15

COMMONWEALTH OF MASSACHUSETTS

MIDDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2381CV02900

JANE AND JOHN DOES 1-37

vs.

TRUSTEES OF BOSTON COLLEGE, BLAKE JAMES and REGGIE TERRY

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
[RULING ON PAPER NO. 3]

The matter is before the court on the plaintiffs Jane and John Does 1-37's motion for preliminary injunction ordering Boston College, pending a trial on the merits, to reverse the suspension of the Boston College Swimming and Diving Team, publicly issue a retraction of the Boston College Athletics Department's September 20, 2023 statement, and remove any notation of suspension from Boston College's records or the individual records of the thirty-seven plaintiffs.[1] Following a hearing conducted on October 24, 2023, the plaintiffs' motion for injunctive relief is **DENIED**.

BACKGROUND

The facts relevant to the court's decision are briefly stated as follows.

The plaintiffs, thirty-seven members of the Boston College Swimming and Diving Team ("the Team"), claim that they were substantially and irreparably harmed by the defendants'

[1] According to the affidavit of Corey Kelly, the Team's suspension does not become part of a student's individual conduct record and is not noted on a student's transcript, nor does it limit or restrict a student's access to the university's classes, facilities, or resources. Affidavit of Corey Kelly, Boston College's Associate Vice President and Dean of Students, para. 12.

hasty, indefinite suspension of the Team prior to any investigation (or sufficient investigation) based on allegations that hazing had occurred, in violation of the university's own policies. They further claim that on September 20, 2023, Boston College falsely and recklessly issued a public statement on the Boston College Athletics website stating that the university had "determined that a hazing incident had occurred" on the Team. In their opposition to the plaintiffs' motion for injunctive relief, the defendants maintain that Boston College's decision to indefinitely suspend the Team was not arbitrary or capricious and was within the discretion of its Athletic Director who suspended the Team on September 20, 2023 after sufficient investigation revealed credible allegations of hazing by members of the Team at an annual "Frosh" event. Per the defendants, that investigation included interviews of twenty members of the Team on September 14, 2023 and the review of photos, videos and group chat messages. At the time the Team was suspended, the defendants had learned that there were three Team events/parties involving underage drinking between September 2 and September 4, 2023. Notably, on September 3, 2023 Team members conducted a "Frosh" event (an annual tradition on the Team) with a series of organized and directed activities for freshmen members involving excessive drinking. Freshmen were instructed to engage in coordinated activities, various drinking games, and binge drinking. The freshmen were given bags to wear around their necks for vomit and a number of them did vomit. Other students passed out. Some older students on the Team instructed the freshmen what to do, while other older students were "taking care of" the freshmen who were sick or otherwise overly intoxicated. According to Boston College, there are 68 members of the Team, including 53 upperclassmen.

The plaintiffs filed their Complaint on October 17, 2023 and simultaneously sought injunctive relief on count 6, their Title IX claim. Complaint, Prayers for Relief, para (vi), p. 38.

DISCUSSION

To obtain preliminary injunctive relief, "a plaintiff must show (1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the plaintiffs['] likelihood of success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction." *Tri-Nel Mgmt., Inc.* v. *Board of Health of Barnstable*, 433 Mass. 217, 219 (2001). A preliminary injunction is a significant remedy that should not be granted unless the moving party has made a clear showing of entitlement thereto. *Student No. 9* v. *Board of Educ.*, 440 Mass. 752, 762 (2004); *Packaging Indus. Grp., Inc.* v. *Cheney*, 380 Mass. 609, 616-617 (1980).

Likelihood of Success on the Merits

As an initial matter, in their Complaint plaintiffs seek injunctive relief only on count 6, the selective enforcement claim brought under the protections of Title IX of the Education Amendment of 1972 (20 U.S.C. section 1681 et. seq.). The plaintiffs' claims for breach of contract (count 1), denial of basic fairness (count 2), estoppel (count 3), defamation (count 4) and intentional infliction of emotional distress (count 5) solely seek monetary damages.

As to the likelihood of success on count 6, plaintiffs' claims of selective enforcement of a disciplinary sanction on their co-ed sports team are predicated on allegations made "upon information and belief." Complaint, paras. 223-225. Specifically, plaintiffs allege "upon information and belief" that all-male teams at Boston College "have engaged in behavior that could amount to an alleged violation of the College's Code [of Conduct]" involving "similar allegations," but were not imposed a disciplinary sanction prior to "an investigation process that amounted to more than what the Plaintiffs in the instant matter received." *Id.* These allegations are presented without any factual detail and reveal only what the plaintiffs hope to be able to

prove based on second-hand information. If the plaintiffs had facts to support their disparate treatment assertion they should have been set forth in the Complaint. Based on these information and belief averments, Jane and John Does 1-37 conclude that the decision to suspend the Team "was motivated by the fact that [the Team] is a co-ed program." *Id.* at para 227. The defendants counter with Athletic Director Blake James's ("AD James") affidavit. In his affidavit, AD James states that the decision to suspend the Team's activities "had nothing to do with the fact that the [T]eam is co-ed" and that "[t]here is no case involving similar circumstances and an all-male team;" namely, that "Boston College has not had occasion to consider evidence of repeated hazing incidents[2] in relation to an all-male team." Affidavit of Blake James, paras. 22-23. Given the record before this court, I will not issue the extraordinary injunctive relief requested where the plaintiffs have substantiated their side of critical facts in dispute not on firsthand knowledge, but rather on information and belief allegations. *Eaton* v. *Federal Nat'l Mortg. Ass'n*, 462 Mass. 569, 590 (2012) (assertions in an affidavit or verified complaint made on "information and belief" that are not supported by any other evidence do "not supply an adequate factual basis" for granting preliminary injunctive relief); *Alexander & Alexander, Inc.* v. *Danahy*, 21 Mass. App. Ct. 488, 493-494 (1986) (same). Thus, the plaintiffs have failed to establish a likelihood of success on the merits of their Title IX claim.

Although the plaintiffs did not seek injunctive relief on any of the other counts, in light of oral argument, the court will briefly address the likelihood of success on the merits of their remaining claims. As to the breach of contract and denial of basic fairness claims, the Team suspension imposed by Boston College Athletics was not arbitrary or capricious, particularly given the prior recent finding of Team hazing in 2022 and the Team nature of what was then

[2] In his affidavit AD James states that he "was informed that members of the [Swimming and Diving] team had been found responsible for hazing in the spring of 2022." Affidavit of Blake James, para. 16.

determined to be an annual freshmen hazing initiation to bring freshmen on to the Team. In 2023, no college student could be unaware of the dire dangers of hazing. Based on this court's review of the materials presented, the upperclassmen of the Team were clearly and repeatedly warned that hazing by student athletes was prohibited by Boston College Athletics rules, the Team's rules and Massachusetts law. That Boston College's investigation revealed that certain upperclassman were assigned to take care of freshmen who were sick or otherwise overly intoxicated is an acknowledgement by those involved in the hazing activity that they understood the potential, serious consequences of their acts, but proceeded nonetheless.[3] On this record, the plaintiffs have failed to convince the court that they are likely to succeed on the merits of their breach of contract or denial of fairness claims. As to the estoppel claim, although the parties disagree as to specifically which Boston College policies govern their dispute, they do not dispute that a contractual relationship exists between the student-athletes and Boston College. As such, the plaintiffs' estoppel claim is unlikely to succeed as a matter of law. *Malden Police Patrolman's Ass'n* v. *City of Malden*, 92 Mass. App. Ct. 53, 60 (2017). Next, as to the defamation claim, the affidavit averments, which the court credits, substantiate Boston College's September 20, 2023 website statement that Boston College had determined that hazing had occurred in the Team. Thus, the plaintiffs have failed to establish a likelihood of success on the merits of their defamation claim. Finally, a claim of intentional infliction of emotional distress requires proof of conduct that is "extreme and outrageous." Conduct qualifies as extreme and outrageous only if it "go[es] beyond all possible bounds of decency, and [is] regarded as atrocious and utterly intolerable in a civilized community." *Roman* v. *Trustees of Tufts Coll.*,

[3] While it is regrettable that certain members of the Team who did not participate in or know of the hazing incident are suffering the consequences of the Team suspension, that reality is an acceptable collateral consequence.

461 Mass 707, 718 (2012). On the record presently before the court, it is unlikely that the plaintiffs will be able to meet the very high standard required to prove this claim.

Irreparable Harm

Although the court acknowledges the personal pains reported by the plaintiffs resulting from the loss of their diving and swimming team association, they have failed to show that the defendants acted unlawfully, so it is unnecessary to address the question of irreparable harm. See *Foster* v. *Commissioner of Corr.*, 484 Mass. 698, 712 (2020) (where plaintiff has not established a likelihood of success on the merits, the court need not reach the issue of irreparable harm); *Wilson* v. *Commissioner of Transitional Assistance,* 441 Mass. 846, 858-859 (2004), citing *Healey* v. *Commissioner of Pub. Welfare,* 414 Mass. 18, 28 (1992) (holding that inevitable harm of limiting public resources does not trump lawful department action); *Packaging Indus. Grp., Inc.*, 380 Mass. at 617 (concluding that "[w]hat matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits").

ORDER

It is therefore *ORDERED* that the plaintiffs' motion for the issuance of a preliminary injunction be *DENIED.*

Date: October 26, 2023

Diane C. Freniere
Justice of the Superior Court