UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MARGARET CZERWIENSKI, LILIA KILBURN, and AMULYA MANDAVA

Plaintiffs,

v.

HARVARD UNIVERSITY AND THE PRESIDENT AND FELLOWS OF HARVARD COLLEGE

Defendants.

CASE NO. 1:22-cv-10202-JGD

LEAVE TO FILE EXCESS PAGES GRANTED ON JULY 19, 2022

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS COUNTS ONE THROUGH NINE OF PLAINTIFFS' AMENDED COMPLAINT

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Introduction

Harvard holds as a core value its commitment to providing all community members with a learning environment that supports their well-being. Consistent with that core value, Harvard has developed and implemented robust policies and procedures, as well as wide-reaching resources, in order to prevent sexual harassment in all of its forms; thoroughly address allegations of impropriety; support members of the community who have been impacted by misconduct; and sanction those who violate those policies and fundamental community norms. Included among the policies and procedures are Harvard's Sexual and Gender-Based Harassment Policy and Procedures for the Faculty of Arts and Sciences (the "FAS Policy and Procedures"), which adopts the Harvard University Sexual and Gender-Based Harassment Policy ("the University Policy") (together, "Harvard's Title IX Policy").[1] In accordance with Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§1681–1688 ("Title IX"), Harvard prohibits "unwelcome conduct of a sexual nature . . . sufficiently severe, persistent, or pervasive" to interfere with a student's education or use of the school's programs or activities. *See* University Policy at 1-2; 20 U.S.C. § 1681; Amended Complaint ("Am. Compl.") at ¶ 15 n.11.

This case has been brought by three doctoral students in Harvard's Anthropology Department who raised concerns about Professor John Comaroff's conduct. After receiving Plaintiffs' concerns, a Program Officer for Title IX and Professional Conduct at Harvard filed complaints with Harvard's Office of Dispute Resolution ("ODR") on behalf of each of the Plaintiffs. The Plaintiffs then filed

[1] The University Policy and the FAS Policy and Procedures are available at https://odr.harvard.edu/. On a motion to dismiss, a court may consider "documents incorporated into the complaint by reference." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *accord Perkins v. City of Attleboro*, 969 F.Supp.2d 158, 164-65 (D. Mass. 2013) (accepting Magistrate Recommendations including consideration of letter on motion to dismiss because of "repeated references to the letter in [the] Complaint" and because "the letter is central to [plaintiff's] claim"); *Routh v. Univ. of Rochester*, 981 F. Supp. 2d 184, 191 (W.D.N.Y. 2013) (considering university's standards of student conduct in granting motion to dismiss in action for Title IX and negligence action where documents "were incorporated by reference [in the complaint] and since [the plaintiff] obviously possessed them and relied on them in drafting [the complaint]"). The Amended Complaint invokes the University Policy and FAS Policy and Procedures throughout its allegations. *See, e.g.,* Am. Compl. ¶¶ 15 n.11, 62, 67, 171, 184, 303-10, 312, 317. Thus, they are incorporated by reference and may properly be considered by the Court at this stage.

their own complaints with ODR. What followed was a robust and thorough investigation by ODR of each complaint pursuant to Harvard's Title IX policies and procedures. Those investigations included over 15 interviews each, and all parties were entitled to submit evidence and to respond to the evidence presented by the other party. In the end, ODR issued lengthy Final Reports in each case, each of which details the Plaintiff's concerns, ODR's factual findings, and the precise basis for those findings. In addition, Harvard directed a third-party investigator to review whether Comaroff had violated a separate policy, the FAS Professional Conduct Policy. On the basis of ODR's Final Reports and the findings of the third-party investigator, which established that in certain instances, Comaroff's conduct had violated Harvard's policies, Harvard issued significant sanctions against Comaroff.

In response to Plaintiffs' original Complaint, Harvard filed a Motion to Dismiss. Plaintiffs then amended their Complaint. However, the Amended Complaint does not cure the deficiencies that were apparent in this case from the outset. Indeed, all of Plaintiffs' alleged theories of liability fail, for the reasons set forth herein. In sum:

- Count One alleges that Harvard is liable for a violation of Title IX based on Harvard's alleged deliberate indifference to a sexually hostile educational environment created by Comaroff. This Count should be dismissed because it is barred by the statute of limitations and because the Amended Complaint itself demonstrates that Harvard's actions did not come close to satisfying the First Circuit's exacting requirements to state a claim for deliberate indifference under Title IX.

- Count Two seeks to hold Harvard liable for purported retaliation by Comaroff and other Harvard faculty members. This Count should be dismissed because Plaintiffs do not allege that *Harvard* retaliated against them, but rather seek to hold Harvard strictly liable for the purported retaliation of Comaroff and others. There is no such cause of action under Title IX. Moreover, even if Harvard could be held liable for the alleged retaliation of others, the alleged conduct does not constitute retaliation under Title IX, and is barred by the statute of limitations.

- Count Three alleges a violation of Title IX based on disparate treatment by Harvard on account of Plaintiffs' gender. However, Plaintiffs rely on conclusory generalizations of gender bias, which are insufficient to state a claim under Title IX.

- Counts Four, Five, and Six, alleging a violation of the Massachusetts Civil Rights Act ("MCRA"), sexual harassment under Mass. Gen. Laws Ch. 214, § 1C, and a violation of the Massachusetts Equal Rights Act ("MERA"), must be dismissed because they are time-barred, and fail to state a claim. Chapter 214 § 1C also bars the other two statutory claims.

- Count Seven, alleging negligent hiring, retention, and supervision, must be dismissed because it is time-barred. Comaroff was hired in 2012. Plaintiffs allege that, in 2017, they were aware of alleged misconduct by him as to them, that they made Harvard aware, and that they experienced negative effects as a result of Comaroff's conduct and the alleged lack of response by Harvard. Accepting the allegations in the Amended Complaint as true for purposes of this Motion, as the Court must, Plaintiffs' negligence claims accrued, at the latest, in 2017 and the statute of limitations has long since run.

- Count Eight, alleging a breach of contract, fails because Plaintiffs do not allege what purported agreement(s) and term(s) were allegedly breached. To the contrary, the Amended Complaint relies on precisely the type of generalized statements of policy that Courts in this jurisdiction do not permit Plaintiffs to enforce against universities.

- Likewise, Count Nine, alleging a breach of the covenant of good faith and fair dealing, does not allege any cognizable terms that were allegedly violated, nor does it assert facts to support conclusory allegations of "bad faith." Thus, this claim must be dismissed.[2]

BACKGROUND

The Amended Complaint obfuscates the relevant events, and is cluttered with information not pertinent to Plaintiffs' claims and which misleadingly suggests a lack of action by Harvard.[3] Read carefully, the Amended Complaint and its incorporated documents set forth the following:

Plaintiff Amulya Mandava

Mandava alleges that Comaroff engaged in a single act of direct wrongdoing toward her at Harvard: he purportedly stated to her, during a conversation on October 13, 2017, that people who spread rumors about him would not get jobs. *See* Am. Compl. ¶¶ 70-73. Mandava told Czerwienski

[2] Harvard is filing, simultaneously with this motion, a Motion for Summary Judgment seeking dismissal of Count Ten (alleging a violation of Kilburn's privacy rights). Cases in this jurisdiction support the view that a partial motion to dismiss stays the requirement to answer the remaining counts. *See Nat'l Cas. Co. v. OneBeacon Am. Ins. Co.*, No. CIV.A. 12-11874-DJC, 2013 WL 3335022, at *6 (D. Mass. July 1, 2013); *Tingley Sys., Inc. v. CSC Consulting, Inc.,* 152 F.Supp.2d 95, 122 (D. Mass. 2001) ("a partial motion to dismiss suspends the time to answer the claims not subject to the motion"). Should the Court disagree, Harvard respectfully moves to extend the deadline for filing an Answer on Count Ten until after the Court rules on the later of this Motion to Dismiss or the Motion for Summary Judgment on Count Ten.

[3] For example, the Amended Complaint resorts to stating as allegations quotations from media stories *about this very lawsuit*—a dizzying and improper attempt to distract this Court from assessing relevant allegations. *See, e.g.*, Amended Compl. ¶¶ 165 & n.35, 205 & n.45, 222 & n.55.

about this conversation, but did not report it or file a formal complaint. *Id.* ¶¶ 76, 80.

Dr. Seth Avakian, a Program Officer for Title IX and Professional Conduct at Harvard, filed a Complaint with Harvard's ODR[4] on Mandava's behalf on May 18, 2020, alleging that the October 13, 2017 statement violated Harvard's Title IX Policy. *Id.* ¶ 119.[5] Mandava filed her own ODR Complaint on July 31, 2020, which superseded Avakian's complaint. *Id.* ¶ 150; FAS Policy & Procedures at 21-22. Attached hereto as Exhibit A is a copy of ODR's Final Report of its investigation of Mandava's Complaint (Mandava Final Report).[6]

During the course of its investigation of Mandava's complaint, ODR interviewed 19 witnesses, including each of the 8 witnesses identified by Mandava. *See* Ex. A at 6. ODR issued its Final Report in Mandava's case on August 27, 2021. *See* Ex. A. The Mandava Final Report is 75 pages long and attaches 24 exhibits. ODR concluded as to Mandava's allegation that the evidence did not support a conclusion that Comaroff had violated Harvard's Title IX Policy. Am. Compl. ¶ 176; *see* Ex. A. Mandava disagreed with the outcome of the Final Report. *See* Am. Compl. ¶ 176. She appealed pursuant to the Policies. *Id.* ¶ 180. The appeal was denied. *Id.*

Plaintiff Margaret Czerwienski

Czerwienski alleges that Comaroff engaged in two instances of misconduct related to her, neither of which involved her being in direct contact or physically present with Comaroff: (1) on

[4] ODR is a neutral body that impartially investigates complaints of sexual harassment and/or other sexual misconduct against students, staff, and faculty. ODR investigations are handled by professional investigators who work together with ODR staff. *See* Harvard University Office of Dispute Resolution, *About Us*, available at https://odr.harvard.edu/about-us. ODR investigates complaints using a preponderance of the evidence standard, as Title IX requires. FAS Policy and Procedures at 25.

[5] The FAS Policy and Procedures allow a third party, designated a "Reporter," to file a complaint on behalf of a potential complainant. ODR then contacts the individual identified as the potential complainant to gather information and determine whether they want to participate in the investigation. FAS Policy and Procedures at 22-23.

[6] As with the University and FAS Policy and Procedures, Plaintiffs incorporate the ODR Final Reports into their Complaint by quoting, invoking, and relying upon them repeatedly. *See, e.g.,* Am. Compl. ¶¶ 170-78, 182. These reports are therefore "incorporated into the complaint by reference," and the Court may properly consider them on a motion to dismiss. *See supra* n.1.

September 22, 2017, another student allegedly told her that Comaroff was texting that student about Ms. Czerwienski in a manner that alarmed Ms. Czerwienski; and (2)[7] on October 13, 2017, Comaroff allegedly told Mandava that Czerwienski was spreading rumors about him, and that people who spread rumors about him had trouble getting jobs. Am. Compl. ¶¶ 69-73.

Czerwienski alleges that on October 16, 2017, she told Avakian about Comaroff's alleged conversation with Mandava and was disappointed with Avakian's response. *Id.* ¶¶ 77-79. She did not file a formal report at this time. *Id.* ¶ 80. Czerwienski and Mandava also spoke to several individuals in the Department about concerns regarding Comaroff, and some of those individuals spoke to Avakian. *E.g., id*. ¶¶ 56, 59, 60, 114.

Avakian filed a complaint with Harvard's ODR on Czerwienski's behalf on May 18, 2020. *Id.* ¶ 119. Czerwienski filed her own ODR complaint on July 28, 2020, which superseded Avakian's complaint. *Id.* ¶ 150. Attached hereto as Exhibit B is a copy of ODR's Final Report of its investigation of Czerwienski's complaint (Czerwienski Final Report). During its investigation of Czerwienski's complaint, ODR interviewed 18 witnesses, including the 4 witnesses suggested by Czerwienski. *See* Ex. B at 5-6. ODR issued its Final Report in the matter on August 27, 2021. *See* Ex. B. It is 47 pages long and attaches 21 exhibits. ODR concluded that the evidence did not support a finding that Comaroff had violated Harvard's Title IX Policy as to Czerwienski. Am. Compl. ¶ 176; *see* Ex. B. She disagreed with the outcome of that Final Report. *See id.* ¶¶ 176-78. She filed an appeal based on alleged procedural violations, which was denied. *Id.* ¶ 180.

Plaintiff Lilia Kilburn

Kilburn alleges that Comaroff engaged in the following wrongful conduct toward her at Harvard: (1) on or about August 27, 2017, he allegedly made a comment about her potentially being

[7] This other student, referred as "Harvard Student 2" in the Amended Complaint, declined to participate in Plaintiffs' ODR investigations (which is her right under Harvard's policies and Title IX). For the reasons discussed herein, *see, e.g.*, *infra* Section B.iv, Plaintiffs' allegations regarding the supposed import of her nonparticipation on their investigations are entirely speculative and do not ground colorable Title IX claims.

raped and killed if she went to South Africa because of her sexual orientation; (2) on or about September 24, 2017, he allegedly hugged and kissed her on the cheek and mouth, and placed his hand uncomfortably on her lower back; (3) in late 2017, he allegedly touched her back again; and (4) in February 2018, he allegedly squeezed her thigh in public. *Id.* ¶¶ 88-89, 92, 100, 102.[8]

Kilburn alleges that she first reported misconduct toward her by Comaroff in May 2019. *Id.* ¶ 109. She did not file an ODR complaint at that time. She alleges that she did, however, speak to several Harvard faculty members about her experiences, and some of the faculty, in turn, relayed information to Avakian. *Id.* ¶¶ 108, 109. On May 18, 2020, Avakian filed an ODR complaint as a reporter, raising the allegations against Comaroff involving Kilburn. *Id.* ¶ 119. Kilburn filed her own ODR complaint on July 16, 2020, superseding Avakian's complaint. *Id.* at ¶ 150.[9]

During the course of its investigation of Kilburn's complaint, ODR interviewed fifteen witnesses, including eight identified by Kilburn. *See* Ex. C at 7-8. ODR issued its Final Report in Kilburn's matter on August 27, 2021. *See* Ex. C. The Kilburn Final Report is 78 pages long and attaches 26 exhibits. *See id.* ODR concluded that evidence supported that Comaroff had violated the FAS Policy and Procedures as to the August 2017 statement concerning what might happen to her in Africa. *Id.* at 1-2; Am. Compl. ¶ 170. It also concluded, however, that there was insufficient evidence to conclude that Comaroff had violated the FAS Policy and Procedures as to the additional alleged conduct. Ex. C at 19-32; 53-69. Kilburn's appeal was denied. Am. Compl. ¶ 180.

Plaintiffs' Complaints and The ODR Investigations

In part by focusing heavily on allegations regarding Comaroff's time at the University of Chicago prior to joining Harvard in 2012 (ten years ago), the Amended Complaint obfuscates the relevant timeline regarding *Harvard's* knowledge of *Plaintiffs'* complaints concerning Comaroff.

[8] Kilburn also alleges that Comaroff kissed her prior to her enrollment at Harvard. *See* Am. Compl. ¶ 12.

[9] The Amended Complaint incorrectly states that Kilburn filed her complaint on July 13, 2020. As set forth in ODR's Final Report as to Kilburn, attached hereto as Exhibit C at 1, Kilburn did not file her own complaint until July 16, 2020. *See infra* n. 10 (where Complaint contradicts incorporated document, the incorrect allegations are not to be taken as true).

But when read carefully—even in the light most favorable to Plaintiffs—the Amended Complaint's operative allegations about that knowledge are as follows:

The first allegation in the Amended Complaint concerning any Plaintiff raising any issue about Comaroff to Harvard's Program Officer for Title IX and Professional Conduct, Seth Avakian, is a claim that Czerwienski complained to Avakian on October 16, 2017 about the comment made by Comaroff to Mandava three days earlier concerning people who spread rumors not getting jobs. Am. Compl. ¶ 77. Czerwienski alleges that she was disappointed in Avakian's response and asked that he keep a record of their conversation. *Id.* ¶¶ 78-80.

According to the Amended Complaint, the next time any person raised any concern about Comaroff was in May 2019. *Id.* ¶¶ 13, 109. In that month, Kilburn allegedly spoke to the Chair of the Anthropology Department and another professor about Comaroff's alleged harassment of her. *Id.* ¶ 109. Those two professors spoke to Avakian. *Id.* ¶ 115. Avakian filed ODR complaints to seek redress for all three Plaintiffs in May 2020, after which Plaintiffs filed their own ODR complaints. *Id.* ¶ 119; *see* Ex. A at 1, Ex. B at 1 n.1 and Ex. C at 1.[10]

As noted above, ODR is the administrative body at Harvard which impartially investigates complaints of sexual harassment and/or other sexual misconduct against students, staff, and faculty; ODR operates under Harvard's Office of the Provost, working in partnership with the University's Office for Gender Equity and Title IX Resource Coordinators.[11]

In the course of the investigations into Comaroff's conduct, ODR interviewed at least 52 different witnesses (some multiple times) and reviewed thousands of pages of exhibits submitted by

[10] Plaintiffs allege that "Harvard" did not "bring[] its own formal complaint." Am. Compl. ¶ 204. In fact, as Plaintiffs themselves acknowledge, Harvard's Program Officer for Title IX and Professional Conduct did exactly this. *Id.* ¶ 119. Although a complaint's allegations must be taken as true for purposes of a motion to dismiss, when a document incorporated into a Complaint "contradicts an allegation in the complaint, the document trumps the allegation." *O'Hara v. Diageo-Guinness, USA, Inc.*, 306 F. Supp. 3d 441, 450 (D. Mass. 2018) (citing *Clorox Co. P.R. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 32 (1st Cir. 2000)).

[11] *See* Harvard University Office of Dispute Resolution, *About Us*, available at https://odr.harvard.edu/about-us.

the parties and witnesses. *See* Exs. A, B, C. Consistent with Title IX and Harvard's Policy, each Complainant and the Respondent were interviewed multiple times and provided abundant opportunities to share their perspectives. *Id.* Complainants were each interviewed at several stages, including upon initial review of the Complaint, again after the Respondent's response to the Complaint, and again prior to the investigation's conclusion for a review of the evidence. *Id.* Complainants and the Respondent were also invited, pursuant to the Policies: to identify witnesses; to review all evidence submitted by a party and all evidence submitted by a third party upon which ODR might rely; to provide comment on ODR's Draft Final Report prior to its finalization; to select a personal representative to attend all ODR interviews with them; and to appeal any decision. *Id.*

ODR issued its Final Reports in the three investigations on August 27, 2021, concluding that there was insufficient evidence to conclude that Comaroff violated Harvard's Title IX Policy as to Mandava or Czerwienski, but that he violated Harvard's Title IX Policy as to an allegation raised by Kilburn. *See* Exs. A, B, C. Because ODR determined that Mandava had not engaged in protected conduct, a required element of a Title IX retaliation claim, ODR did not proceed to make factual findings concerning certain allegations about Comaroff's conduct that, if true, would implicate the FAS Professional Conduct Policy. *See* Ex. A. Accordingly, Harvard directed a third-party investigator to review whether Comaroff had violated a separate policy, the FAS Professional Conduct Policy. Am. Compl. ¶ 182. That investigation concluded he had violated the policy as to the Mandava allegation. *Id.* ¶¶ 182-83. ODR's role does not include the issuance of sanctions.[12]

Sanctions Issued Against Comaroff

Based on the findings that Comaroff had violated the Professional Conduct Policy as to one allegation, and Harvard's Title IX Policy as to another, Harvard issued sanctions against Comaroff.

[12] *See* University Policies at 1 ("Violations of this Policy may result in the imposition of sanctions up to, and including, termination, dismissal, or expulsion, *as determined by the appropriate officials at the School or unit*.") (emphasis added); FAS Policy and Procedures at p. 27, Section VI(D)(xi) ("The administration of discipline in cases against FAS Faculty is subject to the authority of the Dean of the FAS or his or her designee").

Am. Compl. ¶¶ 179, 183, 184-85. Those sanctions included: placing Comaroff on unpaid leave for the Spring 2022 semester; a prohibition against teaching required courses through at least the 2022-23 academic year; a prohibition against taking on additional advisees through at least the 2022-23 academic year; and a prohibition against chairing dissertation committees for the same period. *Id*. ¶ 185.[13]

PROCEDURAL HISTORY

Plaintiffs filed the initial Complaint in this matter on February 8, 2022. Dkt No. 1. On May 31, 2022, Harvard filed a Motion to Dismiss Counts One through Nine of the Complaint and a Motion for Summary Judgment on Count Ten of the Complaint. Dkt. Nos. 19, 24. Plaintiffs filed an Amended Complaint on June 21, 2022, after which this Court denied Harvard's initial Motion to Dismiss as moot. Dkt. Nos. 35, 37.

STANDARD OF REVIEW

To survive a motion to dismiss pursuant to Rule 12(b)(6), a party must allege a claim that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To assess whether a complaint states a plausible claim, the Court must first "isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements." *Zenon v. Guzman*, 924 F.3d 611, 615-16 (1st Cir. 2019). Second, the Court "take[s] the complaint's well-pled (*i.e.*, non-conclusory, non-speculative) facts as true, drawing all reasonable inferences in the pleader's favor, and see if they plausibly narrate a claim for relief." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Feliciano-Hernandez v. Pereira-*

[13] *See also* https://www.thecrimson.com/article/2022/1/21/comaroff-unpaid-leave/.

Castillo, 663 F.3d 527, 533 (1st Cir. 2011) (quoting *Iqbal*, 556 U.S. at 679).

ARGUMENT

I. Counts One, Two, and Three, Alleging Violations of Title IX, Must Be Dismissed.

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). That provision is enforceable through an implied private right of action under "certain limited circumstances." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639, 643 (1999). Would-be plaintiffs can proceed with a claim "only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Id.* at 633.[14]

Plaintiffs bring three counts against Harvard under Title IX, each asserting a different theory of liability. Count One alleges that Harvard exhibited deliberate indifference to a sexually hostile educational environment created by Comaroff. Am. Compl. ¶¶ 232-43. Count Two seeks to hold Harvard liable for purported retaliation by Comaroff and other Harvard faculty members. *Id.* ¶¶ 244-53. Count Three alleges disparate treatment based on Plaintiffs' gender. *Id.* ¶¶ 254-64. As explained below, all three counts are both barred by the statute of limitations and fail to state a claim.

A. Count One, Alleging a Title IX Violation Based on Deliberate Indifference, Must Be Dismissed.

In Count One, Plaintiffs contend that Harvard is liable for a violation of Title IX based on deliberate indifference to a sexually hostile educational environment created by Comaroff. *See* Am. Compl. ¶¶ 232-43. The standard for proving such liability is stringent. A school may only be liable

[14] As set forth in more detail below, at least two of the Plaintiffs—Amulya Mandava and Margaret Czerwienski—cannot possibly meet this standard. Mandava alleges a single act of wrongdoing against her by Comaroff, claiming that in October 2017, he accused her and Czerwienski of spreading rumors about him and threatened them with retaliation. Am. Compl. ¶¶ 70-73. Czerwienski only alleges two acts of wrongdoing, neither of which involved a direct interaction between herself and Comaroff: (1) the aforementioned conversation between Comaroff and Mandava, for which Czerwienski was not present; and (2) an earlier conversation with Harvard Student 2, who allegedly told Czerwienski that Comaroff was texting Harvard Student 2 about Czerwienski. *Id.* ¶¶ 69-73. The remainder of Czerwienski and Mandava's allegations relate to incidents involving non-parties to this lawsuit, particularly Harvard Student 2.

for an employee's discriminatory conduct if: (i) a school official with authority to address the problem receives actual notice of the discrimination; and (ii) the official fails to adequately respond in a manner amounting to deliberate indifference. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998). This standard avoids the "risk that the [school] would be liable in damages not for its own official decision but instead for its employees' independent actions." *Id.* at 290-91. "Title IX does not require educational institutions to take heroic measures, to perform flawless investigations, [or] to craft perfect solutions.'" *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 174 (1st Cir. 2007), *rev'd and remanded on other grounds*, 555 U.S. 246 (2009). Instead, "[t]he test is objective—whether the institution's response, evaluated in light of the known circumstances, is so deficient as to be clearly unreasonable." *Id.*

i. Count One is Barred by the Statute of Limitations

Title IX does not contain its own statute of limitations. Courts in this District therefore apply Massachusetts' three-year tort statute of limitations to Title IX claims. *See, e.g.*, *LeGoff v. Trustees of Bos. Univ.*, 23 F. Supp. 2d 120, 127 (D. Mass. Sept. 28, 1998);[15] Mass. Gen. Laws c. 260, § 2A. Title IX claims based on deliberate indifference must be brought within three years of the date when the plaintiff "'knows, or has reason to know, of the injury on which the action is based.'" *LeGoff*, 23 F. Supp. 2d at 127 (quoting *Rivera-Muriente v. Agosto-Alicea*, 959 F.2d 349, 353 (1st Cir. 1992)); *see Twersky v. Yeshiva Univ.*, 993 F. Supp. 2d 429, 439 (S.D.N.Y. 2014) (Title IX claim accrues "when, despite [plaintiffs'] knowledge of the abuse at the school, the school administrators failed to take corrective actions."), *aff'd*, 579 F. App'x 7 (2d Cir. 2014); *see also Garrett v. Ohio State Univ.*, No. 2:18-CV-692, 2021 WL 7186147, at *5 (S.D. Ohio Sept. 22, 2021) (Title IX deliberate indifference

[15] In *LeGoff*, the Court (Gertner, J.) applied the continuing violation doctrine to a Title IX employment discrimination claim but did so by relying heavily on Title VII case law with no analysis of the differences between Title IX and Title VII. 23 F. Supp. 2d at 127-28. For the reasons discussed in Section A.i.b *infra*, the continuing violation doctrine should not apply to Title IX claims (and even if it did apply in this case, Plaintiffs' claim would still be untimely).

claim accrued "the moment that Plaintiff suffered the Title IX injury").[16]

Here, the original Complaint was filed on February 8, 2022. Accordingly, any claims that accrued before February 8, 2019 are time-barred. As explained below, all of Plaintiffs' allegations underpinning their deliberate indifference claim accrued long before that date.

a. Czerwienski and Mandava's Deliberate Indifference Claims Accrued, at the latest, in 2017 and Count One is Thus Time-Barred.

As mentioned above, the Amended Complaint obfuscates the timeline of *Harvard's* knowledge of *Plaintiffs'* complaints. However, Plaintiffs allege that "Harvard has been on actual notice of the hostile academic environment" that Plaintiffs allegedly endured "since 2017," when Czerwienski first mentioned her concerns about Comaroff to Avakian. Am. Compl. ¶ 236; *see id.* ¶ 77.[17] In fact, Plaintiffs allege that Czerwienski not only notified Avakian of her own concerns, but also shared that "Professor Comaroff had been sexually harassing students." *Id.* ¶ 77. Plaintiffs explicitly allege that they found Avakian's response to this report—which occurred on October 16, 2017—inadequate. *Id.* ¶¶ 78-79. Accordingly, the statute of limitations began to run on their deliberate indifference claim in 2017, and accrued, at the latest, in 2020.

The Amended Complaint contains a number of conclusory statements which elide conduct and dates to imply that certain conduct occurred later than it did. *See, e.g.,* Am. Compl. ¶ 235(b) (alleging that from "2017 through 2022, Professors John and Jean Comaroff created a hostile

[16] *See also Forrester v. Clarenceville Sch. Dist.*, 537 F. Supp. 3d 944, 950-54 (E.D. Mich. 2021) (applying standard accrual rule to Title IX claims); *Doe v. Nat'l Ramah Comm'n, Inc.*, No. 16-CV-6869 (NSR), 2018 WL 4284324, at *6 (S.D.N.Y. Sept. 7, 2018) (same).

[17] Although Plaintiffs allege that they told other Harvard professors and employees about their concerns with Comaroff, none of these individuals had sufficient authority to impute actual knowledge onto Harvard. The Supreme Court has explained that in order for an institution to be liable under Title IX, a school official who "at a minimum has authority to address the alleged discrimination and to institute corrective measures on the [school's] behalf" must be informed about the alleged discrimination. *Gebser*, 524 U.S. at 290. Besides Avakian, none of the individuals with whom Plaintiffs allege they spoke held this power. "[A] university employee's ability to mitigate hardship or refer complaints does not make them an [official with authority]." *Kesterson v. Kent State Univ.*, 967 F.3d 519, 528 (6th Cir. 2020) (mandatory reporter's knowledge of discrimination did not trigger Title IX liability). Otherwise, "every employee would qualify and schools would face a form of vicarious liability that Title IX does not allow." *Id.*; *see Gebser*, 524 U.S. at 290.

educational environment"); *id.* ¶ 235(c) (alleging that "From 2017 through 2021, Professor John Comaroff engaged in a pattern of sexual harassment and retaliation against Kilburn, which created a hostile educational environment."). These conclusory statements do not rely on facts anywhere in the Amended Complaint and do not therefore change the analysis regarding the applicable statute of limitations. Accordingly, Count One must be dismissed.[18]

b. Vague, Later-in-Time Claims Do Not Render Count One Timely.

In an attempt to save Count One from dismissal, Plaintiffs argue that they are "entitled to the application of the continuing violation doctrine to the unlawful acts alleged herein" because "Harvard has shown continued deliberate indifference to Professor Comaroff's sexual harassment and retaliation by tolerating, condoning, ratifying, and failing to take remedial action to correct it." Am. Compl. ¶¶ 236, 240. This too fails.

First, the continuing violation doctrine is not available to Plaintiffs as a means to excuse their failure to timely file. The United States Supreme Court has adopted the continuing violation doctrine for Title VII hostile environment claims, *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), but neither that Court nor the First Circuit has addressed whether the continuing violation doctrine applies to Title IX claims.[19] It should not.

Several federal courts have recognized that certain material differences between Title VII and Title IX suggest that it is inappropriate to apply the continuing violation doctrine under Title IX. *See, e.g., Folkes v. N.Y. Coll. of Osteopathic Med.*, 214 F. Supp. 2d 273, 288 (E.D.N.Y. 2002). Put

[18] Whether Plaintiffs knew the precise elements of a claim or not based on the impact at that time is not material to the timeliness analysis. *See United States v. Kubrick*, 444 U.S. 111, 122 (1979); *Twersky,* 993 F. Supp. 2d at 440; *see also Doe v. Town of Bourne,* No. CIV.A.02-11363-DPW, 2004 WL 1212075, at *11 (D. Mass. May 28, 2004) ("accrual for [Title IX] claims, which is governed by federal law, is determined by when the *plaintiff* knows or has reason to know of the injury on which the action is based"). Because Plaintiffs knew of the incidents and the injury at the latest in Fall 2017, the statute of limitations ran on that claim in 2020.

[19] The Massachusetts Appeals Court has applied the continuing violation doctrine in a case involving claims under G.L. c. 151C and Title IX, but did so by relying heavily on Title VII case law with no analysis of the differences between Title IX and Title VII. *See Morrison v. N. Essex Comm. Coll.*, 56 Mass. App. Ct. 784, 792-98 (2002); *see also supra* n.15.

simply, the continuing violation doctrine is "a poor fit with the goals of Title IX." *Id.* at 288.[20] "Title IX, like Title VI, 'condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.'" *Id.* (quoting *Gebser*, 524 U.S. at 286). "[T]hat contractual framework . . . 'distinguishes Title IX from Title VII, which is framed in terms not of a condition but of an outright prohibition,' and which applies to all employers, not just recipients of federal funds, and aims broadly to 'eradicate discrimination throughout the economy.'" *Id.* (quoting *Gebser*, 524 U.S. at 286–87). "'[W]hereas Title VII aims centrally to compensate victims of discrimination,' and to 'make persons whole for injuries suffered through past discrimination,' Title IX 'focuses more on protecting individuals from discriminatory practices carried out by recipients of federal funds.'" *Id.* (quoting *Gebser*, 524 U.S. at 287). "*Gebser* shows the Supreme Court's reluctance to extend the reach of Title IX beyond that imposed by Congress," which "led the *Gebser* Court to impose the actual notice standard . . . , and [should] lead[] this court to question the advisability of applying the oft-disfavored continuing violation exception to Title IX claims." *Id.* at 289. Because the continuing violation doctrine should not apply in this context, Plaintiffs may not escape dismissal based on the statute of limitations by using later acts to "anchor" their claims.

Second, even if the continuing violation doctrine were to apply in this context, Plaintiffs do not allege actionable conduct within the statute of limitations period that may serve as an "anchoring act." When it applies, "[t]he continuing violation doctrine creates an equitable exception to the [limitations period] when the unlawful behavior is deemed ongoing." *Provencher v. CVS Pharmacy, Div. of Melville, Corp.*, 145 F.3d 5, 14 (1st Cir. 1998) (affirming dismissal of a claim where plaintiff did not timely file). In assessing whether the continuing violation doctrine functions in a particular

[20] The Supreme Court has described "two principal objectives" of Title IX: "[T]o avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." *Gebser*, 524 U.S. at 286 (1998) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979)).

instance to sweep untimely claims into an actionable pattern that encompasses timely conduct, "[t]he First Circuit, in evaluating federal sexual harassment claims, has required that the timely acts be 'linked to the untimely acts by similarity, repetition or continuity.'" *Id.* at 15. In *De Almeida v. Children's Museum*, moreover, the Court recognized that "dark stares" by one person toward another within the statute of limitations period, could not independently support an action for harassment, and were not "substantially related" to the earlier, untimely, sexual harassment allegations. No. 99-0901-H, 2000 WL 96497, at *3 (Mass. Super. Ct. Jan. 11, 2000); *see also Perez v. Horizon Lines, Inc.*, 804 F.3d 1, 8 (1st Cir. 2015) (rejecting claim of continuing violation where purportedly anchoring conduct was not "actionable as a matter of law" because it consisted of uncomfortable behavior but not actionable harassment).

So too, here. Plaintiffs' supposed anchoring acts— vague assertions that Harvard showed "continued deliberate indifference to Professor Comaroff's sexual harassment" and "has also maintained an official policy, custom, and/or practice of deliberate indifference to a known overall risk of sexual harassment, retaliation, and gender-based disparate treatment against graduate students in the Anthropology Department"—are not independently actionable. *See* Am. Compl. ¶¶ 236-37. The elements of a deliberate indifference claim are: (i) a school official with authority to address the problem receives actual notice of an act of discrimination; and (ii) the official fails to adequately respond in a manner amounting to deliberate indifference. *Gebser*, 524 U.S.at 285. General allegations about Harvard's policies and practices do not qualify.

c. The Discovery Rule Does Not Render Count One Timely.

Plaintiffs next argue that "[b]ecause a reasonable person in each Plaintiff's position would have first discovered that Harvard's unlawful practices and handling of prior complaints against professors in the Anthropology Department were the probable cause of her injury within the applicable limitations period, Plaintiffs are entitled to the application of the discovery rule to the unlawful acts alleged herein." Am. Compl. ¶ 241. As explained above, however, the statute of

limitations on a Title IX deliberate indifference claim begins to run "when, despite their knowledge of the abuse at the school, the school administrators failed to take corrective actions." *Twersky*, 993 F. Supp. 2d at 439. Plaintiffs themselves allege that this occurred in 2017. *See* Am. Compl. ¶ 236 ("[S]ince 2017, Harvard has been on actual notice of the hostile academic environment that Plaintiffs [] have endured at Harvard."). Accordingly, the discovery rule is inapplicable.

ii. Count One Must Be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(6).

Even if it were not untimely, Count One must be dismissed for failure to state a claim. The First Circuit has recently reaffirmed a five-part test used to determine whether a school engaged in "deliberate indifference" under Title IX. *See Doe v. Williams Coll.,* 530 F. Supp. 3d 92 (D. Mass. 2021). "To succeed on Title IX deliberate indifference claim, a plaintiff must show that an official with authority to implement corrective measures was aware of and deliberately indifferent to an act of discrimination on the basis of sex." *See Doe v. Trs. of Bos. Coll*., 892 F.3d 67, 93 (1st Cir. 2018). Under that test, "a plaintiff must show that (1) 'he or she was subject to severe, pervasive, and objectively offensive sexual harassment'; (2) 'the harassment caused the plaintiff to be deprived of educational opportunities or benefits'; (3) the funding recipient was aware of such harassment; (4) the harassment occurred 'in [the funding recipient's] programs or activities'; and (5) the funding recipient's response, or lack thereof, to the harassment was 'clearly unreasonable.'" *Doe v. Brown Univ*., 896 F.3d 127, 130 (1st Cir. 2018) (quoting *Porto v. Town of Tewksbury*, 488 F.3d 67, 72-73 (1st Cir. 2007)); *see also Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 66 (1st Cir. 2002).

Despite conceding that they availed themselves of Harvard's robust Title IX policies and procedures, Plaintiffs nonetheless attempt to proceed in this case against Harvard for "deliberate indifference." But deliberate indifference under Title IX is "a stringent standard of fault, requiring proof that a [defendant] disregarded a known or obvious consequence of [its] action or inaction." *Porto*, 488 F.3d at 73 (internal quotation marks omitted). A court may, "on a motion to dismiss…identify a response as not 'clearly unreasonable' as a matter of law." *See Davis*, 526 U.S. at

649. "Title IX does not require educational institutions to take heroic measures, to perform flawless investigations, [or] to craft perfect solutions.'" *Fitzgerald*, 504 F.3d at 174.

Plaintiffs' allegations do not meet this high bar. First, as to Mandava and Czerwienski, the Amended Complaint alleges two incidents of purported harassment by Comaroff — the first involving text messages about Czerwienski and the second involving an October 13, 2017 conversation between Comaroff and Mandava at which Czerwienski was not present. Am. Compl. ¶¶ 69-73. Accordingly, as explained above, Plaintiffs do not sufficiently allege the "severe and pervasive" prong of the deliberate indifference cause of action. *See Doe*, 896 F.3d at 130.

Nor is this Count salvaged by the fact that the alleged October 13, 2017 comment was found by an independent investigator engaged by Harvard to have constituted a violation of Harvard's Professional Conduct Policy, causing Comaroff to be disciplined. Am. Compl. ¶¶ 183, 185. That the conduct was unacceptable under Harvard's policies does not mean that the incident was sufficiently severe and pervasive to support a claim for liability against Harvard related to a sexually hostile environment. *See, e.g.*, *Schaefer v. Yongjie Fu*, 272 F. Supp. 3d 285, 287–88 (D. Mass. 2017) (dismissing Title IX claim where alleged harasser "interacted with [plaintiff] in a variety of ways, including inter alia, sitting near her in class, introducing himself to her at the dining hall and telling plaintiff she could be a headphone model," finding that "[m]ost of those contacts were not….sexual in nature," and concluding that a "single comment does not constitute severe sexual harassment"); *Keskinidis v. Univ. of Mass. Bos.*, 76 F. Supp. 3d 254, 260 (D. Mass. 2014) (conduct deemed not sufficiently severe or pervasive where it was "one-time event, highly ambiguous in its content, and involving nothing that could be reasonably construed as a physical threat or an explicit demand for sex"). Although unacceptable pursuant to Harvard's Professional Conduct Policy, Comaroff's statement to Mandava—which was purportedly about, but not in the presence of Czerwienski—is an insufficient basis upon which to proceed against Harvard with a claim of a sexually hostile environment under Title IX. The same is true for text messages between Comaroff and a third party

that were allegedly about Czerwienski, and conduct directed at that same third party that had an allegedly (albeit, entirely speculative) retaliatory impact on the Plaintiffs' ODR investigations. *Cf. Keskinidis*, 76 F. Supp. 3d at 260 ("[W]here [an educational environment] falls short of that 'abusive' high-water-mark, it cannot sustain a hostile-[educational]-environment claim." (quotations omitted).

Indeed, Plaintiffs can point to *no case* successfully advancing a claim under Title IX where an institution undertook the type of searching and thorough process pursued by Harvard as to Plaintiffs' complaints. To the contrary, the Harvard policies that Plaintiffs reference as applicable in this case are substantially the same as those found *not* deliberately indifferent by this Court. *See Leader v. President & Fellows of Harvard Coll.*, No. 16-10254, 2018 WL 3213490, at *4 (D. Mass. June 29, 2018) (Casper, J.) (granting summary judgment for Harvard where investigation of sexual harassment and other misconduct did not constitute "deliberate indifference," including because its alleged failure to initiate an investigation "was not an unjustified delay, but was rather justified by [the complainant's] choice not to file a complaint at the time" that she initially reported alleged harassment). The *Leader* Court also rejected plaintiff's conclusory allegations that Harvard had a "'policy of indifference' towards sexual misconduct on campus," *id.* at *5, which parallel allegations the Plaintiffs make here. *See* Am. Compl. ¶ 18 (alleging a "policy of indifference").

Second, Count One fails for the additional reason that to validly allege a violation of Title IX based on a sexually hostile environment, Plaintiffs must allege "that a school official authorized to take corrective action had actual knowledge [or notice] of the harassment, yet exhibited deliberate indifference to it." *Frazier*, 276 F.3d at 66; *see Doe v. Emerson Coll.*, 271 F. Supp. 3d 337, 354 (D. Mass. 2017) (when an entity employs "timely and reasonable measures" proportional to allegations, it has not been deliberately indifferent). The "standard is not perfection; it is whether the college's response was 'clearly unreasonable.'" *Emerson Coll.*, 271 F. Supp. 3d at 355.

The Amended Complaint fails to plausibly allege "deliberate indifference" on Harvard's part. To the contrary, even taking Plaintiffs' allegations as true, Harvard followed its policies and

procedures as concerns about Comaroff were made by the Plaintiffs. The Amended Complaint makes clear that Plaintiffs complained to Avakian in October 2017. Am. Compl. ¶ 77. After that, no report is alleged to have been made by Plaintiffs to Harvard's Title IX office until May 2019, when Kilburn complained about Comaroff. *Id.* ¶ 109.[21] Subsequently, other individuals with whom Plaintiffs had spoken "eventually" conveyed information to Avakian. *Id.* ¶ 115. In May 2020, *before* Plaintiffs elected to file ODR complaints, Avakian filed ODR Complaints seeking redress for each of the Plaintiffs. *See id.* ¶ 119. This was done pursuant to the FAS Policy and Procedures, which permit a third party to file on behalf of a potential complainant. *See* FAS Policy and Procedures at 29. When a reporter files such a complaint, ODR contacts the potential complainant to gather information and determine whether they want to participate in the investigation. *Id.* at 22-23. Here, *after* Harvard's Title IX Officer initiated the ODR process of investigating Comaroff's conduct, Plaintiffs filed their own complaints. *Compare* Am. Compl. ¶ 119 *with id.* ¶ 150.

Plaintiffs clearly disagree with the structure and outcome of the investigations,[22] are dismissive of the sanctions imposed upon Comaroff,[23] and would prefer that Harvard revise its policies and processes to their liking.[24] But "Title IX does not guarantee that an investigation will yield the outcome that a complainant desires." *Emerson Coll.*, 271 F. Supp. 3d at 355. Indeed, the "question is not whether [Harvard] could possibly have done more to investigate [Plaintiffs'] claims;

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[21] Plaintiffs' other purported complaints were made to individuals without authority to issue corrective measures. *See, e.g.,* Am. Compl. ¶ 66 (faculty member); ¶ 95 (unnamed classmates and staff); ¶ 96 (Graduate Program Administrator); ¶ 109 (faculty members). Plaintiffs attempt to obfuscate this fact by referring to individuals who are allegedly "mandatory reporters" at Harvard. But there is no basis for Title IX liability arising out of the alleged failure of a "mandatory reporter" to take any particular action. Rather, as stated above, the proper inquiry is whether an individual with authority to take corrective action was on notice and was deliberately indifferent. *See supra* at n.17.

[22] For example, Plaintiffs condemn ODR's findings of certain inconsistencies and insufficient independent corroboration. *See, e.g.*, Am. Compl. ¶¶ 174, 176, 178.

[23] For example, the Amended Complaint characterizes those sanctions as "Inadequate and Temporary." *See* Am. Compl. at p. 51 (O).

[24] For example, Plaintiffs would prefer that Harvard investigate all informal and formal student complaints, *see* Am. Compl. ¶ 204, credit all complainants' testimony even if uncorroborated, *id.* ¶ 206, and consider all written communications even if a party thereto declines to participate in the ODR proceeding and thus declines to subject themselves to cross-examination, *id.* ¶ 207.

it is whether the investigation was so deficient as to be unreasonable." *Id.* Here, as in *Emerson*, Harvard's investigation "clearly was not." *Id.*; *see also Gebser*, 524 U.S. at 277 (finding that a Title IX defendant's failure to comply with its own policy did not constitute deliberate indifference); *Leader*, 2018 WL 3213490, at *4 (a University's "failure to engage in 'particular remedial demands,'…is not sufficient for a finding of liability under Title IX" (citation omitted)); *accord Doe v. Bd. of Educ. of Prince George's Cnty.*, 982 F. Supp. 2d 641, 657-58 (D. Md. 2013).

Notably, the Title IX process concededly followed in this case is substantively the same process found not deliberately indifferent in *Leader*. *See* 2018 WL 3213490, at *4 (Harvard's investigation of sexual harassment and other misconduct did not constitute "deliberate indifference," including because its alleged failure to initiate an investigation "was not an unjustified delay, but was rather justified by [the complainant's] choice not to file a complaint at the time" she initially reported allegedly harassing behavior to Harvard's Title IX coordinator").

B. Count Two, Alleging Retaliation in Violation of Title IX, Must be Dismissed.

In Count Two, Plaintiffs allege that Harvard is separately liable for a violation of Title IX based on alleged retaliation prohibited by that statute. Harvard's Title IX Policy strictly prohibits members of the Harvard community from engaging in retaliation against an individual who has undertaken protected conduct. *See, e.g.*, University Policy at 1 ("Retaliation against an individual for raising an allegation of sexual or gender-based harassment, for cooperating in an investigation of such a complaint, or for opposing discriminatory practices is prohibited."); FAS Policy and Procedures at 24 ("Retaliation of any kind is in itself a separate violation of this Policy and may lead to an additional complaint and consequences.").

"[A] plaintiff may establish a prima facie case for a Title IX retaliation claim by alleging facts sufficient to show [1] that she engaged in activity protected by Title IX, [2] that the alleged retaliator knew of the protected activity, [3] that the alleged retaliator subsequently undertook some action disadvantageous to the actor, and [4] that a retaliatory motive played a substantial part in

prompting the adverse action." *Frazier*, 276 F.3d at 67 (1st Cir. 2002). The familiar burden-shifting framework applies: (1) "the plaintiff must establish a prima facie case" under *Frazier*; (2) the defendant must then "articulate a legitimate, non-retaliatory reason for its employment decision"; and (3) if the defendant meets that burden, the plaintiff still must "show that the proffered legitimate reason is in fact a pretext" for "the defendant's retaliatory animus." *Cass v. Town of Wayland*, 383 F. Supp. 3d 66, 80 (D. Mass. 2019). Moreover, a plaintiff seeking to hold an educational institution liable for retaliation under Title IX must demonstrate that the *entity itself* retaliated. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (retaliation claim lies under Title IX only for the funding recipient's own retaliation—but not for retaliation by employees).

Here, Plaintiffs do not plausibly allege that *Harvard* retaliated against them. Rather, they seek to hold Harvard liable for alleged retaliatory conduct undertaken by others, primarily Comaroff and other faculty members. *See, e.g.,* Am. Compl. ¶¶ 189-91, 248. But as explained below, Title IX does not provide a cause of action against Harvard for retaliation against Plaintiffs by these individuals. *See Jackson*, 544 U.S. at 174. Accordingly, even if the actions alleged to have been taken against Plaintiffs occurred as they contend, and even if those actions contravene Harvard policies, Title IX does not provide a cause of action for redress.

i. Under Title IX, Harvard is Only Potentially Liable for Its Own Allegedly Retaliatory Actions, and Plaintiffs Do Not Allege Retaliatory Action By Harvard.

Harvard cannot be held strictly liable for Comaroff's alleged retaliatory conduct. In *Gebser*, the United States Supreme Court held that neither strict liability nor common law agency principles apply under Title IX. *See* 524 U.S. at 277, 290-91. Instead, to hold a funding recipient liable for sexual harassment—as distinct from retaliation—under Title IX, a plaintiff must show that "an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct." *Id.* at 277. The Court reasoned that "[u]nder a lower standard, there would be a risk that the recipient

would be liable in damages not for its own official decision but instead for its employees' independent actions." *Id.* at 290-91.

Later, in *Jackson*, the Supreme Court held that damages claims for retaliation are viable under Title IX "where *the funding recipient* [itself] retaliates against an individual because he has complained about sex discrimination." 544 U.S. at 174 (emphasis added); *see Turley v. McKenzie*, No. CV 14-14755-LTS, 2018 WL 314814, at *12 n.13 (D. Mass. Jan. 5, 2018) (emphasis added) ("Title IX prohibits sexual discrimination by recipients of federal funding—not sexual discrimination generally."). *Gebser* and *Jackson*, then, establish that a retaliation claim lies under Title IX for a funding recipient's own retaliation—but does not establish a cause of action against an entity for retaliation by its employee. *See Jackson*, 544 U.S. at 184. "To establish Title IX liability, [a plaintiff] must make a showing that the [funding recipient], through one of its officials with 'authority to address the alleged discrimination,' discriminated against the plaintiff." *Turley*, 2018 WL 314814, at *12 n.13 (quoting *Gebser*, 524 U.S. at 290) (plaintiff failed to show that entity, as opposed to individual instructor, retaliated against plaintiff).

The First Circuit has gone no further than the Supreme Court. Counsel for Harvard has been unable to identify any First Circuit cases holding a funding recipient liable for retaliation by an employee, as opposed to the funding recipient itself—whether under a strict liability standard, or even on a theory of deliberate indifference.[25] Therefore, because Plaintiffs do not allege that Harvard itself retaliated against them in any way, but instead seek to hold Harvard liable for alleged retaliation

[25] *See, e.g.*, *Theidon v. Harvard Univ.*, 948 F.3d 477, 506 (1st Cir. 2020) (affirming summary judgment on retaliation claim in tenure denial case where there was "no evidence . . . that the voting members of the *ad hoc* committee were aware of [plaintiff's] protected activities during their deliberation" and Professor alleged to have had retaliatory animus was not a voting member of the committee); *Bose v. Bea*, 947 F.3d 983, 989 (6th Cir. 2020) (questioning whether "deliberate indifference to retaliation [is] even actionable under Title IX"); *Saphir v. Broward Cty. Pub. Sch.*, 744 F. App'x 634, 639 (11th Cir. 2018) (affirming summary judgment on retaliation claim where plaintiffs failed to show that school board "knew about the report of [the] harassment and that the School Board took the adverse action"); *M.D. ex rel. Deweese v. Bowling Green Ind. Sch. Dist.*, 709 Fed. App'x 775, 779 (6th Cir. 2017) (holding that plaintiff raising Title IX retaliation claim cannot use agency principles to impute liability to funding recipient for the misconduct of its employees).

by Comaroff and faculty members, Plaintiffs' retaliation claim fails as a matter of law and Count Two must be dismissed.

ii. The Allegations of Comaroff's Retaliatory Conduct Against Mandava and Czerwienski Are Not Timely.

As explained above, the relevant statute of limitations for Title IX retaliation claims is three years. *See LeGoff*, 23 F. Supp. 2d at 127; M.G.L. c. 260, § 2A (M.G.L. c. 260, § 2A). The sole instance of retaliation alleged to have been perpetrated by Comaroff directly involving Plaintiffs purportedly occurred in October 2017. *See* Am. Compl. ¶¶ 70-73 (alleging that Comaroff threatened Mandava for speaking to students and faculty about alleged misconduct by Comaroff towards other students). This is an insufficient basis on which Plaintiffs may proceed against Harvard, because the alleged activity occurred well outside of the statute of limitations.

iii. The Allegations of Others' Retaliatory Conduct Do Not State a Valid Claim for Retaliation Against Harvard Under Title IX

Plaintiffs allege that Harvard is liable under Title IX for a range of conduct allegedly undertaken by Harvard faculty other than Comaroff. Specifically, they allege that following the announcement of Harvard's sanctions against Comaroff, a "public letter signed by 38 faculty members in support of Comaroff" was issued that had "retaliatory impact." *See* Am. Compl. ¶¶ 194, 197.[26] In addition, Plaintiffs allege that Comaroff's wife (also a Harvard faculty member) sent an email attaching a press release issued by her husband's lawyers to a "broad segment of the Comaroffs' professional network," *id.* ¶¶ 189-91, and that Harvard Law School Professor Janet Halley "joined in the press release's attack" calling Comaroff's meeting with Kilburn "perfectly

[26] The Amended Complaint itself recognizes that the letter was later retracted by 35 of the 38 of the initial signatories. *See* Am. Compl. ¶ 197(a); *see also* https://s3.amazonaws.com/media.thecrimson.com/pdf/2022/02/10/1354086.pdf #viewer.action=download, last visited on April 20, 2022. In addition, the Dean of the FAS responded in an open letter, pointing out that the authors of the initial letter were operating on incomplete information. *See* https://s3.amazonaws.com/media.thecrimson.com/pdf /2022/02/04/1353923.pdf, last visited on April 20, 2022. Regardless, as explained herein, neither the faculty members' issuance of the letter nor their retraction of it states a basis for any claim against Harvard.

legitimate office-hours advice." *Id.* ¶ 192 (emphasis omitted); *see also id.* ¶¶ 248(d) (alleging that these statements were "false or misleading" and "would reasonably dissuade students from making complaints against faculty"); 248(e) (same). Plaintiffs also allege that "academic dignitaries" outside Harvard "retaliate[ed]" against them in an open letter. *Id.* ¶ 195.[27] Notably, Plaintiffs do not allege (nor can they) that these three "communications," nor any of the allegedly retaliatory public statements of faculty members repudiating Comaroff's alleged behavior, *see id.* ¶ 197, were issued or directed by Harvard.

There is no basis to hold the University liable for the conduct of faculty who respond publicly (in whatever fashion) to the outcome of an investigation nor can there possibly be a basis for holding Harvard liable for the conduct of individuals unaffiliated with it. *See Gebser*, 524 U.S. at 290-91. Particularly in the university setting, where principles of freedom of expression are central to the entity's mission, the "independent actions" of faculty and third parties responding to a complaint or its outcome cannot render the entity liable. *Id.*; *Jackson*, 544 U.S. at 174.

iv. Comaroff's Allegedly Retaliatory Conduct Toward Kilburn Is Not Actionable Under Title IX.

Count Two must be dismissed as to Kilburn for the independent reason that Comaroff's alleged conduct against Kilburn is not actionable as retaliation under Title IX as a matter of law.

Kilburn alleges that Comaroff "weaponize[d] the ODR process" by naming "three of the most prominent scholars in Kilburn's field—Peter Geschiere, Caroline Elkins, and Sue Cook—as witnesses in his defense." Am. Compl. ¶ 159. However, there is no basis in Title IX or applicable

[27] The Amended Complaint further quotes from and identifies a February 10, 2022 statement as "retaliatory" in nature, Am. Compl. ¶ 199, but in so doing, deprives that statement of necessary context. When reading the February 10th statement in its totality, as this Court may because it is "incorporated into the [Amended C]omplaint by reference," *Tellabs*, 551 U.S. at 322, Harvard's Title IX Coordinator was commenting specifically on the confidentiality of material provided during ODR investigations and "the University's processes with regard to obtaining and maintaining material during an investigatory process." *See* https://www.harvard.edu/media-relations/2022/02/10/harvard-statements/. Plaintiffs neglect to mention that the same Title IX Coordinator later issued an apology, also "incorporated into the [Amended C]omplaint by reference," *Tellabs*, 551 U.S. at 322, for any misimpressions her February 10th statement caused and clarified that her "intention was to assure community members that they could safely continue to access community resources." *See* https://www.harvard.edu/media-relations/2022/02/10/harvard-statements/.

case law to support the theory that a respondent's selection of witnesses in a Title IX investigation can be deemed retaliation under Title IX. To the contrary, Harvard—like all recipients of federal funds—is required by Title IX and the applicable regulations, to provide respondents in Title IX actions an equal opportunity to present witnesses in the course of an investigation. *See, e.g.*, 34 C.F.R. § 106.45(b)(5)(ii) (funding recipient must provide equal opportunity for parties to present witnesses); *North v. Cath Univ. of Am.*, 310 F. Supp. 3d 89, 92 (D.D.C. 2018) (both parties must have opportunity to present witnesses and other evidence). Indeed, Harvard is *obligated* to provide all parties to a Title IX investigation with a full and fair opportunity to present witnesses in their defense. *See, e.g.*, *Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019) (finding that respondent who alleged university denied him the opportunity to present witnesses in his defense had stated a claim for violation of due process and Title IX); *Doe v. Columbia Univ.*, 831 F.3d 46, 56 (2d Cir. 2016). There is no basis to hold Harvard liable for Comaroff's naming of certain witnesses.

v. Comaroff's Allegedly Retaliatory Conduct Toward a Third Party Is Not Actionable By these Plaintiffs Under Title IX.

Plaintiffs allege that Comaroff pressured another graduate student, Harvard Student 2, into not participating in their ODR investigations, which Plaintiffs suggest constitutes retaliation against them. *See, e.g.*, Am. Compl. ¶¶ 235(e), 248(b). There is no support for permitting a retaliation claim under Title IX to proceed based on conduct directed at a third party, and for good reason. In so claiming, Plaintiffs can only speculate, but do not affirmatively allege (because they cannot), that Harvard Student 2's participation in the investigations would have been beneficial to them. In other words, Plaintiffs can only speculate that Comaroff's "pressuring" of Harvard Student 2 resulted in an adverse action from which they suffered.[28] Therefore, Plaintiffs fail to plausibly allege that Harvard Student

[28] Although there is not recourse under federal law for retaliation against another person, Harvard's Policy provides a means to raise such claims. Accordingly, Harvard's ODR Investigator informed Czerwienski that if she was concerned about retaliation against Harvard Student 2, she had the option to file a complaint on that person's behalf as a Reporter. Ex. B at 12 nn. 16, 17; *see* Am. Compl. ¶ 154. Czerwienski declined to do so.

2's nonparticipation is an "action disadvantageous" to them, a threshold element of their retaliation claim. *Frazier*, 276 F.3d at 67.

C. Count Three, Alleging Gender Discrimination Under Title IX, Must Be Dismissed.

In order to validly allege a Title IX violation based on an erroneous outcome infected by gender bias, Plaintiffs must allege *both* "particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding," *and* "particularized allegation[s] relating to the causal connection between the flawed outcome and gender bias." *Doe v. Harvard Univ.,* 462 F. Supp. 3d 51, 62 (D. Mass. 2020) (citing *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994)).

Courts routinely dismiss complaints which, like the Amended Complaint, allege, at their base, that a flawed proceeding led to an erroneous outcome, but also tack on "a conclusory allegation of gender discrimination." *See Doe v. W. New England Univ.,* 228 F. Supp. 3d 154, 188-89 (D. Mass. 2017). Plaintiffs "cannot rest on superficial assertions of discrimination," and instead must plead "particular circumstances" that show "there was a causal connection between the outcome . . . and gender bias." *Trs. of Bos. Coll.*, 892 F.3d at 91; *see also Doe v. Univ. of Mass.-Amherst,* No. 14–30143–MGM, 2015 WL 4306521, at *8 (D. Mass. 2015) (plaintiff must plead facts showing "that the disparate treatment was *because of* [p]laintiff's sex") (emphasis in original). "[A]llegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss." *Harvard*, 462 F. Supp. 3d at 62 (citing *Yusuf*, 35 F.3d at 715).

Here, the Amended Complaint fails to remedy the flaws in Count Three, which still consists of precisely the type of generalized, conclusory allegations that have been repeatedly held insufficient to state a claim under Title IX in this jurisdiction. Now there are simply more of them. For example, Plaintiffs claim that "ODR ordinarily does not credit women's complaints unless they are corroborated by independent evidence, no matter how credible the complainant's testimony," *see* Am. Compl. ¶ 206,

and "the repeated actions of Harvard administrators and Harvard faculty" in "discourag[ing] complainants from filing formal complaints . . . appears designed to protect powerful male faculty at the expense of their female graduate students." *Id.* ¶ 142; *see also id.* ¶ 204.[29] Plaintiffs further allege that Harvard maintains official practices, policies, and procedures applicable to cases of sexual and gender-based harassment and retaliation "based on bias against women, against students who complaint about gender-based harassment and retaliation, and/or in favor of men." *Id.* ¶ 258.

These broad generalizations are devoid of *any* underlying factual allegations that gender bias was a motivating factor in the ODR proceedings.[30] Plaintiffs do not allege that any specific statements were made, or that any documents exist, reflecting or even allowing for an inference of any gender bias on the part of Harvard or its administrators in the investigations of Plaintiffs' complaints. Nor do Plaintiffs' claims of "differential treatment" based on gender contain *any* reference to male complainants being treated differently and more favorably in the ODR process than female complainants. *Cf. Harvard*, 462 F. Supp. 3d at 62 (dismissing Title IX gender discrimination claim by male plaintiff because he "does not allege that similarly situated individuals . . . are treated differently based on their gender and does not offer statements or other alleged actions by any [d]efendants showing discriminatory animus towards [p]laintiff based on his gender, rather than his status as a person accused of sexual misconduct [who may be of any gender]"). Plaintiffs' claims "amount to no more than . . . allegation[s] that the [R]espondent was favored over the

[29] Plaintiffs allege a number of other purported ODR practices of which they disapprove, for example, that ODR "customarily" will not investigate reports of sexual harassment unless the victim proceeds with a formal ODR complaint. *See* Am. Compl. ¶¶ 204-10. Of course, the opposite occurred here, as Plaintiffs themselves acknowledge, Am. Compl. ¶ 119. Avakian, as a third-party reporter, filed complaints prior to any of the Plaintiffs moving forward, and ODR initiated investigations based on those complaints. *See* Ex. A at 1 n. 1; Ex. B at 1; Ex. C at 1. Harvard recites these "practices" as alleged for purposes of this motion and reserves its right to dispute the allegations if this Count proceeds.

[30] Any allegation that *Comaroff* engaged in behavior evincing an animus against women, *see, e.g.*, Am. Compl. ¶ 106 n.17, does not state a claim against *Harvard* for erroneous outcome. *See Bleiler v. Coll. of Holy Cross*, No. 11–11541–DJC, 2013 WL 4714340, at *5 (D. Mass. Aug. 26, 2013) ("Under the erroneous outcome standard, the question is whether *the College's* actions are motivated by sexual bias or if the disciplinary hearing process constitutes a pattern of decision-making whereby *the [College's]* disciplinary procedures governing sexual assault claims is discriminatorily applied or motivated by a chauvinistic view of the sexes.") (quotation and punctuation omitted) (emphasis added).

[C]omplainant[s], which alone is gender neutral." *See Doe v. Wentworth Inst. of Tech.*, No. 1:21-cv-10840-IT, 2022 WL 1912883, at *5 (D. Mass. June 3, 2022).[31]

Even if Plaintiffs had plausibly alleged "articulable doubt" about the outcome of the ODR proceedings, and they have not, this case "falls on the side of those in which Title IX claims were dismissed for failure to plead sufficient particularized factual allegations to support a 'causal connection' between gender bias and the erroneous" outcome allegedly at issue. *W. New England Univ.*, 228 F. Supp. 3d at 190 (collecting cases); *see Doe v. Trustees of Dartmouth Coll.*, No. 21-cv-085-JD, 2021 WL 2857518, at *5 (D.N.H. July 8, 2021) (dismissing Title IX claim because the complaint's allegations of gender bias were conclusory and speculative).[32] In short, the absence of facts to support Plaintiffs' conclusory assertion that bias motivated the outcome of their ODR proceedings is fatal to their claim. *See W. New England Univ.*, 228 F. Supp. 3d at 190. At this stage, that absence requires the dismissal of Count Three.

II. M.G.L. ch. 214, § 1C Independently Bars Plaintiffs' MCRA and MERA Claims (Counts Four and Six).

The Massachusetts Legislature enacted M.G.L. ch. 214, § 1C to supplement Massachusetts' existing anti-sexual harassment laws. While Chapter 151B provides a remedy for acts of sexual harassment impacting employees at workplaces with six or more employees, and Chapter 151C protects vocational students and individuals who are "seeking admission ... to any educational institution," M.G.L. ch. 214 § 1C "fills a gap in the statutory scheme by extending to employees and

[31] In *Wentworth Institute of Technology*, Judge Talwani found that one of the plaintiff's allegations of gender bias stated an erroneous outcome claim, specifically, that the school's investigative report referenced her sexual history in a discriminatory manner but did not do so for the male respondent. 2022 WL 1912883, at *6. Here, however, Plaintiffs have made no such particularized allegations of Harvard's gender bias in the ODR process, which dooms their claim.

[32] *See also Sahm v. Miami Univ.*, 110 F.Supp.3d 774, 778–80 (S.D. Ohio 2015) (dismissing Title IX claim because complaint failed to allege any statements of members of the disciplinary body or university officials or any patterns of conduct that permitted court to infer bias against male students); *Univ. of Mass.–Amherst*, 2015 WL 4306521, at *8 (dismissing Title IX claim because plaintiff failed to cite any statements that plausibly suggested gender bias and because unsupported claim that the university discriminated against males accused of sexual misconduct was insufficient); *Harris v. St. Joseph's Univ.*, No. 13–3937, 2014 WL 1910242, at *4 (E.D. Pa. May 13, 2014) (dismissing Title IX claim due to failure to allege sufficient facts to support claim that gender bias was motivating factor in the university's decision).

students protection that is not otherwise available under chapter 151B and chapter 151C," specifically: (1) employees of employers with fewer than 6 workers, and (2) students who are neither vocational nor seeking admission. *Harbi v. Mass. Inst. of Tech*., No. CV 16-12394-FDS, 2017 WL 3841483, at *6 (D. Mass. Sept. 1, 2017) (citing *Lowery v. Klemm*, 446 Mass. 572, 576 (2006)).

Plaintiffs are students who are neither vocational nor seeking admission, so M.G.L. ch. 214, § 1C applies to their claim.[33] "[W]hen G.L. c. 214, § 1C applies to a claim of sexual harassment, it is the exclusive remedy: Plaintiffs may not proceed with other statutory or common-law actions for sexual harassment." *Lowery*, 446 Mass. at 576; *see Guzman v. Lowinger*, 422 Mass. 570, 571 (1996) (holding same). Accordingly, Plaintiffs MCRA and MERA claims are barred.

III. The Statutory Claims (Counts Four, Five, and Six) Must Be Dismissed for the Independent Reason That They Are Time-Barred and Fail to State a Claim.

In addition, Plaintiffs' statutory claims are time-barred and fail to state a claim. MERA, MCRA, and M.G.L. ch. 214, § 1C claims are all subject to a three-year statute of limitations. *See* M.G.L. ch. 260, § 5B ("Actions arising on account of violations of any law intended for the protection of civil rights … shall be commenced only within three years next after the cause of action accrues"). The clock begins running "once a plaintiff knows or has reason to know of the alleged wrongful acts." *Sampson v. Salisbury*, 441 F. Supp. 2d 271, 275 (D. Mass. 2006). Unless the wrong is "inherently unknowable," "the limitations period begins on the date of the wrongful act." *Id*.

As explained above, Mandava and Czerwienski's claims are based on allegations of misconduct that occurred in the Fall of 2017, when Comaroff allegedly threatened them in a retaliatory manner, and they claim Harvard failed to respond. *See* Am. Compl. ¶¶ 69-73, 76, 79,

[33] Whether or not Plaintiffs fall into this category, they were (by their own admission, *see, e.g.,* Am. Compl. ¶¶ 20, 22, 239), employees working at Harvard in addition to students enrolled there. To the extent that they seek redress from Harvard for workplace-related harm (as distinct from actions purportedly arising out of and impacting their roles as students), their statutory claims are (a) preempted by the Workers' Compensation Act; and/or (b) precluded by M.G.L. 151B, which is an exclusive remedy where it applies.

269.[34] Plaintiffs do not allege that these acts were somehow "inherently unknowable," nor can they. Thus, to comply with the three-year statute of limitations, Mandava and Czerwienski were required to file their MERA and MCRA[35] claims no later than October 2020 but did not do so.

Kilburn's MERA, MCRA, and M.G.L. ch. 214, § 1C claims are similarly barred. As explained above, the Amended Complaint alleges that the latest instance of actionable harassment directed at Kilburn occurred in Fall 2018. *See* Am. Compl. ¶¶ 102, 103 (alleging that in Fall 2018, Comaroff repeatedly asked Kilburn to meet him alone off-campus for reasons unrelated to her work). Again, Kilburn has not alleged that any of Comaroff's purported wrongs, nor Harvard's allegedly insufficient response to them, were "inherently unknowable." Kilburn was thus required to file her MERA, MCRA, and M.G.L. ch. 214, § 1C claims no later than Fall 2021 to comply with the three-year statute of limitations. Accordingly, all three statutory claims are time-barred. *See also Coll. Hill Properties, LLC v. City of Worcester*, 135 F. Supp. 3d 10, 18 (D. Mass. 2015), *aff'd*, 821 F.3d 193 (1st Cir. 2016) (citations omitted) (claims barred where plaintiff did not allege that earlier facts were unknowable, because "[t]he MCRA statute of limitation begins running once a plaintiff knows or has reason to know of the alleged wrongful acts. A plaintiff need not know the extent or severity of the harm suffered. To start the limitations period a plaintiff need only have knowledge of all the facts necessary to make out his or her civil rights claim. The limitations period begins on the date of the wrongful act, 'unless the wrong is inherently unknowable'").

As with Plaintiffs' Title IX claims, the later-in-time allegations they attempt to sweep into their Massachusetts statutory claims cannot save those claims from dismissal. Kilburn's 2019 claims – that Comaroff "repeatedly pressured" her to redirect her forthcoming project to a new topic, tried to enter a public, glassed-in waiting area where Kilburn was located, and pressured another student not

[34] Again, Czerwienski does not allege that *she* was texted by Comaroff in an "alarming" fashion, nor does she allege her presence at the October 13, 2017 conversation between Comaroff and Mandava and further Czerwienski cannot even allege that she was identified by name in that conversation. *See* Am. Compl. ¶¶ 69-76.

[35] Kilburn is the only Plaintiff who alleges a violation of M.G.L. ch. 214, § 1C.

to participate in ODR's investigation of their complaints, *see* Am. Compl. ¶¶ 104-06—are not, by themselves, actionable under MERA, MCRA, or M.G.L. ch. 214, § 1C. None of these alleged acts, nor the University's alleged response to reports, amount to Harvard subjecting Ms. Kilburn to a pattern of gender-based harassment or sex discrimination.[36] Nor can they reasonably be considered allegations constituting sexual harassment or "verbal and physical conduct of a sexual nature,"[37] or "a pattern of gender-discrimination."[38] Thus, they cannot support Plaintiffs' statutory claims.

Moreover, even if those allegations sufficiently allege gender-based harassment, the 2019 allegations still do not salvage the untimely statutory claims. This is because Plaintiffs' earlier claims are not the type of "claims that cannot be said to occur on a particular day and that by their very nature require repeated conduct to establish an actionable claim." *Ayala v. Shinseki*, 780 F.3d 52, 57 (1st Cir. 2015). Accordingly, the continuing violation doctrine does not apply because the earlier acts are of a "discrete" nature, and were therefore "instantaneously actionable," but Plaintiffs did not file suit in a timely manner. *Id.* Counts Four, Five, and Six must therefore be dismissed.

IV. Count Seven, Alleging Negligent Hiring, Retention & Supervision, Must Be Dismissed Because It Is Untimely.

"An employer must use due care to avoid the selection or retention of an employee whom he knows or should know is a person unworthy, by habits, temperament, or nature, to deal with the persons invited to the premises by the employer." *Foster v. Loft, Inc.*, 26 Mass. App. Ct. 289, 290-91 (1988) (citation omitted). Comaroff was hired in 2012—approximately *ten years* before this Amended Complaint was filed – and Plaintiffs allege that they were aware of Harvard purportedly mishandling its supervision (and presumably retention) of Comaroff by, at the *latest*, the Spring of

[36] *See* Am. Compl. ¶¶ 265-73 (MCRA claim).

[37] *See* Am. Compl. ¶¶ 274-85 (Chapter 214, § 1C claim).

[38] *See* Am. Compl. ¶¶ 286-93 (MERA claim).

2017. *See* Am. Compl. ¶¶ 56, 65-66; 77, 96.[39] This Count may not proceed because "actions of tort ... to recover for personal injuries ... shall be commenced only within three years after the cause of action accrues." Mass. Gen. Laws c. 260, § 2A; *see Street v. Vose*, 936 F.2d 38, 39 (1st Cir. 1991); *Malouf v. Benson*, No. CV 17-10941-LTS, 2018 WL 10155427, at *3 (D. Mass. Aug. 23, 2018).

V. Count Eight, Alleging Breach of Contract, Must Be Dismissed For Failure to State a Claim.

In the University context, "general statements of policy" in a student handbook "cannot form the basis of a viable contract claim." *Noakes v. Syracuse Univ.*, 369 F. Supp. 3d 397, 419 (N.D.N.Y. 2019); *accord Squeri v. Mt. Ida Coll.*, No. 18-12438-RGS, 2019 WL 2249722, at *5 (D. Mass. May 24, 2019), *aff'd*, 954 F.3d 56 (1st Cir. 2020). Even under the low bar of notice pleading, students asserting a breach of contract claim against their universities must "state with 'substantial certainty' the facts showing the existence of the contract and the legal effect thereof." *Squeri v. Mt. Ida Coll.*, 954 F.3d 56, 71 (1st Cir. 2020) (citations and quotations omitted). In particular, it is necessary to allege not only generalized promises, but "specific terms" that Plaintiffs seek to enforce. *Id.* at 71-72.

The Amended Complaint does nothing to cure the deficiencies in Plaintiffs' breach of contract claim. Plaintiffs still allege an amorphous "contract that Harvard makes with its students in exchange for their matriculation, labor, tuition payments, and fees." Am. Compl. ¶ 311. Plaintiffs do not articulate where that contract can be found, the documents or other materials comprising the contract, or any other details apart from selectively quoting several Harvard policies, such as the following:

- "Harvard University is committed to maintaining a safe and healthy educational and work environment in which no member of the University community is, on the basis of sex, sexual orientation, or gender identity, excluded from participation in, denied the benefits of, or subjected to discrimination in any University program or activity." *Id.* ¶ 303, quoting the University Policy; and

- Harvard has an "obligation to keep the community safe and to address incidents of alleged harassment that it knows about or reasonably should know about." *Id.* ¶ 305, quoting the

[39] Indeed, Kilburn alleges that she was "distressed" by Comaroff's harassment of her in February 2017, before she had even enrolled at Harvard, further demonstrating her knowledge of any purported negligent supervision or retention by Harvard by the Fall of that year, at the latest. *See* Am. Compl. ¶¶ 86-87.

Frequently Asked Questions ("FAQs") attendant to the University Policy; *see also id.* ¶ 308, quoting the FAS Policy and Procedures.

After reciting a number of these types of statements, Plaintiffs allege in a conclusory manner: "[t]hese promises are part of the contract that Harvard makes with its students in exchange for their matriculation, labor, tuition payments, and fees." *Id.* ¶ 311. This claim was amended only to add a description of the "promises" as "compulsory, mandatory, and enforced." *Id.*

Plaintiffs' breach of contract claim cannot survive because they have alleged precisely the type of "general [policy] statements" that courts routinely conclude "cannot form the basis of a viable contract claim" in the University setting. *Noakes*, 369 F. Supp. 3d at 419. The First Circuit has held that such statements, even "when read together," are, "[w]ithout diminishing the importance of these words,…exactly the sort of generalized, aspirational statements that are insufficiently definite to form a contract." *G. v. Fay Sch.*, 931 F.3d 1, 12 (1st Cir. 2019) (rejecting an attempt to turn into enforceable contract terms statements such as "We expect all members of the community to respect the rights of others and to behave appropriately at all times"); *Brown v. Suffolk Univ.,* No. CV 19-40062-DHH, 2021 WL 2785047, at *6 (D. Mass. Mar. 31, 2021) (concluding that Suffolk Law School's disability bulletin statements, including that the department "serves as a valuable resource for students with disabilities ... to promote an understanding and awareness of accessibility issues ... in order to provide a supportive and engaging setting for our students" are "exactly the sort of generalized, aspirational statements that are insufficiently definite to form a contract.")

In *Shin v. Massachusetts Institute of Technology*, the Court examined whether plaintiffs could sustain a cause of action based on allegations that MIT failed to comply with certain specific language in MIT's Medical Department brochure and bylaws. No. 020403, 2005 WL 1869101, at *7 (Mass. Super. June 27, 2005). Plaintiffs sought to enforce language such as: "care givers also will help you maintain good health," that "[w]e want to help you maintain your physical, psychological and emotional well-being," and that the department "has the responsibility to provide high quality,

low barrier comprehensive health services to the MIT Community." *Id.* at *7-8. The Court found that the statements were merely "generalized representations" of services available to the MIT community and their purpose, and were not "'definite and certain,'" and instead were "'too vague and indefinite to form an enforceable contract.'" *Id.* at *7-8. Here, too, Plaintiffs invoke only generalized statements which do not state a valid claim for breach of contract.

VI. Count Nine, Alleging Breach of the Implied Covenant of Good Faith and Fair Dealing, Must Be Dismissed.

In Count Nine, Plaintiffs bring a claim for breach of the duty of good faith and fair dealing, a doctrine which "concerns the manner of performance" of contractual duties. *W. New England Univ.*, 228 F. Supp. 3d at 180. Every contract in Massachusetts is subject to an implied covenant of good faith and fair dealing. *See Chokel v. Genzyme Corp.*, 449 Mass. 272, 275-76 (2007). The covenant, however, does not supply terms that the parties were free to negotiate, but did not, nor "'create rights and duties not otherwise provided' for in the contract." *Id.* (quoting *Ayash v. Dana-Farber Cancer Ctr.*, 443 Mass. 367, 385 (2005)). Rather, the scope of the covenant is "circumscribed by the obligations in the contract," and is breached only "when one party violates the reasonable expectations of the other." *Id.*

Here, Plaintiffs merely restate their references to inchoate purported contracts and unarticulated terms—*see, e.g.,* Am. Compl. ¶ 317 (alleging that "multiple Sexual and Gender-Based Harassment Policies, FAS Professional Conduct Policy, Whistleblowing Policy, Non-Retaliation Policy, and other materials applicable to students all contain promises")—and add several recitations of the phrase "bad faith." *Id.* ¶ 320. The Amended Complaint does not allege *any* facts that would establish a breach of the implied covenant separate from any contract (which, as stated above, they have failed to sufficiently identify). Instead, it generically asserts that Harvard violated "the reasonable expectations of Plaintiffs under these contracts." *Id.* ¶ 318. This conclusory allegation fails to state a claim for breach of the covenant of good faith and fair dealing.

CONCLUSION

Harvard's Title IX processes reflect its steadfast commitment to maintaining a healthy and supportive educational and work environment in which all members of the Harvard community can flourish and do their best work and no member is excluded from participation in, denied the benefits of, or subjected to discrimination in any University program or activity as a result of harassment or discrimination. Sexual harassment and other forms of gender bias flatly contradict Harvard's values and violate the policies applicable to all members of the Harvard community.

For all of the reasons set forth herein, Harvard respectfully requests that the Court enter an Order dismissing Counts One through Nine of the Amended Complaint with prejudice.

Respectfully submitted,

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

By its attorneys,

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Dated: July 19, 2022

LOCAL RULE 7.1 CERTIFICATION

I hereby certify that, pursuant to Local Rule 7.1(a)(2), I met and conferred with counsel for Plaintiffs concerning the subject matter herein, and the parties were unable to narrow or resolve the issues raised therein.

/s/ Victoria Steinberg
Victoria Steinberg

CERTIFICATE OF SERVICE

I, Victoria Steinberg, hereby certify that a copy of the foregoing was sent via the Court's electronic filing system and served to all counsel of record on July 19, 2022.

/s/ Victoria Steinberg
Victoria Steinberg