UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOE,

Plaintiff,

-against-

YESHIVA UNIVERSITY, ANDREW "AVI" LAUER, ESQ., CHAIM NISSEL, SEYFARTH SHAW, LLP, DOV KESSELMAN, ESQ., and EMILY MILLER, ESQ.,

Defendants.

Docket No.: 1:22-cv-05405-PKC-KHP

Oral Argument Requested

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS YESHIVA UNIVERSITY, ANDREW "AVI" LAUER AND CHAIM NISSEL'S MOTION TO DISMISS

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Defendants Yeshiva University ("Yeshiva"), Andrew "Avi" Lauer ("Lauer") and Chaim Nissel ("Nissel") (collectively, the "Yeshiva Defendants") respectfully submit this memorandum of law in support of their motion for an Order, pursuant to Fed. R. Civ. P. 12(b)(1) and (6), dismissing the Amended Complaint in its entirety.

PRELIMINARY STATEMENT

Plaintiff's Amended Complaint seeks to hold the defendants responsible for her dissatisfaction with the results of Yeshiva's investigation of her allegations of sexual assault against another Yeshiva student, Perry Doe ("Perry"). Underlying each and every cause of action set forth in the Amended Complaint is Plaintiff's position that the Yeshiva Defendants did not properly investigate her claims of sexual assault according to Yeshiva's applicable procedures, afford her a fair and impartial investigation of those claims, or put adequate safety measures in place to protect her from Perry following the investigation's conclusion. Despite Plaintiff's attempts to frame her primary allegations as a claim arising under Title IX, the Amended Complaint is entirely devoid of any factual allegations that her alleged sexual assault occurred as part of Yeshiva's "education program or activity" and as such fails to state a claim under Title IX.

First, Counts One and Two of the Amended Complaint must be dismissed as Plaintiff has failed to allege any facts demonstrating that her claims are appropriately brought under Title IX. For a claim to be brought under Title IX, the alleged sexual assault must have occurred as part of an educational institution's "education program or activity." For conduct that occurred between students only in a student's private, off-campus apartment to be considered party of an "education program or activity" the school must exercise "substantial control" over both the student who engaged in the inappropriate conduct *and* the context in which that harassment occurred. The allegations in the Amended Complaint fail to state a claim that Yeshiva exercised any control (and certainly not ***substantial*** control) over Plaintiff or Perry. That the alleged perpetrator of the

misconduct was a student, or even a student athlete, alone does not make all off-campus conduct part of a university's "education program or activity." Additional facts demonstrating that the university had substantial control over the context in which the misconduct occurred, such as if a teacher was perpetrating the off-campus misconduct or the location was a fraternity house or other building owned by a school sponsored group, are necessary to impose liability. For these reasons, Plaintiff has failed to state a claim under Title IX and Counts One and Two must be dismissed.

Because Plaintiff has no Title IX claim, the only avenue for her purported grievance with the process of Yeshiva's investigation is Article 78 of the New York CPLR ("Article 78"). Article 78 is the appropriate vehicle for challenging the administrative decisions of private universities and applies to questions of, *inter alia,* whether a university determination was made in violation of a lawful procedure. Plaintiff's transparent attempt to circumvent the four-month statute of limitations that applies to Article 78 claims by stretching the facts and ignoring the clear parameters of when Title IX applies to off-campus, student-on-student conduct must fail. As Plaintiff has failed to state a valid federal claim, the Amended Complaint should be dismissed in its entirety as this Court does not have subject matter jurisdiction under 28 U.S.C. § 1331.

Second, Plaintiff's half-hearted attempt to plead diversity jurisdiction under 28 U.S.C. § 1332 in the alternative cannot save federal jurisdiction. While the Amended Complaint makes several vague assertions that Plaintiff "reside[d] in a state in the United States other than New York," the Amended Complaint does not specify in what state she resided. The Amended Complaint also does not plead any facts to support those assertions, and its paragraphs support the conclusion that Plaintiff *did* intend to abandon her original domicile and reside in New York at the time of filing and for the foreseeable future.

Finally, as Plaintiff has not met her burden of demonstrating complete diversity and has not stated any federal claims, either because Title IX does not apply or because Plaintiff has failed to state a claim under Title IX, there are no claims over which this Court has original jurisdiction. As such, the Court should also decline to exercise supplemental jurisdiction over Plaintiff's numerous state law claims, both against Yeshiva and the Individual Yeshiva Defendants (against whom no federal claims are asserted), Lauer and Nissel, and dismiss the Amended Complaint in its entirety.

STATEMENT OF FACTS[1]

YESHIVA'S OBLIGATIONS TO INVESTIGATE SEXUAL MISCONDUCT

As a recipient of Federal financial assistance, Yeshiva is required to comply with Title IX of the Education Amendments of 1972 ("Title IX"), which "prohibits discrimination on the basis of sex in education programs and activities." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30028 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106). In 2020, the U.S. Department of Education (the "Department") adopted a number of new Title IX regulations effective as of August 14, 2020 (the "2020 Regulations"). 85 Fed. Reg. 30026, et seq. The 2020 Regulations represented the first time that the Department imposed legally binding rules on recipients "with respect to responding to sexual harassment." (*Id.*, at 30029). The 2020 Regulations, relying heavily on Supreme Court precedent, clarify under what circumstances a university is to treat a complaint about a sexual assault occurring between students at an off-campus location as a Title IX complaint. While no one factor is dispositive and the fact that an assault occurred off campus alone is not determinative

[1] The Yeshiva Defendants do not concede the truth of any of the allegations of the Amended Complaint and reserve the right to deny or contest any allegations contained in the Amended Complaint.

of whether Title IX applies, the 2020 Regulations make clear that Title IX only applies to off-campus incidents that occurred as part of the university's "education program or activity," which includes locations, events, or circumstances where the educational institution exercised substantial control over the context in which the harassment occurred. The 2020 Regulations do not provide an exhaustive or definitive list as to when Title IX applies to off-campus conduct between students, but does make it clear that some facts indicating that the university had control over the context, such as the conduct occurring in a building owned by a student organization or at an event sponsored or overseen by the university, are required. (*See generally id.*, at 30195-3021).

In addition to the procedures it follows when investigating a formal Title IX complaint, Yeshiva also has a set of procedures it applies in cases of "Other Sexual Misconduct," where a student complains about misconduct but it is not covered by Title IX. Both sets of procedures and the explanation of when each applies are published and provided to students in Yeshiva's Non-Discrimination and Anti-Harassment Policy & Complaint Procedures (the "Policy") (A copy of the Policy that was in effect at the time of Plaintiff's alleged rape is attached to the Amended Complaint as Exhibit B). The Policy is dated after the 2020 Regulations went into effect, and reflects the language used by the Department to explain when it will and will not apply Title IX to student complaints. (*See e.g.*, Am. Compl., Ex. B., at p. 4) ("The prohibition against Title IX Sexual Harassment…applies to conduct that occurs in the United States in the University's education programs and activities…include[ing] locations, events or circumstances where the University exercised substantial control over both the person accused of misconduct and the context in which the harassment occurred…"). Among other things, the Policy outlines the procedures that are followed in both Title IX investigations and investigations of Other Sexual Misconduct in a way that shows the differences in each procedure. For example, there is always

a Hearing in a Title IX investigation, but a live hearing in investigations of Other Sexual Misconduct is understood to be used "in very limited circumstances." (*Id.*., at p. 36). The Policy also outlines the procedure for appealing the decision in an investigation of Other Sexual Misconduct, which requires the complainant to submit a "plain, concise, and complete written statement outlining the grounds for the appeal," and lists the three possible grounds. (*Id.*, at p. 38).

PLAINTIFF'S STATUS AS A YESHIVA STUDENT

Plaintiff enrolled in Yeshiva University as a full-time student in 2018, and remained a Yeshiva student at least through when she filed the Complaint. (Am. Compl., ¶¶ 4, 57-58). From September 2020 through May 2022, Plaintiff resided in an apartment in Washington Heights near Yeshiva's Wilf Campus. (*Id*., ¶¶ 6, 59). In May 2022, she moved out of her Washington Heights apartment into another apartment in New York City. (*Id.*, ¶ 7). While attending Yeshiva, Plaintiff was also a student athlete on one of Yeshiva's varsity athletic teams. (*Id*., ¶¶ 15, 58). During the COVID-19 pandemic in 2020 and 2021, Plaintiff's classes were conducted primarily online via computer. (*Id.*, ¶ 60). During the pandemic, Plaintiff continued to regularly use the facilities at Yeshiva's Wilf Campus, such as the library to take her classes and the gymnasium in her capacity as a student athlete. (*Id.*, ¶ 61). She also used Yeshiva's Furst Hall to take COVID-19 tests required by Yeshiva. (*Id.*, ¶ 62).

PERRY DOE'S STATUS AS A YESHIVA STUDENT

Perry Doe was also a Yeshiva University student athlete at the time of his interaction with Plaintiff. (*Id.*, ¶¶ 63, 67). At the time of Perry's alleged sexual assault of Plaintiff, Perry lived in an apartment in Washington Heights. (*Id.*, ¶ 64). According to Plaintiff, Perry's apartment was located within the area where Yeshiva security officers routinely patrolled and where Yeshiva provided students with shuttle service. (*Id.*, ¶¶ 64-65). Plaintiff asserts, on information and belief,

that Yeshiva paid all or some of the rent for Perry's apartment, and that without that financial support he would not have been able to afford his apartment, and would not have been able to attend Yeshiva. (*Id.*, ¶¶ 71-72). Plaintiff also believes that Perry was given express permission and authorization to live in his Washington Heights apartment, and that his landlord had a policy of not renting to non-citizens or people under 21-years-old unless they are Yeshiva students. (*Id.*, ¶ 73-75).

PERRY ALLEGEDLY SEXUALLY ASSAULTED PLAINTIFF IN JANUARY, 2021

Plaintiff and Perry first met by messaging on several social media applications two days before they met in person for a first date on January 24, 2021. (*Id.*, ¶¶ 63, 77-78). Perry invited Plaintiff to his apartment, but she declined and instead suggested that they go to her apartment to hang out with her roommates in the living room, which he declined. (*Id.,* ¶ 79). They decided to go for a walk near Perry's apartment, and at some point during the date, Perry allegedly went to a store and purchased beer and soda. (*Id.*, ¶ 80). He then asked Plaintiff to help him carry the beer and soda up to his apartment, which she did. (*Id.*). Perry had recently moved into the apartment, and the only furniture available for Plaintiff to sit on was the bed. (*Id.*, ¶ 81). When she sat on the bed, Plaintiff alleges that Perry moved closer to her and began to touch and kiss her. (*Id.*). Plaintiff states that she told Perry "no" multiple times and conveyed that she did not want to have any kind of sexual contact with him, but that Perry refused to accept her "no" and instead grabbed her leg and pinned it down, and also grabbed her neck to further pin her down. (*Id.*, ¶83). Plaintiff further alleges that Perry continued to use physical force to effectuate his rape of Plaintiff, and in so doing, left marks and bruises on her thigh and neck. (*Id.*, ¶¶ 84-87). Following the alleged rape, Plaintiff was crying and returned to her apartment where she told her roommates that she had been raped

by the man with whom she went on a date and texted a close male friend to tell him the same. (*Id.*, ¶¶ 91-92).

The next day, Plaintiff states that she was in extreme pain for the entire day, and in the evening one of her friends persuaded her to go to the hospital to seek treatment. (*Id.*, ¶ 96). Plaintiff alleges that she was admitted to Columbia Presbyterian Hospital where a Nurse Examiner conducted a rape kit examination and collected evidence, such as photographs of the bruising on Plaintiff's neck and inner thigh. (*Id.*, ¶¶ 97-99).

PLAINTIFF STRUGGLED AT SCHOOL FOLLOWING HER ENCOUNTER WITH PERRY

Following the alleged rape, Plaintiff states that she tried to recover emotionally and physically from the trauma and started falling behind in her classes. (*Id.*, ¶ 103). After one of her professors allegedly responded angrily and notified Plaintiff that her failure to complete assignments would impact her grades, she reached out to Dr. Sara Asher, Yeshiva's Assistant Dean of Students and told her that she had been raped by another student and was having trouble in several of her classes after the incident. (*Id.*, ¶¶ 104-106). Dr. Asher instructed Plaintiff to reach out to her professors to explain the circumstances, and Dr. Asher herself reached out to the professor who previously reacted angrily towards Plaintiff. (*Id.*, ¶¶ 107-108). Plaintiff communicated with Dr. Asher again around February 10, 2021, when she told Dr. Asher Perry's real name, and Dr. Asher advised Plaintiff to make a formal complaint. (*Id.*, ¶ 109-110). On February 17, 2021, Plaintiff notified Dr. Asher by email with the subject that she was "thinking about making a formal report to the school about the incident occurred" and had questions about

"how that would work" and asked to speak again. (*Id.*, ¶ 111; Nissel Decl., ¶ 6, Ex. 2)[2] [3]. Plaintiff had further conversations with Dr. Asher following the February 17 email, at which time Dr. Asher conveyed that she would be speaking with Nissel, Yeshiva's Title IX Coordinator and Vice Provost of Student Affairs about Plaintiff's allegations against Perry. (Am. Compl., ¶¶ 112-113). This was required of Dr. Asher under the Policy, which states that if anyone other than the Title IX Coordinator is the first person notified of a Complaint, she must promptly inform the Title IX Coordinator of the suspected violation of the Policy. (Am. Compl., Ex. B, at p. 14).

YESHIVA INVESTIGATES PLAINTIFF'S CLAIM, WITH THE ASSISTANCE OF AN IMPARTIAL INVESTIGATOR

On March 4, 2021, Nissel sent a letter (the "March 4 Letter") to Plaintiff by email (along with a copy of a similar letter sent to Perry) stating that based on her allegations of sexual assault against Perry, Yeshiva "intend[ed] to conduct an investigation" and was committed to "investigating the allegations and taking immediate action to ensure that the inappropriate conduct ceases." (*Id.*, ¶ 116; Nissel Decl., ¶ 7, Exs. 3, 4). The March 4 Letter also informs Plaintiff that if she had additional information that she felt Yeshiva should consider during the investigation that she had not already brought to its attention, she should contact Dr. Asher or the investigators as soon as possible. (Nissel Decl., Ex. 4, at p. 1). The March 4 Letter further informed Plaintiff that Yeshiva retained the law firm Seyfarth Shaw LLP ("Seyfarth") as an independent investigator to conduct the investigation, noted that Plaintiff had a right to have an "advisor of [her] choice to

[2] While on a motion to dismiss under FRCP 12(b)(6) the Court is required to accept well-pleaded factual allegations in the Amended Complaint as true, the Court is also allowed to consider certain documents that are relied upon heavily in the complaint such that they are deemed "integral" to the complaint. See *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). In deciding motions under 12(b)(1), "[w]here a party offers extrinsic evidence that contradicts the material allegations of the complaint, we have suggested that it would be error for the district court to disregard that extrinsic evidence." *Harty v. West Point Realty, Inc*., 28 F.4th 435, 442 (2d Cir. 2022) (citations omitted).

[3] While the Yeshiva Defendants reserve their right to oppose Plaintiff's Motion to Proceed Under a Pseudonym, Plaintiff and Perry Doe's real names have been redacted from all Exhibits to the Declaration of Chaim Nissel.

accompany [her] to any meeting or proceeding in connection with the investigative process," and explained that it was imposing a mutual no-contact order on Plaintiff and Perry. (Am. Compl., ¶ 188; Nissel Decl., Ex. 4, at p. 1). Importantly, the March 4 Letter makes it clear that Yeshiva was not investigating Plaintiff's complaint as a Title IX complaint, as it directs her to Appendix C of the Policy, which applies to Complaints Not Involving Title IX Sexual Harassment. (Nissel Decl., Ex., at p. 2).

In March 2021, Plaintiff was interviewed by the Seyfarth investigators on several occasions where she was asked questions about the alleged rape. (Am. Compl., ¶¶ 172-173). On April 29, 2021, Nissel emailed Plaintiff (the "April 29 Email") to notify her that Seyfarth had completed its investigative report and it was available for her review. (*Id.*, ¶ 175; Nissel Decl., Ex. 6). The April 29 Email also informs Plaintiff that under the Policy, the typical avenue for review of the investigative report would have been for Plaintiff to review the report in person under the supervision of a University official, but in light of the COVID-19 pandemic, she was entitled to receive a copy of the report.[4] In order to review the report electronically, she first had to sign a Non-Disclosure Agreement (the "NDA") requiring her to keep the contents of the Report confidential, except for discussing it with her advisor and parents. (Nissel Decl., Ex. 6.; Am. Compl., ¶ 176)). The NDA specifically explained that she was not prohibited from discussing the incident with Perry itself. (Nissel Decl., Ex. 6, p. 2).

On May 26, 2021, Nissel sent Plaintiff a letter by email (the "May 26 Letter") informing her that "after an extensive investigation, it has been determined that the evidence does not support a finding that [Perry] violated the Policy." (Am. Compl., ¶ 191; Ex. A). The May 26 Letter

[4] The confidentiality of these reports is critical in order to protect both the complainant and the accused, which Yeshiva has an obligation to do pursuant to the Family Educational Rights and Privacy Act ("FERPA").

informed Plaintiff that she had until June 1, 2021 to submit a request for an appeal, which would need to consist of "a plain, concise, and complete written statement outlining the grounds for the appeal." (*Id.*, Ex. A). The May 26 Letter again directed Plaintiff to Appendix C of the Policy for more guidance on how to formulate her appeal. In June 2021, Plaintiff attempted to appeal the determination but failed to follow the procedures set forth in the Policy, to which she had been referred by Nissel on several occasions. (Am. Compl., ¶¶ 196-197). In response to her attempts to appeal, Nissel repeatedly informed Plaintiff of the correct procedure and granted her an extension of her time to respond, but Plaintiff still failed to comply with the correct procedure for making an appeal. (Nissel Decl., ¶ 11, Ex. 7).

PROCEDURAL HISTORY

Plaintiff first filed the Complaint on June 28, 2022 (Dkt. No. 3) and served the Summons on the Yeshiva Defendants on July 18, 2022. (Dkt. No. 20). This Court entered an Order, also dated June 28, 2022, which stated that the original Complaint, which was 137 pages long and included 467 paragraphs of allegations, failed to comply with Fed. R. Civ. P. 8(a)(2) as it was "replete with unnecessary detail." (Dkt. No. 8). The Court also pointed out that Plaintiff filed using a pseudonym without first seeking leave to do so. (*Id.*). Plaintiff filed her Amended Complaint (which is now 124 pages long and still includes 419 paragraphs of allegations and much of the extraneous detail from the original Complaint) along with a Motion for Leave to File Documents Under Seal and for Leave to Proceed in This Action Under a Pseudonym" on July 12, 2022. (Dkt. No. 11). This motion was provisionally granted on July 13, 2022, and the Court has memo endorsed a briefing schedule for that motion. (Dkt. No. 36).

ARGUMENT

On a motion to dismiss for lack of subject matter jurisdiction under 12(b)(1) of the Federal Rules of Civil Procedure, the plaintiff has the burden of establishing, by preponderance of the evidence, that the court has jurisdiction. *Makarova v. U.S.*, 201 F.3d 110, 113 (2d Cir. 2000). In ruling on such a motion, a court may consider evidence outside the pleadings without converting the motion to dismiss into one for summary judgment. *Luckett v. Bure*, 290 F.3d 493, 496-97 (2d Cir. 2002).

In considering a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must accept as true all well-pleaded facts and draw all reasonable inferences in the light most favorable to the non-moving party. *See Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 237 (2d Cir. 2007). While factual allegations are afforded a presumption of truth, a court is not "bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). Factual allegations must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. A complaint must offer more than mere "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement" in order to survive dismissal. *Twombly*, 550 U.S. at 555, 557.

I. The Court Lacks Jurisdiction Over the Amended Complaint Pursuant to 28 U.S.C. § 1331

A. Title IX Does Not Apply to Off-Campus Incidents of Harassment Between Students Where the School Did Not Have Control Over the Context in Which the Harassment Occurred

Plaintiff's alleged assault took place in an off-campus apartment during a date that was not connected to any school sponsored activity. While Plaintiff has attempted to characterize Perry's apartment as being within Yeshiva's control by alleging, on information and belief, that Yeshiva helped him secure the apartment and pay for it, Plaintiff has provided no factual support for these allegations. Even taking the allegations as true, they still fail to demonstrate that Yeshiva had any control over what occurred inside the apartment. While Title IX may apply to off-campus conduct in certain circumstances (like, for example, within a fraternity house or off-campus conduct involving a professor), Plaintiff has failed to allege any facts, because none exist, demonstrating that Yeshiva had any control over Perry's apartment or that their date was in any way connected to any school sponsored activity.

The current iteration of Title IX requires universities "with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent." 34 C.F.R. § 106.44(a). "Education program or activity" has been defined by the Department to include "buildings or other locations that are part of the school's operations," "off-campus settings if the school exercised substantial control over the respondent and the context in which the alleged sexual harassment occurred (e.g., a school field trip to a museum)," and "off-campus buildings owned or controlled by a student organization officially recognized by a postsecondary school, such as a building owned by a recognized fraternity or sorority." *See* United States Department of Education, Office for Civil Rights, *Questions and Answers on the Title IX Regulations on Sexual*

Harassment (July 2021) (Updated June 28, 2022), https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf.

This definition of "education program activity" is drawn from the Supreme Court's decision in *Davis v. Monroe Cnty. Bd. of Educ*., where the Supreme Court held that in order for Title IX to apply to harassment that occurred exclusively between students, the plaintiff must show that 1) the school exercised substantial control over both the harasser and the context in which the known harassment occurred; 2) plaintiff suffered harassment that is so severe, pervasive, and objectively offensive that it can be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school; 3) a school official with authority to address the alleged discrimination and institute corrective measures on the school's behalf must have had actual knowledge of the harassment; 4) the school acted with deliberate indifference to the harassment; and 5) the school's deliberate indifference subjected plaintiff to harassment. 526 U.S. 629, 640, 644, 648, and 650 (1999); *see also Brown v. Arizona*, 23 F.4th 1173, 1180 (9th Cir. 2022) ("Where an educational institution has no control over the abuse the plaintiff suffered, such abuse does not occur 'under' 'the operations of' the institution. And if this requirement is not met, the institution has not 'expose[d] its students to harassment or cause[d] them to undergo [harassment] under the [institution]'s programs.") (internal citations omitted); 85 Fed. Reg. at 30196 ("The Department thus concludes that we should align these final regulations with the Supreme Court's approach to education program or activity in the context of Title IX sexual harassment.") (internal quotation marks omitted).

Plaintiff's claim fails on the first *Davis* element. A date at a student's private apartment is not a Yeshiva "program or activity" because it did not exercise "substantial control" over the context in which the harassment occurred. The types of "program or activity" where courts have

found the requisite control are contexts such as fraternity houses or school sponsored events at bars where there is a clear level of University involvement in the off-campus event. *See Doe v. Curators of the Univ. of Mo.*, No. 19-cv-04229-NKL, 2022 U.S. Dist. LEXIS 159076, at *46 (W.D. Mo. Aug. 30, 2022) ("Case law has consistently held that peer to peer sexual harassment that occurs off campus is not 'under the control' of the University, unless it is at an off-campus facility under the control of the university, … or during an off-campus activity facilitated by a university.") (internal citations omitted); *Weckhorst v. Kan. State Univ.*, 241 F. Supp. 3d 1154 (D. Kan. 2017) (finding a "nexus" between off-campus conduct and the university where the alleged assaults took place at a fraternity house that was regulated by the university, who had authority to regulate fraternity houses and the parties held in them.).

Plaintiff attempts to equate this off-campus incident to a situation where a school retains control, like a fraternity house, by making numerous un-supported allegations about Yeshiva paying his rent, sponsoring his Visa, and helping him secure his apartment. Plaintiff's allegations about any supposed connection between Yeshiva and Perry's apartment are wholly unsupported by any factual enhancement and are pure speculation. Even accepting these allegations as true, which the Court is not required to do as they fail to comply with the applicable pleading standard, they do not support a finding of "substantial control" by Yeshiva over Perry's private apartment. Plaintiff also tries to establish that Yeshiva had control over Perry's apartment by alleging that Perry's apartment was within or near (the Complaint alleges both) Yeshiva's security perimeter. (Am. Compl., ¶ 65). First, Plaintiff's allegations on this topic themselves conflict as to whether the apartment was actually within any such perimeter. (Am. Compl., ¶ 65) ("[Perry's apartment] was *within or near* the outer perimeter of YU's Wilf Campus.") (emphasis added). Second, even if Perry's apartment was within the area that Yeshiva security patrols, Yeshiva's security patrol is

intended to protect pedestrians walking to and from campus; it has no control over what occurred inside a nearby apartment. Unlike an off-campus building owned or controlled by a recognized student organization, like a fraternity house, where universities generally have the authority to regulate and promulgate rules for parties and other activities that occur inside, the Amended Complaint does not explain how Yeshiva would have similar control over what occurred within a student's private apartment just by virtue of having a security presence patrolling the streets and sidewalks nearby.

The facts of this case are very similar to those in *Brown v. Arizona*, a recent Ninth Circuit decision where that court held that the defendant university was not liable for abuse committed by a student athlete in his off-campus apartment (that he lived in with the school's permission and that was paid for with scholarship funds) at a time unconnected to any school activity. *Brown* appears to be the first decision directly deciding the applicability of Title IX to off-campus conduct involving a student athlete since the 2020 Regulations were enacted. The Ninth Circuit explained that although the student's apartment was paid for with scholarship funds, this fact was not enough to give the school control over the context of the harassment as there is an "appreciable difference between the degree of control an educational institution exercises over on-campus housing and off-campus housing, regardless of how it is paid for." 23 F.4th at 1181. The Ninth Circuit further explained that "there is no indication in the record that by receiving University scholarship funds to cover his living expenses, [the abuser]'s residence was deemed University property or that the University had regulatory control over his residence like it does over on-campus housing." *Id.* ("It would be unreasonable to conclude that Title IX gives educational institutions adequate notice that accepting federal education funds imposes on them liability for what happens between students off campus, unconnected to any school event or activity."); *see also O'Shea v. Augustana Coll.*,

No. 4:20-cv-04243-SLD-JEH, 2022 U.S. Dist. LEXIS 53150 (C.D. Ill. Mar. 24, 2022) (finding that where the student was raped at an off-campus party, there was no evidence that the University had control over the student conduct at the off campus party.).

The Ninth Circuit further explained that just because a person subject to a school's rules or authority – like a student athlete – engages in misconduct does not mean that misconduct occurs under the school's control. In other words, "not everything that a person subject to a school's disciplinary control does can be attributed to the school's operations. This is particularly true of student conduct." *Brown*, 23 F.4th at 1181. The plaintiff here argues that the same factors that were held in *Brown* to be insufficient: specifically, that the student who committed the assault was an athlete who received funds from the school to pay for his apartment and needed the school's express permission to live off-campus. In order for Title IX to apply, Yeshiva would have had to have control over both Perry and his apartment. The *Brown* court noted that "there must be something beyond student-focused disciplinary authority that renders the context where the challenged harassment occurred part of the school's operations," otherwise Congress' express requirement that conduct is only actionable under Title IX if it occurs "under an[] education program or activity receiving federal financial assistance" would be eviscerated. *Brown*, 23 F.4th at 1182. At most, all of the purported facts pointed to by Plaintiff to attempt to show Yeshiva had control over his apartment speak to Yeshiva's ability to discipline its students in certain circumstances, but do not demonstrate its control over his private, non-Yeshiva apartment, which is not enough to make Yeshiva liable for the alleged assault. As such, Plaintiff has not stated a claim under Title IX and Counts One and Two must be dismissed.

B. Article 78, Not Title IX, is the Correct Vehicle for Bringing a Claim About Whether Yeshiva Properly Investigated Plaintiff's Sexual Assault Complaint

New York enacted Article 78 to establish a "streamlined process for challenging the determinations of public bodies and administrative agencies" and requires that certain proceedings be brought in New York Supreme Court. *See Doe v. N.Y. Univ.*, 537 F. Supp. 3d 483, 490 (S.D.N.Y. 2021); CPLR § 7804(b). Article 78 has been held to be the appropriate vehicle to challenge the administrative decisions of educational institutions, including private universities like Yeshiva. *See Maas v. Cornell Univ.*, 94 N.Y.2d 87, 92 (1999). CPLR § 7803 applies to questions of whether a "body or officer failed to perform a duty enjoined upon it by law," or "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious and an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." CPLR § 7803(1) and (3).

Plaintiff has not stated a Title IX claim as demonstrated above and the nature of her claim is one that is properly asserted under CPLR Article 78. Plaintiff is not the first to attempt to plead around Article 78 and its short statute of limitations and lenient standard by trying to disguise her claims under a similar, but not applicable, statute or cause of action. For example, the plaintiff in *Doe v. N.Y. Univ.* framed her allegations challenging NYU's decision to suspend her for allegedly failing to adhere to the school's COVID-19 safety policies as a breach of contract claim. The court found that as the "essence" of her claim was a challenge to her suspension, it was appropriate to convert her contract action into an Article 78 proceeding. 537 F. Supp. 3d at 493; *see also Donoso v. N.Y. Univ.*, 160 A.D.3d 522, 523 (1st Dep't 2018) (Finding that where plaintiff added a claim that the school's grievance process violated his civil rights pursuant to 42 U.S.C. § 1983, "all his claims challenge defendant's academic determination to withdraw his admission to the JSD

program and therefore should have been brought via a CPLR article 78 proceeding.") (citations omitted).

The Yeshiva Defendants do not assert that Article 78 should *always* apply to any claim challenging the decision of an educational institution, but rather that when plaintiff fails to plead a cognizable claim under Title IX or another federal statute, that Article 78 is the appropriate avenue for the Plaintiff's claims. In *Purcell v. N.Y. Inst. of Tech.*, 931 F.3d 59, 63-65 (2d Cir. 2019), a case the Plaintiff has argued is dispositive here, the Second Circuit declined to apply the four month statute of limitations applicable to Article 78 claims because the plaintiff, who alleged that professors and employees of the university made derogatory comments about his sexual orientation and mental health history during an investigation of his dismissal from the program, properly set forth a Title IX complaint. Unlike the plaintiff in *Purcell*, Plaintiff has *not* properly pled a Title IX complaint. As discussed at length above, Plaintiff has not demonstrated that Yeshiva had control over the context where her alleged sexual assault occurred, which is required to impose Title IX liability on a university for student-on-student conduct that occurred off-campus. The *Purcell* plaintiff did state a Title IX claim because he alleged that University employees had harassed him, which puts those claims squarely within Title IX. 931 F.3d at 62-64. Additionally, the claims in *Purcell* focused on the actual harassment and discrimination, perpetrated by employees of the university, rather than any issue with the procedures invoked by the University, and as, such none of the questions earmarked for Article 78 proceedings were triggered. Here, Plaintiff has not asserted a Title IX claim because the alleged circumstances of the sexual assault do not fall within Title IX's purview and her claims challenge the process invoked by Yeshiva. Most importantly, and as addressed at length above, Plaintiff's claims do not fall under Title IX because they occurred off-campus and outside of Yeshiva's control. (Am.

Compl., ¶ 63). Additionally, Plaintiff's allegations of a Title IX violation directly implicate the questions raised under CPLR § 7803, Count One of the Amended Complaint walks through 19 ways in which Yeshiva allegedly violated Title IX, 17 of which outline different ways Plaintiff felt Yeshiva made their determination "in violation of lawful procedure."). *See* CPLR § 7803(3); Am. Compl. ¶ 218(1)-(17). For this reason, unlike the plaintiff in *Purcell*, the proper avenue for Plaintiff to challenge Yeshiva's determination was with an Article 78 proceeding.

C. Plaintiff's Article 78 Claims are Untimely

As Plaintiff's claims are not true Title IX claims, they should have been brought as Article 78 claims. The four-month statute of limitations set forth in CPLR § 217(1) governs claims brought pursuant to Article 78. *See Matter of Park Beach Assisted Living, LLC v. Zucker*, 189 A.D.3d 1756 (3d Dep't 2020); *Sarwar v. N.Y. Coll. of Osteopathic Medicine of N.Y. Inst. of Tech.*, 150 A.D.3d 913, 914 (2d Dep't 2017) (dismissing medical school student's claims for improper dismissal from the program where the claims should have been brought under Article 78 as they implicated the school's "core academic decisions" and were thus time-barred). Plaintiff filed her initial Complaint on June 28, 2022, over a year after she received the letter from Nissel notifying her that a determination had been reached on May 26, 2021. Therefore, her claim is time-barred and Counts One and Two must be dismissed.

II. The Amended Complaint Fails to Allege Diversity Jurisdiction

If this Court agrees that Title IX does not apply to Counts One and Two of the Amended Complaint, this Court does not have jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. § 1331. Plaintiff makes a cursory attempt to plead diversity in the alternative, but her allegations fall far short of establishing complete diversity.

The burden of pleading diversity, and proving diversity if it is questioned, rests on the party invoking federal jurisdiction. *Platinum-Montaur Life Scis., LLC v. Navidea Biopharmaceuticals, Inc.*, 943 F.3d 613, 618 (2d Cir. 2019). The citizenship of an individual is determined by the place she is "domiciled" at the time the complaint was filed. *Dagen v. CFC Grp. Holdings, Ltd.*, No. 00 Civ. 5682 (DAB)(THK), 2002 U.S. Dist. LEXIS 25767, at *9-10 (S.D.N.Y. Mar. 7, 2022); *Van Buskirk v. United Grp. of Cos.*, 935 F.3d 49, 53 (2d Cir. 2019). Domicile requires the concurrence of physical presence in a state and the intent to remain in the state for the foreseeable future. *Dagen*, 2002 U.S. Dist. LEXIS 25767, at *9-10. Domicile does not require permanence or that someone remain in the new state for a certain time period to establish a new state as a domicile, rather it is sufficient if the individual has no fixed intention to go elsewhere or return to the old domicile. *See Sanial v. Bossoreale*, 279 F. Supp. 940 (S.D.N.Y. 1967); *Van Buskirk*, 935 F.3d at 53 (explaining that domicile is "the place where a person has his true fixed home and principal establishment, and to which, whenever he is absent, he has the intention of returning."). A mere statement of a party's residence is insufficient to establish its citizenship. *Dagen*, 2002 U.S. Dist. LEXIS 25767, at *9 (citing *Wolfe v. Hartford Life & Annuity Ins. Co.*, 148 U.S. 389, 389 (1893)).

Multiple paragraphs in the Amended Complaint allege that Plaintiff "reside[d] in a state other than New York," but fail to identify what that other state was. Further, the Amended Complaint is devoid of any facts demonstrating that even though Plaintiff was attending school in New York and living in New York that she did not abandon her previous domicile. In fact, other allegations indicate that she did *not* intend to return to her home state. (Am. Compl., ¶ 59) ("In 2020 through May 2022, Plaintiff resided in an apartment in Washington Heights."); *Id.*, at §§ 60-62 (alleging that even though classes in 2020 and 2021 were primarily conducted remotely, Plaintiff remained in New York and "regularly used" the facilities on Yeshiva's campus). The

Amended Complaint does not even name the other state in which she must establish she was domiciled at the time the original Complaint was filed in June 2022. Plaintiff's bare assertions regarding her citizenship, especially considering that she could have but never left New York during the pandemic, as many college students did, fall far short of her burden to plead complete diversity, and as such this Court does not have jurisdiction pursuant to 28 U.S.C. § 1332.

III. The Court Should Decline to Exercise Supplemental Jurisdiction Over Plaintiff's State Law Claims

As set forth above, this court does not have subject matter jurisdiction over the Amended Complaint under either 28 U.S.C. §§ 1331 or 1332. As all of Plaintiff's federal claims must be dismissed, this Court should also decline to exercise supplemental jurisdiction over Plaintiff's numerous state law claims. 28 U.S.C. § 1367(a) provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy. A district court may decline to exercise supplemental jurisdiction when it has "dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3); *Yahui Zhang v. Akami*, No. 15-CV-4946 (VSB), 2019 U.S. Dist. LEXIS 164524, at *13-14 (S.D.N.Y. Sept. 25, 2019) (explaining that a district court may decline to exercise supplemental jurisdiction if it has "dismissed all claims over which it has original jurisdiction.").

As discussed at length above, dismissal of Plaintiff's Title IX claims, the only federal claims brought against any Defendant in this action, is appropriate. As such, this Court should decline to exercise its supplemental jurisdiction under 28 U.S.C. § 1367(c)(3) and dismiss the Amended Complaint in its entirety. This includes dismissal of the state law claims brought against the individual Yeshiva Defendants, Lauer and Nissel, in Counts Five, Six, Seven, Twelve, and

Fourteen. Indeed, there are no federal claims asserted against these individuals. Because there are no claims remaining over which this Court has original jurisdiction, there is no "case or controversy" for the state law claims against the Individual Defendants to form a part of, and as such they should be dismissed.

CONCLUSION

For the foregoing reasons, the Yeshiva Defendants request that the Amended Complaint be dismissed in its entirety, and for such other relief that this Court deems just and proper.

Date: New York, New York
October 17, 2022

Respectfully submitted,

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