UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ARIELLA CAMPISI,

Plaintiff,

-against-

THE CITY UNIVERSITY OF NEW YORK, and DEAN GEORGE RANALLI, *Individually*,

Defendants.

----------X

Case No.

COMPLAINT

PLAINTIFF DEMANDS A TRIAL BY JURY

Plaintiff ARIELLA CAMPISI ("Plaintiff"), by and through her attorneys, PHILLIPS & ASSOCIATES, Attorneys at Law, PLLC, hereby complains of Defendants, upon information and belief as follows:

NATURE OF THE CASE

1. Plaintiff complains pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX"), and the New York City Human Rights Law, New York City Administrative Code, § 8-107, *et seq.* ("NYCHRL"), and seeks damages to redress the injuries she has suffered as a result of being Sexually Harassed and Discriminated against on the basis of her Gender by Defendants.

JURISDICTION AND VENUE

2. This Court has jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. § 1331.

3. The Court has supplemental jurisdiction over Plaintiff's claims brought under city law pursuant to 28 U.S.C. § 1367.

4. Venue is proper in this district, pursuant to 28 U.S.C. § 1391(b), as it is a judicial district in which a substantial part of the events or omissions giving rise to the claims occurred.

PARTIES

5. At all times relevant, Plaintiff was and is a resident of the State of New York and County of Kings.

6. At all times relevant, Defendant THE CITY UNIVERSITY OF NEW YORK ("CUNY") was and is a public university system, duly existing pursuant to, and by virtue of, the laws of the State of New York.

7. At all times relevant, Defendant CUNY was and is an institution of higher learning as those terms are defined under the New York Education Law (see NY Edn. Law §2).

8. At all times relevant, Defendant CUNY operates and/or maintains a senior college in New York City commonly referred to as the City College of New York (the "City College"). Further, the Bernard and Anne Spitzer School of Architecture (the "Spitzer School") is one of the schools which make up the City College of New York, and is located at 160 Convent Avenue, New York, NY 10031.

9. Upon information and belief, Defendant CUNY receives federal financial assistance.

10. At all times relevant, Defendant DEAN GEORGE RANALLI ("DEAN RANALLI") was and is employed by Defendant CUNY and is employed as the Dean of the Spitzer School.

11. At all times relevant, Plaintiff was and is an enrolled student at the City College of New York, as well as an employee of Defendant CUNY.

12. At all times relevant, Defendant DEAN RANALLI held supervisory authority over Plaintiff and had the power to hire, fire, and/or directly affect the terms and conditions of Plaintiff's employment with Defendant CUNY.

13. Defendant CUNY and Defendant DEAN RANALLI shall be herein referred to together at "Defendants."

MATERIAL FACTS

14. In or around the Fall of 2010, Plaintiff enrolled at the City College as an undergraduate student.

15. In or around January 2013, Plaintiff was hired as a college assistant at the Spitzer School and began working approximately twenty (20) hours per week. She initially earned $11.00 per hour, but after multiple raises, earned $15.00 per hour.

16. Upon starting work at the Spitzer School, Plaintiff was under the supervision of Michael Miller (who, upon information and belief, held the position of "Head of Operations"), Erica Wzsolek (who, upon information and belief, held the position of Assistant to the Dean), as well as Defendant DEAN RANALLI himself. Plaintiff's job included mostly administrative work and she regularly and continuously worked on projects directly with/ for Defendant DEAN RANALLI.

17. On or about December 16, 2013, Plaintiff was invited to, and attended, a Spitzer School-sponsored faculty party at Smoke Jazz & Supper Club located at 2751 Broadway, New York, NY 10025. Defendant DEAN RANALLI was among the individuals who attended this event.

18. The party lasted from approximately 3:00 PM to 6:00 PM. At or around 6:00 PM, as Plaintiff was leaving the holiday party, Defendant DEAN RANALLI approached Plaintiff and asked Plaintiff if she needed a car ride. Plaintiff asked in which direction he was driving and Defendant DEAN RANALLI stated he was heading downtown. Because Plaintiff needed to board a train to travel to her apartment in Brooklyn, she said yes.

19. Defendant DEAN RANALLI immediately told Plaintiff to sit in the front passenger seat (Defendant DEAN RANALLI was also giving a ride to an adjunct professor who he

wanted to sit in the rear seat).

20. Shortly after driving away from the Smoke Jazz & Supper Club, Defendant DEAN RANALLI began driving on the West Side Highway. Almost immediately after getting on the West Side Highway, Defendant DEAN RANALLI unsolicited and unwelcomely began rubbing Plaintiff's leg in a sexual manner. More specifically, Defendant DEAN RANALLI began rubbing Plaintiff's left leg; Plaintiff was wearing a skirt and he began rubbing her knee and mid-thigh region in a sexual manner right below where her skirt ended.

21. Plaintiff immediately became shocked and disgusted by this. Nevertheless, Defendant DEAN RANALLI continued to intermittently move his hand from his car's center console to Plaintiff's leg and continued to rub her left leg mid-thigh section for nearly thirty (30) minutes as there was considerable traffic on the West Side Highway that evening.

22. Defendant DEAN RANALLI exited off the West Side Highway around the Union Square area of Manhattan. The adjunct professor exited the back seat and began walking away down the sidewalk. Nevertheless, as Plaintiff was attempting to exit the car, Defendant DEAN RANALLI stopped her and told her that he needed to talk to her "for a minute." Plaintiff paused, looked back at Defendant DEAN RANALLI, and he stated, "You look so beautiful tonight, can I kiss you?"

23. Plaintiff did not respond, quickly exited his car, walked hurriedly into the bathroom of the nearest restaurant, and began to cry.

24. The following day, on or about December 17, 2013, Plaintiff went to work and immediately reported what had happened to Erica Wzsolek. Erica Wzsolek was in

noticeable shock and stated, "We need to get Michael [Miller]."

25. They then both told Michael Miller, who expressed dismay at what he had heard.

26. Both Michael Miller and Erica Wzsolek told Plaintiff that they were going to report the matter to Defendant CUNY's Office of Human Resources in order for an investigation and proper action to be taken.

27. A few days later, Erica Wzsolek told Plaintiff that she (Erica) had spoken to Defendant DEAN RANALLI, who confessed to what he had been accused of doing. Erica Wzsolek also told Plaintiff that Defendant DEAN RANALLI wanted to apologize to her.

28. In or around the end of January 2014, after Defendant DEAN RANALLI had returned from Winter break, Plaintiff had a meeting with Erica Wzsolek and Defendant DEAN RANALLI in his office whereat Defendant DEAN RANALLI apologized to Plaintiff and attributed his behavior to the fact that he had been inebriated that evening.

29. In response to Plaintiff's complaint, Plaintiff was moved to a different office and was told it was so that she would not have to interact with Defendant DEAN RANALLI. Specifically, her office was moved from Defendant DEAN RANALLI's conference room to an office two doors down. Also, Erica Wzsolek and Michael Miller told Plaintiff that she would have "little to do" with Defendant DEAN RANALLI. However, in practice, this was not true.

30. Specifically, Plaintiff's office was still on the same floor as Defendant DEAN RANALLI's office (and in very close proximity at that), she still routinely saw Defendant DEAN RANALLI in the hallways, and still had to work on projects which compelled her interaction with Defendant DEAN RANALLI.

31. Distraught by the fact that Defendant CUNY's "solution" was such that she had to see

her harasser and was compelled to interact with him on a near-daily basis (and habitually multiple times each day), Plaintiff began suffering from stress and depression which caused Plaintiff's grades to decline. Furthermore, Plaintiff had not received any word from Defendant CUNY as to the outcome of any investigation she was led to believe was occurring.

32. Accordingly, around Commencement of 2014 (in or around May), Plaintiff quit working for Defendant CUNY.

33. In or around September 2014, Plaintiff's father went and spoke with Erica Wzsolek. During their meeting, Plaintiff's father expressed that Plaintiff was "struggling" with everything that had happened and inquired as to whether her not working had anything to do with the incident involving Defendant DEAN RANALLI. Also, during their discussion, Erica Wzsolek admitted that Defendant DEAN RANALLI had indeed sexually harassed Plaintiff.

34. Plaintiff continued to hear nothing about the purported investigation that she was led to believe was being undertaken by Defendant CUNY. Plaintiff became increasingly dismayed and on or about March 24, 2015, Plaintiff went to Defendant CUNY's Office of Human Resources to request an update.

35. Nevertheless, upon Plaintiff inquiring as to this, Plaintiff was told that the Office of Human Resources was the wrong department for a complaint of this nature, and was told that instead, she had to make a complaint to the Office of Diversity and Compliance. Plaintiff became shocked and distraught that she had been led to believe for approximately a year and a half that a supposed investigation that was taking place, yet had actually never even begun.

36. Plaintiff immediately met with Defendant CUNY personnel from the Office of Diversity and Compliance, and also met with individuals from the Public Safety Department. Shortly thereafter, the Dean of Diversity, Compliance and Faculty Relations admitted that her complaint had never previously been investigated and that her supervisors (employees and agents of Defendant CUNY) had erred by reporting the matter to the incorrect department.

37. Upon information and belief, upon actually conducting an investigation, Plaintiff's claims of sexual harassment at the hands of Defendant DEAN RANALLI were substantiated.

38. Based on the foregoing, after Defendant CUNY received actual knowledge of sexual harassment at the hands of Defendant DEAN RANALLI, it failed to take sufficient action to prevent further harassment to Plaintiff, in violation of Title IX.

39. Following Defendant DEAN RANALLI's sexual harassment of Plaintiff, the actions undertaken by Defendant CUNY were wholly insufficient to remedy any risk that Plaintiff may encounter further sexual harassment, and thus, created a hostile environment that effectively deprived her of the educational opportunities or benefits provided by Defendant CUNY, in violation of Title IX.

40. Defendant CUNY's response was inadequate, erroneous, wholly improper, and significantly delayed so as to constitute deliberate indifference by making Plaintiff feel vulnerable to further abuse or harassment and condoning an environment which purported to overlook claims of unconsented touching and sexual harassment (which, upon information and belief, was never denied by the perpetrator). Moreover, Defendant CUNY's response was clearly unreasonable in light of the circumstances as they were then known.

41. Because of the deliberate indifference exhibited by Defendant CUNY, Plaintiff was unable to fulfill her full potential as a student, and accordingly, was caused to suffer a decline in her grades and elevation in her stress, anxiety, and depression, due to Defendant CUNY's deliberate indifference to her complaint and thereafter misleading her as to the status of an investigation.

42. Further, because of the deliberate indifference exhibited by Defendant CUNY, Plaintiff felt unable to work at her on-campus job, upon which she depended financially.

43. Also, Plaintiff, as an employee of Defendant CUNY, was caused to suffer an unlawful hostile work environment on account of her gender at the hands of her supervisor.

44. As a result of the above, Plaintiff has suffered emotional pain, suffering, inconvenience, loss of enjoyment of life, and other non-pecuniary losses. Plaintiff has further experienced severe emotional and physical distress.

45. Plaintiff has been damaged in an amount which exceeds the jurisdictional limits of the Court.

46. Defendant CUNY's conduct has been malicious, willful, outrageous, and conducted with full knowledge of the law. As such, the Plaintiff demands liquidated and punitive damages as against Defendant CUNY.

AS A FIRST CAUSE OF ACTION
VIOLATION OF TITLE IX OF THE
EDUCATIONAL AMENDMENTS OF 1972, 20 U.S.C. § 1681
(Not Against Individual Defendant)

47. Plaintiff repeats and realleges each and every paragraph above as if said paragraph was more fully set forth herein at length.

48. Upon information and belief, Defendant CUNY receives federal financial assistance.

49. Plaintiff sustained harassment because of her sex that was so severe, pervasive, and/or

objectively offensive that it deprived her of access to educational opportunities or benefits provided by Defendant.

50. Defendant CUNY had actual knowledge of the harassment sustained by Plaintiff.

51. Defendant CUNY's response to the harassment sustained by Plaintiff and/or its lack of response was deliberately indifferent, insofar as the response or lack thereof was clearly unreasonable in light of the known circumstances.

AS A SECOND CAUSE OF ACTION FOR DISCRIMINATION UNDER THE NEW YORK CITY ADMINISTRATIVE CODE

52. Plaintiff repeats, reiterates and realleges each and every allegation made in the above paragraphs of this Complaint as if more fully set forth herein at length.

53. The New York City Administrative Code § 8-107(1) provides that "It shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment."

54. Defendants engaged in an unlawful discriminatory practice in violation of New York City Administrative Code § 8-107(1)(a) by creating and maintaining discriminatory working conditions, and otherwise discriminating against Plaintiff because of her gender (sexual harassment).

AS A THIRD CAUSE OF ACTION FOR DISCRIMINATION UNDER THE NEW YORK CITY ADMINISTRATIVE CODE

55. Plaintiff repeats, reiterates and realleges each and every allegation made in the above

paragraphs of this Complaint as if more fully set forth herein at length.

56. The New York City Administrative Code § 8-107(6) provides that it shall be unlawful discriminatory practice: "For any person to aid, abet, incite, compel; or coerce the doing of any of the acts forbidden under this chapter, or attempt to do so."

57. Defendants engaged in an unlawful discriminatory practice in violation of New York City Administrative Code § 8-107(6) by aiding, abetting, inciting, compelling and coercing the above discriminatory, unlawful and retaliatory conduct.

AS A FOURTH CAUSE OF ACTION FOR DISCRIMINATION UNDER THE NEW YORK CITY ADMINISTRATIVE CODE

58. Plaintiff repeats, reiterates and realleges each and every allegation made in the above paragraphs of this Complaint as if more fully set forth herein at length. The New York City Administrative Code § 8-107(13) Employer liability for discriminatory conduct by employee, agent or independent contractor, states:

a. An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of any provision of this section other than subdivisions one and two of this section.

b. An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision one or two of this section only where:

1. the employee or agent exercised managerial or supervisory responsibility; or

2. the employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to

have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or

3. the employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.

c. An employer shall be liable for an unlawful discriminatory practice committed by a person employed as an independent contractor, other than an agent of such employer, to carry out work in furtherance of the employer's business enterprise only where such discriminatory conduct was committed in the course of such employment and the employer had actual knowledge of and acquiesced in such conduct.

59. Defendants violated the section cited herein as set forth.

JURY DEMAND

60. Plaintiff demands a trial by jury.

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Accept jurisdiction over this action;

B. Empanel a jury to hear and decide this action;

C. Award to Plaintiff declaratory relief in the form of an injunction and order requiring that Defendant CUNY revise its policies, procedures, and practices so that it is in compliance with Title IX;

D. Award to Plaintiff compensatory damages resulting from her pain and suffering resulting from the Defendants' sexual harassment and deliberate indifference;

E. Awarding Plaintiff attorneys' fees, costs, and expenses incurred in the prosecution of the action; and

F. Awarding Plaintiff such other and further relief as the Court may deem equitable, just and proper to remedy the Defendant's unlawful practices.

Dated: New York, New York
June 19, 2015

PHILLIPS & ASSOCIATES,
ATTORNEYS AT LAW, PLLC

By: _____

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARIELLA CAMPISI,	:	
	:	
Plaintiff,	:	
	:	15-cv-4859 (KPF)
-against-	:	
	:	
THE CITY UNIVERSITY OF NEW YORK, and DEAN GEORGE RANALLI, Individually,	:	
	:	
Defendants.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE CITY UNIVERSITY OF NEW YORK'S MOTION TO DISMISS

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Defendant The City University of New York ("CUNY") respectfully submits this reply memorandum of law in further support of its motion to dismiss Plaintiff's First Amended Complaint ("Am. Compl.") in its entirety and with prejudice.

PRELIMINARY STATEMENT

CUNY's moving papers demonstrated that Plaintiff's claim under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq. ("Title IX") fails as a matter of law because: (1) Plaintiff cannot assert an employment discrimination claim under Title IX, and (2) Plaintiff failed to state a claim. Plaintiff's opposition fails to refute that showing.

Plaintiff's opposition fails to distinguish the precedent and logic supporting the dismissal of the Title IX claim, because such employment claims must be brought under Title VII of the Civil Rights Act of 1964 ("Title VII"). The purpose of Title IX is to protect against sex discrimination in federally funded educational programs and provide a means to attack discriminatory practices affecting access to education. Yet here, Plaintiff attempts to assert a Title IX claim unrelated to her status as a student. She does not allege that one of her teachers or a fellow student harassed her. She claims her boss in her part time job harassed her. But that claim is not actionable under Title IX.

Further, Plaintiff misconstrues the standard for Title IX harassment claims. The law is clear that such claims require allegations of "severe or pervasive" conduct and a deprivation of educational benefits and opportunities. Plaintiff's allegations fall far short of that standard.

ARGUMENT

I. PLAINTIFF CANNOT ASSERT AN EMPLOYMENT CLAIM UNDER TITLE IX.

Plaintiff's opposition fails to overcome the logic and the law mandating the dismissal of her Title IX claim. While Plaintiff focuses on the limited number of courts that have allowed Title IX employment cases to proceed, she acknowledges that the Second Circuit has not decided this issue, and ignores the numerous cases cited by CUNY establishing that Title VII provides the exclusive

means for bringing an employment discrimination suit. CUNY Mem. pp. 6-11.[1]

Plaintiff disregards the sound rationale used by courts rejecting Title IX employment claims, including the fact that permitting an employment claim to proceed under Title IX is inconsistent with the statutory scheme set up by Congress under Title VII. See id. at pp. 8-9. Allowing employees to pursue employment discrimination claims under Title IX, which does not have an exhaustion requirement, would create an exception to Title VII's administrative procedures solely for employees of educational institutions. Id. (citing cases). Plaintiff further ignores the case law holding that Title VII precludes claims brought under other statutes. See id. at p. 9 (citing cases). Finally, Plaintiff ignores the similarities between this issue and the Second Circuit's analysis and determination that Title II of the ADA does not extend to employment discrimination claims. See id. at pp. 10-11 (citing Mary Jo C. v. N.Y. State & Local Ret. Sys., 707 F.3d 144, 168-71 (2d Cir. 2013) ("it would make no sense for Congress to provide . . . different sets of remedies, having different exhaustion requirements, for the same wrong committed by the same employer.")).

Instead of addressing this precedent, Plaintiff focuses on irrelevant case law and holdings that do not support her position. For example, Plaintiff stubbornly insists that students can bring Title IX claims, and Plaintiff is a student. Yet, that is not at issue here. The issue here is that Plaintiff brings this action as an ***employee***; she does not assert allegations in her capacity as a student. The mere fact that she is a student, unrelated to her allegations, cannot transform this into a viable Title IX action. In fact, Plaintiff concedes that Title IX claims are "traditionally premised on either teacher-on-student harassment or student-on-student harassment." Pl. Opp. p. 11.[2] Yet, this action does not involve either premise. Put simply, Title IX is meant to protect against a "hostile education environment." Papelino v. Albany Coll. of Pharm., 633 F.3d 81, 89 (2d Cir. 2011). Plaintiff's allegations concern

[1] "CUNY Mem." refers to the Memorandum of Law in Support of Defendant The City University of New York's Motion to Dismiss, dated December 16, 2015.
[2] "Pl. Opp" refers to Plaintiff's Memorandum of Law in Opposition to Defendants' Respective Motions to Dismiss, dated February 1, 2016.

her workplace, not her education environment; thus, she cannot bring her claim under Title IX.

In her opposition, Plaintiff cites references to "employees" in language related to Title IX, yet no decision binding on this Court has ever held that an employee can sue an employer under Title IX. Specifically, Plaintiff's discussion of Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) and N. Haven Bd. of Ed. v. Bell, 456 U.S. 512 (1982) misses the mark. In Cannon, the Supreme Court found that students had a private right of action under Title IX. 441 U.S. at 717. In N. Haven, the Court upheld regulations concerning a school's employment practices pursuant to Title IX enforcement provisions and affirmed the finding that federal funds could be terminated for discrimination against employees or students of education programs. 456 U.S. at 535-40. The Court did not address whether employees had a private right of action. Taken together, these cases demonstrate that while an educational institution may be deprived of federal funds for discriminating against students or employees, only students who suffered discrimination in their receipt of an education have a private right of action under Title IX. Therefore, Plaintiff may not maintain her employment claim under Title IX.

To the extent Plaintiff argues that Title IX implicitly covers employment discrimination suffered by anyone who happens to be a student (even where the job need not be filled by a student) (Pl. Opp. pp. 5-6) and that a right to monetary damages on such claim is also implied, such argument appears to be barred by sovereign immunity. Although, pursuant to the Spending Clause, New York can be deemed to have waived sovereign immunity for Title IX purposes, such waiver is not unlimited. The Supreme Court recently recognized the limits "on Congress's power under the Spending Clause to secure state compliance with federal objectives." Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2601-02 (2012). As the Court recognized:

> We have repeatedly characterized . . . Spending Clause legislation as "much in the nature of a contract." The legitimacy of Congress's exercise of the spending power "thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system.

Id. (internal citations omitted) (emphasis in original).

Here, Plaintiff asks this Court to extend Title IX's prohibition on sex discrimination in educational programs to employment discrimination, and also to read an implied entitlement to monetary damages for employment discrimination claims. But for these claims to avoid the bar of sovereign immunity, the waiver of immunity "must extend unambiguously to such monetary claims." See Lane v. Pena, 518 U.S. 187, 192 (1996) (citing U.S. v. Nordic Vill., 503 U.S. 30 (1992)); see also Sossamon v. Tex., 131 S. Ct. 1651, 1658-69 (2011). Here, there has been no unequivocal waiver with respect to claims for monetary damages in the employment context. Plaintiff's request for monetary damages for her employment claim may be actionable under other statutes, like Title VII, but cannot be encompassed under Title IX.

II. PLAINTIFF FAILS TO STATE A CLAIM UNDER TITLE IX.

A. Title IX Requires Allegations of Severe or Pervasive Conduct.

Plaintiff errs in arguing that she need not plead "severe or pervasive" harassment. The law is clear that to state a Title IX claim, a plaintiff must allege, inter alia, that "the alleged harassment was so severe, pervasive, and objectively offensive that it deprived the plaintiff of access to the educational opportunities or benefits provided by the school." Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 642 (1999). Plaintiff mistakenly claims that the "severe or pervasive" requirement is inapplicable to allegations of teacher-on-student harassment, and only applies to student-on-student harassment. First, this case does not involve allegations of either teacher-on-student or student-on-student harassment. Second, the case law makes clear that a claim must be dismissed if it does not allege severe or pervasive conduct, regardless of who it is against. Summa v. Hofstra Univ., 708 F.3d 115, 127, 131 (2d Cir. 2013) (Title VII and Title IX harassment claims are governed by the same standards and require a showing of severe or pervasive conduct).

Plaintiff's support for her position that she need not plead severe or pervasive conduct is

premised on the fact that Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998), a case affirming the dismissal of a suit alleging teacher-on-student harassment, did not discuss that standard. However, the question of whether the conduct was severe or pervasive was not at issue in Gebser. Instead, the issue in Gebser was whether the defendant was on notice of, and was deliberately indifferent to, the teacher's misconduct. Gebser, 524 U.S. 290-93. The Court did not hold, or even imply, that "severe or pervasive" was not a required element of a teacher-on-student harassment claim. It merely declined to address that element because it was not at issue.[3] Thus, the Gebser decision does not impact the insufficiency of Plaintiff's allegations.[4]

Moreover, Plaintiff ignores the fact that the Second Circuit and courts in this district require Title IX plaintiffs to plead "severe or pervasive" conduct in cases not involving peer harassment. In Hayut v. State Univ. of N.Y., a case by a student against a professor, the Second Circuit stated: "Making a 'hostility' determination in the educational context . . . entails examining the totality of the circumstances, including: 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with' the victim's academic performance." 352 F.3d 733, 745 (2d Cir. 2003) (citations omitted); Bliss v. Putnam Vall. Cent. Sch. Dist., 2011 U.S. Dist. LEXIS 35485, at *12-14 (S.D.N.Y. Mar. 24, 2011) (applying "severe or pervasive" standard to teacher-on-student harassment). Therefore, Plaintiff must plead conduct that is severe or pervasive to survive a motion to dismiss.

B. Plaintiff Does Not Allege Facts Showing Conduct That Is Severe or Pervasive.

Plaintiff's opposition does not distinguish the numerous cases supporting the dismissal of her

[3] In Gebser, a teacher was alleged to have harassed an eighth grader and then began an ongoing sexual relationship with her. This is significantly more severe than Plaintiff's allegation that her knee was touched on one occasion.

[4] Plaintiff misinterprets the Supreme Court's subsequent decision in Davis, which discussed the "severe or pervasive" standard with respect to student-on-student harassment. 526 U.S. at 653. While the Court in Davis noted that courts should take into account "the relationship between the harasser and the victim," it did not disavow the severe or pervasive requirement for harassment claims outside of the student-on-student realm. In fact, the Court's language that "[p]eer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment" reaffirms that the requirement applies to all claims of harassment under Title IX.

claim due to her failure to plead facts showing severe or pervasive conduct. See CUNY Mem. pp. 13-14 (citing cases). Instead Plaintiff relies on three inapposite cases that do not support her claim. First, Plaintiff places an inordinate amount of significance on Parrish v. Sollecito, 249 F. Supp. 2d 342 (S.D.N.Y. 2003). In Parrish, the court denied summary judgment where the plaintiff alleged that, inter alia, on four occasions, her manager "touched and rubbed her leg under her skirt, well above the knee and approaching her groin." 249 F. Supp. 2d at 349. In stark contrast, here, Plaintiff alleges that on one occasion, she was touched below where her skirt ended. She does not allege that Ranalli's "hand crawl[ed] under her skirt" or "cre[pt] toward her groin."[5] Thus, the Parrish case is distinguishable and does not support Plaintiff's claim.

Plaintiff also relies on Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1066 (9th Cir. 2002) for the proposition that "grabbing, poking, rubbing or mouthing areas of the body linked to sexuality – is inescapably 'because of . . . sex.'" Pl. Opp. p. 17. Yet Title VII's "because of sex" element is not at issue on this motion, and in Rene, the conduct's severity and pervasiveness was not at issue. Even if it was, the conduct in Rene was significantly more egregious than that alleged here, as it included: "whistling and blowing kisses at Rene, calling him 'sweetheart' and 'muneca' (Spanish for 'doll'), telling crude jokes and giving sexually oriented 'joke' gifts, and forcing Rene to look at pictures of naked men having sex . . . he was caressed and hugged . . . his coworkers . . . 'touch[ed his] body'. . . [and] grabbed him in the crotch and poked their fingers in his anus through his clothing." The severity and pervasiveness of that conduct is incomparable to that alleged here.

The third case Plaintiffs relies on is Pryor v. Jaffe & Asher, LLP, 992 F. Supp. 2d 252 (S.D.N.Y. 2014), even though the cited language makes clear that the conduct alleged in Pryor was significantly more severe than the conduct alleged here. Pl. Opp. p. 17 (noting that in Pryor, the

[5] Further, unlike Plaintiff, the Parrish plaintiff moved away from the unwanted touch. 249 F. Supp. 2d at 345-46.

plaintiff's supervisor "forcibly pulled her back and succeeded in kissing her on the neck.").[6] Here, Plaintiff alleges that on one single occasion, Ranalli touched her knee, told her she was beautiful, and asked for a kiss.[7] While that alleged incident may have been inappropriate, it was not "severe or pervasive," and Plaintiff's Title IX claim should be dismissed.

C. Plaintiff Was Not Denied Access to Educational Opportunities or Benefits.

1. Plaintiff's Opposition Fails to Refute CUNY's Showing That Plaintiff Was Not Denied Access to Educational Opportunities or Benefits.

As demonstrated in CUNY's moving papers, Plaintiff did not plead facts demonstrating that she was denied access to educational opportunities or benefits. CUNY Mem. pp. 14-15. In response, Plaintiff merely rehashes her arguments concerning the severity of the alleged harassing conduct and cites out-of-state, inapposite cases.

Plaintiff cites Doe v. Coventry Bd. of Ed., 630 F. Supp. 2d 226 (D. Conn. 2009) for the proposition that the mere possibility of encountering an alleged harasser could deprive a student of educational opportunities. Pl. Opp. pp. 20-21. Yet, Coventry involved a student who was sexually assaulted by another student, resulting in criminal charges. 630 F. Supp. 2d at 229. The plaintiff and her harasser shared a lunch period and a class, and despite "repeatedly request[ing]" that the school move him, the school refused to act. Id. at 229, 233. Over the next year, the plaintiff received harassing communications, leading to her hospitalization and enrollment in night school. Id. at 230-32. The court held that "[e]ntrance into the night school, which is different than regular day school attended by most high school students, would be sufficient to find a deprivation of educational opportunities." Id. at 234. That is incomparable to the complaint here, in which the alleged acts of harassment were not severe or ongoing, CUNY did not ignore "repeated requests" for action, Plaintiff

[6] Plaintiff ignores the fact that CUNY distinguished Pryor in its moving papers (CUNY Mem. p. 14, n.8).
[7] Plaintiff's argument that the alleged incident was severe because it occurred on a "busy highway" from which she could not escape is overstated. See Pl. Opp. pp. 18-19. As this Court recognized at the pre-motion conference, the West Side Highway is frequently slow-moving due to traffic and has multiple traffic lights. Further, there are crosswalks preventing someone from being "stranded" on the side of the road. Also, there was a third person in the car with Plaintiff and Ranalli. Thus, the location has no impact on the severity of the alleged conduct.

did not attend the Architecture School, where her job was, and she remained enrolled in City College.

Plaintiff also cites Doe v. Derby Bd. of Educ., 451 F. Supp. 2d 438 (D. Conn. 2006), which is similarly distinguishable. In Derby, the plaintiff, a thirteen-year-old student, was sexually assaulted by a high school student, who was later arrested. 451 F. Supp. 2d at 440. Throughout the following year, the plaintiff was "teas[ed] and harass[ed]" and frequently saw the assaulter on campus. Id. at 441-42. As a result, she transferred out of the school system. Id. The court held that there was "minimally sufficient evidence from which a reasonable jury could conclude that going to the same school as [her assaulter] played a role in [her] decision to transfer out . . . thus depriving her of its educational opportunities or benefits." Id. at 445.

Plaintiff ignores the fundamental distinction between those cases and the allegations at issue here. In the cases cited by Plaintiff, the plaintiff suffered multiple instances of harassment, feared further harassment in the school setting, and ultimately left school because of that fear. Here, Plaintiff did not leave school; she is still a student at City College. Nor does Plaintiff allege that she suffered further harassment or even feared further harassment. Rather, Plaintiff merely complains that she still saw Ranalli in her separate workplace. This difference, coupled with the allegations of conduct that is not severe or pervasive, renders the cases cited by Plaintiff irrelevant, and demonstrates how far outside the parameters of Title IX this claim lies.[8]

The same is true for Plaintiff's misplaced reliance on T.Z. v. City of N.Y., in which a special needs student was sexually assaulted in a classroom with a teacher present. 634 F. Supp. 2d 263 (E.D.N.Y. 2009). A male student asked for a hug, and when she refused, he hugged her from behind "and began touching her breasts while she tried to fight him off by kicking and biting." Id. at 266. He "held down the plaintiff's legs as another classmate began touching her breasts . . . and her vagina

[8] Plaintiff relies on cases involving much younger students, yet as acknowledged by Plaintiff, courts evaluate the context of the alleged harassment. See supra n.4. Plaintiff here was a twenty-one year old woman, which is starkly different than a middle school or special needs student.

and buttocks outside of her clothing, after which he pulled her pants down and caressed her buttocks," affecting her ability to attend school. Id. at 266-67. There is a vast disparity between the severity of those allegations and the allegations here. Also, Plaintiff's argument that she still saw Ranalli, "had difficulty concentrating in class, and her work performance began to suffer" (Pl. Opp. p. 22) ignores another critical difference, which is that her allegations relate to ***work*** rather than school. Therefore, they are insufficient to state a claim.

2. Allegations of a Decline in Grades Are Insufficient.

Plaintiff's allegation that her grades declined is insufficient to show that she was denied equal access to an educational program or activity. See Davis, 526 U.S. at 652 ("Nor do we contemplate, much less hold, that a mere 'decline in grades is enough to survive' a motion to dismiss"); HB v. Monroe Woodbury Cent. Sch. Dist., 2012 U.S. Dist. LEXIS 141252, at *54-55 (S.D.N.Y. Sept. 27, 2012) (assertions of a decline in grades and sports performance "insufficient for Title IX purposes"). Faced with this precedent, Plaintiff's attempt to salvage her claim by citing non-binding case law falls short. See Dawn L. v. Gr. Johnstown Sch. Dist., 586 F. Supp. 2d 332, 373 (W.D. Pa. 2008) ("a decline [in grades] is not by itself sufficient to prove denial of educational opportunities"); Herndon v. Coll. of the Mainland, 2009 U.S. Dist. LEXIS 12425 (S.D. Tex. Feb. 13, 2009) (denying summary judgment where there was proof of more than declining grades, including an ulcer, stress-related illness, attendance issues, and withdrawal from the program).

Even if declining grades were sufficient to show a denial of educational opportunities, which they are not, the fact that all of the issues complained of in Plaintiff's complaint occurred outside of her educational setting mandates the dismissal of her claim. Title IX protects against a "hostile education environment." Papelino, 633 F.3d at 89. Plaintiff does not allege facts showing that her educational environment was hostile. At best, she alleges issues concerning her workplace, which impacted her academic performance. That is outside the scope of Title IX.

Nor are Plaintiff's allegations concerning "DC 37" sufficient to salvage her claim. Plaintiff merely alleges that she was eligible to take advantage of a benefits program if she maintained enrollment, a certain grade point average, and worked a certain number of hours each week. Am. Compl. ¶¶ 16-18. Plaintiff does not allege that she met those requirements or that she sought to take advantage of that benefit.[9] Thus, any alleged "loss of eligibility" for that benefit does not rise to the level of loss of an educational opportunity sufficient to state a Title IX claim.

3. Plaintiff Does Not Plead Facts Showing "Deliberate Indifference."

Plaintiff failed to allege that CUNY acted with "deliberate indifference." As Plaintiff acknowledges, a defendant's response is "deliberately indifferent" only if it was "clearly unreasonable in light of the known circumstances." Davis, 526 U.S. at 648. "[T]he deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it." Id. at 645.

Plaintiff acknowledges that when she reported the alleged conduct, Ranalli apologized and her office was moved. Plaintiff's opposition seems to rest on the argument that she expected more to be done. Plaintiff's undisclosed expectations, however, cannot be the basis for a "deliberate indifference" claim. As stated in CUNY's moving papers (p. 17), the allegations here are analogous to those dismissed in KF v. Monroe Woodbury Cent. Sch. Dist., 531 Fed. Appx. 132, 134 (2d Cir. 2013), where even though the school district did not take certain steps to address the plaintiff's complaints, she did "not have a right to specific remedial measures."[10] Here, Plaintiff got an apology and had her office moved in an attempt to limit her interactions with Ranalli. Once she expressed her dissatisfaction, CUNY took additional measures. Am. Compl. ¶ 37; Pl. Opp. p. 25. Plaintiff does not claim that CUNY's ultimate response was "deliberately indifferent." Because CUNY took action and Plaintiff was not subjected to further alleged harassment, her claim should be dismissed.

[9] Plaintiff's amended complaint does not seek damages for lost wages, lost benefits, or any other economic damages.
[10] Plaintiff cites the KF District Court opinion for the proposition that Title IX liability only attaches where a response is "grossly inadequate action or [there was] no action at all." Pl. Opp. p. 26.

CONCLUSION

For the foregoing reasons, and for the reasons stated in its moving papers, CUNY respectfully requests that the Court dismiss the claims against it, in their entirety and with prejudice, and grant such other and further relief as it deems just and proper.

Dated: New York, New York
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