UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DR. JENNY H. CONVISER and ASCEND CONSULTATION IN HEALTH CARE, LLC,	)	Case No. 20-CV-03094
Plaintiffs,	)	
v.	)	Honorable Judge Marvin E. Aspen
DEPAUL UNIVERSITY,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

INTRODUCTION

DePaul's motion to dismiss Plaintiffs' First Amended Complaint ("FAC") should be denied because none of the arguments it raises in its Memorandum in Support ("Def. Br.") should be resolved at the pleading stage, and the FAC meets the pleading requirements of *Iqbal* and *Twombly*. DePaul spends an inordinate amount of time in its moving papers trying to shrink Dr. Conviser down to size, to minimize her role, to marginalize her contributions to DePaul and its student-athlete population, and to attenuate her connection to its Title IX program, all in an effort to deny her whistleblower status and the protection of Title IX. By doing so, they want this Court to follow its lead and ignore the 180 paragraphs of the FAC, concentrate on a "straw man" version of the pleading instead that is comprised of just a handful of allegations, and find that the FAC is deficient at the pleading stage. This Court, however, should reject DePaul's baseless arguments, especially given the severity of the allegations lodged against DePaul and its leadership.

The FAC alleges in detail that Dr. Conviser (and by extension her company, Ascend) was mandated by DePaul to participate in its Title IX program as a condition of continuing as its exclusive mental health provider for its student-athlete population during the almost thirteen (13) years she served in that role. DePaul went so far as to delegate many of its Title IX responsibilities to Dr. Conviser, including training and participating in investigations and counseling required by its Title IX Office.

Consistent with Plaintiffs' obligations under DePaul's Title IX program, Dr. Conviser, at great personal and professional risk, participated in reporting the improper conduct of DePaul's then softball coach, Eugene Lenti ("Lenti"), the brother of its long-time director of athletics. In retaliation for doing so, DePaul took adverse action against her and her company, fired her from her campus role, and terminated its contract with her company. Plaintiffs are exactly the type of

parties that Title IX was designed to protect from retaliation, and the Court should not deny them its protection and close the courthouse doors to them, thus rewarding DePaul's bad behavior.

As more fully detailed below, DePaul's motion to dismiss should be denied with the Court finding that the FAC states a claim for Title IX retaliation and breach of contract to allow the case to proceed.

THE FAC'S FACTUAL ALLEGATIONS SUPPORT ITS CLAIMS

The allegations that comprise the FAC properly support both Plaintiffs' standing to bring their suit as a Title IX plaintiff and a whistleblower retaliated against, and the other pendant state law claims. While DePaul conveniently and intentionally ignores most of the 180-paragraphs in the FAC and relies solely on just 18 select paragraphs instead to minimize and marginalize Dr. Conviser (Def. Br., pp. 2-3), the Court should decline the invitation to not review the entirety of the FAC on a motion to dismiss.

Dr. Conviser, through her companies, treated countless student-athletes referred to her by DePaul from 2005 until the time of her wrongful termination in 2018. FAC, ¶¶ 21-22. In effect, DePaul chose to "outsource" its student-athlete mental health services to Dr. Conviser, while requiring her at all times to report to and participate in its Title IX program as if she was a University employee. *Id.*, ¶¶ 2, 4-6, 21, 52, 56, 60-63, 67-68, 71-75, 103-08. Understandably given Dr. Conviser's unique status, DePaul's senior leaders referred to her as its "lead mental health provider." *Id.*, ¶¶ 21-22. DePaul not only permitted "student-athletes to be seen off campus in Ascend's private office," but also provided Dr. Conviser "with an on-campus office for individual athlete consultations" and "conference rooms for staff meetings and trainings." *Id.*, ¶ 54. DePaul went a step further and required Dr. Conviser to play an "integral and active role in the University's Title IX program to ensure its compliance with federal regulations." *Id.*, ¶¶ 4, 12,

26, 56, 77-78, 103-09, 117. Dr. Conviser was conscripted by DePaul to participate in its Title IX program, obligating her to "report abusive conduct to DePaul's Title IX office," "participate in any resulting investigations conducted by DePaul's Title IX Office," and "meet with, train and/or counsel DePaul Athletics coaches and staff on proper Title IX conduct." *Id.*, ¶ 56; *see also* ¶¶ 4-8, 12, 14, 19, 20, 31 67-70, 77-78, 103-09, 117. On multiple occasions, the University reminded Dr. Conviser of her Title IX obligations and responsibilities. *Id.*, ¶¶ 6, 78, 88. Throughout her thirteen-year tenure with DePaul, Dr. Conviser had numerous in-person meetings with DePaul's senior administration about the operation of its Title IX office. *Id.*, ¶¶ 7, 60, 62, 68, 71-72. And it was her participation in the Title IX process that ultimately was her undoing. *Id.*, ¶¶ 8-10, 69, 76-77, 79, 101.

Dr. Conviser's relationship with the heads of both the Title IX Office and Athletic Department deteriorated as soon as she raised issues about Lenti, the Athletic Director's brother, who also happened to be the most accomplished softball coach in DePaul's history, and the FAC alleges that the DePaul retaliated against Dr. Conviser as a result. *Id.*, ¶¶ 9-10, 108-13, 117. For example, immediately following Dr. Conviser's and her staff's initial reporting about Lenti's bad conduct in 2016, DePaul slowly started to decrease the number of referrals to Ascend, until it cut off referrals altogether. *See Id.*, ¶¶ 9-11, 15, 23, 97, 99, 100-01, 149, 163.

In February 2018, after Dr. Conviser counseled "a student-athlete patient to report a campus-related sexual assault" (*id.*, ¶ 77), then-Title IX Coordinator, Karen Tamburro, "aggressively interrogated [Dr. Conviser] about whether DePaul provided a 'safe environment for athletes'" and "attacked [Dr. Conviser's] professional ethics." *Id.*, ¶¶ 78-79. Once again, in April 2018, Dr. Conviser and Ascend counseled a DePaul student-athlete patient to report through the University's Title IX office that she had witnessed Lenti "punch his female Associate Head Coach

in the face." *Id.*, ¶¶ 1, 10-11, 13, 77, 85-87, 109. In respect to, Dr. Conviser's and Ascend's mandatory reporting to DePaul, and DePaul's knowledge that Dr. Conviser was behind the reporting (*Id.*, ¶¶ 89, 110), DePaul retaliated against Plaintiffs by wrongfully terminating its Professional Services Agreement ("PSA") with Ascend in violation of the termination clause and Illinois law, and cutting Dr. Conviser off from the University community. *Id.*, ¶¶ 90-91.

LEGAL STANDARD

The FAC's well-pled allegations and each of its claims satisfy the *Iqbal* and *Twombly* standards by pleading claims "plausible" on their face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570); *Hallom v. City of Chi.*, 2019 U.S. Dist. LEXIS 67659, *3-4 (N.D. Ill.); *Killingsworth v. HSBC Bank Nev., N.A.*, 507 F.3d 614, 618-19 (7th Cir. 2007). *See also Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010).

ARGUMENT[1]

A. The FAC States a Claim for Title IX Retaliation.

1. Plaintiffs Sufficiently Plead Title IX Standing.

DePaul confuses its defenses with the pleading standard applicable to the FAC to argue that this case "is not really about Dr. Conviser" (Def. Br. p. 1). That is for the trier of fact to decide after weighing the evidence, not for this Court to decide at the pleading stage. What is relevant now is that the FAC pleads allegations that support that Dr. Conviser and Ascend are proper Title IX plaintiffs under the prevailing law because, as alleged, they both satisfy the "zone of interests" test to maintain a claim. That DePaul elected to outsource a major component of its on-campus

[1] At present, Plaintiffs agree to voluntarily withdraw their claims for defamation *per se* (Claim IV), defamation *per quod* (Claim V) and false light (Claim VI) without prejudice. If appropriate after discovery, Plaintiffs reserve the right to move to amend to address these claims.

student-athlete mental health services to Dr. Conviser (FAC, ¶ 103) is of no moment, and certainly does not allow the university to get out from under Title IX's anti-retaliation provisions by using independent contractors for key school functions and services. If that were the case, an institution of higher learning could simply remove itself from the ambit of Title IX by electing to outsource and "privatize" its faculty, classrooms, dormitories, libraries, sports facilities, and in this case, its mental health services. *That cannot be the law*. So while it is true that Plaintiffs are not students, parents or employees, that does not end the Title IX inquiry.

The Statute's text is the starting point, and its plain meaning clearly applies to someone in Plaintiffs' situation. *See United States v. Berkos*, 543 F.3d 392, 394 (7th Cir. 2008). Title IX provides that "[*n*]*o person* in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, *or be subjected to discrimination under* any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (emphasis added). On its face, the Statute, unlike Title VII, is very broad as to whom it protects, and does not expressly limit who can sue. *Id.* "Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict the scope" of section 1681. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520 (1982). <u>But Congress did not do that, leaving the category of plaintiffs who can seek the protection of Title IX intentionally broad.</u>

Title IX's text contradicts DePaul's contention that the reference to "'education program or activity' limits Title IX's scope to those who seek or receive 'educational benefits.'" Def. Br. p. 4. Section 1687 defines "program or activity" to include "all the operations of" a Federal funds recipient so long as "any part of [the Federal funds recipient] is extended Federal financial assistance." 20 U.S.C § 1687. *See Fox v. Pittsburg State Univ.*, 257 F. Supp. 3d 1112, 1124 (D.

Kan. 2017) (rejecting the argument that an employee must show a "'nexus' to education to qualify for Title IX remedies").

Title IX's legislative history also indicates that the "person" protected should be read broadly and apply to a large range of operations within a university and is not dependent upon whether the plaintiff is an employee, parent or student. These include plaintiffs connected to "traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities." S. Rep. No. 100-64, at 16-17, *reprinted in* Jon S. Schultz, *Compiler. Legislative History and Analysis of the Civil Rights Restoration Act* (1989); s*ee also* Testimony of Birch Bayh, Joint Hearings on H.R. 5490, p. 41, May 9, 1984. Senator Bayh's comments inform that at a minimum, Title IX is meant to include "discrimination in employment within an institution, as a member of faculty *or whatever*." 118 Cong. Rec. 5812 (emphasis added). Plaintiffs are more than just "whatever" as alleged. This is especially relevant because it is alleged that DePaul effectively "outsourced" its student-athlete mental health services to Dr. Conviser (FAC, ¶¶ 2, 52, 61, 99), treating her at all times as if she was an employee, commanding her to participate in its Title IX process as a mandatory reporter, instructing her to conduct formal Title IX meetings and trainings, and admonishing her when they believed that she was not following its Title IX procedures. *Id.*, ¶¶ 4, 56, 68, 78-79, 104, 103-08.

The Supreme Court has held that courts should give Title IX "a sweep as broad as its language." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982); *see also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005) (Title IX "broadly prohibits" a funding recipient from subjecting any person to discrimination on the basis of sex); *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 178 (2011) ("[enables] suit by any plaintiff with an interest arguably sought to be protected by the statute . . . "); *Nat'l Collegiate Athletic Assoc. v. Califano*, 622 F.2d

1382 (10th Cir. 1980) ("[u]nless the legislative history shows the plaintiff to be clearly not within the statute's 'zone of interests', and it rarely does, a court should demand no more than a *sensible* relationship between some subject of the statute and the plaintiff's interest in the outcome of the litigation.") (emphasis added)). *See also Fox v. Pittsburg State Univ.*, 257 F. Supp. 3d 1112, 1126 (D. Kan. 2017).

Title IX does not require that a plaintiff be an "intended beneficiary"; standing may derive from being subjected to discrimination. 20 U.S.C. § 1681. Nor are Plaintiffs alleging that "virtually anyone" who has "some association with someone, somewhere, who has a disability and who has been plausibly subjected to discriminatory action" should be able to sue under Title IX. *Friends of Trumbull v. Chi. Bd. Of Educ.*, 123 F. Supp. 3d 990, 994 (N.D. Ill. 2015). Dr. Conviser, as DePaul's sole mental health provider for thirteen (13) years and a mandatory participant and leader, is much more than just "virtually anyone." *Id.*

DePaul's cited cases do not stand for the proposition that Plaintiffs lack Title IX standing because in each, the nexus between the plaintiff, the Title IX process, and the purposes of Title IX are so attenuated as to place the party outside the "zone," or the case is not based on a Title IX analysis at all. *See Doe v. Brown University*, 270 F. Supp. 3d 560 (D.R.I. 2017) (non-Brown University female raped by Brown University students did not have Title IX standing because she did not allege she was excluded from or deprived of any educational benefit at Brown University guaranteed by Title IX); *Brown v. Illinois Dep't of Human Servs.*, 717 F. Appx. 623, 626 (7th Cir. 2018) (independent contractor vendor alleging employment discrimination, but not retaliation, was not covered under Title IX) (emphasis added); *Rossley v. Drake Univ.*, 336 F. Supp. 3d 959, 970 (S.D. Iowa 2018) (former university board member and parent of a student with no Title IX responsibilities or obligations could not bring a Title IX retaliation claim based on the university's

refusal to allow him to be part of his son's Title IX investigation); *Prey v. Kruse*, 2009 WL 10679036, *2 (S.D. Ohio 2009) (plaintiff did not fall within Title IX's protections when the claim of retaliation was based on the university allegedly withholding information regarding her ex-lover and a university professor); *Lopez v. San Luis Valley, Bd. Of Co-Op Educ. Servs.*, 977 F. Supp. 1422, 1426 (D. Colo. 1997); *Shebley v. United Cont'l Holdings, Inc.*, 357 F. Spp. 3d 684, 694 (N.D. Ill. 2019) (relying on program-specific applications of Title VI).

In fact, DePaul can cite to no case on the unique facts presented here in which a court found that Title IX did not apply to someone in Dr Conviser's and Ascend's unique factual situation as compelled Title IX reporters and participants who were retaliated against. By contrast, in *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005), the Supreme Court held that there is a "[p]rivate right of action implied by Title IX for victims of sex discrimination by recipients of federal education funds held to encompass claims of retaliation for complaining about sex discrimination." *Id.* at 173-74. The Court went on to state that, "Congress enacted Title IX not only to prevent the use of federal dollars to support discriminatory practices, but also to provide *individual citizens* effective protection against those practices . . . this objective would be difficult to achieve if persons complaining . . . did not have effective protection against retaliation." *Id.* at 180 (emphasis added) (citations omitted).

In sum, Title IX's text, legislative history, and relevant case law, including that of the United States Supreme Court, taken together, demonstrate that Plaintiffs have standing to bring their Title IX claims, and their claims should not be dismissed at the pleading stage.

2. Plaintiffs Have Sufficiently Pled Their Retaliation Claim.

Title IX's standard for retaliation is the same as Title VII's. A plaintiff may state a direct retaliation claim by alleging that (i) he or she engaged in protected activity under Title IX,

(ii) the defendant took an adverse action against him or her, and (iii) there is a "but-for" causal connection between the protected activity and the adverse action. *Burton v. Bd. of Regents of Univ. of Wisconsin Sys.*, 851 F.3d 690, 695 (7th Cir. 2017). As alleged in the FAC, Dr. Conviser and Ascend engaged in "protected activity" under Title IX. As DePaul's lead mental health provider for its student-athlete population, Plaintiffs were required by DePaul to participate in the program; to report to the Title IX office and participate in its functions and investigations; and to conduct Title IX training of the University's key personnel. *See* FAC, ¶¶ 2, 4-6, 11-12, 19, 31, 56, 58, 60, 67-70, 78, 86, 103. And the "protected activity" that Plaintiffs are alleged to have participated in goes to the very heart of their Title IX obligations: Reporting physical abuse of a female associate head coach by a University coach. *Id.*, ¶¶ 1, 9-11, 13, 26, 85-90, 96, 109.

a. The FAC Alleges a Sufficient Causal Connection.

The FAC alleges much more than Plaintiffs' mere speculation concerning DePaul's retaliation against them. The FAC alleges instead that Plaintiffs suffered the adverse consequences of having the contract terminated, Dr. Conviser being made a pariah, and having her association as the University's leading mental health provider dashed, following her repeated attempts to call attention to Lenti's abuse. FAC, ¶¶ 27, 57, 60, 62-63, 69, 71, 78-79, 97-101. The FAC is replete with allegations that Plaintiffs were retaliated against that cannot be refuted on a motion to dismiss. See *Id.*, ¶¶ 8, 11, 33-37, 57-58, 77-78, 89, 97-101, 103-19.

Where, as here, the "[t]emporal proximity between [a] protected activity and an adverse action" coupled with the circumstances are "fishy" enough to give rise to a reasonable inference of causation, causation is a fact-based inquiry that should go to the jury. *Loudermilk v. Best Pallet Co.*, LLC, 636 F.3d 312, 315 (7th Cir. 2011); *see also Norman v. Donahoe*, 2016 LEXIS 131551 (N.D. Ill.). DePaul's cases, in an effort to break the link between the protected activity and the

retaliation, are inapplicable as they involve critically different facts. *See Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027 (7th Cir. 1998); *Marijan v. Univ. of Chi.*, 2018 WL 3463272, *5 (N.D. Ill.) (large time gap between a report of sexual harassment and alleged retaliation can imply causation is missing if complaint only "infers causation based on timing").

b. Plaintiffs Were Integral to the Title IX Reporting Process.

Dr. Conviser was significantly more than a "mere acquaintance" to DePaul students, coaches, and staff, or just a "drive by" Plaintiff as DePaul suggests. She was integral to the Title IX reporting and compliance process, and for thirteen (13) years, she was the sole mental health provider to DePaul student-athletes. FAC, ¶¶ 1-2, 4-5, 8-12, 19, 22, 26, 53, 56, 77-78, 86, 99. Dr. Conviser, through Ascend[2], directly coordinated all patients referred to Ascend by DePaul, and counseled patients and her staff to encourage reporting of abuse, including the student who reported Lenti's abuse in 2018. *Id.*, ¶¶ 85-89. To portray her, as DePaul tries in its papers, as a mere "fourth degree" spectator demonstrates a shocking lack of understanding of the unique patient-therapist relationship and Dr. Convisers's mandatory Title IX reporting obligations.[3] *Id.*, ¶¶ 4, 11-12, 19, 31, 56, 63, 68, 77.

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[2] While *Crawford* holds that a corporation cannot have Title VII standing, the argument relies on Title VII's express retaliation provision that protects "employees or applicants for employment" and defines "employee" as "an individual employed by an employer." *Crawford v. George & Lynch, Inc.*, 2012 U.S. Dist. LEXIS 93106, *6 (D. Del. 2012). Title IX has no such provision; nor does Title IX define "person" at all, much less in exclusive terms as Title VII does.

[3] DePaul relies heavily on *Thompson v. North America Stainless, LP*, as holding that "the circumstances in which 'third-party retaliation' claims may proceed are narrow." Def. Br., p. 8 (*citing* 562 U.S. 170, 174-75 (2011)). Yet, because of "the broad statutory text and the variety of workplace contexts in which retaliation may occur," the Supreme Court was "reluctant to generalize because the significance of any given act of retaliation will often depend upon the particular circumstances." 562 U.S. at 175. The *Thompson* Court held that "[t]hird-party reprisals are only materially adverse if they would deter a reasonable complaining party from opposing future discrimination." *Id.* at 174-75. DePaul's actions would deter a "reasonable complaining party" – a student, coach, or mental health care provider – who would otherwise report. As the Court wrote in *Jackson*, "[w]ithout protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short circuited, and the

Other cases cited by DePaul are also inapposite. *See Mackall v. Colvin*, 2015 WL 412922, *23-24 (D. Md. 2015) (plaintiff lacked standing to bring a third-party Title VII retaliation claim because he had not shown he and the co-worker engaging in protective activity were more than "mere acquaintances"); *Ordonio v. County of Santa Clara*, 2012 U.S. Dist. LEXIS 48639, *16 (N.D. Cal.) (patient lacked standing to bring a First Amendment third-party retaliation claim on behalf of his doctor because plaintiff could not meet a different test, that plaintiff would "act as an effective advocate" for the doctor's rights and the doctor needed such an advocate).

B. Ascend has Properly Stated a Claim for Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing.

The FAC properly states a claim for breach of contract and breach of the covenant of good faith and fair dealing.

1. Ascend has Properly Stated a Claim for Breach of Contract.

The FAC alleges all elements of a breach of contract claim necessary to survive a motion to dismiss. "Under Illinois law, a breach of contract claim has four elements: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) a breach of contract by the defendant; and (4) resultant injury to the plaintiff." *Smith v. NVR, Inc.*, 2018 LEXIS 94712, *8 (N.D. Ill.). "A court must initially look to the language of a contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties' intent." *Id*. at *8-9. "If the words in the contract are clear and unambiguous, they must be given their plain, ordinary and popular meaning." *Right Field Rooftops, LLC v. Chi. Cubs Baseball Club, LLC,* 870 F.3d. 682, 690 (7th Cir. 2017).

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underlying discrimination would go unremedied." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180-81 (2005).

The FAC alleges: (1) the parties had a valid and enforceable contract (FAC, ¶¶ 67, 121-22); (2) Ascend performed its duties under the Agreement (*id.*, ¶¶ 21-22, 85-87, 131); (3) DePaul breached the PSA by improperly terminating it (*id.*, ¶¶ 15, 23, 77, 97-101, 126-30); and (4) Ascend suffered injury as a result of DePaul's breach. *Id.*, ¶¶ 8, 13, 15, 132, 147, 149, 151. *See Smith v. NVR, Inc.*, 2018 LEXIS 94712, *8 (N.D. Ill.). In sum, a party's failure to adhere to the terms of a contract is a breach. *See Haywood v. Chi. Hous. Auth.*, 212 F. Supp. 3d 735, 751 (N.D. Ill. 2016) (*citing Hammarquist v. United Cont'l Holdings, Inc.*, 809 F.3d 946, 949 (7th Cir. 2016)).

Without disputing the validity and enforceability of the PSA, DePaul argues that it did not breach the PSA because it had no obligation to refer student-athletes to Ascend due to the "*may refer*" language and the non-exclusivity terms contained in the PSA. *See* Def. Br., p. 10; *see also* Def. Br., Ex. A, ¶¶ 2(a), 2(b). But this misses the point. Ascend does not allege that DePaul breached the non-exclusivity clause of the PSA, but rather that it breached the PSA by: (a) terminating the PSA in violation of the termination clause, which required prior written notice and a cure period, and (b) attempting to do so early without satisfying certain enumerated grounds, none of which are alleged to have existed here. *See* FAC, ¶¶ 15, 23, 77, 97-101, 126-30; *see also* Def. Br., Ex. A, ¶ 14. Whether DePaul had an obligation to refer student-athletes to Ascend or not is irrelevant to the analysis. As alleged, under the PSA, DePaul could only terminate the PSA in accordance with its terms. DePaul breached the termination clause of the PSA by terminating it in retaliation for reporting Lenti's abuse to the Title IX office. FAC, ¶¶ 15, 23, 77, 97-101, 126-30. The pretextual rationale DePaul provided – that it was allegedly utilizing its "in-house facilities" (*id.*, ¶ 99) due to "budget constraints" – only serves to further demonstrate the breach alleged. Def. Br., Ex. B, p. 2. DePaul's reliance on *Royal Consumer Prods. LLC v. Walgreen Co.*,

2019 LEXIS 63809 (N.D. Ill. 2019), is unpersuasive because, there, the court held that defendant's termination of the agreement was not a breach because it had no obligation pursuant to the terms of the contract to continue to work with plaintiff. Here, the FAC alleges that DePaul breached the terms of the PSA by improperly terminating the PSA by its expressed terms.

2. Ascend has Properly Stated a Claim for Breach of the Covenant of Good Faith and Fair Dealing.

The FAC properly states a claim for breach of Illinois' implied covenant of good faith and fair dealing. *Ill. ex rel. Hammer v. Twin Rivers Ins. Co.*, 2017 LEXIS 103833, *19 (N.D. Ill.). "To establish a breach of the duty of good faith and fair dealing, the complaining party must show that the contract vested the opposing party with discretion in performing an obligation under the contract and the opposing party exercised that discretion in bad faith, unreasonably, or in a manner inconsistent with the reasonable expectations of the parties." *LaSalle Bank Nat'l Assoc. v. Paramont Props.*, 588 F. Supp. 2d 840, 857 (N.D. Ill. 2008); *see also McCleary v. Wells Fargo Sec., L.L.C.*, 2015 IL App (1st) 141287 (1st Dist.).

Here, the FAC properly alleges all of the elements of a good faith and fair dealing covenant and its breach. FAC, ¶¶ 8-11, 15, 21-23, 34, 52, 57-58, 67, 77, 97-101. The PSA provides DePaul with discretion to perform an obligation (*i.e.*, "DePaul *may* refer student-athletes . . . to Ascend"). Def. Br., Ex. A, ¶ 2(a). For DePaul to reduce patient referrals in 2016 and 2017 and then stop referring patients altogether almost immediately after they were involved in reporting Lenti's misconduct in 2018, constitutes bad faith in exercising its rights under the PSA, and in a manner inconsistent with the reasonable expectations of the parties which were established over the course of a thirteen-year relationship. FAC, ¶¶ 97-101, 126.

DePaul's cases on this issue are inapposite. The FAC does not use the implied covenant to rewrite the parties' obligations. Instead, it alleges as permitted under Illinois law, that if a party

has an obligation under a contract, it must exercise it for a proper purpose and not in bad faith. Here, Plaintiffs have alleged that DePaul's cutting off of the spigot of clients to Plaintiffs was an improper exercise of its discretion and in bad faith.

C. Ascend Properly Stated a Claim for Indemnification of First-Party Claims.

Ascend has properly stated a claim for indemnification under the PSA. The indemnification provision in the PSA is clear: A party shall be indemnified in the event of a ". . . breach of promise, or breach of covenant by the Indemnifying Party. . . arising out of or related to the Indemnifying Party's performance of its obligations." FAC, ¶¶ 137-40. On its face, then, this clause applies to first-party claims between the parties, and is not expressly limited to third-party claims (FAC, ¶¶ 137-40). It is well-settled that "a party wishing to narrow an indemnification clause to third-party damage is obligated to limit . . . the clause expressly; and absent such express limitation, indemnification clauses may apply to damage suffered by the contracting parties themselves." *Water Tower Realty Co. v. Fordham 25 E. Superior, L.L.C.*, 2010 Ill. App. LEXIS 1027 (1st Dist.). No such limitation was included by DePaul, which is presumed to be the drafter of its own contract with Dr. Conviser and her company.

The cases cited by DePaul in this regard are inapposite because they rely on specific contractual terms that, in the context of the contract at issue, made it clear that they only applied to third-party claims, and/or were resolved on summary judgment other than on a motion to dismiss. *See Allied Waste Transp., Inc. v. Bellemead Dev. Corp.*, 2014 U.S. Dist. LEXIS 124655, at *20 (N.D. Ill. 2014); *see also Allianz Glob. Corp. & Specialty Marine Ins. Co. v. Host Int'l, Inc.*, No. 12 C 0869, 2013 U.S. Dist. LEXIS 54522, at *15 (N.D. Ill.); *John Hancock Life Ins. Co. v. Abbott Labs., Inc.*, 183 F. Supp. 3d 277, 325 (D. Mass. 2016); *Va. Sur. Co. v. N. Ins. Co.*, 224 Ill. 2d 550, 568 (2007).

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court deny DePaul's motion to dismiss the FAC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 21, 2020, I electronically filed the foregoing *Memorandum in Opposition to Defendant's Motion to Dismiss the First Amended Complaint* with the Clerk of this Court by using the CM/ECF system, which will send notification of such filing to all counsel of record.

By: /s/ *Michael S. Popok*
Attorneys for Plaintiffs Dr. Jenny H. Conviser and Ascend Consultation in Health Care, LLC

Michael S. Popok, Esq. (Admitted *Pro Hac Vice)*
ZUMPANO PATRICIOS & POPOK, PLLC
417 Fifth Avenue, Suite 826
New York, NY 10016
Telephone: (212) 381-9999
Facsimile: (212) 320-0332

Art Bresnahan, Esq.
ZUMPANO PATRICIOS & BRESNAHAN, LLC
Law Firm No. 13698
829 N Milwaukee Avenue
Chicago, IL 60642
Telephone: (312) 924-3609
Facsimile: (312) 268-7179

and,

Ben Meiselas, Esq. (*Pro Hac Vice* application forthcoming)
GERAGOS & GERAGOS, PC
644 South Figueroa Street
Los Angeles, California 90017
Telephone: (213) 625-3900
Facsimile: (213) 232-3255

Dated: August 21, 2020