**UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF VIRGINIA**
**Abingdon Division**

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| **HILLARY LYNNE BURGESS,** | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| **v.** | ) | **Case No. 1:17-CV-00015** |
| | ) | |
| **APPALACHIAN REGIONAL LAW SCHOOL d/b/a APPALACHIAN SCHOOL OF LAW, *et al.*** | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

Defendants Appalachian Regional Law School d/b/a Appalachian School of Law ("ASL"), Jina Sauls ("Sauls"), Sandra Keen McGlothlin ("McGlothlin"), and Patricia Deel ("Deel") (collectively, "Defendants"), by counsel and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (the "Rules"), file this Memorandum of Law in Support of Motion to Dismiss the Complaint filed by Plaintiff Hillary Lynne Burgess ("Burgess" or "Plaintiff"). Sauls, McGlothlin, and Deel are collectively referred to as "Individual Defendants."

## INTRODUCTION

Plaintiff's 335-paragraph Complaint is at the same time repetitive, contradictory, and conclusory, and seeks to allege causes of action for disparate treatment under Title VII of the Civil Rights Act of 1964, as amended ("Title VII") (count I), disparate impact under Title VII (count II), sexual harassment and hostile work environment under Title VII (count III), Title VII retaliation (count IV), discrimination and retaliation under Title IX of the Education Amendment

Acts of 1972 ("Title IX") (count V), sexual harassment and hostile work environment under Title IX (count VI), Title IX selective enforcement (count VII), breach of contract under Title IX (count VIII), intentional infliction of emotional distress ("IIED") (count IX), and negligent infliction of emotional distress ("NIED") (count X) against Defendants.

Significantly, each of these counts are based on nothing more than Plaintiff's unsubstantiated assumptions that "upon information and belief" Mr. Doe's conduct was sexually motivated (Compl. at ¶ 31), "upon information and belief" male professors were not expected to do additional work without additional compensation (Id. at ¶ 47), and "upon information and belief" the Title IX investigation's outcome would have been different if Plaintiff were male. Id. at ¶ 278. Count II is also procedurally barred by Plaintiff's failure to include a Title VII claim of disparate impact in her administrative charge filed with the Equal Employment Opportunity Commission ("EEOC"). Count VIII is also barred as there is no contractual obligation between Plaintiff and Defendants under Title IX. Finally, to the extent these claims are alleged against the Individual Defendants, they are insufficient and duplicative. Consequently, Plaintiff's claims fail as a matter of law and the Complaint should be dismissed with prejudice.

## ARGUMENT

### I. Standard of Review

"[W]hen ruling on a defendant's motion to dismiss, a [trial] judge must accept as true all of the factual allegations contained in the complaint." Smith v. McCarthy, 349 F. App'x 851, 856 (4th Cir. 2009) (quoting Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (citations omitted)). To survive a Rule 12(b)(6) motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level," with the complaint having "enough facts to state a claim to relief that is plausible on its face." Bell

Atl. Corp. v. Twombly, 550 U.S. 544, 555, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are insufficient. Ashcroft v. Iqbal, 556 U.S. 662 (citing Twombly, 550 U.S. at 555). A complaint may survive a motion to dismiss only if it "states a plausible claim for relief" that "permit[s] the court to infer more than the mere possibility of misconduct" based upon "its judicial experience and common sense." Id. (citing Twombly, 550 U.S. at 556, 127 S.Ct. 1955)).

## II. Individual Defendants, Sued In Their Official Capacity, Are Improperly Named As Defendants And Must Be Dismissed From The Case With Prejudice.

### A. Plaintiff's Claims Against Individual Defendants Are Duplicative Of Her Claims Against ASL.

Plaintiff names Sauls, McGlothlin, and Deel, as defendants in their official capacity as Title IX Coordinator, Dean, and Director, respectively. "[A] suit against a defendant in his official capacity . . . is considered by the Court to be a suit against [the entity] itself because suits against officers of an entity generally represent only another way of pleading a suit against the entity of which the officer is an agent." See Bracey v. Buchanan, 55 F.Supp.2d 416, 420 (E.D. Va. 1999) (analyzing "official capacity" claims under Title IX); Pettis v. Nottoway Cty Sch. Bd., 2013 WL 3063704 (E.D. Va. June 17, 2013) (analyzing "official capacity claims under Title VII). Consequently, Plaintiff's claims against Independent Defendants are duplicative of the claims against ASL, and Independent Defendants must be dismissed with prejudice. Id. at *5-6 (finding that "claims against individuals defendants in their official capacities are essentially claims against the [entity], which is the real party in interest" thus dismissal of the individuals was appropriate).

**B. Plaintiff Cannot Support "Official Capacity" Liability Under Title IX.**

Where Title IX claims against a defendant in his "official capacity," are permitted, a plaintiff must plead that the defendant was "deliberately indifferent" in his handling of the alleged harassment. Shores v. Stafford Cty. Sch. Bd., 2005 WL 2071730 at *5 (E.D. Va. Aug. 26, 2005).

Significantly, a plaintiff cannot satisfy the "deliberate indifference" standard based on mere dissatisfaction with the remedial action taken by the defendants. For example, in Shores, the plaintiff's complaint acknowledged that (1) her harassers were suspended based on her complaints, (2) she was allowed to change her seat in class, (3) her formal complaint to the guidance counselor was provided to the police, and (4) school officials ended the harassment in the classroom, though plaintiff continued to be harassed in the hallways. Id. Nonetheless, plaintiff alleged Title IX liability based on her assertion that these actions were inadequate responses to her complaint. Id. Plaintiff's allegation of inadequacy, however, was not sufficient to establish the deliberate indifference element to support Title IX liability against the defendants in their official capacities. Id. See also Bracey, 55 F.Supp.2d at 420 ("That the plaintiff is dissatisfied with the outcome of the investigation" is not sufficient to establish the deliberate indifference element necessary to maintain a Title IX claim against the individual defendant in his official capacity.).

Here, despite naming them as defendants, Plaintiff barely mentions the Individual Defendants in her complaint and not once alleges that they personally engaged in conduct that was "deliberately indifferent." To the contrary, Plaintiff alleges that:

1. her alleged harasser was "withdrawn from bartending at a particular school event" at her request. Compl. at ¶ 70;
2. an investigation was undertaken pursuant to Title IX. Id. at ¶ 74;

3. she was permitted to teach the remaining classes of the semester "remotely" from an "undisclosed location." Id. at ¶¶ 86-87;
4. the school appointed a Title IX investigator to investigate Plaintiff's claims. Id. at ¶¶ 92, 119-22;
5. the school did issue a "no-contact" order to Plaintiff's alleged harasser. Id. at ¶ 96;
6. the school conducted a "separate Title IX investigation . . . related to the rape charge." Id. at ¶ 100;
7. the Title IX investigator interviewed Plaintiff during his investigation of her complaints. Id. ¶ 126; and
8. a Title IX hearing was conducted following the investigation of Plaintiff's claims. Id. at ¶¶ 128-31.

Like the Shores plaintiff, Plaintiff in the case at bar "recogniz[es] that Defendants responded, but assert[s] that such efforts were insufficient." Shores, 2005 WL 2071730 at *5. Plaintiff offers only conclusory, hyperbolic, and self-serving statements categorically characterizing ASL's actions as somehow deliberately indifferent. In fact, Plaintiff's characterization of ASL's actions as "deliberately indifferent" is based on nothing more than her personal dissatisfaction with the school's Title IX investigation and the investigation's outcome, which is not sufficient to establish the element of deliberate indifference necessary to impose liability under Title IX. *See* Shores, 2005 WL 2071730 at *5; Bracey, 55 F.Supp.2d at 420. Consequently, the Individual Defendants must be dismissed from this case with prejudice.

## III. Plaintiff's Title VII Claims Asserted In Counts I, III, And IV Are Inadequately Plead And Must Be Dismissed

Plaintiff alleges multiple Title VII violations, including disparate treatment (count I), sexual harassment and hostile work environment (count III), and retaliation (count IV). Each of these claims is based on nothing more than conclusory, and sometimes contradictory, allegations and must be dismissed.

Though, at the pleading stage, a plaintiff is not required to plead facts that constitute a *prima facie* case of Title VII disparate treatment, retaliation, or hostile work environment, the complaint's "factual allegations must be enough to raise a right to relief above the speculative

level." Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). "Conclusory allegations of Title VII violations do not establish plausibility." Coleman v. Maryland Court of Appeals, 626 F.3d 187, 190 (4th Cir. 2010), aff'd sub nom. Coleman v. Court of Appeals of Maryland, 566 U.S. 30, 132 S. Ct. 1327, 182 L. Ed. 2d 296 (2012). See also Jones v. HCA, 16 F.Supp.3d 622, 629 (E.D. Va. 2014) (quoting Bass v. E.I. DuPont de Nemours & Co., 324 F.3d 761, 765 (4th Cir. 2003)) (While a "plaintiff need not plead 'specific facts establishing a prima facie case' at this stage of the proceedings. . . . [the] complaint must allege sufficient facts to state the elements of the claim."); Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 256, 262 (4th Cir. 2009) (Plaintiff's allegations must "possess sufficient 'heft' to push her claims "across the line from conceivable to plausible."). Specifically, ***conclusory allegations based "upon information and belief" "are insufficient to defeat a motion to dismiss."*** Harman v. Unisys Corp., 356 Fed.Appx. 638, 640-41 (4th Cir. 2009) (emphasis added).

### A. Plaintiff's Allegations of Title VII Disparate Treatment Are Speculative; Thus Count I Must Be Dismissed

The elements of a *prima facie* case under Title VII are "(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) different treatment from similarly situated employees outside the protected class." Coleman, 626 F.3d at 190.

In Coleman, the plaintiff alleged that he "was treated differently as a result of his race than whites" and even identified a Caucasian co-worker he believed had received more favorable treatment Id. at 191. The Coleman court, however, held that these were conclusory allegations with no facts alleged to believe that the Caucasian co-worker engaged in similar conduct, that the plaintiff and identified Caucasian co-worker were similarly situated, or that race was the true

reason for plaintiff's termination. Id. Plaintiff's allegations in the Complaint at bar are similarly inadequate.

For instance, Plaintiff states, without substantiating, that she was treated "differently from and less preferably than similarly situated male employees." The only facts offered in support of this conclusory allegation are wholly speculative and insufficient to create a plausible inference of disparate treatment. Specifically, regarding her disparate pay allegations, Plaintiff first compares herself, as a "Visiting Associate Professor" (Compl. at ¶ 18) to "permanent, tenured, male faculty." Id. at 47. Plaintiff goes on to speculate that "***upon information and belief***" male professors did not perform extra work without receiving extra pay. Id. at ¶ 47. (emphasis added). On their face, these allegations rebut any allegation necessary to establish the fourth element of a Title VII disparate treatment claim and prohibit a plausible inference of disparate treatment.

Similarly, in her complaints related to the Title IX investigation, Plaintiff speculates that "***upon information and belief***" the outcome would have been more favorable to her if she were male Id. at ¶ 278. (emphasis added). She does not offer a single fact to support this assumption. This theoretical assertion is insufficient to create a plausible inference that the alleged unfavorable treatment was based on her sex. As with all claims in the Complaint, Plaintiff's Title VII disparate treatment claim is based on assumptions that do not "possess sufficient 'heft' to push them "across the line from conceivable to plausible." Nemet Chevrolet, 591 F.3d at 262. Consequently, Count I must be dismissed.

**B. Plaintiff Has Not Adequately Pled Her Claims Of Sexual Harassment And Hostile Work Environment Under Title VII[1] (Count III) Or Title IX (Count VI).**

***i. Plaintiff Has Not Alleged Sufficient Facts To Support Her Hostile Work Environment Sexual Harassment Claim Under Title VII.***

Plaintiff alleges that she was subject to hostile work environment sexual harassment in violation of Title VII (count III) and Title IX (count VI). To establish a hostile work environment, a plaintiff must show: (1) she was subjected to unwelcome harassment; (2) because of her sex; (3) that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment; and (4) which is imputable to her employer. Prince-Garrison v. Md. Dep't of Health & Mental Hygiene, 317 Fed. App'x 351, 354 (4th Cir. 2008). A plaintiff alleging hostile work environment must "set forth facts sufficient to allege each element of [her] claim." Rivera v. Prince William Cty. Sch. Bd., 2009 WL 2232746, at *4 (E.D. Va. July 22, 2009) (quoting Bass, 324 F.3d at 765).

As an initial matter, Plaintiff has not alleged the unwelcome harassment to which she claims she was subjected with any degree of clarity. As with the rest of her claims, Plaintiff asserts baldly that she "personally was subjected to unwelcome and aggressive behavior based upon her sex. . . ." Compl. at ¶ 192. It is not clear whether this alleged unwelcome and aggressive behavior was the alleged wage disparagement, the alleged conduct of Mr. Doe, or the alleged inadequacies of the Title IX investigation into Plaintiff's complaints about Mr. Doe.

[1] Though Plaintiff's Count III implies that she is claiming sexual harassment ***and*** hostile work environment, relevant legal authority suggests that Plaintiff must mean sexual harassment which creates a hostile work environment, otherwise known as non-quid pro quo harassment. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (Title VII provides for two types of sexual harassment. The first is harassment that conditions the employment benefits on sexual favors. The second is harassment that creates a hostile work environment.). Accordingly, Count III will be analyzed as the second type of sexual harassment.

This element of Plaintiff's sexual harassment is simply too vaguely pled to meet the pleading requirements.

Even assuming Plaintiff has adequately identified the alleged "unwelcome and aggressive behavior," Plaintiff must allege facts sufficient for the court to infer that the unwelcome harassment was based on her sex. Jones, 16 F.Supp.3d at 629. Plaintiff's allegations do not meet this requirement either. Instead, Plaintiff makes several allegations repeated throughout the Complaint that allow the Court to infer that the alleged unwelcome harassment was based on something other than sex. For example, Plaintiff's allegations allow the Court to infer that Mr. Doe's alleged unwelcome conduct was based on her "direct[ing] Mr. Doe to leave her classroom." Compl. at ¶ 29. Indeed, Plaintiff does not allege any sex based discriminatory or harassing conduct from Mr. Doe until ***after*** she ejects him from her class. Id. As with her other allegations, all Plaintiff offers to support her sexual harassment and hostile work environment claim based on Mr. Doe's alleged conduct is her assumption that "***[u]pon information and belief***, Mr. Doe was targeting [her] due to her sex, female." Id. at ¶ 31. (emphasis added). This conclusory statement cannot "establish plausibility." Coleman, 626 F.3d at 190; Harman, 356 Fed.Appx. at 640-41.

Plaintiff likewise offers numerous facts to allow the Court to infer that alleged unwelcome conduct in the form of the alleged wage disparity or alleged Title IX investigation inadequacies was a result of her demand for additional compensation (Compl. at ¶ 41), requests for additional assistance (Id. at ¶ 51), "voiced concerns" about her health (Id. at ¶ 53) or even her status as a "Visiting Associate Professor." Compl. at ¶ 18. Indeed, Plaintiff herself alleges that the treatment she received throughout the Title IX investigation was "arguably . . . retaliation for her initial refusal to complete additional work duties . . . and/or for being so vocal about Mr.

Doe." Compl. at ¶ 106. Plaintiff's own allegations make clear that there are many reasons for the alleged treatment she received other than ***because of her sex***, thus prohibiting her from creating a plausible inference of hostile work environment sexual harassment. See Jones, 16 F.Supp.3d at 629-630 (finding alleged facts suggest other reasons for the alleged negative treatment of plaintiff).

Plaintiff's allegations are similarly insufficient to establish that the environment was plausibly "sufficiently severe or pervasive." To meet this element, the conduct complained of must be both subjectively and objectively hostile or pervasive. Id. at 629. While Plaintiff categorically alleges that she personally was offended by the alleged circumstances, she cannot establish that the circumstances were objectively severe or pervasive. As to Mr. Doe's conduct, Plaintiff identifies only a handful of comments allegedly made by Mr. Doe and reported to Plaintiff by an unnamed third party. Compl. at ¶ 29. Additionally, Plaintiff alleges that Mr. Doe was disruptive in class and open with Plaintiff and others about his collection of, and interest in, firearms. Compl. at ¶¶ 25-33. At best, these allegations suggest an obnoxious law student in Buchanan County, Virginia with a professed interest in guns. While Plaintiff may have found Mr. Doe personally offensive, this conduct does not rise to the level of being objectively severe and pervasive to support Plaintiff's claim of hostile work environment sexual harassment.

Plaintiff's allegations are also insufficient to the extent her hostile work environment sexual harassment claims stem from the alleged disparity in pay or alleged inadequacy of the Title IX investigation. Plaintiff herself acknowledges that ASL took actions to protect her from her alleged harasser, investigate her allegations, and accommodate her safety concerns. See supra at 4.

Courts have declined to find hostile work environments in circumstances far more

egregious those alleged by Plaintiff. See See Singleton v. Dep't of Corr. Educ., 115 Fed. Appx. 119, 120, 122 (4th Cir. 2004) (finding plaintiff had not established the objectively severe or pervasive conduct requirement, despite evidence that an employee relentlessly complimented her, stared at her breasts when he spoke to her, measured the length of her skirt and told her it looked "real good", and consistently told her how attractive he found her); Hartsell v. Duplex Prods., Inc., 123 F.3d 766, 773 (4th Cir. 1997) (finding four alleged comments demeaning towards women were insufficient to be sever and pervasive); Lorenz v. Fed. Express Corp., 2012 WL 4459570, at *8 (W.D. Va. Aug. 17, 2012) (allegations of comments regarding plaintiff's appearance, cat calls in her direction, lewd gestures, male co-workers engaging in horseplay of a sexual nature, occasional unwanted physical contact, including hugs and "being pressed up against a male co-worker" over several months was insufficiently severe and pervasive); Rivera v. Prince William Cnty. Sch. Bd., 2009 WL 2232746, at *2, *5 (E.D. Va. July 22, 2009) (finding on motion to dismiss that comments about plaintiff's sexual relationship with her husband, asking "if she would wear lingerie for him or her husband," "frequent[ ] use of sexual innuendo referring to male genitalia, and "at least one email containing sexual comments and/or sexual innuendo" were insufficiently severe and pervasive.). Based on these pleading deficiencies, Count III should be dismissed.

***ii. Plaintiff Has Not Alleged Deliberate Indifference Sufficient To Support Her Sexual Harassment Claim Under Title IX.***

"The operative elements in a *prima facie* hostile work environment claim [under Title IX] are . . . essentially the same" as those of a *prima facie* hostile work environment claim under Title VII. Kahan v. Slippery Rock Univ. of Pennsylvania, 50 F.Supp.3d 667, 697 (W.D. Pa. 2014) (collecting cases). To impose hostile work environment sexual harassment liability on an employer under Title IX, however, the plaintiff must demonstrate that "the employer was

deliberately indifferent to a report of discrimination." Id.; See also, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290-91 (1998). Plaintiff cannot plausibly establish the *prima facie* elements of a hostile work environment sexual harassment claim (supra at 7-10). To the contrary, Plaintiff acknowledges ASL's efforts to address her concerns, including actions taken to protect her from her alleged harasser, investigate her allegations, and accommodate her safety concerns. See supra at 4. Because Plaintiff cannot establish a *prima facie* case of hostile work environment sexual harassment and deliberate indifference, Plaintiff's Title IX hostile work environment sexual harassment claim (count VI) also must be dismissed.

**C. Plaintiff Has Not Adequately Pled Her Title VII Retaliation Claim (Count IV).**

The elements of a *prima facie* case of retaliation are: "(1) engagement in a protected activity; (2) adverse employment action; and (3) a causal link between the protected activity and the employment action." Coleman, 626 F.3d at 190.

In support of her Title VII retaliation claim (count IV), Plaintiff alleges that she was "unlawfully and constructively discharged from employment within short temporal proximity to her complaint, and in direct retaliation for her complaints." Compl. at ¶ 218.
"Temporal proximity can show a causal link, but only if an employer's knowledge of protected activity and the adverse employment action that follows are very closely related in time." Emami v. Bolden, 2017 WL 945769, at *4 (E.D. Va. Mar. 10, 2017). "[A] time period of three to four months is too great to establish a causal link through temporal proximity alone." Id.

Plaintiff alleges that she complained about Mr. Doe's conduct in September 2015 (Id. at ¶ 37) and again in and around March 2016. Id. at ¶ 57. Plaintiff alleges that she complained of the alleged disparity in pay in or around December 2015. Id. at ¶ 42. Plaintiff alleges that she was constructively discharged in or around August 2016. Id. at ¶ 168. Because this gap in time

is to long to support an inference that Plaintiff's alleged constructive discharge was in retaliation for her complaints, Count IV must be dismissed.[2]

## IV. Plaintiff's Claim Of Disparate Impact (Count II) Is Procedurally Barred, Inadequately Pled And Must Be Dismissed With Prejudice.

### A. Plaintiff's Disparate Impact Claim Is Beyond The Scope Of Her EEOC Charge And Thus Must Be Dismissed With Prejudice.

A Title VII plaintiff must exhaust administrative remedies prior to filing suit. Jones v. Calvert Group, Ltd., 551 F.3d 297, 300 (4th Cir. 2009). "The scope of the plaintiff's right to file a federal lawsuit is determined by the charge's contents." Id.; Bryant v. Bell Atl. Md., Inc., 288 F.3d 124, (4th Cir. 2002). "[F]ailure by the plaintiff to exhaust administrative remedies concerning a Title VII claim deprives the federal courts of subject matter jurisdiction over the claim." Calvert Group, 551 F. 3d at 300.

Count II of Plaintiff's complaint alleges disparate impact. "An essential element of a disparate impact claim is the presence of a 'facially-neutral employment practice' that as implemented treats protected groups of people worse than others." Cross v. Suffolk City Sch. Bd., 2011 WL 2838180 at *8 (quoting Pardon v. Wal-Mart Stores, Inc., ----- F.Supp.2d. -----, 2011 WL 1760229, at *6 (N.D. Ill. May 9, 2011)). Consequently, "to bring a disparate impact claim, a plaintiff's EEOC charge must, at a minimum, identify a facially neutral policy that has a disparate impact on a protected group of which the plaintiff is a member and/or facts supporting a reasonable inference of one." Cross, 2011 WL 2838180, at *8.

[2] Also, between the time of her last complaints in March 2016 and her alleged constructive discharge in August 2016, Plaintiff alleges that there she had problems getting her final grade submitted (Compl. at ¶¶ 165-67), providing the court with an alternative inference as to the cause of Plaintiff's alleged discharge. See Jones, 16 F.Supp.3d at 629 (allegations provided alternative inferences for the cause of alleged negative treatment of plaintiff).

In Cross, the plaintiff alleged that her age played a role in her not being selected for the assistant principal position. Id. The Court found that while that allegation related to a disparate treatment claim, it was insufficient to support a disparate impact claim. Id. Similarly, the Pacheco v. Mineta Court held that the plaintiff failed to exhaust administrative remedies as to a disparate impact theory where the EEOC charge "facially alleged disparate treatment," "identified no neutral employment policy," and complained of past incidents of disparate treatment only." 448 F. 3d 783, 792 (5th Cir. 2006)

Plaintiff's EEOC complaint did not identify a "facially-neutral employment practice" with a disparate impact on a protected class of which she is a member. Indeed, Plaintiff's EEOC complaint did not make any mention of "disparate impact" whatsoever. Consequently, Count II of Plaintiff's complaint is outside the scope of her EEOC charge, not within the court's jurisdiction, and must be dismissed with prejudice.

**B. Plaintiff Has Not Adequately Pled Disparate Impact.**

As the Supreme Court has made clear, "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact." Smith v. City of Jackson, Miss., 544 U.S. 228, 241 (2005) (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)). Instead, "the employee is 'responsible for isolating and identifying the *specific* employment practices that are allegedly responsible'" for the alleged disparity. Smith, 544 U.S. at 241 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 997, 994 (1988)) (emphasis in original).

The allegations constituting Plaintiff's disparate impact claim fall woefully short of what is required. In fact, the allegations of Count II (disparate impact) are identical to the allegations of Count I (disparate treatment) expect for Paragraph 183, which alleges in full that:

> ASL's policies, practices, and/or procedures, including policies concerning compensation and Title IX, have had a disparate impact on Prof. Burgess with respect to the terms and conditions of her employment.

Compl. at ¶ 183.

These vague allegations not only fail to identify a "specific employment practice," as required by the Supreme Court, but also alleged only that Plaintiff herself was disparately impacted. There is no allegation within Count II, or otherwise in the Complaint, that identifies the specific policy at issue and the protected class allegedly suffering a disparate impact. Consequently, Plaintiff has not adequately pled a claim of disparate impact and thus Count II must be dismissed with prejudice.

## V. Plaintiff's Title IX Discrimination And Retaliation Claim (Count V) Is Based On Assumptions And Inapposite Allegations.

### A. Title IX Retaliation Is Inadequately Plead And Directly Rebutted By Plaintiff's Own Allegations.

To state a claim for Title IX retaliation, a plaintiff must plead, "(1) engagement in a protected activity; (2) an adverse action; and (3) a causal connection between the protected activity and the adverse action." Armstrong, 2017 WL 2390234, at *9 (quoting Doe v. Salisbury Univ., 123 F.Supp.3d 748, 769 (D. Md. 2015)). The alleged adverse action must be material, "mere petty slights or minor annoyances" are not enough. Id.

In the case at bar, Plaintiff claims that she "engaged in the protected activity of making multiple complaints about Mr. Doe" (Compl. at ¶ 230) and that ASL "retaliated against her for making these complaints by acting with deliberate indifference toward [her] and her legitimate complaints." Id. at ¶ 232. Plaintiff acknowledges, however, throughout her complaint that ASL conducted a Title IX investigation. Supra at 4. Indeed, the primary basis for Plaintiff's

Complaint is her dissatisfaction with the Title IX investigation and procedure.[3] Given that the alleged harassment by Mr. Doe apparently began "nearly eight months" earlier (id. at ¶ 74) and was so severe as to cause Plaintiff to "fle[e] to an undisclosed location" (id. at ¶ 19), it is incredible that Plaintiff now seeks to establish that the Title IX investigation and her role in it, was done in retaliation for the very complaints the Title IX investigation sought to address.

Nonetheless, Plaintiff's complaint that the Title IX investigation was purposely delayed, obstructed, or otherwise tampered with by Defendants, is insufficient to support a Title IX retaliation claim. Plaintiff acknowledges that ASL took actions to protect her from her alleged harasser, investigate her allegations, and accommodate her safety concerns. See supra at 4. Indeed, Mr. Doe was found "responsible" for some of the claims against him following the Title IX hearing. Id. at 132. Plaintiff was, and is, obviously displeased with the outcome of the Title IX process but does not allege that she made any effort to appeal the decision. These facts make Plaintiff's complaint about the investigation's pace and procedure trivial. As Armstrong makes clear:

> [e]ven assuming that officials in the office had actually received [plaintiff's] complaint and deliberately delayed acting on it, [plaintiff] still acknowledges that [defendant] had asked him about this complaint within a month of it being filed. He does not allege that he followed up on this communication or ever made another attempt to bring his claim forward. A delay of a few weeks, followed by [plaintiff's] seeming refusal to take any further action once he had the opportunity to do so, is simply too insubstantial to be truly adverse.

2017 WL 2390234, at *9. Thus, as Plaintiff has not plead any material adverse action. Instead, she makes only the conclusory statement that Defendants acted with deliberate indifference

[3] Paradoxically, Plaintiff first complains was moving too slowly (Compl. at ¶¶ 74, 78) and then complains was moving too quickly. Id. at ¶¶ 110-18. Though not included in the Title IX retaliation claim itself, Plaintiff similarly complains first that ASL retaliated against her by forcing her to be the complainant in the Title IX investigation (id. at ¶¶ 105-06) and then complains that the investigation did not adequately investigate her claims. Id. at ¶ 121.

(Compl. at ¶ 232) and speculates that she was "arguably forced to be the [Title IX] Complainant in retaliation for her initial refusal to complete additional work duties . . . and/or for being so vocal about Mr. Doe" Id. at ¶ 106. These allegations are not sufficient to sustain her Title IX retaliation claim, thus Count V must be dismissed.

**B. Plaintiff Only Generally And Summarily Alleges Title IX Discrimination.**

Title IX discrimination claims "are analyzed by analogy to the legal standards of Title VII." Bedard v. Roger Williams Univ., 989 F.Supp. 94, 97 (D.R.I. 1997) (collecting cases). Though Count V is titled "Discrimination and Retaliation," the allegations supporting a discrimination claim are vague and conclusory, simply characterizing the alleged actions of Mr. Doe and Defendants as "discriminatory on the basis of [Plaintiff's] sex, female." Compl. at ¶ 235. These conclusory allegations are not sufficient to sustain Plaintiff's Title VII discrimination claims (supra at 6-8), and similarly cannot sustain Plaintiff's Title IX discrimination claim. Coleman, 626 F.3dat 190. Consequently, Count V must be dismissed.

**VI. Plaintiff Has Not Adequately Pled A Title IX Selective Enforcement Claim, SoCount VII Must Be Dismissed.**

A Plaintiff attacking a Title IX disciplinary proceeding can proceed under a theory of "erroneous outcome" or "selective enforcement." Armstrong v. James Madison Univ., 2017 WL 2390234, at *7 (W.D. Va. Feb. 23, 2017), report and recommendation adopted, 2017 WL 2399338 (W.D. Va. June 1, 2017) (citing Yusuf v. Vasser Coll., 35 F.3d 709, 715 (2d. Cir. 1994). A selective enforcement claim "asserts that, regardless of the [plaintiff's] guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the [plaintiff's] gender." Yusuf, 35 F.3d at 715. Specifically, to sustain a Title IX selective enforcement claim, the plaintiff must allege that a member of the opposite sex "was in

circumstances sufficiently similar to his own and was treated more favorably." Armstrong, 2017 WL 2390234, at *7 (citing Mallory v. Ohio Univ., 76 F.App'x 634, 641 (6th Cir. 2003).

"A plaintiff alleging racial or gender discrimination by a university must do more than recite conclusory assertions." Yusuf, 35 F.3d at 713. Instead, "to survive a motion to dismiss, the plaintiff must specifically allege the events claimed to constitute intentional discrimination as well as circumstances giving rise to a plausible inference of racially discriminatory intent." Id. "[A]llegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss." Armstrong, 2017 WL 2390234, at *9 (quoting Yusuf, 35 F.3d at 715). Rather, a showing of discrimination requires the pleading of particular facts, such as "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." Id.

Despite this pleading standard, and in support of her Title IX selective enforcement claim (count VII), Plaintiff "asserts that, the reduced severity of the penalty against Mr. Doe (and, ultimately, the lack thereof of any penalty) was affected by [her] gender, female." Compl. at ¶ 277. Plaintiff further alleges that "[u]pon information and belief, had a male employee been placed in [her] circumstances, the outcome would have been different and he would have been treated more favorably by ASL and would not have been retaliated against by ASL." Id. at ¶ 278. These allegations are apparently based on the "systemic gender bias at ASL" as alleged by Plaintiff, which is allegedly evidenced in ASL's alleged failure to follow the proper Title IX process.[4] Id.

[4] Notably, Title IX "erroneous outcome" and "selective enforcement claims" are typically brought by the individual who is the subject of the Title IX investigation, not the Title IX complainant.

Plaintiff's allegations constitute nothing more than "allegations of a procedurally or otherwise flawed proceeding" "combined with a conclusory allegation of gender discrimination [which are] not sufficient to survive a motion to dismiss." Armstrong, 2017 WL 2390234, at *9 (quoting Yusuf, 35 F.3d at 715). Plaintiff has not identified a member of the opposite sex who received more favorable treatment in similar circumstances (Armstrong, 2017 WL 2390234, at * 7), nor has she alleged particular facts sufficient to support her claim. See Yusuf, 35 F.3d at 715 (noting that specific facts are required and dismissing plaintiff's selective enforcement claim where the allegations "do not demonstrate an inconsistency that warrants further inquiry"). Instead, Plaintiff's selecting enforcement claim is based "upon information and belief," speculation, conclusory statements of "systemic gender bias at ASL," and her general, apparent dissatisfaction with the outcome of ASL's Title IX investigation. Comp. at ¶¶ 277-78. Such allegations cannot sustain a Title IX selective enforcement claim and, thus Count VII of the Complaint must be dismissed. Harman, 356 Fed.Appx. at 640-41 (conclusory allegations based "upon information and belief" "are insufficient to defeat a motion to dismiss.").

## VII. Neither Title IX, Nor ASL's Title IX Policy, Create An Enforceable Contract Between Plaintiff and Defendants; Thus Count VIII Must Be Dismissed.

A breach of contract claim requires "(1) a legally enforceable obligation of a defendant to a plaintiff, (2) the defendant's violation or breach of that obligation, and (3) injury or damage to the plaintiff caused by the breach of obligation." Navar, Inc. v. Federal Business Counsel, 291 Va. 338, 344 (2016). Count VIII alleges breach of contract based on ASL's purported failure to respond adequately to Plaintiff's complaints. Plaintiff bases this claim on her assertion that the school's "sexual misconduct policy in place pursuant to Title IX" is itself a "binding contract[ ] between ASL and its employees." Compl. at ¶ 301. This assertion is incorrect as a matter of law.

Though not specifically addressed in Virginia, other courts in this Circuit have held that employer policies are not enforceable contracts between the employer and employee absent mandatory language. Lindquist v. Tanner, 2012 WL 3839235, at *3 (D.S.C. Sept. 4, 2012). Specifically, "[f]or an employment policy to be enforceable in contract, it must be 'definitive in nature, promising specific treatment in specific situations.'" Id. (quoting Hessenthaler v. Tri-County Sister Help, Inc., 616 S.E.2d 694, 697-99 (S.C. 2005)). See also Petrosyan v. Delfin Group U.S.A., LLC, 2015 WL 685266 (D.S.C. Feb. 18, 2015) (finding that employer's anti-discrimination policy was not a binding contract, despite plaintiff's conclusory allegation that it contained mandatory language); Spillane v. Low Country Harley-Davidson, Inc., 2013 WL 4084098, at *2-3 (D.S.C. Aug. 13, 2013) ("as a matter of law, generalized harassment and anti-discrimination policies . . . do not constitute implied employment contracts").

Plaintiff does not make even a conclusory allegation of mandatory language within the school's "sexual misconduct policy" that might be sufficient to create a binding contract. Instead, Plaintiff makes only vague reference to the school's general "sexual misconduct policy," which is insufficient to establish the policy as an enforceable contract between Plaintiff and ASL.[5] Consequently, Plaintiff's breach of contract claim must be dismissed with prejudice.

## VIII. Plaintiff's Emotional Distress Claims Are Insufficiently Pled And Must Be Dismissed.

### A. Plaintiff's Intentional Infliction Of Emotional Distress Claim (Count IX) Fails As A Matter Of Law.

[5] Plaintiff also cannot rely on Title IX itself as the contract underlying her breach of contract claim. Title IX does not create any contractual relationship between an entity and its employees. See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998). Instead, Title IX conditions the receipt of federal funding the recipient's promise not to discriminate. *Id.* Therefore, whatever contractual relationship exists under Title IX, it is "between the Government and the recipient," in this case, ASL, not between ASL and its employees. *Id.* at 275.

Claims of intentional infliction of emotional distress carry potential for great abuse. Indeed, such claims are "not favored in the law, because there are inherent problems in proving a claim alleging injury to the mind or emotion in the absence of accompanying physical injury." Supervalu, Inc. v. Johnson, 276 Va. 356, 370 (2008); Russo v. White, 241 Va. 23, 26 (1991); Ruth v. Fletcher, 237 Va. 366, 373 (1989). For this reason, courts have "tightly controlled" such claims, Beardsley v. Isom, 828 F. Supp. 397, 401 (E.D. Va. 1993) (quoting Ruth v. Fletcher, 237 Va. 366, 373 (1989)), and are admonished to prohibit recovery in all doubtful cases. Ruth, 237 Va. at 373 (quoting Bowles v. May, 159 Va. 419, 438 (1932)) ("[B]ecause of the fact that fright or mental shock may be so easily feigned without detection, the court should allow no recovery in a doubtful case."). This is especially true in instances where, as here, the plaintiff seeks recovery based on nothing more than legal conclusions.

Plaintiff's claim of intentional infliction of emotional distress (count IX) is based on the following allegations – and nothing more:

- "At all times, through its agents and representative, ASL acted intentionally and/or recklessly regarding the treatment of Prof. Burgess." Compl. at ¶ 323.
- "ASL's conduct was both extreme and outrageous." *Id*. at ¶ 324.
- "Due to the acts and/or omissions of ASL, Prof. Burgess has suffered severe emotional distress and related physical health issues." *Id*. at ¶ 325.

Plaintiff alleges that these actions caused physiological symptoms and severe emotional distress, "Post Traumatic Stress Disorder . . . an increase in worrying, fear for her safety, debilitating anxiety, difficulty with memory, severe headaches, psychomotor retardation, numbness in her limbs, depression, fatigue, limb pain, lethargy, weight gain, hypersensitivity to light and sound, hair loss, vomiting of blood, insomnia, frequent panic attacks, and other health issues." Compl. at ¶ 326.

To withstand this Motion, Plaintiff must set forth non-conclusory allegations establishing each of the following elements. See Ruth v. Fletcher, 237 Va. 366, 367-68 (1989); Russo, 241 Va. at 26:

- facts establishing that the defendant's conduct was "intentional or reckless," meaning the defendant must have intended her specific conduct and knew, or should have known, that emotional distress was likely to result. Womack v. Eldridge, 215 Va. 338, 342 (1974);
- facts establishing that the defendant's conduct was "outrageous and intolerable in that it offends against the generally accepted standards of decency and morality." Id;
- facts evincing a causal connection between the defendant's conduct and the emotional distress suffered by the plaintiff; and
- facts establishing that the emotional distress itself is severe. Id.

***i. Plaintiff's Allegations Fail To Satisfy The "Intentional Or Reckless" Element.***

The "intentional or reckless" element precludes recovery in all but the most egregious circumstances. Ruth v. Fletcher, 237 Va. 366 (1989). Judged against this standard, Plaintiff's allegations fail as a matter of law.

In Ruth, the evidence adduced at trial demonstrated that the defendant convinced the plaintiff she was pregnant with his child, even though she had sexual intercourse with two men during the week of conception; she persuaded the plaintiff's parents that the child was their grandchild; she strenuously objected to the plaintiff's requests to confirm the identity of the child's natural father through blood tests; she caused the plaintiff to pay monthly child support in exchange for visitation rights; she never expressed any doubt about the identity of the child's natural father, even though a subsequent chance encounter with the other possible father allowed her to realize she incorrectly identified the plaintiff; she did not inform the plaintiff of this realization until she could afford to petition for adoption several years later; she fostered a bond of love and affection between the plaintiff and the child; and she told the plaintiff he could no

longer see the child after she got married and persuaded her husband to file a petition for adoption. Id. at 368-71.

Despite all this evidence, the Virginia Supreme Court held that the plaintiff fell short of demonstrating that the defendant's conduct was sufficiently "intentional or reckless." Id. at 373. Rather, to prevail, the Ruth plaintiff needed to allege and prove that the defendant "***set out*** to convince [the plaintiff] that the child was his, and, to cause him to develop a loving relationship with the child so that *in the end* she could hurt [the plaintiff] by taking the child away from him forever." Ruth, 237 Va. at 373 (emphasis added).

Because the circumstances here are much less egregious than those which the Ruth Court rejected as legally insufficient, Count IX fails to state a claim as a matter of law. As an initial matter, Plaintiff's intentional infliction of emotion distress claim fails to identify the specific conduct which was allegedly "intentional and reckless." Instead, Plaintiff makes only the conclusory assertion that "ASL acted intentionally and/or recklessly regarding the treatment of Prof. Burgess." Compl. at ¶ 323. Such conclusory allegations cannot sufficiently establish the "intentional and reckless" element of an intentional infliction of emotional distress. Russo, 241 Va. at 28.

Obviously, and evidenced by the fact of the lawsuit itself, Plaintiff here is unhappy, disappointed, and dissatisfied with the results of the Title IX investigation. Plaintiff's disappointed expectations, however, do not give rise to a cause of action for intentional infliction of emotional distress. See, e.g., Talbert v. City of Charlottesville, 45 Va. Cir. 142, 146-47 (1998); Johnson v. Plaisance, 25 Va. Cir. 264, 268 (1991); Ellison v. St. Mary's Hospital, 8 Va. Cir. 330, 332 (1987) ("To make such actions as plaintiff alleges actionable would be to create

chaos in the work place. Workers must not be so thin-skinned as to allow themselves to be unnerved by the rough and tumble of everyday life.").

***ii. Plaintiff's Allegations Fail To Satisfy The "Outrageous And Intolerable" Element.***

Even if the Court assumes the Plaintiff's conclusory allegations somehow satisfy the strict "intentional or reckless" element, she still must satisfy the more demanding "outrageous and intolerable" element. See Beardsley, 828 F. Supp. at 400 (discussing difficulty of adducing proof to satisfy "outrageous and intolerable" element). Plaintiff fails to specifically plead facts demonstrating that Defendants' conduct was sufficiently "outrageous and intolerable."

The Russo Court stated that factual allegations demonstrating that the defendant acted with a tortious or even criminal intent, still may fail to satisfy the "outrageous and intolerable" element. See Russo, 241 Va. at 27. This element is not even satisfied where the allegations demonstrate that the defendant ***specifically intended*** to inflict emotional distress. See id. Nor is it satisfied where the allegations demonstrate that the defendant's conduct can be characterized by malice, or a degree of aggravation which would permit recovery of punitive damages for another tort. See id. Rather, to satisfy this element the allegations must demonstrate that the defendant's conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." See id. (quoting Restatement (Second) of Torts § 46 cmt. d (1965)).

Plaintiff's bare allegations do not even come close to meeting the "outrageous and intolerable" element. Indeed, Plaintiff again fails to specifically identify the conduct that was allegedly "outrageous and intolerable" in the count itself. Even throughout the complaint, Plaintiff's allegations are confusing and contradictory, simultaneously alleging that ASL moved too slowly in investigating Plaintiff's claims (compl. at ¶ 55) and did not provide Plaintiff

adequate time to gather evidence about conduct that had allegedly been going on for approximately 9 months. Compl. at ¶¶ 112-13; 118. Even if ASL did not follow the Title IX procedure and those failures resulted in her constructive discharge as Plaintiff suggests, this conduct does not rise to the level of "outrageous and intolerable" needed to sustain a claim of intentional infliction of emotional distress. See, e.g., Talbert v. City of Charlottesville, 45 Va. Cir. 142, 146-47 (1998) (stating that decisions to refuse employee's requests for full-time employment following injury and to subsequently terminate employment were insufficient as matter of law, because conduct not so outrageous and intolerable so as to offend generally accepted standards of decency and morality); Johnson v. Plaisance, 25 Va. Cir. 264, 268 (1991) (granting demurrer to claim for intentional infliction of emotional distress where plaintiff alleged that she was fired from her employment because of unfounded allegations of excessive drinking); Ellison v. St. Mary's Hospital, 8 Va. Cir. 330, 332 (1987) ("To make such actions as plaintiff alleges actionable would be to create chaos in the work place. Workers must not be so thin-skinned as to allow themselves to be unnerved by the rough and tumble of everyday life.").

***iii. Plaintiff's Allegations Lack Any Facts Evincing A Causal Connection Between The Purportedly Intentional Or Reckless And Outrageous And Intolerable Conduct And Her Emotional Distress.***

Despite her obligation to provide something beyond mere conclusions of law addressed to each of the four elements of her intentional infliction of emotional distress claim, the Complaint lacks any facts evincing a causal connection between Defendants' purportedly actionable conduct and the emotional distress suffered by Plaintiff. See Russo, 241 Va. at 26 (establishing that Plaintiff must allege facts sufficient to address each elements of this claim). Rather, Plaintiff alleges in mere conclusory terms that "[d]ue to ASL's actions" Plaintiff

has allegedly suffered a myriad of physical and mental injuries. Compl. at ¶ 326. Because this legal conclusion fails to satisfy the pleading requirement for the third element of this claim, Plaintiff fails to state a *prima facie* claim of intentional infliction of emotional distress.

In Russo, the Supreme Court of Virginia made it abundantly clear that allegations utterly devoid of facts, such as Paragraph 326 of the Complaint, render a claim for intentional infliction of emotional distress subject to dismissal as a matter of law:

> Even on demurrer, the court is not bound by such conclusory allegations when the issue involves, as here, a mixed question of law and fact. This is not a negligence case where, according to Rule 3:16(b), an allegation of "negligence" is sufficient without specifying the particulars. In the present claim, "a plaintiff must allege all facts necessary to establish" the cause of action.

Russo, 241 Va. at 28; see also Ely v. Whitlock, 238 Va. 670, 677 (1989) (holding that given absence of facts supporting elements of claim, trial court erred in failing to sustain demurrer to count in motion for judgment alleging intentional infliction of emotional distress).

#### *iv. Plaintiff's Allegations Confirm That The Alleged Emotional Distress Is Not Sufficiently "Severe."*

The final element of a claim for intentional infliction of emotional distress requires allegations of fact establishing that the purported emotional distress is "severe" – meaning it's both extreme and "so severe that no reasonable person could be expected to endure it." Ruth, 237 Va. at 367-68; Russo, 241 Va. at 26-27. This stringent standard leads to frequent dismissal of emotional distress claims on grounds that the alleged harm is not sufficiently severe. In Russo, allegations that the plaintiff "was nervous, could not sleep, experienced stress and 'its physical symptoms,' withdrew from activities, and was unable to concentrate at work" were deemed insufficient as a matter of law. Russo, 241 Va. at 27. Nor was it enough for the plaintiff to have "experienced nightmares, sleeplessness, nervousness, inability to concentrate, fear and

anxiety." Collins v. Franklin, No. 2:00cv00044, 2001 WL 589029, at *2-3 (W.D.Va. May 29, 2001).

The Russo opinion reveals the degree of harm necessary to establish a viable claim: "There is no claim, for example, that [plaintiff] had any objective injury caused by the stress, that she sought medical attention, that she was confined at home or in a hospital, or that she lost income." Russo, 241 Va. at 26-27. Not surprisingly, fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea do not constitute "severe" emotional distress. Id. Nor is emotional distress "severe" simply because one manifests the physical symptoms of stress, nervousness, insomnia, withdrawal from activities, and an inability to concentrate at work. Id. at 28.

The harm Plaintiff allegedly suffered is simply not severe enough to support Count her claim of intentional infliction of emotional distress. The majority of Plaintiff's alleged injuries ("increase in worrying, fear for her safety, debilitating anxiety, difficulty with memory, severe headaches, psychomotor retardation, numbness in her limbs, depression, fatigue, limb pain, lethargy, weight gain, hypersensitivity to light and sound, hair loss, vomiting of blood, insomnia, [and] frequent panic attacks") are of the quality rejected as insufficiently severe in Russo, Collins, and scores of other, similar cases. The only potentially objective injury Plaintiff alleges is a diagnosis of PTSD, but even this allegation is conclusory, stating only that "[d]ue to ASL's actions, Prof. Burgess has suffered and been diagnosed with Post Traumatic Stress Disorder[.]" See Compl. at ¶ 326 (setting forth alleged harm in these conclusory terms – and nothing more). The Court is not bound by such conclusory allegations where, just as here, the issue involves a mixed question of law and fact. Russo, 241 Va. at 28 (ignoring conclusory allegations that plaintiff suffered "severe emotional distress" and "extreme emotional distress").

**B. Plaintiff's Claim For Negligent Infliction Of Emotional Distress Fails As A Matter Of Law And Must Be Dismissed With Prejudice.**

"Because injury to the mind or emotions can be easily feigned, actions for intentional infliction of emotional distress are not favored in Virginia" and "the standard for negligent infliction of emotional distress is even more rigorous." Michael v. Sentara Norfolk Gen. Hosp., 939 F.Supp. 1220, 1233-34 (E.D. Va. 1996). "To establish a claim of NIED, plaintiff must sufficiently allege the following elements to survive a Rule 12(b)(6) motion: (1) physical injury (2) proximately caused (3) by negligent conduct (4) wantonly inflicted by defendants (5) upon plaintiff." Guerrero v. Deane, 2010 WL 670089, at *16 (E.D. Va. Feb. 19, 2010). The requisite physical injury for a claim of negligent infliction of emotional distress must be the "natural result of fright or shock proximately caused by the defendant's negligence. In other words, there may be recovery in such a case if, but only if, there is shown a clear and unbroken chain of causal connection between the negligent act, the emotional disturbance, and the physical injury." Thompson v. Town of Front Royal, 117 F. Supp. 2d 522, 532 (W.D. Va. 2000) (quoting Delk v. Columbia/HCA Healthcare Corp., 259 Va. 125, 137–38, 523 S.E.2d 826 (2000)). See also Contrearas v. Thor Norfolk Hotel, L.L.C., 292 F.Supp..2d 798, 802 (E.D. Va. 2003) ("In the Commonwealth of Virginia, a plaintiff may recover for the tort of negligent infliction of emotional distress only if [she] suffers a physical manifestation of [her] injury."); Hughes v. Moore, 214 Va. 27, 34 (plaintiff claiming negligent infliction of emotional distress must "plead[ ] . . . that his physical injury was the natural result of fright or shock proximately caused by the defendant's negligence.")

The type of physical injury necessary for a claim of negligent infliction of emotional distress is illustrated by the case of Myseros v. Sissler, 239 Va. 8 (1990). In Myseros, the plaintiff's claims arose out of a minor car accident. Id. at 10. Though the plaintiff was not

injured in the accident, it apparently left him on foot on the side of a major highway. Id. Plaintiff filed a claim of negligent infliction of emotion distress, alleging that his injuries included: "post-traumatic stress disorder" "accompanied by sweating, dizziness, nausea, difficulty in sleeping and breathing, constriction of the coronary vessels, two episodes of chest pain, hypertension, unstable angina, an electrocardiogram showing marked ischemia, loss of appetite and weight, change in heart function, and problems with the heart muscle." Id. at 11. The court found that these alleged injuries were the "typical symptoms of an emotional disturbance" and not physical injuries sufficient to sustain plaintiff's claim for negligent infliction of emotional distress. Id. at 12. See also Guerrero, 2010 WL 670089, at *16 (finding a negligent infliction of emotional distress claim for plaintiff who suffered physical injury from defendants' physical attack but no negligent infliction of emotional distress for onlooking children and woman who suffered manifestations of fear, anxiety, embarrassment, and depression following the attack).

The allegations made by Plaintiff in support of her negligent infliction of emotional distress claim are identical to the assertions made in support of her claim for intentional infliction of emotional distress. Specifically, Plaintiff alleges:

- "At all times, through its agents and representative, ASL had a duty not to act with such reckless disregard as to cause Prof. Burgess harm." Compl. at ¶ 330.
- "ASL's conduct was both extreme and outrageous." Id. at ¶ 331.
- "Due to the acts and/or omissions of ASL, Prof. Burgess has suffered severe emotional distress and related physical health issues." Id. at ¶ 332.

Plaintiff's alleged resultant injuries are identical to those claimed under her claim for intentional infliction of emotional distress. See supra at 21; Compl. at ¶ 333. Plaintiff goes on to make the conclusory allegation that "ASL negligently inflicted emotional distress upon Prof. Burgess."

Compl. at ¶ 335. These conclusory allegations are insufficient to sustain her claim of negligent emotional distress. Guerrero, 2010 WL 670089, at *16.

Plaintiff also fails to allege a physical injury proximately caused by Defendants' alleged conduct. Instead, Plaintiff simply reasserts her injuries of "Post Traumatic Stress Disorder" "an increase in worrying, fear for her safety, debilitating anxiety, difficulty with memory, severe headaches, psychomotor retardation, numbness in her limbs, depression, fatigue, limb pain, lethargy, weight gain, hypersensitivity to light and sound, hair loss, vomiting of blood, insomnia, frequent panic attacks, and other health issues." Compl. at ¶ 333. These are precisely the type of alleged injuries the Myseros court found to be manifestations of emotional injury and not physical injuries sufficient to support a claim of negligent infliction of emotional distress. 239 Va. at 12.

Plaintiff has failed to plead the elements of either intentional infliction of emotional distress or negligent infliction of emotional distress. Consequently, Counts IX and X of the Complaint must be dismissed.

## CONCLUSION

Despite the 335-paragraph complaint, which is often repetitive and contradictory, Plaintiff claims come down to naked assumptions that ***"upon information and belief"*** Mr. Doe's conduct was sexually motivated (Compl. at ¶ 31), ***"upon information and belief"*** male professors were not expected to do additional work without additional compensation (Id. at ¶ 47), and ***"upon information and belief"*** the Title IX investigation's outcome would have been different if Plaintiff were male. Id. at ¶ 278. These allegations are simply insufficient to sustain Plaintiff's claims and the Complaint should be dismissed with prejudice.

For the reasons stated above Defendants ask that the Court grant this Motion to Dismiss, dismiss Plaintiff's Complaint with prejudice.

Dated: July 7, 2017

Respectfully submitted,

**APPALACHIAN REGIONAL LAW SCHOOL d/b/a APPALACHIAN LAW SCHOOL, JINA SAULS, SANDRA KEEN MCGLOTHLIN, AND PATRICIA DEEL**

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 7th day of July, 2017, I caused a true and accurate copy of the foregoing to be served by U.S. Mail delivery, postage prepaid and ECF to the following:

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