UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOHN DOE,

Plaintiff, 5:19-cv-00190 (BKS/ATB)

v.

SYRACUSE UNIVERSITY, SYRACUSE UNIVERSITY BOARD OF TRUSTEES, SHEILA JOHNSON-WILLIS, in her individual capacity, and BERNERD JACOBSON, in his individual capacity,

Defendants.

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Hon. Brenda K. Sannes, United States District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff John Doe commenced this action against Defendants Syracuse University (the "University"), the Syracuse University Board of Trustees, Sheila Johnson-Willis, and Bernerd Jacobson. (Dkt. No. 1). Following this Court's February 21, 2020 decision and order on Defendants' partial motion to dismiss, Plaintiff's Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX") and several breach of contract claims remain. *Doe v. Syracuse Univ.* ("*Doe I*"), 440 F. Supp. 3d 158 (N.D.N.Y. Feb. 21, 2020).

Presently before the Court is Defendants' appeal, (Dkt. No. 51), of the March 25, 2020 Decision and Order (the "Order") issued by Magistrate Judge Andrew T. Baxter. (Dkt. No. 48). Magistrate Judge Baxter's Order requires disclosure of redacted versions of certain records retained by the University Counseling Center and Tekhara Watson. *Doe v. Syracuse Univ.* ("*Doe II*"), No. 19-cv-00190, 2020 WL 1443023, 2020 U.S. Dist. LEXIS 51394 (N.D.N.Y. Mar. 25, 2020). The records contain reports regarding "RP," the complainant in underlying Title IX proceedings, and include communications between RP and Ms. Watson, a licensed therapist employed by the University. Defendants move to reverse the Order in its entirety, and Plaintiff opposes. (Dkt. Nos. 51, 56). On July 21, 2020, based on Defendants' argument, on appeal, that the records were subject to a "confidential patient-therapist privilege" the Court ordered supplemental briefing directing the parties to address the potential application of the federal psychotherapist-patient privilege. (Dkt. No. 59; Dkt. Nos. 60–61). For the reasons that follow, the Order, which applied the New York State Mental Hygiene Law provision advocated by Defendants during the discovery proceedings, is reversed.

II. BACKGROUND[1]

A. Relevant Procedural History before Magistrate Judge Baxter

1. Plaintiff's Request for Production

On July 1, 2019, Plaintiff served a First Set of Requests for Production on Defendants. (Dkt. No. 51-2, at 71). As part of that request, Plaintiff sought documents concerning John Doe and RP, including "all documents concerning RP" and "[a]ll documents concerning RP's allegations of sexual misconduct against John Doe." (*Id.* at 75). Defendants objected, inter alia, on the ground that the "information and/or documents" sought "are protected from disclosure" under the Family Educational Rights and Privacy Act, 20 U.S.C § 1232g ("FERPA"). (*Id.* at 88–89). Defendants argued that "FERPA preclude[d] the University from disclosing a student's education records without consent, unless one of the defined exceptions apply." (*Id.*).

The parties were unable to independently resolve the discovery dispute, and Magistrate Judge Baxter, by Minute Entry following a November 14, 2019 telephonic conference, ordered briefing.

2. The Parties' Initial Briefing

Defendants objected to Plaintiff's request for "[a]ll documents pertaining to RP," because "[t]he University ha[d] not received written consent from RP to disclose such documents (from Plaintiff's counsel or otherwise), and none of the defined exceptions under FERPA appl[ied]." (*Id.* at 118). Defendants further objected on the grounds that the documents sought were "not relevant to the claims or defenses at issue in this litigation" and "not proportional to the needs of the case." (*Id.*). Defendants also asserted that Plaintiff had not "proffered any rationale for how 'all documents' concerning RP are relevant to this litigation and outweigh RP's privacy

[1] The Court assumes familiarity with the facts as alleged in the Complaint and set forth in the Court's decision in *Doe I*, 440 F. Supp. 3d 158.

concerns," citing to Plaintiff's burden under FERPA to show that his interests in the protected education records outweighs the student's privacy interests. (*Id.*) (citing *Doe v. Rensselaer Polytechnic Inst.*, No. 18-cv-1013, 2018 U.S. Dist. LEXIS 147468, at *7–9[2] (N.D.N.Y. Aug. 29, 2018)). Plaintiff countered that "[t]he documents in question are part of [Plaintiff's] educational records and disciplinary file," and are "directly relevant" because Plaintiff "must be able to know and hear what his accuser said against him." (*Id.* at 161).

On January 7, 2020, Magistrate Judge Baxter authorized and ordered the University, "[p]ursuant to FERPA and the Health Insurance Portability and Accountability Act of 1996 ('HIPAA') . . . to obtain, from its Counseling Center and Tekhara Watson, M.A., LMFT, any records requested by plaintiff with respect to Ms. Watson's communications with complainant RP regarding her allegations of sexual misconduct by plaintiff John Doe and the related hearings and appeals." (*Id.* at 169). Magistrate Judge Baxter ordered the University "to submit those records, after review by defense counsel, to the court for *in camera* review to determine if they should be disclosed to plaintiff." (*Id.*).

3. The Parties' Supplemental Briefing

On February 6, 2020, following supplemental oral arguments, Magistrate Judge Baxter modified the January 7, 2020 order such that Ms. Watson and the Counseling Center would "not be required to disclose any responsive records, to Syracuse University counsel, defense counsel, or to the court, until defense counsel have an opportunity to further brief the issue and the court enters a further order." (Dkt. No. 43; Dkt. No. 51-2, at 172).

[2] No Westlaw citation available.

a. Defendants' Supplemental Brief and Declaration Regarding Ms. Watson

In their briefing to Magistrate Judge Baxter, Defendants asserted that Ms. Watson's communications with RP, which they call "counseling records," are "privileged and confidential." (*Id.* at 174, 176). Defendants cited, inter alia, New York Mental Hygiene Law § 33.13(c) (the "Mental Hygiene Law").[3] (*Id.* at 176–77). Defendants asserted that under this law, "courts will not order disclosure of confidential mental health records unless there is a finding that the interests of justice substantially outweigh the need for confidentiality," (*id.*), and that here the interests of justice did not outweigh the need for confidentiality. (*Id.* at 176). Defendants argued that "it is critical for the Counseling Center to protect the confidentiality of its counseling records. By guaranteeing confidentiality . . . the Counseling Center provides the necessary assurance for students to seek the treatment and support they may need." (*Id.*).

Defendants no longer relied on FERPA. Defendants asserted that the "[r]ecords maintained by the University's Counseling Center are not 'education records' under FERPA. Rather, they are 'treatment records,' which are specifically excluded from the definition of 'education records.'"[4] (*Id.* at 178).

Defendants submitted a declaration by Cory Wallack, PhD, the Executive Director of Health and Wellness at Syracuse University, stating as follows. (Dkt. No. 44-1). The University

[3] Defendants also noted that Ms. Watson is a "[m]ental health practitioner . . . licensed by New York State pursuant to the state's Education Law." (Dkt. No. 44, at 3). According to Defendants, as a licensed mental health provider, Ms. Watson "shall not engage in 'unprofessional conduct, as defined by the board of regents in its rules or by the commissioner in regulations approved by the board of regents.'" (*Id.* (quoting N.Y. Educ. Law § 6509(9))). "Under Section 29.1(b)(8) of the Rules of the New York State Board of Regents, '[u]nprofessional conduct' includes 'revealing identifiable facts, data or information obtained in a professional capacity without the prior consent of the patient or client, except as authorized or required by law.'" (*Id.* (quoting 8 N.Y.C.R.R. § 29.1 (Part 29 of the Rules of the Board of Regents))).

[4] *See* § 1232g(a)(4)(B) (explaining what FERPA excludes under the term "Education records"); 34 C.F.R. § 99.3(b)(4) (same). Defendants conceded that "[m]ental health records maintained by the University's Counseling Center are excluded from coverage of the HIPAA Privacy Rule." (*Id.* at 178 n.2).

Counseling Center houses a Sexual and Relationship Violence Response Team ("SRVRT"), "which provides 24-hour confidential counseling and support to the University's students who have experienced sexual or relationship violence." (*Id.* ¶ 3). The SRVRT "is intended to provide invaluable support to students who experience sexual assault, including ensuring victims' physical safety, and mitigating the mental and emotional harm caused by sexual assault." (*Id.*). SRVRT therapists "explain the different processes involved with each reporting option, including the University's Title IX process." (*Id.* ¶ 12). If a student decides to pursue a complaint with the University's Title IX office, "SRVRT therapists provide support through ongoing counseling and by accompanying [students] to investigation interviews or administrative hearings." (*Id.*). By helping students "navigate the University's Title IX process, SRVRT therapists provide continued 'emotional and mental health' therapy and support." (*Id.* ¶ 13). The therapists "do not advocate on behalf of students in a pro-active or argumentative sense, nor do they advise them as to how to proceed." (*Id.*). During the time period relevant to this case, Ms. Watson was a licensed therapist employed by the SRVRT. (*Id.* ¶ 4).

b. Plaintiff's Supplemental Brief

In his response, Plaintiff asserted that Ms. Watson was RP's "Advisor in the disciplinary process at Syracuse," and her role as such was to "render ***procedural*** advice, ***not therapy***." (*Id.* at 181). Plaintiff argued that he "is not asking for RP's psychiatric or therapy records. Rather, he seeks discovery of Ms. Watson's records in the possession of Syracuse concerning the disciplinary proceedings in which he was unfairly expelled." (*Id.* at 182). Plaintiff argued that "Syracuse could have, but did not, separate the therapeutic role of counselors from the procedural role of advisors." (*Id.* at 185).

4. Magistrate Judge Baxter's Decision and Order Following *in camera* Review

On February 25, 2020, Magistrate Judge Baxter directed the University Counseling Center and Ms. Watson "to disclose, solely to the court, for the purpose of *in camera* review, any records requested by plaintiff with respect to Ms. Watson's communications with complainant RP regarding her allegations of sexual misconduct by plaintiff John Doe and the related hearings and appeals." (Dkt. No. 47, at 3).

Following *in camera* review of those documents, in the Order at issue here, Magistrate Judge Baxter found "that Ms. Watson both served as a therapist to RP and provided her with information about her reporting options and the relevant procedures for Title IX disciplinary hearings and appeals." *Doe II*, 2020 WL 1443023, at *2, 2020 U.S. Dist. LEXIS 51394, at *4. He noted that "[p]ortions of Ms. Watson's notes are relevant to [P]laintiff's theories that Syracuse University's disciplinary proceedings were procedurally unfair and biased against male students." *Id.* Magistrate Judge Baxter applied the Mental Hygiene Law and concluded that, "with respect to those portions of Ms. Watson's records, the interests of justice substantially outweigh the need for confidentiality, under the legal standard the defendants now advocate."[5] *Id.* Magistrate Judge Baxter also indicated that, "[t]o the extent [FERPA] or its broad policy mandates would apply to these records, the standard for a judicial order of disclosure are similar." *Id.* at *2 n.3, 2020 U.S. Dist. LEXIS 51394, at *4 n.3 (citing *Ragusa v. Malverne Union Free Sch. Dist.*, 549 F. Supp. 2d 288, 292 (E.D.N.Y. 2008)).

Magistrate Judge Baxter redacted the records created by Ms. Watson in an effort "to disclose only those portions of her advice that related to reporting options and procedures

[5] Magistrate Judge Baxter noted that "[t]he parties have taken different, and sometimes shifting positions with respect to the legal standards applicable to the decision whether to order disclosure of some of Ms. Watson's records relating to RP." *Doe II*, 2020 WL 1443023, at *1 n.2, 2020 U.S. Dist. LEXIS 51394, at *2 n.2.

relating to Title IX disciplinary proceedings." *Id.* at *2, 2020 U.S. Dist. LEXIS 51394, at *4–5.[6] Magistrate Judge Baxter noted that "[p]resumably, in deciding whether to object to [his] ruling, the Counseling Center will disclose the *redacted* records to, and seek advice from, counsel for Syracuse University, or some other attorney, which would be consistent with, and authorized by, [his] ruling" and that if the ruling was "not appealed within the requisite 14-day period, the redacted records will be disclosed to all parties." *Id.* at *2, 2020 U.S. Dist. LEXIS 51394, at *6. The present appeal followed.

B. The Parties' Arguments on Appeal

1. Initial Briefing

On appeal, Defendants described "the issue" as one concerning "the confidential patient-therapist privilege," asserting that Ms. Watson's communications with RP are "privileged and confidential" under the Mental Hygiene Law; they assert that, under that law, "the interests of justice do not outweigh the need for confidentiality." (Dkt. No. 51-3, at 16–18).[7] Defendants acknowledged that Ms. Watson was also RP's advisor during the Title IX process and noted that Ms. Watson "connected RP to [Defendant] Bernerd Jacobson . . . to pursue a Title IX disciplinary proceeding against Plaintiff." (Dkt. No. 51-3, at 11–12). Defendants argued that Magistrate Judge Baxter's "reclassification of portions of the records was an abuse of discretion" and that, to the extent the counseling records at issue contain "procedural advice," those records

[6] Magistrate Judge Baxter noted that these redacted records would be subject to the October 9, 2019 protective order in place in this action, (Dkt. No. 51-2, at 110–14). *Doe II*, 2020 WL 1443023, at *2, 2020 U.S. Dist. LEXIS 51394, at *5.

[7] Defendants mentioned a "patient-therapist privilege" and "therapist-patient privilege," but did not provide any analysis of the federal psychotherapist-patient privilege. (Dkt. No. 51-3, at 5, 21).

are "intertwined with privileged material" with "no objective way to distinguish between mental health advice," "counseling," and "a discussion of procedural options." (*Id.* at 21).[8]

Plaintiff argued that Magistrate Judge Baxter correctly balanced relevant considerations under the Mental Hygiene Law, (Dkt. No. 56, at 13–14), that the records at issue are part of Plaintiff's disciplinary record and therefore subject to disclosure under FERPA, (*id.* at 18), and that Defendants' public policy arguments are without merit. (*Id.* at 19–22). Plaintiff also argued that the Order "cannot be disturbed even under" the federal psychotherapist-patient privilege. (*Id.* at 14–16).

2. Supplemental Briefing

In light of Defendants' assertion on appeal that the issue here concerns "the confidential patient therapist privilege," (Dkt. No. 51-3, at 5), and the absence of briefing on the federal psychotherapist-patient privilege, the Court ordered supplemental briefing regarding the application of the federal psychotherapist-patient privilege to the records at issue. (Dkt. Nos. 59–61). Specifically, Defendants were directed to brief: (1) how the federal psychotherapist-patient privilege applies to the redacted documents Magistrate Judge Baxter ordered produced, including whether the privilege applies to a record of a complainant's report to the University Department of Public Safety, attended by a therapist; (2) whether the privilege applies to records reflecting conversations that a patient agreed could be reported to a University's Title IX Office; and (3) whether the privilege applies to summary reports of meetings, attended by a therapist, between a patient and others. (Dkt. No. 59).

In their supplemental briefing, Defendants argued—for the first time in these proceedings—that the federal psychotherapist-patient privilege applies to all of the records at

[8] Defendants maintained their position that FERPA does not apply. (Dkt. No. 51-3, at 22–23).

issue because the records were confidential and made in the course of RP's treatment. (Dkt. No. 60). Plaintiff responded that to the extent the records at issue were not "confidential communications" made "in the course of psychotherapy," the privilege does not apply and that to the extent that RP elected to share her communications with Ms. Watson with others the privilege was waived. (Dkt. No. 61, at 3–6).

III. STANDARD OF REVIEW

"A district court judge reviewing a magistrate judge's non-dispositive ruling may not modify or set aside any part of that order unless it is clearly erroneous or contrary to law." *Gregory v. Stewart's Shops Corp.*, No. 14-cv-00033, 2016 WL 5409326, at *2, 2016 U.S. Dist. LEXIS 133136, at *3 (N.D.N.Y. Sept. 28, 2016) (citing *Labarge v. Chase Manhattan Bank*, No. 95-cv-173, 1997 WL 583122, at *1, 1997 U.S. Dist. LEXIS 13803, at *2 (N.D.N.Y. Sept. 3, 1997)); 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). "A finding is clearly erroneous if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Malowsky v. Schmidt*, No. 15-cv-666, 2017 WL 5496068, at *2, 2017 U.S. Dist. LEXIS 229306, at *5 (N.D.N.Y. Jan. 9, 2017). "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law, or rules of procedure." *Id.* at *2, 2017 U.S. Dist. LEXIS 229306, at *5; *see also In re Hulley Enters. Ltd.*, 400 F. Supp. 3d 62, 70 (S.D.N.Y. 2019); *E.E.O.C. v. First Wireless Grp., Inc.*, 225 F.R.D. 404, 405 (E.D.N.Y. 2004). As such, a Magistrate Judge's order is clearly erroneous and contrary to law where the Magistrate applies an incorrect legal standard. *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 119 F.R.D. 625, 626 (E.D.N.Y. 1988).

IV. DISCUSSION

A. Applicable Law

In the proceedings before Magistrate Judge Baxter, Defendants argued that the Mental Hygiene Law applied to the records at issue. (Dkt. No. 51-2, at 176–77). Now, on appeal, Defendants assert that the federal psychotherapist-patient privilege applies. (Dkt. No. 60, at 1–2). The Court agrees that federal rather than state law controls here. *See von Bulow by Auersperg v. von Bulow,* 811 F.2d 136, 141 (2d Cir. 1987); *Tavares v. Lawrence & Mem'l Hosp.*, No. 11-cv-770, 2012 WL 4321961, at *5, 2012 U.S. Dist. LEXIS 134881, at *20 (D. Conn. Sept. 20, 2012). "While '[s]tate rules may illustrate important privacy interests,' wholesale application of state rules could 'frustrate the important federal interest in broad discovery and truth-seeking and the interest of vindicating important federal substantive policy.'" *Benacquista v. Spratt*, No. 16-cv-0581, 2017 WL 11286310, at *3 (N.D.N.Y. Mar. 7, 2017) (quoting *King v. Conde*, 121 F.R.D. 180, 187 (E.D.N.Y. 1988)).[9] Federal law controls even where, as here, "there are state law claims based on pendent and diversity jurisdiction. . . . In such situations courts consistently have held that the asserted privileges are governed by the principles of federal law." *von Bulow by Auersperg,* 811 F.2d at 141.

Magistrate Judge Baxter, consistent with Defendants' argument at that time, applied state confidentiality law—the Mental Hygiene Law—to determine whether the potentially confidential communications between RP and Watson should be disclosed. *Doe II*, 2020 WL 1443023, at *2, 2020 U.S. Dist. LEXIS 51394, at *4 (applying Mental Hygiene Law § 33.13, "the legal standard the defendants now advocate"). That application was clearly erroneous. *See Bonanno*, 119 F.R.D at 626; *Malowsky*, 2017 WL 5496068, at *2, 2017 U.S. Dist. LEXIS

[9] No Lexis citation available.

229306, at *5 ("An order is contrary to law when it fails to apply or misapplies relevant statutes, case law, or rules of procedure."). Here, as Defendants' now concede, that analysis should have been guided by federal law because Plaintiff's Title IX claims in this case are premised on a federal question, (*see* Dkt. No. 1, ¶ 15), and the Court has supplemental jurisdiction over the remaining state law claims. *See von Bulow by Auersperg,* 811 F.2d at 141.

B. Federal Psychotherapist-Patient Privilege

1. General Principles

In *Jaffee v. Redmond*, 518 U.S. 1 (1996), "the Supreme Court made clear that the federal courts are required to recognize that [1] confidential communications [2] between a licensed psychotherapist—including a licensed social worker engaged in psychotherapy—and his or her patients [3] in the course of diagnosis or treatment are protected from compelled disclosure." *In re Sims*, 534 F.3d 117, 130 (2d Cir. 2008). A party invoking this privilege must establish those three elements. *Cuoco v. U.S. Bureau of Prisons,* No. 98-cv-9009, 2003 WL 1618530, at *2, 2003 U.S. Dist. LEXIS 4766, at *5 (S.D.N.Y. Mar. 27, 2003); *see also United States v. Pugh*, 945 F.3d 9, 18 (2d Cir. 2019) ("[T]he party invoking a privilege bears the burden of establishing its applicability to the case at hand.") (alteration in original) (quoting *In re Grand Jury Subpoenas*, 318 F.3d 379, 384 (2d Cir. 2003)).

Because "confidentiality is a *sine qua non* for successful psychiatric treatment," *Jaffee*, 518 U.S. at 10, the Supreme Court "refused to endorse the proposition that a court could subject a claim of psychotherapist-patient privilege to a balancing test." *In re Sims*, 534 F.3d at 131; *Jaffee*, 518 U.S. at 10, 17. "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Jaffee*, 518 U.S. at 17. Therefore, "if the purpose of the privilege is to be served, the participants in the confidential

conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'" *Id.* at 18 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

2. Application

In their supplemental briefing, the parties primarily dispute whether the communications here are confidential and whether they were made in the course of diagnosis or treatment. "[C]ourts considering whether communications between a patient and psychotherapist are confidential have focused on the expectation of disclosure." *Tesser v. Bd. of Educ.*, 154 F. Supp. 2d 388, 392 (E.D.N.Y. 2001). The Court has reviewed the unredacted records at issue and finds that they contain a substantial amount of privileged material, as well as material not covered by the privilege—either because (1) they were not made in the course of diagnosis, (2) because RP reasonably expected they would be disclosed, or (3) both. Accordingly, some of the records here—and sometimes portions thereof—are not subject to the federal psychotherapist-patient privilege. Conversely, where necessary to protect RP's privilege, the Court has redacted the records.[10]

The records include the following unprivileged information: records reflecting conversations between RP and Watson that RP explicitly agreed could be reported to the University's Title IX Office; a record describing a report made to a Department of Public Safety officer; and records summarizing meetings attended by RP, Watson, and others. As to records where RP agreed information could be disclosed to the University's Title IX Office, RP could

[10] Plaintiff is proceeding anonymously in this case. Accordingly, the Court has also redacted Plaintiff's name where it appears.

not have expected those communications would be kept confidential. *Tesser*, 154 F. Supp. 2d at 392; *see also United States v. Romo*, 413 F.3d 1044, 1047 (9th Cir. 2005) ("Even in the face of an ongoing patient-therapist relationship, the patient and therapist may have contacts that do not involve therapy. Thus, we pay special attention to the particulars of the meeting during which the allegedly privileged information was exchanged."). And as for the records memorializing a report to the Department of Public Safety, and the records summarizing meetings attended by the RP, Watson, and others, the communications were neither confidential nor "in the course of diagnosis or treatment." *Jaffee*, 518 U.S. at 15; *United States v. Parker*, 116 F. Supp. 3d 159, 178 (W.D.N.Y. 2015) ("[T]o qualify as privileged, the communication must be made 'in the course of diagnosis or treatment.'" (quoting *Romo*, 413 F.3d at 1048)); *Romo,* 413 F.3d at 1048–49 ("[T]hat [the doctor] had previously provided [the defendant] with therapy does not mean that every interaction between the two constituted a therapy session, and this particular meeting involved no therapy"). Accordingly, as to these records, the privilege does not apply.[11]

Defendants argue that the University's "'express assurances' of confidentiality" to RP indicate that RP "had (and has) a reasonable expectation that her counseling records would remain confidential." (Dkt. No. 60, at 5). For support, Defendants cite *Callahan v. County of Suffolk*. No. 12-cv-02973, 2014 WL 1669110, 2014 U.S. Dist. LEXIS 58472 (E.D.N.Y. Apr. 24, 2014). The plaintiff there, as RP apparently did here, had "assurances of confidentiality" with respect to counseling sessions. *Id.*, 2014 WL 1669110, at *4, 2014 U.S. Dist. LEXIS 58472, at *11. However, unlike *Callahan*, here, the records also indicate that RP explicitly agreed that

[11] The Court is mindful, as Defendants note, that the records at issue pertain to RP, who is not a party to this action. (Dkt. No. 60, at 7). However, if the communications sought were "not intended to be kept confidential between the psychotherapist and the patient," they are "not privileged, even if the patient did not understand the full implications of that lack of confidentiality." *United States v. Whitney*, No. 05-cv-40005, 2006 WL 2927531, at *3 n.2, 2006 U.S. Dist. LEXIS 74522, at *8 n.2 (D. Mass. Aug. 11, 2006); *Jaffee*, 518 U.S. at 15; *Tesser*, 154 F. Supp. 2d at 392.

Watson could report their conversation to the Title IX office. And as discussed above, other records—for instance, Watson's account of a report made to the Department of Public Safety or her account of meetings with Watson, RP, and others present—plainly are not communications made in the course of treatment or diagnosis.[12] *Jaffee*, 518 U.S. at 15. Thus, the Court finds that Defendants, the party invoking the privilege, have failed to establish that the privilege applies to all of the records at issue.[13] *See Cuoco*, 2003 WL 1618530, at *2, 2003 U.S. Dist. LEXIS 4766, at *5.

In sum, the Court finds Magistrate Judge Baxter's March 25, 2020 Order was contrary to law to the extent it applied the New York confidentiality law and not the federal psychotherapist-patient privilege law.[14] Applying the federal psychotherapist-patient privilege to the records at issue reveals that they include both privileged and non-privileged material. Accordingly, the Court has redacted the records and orders Defendants to disclose the redacted records within two weeks of the date of this Order.

V. CONCLUSION

For these reasons, it is hereby

[12] The Court rejects Defendants' argument, made without citation to authority, that "[t]he fact that a third party is present during discussions memorialized in a therapist's notes has no relevance to determining whether the therapist's notes are privileged." (Dkt. No. 60, at 7). The presence of a third party undermines the argument that RP expected these communications to remain confidential. *See Jaffee*, 518 U.S. at 15; *Tesser*, 154 F. Supp. 2d at 392 ("[O]nly confidential communications made to psychotherapists may be privileged.").

[13] Defendants challenge Magistrate Judge Baxter's finding that the records at issue are "relevant to plaintiff's theories that Syracuse University's disciplinary proceedings were procedurally unfair and biased against male students." (Dkt. No. 51-3, at 18 (quoting Dkt. No. 48, at 4)). The Court finds that Magistrate Judge Baxter's finding of relevance was not clearly erroneous.

[14] The parties dispute FERPA's applicability to these records. Having considered the parties' arguments, the Court finds that (as to the remaining non-privileged material) Magistrate Judge Baxter's alternative rationale for disclosure and redaction—that a party seeking disclosure of records covered by FERPA "is required to demonstrate a genuine need for the information that outweighs the privacy interests of the students"—was not clearly erroneous. *Doe II*, 2020 WL 1443023, at *2 n.3, 2020 U.S. Dist. LEXIS 51394, at *4 n.3 (quoting *Ragusa*, 549 F. Supp. 2d at 292).

ORDERED that the Magistrate Judge's Decision and Order (Dkt. No. 48) is **REVERSED**, and that Defendants' Appeal (Dkt. No. 51) is **GRANTED** to the extent that the Court has found some portion of the records at issue to be privileged under the federal psychotherapist privilege and **DENIED** with respect to Defendants' argument that the privilege applies to all of the records sought; and it is further

ORDERED that the newly redacted version of Ms. Watson's records disclosed by the Court to the Defendants in accord with this Order are subject to the terms of the protective order in place in this action, (Dkt. No. 35), and must be provided to the Plaintiff within two weeks of the date of this Order; and it is further

ORDERED that Defendants are to maintain the original unredacted records, the records redacted by Magistrate Judge Baxter, and the records redacted by this Court in the event any of these records are necessary for any further proceedings.

IT IS SO ORDERED.

Dated: August 24, 2020
Syracuse, New York

Brenda K. Sannes
U.S. District Judge