. *Id.* ¶ 78.

Four days after the incident, on October 10, 2014, Meyers, the Chair of the Harassment and Discrimination Review Board at NYLS, convened an Investigation Panel consisting of Becherer, Assistant Dean for Career Planning, and Wood, Associate Professor of Law, to

investigate the incident. SAC Ex. B ("Investigation Report") at 1. The Investigation Panel interviewed Plaintiff on October 20, 2014[4] and November 5, 2014. *Id.* at 3.

On October 26, 2014, prior to the issuance of the Investigation Report, Plaintiff sent Crowell, the Dean, and Archer, the Dean of Diversity & Inclusion and Director of the Racial Justice Project, an email concerning the incident and NYLS's alleged mishandling of her complaint. SAC ¶¶ 3, 24; SAC Ex. A ("May 3, 2016 Email") at 5. This email was considered her "formal written complaint." Investigation Report at 1; SAC Ex. C at 2. In her email to Crowell and Archer, Plaintiff stated, *inter alia*, that NYLS personnel had acted improperly after she reported Nesbit's harassment. *See* SAC Ex. F. She alleges that Crowell never responded to the email, and that when she met with Archer to discuss it, she was "oppositional, abrasive, hostile, and defensive." SAC ¶¶ 25-26, 57. Plaintiff then contrasts how she was treated by Crowell with the way he treated two male NYLS students. *Id.* ¶ 26. She notes that after a white male student was "found sleeping in the school after hours," Crowell personally hired him for an NYLS work-study position in which he reported directly to Crowell. *Id.* ¶¶ 26, 58. Crowell also recommended another male student, with a grade point average below 2.5, for a legal job upon request. *Id.* ¶¶ 26, 60. Moreover, Crowell did not meet with Plaintiff about her concerns, but he did meet with Nesbit. *Id.* ¶ 82.

As part of the investigation, the Investigation Panel reviewed Plaintiff's written complaint; a report from a security officer; security camera footage; interviews with Plaintiff, Nesbit and a witness to the incident; and conversations with certain school administrators. Investigation Report at 2. On November 25, 2014, NYLS adopted the Investigation Panel's

[4] In the meantime, on October 20, 2014, Plaintiff also reported the incident to the police. SAC Ex. F at 3. According to Plaintiff, the police informed her that she had reported the incident too late, and that she should consult an attorney. SAC Ex. C at 2.

findings and recommendations. *See id.*; May 3, 2016 Email at 5. As adopted by NYLS, the Investigation Report concluded that Nesbit violated Section I.B.2 of the Non-Discrimination and Harassment Policy, which prohibits "subjecting an individual to humiliating, offensive, abusive or threatening conduct that creates intimidating, hostile or abusive work, residential or academic environment, . . . or unreasonably interferes with an individual's academic . . . performance *on the basis of the individual's Protected Classification.*" Investigation Report at 1 (emphasis added). It also issued a number of sanctions against Nesbit, including: (1) prohibiting him from appearing on campus until January 11, 2015, and restricting his presence on campus thereafter to only his classes and co-curricular activities; (2) placing him on probation through his graduation at NYLS, meaning that any further Non-Discrimination and Harassment Policy violation would result in his immediate expulsion; (3) permitting him to enroll only in classes that met between 9:00 a.m. and 5:40 p.m., presumably because Plaintiff was a night student, thereby minimizing the likelihood that the two would come into contact; (4) preventing him from enrolling in any classes in which Plaintiff was enrolled; (5) requiring him to obtain approval of his schedule from the Assistant Dean for Academic Affairs; and (6) requiring him to attend a harassment training program. *Id.* at 4-5. Furthermore, following his graduation from NYLS, Nesbit would be permitted to appear on campus only to attend a bar review course, and upon completing the bar examination in July 2015, Nesbit would be prohibited from appearing on campus until Plaintiff graduated and completed her bar examination. *Id.* at 5.

Despite the findings in her favor, Plaintiff disagreed with the Investigation Panel's recommendation, and moved for a rehearing. SAC Ex. C at 2. The rehearing was initially scheduled for March 19, 2015, but was rescheduled because Nesbit failed to appear. *Id.* On March 26, 2015, the rehearing was held. *Id.* Although Plaintiff does not describe the results in

detail, it appears that NYLS did not change its decision and allowed Nesbit to graduate from NYLS. May 3, 2016 Email at 3, 5; SAC ¶ 25.

Plaintiff claims that the investigation and the hearing were inadequate. Specifically, Plaintiff objects that NYLS wrongfully allowed the male student who had witnessed the incident to refuse to testify at the hearing, and failed to resolve whether there was staff misconduct during the investigation. SAC ¶¶ 18, 67. Moreover, Nesbit claimed to NYLS that he did not abuse alcohol and did not commit any misconduct on campus against other females. *Id.* ¶¶ 18, 63, 64, 67. Although NYLS had written complaints that showed Nesbit's statements to be false, NYLS allegedly accepted his testimony.[5] *Id.*

4. Retaliation

Plaintiff allegedly faced retaliation for reporting the incident, such as receiving a failing grade in Professor Barbara Graves-Poller's Family Law class, and receiving a D + in Professor David Schoenbrod's Remedies class. *Id.* ¶¶ 34-36. Plaintiff states that Graves-Poller had "personal disdain" for her, ignoring Plaintiff when she raised her hand even though Graves-Poller was "begging" students to participate and the other African-American female students seldom raised their hands.[6] *Id.* ¶ 35; May 3, 2016 Email at 1-2. She also failed to provide Plaintiff with a nameplate and ignored Plaintiff's requests for a nameplate. May 3, 2016 Email at 1. Graves-Poller also allegedly once mischaracterized Plaintiff's answer in class.[7] *Id.* at 2. Plaintiff was the only one in the class that was treated in this manner. *Id.* at 1-2. Because of

[5] The Court notes that, in apparent tension with Plaintiff's assertions, the Investigation Report, which is included as an attachment to the SAC, states that there were two other complaints involving female students, and that Nesbit was "intoxicated" on the date of the first incident, August 28, 2014, and "under the influence of prescription medication" on the date of the second incident, October 6, 2014. Investigation Report at 1, 3-4.

[6] Plaintiff does not specify whether the alleged disdain Graves-Poller harbored towards her pre-dated the incident.

[7] Plaintiff answered in class that a particular case's holding made her hold her "breath," but Graves-Poller responded by asking Plaintiff what it was about the case that made her hold her "nose." May 3, 2016 Email at 2.

these incidents, Plaintiff requested approval from NYLS to transfer from Graves-Poller's class, despite the fact that the period during which students could elect to transfer classes had passed. *Id.* at 2; SAC ¶ 35. While Plaintiff acknowledges that her belated request to transfer from Graves-Poller's class was nonetheless granted, she asserts, inexplicably, that Graves-Poller failed her for not complying with the attendance policy. SAC ¶ 35.

At Eastus's suggestion, Plaintiff met with Schoenbrod about the D + she received in his class. *Id.* ¶ 36. However, Schoenbrod allegedly did not have a good explanation. *Id.* He refused to consult or show Plaintiff the comments he made on the exam, and had no adequate response when Plaintiff pointed out material in her answers that he claimed was missing. *Id.*; May 3, 2016 Email at 3. She allegedly later discovered that Schoenbrod had been a part of NYLS's March 26, 2015 rehearing process concerning the incident, but she does not specify the role he had.[8] May 3, 2016 Email at 3; SAC Ex. C at 2.

In June 2015,[9] Plaintiff met Crowell and asked him for help in transferring to another school. *Id.* ¶ 38. Plaintiff claims that her transfer application was also hampered by Defendants' retaliation. *Id.* ¶¶ 37-39. Crowell enlisted the help of Ella Mae Estrada, the Associate Dean of Enrollment Management, Financial Aid and Diversity Initiatives. *Id.* ¶¶ 3, 38. In an email dated June 5, 2015, Estrada wrote to Plaintiff stating, "I apologize for the delay. Please see the attached spreadsheet that we were working on earlier today. I'll look over your personal statement this weekend and provide feedback." SAC Ex. H at 1. Five days later, on June 10, 2015, Plaintiff responded to Estrada, providing a revised personal statement and requesting that

[8] During the re-hearing, Schoenbrod allegedly stated that he was not aware that the initial incident occurred approximately six months prior. SAC Ex. C at 1.

[9] The SAC states that the meeting was in "June 2014," but the Court assumes that this is a typographical error since the encounter with Nesbit did not occur until October 6, 2014, and she only sought to transfer law schools after that incident.

Estrada review the document. *Id.* On July 14, 2015, Estrada wrote to Plaintiff in an email, "I wanted to check in with you to see how you were doing; as well as, how the transfer process has been? I know that most schools have a deadline of July 15th. I thought I would touch base with you." *Id.* at 2. Plaintiff asserts that law school transfer application deadlines had already passed by that date. SAC ¶ 39. She attributes Estrada's late email to the fact that Crowell and Estrada "conspired to deny NYLS assistance in the transfer process." *Id.*

C. Proposed Third Amended Complaint

On May 12, 2017, the Court held a pre-motion conference during which the Defendants requested leave to file a motion to dismiss the SAC on the ground that Plaintiff's revised pleadings did not cure the defects identified in the FAC. The Court granted Plaintiff leave to submit a Third Amended Complaint ("TAC") to remedy those defects to comply with the March Order, and specifically advised her that she could not unilaterally amend her pleadings to add new claims or parties without the Court's permission or the Defendants' consent.

By letter dated June 7, 2017, Plaintiff requested permission from the Court to join the three new defendants and add NYHRL claims. Doc. 43. Defendants opposed Plaintiff's request on June 14, 2017. Doc. 45. On June 15, 2017, the Court directed Plaintiff to file a formal motion to amend if she wished to add the new proposed defendants and claims. Doc. 46.

On July 17, 2017, Plaintiff filed her motion to amend the SAC, attaching a proposed TAC. Doc. 49. The proposed TAC seeks to add Estrada, Graves-Poller and Schoenbrod as defendants and asserts the following causes of actions: (1) violation of Title IX against NYLS, (2) violation of NYHRL against all Defendants, (3) violation of GBL Section 349 against NYLS, (4) breach of contract against NYLS, (5) fraud against all Defendants, (6) intentional infliction of emotional distress against all Defendants, (7) violation of Section 1985(3) against all Defendants,

and (8) violation of Title VI against NYLS. Notably, the proposed TAC adds the following factual allegations:

- Prior to the date of the incident, October 6, 2014, Plaintiff asked Crowell for assistance in finding employment, and was merely advised to consult the NYLS career center. TAC ¶ 29. Plaintiff claims that this treatment differed from the way that Crowell had assisted two male students. *Id.* ¶¶ 28-29.

- She states that Defendants could not have begun the investigation on the date of the incident. *Id.* ¶ 38. The Investigation Report states that an NYLS administrative employee filed an incident report on October 6, 2014, that the Investigation Panel was convened on October 10, 2014, that it interviewed Plaintiff on October 20, 2014, and that Plaintiff submitted a formal written complaint on October 26, 2014. Investigation Report at 1, 3. Plaintiff states that she spoke to the Investigation Panel more than two weeks after the incident, and that, prior to that time, the investigation could not have been properly commenced. TAC ¶¶ 38-39.

- She also states that Schoenbrod had asked her if she was dyslexic during their meeting concerning her grade in his Remedies class, which caused her to feel disgusted and ashamed. *Id.* ¶ 51.

On August 14, 2017, the Defendants filed their motion to dismiss the SAC and opposition to Plaintiff's motion to amend the SAC. Doc. 52.

II. LEGAL STANDARD

A. Rule 12(b)(6) Motion to Dismiss

Under Rule 12(b)(6), a complaint may be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012). However, the Court is not required to credit "mere conclusory statements" or "[t]hreadbare recitals of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to

relief that is plausible on its face.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). If the plaintiff has not "nudged [his] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Twombly*, 550 U.S. at 570.

In the Court's review of a Rule 12(b)(6) motion to dismiss, it may consider any "documents attached to the complaint as an exhibit or incorporated in it by reference." *Carlin v. Davidson Fink LLP*, 852 F.3d 207, 212 (2d Cir. 2017) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). If a plaintiff's own pleadings are contradicted by matters in such documents, the Court need not reconcile this difference or accept the plaintiff's pleadings as true. *Gachette v. Metro N. High Bridge*, No. 12 Civ. 3838 (AJN), 2013 WL 144947, at *1 (S.D.N.Y. Jan. 14, 2013) (citing *Fisk v. Letterman*, 401 F.Supp.2d 362, 368 (S.D.N.Y. 2005); *see also U.S. Bank Nat. Ass'n v. Bank of America, N.A.*, No. 12 Civ. 4873, 2012 WL 6136017, at *7 (S.D.N.Y. Dec. 11, 2012) ("Where plaintiff's own pleadings are internally inconsistent, a court is neither obligated to reconcile nor accept the contradictory allegations in the pleadings as true in deciding a motion to dismiss."); *Amidax Trading Group v. S.W.I.F.T. SCRL*, 607 F.Supp.2d 500, 502 (S.D.N.Y. 2009) ("Where a conclusory allegation in the complaint conflicts with a statement made in a document attached to the complaint, the document controls and the allegation is not accepted as true.").

The same standard applies to motions to dismiss *pro se* complaints. *See Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir. 2011); *see also Fisk*, 401 F. Supp. 2d at 368 ("The Court . . . is not obliged to reconcile [a *pro se*] plaintiff's own pleadings that are contradicted by other matters asserted or relied upon or incorporated by reference by a plaintiff in drafting the complaint.").

Courts also generally construe a *pro se* complaint liberally and interpret a *pro se* plaintiff's claims as raising the strongest arguments that they suggest. *In re Sims*, 534 F.3d 117, 133 (2d Cir. 2008). The obligation to be lenient while reading a *pro se* plaintiff's pleadings "applies with particular force when the plaintiff's civil rights are at issue." *Jackson v. N.Y.S. Dep't of Labor*, 709 F. Supp. 2d 218, 224 (S.D.N.Y. 2010) (citing *McEachin v. McGuinnis*, 357 F.3d 197, 200 (2d Cir. 2004)). However, "the degree of solicitude may be lessened where the particular *pro se* litigant is experienced in litigation and familiar with the procedural setting presented." *Tracy v. Freshwater,* 623 F.3d 90, 102 (2d Cir. 2010). Plaintiff's pleadings suggest that she is not a practicing attorney and is not barred. TAC ¶ 1. Thus, the Court will grant leniency to Plaintiff's pleadings, though less than that would be afforded a *pro se* litigant without *any* legal education. Nevertheless, "[e]ven *pro se* plaintiffs asserting civil rights claims cannot withstand a motion to dismiss unless their pleadings contain factual allegations sufficient to raise a 'right to relief above the speculative level.'" *Jackson*, 709 F. Supp. 2d at 224 (quoting *Twombly*, 550 U.S. at 555). A complaint that "tenders 'naked assertion[s]' devoid of 'further factual enhancement'" will not suffice. *Iqbal,* 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 557); *see also Triestman,* 470 F.3d at 477 ("[*P*]*ro se* status 'does not exempt a party from compliance with relevant rules of procedural and substantive law.'") (quoting *Traguth v. Zuck,* 710 F.2d 90, 95 (2d Cir. 1983)).

B. Rule 15 Motion to Amend

Parties are entitled to amend their pleadings once, as a matter of course, within 21 days after serving the pleading or, if a responsive pleading is required, within 21 days after service of a responsive pleading or a Rule 12 motion. Fed. R. Civ. P. 15(a)(1). A party may not otherwise amend its pleading without either the written consent of the opposing party or leave of the court. Fed. R. Civ. P. 15(a)(2). "The court should freely give leave when justice so requires." *Id.* The

Supreme Court has held that it would be an abuse of discretion, "inconsistent with the spirit of the Federal Rules," for a district court to deny leave without some justification, "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The Second Circuit has stated that a court should allow leave to amend a pleading unless the non-moving party can establish prejudice or bad faith. *AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 725 (2d Cir. 2010) (quoting *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993)). Motions to amend are ultimately within the discretion of the district courts, *Foman*, 371 U.S. at 182, and they should be handled with a "strong preference for resolving disputes on the merits." *Williams v. Citigroup Inc.*, 659 F.3d 208, 212-13 (2d Cir. 2011) (quoting *New York v. Green*, 420 F.3d 99, 104 (2d Cir. 2005)) (internal quotation marks omitted). "Courts in this district have consistently granted motions for leave to amend a complaint where facts and allegations developed during discovery are closely related to the original claim and are foreshadowed in earlier pleadings." *Stonewell Corp. v. Conestoga Title Ins. Co.*, No. 04 Civ. 9867 (KMW) (GWG), 2010 WL 647531, at *2 (S.D.N.Y. Feb. 18, 2010). Although permissive, the standard for leave to amend "is by no means 'automatic.'" *Billhofer v. Flamel Technologies, S.A.*, No. 07 Civ. 9920, 2012 WL 3079186, at *4 (S.D.N.Y. July 30, 2012) (quoting *Klos v. Haskel*, 835 F. Supp. 710, 715 (W.D.N.Y. 1993)).

Leave to amend may also be denied on the basis of futility if the proposed claim would not withstand a Rule 12(b)(6) motion to dismiss. *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002). The party opposing the amendment has the

burden of establishing its futility. *Blaskiewicz v. Cnty. of Suffolk*, 29 F. Supp. 2d 134, 137-38 (E.D.N.Y. 1998) (citing *Harrison v. NBD Inc.*, 990 F. Supp. 179, 185 (E.D.N.Y. 1998)).

III. DISCUSSION

A. Claims Permitted to be Re-Pleaded

In the March Order, the Court expressly allowed Plaintiff to re-plead her breach of contract and Title VI claims against NYLS, and her fraud, intentional infliction of emotional distress, and Section 1985(3) claims against all Defendants.[10] March Order at 22. Defendants challenge the sufficiency of her amended pleadings in both the SAC and the proposed TAC.

1. Breach of Contract Claim Against NYLS

"The elements of a breach of contract claim in New York are: (1) the existence of a contract, (2) performance by the party seeking recovery, (3) non-performance by the other party, and (4) damages attributable to the breach." *RCN Telecom Servs., Inc. v. 202 Ctr. St. Realty LLC.*, 156 F. App'x 349, 350-51 (2d Cir. 2005) (citation omitted). The "relationship between a university and its students is contractual in nature." *Yu v. Vassar Coll.*, 97 F. Supp. 3d. 448, 481 (S.D.N.Y. 2015) (citation omitted). When a student is admitted to a school, "an implied contract forms and the terms of the agreement are 'supplied by the bulletins, circulars and regulations made available to the student.'" *Papspiridakos v. Education Affiliates, Inc.*, No. 10 Civ. 5628 (RJD) (JO), 2013 WL 4899136 at *3 (S.D.N.Y. Sept. 11, 2013) (quoting *Dasrath v. Ross Sch. Of Med.*, 494 Fed. Appx. 177, 178 (2d Cir. 2012)). However, to assert a claim for breach of such contracts, a student must identify "specifically designated and discrete promises." *Ward v. New*

[10] Although whether Plaintiff may name Estrada, Graves-Poller and Schoenbrod as additional defendants is at issue in the instant motion to amend, the Court will also address the fraud, intentional infliction of emotional distress and Section 1985(3) claims against these three individuals for convenience. Any reference to the Defendants in this section includes these three individuals.

York Univ., No. 99 Civ. 8733 (RCC), 2000 WL 1448641, at *4 (S.D.N.Y. Sept. 28, 2000). "[G]eneral policy statements" and "broad and unspecified procedures and guidelines" will not suffice. *Id.* Additionally, there is no claim of educational malpractice in New York, and students cannot circumvent this rule by couching such a claim as a breach of contract. *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 93 (2d Cir. 2011) (citation omitted).

Plaintiff alleges that NYLS breached its contract with her by acting contrary to the representations in its Code of Conduct, Student Handbook, and admissions letter. As Defendants argue, many of those statements fail to create contractual obligations. NYLS's statement of commitment to complying with non-discrimination laws, SAC ¶ 71, is a non-actionable general policy statement. Indeed, courts in this district have held that such general statements of a university's adherence to existing anti-discrimination laws cannot create independent contractual obligations. *Gally v. Columbia Univ.*, 22 F. Supp. 2d 199, 208 (S.D.N.Y. 1998) (citing *Blaise-Williams v. Sumitomo Bank, Ltd.*, 592 N.Y.S.2d 41, 42 (1st Dep't 1993)); *see also Nungesser v. Columbia Univ.*, 244 F. Supp. 3d 345, 373 (S.D.N.Y. 2017) (defendant's statement of commitment "to providing an environment free from gender-based discrimination and harassment" cannot form the basis for a breach of contract action).

Furthermore, to the extent that the statements merely provide what may occur, or encourage NYLS personnel and students to engage in certain behaviors, they are not specific and discrete promises. *See Nungesser v*, 244 F. Supp. 3d at 374-75; *see also Cheves v. Columbia Univ.*, 931 N.Y.S.2d 877, 877 (1st Dep't 2011) (holding that the alumni relations brochure listing certain benefits and services generally available to alumni did not guarantee alumni access to campus). The 2012-2013 Student Handbook provides that students *may* be disciplined for engaging in threatening or injurious conduct, that a student's refusal to participate as a witness

may be considered a violation, that Crowell *may* take action to deal with emergency situations, that Crowell *may* meet with students about the Investigation Panel's report, and that NYLS personnel and students were *expected and encouraged* to cooperate with investigations and hearings. SAC ¶¶ 59, 62, 65, 67-68. Crowell's admissions letter to Plaintiff also invited her to "call or write [to Crowell] via e-mail," but did not guarantee a response. *Id.* ¶ 56. Indeed, Plaintiff concedes that Crowell had discretion to assist students. *Id.* ¶ 61. Accordingly, none of these statements constitute binding contractual provisions.

However, the Court finds that Sections 2(3) and 3(D) of the Student Handbook, which deal with investigations, and page 32 of the Student Handbook, which addresses seriously impaired individuals on campus, contain enforceable contractual provisions. Section 2(3) states that "[t]he Fact Finder is responsible for gathering and presenting information in an impartial and thorough manner," and the investigation and the Investigation Panel "should be impartial and thorough;" and Section 3(D) states that "[t]he Investigation Panel shall review the report of the Fact Finder and any relevant written materials." *Id.* ¶¶ 63, 66. Plaintiff avers that NYLS breached these provisions because (1) there was no inquiry about whether Nesbit targeted women, and (2) NYLS blindly accepted Nesbit's admissions that he did not abuse alcohol and that there were no other on-campus incidents concerning women. *Id.* ¶¶ 63-64. However, these allegations are directly contradicted by the Investigation Report, which Plaintiff attaches to the SAC. The report states that the Investigation Panel examined two previous complaints in which Nesbit approached female students. Investigation Report at 1-4. It noted that Nesbit was "under the influence of prescription medication" on October 6, 2014, and was "intoxicated" on August 28, 2014. *Id.* at 1, 3-4. NYLS then concluded that Nesbit committed misconduct against Plaintiff "*on the basis of [her] Protected Classification.*" *Id.* at 1 (emphasis added). As

discussed above, the Court need not reconcile pleadings that contradict documents attached to the SAC, and need not accept such pleadings as true. *Gachette*, 2013 WL 144947, at *1; *see also Amidax Trading Group*, 607 F.Supp.2d at 502; *Fisk*, 401 F. Supp. 2d at 368. Accordingly, the Court will not accept these allegations of NYLS misconduct as true, as they are contradicted by the Investigation Report.

Page 32 of the Student Handbook states that "[n]o seriously impaired individual should be allowed to leave the Law School premises by him/herself." SAC ¶ 69. Plaintiff alleges that NYLS violated this provision when they "threw [Nesbit] out" of the campus when he was intoxicated or otherwise seriously impaired. *Id.* While Nesbit may arguably have a breach of contract claim against NYLS for not escorting him outside of the premises on October 6, 2014, Plaintiff does not have standing to assert a violation of this provision because NYLS did not breach any promise to her in this regard. *Monahan v. Pena*, No. 08 Civ. 2258 (JFB)(ARL), 2009 WL 2579085, at *3 (E.D.N.Y. 2009); *Wein v. Fensterstock*, No. 04 Civ. 4640 (RO), 2004 WL 2423684, at *1 (S.D.N.Y. 2004). Plaintiff alleges that the failure shows NYLS's "poor judgment," "deference to Nesbit to [Plaintiff's] detriment" and intent to "avoid NYLS liability and poor publicity." *Id.* Accepting these allegations as true and drawing all reasonable inferences in Plaintiff's favor, they also do not show that Plaintiff "directly and proximately" suffered any injury as a result. *Harding v. Naseman*, No. 07 Civ. 8767 (RPP), 2009 WL 1953041, at *28 (S.D.N.Y. July 8, 2009), *aff'd*, 377 F. App'x 48 (2d Cir. 2010). Accordingly, the Court finds Plaintiff has not sufficiently pleaded a breach of contract claim in the SAC.

The Court further finds that allowing Plaintiff to amend this claim would be futile. The proposed TAC does not allege any other contractual provisions or actions by NYLS that may

constitute a breach. Because Plaintiff had adequate opportunities to remedy her breach of contract claim and has repeatedly failed to do so, the Court dismisses the claim with prejudice.

2. Fraud Claims Against All Defendants

"Under New York law, to state a claim for fraud a plaintiff must demonstrate: (1) a misrepresentation or omission of material fact; (2) which the defendant knew to be false; (3) which the defendant made with the intention of inducing reliance; (4) upon which the plaintiff reasonably relied; and (5) which caused injury to the plaintiff." *Wynn v. AC Rochester*, 273 F.3d 153, 156 (2d Cir. 2001) (citation omitted). In addition, the plaintiff must "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). In other words, the complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Hirsch v. Columbia Univ., Coll. of Physicians & Surgeons*, 293 F. Supp. 2d 372, 381 (S.D.N.Y. 2003) (quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993)). Or in the case of omissions, the complaint must specify "(1) what the omissions were; (2) the person responsible for the failure to disclose; (3) the context of the omissions and the manner in which they misled the plaintiff; and (4) what the defendant obtained through the fraud." *Manhattan Motorcars, Inc. v. Automobili Lamborghini, S.p.A.*, 244 F.R.D. 204, 213 (S.D.N.Y. 2007).

Plaintiff alleges that Defendants committed fraud because although NYLS made representations that it was committed to diversity and that discrimination would not be tolerated, NYLS personnel failed to act accordingly. Specifically, Defendants allegedly made the following misrepresentations or omissions: (1) Eastus stated that Nesbit was "good" and "well-liked;" (2) Hope stated that Nesbit was "not on campus;" (3) Eastus represented that there were

no other complaints against Nesbit at NYLS; and (4) Hope, Crowell, Archer, Meyers, Becherer, and Wood failed to disclose that other female students previously complained of Nesbit. SAC ¶¶ 76-79. However, she fails to plead sufficient facts to create a plausible inference of fraud based on these statements and omissions.

Eastus's statements concerning Nesbit's good character and reputation are not actionable false statements. Generally, statements of opinion cannot constitute fraud unless the speaker had a present intent to deceive. *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 547 F.3d 115, 134 (2d Cir. 2008). The Court finds the statements that Nesbit was "good" and "well-liked" are value judgments. *See Canelle v. Russian Tea Room Realty LLC*, No. 01 Civ. 0616 (DAB), 2002 WL 287750, at *5 (S.D.N.Y. Feb. 27, 2002) (holding that the statement that the contract is "not great" is an opinion); *see also Sheth v. New York Life Insurance Co.*, 709 N.Y.S.2d 74, 75 (1st Dep't 2000) (noting that purported misrepresentations that are opinions of value may not form a basis for fraud). Moreover, there is no indication in any of Plaintiff's pleadings that Eastus spoke with intent to deceive. Accordingly, the statements concerning Nesbit's character and reputation are protected opinions.

Hope's statement that Nesbit was not on campus is similarly unavailing. Plaintiff concedes that Nesbit was indeed not on campus when Hope made that representation. SAC ¶ 19. Therefore, the statement was true and Plaintiff cannot serve as a premise for her fraud claim.

Plaintiff's fraud claim against Eastus, Hope, Crowell, Archer, Meyers, Becherer and Wood based on their misrepresentation or concealment of the existence of other complaints also fail because she has not pleaded reasonable reliance. Plaintiff argues that if she knew that other women reported Nesbit, she would have concluded that NYLS was incompetent to handle the investigation, and would have gone to the police earlier. *Id.* ¶ 78. The Court first notes that

Plaintiff must allege that she relied on the actual misrepresentation or omissions to her detriment, not that she relied on any other fact or *implied* message. *See Shelton v. Sethna*, No. 10 Civ. 4128 (TPG), 2012 WL 1022895, at *6 (S.D.N.Y. Mar. 26, 2012) (argument that the false statements deterred plaintiff from suing for breach of contract earlier fails because it does not involve reliance on the actual statements by the defendant, but reliance "upon a message *implied* by the false statements"); *see also Bermuda Container Line Ltd. v. Int'l Longshoremen's Ass'n, AFL-CIO*, 192 F.3d 250, 258 (2d Cir. 1999) (finding that there is no fraud claim where the cause of the detrimental effect was reliance on something other than the alleged omission). Here, Plaintiff makes clear that she relied on the implication that NYLS is a competent investigatory body in deciding not to go to the police. However, she alleges no representation or omission concerning NYLS's ability to conduct a thorough and effective investigation. Instead, she relies on the purported concealment of complaints previously made by female students to draw a negative inference, but those instances do not on their face make any suggestion concerning NYLS's investigatory competence.

Moreover, her decision not to go to the police earlier could not have been reasonably based on anything said or not said by Crowell, Archer, Meyers, Becherer or Wood. Her first contact with these Defendants occurred *after* she reported the incident to the police. Plaintiff went to the police on October 20, 2014. SAC Ex. F at 3. The first time she had any contact with Crowell and Archer was six days later, when she emailed them on October 26, 2014. May 3, 2016 Email at 5. The Investigation Report also shows that her first contact with Meyers, Wood and Becherer was on October 20, 2014, and Plaintiff expressly states in the proposed TAC that this first interaction occurred after she submitted the police report. Investigation Report at 3; TAC ¶ 39. Thus, any alleged omissions by these Defendants could not have reasonably

impacted Plaintiff's decision to go to the police. *In re Parmalat Sec. Litig.*, 477 F. Supp. 2d 602, 611 n. 62 (S.D.N.Y. 2007) ("The reliance element of fraud is essentially causation in fact") (citing *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 278 (2d Cir. 1992)). To the extent that she seeks to argue that these Defendants made false omissions prior to October 20, 2014, she has failed to plead any supporting facts, much less with particularity.

Plaintiff also cannot plausibly argue that she reasonably relied on any representation or omission that there was no other known misconduct by Nesbit against other women. Indeed, she acknowledges that, before October 6, 2014, she personally observed "Nesbit physically touch other females on-campus without permission and ogle females, in a manner that would lead to a sexual harassment complaint had it occurred at work," and had thus "avoided Nesbit." SAC ¶¶ 20, 81. Courts in this district have held that "a plaintiff's actual knowledge of the allegedly misrepresented or omitted facts is fatal to his or her fraud claim." *de Atucha v. Hunt*, 756 F. Supp. 829, 831 (S.D.N.Y. 1991) (citations omitted); *In re Eugenia VI Venture Holdings, Ltd. Litig.*, 649 F. Supp. 2d 105, 118 (S.D.N.Y. 2008) ("Where a plaintiff actually knew at the time a representation was made that it was false, she cannot claim to have relied on the truth of that representation"). Since Plaintiff concedes that she knew Nesbit acted improperly with other female students, she could not have reasonably relied on any representation or omission suggesting that he had not done so.[11]

Moreover, Plaintiff's allegations against Estrada, Graves-Poller and Schoenbrod are deficient because she fails to plead any facts concerning the alleged fraud. To comply with Rule 9(b) pleading standards, plaintiffs must plead the fraudulent acts or omissions of *each* defendant

[11] Defendants also argue that Plaintiff has insufficiently pleaded knowledge and intention to induce reliance, but the Court need not reach these issues as it finds that the claims fail on other grounds.

with particularity. *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F.Supp.2d 282, 293 (S.D.N.Y. 2000). Plaintiff attributes no statements or actions to Estrada, Graves-Poller or Schoenbrod in furtherance of the purported fraudulent scheme in either the SAC or the proposed TAC. Plaintiff has therefore also failed to state a claim for fraud as to these Defendants.

Accordingly, the Court dismisses all of Plaintiff's fraud claims. The proposed TAC contains the same defects as the SAC. Plaintiff's motion to amend, seeking to bolster this claim and to bring new fraud claims against Eastus, Graves-Poller or Schoenbrod, is denied.

3. Intentional Infliction of Emotional Distress

To state a claim for intentional infliction of emotional distress in New York, a plaintiff must allege: "(1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress." *McGrath v. Dominican Coll. of Blauvelt, New York*, 672 F. Supp. 2d 477, 492 (S.D.N.Y. 2009); *see also Howell v. N.Y. Post Co.*, 612 N.E.2d 699, 702 (N.Y. 1993). The standard for asserting a claim is "rigorous, and difficult to satisfy." *TC v. Valley Cent. Sch. Dist.*, 777 F. Supp. 2d 577, 604 (S.D.N.Y. 2011) (quoting *Howell*, 612 N.E.2d at 702); *see also Conboy v. AT & T Corp.*, 84 F.Supp.2d 492, 507 (S.D.N.Y. 2000), *aff'd*, 241 F.3d 242 (2d Cir.2001) ("Satisfying the first element of this claim is difficult, even at the pleadings stage"). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of

decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Howell*, 612 N.E.2d at 702.

Plaintiff has again failed to clear the high hurdle of asserting an intentional infliction of emotional distress claim against the Defendants. She avers that Defendants lied to her, failed to aid her when she reported staff misconduct, was hostile towards her, and conducted a "helplessly flawed" investigation. SAC ¶¶ 81-84. Despite the serious nature of these allegations, the Court cannot conclude that Defendants' treatment of Plaintiff approached the level of extreme and outrageous conduct required to state a claim for intentional infliction of emotional distress under New York law. As the Investigation Report shows, the school promptly convened an Investigation Panel after Plaintiff made her complaint. Investigation Report at 1. The Panel conducted its investigation, credited Plaintiff's testimony, and punished Nesbit, establishing conditions on him that were meant to ensure that he would not come into contact with Plaintiff while she was at school. *Id.* at 4-5. These facts do not amount to intentional infliction of emotional distress. *See e.g. TC*, 777 F. Supp. 2d at 605 (delinquencies in how defendants addressed ongoing discrimination did not rise to the level of extreme or outrageous, and defamation generally cannot constitute extreme and outrageous behavior); *Sigmon v. Parker Chapin Flattau & Klimpl,* 901 F.Supp. 667, 671-74, 681-82 (S.D.N.Y. 1995) (intentional infliction of emotional distress claim dismissed where plaintiff suffered exclusion from firm activities, criticism, discrimination, and discriminatory comments, and received poor reviews); *Silverman v. New York Univ. School of Law,* 597 N.Y.S.2d 314, 315 (1st Dep't 1993) (destroying a student's exam motivated by personal animus toward the student not sufficient to state intentional infliction of emotional distress claim).

The proposed TAC also fails to add any allegations that constitute intentional infliction of emotional distress. The fact that Schoenbrod asked Plaintiff whether she was dyslexic, or the fact that Crowell directed her to the NYLS career center instead of helping her personally with legal employment, TAC ¶¶ 29, 51, do not show that Defendants engaged in extreme and outrageous conduct. Accordingly, Plaintiff's intentional infliction of emotional distress claim is dismissed with prejudice, and her motion to amend this claim is denied.

4. Section 1985(3) Claim Against All Defendants

To state a claim for conspiracy to commit a civil rights deprivation under Section 1985(3), a plaintiff must plausibly allege:

> (1) a conspiracy; (2) to deprive directly or indirectly any person of equal protection of the laws, or of equal privileges and immunities; and (3) an act in furtherance of the conspiracy; (4) whereby his person or property is injured or he is deprived of any right of a U.S. citizen.

Roberts v. City of New York, No. 14 Civ. 5198 (GHW), 2016 WL 4146135, at *8 (S.D.N.Y. Aug. 2, 2016). Furthermore, the conspiracy must also be motivated by "invidious discriminatory animus behind the conspirators' action." *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1088 (2d Cir. 1993).

Neither the supplemental allegations in the SAC or the proposed TAC support a plausible inference of a conspiracy between any of the Defendants. She claims that Defendants conspired to permit undue delay, to avoid addressing complaints of wrongdoing and retaliation by NYLS personnel, to conduct a flawed investigation, and to issue poor grades. SAC ¶ 89. However, she provides no facts suggesting any agreement or meeting of the minds. *Kalderon v. Finkelstein*, 495 Fed. Appx. 103, 108 (2d Cir. 2012) (plaintiff must plead "some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end.") (citation omitted); *see also Ochoa v. Bratton*, No. 16 Civ. 2852 (JGK), 2017

WL 5900552, at *9 (S.D.N.Y. Nov. 28, 2017) (dismissing a Section 1985(3) claim on a motion to dismiss where there are no facts that suggest an agreement or meeting of the minds among the defendants). She merely states in both the SAC and the proposed TAC that all of the alleged wrongs she experienced were due to "acts [that] were committed in furtherance of the conspiracy," and not due to coincidence or bad luck. SAC ¶¶ 37, 39, 89; *see also* TAC ¶ 33 (noting that Defendants "conspired to affect a bias in favor of males"). Such conclusory statements are insufficient to state a claim for conspiracy. *Gallop v. Cheney*, 642 F.3d 364, 369 (2d Cir. 2011) (claims of conspiracy "containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss.") (citing *Leon v. Murphy*, 988 F.2d 303, 311 (2d Cir. 1993)). Accordingly, the Court dismisses her Section 1985(3) claims with prejudice.

5. Title VI Claim Against NYLS

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. To state a claim for a violation of the statute, a plaintiff must plausibly allege that (1) the defendant discriminated against her on the basis of race, color, or national origin; (2) the discrimination was intentional; and (3) the discrimination was a substantial or motivating factor for the defendant's actions. *Tolbert v. Queens Coll.*, 242 F.3d 58, 69 (2d Cir. 2001).

In the SAC, Plaintiff supports her Title VI claim by alleging that NYLS's handling of complaints discriminates against women and has a disparate impact on women, and that she is more vulnerable to the disparate impact as an African American woman because "African-

Americans have less access to financial and other resources and are more prone to discrimination." SAC ¶ 90. The SAC is otherwise devoid of allegations concerning her race. Instead, she emphasizes that certain Defendants treated her differently from other male students because of her gender. *See* SAC ¶¶ 26, 58, 60, 82, 93.

As a threshold matter, the Court notes that gender is not a protected class under Title VI, and thus, any allegations that she was mistreated because she is a woman is irrelevant. Moreover, even after viewing these allegations in the light most favorable to Plaintiff, she states at most that NYLS's gender discrimination impacts her more severely because of her race. Title VI only targets intentional discrimination, and cannot be invoked to redress disparate-impact discrimination. *Joseph v. Metro. Museum of Art*, 684 F. App'x 16, 17 (2d Cir. 2017) (citing *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005)). Thus, the SAC fails to state a Title VI claim.

The proposed TAC does not cure this defect as it also largely alleges that Plaintiff suffered discrimination due to her gender. TAC ¶¶ 29-35, 64, 66, 70. She only mentions race in conclusory allegations devoid of any specific facts suggesting that she was discriminated *because* of her race. In the proposed TAC, Plaintiff objects to NYLS's attitude "towards women who are not white" without further details. *Id.* ¶ 65. She also makes bald assertions that her white peers were protected from ridicule by Schoenbrod and Graves-Poller, and that white females received meaningful replies to grading inquiries. *Id.* ¶ 83.

Naked allegations that plaintiffs were treated differently from others outside of the protected class cannot demonstrate entitlement to Title VI relief. *Kajoshaj v. New York City Department of Education*, 543 F. App'x 11, 14 (2d Cir. 2013); *see also Sulehria v. New York*, No. 13 Civ. 6990 (AJN), 2014 WL 4716084, at *6 (S.D.N.Y. Sept. 19, 2014) (the fact that

individuals outside of the plaintiff's protected class were hired to the positions he sought does not establish intentional discrimination because there are no facts to show that he was passed over because of his race, color, or national origin); *Manolov v. Borough of Manhattan Cmty. Coll.*, 952 F. Supp. 2d 522, 532 (S.D.N.Y. 2013) (dismissing a Title VI claim where the plaintiff does not "allege that any defendant referred to his race . . . nor does he recite any other fact from which race[]-based discriminatory intent reasonably could be inferred."). Plaintiff must provide facts demonstrating either that NYLS personnel referred to her race, or that she was similarly situated in material ways to individuals outside of her race. *Id.*; *Williams v. Pace Univ.*, 192 F. Supp. 3d 415, 422-23 (S.D.N.Y. 2016) (finding that plaintiff could not state a *prima facie* case of racial discrimination under Title VI because she did not plead facts showing that she was similarly situated to individuals outside of her protected class that were treated preferentially). She fails to do so.[12] Accordingly, the Court dismisses Plaintiff's Title VI claim with prejudice and denies her motion to amend the SAC.

B. Claims Unilaterally Amended by Plaintiff

1. Title IX Claims

In the March Order, the Court dismissed Plaintiff's Title IX claims against all of the individual Defendants, and her Title IX discrimination claim against NYLS with prejudice. March Order at 11-13, 22. However, the SAC re-pleads the Title IX claims against individual Defendants and the Title IX discrimination claim against NYLS without prior consent from the Defendants or approval from this Court. The Court previously dismissed these claims against all individual Defendants with prejudice because "the statute 'has consistently been interpreted as

[12] Indeed, she admits that Graves-Poller treated her differently from everyone else in the class, which included other African-American female students. TAC ¶ 56; May 3, 2016 Email at 2.

not authorizing suit against school officials, teachers, and other individuals,' since they do not personally receive federal education funding." March Order at 12 (citations omitted). Therefore, no amount of additional pleading can salvage Plaintiff's Title IX claims against the individual Defendants.

Plaintiff's Title IX discrimination claim against NYLS, premised on Nesbit's harassment, cannot be resurrected either. As the Court previously noted, NYLS can only be held liable for student-on-student harassment if it was, *inter alia*, deliberately indifferent to the harassment, *i.e.*, if NYLS's actions were "clearly unreasonable." *Id.* at 12 (citations omitted). Like the FAC, the SAC alleges facts demonstrating that "NYLS did not act with deliberate indifference in response to Nesbit's harassment of female students." *Id.* at 13; *see* Investigation Report. Although Plaintiff challenges the adequacy of the investigation and resulting disciplinary measures, the Investigation Report demonstrates that the investigation was not clearly unreasonable and that NYLS imposed severe sanctions on Nesbit. Investigation Report at 4-5. Accordingly, Plaintiff's Title IX discrimination claim against NYLS is dismissed again with prejudice. However, since Defendants do not seek to dismiss Plaintiff's Title IX retaliation claim against NYLS, she may still proceed on that claim.

2. GBL Section 349 Claim against NYLS

In the March Order, the Court allowed Plaintiff to proceed on her GBL Section 349 claim against NYLS based on the allegedly misleading advertisements and marketing by NYLS to induce minorities to attend NYLS. March Order at 16-17, 22. Nevertheless, in the SAC, Plaintiff amended her pleadings concerning this claim. Defendants argue that her "recast" allegations in the SAC now fail to maintain a GBL Section 349 claim. The Court disagrees.

As the Court previously noted in its March Order, GBL § 349 prohibits "[d]eceptive acts

or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." N.Y. Gen. Bus. Law § 349(a). In order to succeed on her GBL § 349 claim, Plaintiff must ultimately prove that (1) Defendants engaged in an act or practice that is deceptive or misleading in a material way; (2) she was injured by reason thereof; and (3) the deceptive act or practice is "consumer oriented." *Gaidon v. Guardian Life Ins. Co. of Am.*, 725 N.E.2d 598, 603-04 (N.Y. 1999). A "deceptive act or practice" is a representation or omission "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Id.* at 604 (quoting *Karlin v. IVF Am., Inc.*, 712 N.E.2d 662, 668 (N.Y. 1999)).

In the SAC, Plaintiff supplements her prior allegations by listing many of the specific representations NYLS made in order to create the perception that NYLS was committed to diversity and prohibited discrimination. SAC ¶¶ 42-46. Defendants argue that because she failed to explicitly state that any of the specific representations are false, her GBL Section 349 claim cannot survive. However, viewing Plaintiff's pleadings in the light most favorable to her, Plaintiff sufficiently suggests that NYLS's specific marketing representations were false, and that NYLS made false assurances that gender-based harassment and discrimination would not be tolerated and that its anti-discrimination policies would be adequately enforced. *Id.* ¶¶ 52-54. Regardless of whether or not she can ultimately prove this claim, she should be given the opportunity to conduct discovery. For substantially the same reasons as in the March Order, the Court allows Plaintiff's GBL Section 349 claim to proceed.

3. NYHRL against All Defendants

Plaintiff seeks to add a NYHRL claim, which is intended to "eliminate and prevent discrimination" in, *inter alia*, educational institutions. N.Y. Exec. Law § 290(3). Plaintiff does not specify which of NYHRL's specific provisions were violated. However, her NYHRL

allegations are identical to her Title IX allegations. Thus, the Court assumes that the SAC purports to state a claim under NYHRL Sections 296(4), 296(6) and 296(7). Section 296(4) prohibits "an education corporation or association which holds itself out to the public . . . to deny the use of its facilities to any person otherwise qualified, or to permit the harassment of any student or applicant, by reason of his race, color, . . . [or] sex." N.Y. Exec. Law § 296(4). Section 296(6) further makes it unlawful for individuals to "aid, abet, incite, compel or coerce" violations of Section 296. N.Y. Exec. Law § 296(6). Section 296(7) prohibits "retaliat[ion] or discriminat[ion] against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article." N.Y. Exec. Law § 296(7).

The Second Circuit has held that NYHRL claims are evaluated under the same standard as analogous claims under Title IX. *See Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 n. 1 (2d Cir. 2000); *see also T.P. ex rel. Patterson v. Elmsford Union Free Sch. Dist.*, No. 11 Civ. 5133 (VB), 2012 WL 860367, at *9 (S.D.N.Y. Feb. 27, 2012) (finding that plaintiff adequately pleaded a claim for retaliation under NYHRL because the Court has found that plaintiff stated a claim for Title IX retaliation); *Tesoriero v. Syosset Cent. Sch. Dist.*, 382 F. Supp. 2d 387, 400 (E.D.N.Y. 2005) ("NYHRL discrimination claims are evaluated using the same *analytic framework* as federal discrimination actions.") (emphasis in original).

Accordingly, for the same reasons as stated in examining Plaintiff's Title IX claims in the March Order, the Court finds that Plaintiff adequately pleaded a retaliation claim against NYLS under Section 296(7), but has not adequately pleaded a discrimination claim against NYLS under Section 296(4).

Moreover, Plaintiff alleges that Crowell and Estrada improperly retaliated against her by

failing to assist her law school transfer and that Graves-Poller and Schoenbrod retaliated against her by awarding her low grades. SAC ¶¶ 32-41; TAC ¶¶ 43-59. Taking her pleadings as true and construing them liberally, the Court finds that these facts sufficiently support the claim that Crowell, Estrada, Graves-Poller and Schoenbrod violated Section 296(6) by improperly aiding and abetting NYLS's retaliation. However, Plaintiff does not plead any facts showing that Archer, Meyers, Becherer, Wood, Hope or Eastus retaliated against her. Therefore, the Court allows Plaintiff to amend the SAC to the extent that it adds NYHRL claims against NYLS, Crowell, Estrada, Graves-Poller and Schoenbrod.

IV. CONCLUSION

For the aforementioned reasons, the Plaintiff's motion to amend is GRANTED in part and DENIED in part, and Defendants' motion to dismiss is GRANTED in part and DENIED in part. Specifically, the following claims remain: (1) Title IX retaliation claim against NYLS; (2) GBL Section 349 claim against NYLS; and (3) NYHRL claims against NYLS, Crowell, Estrada, Graves-Poller and Schoenbrod. The following claims are dismissed with prejudice: (1) Title IX claims against individual Defendants; (2) Title IX discrimination claim against NYLS; (3) breach of contract claim against NYLS; (4) fraud claims against all Defendants; (5) intentional infliction of emotional distress claims against all Defendants; (5) Section 1985(3) claims against all Defendants; (6) Title IV claim against NYLS; and (7) NYHRL claims against Archer, Meyers, Becherer, Wood, Hope and Eastus.

The parties are directed to appear for a status conference on **Wednesday, January 10, 2018 at 12:30 p.m.** The Clerk of the Court is respectfully directed to terminate the motions, Docs. 49 and 52.

It is SO ORDERED.

Dated: December 27, 2017
New York, New York

Edgardo Ramos, U.S.D.J.

USDC SDNY
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THERESA BAILEY,

Plaintiff,

– against –

NEW YORK LAW SCHOOL, ANTHONY CROWELL, DEBORAH ARCHER, HOWARD MEYERS, JEFFERY BECHERER, and ERIKA WOOD,

Defendants.

ORDER

16 Civ. 4283 (ER)

Ramos, D.J.:

On March 7, 2017, *pro se* plaintiff Theresa Bailey ("Plaintiff") filed an application for the court to request that *pro bono* counsel represent her in this action. Doc. 25.

Courts do not have the power to obligate attorneys to represent *pro se* litigants in civil cases. *Mallard v. U.S. Dist. Ct. for the S. Dist. of Iowa,* 490 U.S. 296, 310 (1989). Instead, pursuant to 28 U.S.C. § 1915(e)(1), the Court may, in its discretion, order that the *Pro Se* Office request that an attorney represent an indigent litigant by placing the matter on a list that is circulated to attorneys who are members of the Court's *Pro Bono* Panel. *Palacio v. City of New York*, 489 F. Supp. 2d 335, 344 (S.D.N.Y. 2007). The standards governing the appointment of counsel in *pro se* cases were set forth by the Court of Appeals in *Hendricks v. Coughlin*, 114 F.3d 390, 392 (2d Cir. 1997), *Cooper v. A. Sargenti Co.*, 877 F.2d 170, 172 (2d Cir. 1989), and *Hodge v. Police Officers*, 802 F.2d 58, 60–61 (2d Cir. 1986). The factors to be considered in ruling on an indigent litigant's request for counsel include the merits of the case and Plaintiff's ability to gather the facts and present the case if unassisted by counsel. *See Dolan v. Connolly*,

794 F.3d 290, 296 (2d Cir. 2015) (citing factors set forth in *Hodge*, 802 F.2d at 60–62). Of these, the Court must "first determine whether the indigent's position seems likely to be of substance," *Hodge*, 802 F.2d at 61, and, if this threshold requirement is met, then the Court must consider additional factors, including the *pro se* litigant's "ability to handle the case without assistance," *Cooper*, 877 F.2d at 172; *accord Hendricks*, 114 F.3d at 392.

At this early stage in the proceedings, the Court is unable to conclude that Plaintiff's claims are likely to have merit, although naturally that may change as the litigation progresses. Accordingly, Plaintiff's application for the appointment of *pro bono* counsel is DENIED without prejudice to possible renewal at a later stage in the case.

Although the Court has denied Plaintiff's request for *pro bono* counsel, Plaintiff may seek advice from the new legal clinic opened in this District to assist people who are parties in civil cases and do not have lawyers. The Clinic is run by a private organization called the New York Legal Assistance Group; it is not part of, or run by, the Court (and therefore, among other things, cannot accept filings on behalf of the Court, which must still be made by any unrepresented party through the *Pro Se* Intake Unit). The Clinic is located in the Thurgood Marshall United States Courthouse, 40 Centre Street, New York, New York, in Room LL22, which is just inside the Pearl Street entrance to that Courthouse. The Clinic is open on weekdays from 10 a.m. to 4 p.m., except on days when the Court is closed. Plaintiff can make an

appointment in person or by calling 212-659-6190.

The Clerk of the Court is respectfully directed to terminate the motion, Doc. 25.

It is SO ORDERED.

Dated: March 9, 2017
New York, New York

Edgardo Ramos, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THERESA BAILEY,

Plaintiff,

– against –

NEW YORK LAW SCHOOL, ANTHONY CROWELL, DEBORAH ARCHER, HOWARD MEYERS, JEFFERY BECHERER, and ERIKA WOOD,

Defendants.

OPINION AND ORDER

16 Civ. 4283 (ER)

Ramos, D.J.:

Pro se plaintiff Theresa Bailey ("Plaintiff") brings this action against New York Law School ("NYLS" or the "School"), Anthony Crowell, Deborah Archer, Howard Meyers, Jeffery Becherer, and Erika Wood (collectively, "Defendants"), alleging, among other things, that Defendants failed to adequately discipline a classmate who assaulted her and then retaliated against her for reporting the attack in violation of Title IX and Section 1983. Before the Court is Defendants' motion to dismiss the Amended Complaint. For the reasons discussed below, Defendants' motion is GRANTED in part and DENIED in part. Plaintiff will be given an opportunity to replead.

I. BACKGROUND[1]

A. Factual Background

Plaintiff is a 32-year-old woman of color and a United States Marine who attended NYLS as an evening student from August 2012 until her graduation in May 2016. Am. Compl. (Doc. 17) ¶ 1. The individual Defendants are all affiliated with the School: Anthony Crowell is the School's Dean; Deborah Archer is the Dean of Diversity and Inclusion and Director of the Racial Justice Project; Howard Meyers is a professor and Associate Director for the Center for Business and Financial Law; Jeffery Becherer is an Associate Dean for Career Planning; and Erika Wood is a professor. *Id.* ¶ 3.

Plaintiff's suit centers on an incident that occurred on the campus of NYLS on October 6, 2014. That evening, Plaintiff left a class to use the restroom. *Id.*, Ex. C at 1. In the hallway, she encountered Stephen Nesbit, a 6-foot, 200-pound white student she had theretofore avoided based on observations of him with other women on campus. *Id.* ¶ 4, Ex. C at 1 ("always too close, making physical contact without permission, interrupting their lives to make space for his agenda, staring for long periods, and ogling our bodies"), Ex. E at 2. Nesbit allegedly trapped Plaintiff so that she could not pass, pushing her into a wall and sliding his body across hers. *Id.*, Ex. E at 2–3. Plaintiff was able to free herself, and when she turned to confront her attacker, she realized his pants were down and his butt and thighs were exposed. *Id.* ¶ 4, Ex. E at 3. According to Plaintiff, Nesbit was "clearly on drugs." *Id.* ¶ 4. "His eyes were red and glazed over, he was drooling, his chest was rising and falling, he was clenching and unclenching his fists, and his shoulders were rounded in an aggressive posture." *Id.*, Ex. E at 3. Nesbit began

[1] The following facts are based on the allegations in the Amended Complaint, which the Court accepts as true for purposes of the instant motion, as well as the documents attached to it and incorporated by reference. *See Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012); *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010); *Eaves v. Designs for Fin., Inc.*, 785 F. Supp. 2d 229, 244 (S.D.N.Y. 2011).

walking towards Plaintiff, and Plaintiff headed towards a stairwell. *Id.*, Ex. E at 3. There she encountered Paul Metcalf, another student. *Id.*, Ex. A at 2, Ex. E at 3. Plaintiff told Metcalf what had just occurred, and Metcalf walked her back to her class and then reported the incident to a School security officer.[2] *Id.*, Ex. E at 3.

The following day, Plaintiff reported the incident to Oral Hope, the School's Registrar Dean; Victoria Eastus, the School's Title IX coordinator; and Sally Harding, the School's Director of Student Life. *Id.* ¶ 4. Hope allegedly told Plaintiff that Nesbit was "no longer at NYLS." *Id.* ¶ 5. Days later, Eastus allegedly characterized Nesbit as "well-liked" and "good" and told Plaintiff that NYLS had no other complaints about him. *Id.* Plaintiff did not initially report the incident to the police, because of the fact that Nesbit had been removed from campus. *Id.*, Ex. C at 3.

On October 10, 2014, Defendant Meyers, serving as Chair of the School's Harassment and Discrimination Review Board ("Board"), convened an Investigation Panel ("Panel") to investigate the October 6, 2014 incident and record its findings and recommendations, pursuant to the School's Non-Discrimination and Harassment Policy ("Harassment Policy"). *Id.*, Ex. A at 1. The Panel consisted of Defendants Becherer and Wood. *Id.* Plaintiff was interviewed by the Panel on October 20, 2014, and she described feeling scared, unsafe, and vulnerable on campus as a result of the incident. *Id.*, Ex. A at 3. Plaintiff also alleges that as a result of the incident, she suffered panic attacks in the hallways of the School and had to leave class numerous times because of her emotional distress. *Id.*, Ex. C at 2, Ex. E at 3. Plaintiff talked to School Deans

[2] Plaintiff did not attempt to speak to a security officer because of a past experience she described. Am. Compl. ¶ 4. Namely, as Plaintiff reported in a NYLS survey in 2012, while she was speaking with another female student, she observed a security guard "stop[] in his tracks and turn[] 180 degrees to look at a third female student walking down the hall." *Id.*, Ex. C at 2. From that point on, Plaintiff did not feel safe interacting with security officers and made sure never to be on campus late at night. *Id.*

regarding her safety concerns, but she was dissatisfied with the way her concerns were addressed. *Id.*, Ex. E at 3.

On October 23, 2014, after being assessed by a mental health professional, Nesbit was permitted to return to NYLS. *Id.* ¶¶ 5, 8, Ex. C at 3. According to Plaintiff, Nesbit told the mental health professional that he had not engaged in any other incidents at NYLS and that he had no history of alcohol abuse. *Id.*, Ex. C at 3. Based on the information Nesbit provided, the mental health professional determined that Nesbit was not a threat to himself or others. *Id.* Upon learning that Nesbit was returning to campus, Plaintiff attempted to report the attack to the police. *Id.* ¶ 5, Ex. C at 3. The police allegedly told her that too much time had passed to arrest Nesbit or to obtain a temporary restraining order against him. *Id.* ¶ 5, Ex. E at 3.

On October 26, 2014, Plaintiff emailed Defendants Crowell and Archer about the incident.[3] *Id.* ¶ 6. Crowell never responded, but the next day, Plaintiff met with Archer. *Id.* ¶ 6, Ex. B at 2. According to Plaintiff, Archer was "hostile" and suggested that Plaintiff had failed to report the incident to the appropriate employee. *Id.* ¶ 6. Plaintiff met with the Panel again on November 5, 2014 and again described feeling scared, unsafe, and vulnerable on campus. *Id.*, Ex. A at 3.

Sometime thereafter, the Panel issued its findings and recommendations, which the Board adopted on November 25, 2014. *Id.* ¶ 7, Ex. A. The Panel's findings—which were based on a report from a security officer, security camera footage, interviews with Plaintiff, Nesbit, and Metcalf, and conversations with certain School administrators—largely tracked Plaintiff's allegations regarding what took place on October 6, 2014. *Id.*, Ex. A at 2. According to the

[3] Plaintiff's email was used by the School as her "formal written complaint" against Nesbit. Am. Compl., Ex. A at 1, Ex. B at 2.

report, Nesbit did not deny any of Plaintiff's allegations regarding the attack. *Id.*, Ex. A at 3. Instead, he stated that he was under the influence of prescription medication that day and claimed to have no memory of being on campus that night. *Id.*, Ex. A at 3.

The report also detailed the Panel's findings regarding two other incidents involving Nesbit. One of the incidents occurred shortly after Plaintiff's encounter on the same evening. A female student was walking down a stairwell when she observed Nesbit sitting on the bottom stair, talking to himself. *Id.* As the student walked past him, he looked up and made eye contact with her, appearing upset and angry. *Id.* The student continued walking, and Nesbit began to follow her. *Id.* When she sat down on a couch outside a classroom, Nesbit sat down on a couch opposite hers. *Id.* He stared at her with bloodshot eyes for approximately one minute and appeared to be trying to get her attention. *Id.* He attempted to put his hands in his jacket pockets, but fumbled and was unable to do so. *Id.* The student was made uncomfortable by Nesbit's stares, and she got up, walked to the security desk, and reported the incident. *Id.*, Ex. A at 3–4. As with the incident involving Plaintiff, Nesbit did not deny any of these allegations, but instead claimed to have no memory of being at the School that evening. *Id.*, Ex. A at 4.

The other incident detailed in the report occurred a little over one month earlier.[4] On August 28, 2014, two female students separately reported to security that Nesbit approached them in an unwelcomed manner at the School while he was inebriated. *Id.*, Ex. A at 1. Nesbit approached the first student between 3:00 and 3:30 p.m., and he flirted with her and spoke about being her friend. *Id.* Once he left, the student called security and reported the incident. *Id.* Shortly thereafter, Nesbit sat down near the second student and began speaking with her, telling

[4] Plaintiff alleges that if the School had told her that Nesbit had previously been reported for similar acts, she would have filed a police report sooner. Am. Compl., Ex. E at 3.

her that he was her friend and could help her. *Id.* The student told him to leave her alone. *Id.* Security officers observed Nesbit speaking to the second student, observed that he appeared drunk and smelled like alcohol, and escorted him off campus. *Id.* Nesbit admitted to the Panel that he was intoxicated on campus that day. *Id.*

Based on the foregoing findings of fact, the Board concluded that Nesbit had violated Section I.B.2 of the Harassment Policy, which prohibited "subjecting an individual to humiliating, offensive, abusive or threatening conduct that creates an intimidating, hostile or abusive work, residential or academic environment, . . . or unreasonably interferes with an individual's academic . . . performance on the basis of the individual's Protected Classification." *Id.*, Ex. A at 1, 4. The Board issued a number of sanctions against Nesbit, including: (1) prohibiting him from appearing on campus until January 11, 2015 and restricting his presence on campus thereafter to only his classes and co-curricular activities; (2) placing him on probation through his graduation at NYLS, meaning that any further Harassment Policy violation would result in his immediate expulsion; (3) permitting him to enroll only in classes that met between 9:00 a.m. and 5:40 p.m.; (4) preventing him from enrolling in any classes in which Plaintiff was enrolled; (5) requiring him to obtain approval of his schedule from the Assistant Dean for Academic Affairs; and (6) requiring him to attend a harassment training program. *Id.*, Ex. A at 4–5. Furthermore, following his graduation from NYLS, Nesbit would be permitted to appear on campus only to attend a bar review course, and upon completing the bar examination in July 2015, Nesbit would be prohibited from appearing on campus until Plaintiff graduated and completed her bar examination. *Id.*, Ex. A at 5.

Dissatisfied with what she considered to be inadequate sanctions, Plaintiff appealed the Board's decision and requested a hearing, which was held in March or April 2015. *Id.* ¶¶ 7, 8,

Ex. B at 2, Ex. E at 4. Plaintiff noted in her appeal that Nesbit lied on his safety risk evaluation and that the hearing took place after an unreasonable delay. *Id.* ¶ 8. On April 9, 2015, Plaintiff received NYLS's final decision on the matter. *Id.*, Ex. D. Nesbit was not expelled, and he was able to graduate in 2015. *Id.* ¶ 8, Ex. E at 1, 4.

In light of the way the School handled the matter, Plaintiff made the decision to transfer to another law school. *Id.* ¶ 9, Ex. D. In April 2015, she wrote to Defendant Crowell, as well as several professors at the School, seeking assistance. *Id.*, Ex. C at 3–4, Ex. D. Plaintiff also met with Crowell in June 2015, along with an individual from the Admissions Office who was supposed to aid her transfer. *Id.* ¶ 6. According to Plaintiff, her transfer application was returned unread because she was unable to obtain a letter of recommendation from a NYLS professor. *Id.* ¶ 9, Ex. E at 1, 4.

Unable to transfer to another school, Plaintiff returned to NYLS for the fall 2015 semester. *Id.*, Ex. E at 1. That semester, Plaintiff received the worst grades of her law school career, including a D+ and an F. *Id.* ¶ 10, Ex. E at 1, Ex. F at 2. Plaintiff requested that the School investigate whether she received poor grades in retaliation for her complaints about Nesbit, specifically naming two NYLS professors, Barbara Graves-Pollar and David Schoenbrod. *Id.* ¶ 11, Ex. E at 1. Plaintiff is not aware of any investigation by the School into her claims. *Id.* ¶ 11.

B. Procedural Background

On April 29, 2016, Plaintiff filed suit against Defendants in the Supreme Court of the State of New York, New York County, alleging a host of federal and state law claims. Doc. 1, Ex. A. On June 8, 2016, Defendants removed the case to this Court. Doc. 1. Defendants thereafter filed a letter, in accordance with this Court's Individual Practices, requesting a pre-

motion conference and leave to file a motion to dismiss the Complaint. Doc. 14. Plaintiff responded to Defendants' letter, Doc. 16, and on June 30, 2016, a pre-motion conference was held. At the conference, the Court heard arguments regarding Defendants' proposed motion to dismiss. The Court granted Plaintiff leave to amend her Complaint, and Defendants were granted leave to file a motion to dismiss the amended version of the pleading.

On July 5, 2016, Plaintiff filed her Amended Complaint. Doc. 17. Plaintiff alleges federal claims under Title IX and Section 1983, as well as a number of claims under state law. *Id.* at 4. Plaintiff seeks $5 million in damages to cover, among other things, her paid tuition to the School, lost wages, pain and suffering, and punitive damages. *Id.* On August 8, 2016, Defendants filed their motion to dismiss the Amended Complaint. Docs. 19–20. Plaintiff filed her opposition brief on September 1, 2016, Doc. 21, and on September 21, 2016, Defendants filed their reply, Doc. 22.

II. LEGAL STANDARD

When ruling on a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014). The Court is not required to credit "mere conclusory statements" or "[t]hreadbare recitals of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). More specifically, the

plaintiff must allege sufficient facts to show "more than a sheer possibility that a defendant has acted unlawfully." *Id.* If the plaintiff has not "nudged [his] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Twombly*, 550 U.S. at 570; *see Iqbal*, 556 U.S. at 680.

The same standard applies to motions to dismiss *pro se* complaints. *See Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir. 2011). The Court is also obligated to construe a *pro se* complaint liberally and to interpret a *pro se* plaintiff's claims as raising the strongest arguments that they suggest. *Id.*; *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475 (2d Cir. 2006). The obligation to be lenient while reading a *pro se* plaintiff's pleadings "applies with particular force when the plaintiff's civil rights are at issue." *Jackson v. N.Y.S. Dep't of Labor*, 709 F. Supp. 2d 218, 224 (S.D.N.Y. 2010) (citing *McEachin v. McGuinnis*, 357 F.3d 197, 200 (2d Cir. 2004)). "However, even *pro se* plaintiffs asserting civil rights claims cannot withstand a motion to dismiss unless their pleadings contain factual allegations sufficient to raise a 'right to relief above the speculative level.'" *Id.* at 224 (quoting *Twombly*, 550 U.S. at 555). A complaint that "tenders 'naked assertion[s]' devoid of 'further factual enhancement'" will not suffice. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557); *see also Triestman*, 470 F.3d at 477 ("[*P*]*ro se* status 'does not exempt a party from compliance with relevant rules of procedural and substantive law.'") (quoting *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983)).

III. DISCUSSION

A. Section 1983 Claims

To state a claim under 42 U.S.C. § 1983, Plaintiff must allege that Defendants violated her federal rights while acting "under color of state law." *McGugan v. Aldana-Bernier*, 752 F.3d 224, 229 (2d Cir. 2014) (citing 42 U.S.C. § 1983). NYLS is a private educational institution and

the individual Defendants are employees of that private entity. In evaluating whether such actors may be held liable under Section 1983, courts consider whether: (a) the State compelled their conduct (the "compulsion test"); (b) there is a sufficiently close nexus between the State and their private conduct (the "close nexus test" or "joint action test"); or (c) their private conduct consisted of activity that has traditionally been the exclusive prerogative of the State (the "public function test"). *McGugan*, 752 F.3d at 229 (quoting *Hogan v. A.O. Fox Mem. Hosp.*, 346 F. App'x 627, 629 (2d Cir. 2009)).[5] "The fundamental question under each test is whether the private entity's challenged actions are 'fairly attributable' to the state," *McGugan*, 752 F.3d at 229 (quoting *Fabrikant v. French*, 691 F.3d 193, 207 (2d Cir. 2012)), an inquiry that is "necessarily fact-bound," *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298 (2001) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982)).

Here, under any of the foregoing tests, the allegations in the Amended Complaint are insufficient to support a claim that Defendants were acting under color of state law. In her brief, Plaintiff argues that the State "compelled" Defendants' conduct, because the School's federal funding could be terminated if it violated Title IX. Pl.'s Opp'n Mem. (Doc. 21) at 8. The receipt of public funds is not, however, "sufficient to transform the actions of a private entity into 'state action' for purposes of a lawsuit under § 1983." *Cain v. Christine Valmy Int'l Sch. of Esthetics, Skin Care, & Makeup*, No. 16 Civ. 170 (GHW), 2016 WL 6127514, at *4 (S.D.N.Y. Oct. 20, 2016); *see also Dawkins v. Biondi Educ. Ctr.*, No. 13 Civ. 2366 (KMK), 2017 WL 325262, at *3–7 (S.D.N.Y. Jan. 20, 2017) (dismissing Section 1983 claims where the plaintiff failed to

[5] *Cf. Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 744 (2d Cir. 2003) ("We think it clear that a professor employed at a state university is a state actor.").

plausibly plead that a private high school and its employees were acting under color of state law).

Plaintiff also argues that Defendants "insert[ed] themselves into the police function," and that Defendants "obstructed [her] access to a police investigation" by "barring access to evidence that would have enabled police to conduct a separate investigation." Pl.'s Opp'n Mem. at 8. Plaintiff's own allegations demonstrate that to be inaccurate, however, as she admits she could have reported the incident to the police at any time, choosing to delay doing so because her attacker had been removed from campus. Am. Compl. ¶ 5, Ex. C at 3.

Plaintiff attempts to liken her case to *McGrath v. Dominican College of Blauvelt*, 672 F. Supp. 2d 477 (S.D.N.Y. 2009), wherein the district court found that a private college and its administrators acted under color of state law for Section 1983 purposes. Pl.'s Opp'n Mem. at 8–9. In *McGrath*, however, there was significant collaboration between the college and a state official. Namely, the college delegated its responsibility to investigate the plaintiff's complaint of sexual assault to the police, through a police detective who was also an employee of the college. 672 F. Supp. 2d at 489–90. Here, there is no allegation that the police or any other state official was entwined in any way in the School's handling of Plaintiff's complaints. Accordingly, Plaintiff's Section 1983 claims warrant dismissal.[6]

B. Title IX Claims

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of gender in educational programs and activities receiving federal financial assistance, providing, with certain exceptions, that "[n]o person in the United States shall, on the basis of sex, be

[6] The Court need not decide whether Plaintiff's Section 1983 claims against Defendants Crowell and Archer should alternatively be dismissed for failure to plausibly allege that these individuals were personally involved in a constitutional deprivation. *See* Defs.' Mem. (Doc. 20) at 9–10.

excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). It is well settled that an aggrieved individual has an implied right of action under Title IX for injunctive relief and monetary damages. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (2009). It is also clear that sexual harassment in the educational context—whether teacher-on-student or student-on-student—may constitute discrimination in violation of the statute. *Davis v. Monroe Cnty. Bd. of Edu.*, 526 U.S. 629, 649–50 (1999).

Plaintiff brings her Title IX claims against NYLS and the individual Defendants alike. However, the statute "has consistently been interpreted as not authorizing suit against school officials, teachers, and other individuals," since they do not personally receive federal education funding. *Fitzgerald*, 555 U.S. at 257; *see also Bliss v. Putnam Valley Cent. Sch. Dist.*, No. 06 Civ. 15509 (WWE), 2011 WL 1079944, at *5 (S.D.N.Y. Mar. 24, 2011) (dismissing Title IX claims against individual defendants). Accordingly, Plaintiff's Title IX claims against the individual Defendants must be dismissed.

NYLS, on the other hand, as a Title IX funding recipient, may be held liable for student-on-student harassment, but only if the School was: (1) deliberately indifferent; (2) to sexual harassment; (3) of which it had actual knowledge; (4) that was so severe, pervasive, and objectively offensive that it deprived the victim of access to the educational opportunities or benefits provided by the school. *Davis*, 526 U.S. at 650. In order to constitute deliberate indifference, the School's actions must be "clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648; *see also Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 666 (2d Cir. 2012) (same). "[T]his is not a mere 'reasonableness' standard that transforms every school disciplinary decision into a jury question." *Gant v. Wallingford Bd. of Edu.*, 195

F.3d 134, 141 (2d Cir. 1999) (quoting *Davis*, 526 U.S. at 649) (internal quotation marks omitted). "On the contrary, the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable." *Davis*, 526 U.S. at 648–49.

The Amended Complaint, on its face, alleges facts demonstrating that NYLS did not act with deliberate indifference in response to Nesbit's harassment of female students. The Amended Complaint reflects that on August 28, 2014, upon receiving notice that Nesbit was intoxicated on campus attempting to flirt with female students, Nesbit was removed from campus. Am. Compl., Ex. A at 1. After Nesbit's attack on Plaintiff on October 6, 2014, the School also promptly removed Nesbit from campus, permitting him to return only after being assessed by a mental health professional. *Id.* ¶¶ 5, 8, Ex. C at 3. The School convened a Panel to investigate the attack within days of its occurrence, and approximately one month after Nesbit's return—after reviewing evidence, interviewing witnesses, and speaking with School administrators—the Board implemented a number of sanctions against Nesbit targeted to limit his presence on campus, particularly at times when Plaintiff would also be there. *Id.*, Ex. A at 4–5 (listing sanctions). Although Plaintiff contends that Nesbit should have been expelled for his conduct, "victims do not have a right to specific remedial measures." *Zeno*, 702 F.3d at 666 (citing *Davis*, 526 U.S. at 648). In light of the circumstances, including the non-physical nature of the August 28, 2014 incidents and the severity of the sanctions ultimately imposed by the Board, the Court concludes that the School's response to Nesbit's harassment was not clearly unreasonable as a matter of law. Accordingly, Plaintiff's Title IX claim premised on Nesbit's harassment must be dismissed. *See Davis*, 526 U.S. at 649 ("In an appropriate case, there is no reason why courts, on a motion to dismiss, . . . could not identify a response as not 'clearly unreasonable' as a matter of law.").

Plaintiff additionally alleges that NYLS violated Title IX by retaliating against her for complaining about harassment. Am. Compl. ¶¶ 9–11. "[R]etaliation against individuals because they complain of sex discrimination is 'intentional conduct that violates the clear terms of [Title IX].'" *Jackson v. Birmingham Bd. of Edu.*, 544 U.S. 167, 183 (2005) (quoting *Davis*, 526 U.S. at 642). In order to succeed on such a claim, Plaintiff will first need to establish a prima facie case by showing: (1) protected activity; (2) knowledge by the defendant of the protected activity; (3) adverse school-related action; and (4) a causal connection between the protected activity and the adverse action. *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 91 (2d Cir. 2011).[7] At the pleading stage, however, a plaintiff need not plead facts giving plausible support to the "ultimate question" of whether an adverse action was attributable to discrimination; rather, the facts need only give plausible support to a "minimal inference" of discriminatory motivation. *Littlejohn v. City of New York*, 795 F.3d 297, 311 (2d Cir. 2015). The Second Circuit has clarified that "the inference of discriminatory intent supported by the pleaded facts [need not] be *the most plausible* explanation of the defendant's conduct. It is sufficient if the inference of discriminatory intent is plausible." *Doe v. Columbia Univ.*, 831 F.3d 46, 57 (2d Cir. 2016) (emphasis in original); *see also Dawson v. N.Y.C. Transit Auth.*, 624 F. App'x 763, 770 (2d Cir. 2015) (summary order) ("At the pleading stage, district courts would do well to remember this exceedingly low burden that discrimination plaintiffs face . . . .").

Here, Plaintiff has met her exceedingly low burden of demonstrating a plausible minimal inference that NYLS retaliated against her because of her complaints. Plaintiff alleges that she complained to School officials throughout the 2014–2015 school year and actively participated

[7] "Once a plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. After the defendant has done so, the burden shifts back to the plaintiff to demonstrate that the articulated reasons are pretextual." *Papelino*, 633 F.3d at 92 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804–05 (1973)) (citation omitted).

in the School's disciplinary process against Nesbit. Am. Compl. ¶¶ 6–8, Ex. A, Ex. B at 2, Ex. E at 3–4. Shortly after she received the School's final decision with respect to Nesbit, Plaintiff made known to School officials her decision to transfer law schools. *Id.* ¶ 9, Ex. D. However, Plaintiff was unable to obtain a letter of recommendation that was required for her application. *Id.* ¶ 9, Ex. E at 1, 4. When she returned to NYLS for the fall 2015 semester, she received the worst grades of her law school career. *Id.* ¶ 10, Ex. E at 1, Ex. F at 2. Assuming Plaintiff's allegations to be true, as the Court must at this stage, the Court finds it at least minimally plausible to infer that the School took adverse action against Plaintiff because of her repeated complaints. *See Papelino*, 633 F.3d at 91 ("Close temporal proximity between the plaintiff's protected activity and the . . . adverse action may in itself be sufficient to establish the requisite causal connection.") (quoting *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 552 (2d Cir. 2010)). Accordingly, Plaintiff may proceed on her Title IX retaliation claim against NYLS.[8]

C. State Law Claims

Plaintiff's state law claims are not entirely clear. The Amended Complaint states broadly that Plaintiff is seeking damages for Defendants' "violations of tort, contract and [New York's General Business Law ("GBL")] § 349." Am. Compl. ¶ V. The pleading also references Plaintiff's "[s]evere emotional distress from defendants' intentional and persistent failure to respond reasonably to complaints" and Defendants' "misrepresentations," "inducements" to minority applicants, and "fraud." *Id.* ¶ IV. Plaintiff slightly clarifies her claims in her opposition brief by making arguments as to "common law fraud," "misrepresentation," having been

[8] The Court's decision to allow Plaintiff to go forward on her retaliation claim "in no way suggests that [the] court has any view, one way or the other, on the likely accuracy of what Plaintiff has alleged. . . . The role of the court at this stage of the proceedings is not in any way to evaluate the truth as to what really happened, but merely to determine whether the plaintiff's factual allegations are sufficient to allow the case to proceed." *Doe*, 831 F.3d at 59.

"fraudulently induced," and "hav[ing] not received" the benefit of her contract with NYLS. Pl.'s Opp'n Mem. at 27–28.

The submissions of a *pro se* litigant must be construed liberally and interpreted to raise the strongest arguments that they suggest. *Hill*, 657 F.3d at 122; *Triestman*, 470 F.3d at 475. At the same time, a party's *pro se* status does not exempt her from compliance with relevant rules of procedural and substantive law, and the Court cannot read into *pro se* submissions claims that are not consistent with the allegations. *Triestman*, 470 F.3d at 477. With these principles in mind, the Court construes the Amended Complaint to assert state law claims against Defendants for violations of GBL § 349, breach of contract, fraud, and intentional infliction of emotional distress.[9] The Court addresses each of these claims in turn.

1. GBL § 349

GBL § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." N.Y. Gen. Bus. Law § 349(a). "In addition to [a] right of action granted to the attorney general," the statute permits "any person who has been injured by reason of any violation" of the statute to bring an action for damages and/or injunctive relief. *Id.* § 349(h). "Although a person's actions may at once implicate both, [GBL] § 349 contemplates actionable conduct that does not necessarily rise to the level of fraud." *Gaidon v. Guardian Life Ins. Co. of Am.*, 725 N.E.2d 598, 603 (N.Y. 1999).

In order to succeed on her GBL § 349 claim, Plaintiff must ultimately prove that (1) Defendants engaged in an act or practice that is deceptive or misleading in a material way; (2) she was injured by reason thereof; and (3) the deceptive act or practice is "consumer

[9] Plaintiff explicitly disclaims liability on the basis of negligence. Am. Compl. ¶ 5; *see also id.* ¶ IV (referring to Defendants' "intentional" conduct).

oriented." *Gaidon*, 725 N.E.2d at 603–04. A "deceptive act or practice" is a representation or omission "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Id.* at 604 (quoting *Karlin v. IVF Am., Inc.*, 712 N.E.2d 662, 668 (N.Y. 1999)).

Here, Plaintiff alleges that NYLS advertised and marketed the diversity of the School and reputation of its faculty to diverse and minority applicants like herself, that the School's representations in this regard were false, and that she detrimentally relied on these "inducements" by deciding to attend and remain at NYLS and accrue over $200,000 in student loan debt. Am. Compl. ¶ IV. Irrespective of whether Plaintiff will ultimately be able to satisfy her burden of proof, the Court finds Plaintiff's allegations sufficient to make out a plausible claim against NYLS for violation of GBL § 349. *See, e.g.*, *Gomez-Jimenez v. N.Y. Law Sch.*, 103 A.D.3d 13, 17 (1st Dep't 2012) (noting that NYLS's efforts to sell its services to prospective students was "consumer-oriented," but dismissing plaintiff's claim under GBL § 349 because the information published by the School was truthful). Accordingly, Plaintiff will be permitted to proceed on this claim. As none of the aforementioned allegations relate specifically to any of the individual Defendants' conduct, however, Plaintiff's GBL § 349 claims against those Defendants are dismissed.

2. Breach of Contract

In New York, a student may bring a breach of contract action against an institution of higher education, such as NYLS. *Keefe v. N.Y. Law Sch.*, 71 A.D.3d 569, 570 (1st Dep't 2010); *see also Papelino*, 633 F.3d at 93; *Nungesser v. Columbia Univ.*, 169 F. Supp. 3d 353, 369 (S.D.N.Y. 2016); *Pearson v. Walden Univ.*, 144 F. Supp. 3d 503, 509 (S.D.N.Y. 2015). "However, only specific promises set forth in a school's bulletins, circulars and handbooks, which are material to the student's relationship with the school, can establish the existence of an

implied contract." *Keefe*, 71 A.D.3d at 570. "Where the essence of the complaint is that the school breached its agreement by failing to provide an effective education, the complaint must be dismissed as an impermissible attempt to avoid the rule that there is no claim in New York for 'educational malpractice.'" *Gally v. Columbia Univ.*, 22 F. Supp. 2d 199, 206–07 (S.D.N.Y. 1998) (quoting *André v. Pace Univ.*, 170 Misc. 2d 893, 896 (2d Dep't 1996)).

Here, Plaintiff does not allege the existence of a contract with any individual Defendant. As a result, her contract claims against those individuals must be dismissed. By contrast, although the Amended Complaint is silent on the point, Plaintiff argues in her opposition brief that she entered into a contract with NYLS "for education services that [she] [did] not receive[]." Pl.'s Opp'n Mem. at 28. This allegation alone is too vague to serve as the basis for a contract claim against an educational institution under New York law and, accordingly, the claim against NYLS must also be dismissed. *See Keefe v. N.Y. Law Sch.*, 25 Misc. 3d 1228(A), at *2 (Sup. Ct., N.Y. Cnty. 2009) (granting motion to dismiss a contract claim against NYLS where the plaintiff "fail[ed] to point to any document or communication that [gave] rise to a promise which NYLS [had] breached"), *aff'd*, 71 A.D.3d 569 (1st Dep't 2010); *see also Gally*, 22 F. Supp. 2d at 207 ("[T]he mere allegation of mistreatment without the identification of a specific breached promise or obligation does not state a claim on which relief can be granted."). Because it is not clear that granting Plaintiff leave to replead her contract claim against NYLS would be futile, however, the claim against NYLS is dismissed without prejudice.

3. Fraud

To state a claim for fraud in New York, a plaintiff must allege "that the defendant knowingly made a false statement of material fact with the intent to induce the plaintiff's reliance, and also that the plaintiff did in fact rely on that false statement to [her] detriment."

Apex Maritime Co. v. OHM Enters., Inc., No. 10 Civ. 8119 (SAS), 2011 WL 1226377, at *2 (S.D.N.Y. Mar. 31, 2011) (quoting *Lomaglio Assocs. Inc. v. LBK Marketing Corp.*, 876 F. Supp. 41, 44 (S.D.N.Y. 1995)). In addition, the plaintiff must "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). In other words, the complaint must: "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Hirsch v. Columbia Univ., Coll. of Physicians & Surgeons*, 293 F. Supp. 2d 372, 381 (S.D.N.Y. 2003) (quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993)).

Here, Plaintiff fails to state with particularity the elements of her fraud claims against the Defendants. Having reviewed the Amended Complaint and Plaintiff's opposition brief, it is still unclear to the Court whether Plaintiff is alleging that the fraud consisted of statements NYLS made in advertising materials or a campus safety poll, or statements School administrators made in meetings concerning Nesbit. *See* Am. Compl. ¶ 5, 7, IV; Pl.'s Opp'n Mem. at 12, 27–28. Because Plaintiff's claim for fraud fails to satisfy Rule 9(b), the claim must be dismissed. Plaintiff will, however, have the opportunity to replead her claim in a Second Amended Complaint.

4. Intentional Infliction of Emotional Distress

To state a claim for intentional infliction of emotional distress in New York, a plaintiff must allege: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress. *McGrath*, 672 F. Supp. 2d at 492; *see also Howell v. N.Y. Post Co.*, 612 N.E.2d 699, 702 (N.Y. 1993). The standard for asserting a claim is

"rigorous, and difficult to satisfy." *TC v. Valley Cent. Sch. Dist.*, 777 F. Supp. 2d 577, 604 (S.D.N.Y. 2011) (quoting *Howell*, 612 N.E.2d at 702). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Howell*, 612 N.E.2d at 702.

Plaintiff alleges that certain School administrators lied to her about whether other students had complained about Nesbit prior to her attack, told her Nesbit was "good" and "well-liked" while she made her complaints, were hostile to her in response to her complaints, and retaliated against her for complaining by preventing her from transferring schools and awarding her bad grades. Am. Compl. ¶¶ 5–11. Despite the serious nature of these allegations, the Court cannot conclude that Defendants' treatment of Plaintiff approached the level of extreme and outrageous conduct required to state a claim for intentional infliction of emotional distress under New York law. Accordingly, Plaintiff's claim for intentional infliction of emotional distress is dismissed. Since Plaintiff may be able to supplement her allegations, Plaintiff will be permitted to replead the claim in a Second Amended Complaint.

D. New Claims

In her opposition brief, Plaintiff asserts, for the first time, claims under 42 U.S.C. § 1985(3), Title VI of the Civil Rights Act of 1964, and the First Amendment. Pl.'s Opp'n Mem. at 21–25. Because these claims were not asserted in the Amended Complaint, the Court may not consider them in deciding Defendants' motion to dismiss. *Jordan v. Chase Manhattan Bank*, 91 F. Supp. 3d 491, 500 (S.D.N.Y. 2015); *see also O'Brien v. Nat'l Prop. Analysts Partners*, 719 F. Supp. 222, 229 (S.D.N.Y. 1989) ("[I]t is axiomatic that the Complaint cannot be amended by the

briefs in opposition to a motion to dismiss."). The Court has, however, considered whether to allow Plaintiff the opportunity to plead these claims in a Second Amended Complaint.

To state a claim for conspiracy to commit a civil rights deprivation under Section 1985(3), a plaintiff must plausibly allege:

> (1) a conspiracy; (2) to deprive directly or indirectly any person of equal protection of the laws, or of equal privileges and immunities; and (3) an act in furtherance of the conspiracy; (4) whereby his person or property is injured or he is deprived of any right of a U.S. citizen.

Roberts v. City of New York, No. 14 Civ. 5198 (GHW), 2016 WL 4146135, at *8 (S.D.N.Y. Aug. 2, 2016). Plaintiff alleges that Defendants conspired to prevent her from reporting Nesbit's attack to the police because of her gender. Pl.'s Opp'n Mem. at 21–22; *see N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1359 (2d Cir. 1989) (holding that women may constitute a class for purposes of Section 1985(3)). Plaintiff provides no allegations regarding any acts taken in furtherance of a conspiracy, however, and she fails to raise even a plausible minimal inference that Defendants were motivated by discriminatory animus towards women.

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. To state a claim for a violation of the statute, a plaintiff must plausibly allege that (1) the defendant discriminated against her on the basis of race, color, or national origin; (2) the discrimination was intentional; and (3) the discrimination was a substantial or motivating factor for the defendant's actions. *Tolbert v. Queens Coll.*, 242 F.3d 58, 69 (2d Cir. 2001). Plaintiff alleges that NYLS "targeted diverse students . . . through fraudulent, misleading, and unsavory advertising and marketing strategies" and that "asking for help at NYLS as a black

student will not get you anywhere." Pl.'s Opp'n Mem. at 24. These cryptic race-related allegations are insufficient to adequately state a claim under Title VI.

Although Plaintiff fails to set forth facts to sufficiently plead a claim under either Section 1985(3) or Title VI, Plaintiff will be permitted an opportunity to supplement her allegations as to these claims in a Second Amended Complaint. Amending her complaint to include a First Amendment claim would be futile, however, as Plaintiff cannot show that Defendants acted under color of state law. *See supra* Section III.A; *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982) ("[I]t is fundamental that the First Amendment prohibits governmental infringement on the right of free speech.").

IV. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss the Amended Complaint is GRANTED in part and DENIED in part. Plaintiff is permitted to proceed on her Title IX retaliation claim and GBL § 349 claim against NYLS, and Plaintiff is granted leave to replead her breach of contract claim against NYLS, her fraud claims against all Defendants, her intentional infliction of emotional distress claims against all Defendants, her Section 1985(3) claims against all Defendants, and her Title VI claim against NYLS. Plaintiff's remaining claims are dismissed with prejudice. Plaintiff's Second Amended Complaint must be filed, if at all, on or before **March 29, 2017**. The parties are directed to appear for a conference on **May 3, 2017**

at 10:30 a.m. The Clerk of the Court is respectfully directed to terminate the motions, Docs. 11 and 19.[10]

It is SO ORDERED.

Dated: March 1, 2017
New York, New York

Edgardo Ramos, U.S.D.J.

[10] On June 14, 2016, Plaintiff filed a request that the Court take notice of the fact that, contrary to what Defendants marked on their Civil Cover Sheet, she did demand a jury trial in her state court complaint. Doc. 11. The Court acknowledges that Plaintiff indeed made such a request.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
32 OLD SLIP, 26TH FLOOR
NEW YORK, NEW YORK 10005

TIMOTHY C. J. BLANCHARD
DIRECTOR
NEW YORK OFFICE

June 3, 2016

Theresa Bailey
1809 7th Avenue
New York, New York 10026

Re: Case No. 02-16-2208
New York Law School

Dear Ms. Bailey:

On April 25, 2016, the U. S. Department of Education, New York Office for Civil Rights (OCR) received the above-referenced complaint you filed against the New York Law School (the School). You alleged that the School discriminated against you on the bases of your race (African American) and sex by failing to respond appropriately to a complaint of sexual harassment that you filed with the School in October 2014 (Allegation 1). You also alleged that throughout the fall 2015 semester, your family law professor discriminated against you on the bases of your race and sex, or, in the alternative, retaliated for your prior complaint of sexual harassment, by treating you differently from other students (Allegation 2). You also alleged that in or about December 2015, the School retaliated against you for your prior complaint of sexual harassment by assigning you a failing grade and a D+ for two courses in which you were enrolled during the fall 2015 semester (Allegation 3).

Based on the information you provided in your complaint and supplemental documentation, OCR has determined that your complaint is inappropriate for investigation for the reasons set forth below.

With respect to Allegation 1, OCR has determined that your allegation is untimely. OCR requires that complaints be filed with OCR within 180 calendar days of the alleged discriminatory event, or 60 days after the complainant became aware of the alleged discrimination, unless the time for filing is extended by this office. The information you provided indicates that the last act of discrimination of which you are complaining occurred during academic year 2014-2015, which is more than 180 calendar days from the filing of your OCR complaint on April 25, 2016.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

In your complaint you requested a waiver of the timeliness requirement. You stated that you did not file Allegation 1 at an earlier date because you were not aware of OCR's existence prior to a response you received from a letter you wrote to the White House regarding Allegation 1, informing you of OCR's existence. You also stated that you had believed your remedies were limited to filing a lawsuit against the School, which you were "really scared" to do. Based on the information you provided, OCR determined that the circumstances you described do not warrant a waiver of the timeliness requirement. Accordingly, OCR has dismissed Allegation 1 as of the date of this letter.

With respect to Allegations 2 and 3, you informed OCR that you raised the same allegations in a complaint filed with the School's legal grievance committee in March 2016; and a complaint you filed with the Supreme Court of New York on April 21, 2016. You advised OCR that your complaints in these other forums are currently pending. Pursuant to OCR's case processing procedures, when a complainant has filed the same allegations against the same recipient with a state court or through a recipient's internal grievance procedures, and OCR anticipates that there will be a comparable resolution process under comparable legal standards (i.e., all allegations will be investigated, appropriate legal standards will be applied, and any remedies secured will meet OCR's standards), OCR will dismiss the OCR complaint. OCR has concluded that it would be inappropriate to continue processing allegations that are pending in another forum, as any remedies you obtain in connection with your pending complaint with the aforementioned entities will likely have bearing on the disposition of the allegations in the instant complaint filed with OCR. Accordingly, OCR has dismissed Allegations 2 and 3, and has closed your complaint as of the date of this letter.

However, you may re-file Allegation 2 or 3 with OCR within 60 days of the date of the aforementioned entities' final determination if you are not satisfied with the outcome. Generally, OCR will not conduct its own investigation in such an instance; instead, OCR will review the results of the other entities' actions and determine whether the other entities provided a comparable process and met appropriate legal standards.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. You may have the right to file a private suit in federal court whether or not OCR finds a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions, please contact Michele Ginter-Barbara, Compliance Team Investigator, at (646) 428-3816 or michele.ginter-barbara@ed.gov; or Eric Bueide, Compliance Team Attorney, at (646) 428-3851 or eric.bueide@ed.gov.

Sincerely,

Crystal K. Johnson

for Erin Emery
Compliance Team