THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MARGARET CZERWIENSKI, LILIA KILBURN, and AMULYA MANDAVA

Plaintiffs,

v.

HARVARD UNIVERSITY AND THE PRESIDENT AND FELLOWS OF HARVARD COLLEGE

Defendant.

Case No. 1:22-cv-10202-JGD

MOTION FOR LEAVE TO FILE EXCESS PAGES GRANTED ON AUGUST 19, 2022

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNTS ONE TO NINE OF PLAINTIFFS' AMENDED COMPLAINT

TABLE OF CONTENTS

This case targets Harvard's decade-long deliberate indifference to sexual harassment and retaliation by senior faculty—a custom and practice that Harvard hid from Plaintiffs and the public until 2020, when the media exposed it. From at least 2012 through 2017, Harvard repeatedly failed to respond to complaints against three powerful anthropology professors: Gary Urton, Ted Bestor, and John Comaroff. By 2017, Harvard had received multiple reports that Comaroff engaged in sexual relationships with students and sexually harassed an advisee at Harvard. This advisee had herself reported that he repeatedly kissed and groped her without consent. But Harvard ignored those reports, allowing Comaroff to target Plaintiffs. In October 2017, Comaroff threatened Plaintiffs Amulya Mandava and Margaret Czerwienski to stop them from discussing his harassment. Starting that same year, Comaroff kissed Plaintiff Lilia Kilburn on the lips without consent, groped her, imagined aloud her rape and murder, and cut her off from her other advisor. His harassment continued well into 2019, when Kilburn and Mandava reported him.

Yet the pattern continued. Even though Harvard had received at least eight complaints against Comaroff by 2019, Harvard did not investigate until one year later—when ***the media*** was poised to reveal Harvard's years-long pattern of inaction. The resulting investigation put Plaintiffs through a second ordeal that betrayed their trust and exposed them to further retaliation. Harvard allowed Comaroff to intimidate witnesses and failed to even *decide* the key issue in Mandava's Title IX complaint: whether he threatened her career because he believed she had discussed his misconduct. Harvard also dismissed overwhelming evidence that Comaroff repeatedly kissed and groped Kilburn based on manufactured "inconsistencies" in her testimony. Harvard's sham investigation allowed Comaroff to continue teaching on campus and his allies to smear Plaintiffs in the press. Plaintiffs, meanwhile, must work to salvage what is left of their academic careers.

Harvard now argues that Plaintiffs have no remedy. Harvard is wrong.

Counts One and Two state claims under Title IX on two grounds. ***First***, Plaintiffs plead that Harvard's pattern of deliberate indifference to ***prior*** complaints allowed Comaroff to harass and retaliate against them. Such allegations of *pre-harassment* indifference state a claim under First Circuit precedent (Part I.A.1-2). *See Doe v. Pawtucket Sch. Dep't*, 969 F.3d 1, 10 (1st Cir. 2020). ***Second***, Harvard's *post-complaint* response violated Title IX by failing to redress Plaintiffs' complaints (Part I.A.3). Harvard's year-long delay in investigating Plaintiffs' 2019 complaints was "clearly unreasonable" and alone shows deliberate indifference to Comaroff's serial harassment and retaliation. *See Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 175 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009). Harvard's indifference violated Plaintiffs' trust, left them "vulnerable" to further harassment and retaliation, and created a hostile educational environment—all actionable harms under Title IX (Part I.B). *See id.* And, as alleged in **Count Three**, Harvard's insistence on independent corroboration for claims of sexual harassment—based on archaic distrust of women—states a claim for gender bias under Title IX.

Counts Four, Five, and Six state claims under Massachusetts civil rights laws. These statutes make Harvard liable for Comaroff's sexual harassment of Kilburn under Mass. Gen. Laws c. 214 § 1C (Count 4), interference with Plaintiffs' civil rights under the Massachusetts Civil Rights Act ("MCRA") (Count 5), and gender discrimination (including retaliation) towards all three Plaintiffs under the Massachusetts Equal Rights Act ("MERA") (Count 6). To be sure, students may not bring "***duplicative*** . . . claim[s] for sexual harassment" under the latter two statutes, but Plaintiffs' claims are not duplicative; indeed, Mandava and Czerwienski do not even allege "a claim of sexual harassment." *See Lowery v. Klemm*, 446 Mass. 572, 576 (2006).

These claims are all timely. Harvard faults Plaintiffs for not filing suit by "February 8, 2019." But that is not the cut-off date for Plaintiffs' claims, which were tolled for 105 days during

the COVID-19 pandemic. *See Silva v. City of New Bedford,* No. 20-11866, 2022 WL 1473727, at *5 & nn.7-8 (D. Mass. May 10, 2022) (Supreme Judicial Court's ("SJC") 105-day tolling order applies to federal claims that borrow state statutes of limitation, like Title IX). Plaintiffs' claims survive so long as they accrued after October 26, 2018. They did.

First, Plaintiffs' Title IX claims (**Counts 1-2**) are timely under the **discovery rule**. A claim of deliberate indifference against an institution accrues under the rule when the plaintiff "knew or should have known the necessary factual predicate to file suit" against ***the defendant***. *Ouellette v. Beaupre*, 977 F.3d 127, 139 & n.7 (1st Cir. 2020). Plaintiffs' claims thus accrued not when *Comaroff* threatened and harassed them, but when a reasonable student would have learned that ***Harvard's "deliberate indifference"*** enabled Comaroff to do so. *See id.* at 142. That occurred in 2020, when "press coverage first publicized [Harvard's] alleged deliberate indifference" to prior complaints of harassment in the department. *See id.* at 145. Until then, Plaintiffs had "no reason to suspect that [Harvard's Title IX Office] was not doing its job." *See id.* at 143.

Second, Plaintiffs' federal and state civil rights claims (**Counts 1-6**) are all timely under the **continuing violation doctrine**. Every reported case to decide the question has held that the doctrine applies to Title IX. Harvard does not contest that the Complaint pleads "actionable harassment" directed at Kilburn throughout fall 2018. *See* Def. Br. 30; *see Silva*, 2022 WL 1473727, at *5 & n.7-8. And Comaroff's harassment continued into 2019. Likewise for Mandava and Czerwienski, Harvard's deliberate indifference and the hostile environment it perpetuated continued through at least 2019, when Harvard refused to investigate Plaintiffs' complaints against Comaroff for over a year, until the media spurred it to action in mid-2020. *See, e.g.*, *Cook v. Entergy Nuclear Ops., Inc.*, 948 F. Supp. 2d 40, 43 (D. Mass. 2013) (Gorton, J.) (institution's "failure to take adequate steps in response to [the plaintiff's] complaint" is itself "an act of

discrimination" that anchors a continuing violation). All plaintiffs thus allege conduct after October 26, 2018 that anchors the violations within the limitations period (as tolled by the SJC).

Count Seven states a claim for negligence because Harvard "knew, or should have known, that [Comaroff] had a proclivity to commit [harassment and retaliation], and . . . failed to take corrective action," allowing him to harass and retaliate against Plaintiffs. *See Bloomer v. Becker Coll.*, No. 09-11342, 2010 WL 3221969, at *9 (D. Mass. Aug. 13, 2010) (Saylor, C.J.). The discovery rule applies to this claim, and it is thus timely for reasons similar to Counts 1 and 2.

Finally, **Counts Eight and Nine** state claims that Harvard breached its "obligation . . . to address incidents of harassment it knew or reasonably should have known about," and failed to "provide prompt and equitable methods of investigation and resolution" to "stop" and "remedy" harassment and retaliation. This language tracked directives issued by the Department of Education—far from the "aspirational" goals in the cases Harvard cites.

The Court should deny Harvard's motion.

FACTUAL BACKGROUND

The Amended Complaint ("Complaint") alleges that from 2012 to mid-2017, Harvard received at least nine complaints against three Anthropology professors: Department Chairs Gary Urton and Theodore Bestor, and Comaroff. Am. Compl ¶¶ 17, 42-43, 60-61, 129-40. But instead of initiating an investigation, Harvard's Title IX Office told students that Harvard could not protect them from professional retaliation and discouraged them from making formal complaints. *Id.* ¶¶ 142, 204. It was only when the media exposed these issues in 2020 that Plaintiffs and other victims learned of Harvard's complicity and Harvard began its deficient investigation. *Id.* ¶¶ 14-15.

The road to 2020 was long. Comaroff sexually harassed and retaliated against students at the University of Chicago ("UChicago") from 1979 to 2012. *Id.* ¶¶ 8, 27-40. At least one UChicago

faculty member warned Harvard of this, and an Anthropology Department employee reported to a Title IX official, Seth Avakian, that Comaroff engaged in inappropriate sexual conduct with his students. *Id.* ¶¶ 42-43, 45. But Harvard hired Comaroff anyhow around 2012. *Id.* ¶ 42.

Similar complaints soon emerged from Harvard students. In the 2016-17 academic year, Harvard Student 2 ("HS 2") reported to Avakian that Comaroff was sexually harassing her—that he kissed her without consent, groped her, and made sexual comments. *Id.* ¶¶ 49-54, 60-61. But Avakian did not assist HS 2 and she did not file a formal complaint. *Id.* ¶¶ 63-64. Nor did Harvard.

HS 2 also confided in Czerwienski, who was herself aware of Comaroff's inappropriate behavior towards another graduate student, HS 3. *Id.* ¶ 55. Czerwienski, in turn, warned other graduate students about Comaroff. *Id.* ¶ 58. By spring 2017, Mandava, too, learned that Comaroff had sexually harassed HS 2 and HS 3. *Id.* ¶ 65. Like Czerwienski, Mandava warned other students. *Id.* Czerwienski and Mandava also separately complained to their respective advisors, who were mandatory reporters. *Id.* ¶¶ 56-57, 66-67. They trusted that Harvard would act. *Id.* ¶ 79. It did not.

Because Harvard failed to act, in October 2017, Comaroff retaliated against Czerwienski and Mandava. He told Mandava that he knew that she and other students—among them Czerwienski—were spreading "nasty rumors" about his sexual misconduct with students. *Id.* ¶ 70. He threatened that anyone spreading such "rumors" about him would have "trouble getting jobs." *Id.* ¶¶ 68-76. Czerwienski immediately reported the threat to Avakian and reminded him that Comaroff had been sexually harassing students. *Id.* ¶ 77. Czerwienski and Mandava believed that Harvard, now informed of both harassment and retaliation by Comaroff, would act to stop him. *Id.* ¶ 79. Still, as they later learned, Harvard did not. *Id.* Meanwhile, Mandava and Czerwienski took Comaroff's threat seriously and stopped warning other students. *Id.* ¶ 76, 80.

Even though Harvard knew of numerous complaints against Comaroff, it assigned him to

advise Kilburn. *Id.* ¶ 88. Comaroff promptly began harassing her. Beginning in February 2017 and continuing for the next two years, Comaroff kissed Kilburn's lips, groped her thigh, and imagined aloud her rape and murder. *Id.* ¶¶ 85-94. When Kilburn took clear steps to avoid his harassment and refused to meet with him alone, Comaroff retaliated: He became possessive, forbade her from working with her other advisor (Professor Nicholas Harkness), pressured her to change her dissertation topic to one in which Comaroff (rather than Harkness) specialized, and attempted to force himself into a small space with Kilburn over her physical resistance. *Id.* ¶¶ 99-107.

Kilburn complained to Avakian about Comaroff's harassment in May 2019. *Id.* ¶ 109. Avakian admitted to Kilburn that he had received complaints about Comaroff, but, rather than investigate, he instead put Kilburn in touch with HS 2. *Id.* ¶¶ 110-12. This was the first time Kilburn learned that Comaroff had ever harassed another student. *Id.* ¶ 113. Kilburn also confided details in Mandava in June 2019. *Id.* ¶ 114. Mandava, in turn, reported Comaroff's harassment of Kilburn to two professors, who both reported it to Avakian in 2019. *Id.* ¶¶ 114-17. But despite at least *eight* separate complaints about Comaroff to Harvard's Title IX Office—and at least *four* such complaints in 2019 alone—Harvard *still* failed to investigate Comaroff. *Id.*

It was only in May 2020—when administrators learned that *The Harvard Crimson* (the "*Crimson*") was set to run a story on sexual harassment within the Anthropology Department and Harvard's failures to address it—that Avakian filed a formal complaint with Harvard's Office of Dispute Resolution ("ODR") and Harvard finally initiated an investigation. *Id.* ¶¶ 118-19.

Before May 2020, Czerwienski, Kilburn, and Mandava were aware only of the harm Comaroff had caused them and two other students—HS 2 and HS 3. They did not suspect that Harvard had failed to respond to prior reports of sexual harassment. Only after the *Crimson* and *The Chronicle of Higher Education* published articles in May and June 2020 and in August 2020,

respectively, did Plaintiffs infer Harvard's longstanding complicity in Comaroff's abuse. *Id.* ¶ 123.

As a result of these articles, other students came forward, detailing how Comaroff had harassed and retaliated against them for speaking up. *Id.* ¶¶ 124-26. Plaintiffs learned that since at least 2013, Harvard had been ignoring complaints against Urton and Bestor, would not investigate unless a student was willing to file a formal complaint (even though the Title IX Office has the authority to do so), told students that Harvard could not protect them from professional retaliation, and discouraged students from filing formal complaints, thus forestalling investigations. *Id.* ¶¶ 127-143, 204. In short, Plaintiffs learned that Harvard had systematically failed to protect female graduate students from known abusers in the Anthropology Department. *Id.*

"These new revelations—that Professor Comaroff had continued to sexually harass multiple students after Harvard received multiple complaints about him, and of Harvard's pattern of deliberate indifference to reports against faculty— . . . alerted Plaintiffs that Harvard had likely not responded adequately to prior complaints against Professor Comaroff." *Id.* ¶ 143.[1]

They complained to Harvard. *Id.* ¶ 150. What followed was a biased, deficient, and burdensome investigation by Harvard's ODR. First Harvard limited its investigation to complaints made by the three Plaintiffs, ignoring the prior complaints of HS 2 and others. *Id.* ¶ 151. Then Comaroff pressured HS 2 to delete messages that formed the basis of Czerwienski's complaint, and ODR ignored Czerwienski's complaint of spoliation and witness tampering. *Id.* ¶¶ 153-57. Harvard also allowed Comaroff to retaliate against Kilburn by needlessly naming prominent scholars in her field and a current dissertation committee member as witnesses, even though they had no firsthand knowledge of the relevant events and some *did not even know* Ms. Kilburn. *Id.* ¶¶ 158-63. And Harvard required Plaintiffs to provide independent corroborating evidence, but

[1] Professor Comaroff confirmed this himself on February 8, 2022: In response to the lawsuit, he announced through counsel that Harvard had *never* notified him of any complaint against him aside from the Plaintiffs'.

then ignored evidence they provided and refused to interview witnesses. *Id.* ¶¶ 178, 206-07.

When Harvard finally issued findings in August 2021, over *a year* after Plaintiffs had filed their complaints, the university found *only* that Comaroff's statements that Kilburn "would be raped" constituted sexual harassment; it refused to hold him accountable on any other allegations. *Id.* ¶¶ 170-72. To reach this finding, Harvard ignored witness testimony, manufactured "inconsistencies" in Kilburn's account, determined that Mandava had not engaged in protected activity (despite messages corroborating that she had complained to a professor and students about Comaroff's harassment),[2] and found that Comaroff did not have "notice" of Czerwienski's protected activity (even though she testified how Comaroff had learned of her warnings to other students). *Id.* ¶¶ 173-78. Harvard thus "made no finding against Professor Comaroff on the central issue in Ms. Mandava and Ms. Czerwienski's cases: whether Professor Comaroff threatened them and other students in retaliation for discussing his sexual misconduct." *Id.* ¶ 176.

Harvard then imposed limited, temporary sanctions on Comaroff, and failed to take any measures to prevent him or those in his network from engaging in further harassment or retaliation. *Id.* ¶¶ 184-87. And they did retaliate: Professor Jean Comaroff disseminated a press statement disparaging Plaintiffs to academics wielding influence over Plaintiffs' careers. *Id.* ¶¶ 188-93. Within days of the sanctions announcement, the Comaroffs organized 38 Harvard faculty members and 54 academics from other institutions to sign letters that minimized John Comaroff's abuse and misrepresented Plaintiffs' allegations. *Id.* ¶¶ 194-201. Again, Harvard did nothing, standing by as Plaintiffs' reputations and academic futures were dashed. *Id.*; *see also id.* ¶¶ 223-31.

ANALYSIS

On a motion to dismiss, the Court must take the well-pleaded facts as true, "draw all

[2] In December 2021, an external factfinder found that Comaroff had threatened Mandava to stop her from discussing his sexual misconduct, which violated Harvard's Professional Conduct Policy. *Id.* at ¶¶ 182-83.

reasonable inferences from those facts in the plaintiff's favor," and deny the motion if they "plausibly state a claim." *Pawtucket*, 969 F.3d at 5, 7. They do so here.

I. Counts One and Two State a Claim for Deliberate Indifference Under Title IX

Counts One and Two allege that Harvard's deliberate indifference to sexual harassment in the Anthropology Department exposed Plaintiffs to sexual harassment and retaliation—both forms of gender-based "discrimination" under Title IX. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005). Harvard mounts four challenges to these claims under Title IX: (1) that the Complaint fails to plausibly allege that Harvard responded to Plaintiffs' complaints with deliberate indifference; (2) that Title IX does not prohibit deliberate indifference to retaliation; (3) that Czerwienski and Mandava allege only "two incidents" of retaliation that did not create a hostile environment for them; and (4) that the claims are untimely. All fall flat.

Title IX provides that no "person in the United States shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). A recipient "violates Title IX, and is subject to a private damages action," when it "[1] is deliberately indifferent to known acts of teacher-student discrimination" and [2] its deliberate indifference "subject[s]" students to "discrimination" based on gender. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643-45 (1999). The institution acts with "deliberate indifference" when an "official with authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs," *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998), and responds in a way that is "clearly unreasonable under the known circumstances." *Fitzgerald*, 504 F.3d at 175. The university "subjects" a student to discrimination when the school leaves her "vulnerable" to sexual harassment or retaliation. *Id.* at 172; *see Jackson*, 544 U.S. at 173.

A. Plaintiffs Plausibly Allege That Harvard Acted with Deliberate Indifference

The Complaint alleges that Harvard acted with deliberate indifference to Comaroff's sexual misconduct since hiring him in 2012, and certainly since 2016, when Harvard learned that he sexually harassed HS 2 and failed to act. Am. Compl. ¶¶ 8-13, 41-117. In its Motion, however, Harvard argues solely that ***after Plaintiffs*** reported Comaroff's harassment and retaliation, it responded adequately. *See* Def. Br. 18-20. This argument misses Plaintiffs' principal theory under Title IX: that Harvard's practice of deliberate indifference to sexual harassment, and its failure to adequately respond to ***prior*** reports of harassment—by Comaroff and others—exposed Plaintiffs to Comaroff's behavior in the first place (a so-called "pre-harassment" claim). *See*, *e.g.*, Am. Compl. ¶¶ 236-37 (pleading that Harvard "maintained an official policy, custom, and/or practice of deliberate indifference to a known overall risk of sexual harassment" and "retaliation . . . against graduate students in the Anthropology Department" and "failed to take adequate measures to prevent harm to Plaintiffs"); *see also id.* ¶¶ 1, 11-12, 63, 223, 249. Moreover, Harvard's argument also fails on its own terms: Harvard's belated response to Plaintiffs' complaints was clearly inadequate. It is "plausible" that Harvard's years-long pattern of inaction was "clearly unreasonable in light of the known circumstances." *See Davis*, 526 U.S. at 648.

1. Harvard Was Deliberately Indifferent to Prior Complaints Against Comaroff

A plaintiff states a pre-harassment claim under Title IX if she plausibly alleges that school officials knew a teacher "harassed or assaulted other students" and "did nothing to prevent [the teacher] from assaulting [the plaintiff]." *Pawtucket*, 969 F.3d at 10. In other words, a plaintiff shows deliberate indifference when the school learned of "the alleged harasser's conduct toward others which indicates some degree of risk that the harasser would subject the plaintiff to similar treatment" and fails to adequately respond to the threat. *Brodeur v. Claremont Sch. Dist.*, 626 F. Supp. 2d 195, 208 (D.N.H. 2009); *see, e.g.*, *Bloomer*, 2010 WL 3221969, at *5 (holding that

plaintiff stated a claim because she alleged the school failed to respond to "complaints by other students regarding the same harassing employee," which exposed her to harassment by the same employee); *Morrison v. N. Essex Cmty. Coll.*, 56 Mass. App. Ct. 784, 799 (2002) (same).[3]

Plaintiffs state a plausible pre-harassment claim: The Complaint alleges that Harvard knew Comaroff made sexual advances on students and sexually harassed HS 2 but took no action to prevent him from targeting Plaintiffs. Am. Compl. ¶¶ 60-63, 68-76. When Harvard first hired Comaroff, it was warned through Avakian and other relevant officials that Comaroff had engaged in inappropriate sexual relationships at UChicago. *Id*. ¶¶ 41-43. In addition, in 2016 and again in 2017, HS 2 reported to Avakian that Comaroff sexually harassed and assaulted her. *Id.* ¶¶ 60-63. Harvard admits that Avakian was an appropriate official with authority to "take corrective measures," meaning that the reports to him were "actual notice" to Harvard. Def. Br. 12 n.17; Am. Compl. ¶¶ 62-63. As Plaintiffs later learned, Harvard failed to respond to these prior reports, which exposed them to retaliation[4] (against Plaintiffs Czerwienski and Mandava) and further sexual harassment (against Plaintiff Kilburn) by the same professor. These allegations state a plausible pre-harassment deliberate indifference claim under Title IX. *See Pawtucket*, 969 F.3d at 10.

2. Harvard's Indifference Was a Custom or Practice Actionable Under Title IX

The Complaint further alleges that Harvard's inaction arose from a custom and practice of deliberate indifference to sexual harassment by professors. Even without evidence that the school knew of a "specific instance of sexual misconduct," a school is liable under Title IX if it (1) "maintained a policy of deliberate indifference to reports of sexual misconduct, (2) which created

[3] None of Harvard's cases involved a claim that the school failed to *prevent* harassment of plaintiff; all alleged only that the school failed to adequately *respond* to the plaintiff's complaints. Def. Br. 16 (citing, *e.g.*, *Doe v. Brown Univ.*, 896 F.3d 127, 130 (1st Cir. 2018)). Those cases thus do not describe the "test" applicable here (*contra id.* at 1).

[4] Just as "harassment by a supervisor carries an implied threat that the supervisor will punish resistance through exercising supervisory powers," sexual harassment by a powerful professor presages retaliation against students who challenge that behavior. *See Coll.-Town, Div. of Interco, Inc. v. MCAD*, 400 Mass. 156, 166 (1987).

a heightened risk of sexual harassment that was known or obvious (3) in a context subject to the school's control" and (4) thus exposed students to a hostile environment based on gender. *Karasek v. Regents of Univ. of Cal.*, 956 F.3d 1093, 1112 (9th Cir. 2020). Such a claim is strongest when "the heightened risk of harassment exists in a specific program." *Id.* at 1113.

Plaintiffs plead that Harvard knew about multiple complaints against three Anthropology professors—including two *Department Chairs*—but repeatedly failed to respond. Am. Compl. ¶¶ 127-43. The Complaint identifies three specific practices underpinning Harvard's inaction. *First*, Harvard failed to investigate faculty misconduct unless a *student* initiated a formal complaint to ODR, even after the government warned Harvard that a school violates Title IX when it fails to respond to known harassment "regardless of whether a student has complained" or "asked the [school] to take action."[5] *Id.* ¶¶ 126, 132 & n.24, 148, 204 & n.43. *Second*, Harvard disclaimed the power to prevent professional retaliation. *Id.* ¶¶ 117, 131, 146-48, 188-202, 208. *Third,* Harvard maintained these practices even as it routinely discouraged students from filing formal ODR complaints, and even though it knew that female graduate students widely feared that complaints would prompt retaliation. *Id.* ¶¶ 131, 208. These practices created a "heightened risk" of sexual harassment and retaliation against Anthropology students that was "known or obvious" to Harvard—a risk that materialized against the Plaintiffs when Harvard ignored HS 2's prior complaints to Avakian and failed to prevent Comaroff's retaliation against Mandava and Czerwienski. *See Karasek v. Regents of Univ. of Cal.*, 500 F. Supp. 3d 967, 988-89 (N.D. Cal.

[5] The Court should thus reject any suggestion that Harvard could sit on its hands until a victim volunteered to prosecute a complaint herself. Title IX requires "only that 'the funding recipient had actual knowledge of the sexual harassment,' and not that the plaintiff followed a formal procedure to put the funding recipient on notice." *Doe v. Miami Univ.*, 882 F.3d 579, 591 (6th Cir. 2018); *see* U.S. Dep't of Educ, Final Rule, 85 Fed. Reg. 30026, 20089 (May 19, 2020) (explaining that a school may violate the deliberate indifference standard if it knows of "a pattern of alleged sexual harassment by a perpetrator in a position of authority" and fails to investigate, "even if the complainant (*i.e.,* the person alleged to be the victim) does not wish to file a formal complaint or participate in a grievance process"); *Tubbs v. Stony Brook Univ.*, No. 15-0517, 2016 WL 8650463, at *7 n.6 (S.D.N.Y. Mar. 4, 2016) (same). Harvard's decision to create a byzantine student complaint process is no defense.

2020) (plaintiff alleged "de facto policies" creating heightened risk based on repeated failures to respond to assaults in same club). This deliberate indifference states a claim under Title IX. *Id.*

Harvard does not confront Plaintiffs' pre-harassment claims. It ignores Plaintiffs' allegations of prior complaints against Comaroff, and it ignores Plaintiffs' allegations of Harvard's custom and practice of deliberate indifference. Harvard therefore waives any argument that Plaintiffs fail to plausibly allege a pre-harassment claim. *See, e.g.*, *Roshi v. Comm'r of Soc. Sec.*, No. 14-10705, 2015 WL 6454798, at *15 (D. Mass. Oct. 26, 2015) (Dein, J.) (When "a moving party raises an argument for the first time in a reply brief, [it] is waived.").

3. Harvard's Response to Plaintiffs' Complaints Was Clearly Unreasonable

Harvard continued its deliberate indifference after Plaintiffs complained. *First*, Harvard failed to investigate Plaintiffs' 2019 complaints for over a year. In May 2019, Plaintiff Kilburn reported Comaroff's years-long pattern of harassment against her, and, in June 2019, Plaintiff Mandava reported Comaroff's 2017 retaliatory threat to the Department Chair,[6] who reported it to Avakian by November 2019. Am. Compl. ¶¶ 114-15. By then, Harvard's Title IX Office had received least *eight* complaints about Comaroff. *Id.* ¶ 117. But Harvard did not investigate until a ***full year*** after Kilburn made her complaint—and only then because the *media* was poised to expose Harvard's inaction. *Id.* ¶¶ 14, 117-19. Harvard's year-long delay (after nearly a decade of inaction), which left Plaintiffs vulnerable to further harassment and retaliation, would itself state a claim. *Id.* ¶¶ 117-18, 223, *see Fitzgerald*, 504 F.3d at 175; *Williams v. Bd. of Regents of Univ. Sys. of Georgia*, 477 F.3d 1282, 1296-97 (11th Cir. 2007) (11-month delay constituted deliberate indifference); *JD1 v. Canisius Coll.*, No. 21-521, 2022 WL 2308902, at *13 (W.D.N.Y. June 27, 2022) (eight-month delay). But that the ***fear of bad publicity*** was what spurred Harvard to act

[6] The Department Chair was also an "appropriate person" with authority to take corrective measures, so that a report to her was a report to Harvard. *See, e.g.*, *Lipian v. Univ. of Michigan*, 453 F. Supp. 3d 937, 957-58 (E.D. Mich. 2020).

confirms its deliberate indifference. *See* Am. Compl. ¶¶ 14, 118-19.

Second, ODR's belated 2020 investigation continued Harvard's ongoing indifference to Comaroff's harassment. Among the deficiencies:

- Harvard allowed Comaroff to pressure HS 2 and three other witnesses to his misconduct not to testify and failed to act even after Czerwienski notified ODR. *Id.* ¶¶ 147, 152-57.

- Harvard allowed Comaroff to call a member of Kilburn's dissertation committee, and other potential mentors and advisors, as witnesses, despite their irrelevance; it also discounted Comaroff's pattern of physical harassment based on manufactured "inconsistencies" in Kilburn's testimony that were obviously unsupported in the evidence. *Id*. ¶¶ 173-75.

- Harvard ignored clear evidence that Comaroff threatened Czerwienski and Mandava based on his belief that they had discussed his harassment. *Id*. ¶¶ 176-77. Indeed, it inexplicably dismissed Mandava's claim based solely on its finding that she "did not engage in protected activity"—even though a threat based on a "*belief*" that a person engaged in protected activity is retaliation. *Heffernan v. City of Paterson*, 578 U.S. 266, 268-70 (2016).

- Harvard entirely ignored (and made no finding on) multiple instances of harassment against Kilburn in 2019 as well as against other students, including HS 2. *Id*. ¶¶ 147, 171.

- Harvard refused to consider relevant evidence, failed to stop Comaroff from spoliation and intimidation of witnesses, and completely disregarded complaints made by HS 1, HS 4, UChicago Student 4, and Harvard Post-Doc 1. *Id*. ¶¶ 126, 152-57, 173-78.

These actions reflected willful blindness to the overwhelming evidence that Comaroff engaged in a *pattern* of serial sexual harassment and retaliation that Harvard knew about but failed to stop.

Harvard cannot paper over these deficiencies by citing the page counts of its convoluted ODR Reports. *See* Def. Br. 4-6. Their volume in fact reflects the tortured logic in which ODR engaged. *See Leader v. Harvard Univ. Bd. of Overseers*, No. 16-10254, 2017 WL 1064160, at *4 (D. Mass. Mar. 17, 2017) (holding that plaintiff stated plausible claim despite investigation; a defendant may not escape liability by "merely investigating"). Drawing inferences in Plaintiffs' favor, Harvard's belated, blinkered response was "clearly unreasonable" given what it knew about Comaroff's pattern of harassment and retaliation against Plaintiffs and others. *See Fitzgerald*, 504 F.3d at 173, 175 (When an institution's response to harassment" is "carried out so inartfully as to

render it clearly unreasonable," and exposes the student to further "post-notice interactions between the victim and the harasser," the school violates Title IX.).[7] Moreover, Harvard "did not take any measures to prevent Professor Comaroff or those in his network from engaging in further harassment or retaliation against Plaintiffs or other students," and allowed Comaroff to return to campus and teach courses the very next semester, exposing Plaintiffs to further harassment by him as well as retaliation from him and his network. *See* Am. Compl. ¶¶ 186-202.

B. Comaroff's Conduct and Harvard's Indifference Subjected Plaintiffs to Discrimination, Including Retaliation and Harassment, Actionable Under Title IX

Harvard does not dispute that the Complaint plausibly alleges Comaroff's repeated sexual harassment created a hostile environment for Kilburn. And contrary to Harvard's claims, it is liable for exposing Czerwienski and Mandava to both retaliation and a hostile educational environment.

1. Title IX Makes a School Liable for Deliberate Indifference that Exposes Students to Retaliation, a Form of Gender Discrimination

A university is liable when its deliberate indifference subjects a student to retaliation. "Title IX . . . broadly prohibits a funding recipient from subjecting any person to [sex] 'discrimination,'" and "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination." *Jackson*, 544 U.S. at 173, 179 & n.3 ("[B]ecause retaliation in response to a complaint about sex discrimination is 'discrimination' 'on the basis of sex,' the statute clearly protects those who suffer such retaliation."). Every court to have decided the issue thus agrees that deliberate indifference that subjects a student to retaliation is actionable under Title IX. *See*, *e.g.*, *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 695-96 (4th Cir.

[7] *Leader v. President & Fellows of Harvard Coll.*, No. 16-10254, 2018 WL 3213490, at *4 (D. Mass. June 29, 2018), does not help Harvard here. First, that case was decided on summary judgment, after full discovery. Second, the facts were wholly distinct: Leader did not allege that Harvard kept a ***professor in a position of authority*** over students for ***years*** after multiple complaints that he had engaged in sexual misconduct toward other students. In that case, Harvard delayed only three months before investigating a complaint of sexual harassment by another student (not a professor) and it provided the plaintiff with supportive measures in the interim. *Id.*

2018) (Based on "*Davis* and *Jackson*," "an educational institution can be liable for acting with deliberate indifference toward known instances of student-on-student retaliatory harassment[.]").[8] None of Harvard's cases supports its chilling claim that Title IX provides no remedy for students when a school's deliberate indifference exposes them to retaliation.[9] *See* Def. Br. 22. Such a rule would gut Title IX's goal of "effective protection against [discriminatory] practices." *Jackson*, 544 U.S. at 180 ("[T]his objective would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation.").

Comaroff's threat of "trouble getting jobs" towards Mandava and Czerwienski was retaliation by any measure. It was clearly intended to "dissuade a reasonable [student] from making or supporting a charge of discrimination." *Dixon v. Int'l Bhd. of Police Officers*, 504 F.3d 73, 81 (1st Cir. 2007). That Czerwienski heard of the threat through Mandava does not matter. *See Planadeball v. Wyndham Vacation Resorts, Inc.*, 793 F.3d 169, 178 (1st Cir. 2015) (threats of termination "stated to an employee directly ***and to her co-worker who passed the message to that employee***" both retaliation (emphasis added)); *see also Dixon*, 503 F.3d at 84 (statement on TV—"that girl who made these fabrications, she's in trouble"—was actionable as retaliation); 34 C.F.R. 106.71 (prohibiting "intimidat[ion]" and "threat[s]" as retaliation under Title IX).

And Harvard's deficient response to Plaintiffs' complaints exposed them to further

[8] *See also Papelino v. Albany Coll. of Pharm. of Union Univ.*, 633 F.3d 81, 93 (2d Cir. 2011) (holding college's deliberate indifference to the professor's retaliatory act subjected the college to Title IX liability); *Doe v. Univ. of Tenn.*, 186 F. Supp. 3d 788, 810-11 (M.D. Tenn. 2016) (holding that plaintiff's allegations that the institution condoned retaliatory threats by other students stated claim under Title IX); *cf. Thomas v. Chelmsford*, 267 F. Supp. 3d 279, 301-02 (D. Mass. 2017) (holding that deliberate indifference to retaliation stated claim under § 1983).

[9] None of Harvard's cases addressed a claim that deliberate indifference subjected a student to retaliation. *Theidon v. Harvard Univ.*, 948 F.3d 477, 506-08 (1st Cir. 2020) and *Turley v. McKenzie*, No. 14-14755, 2018 WL 314814, at *13 (D. Mass. Jan. 5, 2018) challenged discriminatory official personnel actions under the *McDonnell-Douglas* framework. In *Bose v. Bea*, 947 F.3d 983, 989 (6th Cir. 2020), and *Deweese ex rel. M.D. v. Bowling Green Indep. Sch. Dist.*, 709 F. App'x 775, 779 (6th Cir. 2017), the plaintiffs did not make any claim of deliberate indifference. *See also Saphir ex rel. Saphir v. Broward Cnty. Public Schools*, 744 F. App'x 634, 640 (11th Cir. 2018) (affirming because plaintiff failed to show "knowledge or approval by such officials" of the "retaliatory conduct" at issue); Appellant's Br. in *Saphir*, Case No. 17-11370, at 28-30 (making no argument regarding deliberate indifference to retaliation).

retaliation. First, Comaroff's intimidation of HS 2 deprived Plaintiffs of a key witness and evidence, undercutting their complaints.[10] Such interference states a claim for retaliation against Plaintiffs. *See Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 178 (2011) (adverse action against a third party is retaliation when "intended [as a] means of harming" plaintiff). Second, Jean Comaroff disseminated a press statement disparaging Plaintiffs to the Comaroffs' network of powerful faculty, and the Comaroffs then convinced 38 Harvard faculty and 54 academics across the ***world*** to publish letters that "minimized . . . Comaroff's abuse and misrepresented the few factual findings ODR made." Am. Compl. ¶¶ 189, 194-95. All three letters implicitly disparaged Plaintiffs for complaining about Comaroff and damaged Plaintiffs' reputations among the potential mentors, advisors, peer reviewers, and committee members crucial to a Ph.D. student's academic success. *Id.* ¶¶ 188-202. Indeed, faculty signatories of the letters themselves recognized the letters' chilling (and thus retaliatory) effect. *Id.* ¶ 197. It is at least plausible that they are correct. *Dixon*, 504 F.3d at 84 (defendant's comments disparaging plaintiff on television constituted retaliation).

2. Comaroff's and Harvard's Conduct Also Created a Hostile Environment

The Complaint also plausibly alleges that Mandava and Czerwienski faced a hostile environment. "Conduct that might not be actionable under Title IX if perpetrated by a student might be deemed more likely to exclude, or discriminate against, the potential targets of the conduct if perpetrated by a person in authority." *Pawtucket*, 969 F.3d at 10. Thus, teacher-on-student harassment need ***not*** be both "severe and pervasive" (Def. Br. 17) to create a hostile environment. *Pawtucket*, 969 F.3d at 10-11 (distinguishing "severe and pervasive" standard applicable only to "student-on-student" harassment). A professor's conduct is actionable if "sufficiently severe to interfere with the workplace or school opportunities normally available to

[10] *See* Am. Compl. ¶¶ 147, 151, 153, 155, 178, 207; *contra* Def. Br. 25. Even if not prejudicial, witness intimidation "dissuades" students from filing complaints and exposing witnesses to intimidation. *Jackson*, 544 U.S. at 180.

the worker or student," *Wills v. Brown Univ.*, 184 F.3d 20, 25-26 (1st Cir. 1999), or if it creates unequal opportunities. *See Pawtucket*, 969 F.3d at 10 (teacher's conduct need only have "some degree of severity or pervasiveness," "enough to 'undermine[ ] and detract[ ] from the victim's educational experience'" and "den[y] **equal** access" to the school's "resources and opportunities").

The Complaint details a series of actions by Comaroff and Harvard that "detract[ed]" from Czerwienski and Mandava's "educational experience." *See Pawtucket*, 969 F.3d at 10.

First, Comaroff's retaliatory threat derailed their academic careers. It caused Czerwienski to drop Jean Comaroff as her advisor and change her focus of study away from Africa—the region of focus dominated by the Comaroffs. *See* Am. Compl. ¶ 82. Mandava lost the mentorship of both Comaroffs, on whom she had relied for recommendations since college, and had to change the topic of her dissertation. *Id.* ¶ 83. Comaroff's conduct thus clearly "interfere[d] with the . . . school opportunities normally available to the worker or student." *See Wills*, 184 F.3d at 25-26. It denied the Plaintiffs "equal access" to the opportunities they would have enjoyed had they not spoken out about Comaroff's abuse. *See Pawtucket*, 969 F.3d at 10. Harvard never remedied this loss.

Second, Harvard perpetuated the hostile environment when it failed to act on Plaintiffs' 2019 and 2020 complaints—even after Comaroff had repeated his sexual harassment against Kilburn. As the First Circuit has held, an institution's manifest indifference to complaints of harassment contributes to a hostile environment. *See Fitzgerald*, 504 F.3d at 173 (harassment and a school's deliberate indifference can "have the combined systemic effect of denying access to a scholastic program or activity"); *Dixon*, 504 F.3d at 85 ("[A] jury could easily see the union's inaction and failure to investigate . . . as increasing the union's liability" for hostile environment).[11]

[11] This comports with the well-established psychological effects of "institutional betrayal." Am. Compl. ¶ 19. *See, e.g.*, Ltr. from J.L. Herman to S. Goldberg, Assistant Sec'y, for Civil Rights, Dep't of Educ. (Jan. 25, 2019) ("[S]urvivors who are met with indifference or blame from authority figures will predictably suffer increased symptoms of post-traumatic stress and depression, as they will feel betrayed by their community.").

Here, Harvard's indifferent response exposed Plaintiffs to further harassment and retaliation, caused them grave emotional distress, and derailed their careers. *See* Am. Compl. ¶¶ 117, 146-47, 188-202 (further harassment/retaliation), ¶¶ 223-31, 239 (emotional/career harm).

Third, Plaintiffs have all been lightning rods for stories of harassment and retaliation by Comaroff, Bestor, and Urton. Kilburn reported her ongoing experience to Mandava in 2019, and HS 2 shared her story with Plaintiffs; others followed in the wake of the *Crimson* and *Chronicle* articles. *Id.* ¶¶ 112, 114, 124-126. Yet Harvard has refused to investigate many of these allegations ***to this day***. *Id.* ¶¶ 124-26, 151. These "acts of sexual harassment directed against others that were known to the plaintiff, and the defendant's failure to discipline anyone for the acts, or effectively to remedy them, may be considered as part of the hostile environment in which the plaintiff worked" or studied. *Cuddyer v. Stop & Shop Supermarket Co.*, 434 Mass. 521, 541 (2001); *see also Ruffino v. State Street Bank & Trust Co.,* 908 F. Supp. 1019, 1038-1039 n. 34 (D. Mass. 1995).

Harvard's failure to act has left Plaintiffs alone and exposed to a hostile academy called to arms against them, even as accounts of misconduct and institutional betrayal accumulate.

II. Counts Four, Five, and Six State a Claim under Massachusetts Civil Rights Laws

Harvard does not dispute that Plaintiffs allege conduct that would plausibly violate three Massachusetts civil rights statutes: the MCRA (Count 4), the right against sexual harassment under Mass. Gen. Laws c. 214 § 1C (Count 5), and the MERA (Count 6), which make Harvard strictly liable for its employees' actions. *See* Am. Compl. ¶¶ 271, 283, 291. Harvard argues only that the statutory right against sexual harassment under § 1C precludes Plaintiffs' claims under the MCRA and MERA and that the claims are untimely. Def. Br. 28-31. These arguments fail.

Chapter 214 § 1C does *not* preclude Plaintiffs' claims under the MERA or the MCRA—especially not at pleading stage. "[W]hen G.L. c. 214, § 1C ***applies to a claim of sexual***

harassment, it is the exclusive remedy." *Lowery*, 446 Mass. at 576 (citing *Guzman v. Lowinger*, 422 Mass. 570, 572 (1996)) (emphasis added). In other words, when a "claim falls squarely under G.L. c. 214, § 1C," the plaintiff has no "independent and ***duplicative*** right . . . to pursue such claims under the [MCRA]," as there is "no basis for concluding that the Legislature intended to provide two remedies for ***the same claim***." *Guzman*, 422 Mass. at 572 (holding that a plaintiff who "lost at trial" under § 1C could not "to retry the same claim" under the MCRA) (emphasis added). This does not mean that § 1C—designed to ***broaden*** protections against harassment, *see Lowery*, 446 Mass. at 576—restricts the remedies for claims *beyond* sexual harassment. A plaintiff "may bring actions under other statutes" to the extent that § 1C does not apply. *Id.* at 581.

Plaintiffs' claims under the MERA and MCRA do not duplicate Kilburn's claim under § 1C. First, Mandava and Czerwienski ***do not even allege a claim for sexual harassment under § 1C***, and Harvard does not contend that they could. Am. Compl. ¶¶ 269, 290(a), (d)-(h); *id.* ¶¶ 274-85 (alleging sexual harassment only as to Kilburn). Second, Kilburn's MCRA and MERA claims allege a hostile environment that includes retaliation and, therefore, assert claims ***broader*** than her § 1C claim (which alleges *solely* sexual harassment). *Compare id.* at 77 (Count Five) with ¶¶ 269, 290. Plaintiffs thus plead actionable claims under all three state statutes, and the Court should reject the position that § 1C denies Plaintiffs a remedy for these additional wrongs.

III. Plaintiffs' Federal and State Civil Rights Claims (Counts One - Six) Are Timely

Unable to dispute that Plaintiffs' federal and state civil rights claims are plausible on their merits, Harvard argues that Plaintiffs filed them too late. Harvard maintains this position even though (as it does not contest) Plaintiffs allege that they could not have reasonably discovered their Title IX claims within the limitations period, and even though Harvard's violations of their rights continued into the statutory period. But Plaintiffs' Title IX claims (Counts 1-2) are timely under

the federal discovery rule, and Counts 1-6 are all timely under the continuing violation doctrine.

"A defendant may assert a statute of limitations defense in a motion to dismiss if 'the facts establishing the defense are clear on the face of the plaintiff's pleadings.' Granting a motion to dismiss on limitations grounds is appropriate, therefore, only when the complaint 'leave[s] no doubt that an asserted claim is time-barred.'" *Maffeo v. White Pine Invs.*, 537 F. Supp. 3d 45, 47-48 (D. Mass. 2021) (cite omitted) (quoting the First Circuit and concluding that on a motion to dismiss, it was "premature to determine whether the discovery rule applies or [whether] plaintiff's claim is time-barred"). Harvard has not shown that Plaintiffs' civil rights claims accrued more than three years before they filed suit. Rather, the Complaint shows that Plaintiffs' claims are timely.

A. The Federal Discovery Rule Governs Plaintiffs' Title IX Claims

"Under the [federal] discovery rule, 'a claim accrues when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the factual basis for the cause of action.'" *McIntyre v. United States*, 367 F.3d 38, 52 (1st Cir. 2004). The First Circuit has consistently held that this rule applies to federal statutes which, like Title IX, do not specify when a claim accrues.[12] *Ouellette*, 977 F.3d at 136 n.7 (1st Cir. 2020) (stating that the First Circuit has "ma[de] of [the discovery rule] a general rule"); *see also Rotella v. Wood*, 528 U.S. 549, 555 (2000) ("[F]ederal courts . . . generally apply a discovery accrual rule when a statute is silent on the issue[.]").

The First Circuit has also specifically held that the discovery rule applies to all "civil rights actions," including to the family of antidiscrimination statutes to which Title IX belongs. *Nieves-Márquez v. Puerto Rico*, 353 F.3d 108, 119-20, 126-28 & n.20 (1st Cir. 2003) (claims under the Rehabilitation Act, the IDEA, and the ADA Title II, which ban discrimination in federally funded

[12] *See*, *e.g.*, *Ouellette*, 977 F.3d at 136 (42 U.S.C. § 1983); *McIntyre*, 367 F.3d at 52 (FTCA); *Riley v. Metro. Life Ins. Co.*, 744 F.3d 241, 245 (1st Cir. 2014) (ERISA); *Warren Freedenfeld Assocs., Inc. v. McTigue*, 531 F.3d 38, 44 (1st Cir. 2008) (Copyright Act); *Morris v. Gov't Dev. Bank of Puerto Rico*, 27 F.3d 746, 749-50 (1st Cir. 1994) (Title VII).

programs under the Spending Clause, were timely based on the discovery rule); *see also Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (holding that remedies under these statutes are "coextensive" with Title IX). Moreover, the First Circuit also applies the discovery rule to analogous claims for deliberate indifference under 42 U.S.C. § 1983, from which the Supreme Court adopted Title IX's "deliberate indifference" standard. *See Ouellette*, 977 F.3d at 135-36; *see Davis*, 526 U.S. at 642. Indeed, the only in-circuit case Harvard cites held that the discovery rule ***applied*** to a Title IX claim based on a First Circuit case ***under § 1983***. *See LeGoff v. Trs. of Boston Univ.*, 23 F. Supp. 2d 120, 127 (D. Mass. 1998) (Gertner, J.) (citing *Rivera-Muriente v. Agosto-Alicea,* 959 F.2d 349, 353 (1st Cir. 1992)). And "every other circuit to have considered the matter in a published opinion" holds "that Title IX should be treated like § 1983 for limitations purposes," and the discovery rule applies. *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 759, 762 (5th Cir. 2015).[13] There is no principled reason to deviate from these authorities; the discovery rule clearly applies here.

B. Plaintiffs' Claims Are Timely Under the Discovery Rule

Under the discovery rule, a claim accrues when the plaintiff had "the necessary factual predicate to file suit, including knowledge of ***both*** an injury ***and the injury's likely causal connection with the putative defendant***." *Ouellette*, 977 F.3d at 139 (emphasis added). Therefore, "a plaintiff's Title IX pre-assault claim accrues when the plaintiff knows or has reason to know of the school's policy of deliberate indifference that created a heightened risk of harassment." *Canisius Coll.*, 2022 WL 2308902, at *12; *see also Dutchuk*, 2020 WL 5752848, at *5 (claim

[13] *See further Dutchuk v. Yesner*, No. 19-0136, 2020 WL 5752848, at *5 (D. Alaska Sept. 25, 2020); *Karasek*, 500 F. Supp. 3d at 978; *Barnett v. Kapla*, No. 20-03748, 2020 WL 6737381, at *8 (N.D. Cal. Sept. 28, 2020); *Lozano v. Baylor Univ.*, 408 F. Supp. 3d 861, 900 (W.D. Tex. 2019); *Hernandez v. Baylor Univ.*, 274 F. Supp. 3d 602, 617 (W.D. Tex. 2017). None of Harvard's cases actually decided the issue. *See Garrett v. Ohio State Univ.*, 561 F.Supp.747, 755 (S.D. Ohio 2021); *Forrester v. Clarenceville Sch. Dist.*, 537 F. Supp. 3d 944, 952 (E.D. Mich. 2021); *Doe v. Nat'l Ramah Comm'n, Inc.*, No. 16-6869, 2018 WL 4284324, at *6 (S.D.N.Y. Sept. 7, 2018). *Twersky v. Yeshiva Univ.* also reserved the issue, and on appeal, the Second Circuit suggested that the discovery rule ***would*** apply to Title IX because the rule "generally applies when statute is silent on issue." 579 F. App'x 7, 9 (2d Cir. 2014).

accrues when the plaintiff "know[s] or ha[s] reason to know that the institution's handling of prior sexual harassment complaints had subjected her to a heightened risk of being harassed"). *When* the claims accrued under this rule is a question of *fact* for trial. *Ouellette*, 977 F.3d at 142-43, 145.

1. Plaintiffs' Claims Accrued in 2020 Under the Discovery Rule

Here, the Complaint plausibly alleges that a "reasonable person in each Plaintiff's position would have first discovered that Harvard's unlawful practices and handling of prior complaints against professors in the Anthropology Department were the probable cause of her injury" in 2020, less than three years before Plaintiffs sued. Am. Compl. ¶¶ 241, 252. From 2017 to 2019, Plaintiffs had no reason to believe that ***Harvard*** was "responsible" for Comaroff's threats and harassment: *i.e.*, that Harvard knew Comaroff had harassed others ***and*** "condoned" that conduct by failing to address it *before* Comaroff targeted the Plaintiffs—as required to state their claim for deliberate indifference. *See Ouellette*, 977 F.3d at 142. Nor would "a reasonably diligent investigation" by Plaintiffs have revealed how Harvard handled prior complaints, because Harvard kept them confidential. *Id.* at 142, 144; *see*, *e.g.*, FAS Policy and Procedures (cited in Def. Br. 1) at 7.

Plaintiffs' claims did not accrue until 2020, when the *Crimson* revealed "Harvard's pattern of deliberate indifference to reports against faculty" in their department. Am. Compl. ¶ 143; *id.* ¶¶ 122-23. Only then could Plaintiffs infer that "Harvard had likely not responded adequately to prior complaints against Professor Comaroff." *Id*. ¶ 143. Indeed, Harvard does not argue otherwise. *See Roshi*, 2015 WL 6454798, at *15 (waiver). Because Plaintiffs sued within three years of that discovery (i.e., before 2023) their claims are timely. *See Canisius Coll.*, 2022 WL 2308902, at *12.

2. First Circuit Precedent Holds that Plaintiffs' Claims for Deliberate Indifference Did Not Accrue Until Plaintiffs Reasonably Discovered Harvard's Complicity

The First Circuit's decision in *Ouellette* is squarely on point. There, the court held that the plaintiff had timely § 1983 claims for deliberate indifference against the defendant city even

though his sexual abuse by a city police officer occurred ***decades*** before he sued. 977 F.3d at 130-31. **The plaintiff's knowledge that the perpetrator was the defendant's employee "and may have used that role" to abuse the plaintiff did not trigger accrual**. *Id.* at 142. That knowledge alone did not "support the inference that [the defendant's] higher-ups ***condoned*** [their employee's] conduct," as required to show deliberate indifference. *Id.* (emphasis added). Rather, a jury could reasonably have found that a diligent plaintiff would *not* have discovered the basis for his claim until decades later, "when the social media posts and press coverage first publicized [the city's] alleged deliberate indifference to the sexual abuse of [other] minors by [police] officers, thus alerting [the plaintiff] that [the city's] actions or inaction may have also been a cause of his injury." *Id.* at 145. The court thus reversed the grant of summary judgment for the defendant city. *Id.*

3. Plaintiffs Reasonably Trusted Harvard to Act on Complaints of Harassment Until 2020, When the Media Revealed Its Pattern of Inaction

Plaintiffs similarly had no reason to blame Harvard—as opposed to Comaroff—until the 2020 media reports and their aftermath revealed Harvard's repeated inaction. Harvard's policies promised that Harvard would "address incidents of alleged harassment," "prevent its recurrence," and "protect" students from retaliation. Am. Compl. ¶¶ 304-05, 309. A reasonable student would have trusted Harvard to keep that promise. As in *Ouellette*, until 2020, Plaintiffs had "no reason to suspect that [Harvard's Title IX Office] was not doing its job." 977 F.3d at 143. Indeed, before May 2019, **Plaintiff Kilburn did not even know that Comaroff had harassed another student**—let alone that Harvard failed to investigate those reports. *See* Am. Compl. ¶¶ 113, 141-43. Only after she learned of HS 2's complaint and the *Crimson*'s 2020 "press coverage first publicized [Harvard's] alleged deliberate indifference" did Kilburn have reason to infer that Harvard had not investigated prior complaints about Comaroff and others and was therefore responsible for her harassment. *See Ouellette*, 977 F.3d at 145; *see* Am. Compl. ¶¶ 141-43.

The same holds true for Czerwienski and Mandava. Although they knew that Comaroff had harassed HS 2 in 2017, they reasonably "trusted that Harvard, informed of Professor Comaroff's harassment, would take action to stop" it and prevent retaliation. Am. Compl. ¶ 79. Until 2020, they did not know that the Title IX Officer believed he could not protect students against retaliation or "of Harvard's pattern of deliberate indifference to reports against faculty." *Id.* ¶¶ 131, 143. They also could not reasonably have known of Harvard's practice of failing to investigate reports to the Title IX office (like HS 2's) unless the student herself initiated a formal complaint with ODR, and they did not know that Harvard used that excuse to ignore complaints against multiple professors in the Department for years. *Id.* ¶¶ 127-43. It is at least plausible that until these facts emerged, "a reasonable person would believe that [Harvard] took [HS 2's] allegations seriously and conducted an appropriate investigation."[14] *See Ouellette*, 977 F.3d at 143; *see also Karasek*, 500 F. Supp. 3d at 981, 971-72 (holding that plaintiff's claim did not accrue when she learned the school had received reports of "past assaults in the same club" and *by her assailant*; instead, her claim accrued when a public report revealed facts showing the university's broader "policy of deliberate indifference"); *accord Lozano*, 408 F. Supp. 3d at 875-77, 900-01 (Title IX claim was timely even though the plaintiff knew *she* reported two prior assaults by the same perpetrator; her claims did not accrue until public reports revealed the university's "pervasive" failure to respond to "a known issue of sexual misconduct" in its football program).

Nor did Czerwienski's *post*-retaliation complaint to Avakian in October 2017 alert her or Mandava that Harvard's deliberate indifference had exposed them to Comaroff's retaliation in the first place. *See Ouellette*, 977 F.3d at 142-43 (plaintiff's post-assault complaints did not trigger

[14] Indeed, the Court can plausibly infer that a student would have believed from Comaroff's threat that Harvard had approached him to investigate his harassment of HS 2, thereby alerting him that students were talking.

accrual of pre-assault claims even at the summary judgment stage); *Hernandez*, 274 F. Supp. 3d at 617 (pre-harassment claims timely even though post-reporting claims were time-barred; plaintiff knew that the university failed to respond to her own complaint but not that its policy of indifference led to her assault); *see also Dutchuk*, 2020 WL 5752848, at *5 (same).[15] Plaintiffs had no reason to believe that Harvard had ignored prior complaints, thus exposing them to retaliation.

It simply cannot be said that the Complaint "leave[s] no doubt that [Plaintiffs'] claim[s] [are] time-barred." *Maffeo*, 537 F. Supp. 3d at 47 (quoting *LaChapelle*, 142 F.3d at 509).

C. Plaintiffs' Claims Are Timely Under the Continuing Violation Doctrine

Plaintiffs' Title IX claims are also timely under the continuing violation doctrine. As Harvard agrees, "[t]he continuing violation doctrine . . . creates an equitable exception to the [statute of limitations] when the unlawful behavior is deemed ongoing." *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 405 (1st Cir. 2002). If a violation is of a "continuing nature," a complaint "may be timely as to all discriminatory acts encompassed by the violation so long as the [complaint] is filed during the life of the violation or within the statutory period," which commences upon the violation's termination. *O'Rourke v. City of Providence*, 235 F.3d 713, 730 (1st Cir. 2001). The First Circuit "has recognized two types of continuing violations: serial violations and systemic violations." *Thornton v. United Parcel Serv., Inc.*, 587 F.3d 27, 33 (1st Cir. 2009). Harvard's deliberate indifference to Professor Comaroff's harassment and retaliation—and the hostile environment it created—qualifies as both.

1. The Continuing Violation Doctrine Applies to Title IX Claims

The continuing violation doctrine clearly apples to Title IX claims. Every reported case to have addressed the issue in this circuit, as well as the Massachusetts Appeals Court, and every

[15] Even if Czerwienski's post-retaliation complaint could trigger accrual, as explained above, Plaintiffs plausibly allege that Mandava and Czerwienski reasonably trusted Harvard to handle such complaints before 2020.

other circuit to address the issue has applied the continuing violation doctrine to Title IX claims.[16] In *Doe v. Brown*, the court explicitly rejected Harvard's argument that differences between Title IX and Title VII made the doctrine nontransferable, correctly noting that "the First Circuit looks to Title VII for guidance in interpreting Title IX." 327 F. Supp. 3d at 480.[17] And the First Circuit has also applied the doctrine to a range of other civil rights claims, including under § 1983. *Fincher v. Town of Brookline*, 26 F.4th 479, 486 (1st Cir. 2022); *see also DePaola v. Clarke*, 884 F.3d 481, 486 (4th Cir. 2018) (explaining that continuing violation doctrine is "a general principle of federal common law" that applies to claims for deliberate indifference under § 1983, and "**no circuits have held to the contrary**") (listing similar holdings in four other circuits).

Harvard cites no case holding that Title IX is an exception. *See* Def. Br. 13-14 (citing *Folkes v. N.Y. Coll. Of Osteopathic Med. Of N.Y. Inst. of Tech.*, which did "not reach a holding on that issue," 214 F. Supp. 2d 273, 289 (E.D.N.Y. 2002)). And Harvard's argument based on Title IX's purported "contractual" nature has not been accepted by any court—and would, if anything, double the limitations period.[18] There are no grounds to deviate from the weight of authority.

2. Plaintiffs Allege a Systemic Continuing Violation

"[A] systemic violation need not involve an identifiable, discrete act of discrimination transpiring within the limitation period. A systemic violation has its roots in a discriminatory

[16] *See Doe v. Brown Univ.*, 327 F. Supp. 3d at 408; *LeGoff*, 23 F. Supp. 2d at 128; *Morrison*, 56 Mass. App. Ct. at 792-98; *see also Sewell v. Monroe City School Bd.*, 974 F.3d 577, 584 n.2 (5th Cir. 2020); *Papelino*, 633 F.3d at 91 (2d Cir.); *Stanley v. Trs. of Cal. State Univ.*, 433 F.3d 1129, 1136-37 (9th Cir. 2006).

[17] The continuing violation doctrine applies to hostile environment claims "based on [their] cumulative nature," not for any reason specific to Title VII. *Sewell*, 974 F.3d at 583-84 & n.2 (holding that the doctrine applies to such claims under **Title IX** because such claims "arise[ ] from the 'cumulative effect of individual acts,' some of which 'may not be actionable on [their] own.'") (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002)).

[18] If Plaintiffs' Title IX claims are "contractual" in nature, Def. Br. 14, then Massachusetts' six-year statute of limitations for *contract* claims applies. *See Owens v. Okure*, 488 U.S. 235, 236 (1989) (holding that the forum state's most analogous "general" statute of limitations should apply to federal civil rights claim); *Riley v. Metro. Life Ins. Co.*, 744 F.3d 241, 245 (1st Cir. 2014) (holding that Massachusetts six-year statute of limitations applied to federal ERISA claim because the claim was most analogous to a contract claim—and applying the discovery rule).

policy or practice; so long as the policy or practice itself continues into the limitation period, a challenger may be deemed to have filed a timely complaint." *Jensen v. Frank*, 912 F.2d 517, 523 (1st Cir. 1990) (citation omitted). "In other words, if both discrimination and injury are ongoing, the limitations clock does not begin to tick until the invidious conduct ends." *Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 183 (1st Cir. 1989); *see also AKM LLC v. Sec'y of Labor,* 675 F.3d 752, 763 (D.C. Cir. 2012) (Garland, J., concurring) ("[W]here a . . . statute [ ] imposes a continuing obligation to act, a party can continue to violate it until that obligation is satisfied and the statute of limitations will not begin to run until it does."). A university's ongoing policy or practice of deliberate indifference to sexual harassment or retaliation continues its violation against the plaintiffs so long as they are students to whom the school owes an obligation under Title IX.[19]

Harvard's ongoing failure to address and remediate Comaroff's harassment, of which it was aware since at least 2016, constitutes an ongoing violation of Title IX. As explained above, the Complaint alleges a custom and practice of deliberate indifference to sexual harassment and retaliation by faculty, which has continued and exposed Plaintiffs to harm within the limitations period. *Supra* at 10-13, 16-19. As "both the discrimination and injury were ongoing," Plaintiffs have alleged a plausible systemic violation. *See Mack*, 871 F.2d at 183; *Heard*, 253 F.3d at 318.

3. Plaintiffs Allege a Serial Continuing Violation

Under both federal and state law, a complaint states a continuing violation if it alleges "an ongoing series of discriminatory acts and there is some violation within the statute of limitations period that anchors the earlier claims," which may be "nonsexual." *O'Rourke*, 235 F.3d at 730;

[19] *See Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 974 (9th Cir. 2010) (the "university's ongoing and intentional failure to provide equal athletic opportunities for women [was] a systemic violation" under Title IX and § 1983 while "the plaintiffs were students and therefore subject to the policy"); *see also Heard v. Sheahan*, 253 F.3d 316, 318 (7th Cir. 2001) (when a prison continually fails to treat a prisoner's medical condition, the violation "continue[s] for as long as the defendants ha[s] the power to do something about [the] condition, which is to say until [the prisoner] le[aves] the jail"); *accord DePaola*, 884 F.3d at 487 (same).

Morrison, 56 Mass. App. Ct. at 797; *cf. Sheehan v. Verizon Commc'ns, Inc.*, No. 04-12364, 2005 WL 8175875, at *6 (D. Mass. May 10, 2005) (Dein, J.) (The definition of "sexual harassment" applicable to c. 214 § 1C covers not only "requests for sexual favors," but also harassment directed a plaintiff because of her gender.). "Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." *Morgan*, 536 U.S. at 117. Contrary to Harvard's suggestion, Def. Br. 15, "***a timely 'anchoring act' need not on its own be actionable***"; it need only "'contribut[e] to' the impermissibly harassing environment." *Nieves-Borges v. El Conquistador P'ship, L.P., S.E.*, 936 F.3d 1, 9 (1st Cir. 2019). Plaintiffs allege at least four.

First, as to Kilburn, the Complaint alleges that "throughout the fall 2018 semester," after Comaroff had kissed her and groped her, and after she made clear she did not want to meet with him alone, Comaroff repeatedly asked Kilburn to meet alone off campus. Am. Compl. ¶ 103. These repeated invitations were "actionable harassment," as Harvard concedes. Def. Br. 30; *see Morrison*, 56 Mass. App. Ct. at 796-97 (jury could conclude that, against the backdrop of supervisor's prior pattern of sexual harassment, his unwanted invitations to lunch were sex-based and anchored the plaintiff's entire claim). As explained above, the limitations period for both Plaintiffs' Title IX and Massachusetts claims begins on October 26, 2018, in the middle of the fall 2018 semester during which Comaroff continued this actionable harassment. *See Silva*, 2022 WL 1473727, at *5 & n.7 (citing *Shaw's Supermarkets, Inc. v. Melendez*, 488 Mass. 338, 342 (2021)). The fall 2018 invitations thus anchor Kilburn's claims and render them timely in their entirety.

Second, the Complaint alleges that in 2019, when Comaroff realized Kilburn was avoiding him, he responded with possessive behavior—he pressured her to change her area of study to one in which he alone specialized and ***forbade*** her from working with her other advisor, thereby

"mak[ing] her entirely beholden to him and more vulnerable to his sexual advances." Am. Compl. ¶ 105. Kilburn tried to avoid him, but he then attempted to "force his way" into a small space with her "[a]gainst [her] physical resistance"—a moment that was "a breaking point." *Id.* ¶¶ 106-07.

Viewed in the context of Comaraff's long pattern of harassment, it is plausible to infer that Comaroff engaged in this conduct to thwart Kilburn's attempts to avoid forced sexual intimacy and thus that Comaroff committed these acts because of her gender. *See*, *e.g.*, *Papelino*, 633 F.3d at 91 (non-sexual acts anchored Title IX claim because "[a] reasonable jury could find that [professor] engaged in this conduct because [student] rejected her sexual advances" and acts were "part of a pattern" that "alter[ed] the conditions of [the student's] educational environment"); *Heywood v. Buckley*, 2017 WL 1838466, at *3 (Mass. Super. Mar. 28, 2017) (holding that non-sexual conduct was "part of a course of conduct to harass [the plaintiff] because she rejected the sexual conduct" and anchored her claim under Massachusetts law).[20] Even if non-sexual, this conduct—the attempted "denial of [the] support" of her other advisor, interference with her work, and intrusive physical conduct—"undermine[d] [Kilburn's] ability to succeed at her job" and "contribute[d] to a hostile work environment" she faced. *See O'Rourke*, 235 F.3d at 729-30. These 2019 acts, too, anchor Kilburn's claim within the limitations period.

Third, **both** Harvard's failure to investigate Plaintiffs' complaints in 2019 **and** its clearly unreasonable investigation in 2020-22 each anchor all three Plaintiffs' claims, as does the retaliation to which that deficient investigation exposed them. *See supra* at 17-19; *Cook*, 948 F. Supp. 2d at 43 (institution's "failure to take adequate steps in response to [the plaintiff's]

[20] *See also Eisenhour v. Cty.*, 897 F.3d 1272, 1276 (10th Cir. 2018) (supervisor's "possessive" behavior, including placing restrictions on when employee could use leave time, contributed to hostile environment); *McFarland v. Henderson*, 307 F.3d 402, 408-09 (6th Cir. 2002) (supervisor's "poor treatment" of plaintiff that "stemmed from her earlier rejection of his sexual advance" anchored claim); *Tainsky v. Clarins USA, Inc.*, 363 F. Supp. 2d 578, 584 (S.D.N.Y. 2005) ("possessive" and intrusive behavior was gender-based and contributed to hostile environment).

complaint" was itself "an act of discrimination" that anchored continuing violation); *Keel v. Del. State Univ. Bd. of Trs.*, 2020 WL 2839222, at *6 (D. Del. 2020) ("[B]y failing to address Plaintiffs' allegedly repeated complaints" about harasser, the school "engaged in acts during the limitations period" that anchored claims under Title IX).[21] A school's deliberate indifference to a complaint of sexual harassment may itself contribute to the hostile environment. *Supra* at 18-19; *Fitzgerald*, 504 F.3d at 173; *Dixon*, 504 F.3d at 85. Thus, "a failure to investigate claims of sexual harassment may be evidence of a hostile environment and may continue the substantive violation of a plaintiff's rights to work free of sexual harassment." *Ruffino*, 908 F. Supp. at 1039. Just so here.

Fourth, as explained above, "acts of sexual harassment directed against others that were known to the plaintiff, and the defendant's failure to discipline anyone for the acts, or effectively to remedy them" also contribute to a "hostile environment." *Cuddyer*, 434 Mass. at 541; *Ruffino*, 908 F. Supp. at 1038-1039 & n. 34. In 2019, Kilburn shared Comaroff's ongoing harassment with Mandava, who was "disturbed to learn that Professor Comaroff had continued his abuse." Am. Compl. ¶ 114. And from 2019 to 2020, all three Plaintiffs learned that Harvard failed to respond to yet more harassment and retaliation in their Department by Comaroff, Bestor, and Urton, and that Comaroff intimidated witnesses. *See id.* ¶¶ 124-143, 153-57. Finally, Harvard's deficient investigation exposed Plaintiffs to retaliation, including public reprisals from faculty in 2022. *See id.* ¶¶ 188-202. These unremedied acts of harassment and retaliation further anchor Harvard's ongoing indifference in the limitations period. *See Cuddyer*, 434 Mass. at 541.[22]

[21] *See also Carter v. Englander*, 2018 WL 6593934, at *3 (D.N.H. Aug. 22, 2018) (§ 1983 deliberate indifference claims timely because institution continued to refuse requests to treat prisoner's medical condition until his release).

[22] Under Massachusetts law, a plaintiff must file suit once she "knew or reasonably should have known then that her [educational] situation was pervasively hostile and unlikely to improve," such that "a reasonable person in her position" would have sued. *Morrison*, 56 Mass. App. Ct. at 797. All three Plaintiffs meet this requirement. "The fact that [Plaintiffs] filed . . . internal complaint[s]" in 2019 and 2020 shows that they "reasonably believed that [their] work environment could improve" through Harvard's process. *See Cook*, 948 F. Supp. 2d at 44 (A "plaintiff is entitled and . . . should be encouraged to wait a reasonable time for the employer to respond by investigating and remedying the situation before" suing.). Moreover, before Comaroff's April 2019 behavior brought the harassment to a "breaking

IV. Count Three States a Claim for Gender Discrimination Under Title IX

Count Three alleges that Harvard's archaic independent-corroboration requirement rests on biases against the credibility of women. This is an actionable Title IX violation.

Plaintiffs state a claim for gender discrimination under Title IX if they "allege (1) 'particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding' and (2) 'particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding.'" *Doe v. Wentworth Inst. of Tech., Inc.*, No. 1:21-10840, 2022 WL 1912883, at *5 (D. Mass. June 3, 2022) (Talwani, J.); *accord* Def. Br. 26. Plaintiffs satisfy the second prong if they allege facts that "tend to show that there was a causal connection between the outcome of [the plaintiff's] disciplinary proceedings and gender bias." *Doe v. Trs. of Boston Coll.*, 892 F.3d 67, 91 (1st Cir. 2018). Gender bias is shown by alleging that the university relied on "archaic assumptions" about women to find against the plaintiff in a sexual harassment investigation. *Bleiler v. Coll. of Holy Cross*, No. 11-11541, 2013 WL 4714340, at *5 (D. Mass. Aug. 26, 2013) (Casper, J.).

Plaintiffs identify such an "archaic assumption": The Complaint pleads that Harvard insists on independent corroboration beyond a woman's testimony before it will hold a professor responsible for sexual harassment and cites specific examples of this practice.[23] Plaintiffs further allege a scholarly consensus that "the archaic historical requirement of independent corroboration in cases of gender violence (and sexual assault in particular) rests on biases against women as lacking credibility." Am. Compl. ¶ 206. And they plead that Harvard applied its biased practice of requiring independent corroboration when it adjudicated Plaintiffs' complaints. *Id.* ¶ 176 ("ODR

point," [Kilburn] believed she could manage [ ] Comaroff's behavior by avoiding him." Am. Compl. ¶ 107.

[23] *See* Am. Compl. ¶¶ 134, 206 (another complainant attested that Harvard has "ignored some of the most egregious cases of harm and sexual harassment that were brought to their office because of lack of documentary evidence" and alleging that Harvard ignored female professor's allegations against Bestor due to lack of independent corroboration).

disregarded Ms. Mandava's testimony . . . because it found that Ms. Mandava offered insufficient independent corroboration."); ¶ 178 (ODR "disregarded much of Ms. Czerwienski's relevant testimony for lack of independent corroboration."). They also allege that these practices disproportionately harm women, who make up three quarters of complainants at Harvard. *Id.* ¶ 214. These facts state a claim for gender discrimination under Title IX. *See, e.g.*, *Yusuf v. Vassar Coll.*, 35 F.3d 709, 716 (2d Cir. 1994) (allegations of biased investigation stated Title IX claim).

V. Count Seven States a Claim for Negligent Hiring, Retention, and Supervision

The Complaint also states a plausible claim for negligence because it alleges that Harvard "knew, or should have known, that [Professor Comaroff] had a proclivity to commit the complained-of acts, and . . . nevertheless failed to take corrective action," causing harm to Plaintiffs. *See Bloomer*, 2010 WL 3221969, at *9. Harvard does not dispute that the discovery rule applies to this claim. *See Bowen v. Eli Lilly & Co.*, 408 Mass. 204, 205 (1990). And Plaintiffs do not allege they were "aware of Harvard purportedly mishandling its supervision (and presumably retention) of Comaroff by . . . Spring of 2017." Def. Br. 31-32.[24] As explained earlier, Plaintiffs allege the opposite. *See supra* § III. This claim is therefore timely for the reasons set forth above.

VI. Count Eight States a Claim for Breach of Contract

Harvard's failure to prevent harassment, protect its students from retaliation, and provide a prompt and equitable investigatory process also breached its contract with Plaintiffs. Under Massachusetts law, "the relationship between a student and a university is based on contract" whose terms are in "the Student Handbook and other college materials." *Doe v. W. New England Univ.*, 228 F. Supp. 3d 154, 169 (D. Mass. 2017). In reviewing student breach of contract claims,

[24] The allegations to which Harvard points (Def. Br. 32) allege only that Plaintiffs knew of *Comaroff's* harassment and retaliation, not that they knew of Harvard's deficient handling of reports. *See* Am. Compl. ¶¶ 56, 65-66, 77, 96.

the First Circuit and Massachusetts courts construe the school's sexual misconduct policies as the university "should reasonably expect" a student would construe them. *Sonoiki v. Harvard Univ.*, 37 F.4th 691, 704 (1st Cir. 2022). "If the facts show that the university has 'failed to meet the student's reasonable expectations,' the university has committed a breach." *Id.*

Harvard's written policies promise that Harvard will "prevent incidents of sexual and gender-based harassment from denying or limiting an individual's ability to participate in or benefit from the University's programs," "provide prompt and equitable methods of investigation and resolution to stop discrimination, remedy any harm, and prevent its recurrence," and "protect" students from retaliation. Am. Compl. ¶¶ 304, 309. Harvard admits that its sexual harassment policy gives it "an obligation to keep the community safe and to address incidents of alleged harassment ***that it knows about or reasonably should know about***." *Id.* ¶ 305 (emphasis added).

These statements are far from the "generalized" and "aspirational" statements found not binding in *G. v. Fay School. See* 931 F.3d 1, 12 (1st Cir. 2019) (involving statements that the school saw "[m]utual respect and civility" as "a central aspect of healthy communities" and "expect[ed] all members of the community to respect the rights of others and to behave appropriately at all times"). Indeed, they track the Department of Education's interpretation of Title IX's requirements effective from 2011 through 2017. *See* 2011 Dear Colleague Letter at 4 ("If a school knows or reasonably should know about . . . harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects."). And the DOE's binding regulations—still in effect today—require the "prompt and equitable resolution" of complaints alleging Title IX violations. 34 C.F.R. § 106.8(c). A reasonable student would not have expected that the University viewed the agency's directives as too "generalized" and "aspirational" to describe obligations, as Harvard

now suggests. Rather, students would expect the University to abide by federal requirements.

Harvard's failure to address harassment about which it knew or reasonably should have known breached Harvard's promise to "provide prompt and equitable methods of investigation and resolution to stop discrimination, remedy any harm, and prevent its recurrence." Am. Compl. ¶ 304. Plaintiffs thus state a claim for breach of contract. *Wentworth*, 2022 WL 1912883, at *6 (student stated claim that university breached contract by violating its sexual misconduct policy); *Guckenberger v. Bos. Univ.*, 957 F. Supp. 306, 317 (D. Mass. 1997) (students stated breach of contract based on school's failure to provide accommodations promised in promotional materials).

VII. Count Nine States a Claim for Breach of the Covenant of Good Faith and Fair Dealing

Beyond the express terms of its policies, Harvard also breached the covenant of good faith and fair dealing. That covenant provides that "neither party shall do anything that will have the effect of destroying or injuring the rights of the other party to receive the fruits of the contract." *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 471 (1991). Comaroff's harassment and retaliation, and Harvard's failure to protect Plaintiffs even though it knew or should have known of the risk he posed—or to respond promptly or equitably when they complained—deprived Plaintiffs of the educational and career opportunities that they reasonably expected to receive in exchange for their labor, tuition payments, and fees. *See* Am. Compl. ¶¶ 223-31, 289; *see also Doe v. Harvard Univ.,* 462 F. Supp. 3d 51, 66-67 (D. Mass. 2020) (claims based on covenant survived based on allegations that Harvard failed to fulfill student's reasonable expectations that arose from its sexual misconduct policies). Plaintiffs therefore state a claim.

CONCLUSION

Drawing all reasonable inferences in Plaintiffs' favor, as required at the pleadings stage, Plaintiffs' Complaint states timely claims. The Court should deny Harvard's Motion to Dismiss.

Dated: August 23, 2022

Respectfully submitted,

/s/ Russell Kornblith
Russell Kornblith (*pro hac vice*)
Carolin Guentert (*pro hac vice*)
SANFORD HEISLER SHARP, LLP
1350 Avenue of the Americas, 31st Floor
New York, New York 10019
Telephone: (646) 402-5650
rkornblith@sanfordheisler.com
cguentert@sanfordheisler.com

Sean Ouellette (BBO# 697559)
SANFORD HEISLER SHARP, LLP
700 Pennsylvania Avenue SE, Suite 300
Washington, DC 20003
Telephone: (202) 499-5200
souellette@sanfordheisler.com

Attorneys for Plaintiffs