UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

JOHN DOE, Plaintiff, vs. BROWN UNIVERSITY IN PROVIDENCE IN THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, Defendant.	Case No.: 2016-cv-17-S

MEMORANDUM IN SUPPORT OF
JOHN DOE'S EMERGENCY MOTION FOR INJUNCTIVE RELIEF

The Plaintiff, John Doe ("John"), submits this memorandum in support of his request that the Court enjoin the Defendant, Brown University in Providence in the State of Rhode Island and Providence Plantations ("Brown") from enforcing its decision of April 20, 2016 finding John responsible for sexual misconduct as alleged in the Title IX complaint of student Ann Roe. Brown has arbitrarily applied a policy that did not exist at the time of the conduct at issue, and on that basis, seeks to effectively deny John his right to appeal and prematurely terminate his academic career at Brown University.

Factual Background

This matter was previously before the Court on January 22 and 25, 2016 on a motion to enjoin Brown from immediately removing John from campus. Brown had proposed to take that action, despite any finding of danger, in response to the Title IX complaint of a woman named Rae[1] who lived in the room above John in Olney House. However, following two chamber's

[1] This is a pseudonym.

conferences, the parties reached an accommodation whereby John remained on campus in his residence hall, albeit on a different floor.

In all, three Title IX complaints were pending against John. There was Rae's complaint, one filed by Brown on behalf of a student who refused to file her own, and a third filed by Ann Roe, whose explicit text messages and sexual encounter with John are set forth in detail in John's Verified Complaint filed on January 20, 2016. Two of these Title IX complaints have now been adjudicated. Brown found John *not responsible* in Rae's complaint, but *responsible* for sexual misconduct in Ann's. The findings and decision of Ann's Title IX Panel are attached hereto as Exhibits A and B. Brown has now suspended John, effective immediately. If he wishes, John may appeal the decision, but must do so no later than 5:00 PM on Monday, April 25, 2016. Meanwhile, Brown has ordered John to vacate his residence hall and move all of his belongings off campus no later than 5:00 PM tonight, Thursday, April 21, 2016. John has nowhere to go.

In brief, Ann's complaint involved a series of text messages, hundreds actually, that culminated in a late-night rendezvous between Ann and John to watch a movie in a storage closet at Faunce House. There, John digitally penetrated Ann and Ann gave John oral sex. (Compl. ¶¶ 33-34.) Ann belatedly claimed that the encounter was non-consensual. John vehemently disagrees.

Before the encounter, Ann asked John, "What if you were sure there was no chance I would ever have sex with you? Where would you go from here?" John replied that they would be friends. Ann then asked, "And would you watch a movie with me?" John flatly said, "No." (Compl. ¶ 31). Ann nonetheless agreed to meet John for a movie at 1:20 in the morning on November 10, 2014. (Compl. ¶ 32). Their sexual activity began almost immediately. (Compl. ¶ 33). During the encounter, the motion-activated light came on twice. (Compl. ¶ 35). Ann concedes that she walked approximately ten feet, turned off the lights, and then came back

to John. (Ex. C, p. 10). As John neared ejaculation, he asked Ann if he could do so in her mouth. Ann agreed. (Ex. C, p. 11). After John ejaculated, John and Ann sat down, cuddled, and started kissing again. Approximately ten minutes later, John and Ann left the storage room together, went out the doors under the arch, gave each other a hug, and said goodbye. (Compl. ¶¶ 36-37).

Though Ann agrees that she pursued John for some time after the encounter, he rebuffed her affections and instead asked her to put in a good word for him with her best friend. (Compl. ¶ 43). On November 3, 2015, nearly one year after her intimate encounter with John, Ann filed a Title IX complaint against him alleging sexual assault. (Compl. ¶ 68). Brown assigned Attorney Djuna Perkins to investigate the complaint. (Compl. ¶ 71). Ms. Perkin's full report is attached as Exhibit C.

Though Ann claims she went home in shock and upset on that fateful night, (Compl. ¶ 68), the witnesses Ms. Perkins interviewed had a starkly different recollection. One was a friend, identified in the report as Witness 1, who was staying in Ann's dorm room. (Ex. C, p. 16). Witness 1 recounted that one night she was staying in the Complainant's room and was up until 4:00 am watching "New Girl" on Netflix when Ann came in and said, "Oh my God, I have to tell you something. Do you guys remember that guy [John] I've been telling you about?" (Ex. C, p. 16). When Witness 1 and Ann's roommate said they did, Witness 1 recalled Ann to say, "I just hooked up with him. It was like really weird because we were just in Faunce and hooked up." (Ex. C, p. 16). According to Witness 1, Ann made the whole thing sound "sexy and cool." (Ex. C, p. 16). She asked if they had sex, and Ann said, "No, but it was really hot. I mean, you know it wasn't recripocal because he only fingered me--he didn't eat me out - but we might hook up again, I don't know." (Ex. C, p. 16). Ann elaborated further and stated that she gave John a

"blowjob." (Ex. C, p. 16). Witness 1 said Ann made it sound as if she wished they had done more and was her typical "happy, bubbly" self. (Ex. C, pp. 16-17).

Ms. Perkins asked Ann about the oral sex. Ann responded that she only gave John oral sex because it was the best way to avoid intercourse with him and not feel awkward while watching the movie together. (Ex. C, p. 12). As for swallowing John's semen, Ann claimed that she did not want to leave a mess on the carpeted floor. (Ex. C, p. 11). The all-female Title IX Panel found Ann credible.

Other witnesses interviewed by Ms. Perkins recalled Ann expressing annoyance with John because he was ignoring her at mock trial. Witness 3, who is a friend of Ann, recalled Ann saying at a mock trial tournament at Yale, "[John] still hasn't talked to me. Is that what he's going to do after me giving him head?" (Ex. C, p. 19). Witness 5 remembered Ann describing the encounter in the car at a tournament in Washington, D.C. and saying that she told John, "I can't really do anything but if you want to do something [to me] you can." (Ex. C, p. 20).

The foregoing notwithstanding, on April 20, 2016, Brown found John responsible with respect to Ann's Title IX complaint. (Ex. A, p. 1). In so doing, Brown applied the definition of consent found in its *Sexual and Gender-Based Harassment, Sexual Violence, Relationship and Interpersonal Violence and Stalking Policy,* adopted on or about September 3, 2015, ten months after Ann's late-night encounter with John. (Ex. A, p. 1). At the outset of this matter, Brown agreed that current procedure would apply, but the substantive aspects of the new policy would not. Nonetheless, the Panel ultimately chose to apply the new policy, and has now suspended John until Ann graduates. (Ex. B, p. 1). John will be allowed to petition for readmission in the fall of 2018. (Ex. B, p. 1). Moreover, Brown has ordered John to vacate campus no later than tonight at 5:00 PM, which is approximately 24 hours' notice. (Ex. B, p. 1).

Legal Standard

A preliminary injunction is appropriate in order to "preserve the status quo, freezing an existing situation so as to permit the trial court, upon full adjudication of the case's merits, more effectively to remedy discerned wrongs." *CMM Cable Rep., Inc. v. Ocean Coast Prop., Inc.,* 48 F.3d 618, 620 (1st Cir. 1995). In order to obtain a preliminary injunction, the moving party bears the burden of showing that: (1) he will suffer irreparable injury if the injunction is not granted; (2) such injury outweighs any harm which granting injunctive relief would inflict on the nonmovant; (3) he has a likelihood of success on the merits; and (4) the public interest will not be adversely affected by the granting of the injunction. See *Narragansett Indian Tribe v. Guilbert,* 934 F.2d 4, 5 (1st Cir. 1991); *Hasbro, Inc. v. MGA Entm't Inc.,* 497 F. Supp. 2d 337, 340 (D.R.I. 2007). The following addresses each of these elements in detail.

Discussion

I. John Has Shown a Reasonable Likelihood of Success in Demonstrating Breach of His Contract With Brown.

A plaintiff need not demonstrate an irrebuttable or even a particularly strong chance of success on the merits. "While plaintiffs seeking preliminary injunctions must demonstrate that they are likely to succeed on the merits, they 'need not show a certainty of success.'" *League of Women Voters of N.C.* v. *North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); see also *The Fund for Community Progress v. United Way of Southeastern New England*, 695 A.2d 517, 521 (R.I. 1997) ("We do not require a certainty of success…. Instead we require only that the moving party make out a prima facie case"). Thus, John may meet this relatively low bar by proffering evidence that, if believed, would support each element of his claim. The elements of an action for breach of contract are the existence of a contract, breach of that contract, and damages

flowing from the breach. See *Petrarca v. Fidelity and Cas. Ins. Co.*, 884 A.2d 406, 410 (R.I. 2005).

A. *John's relationship with Brown is contractual and incorporates the code of student conduct.*

Numerous jurisdictions, including Rhode Island, have concluded that the relationship between student and university is contractual in nature. See *Gorman v. St. Raphael Academy*, 853 A.2d 28, 34 (R.I. 2004). In *Mangla v. Brown University*, this Court stated, "[t]he student-college relationship is essentially contractual in nature." *Mangla v. Brown University*, 135 F.3d 80, 83 (1st Cir. 1998). "The terms of the contract may include statements provided in student manuals and registration materials." *Id*., citing *Lyons v. Salve Regina College,* 565 F.2d 200, 202 (1st Cir. 1977) (construing College Manual and Academic Information booklet as terms of a contract between a student and college). Moreover, "[t]he proper standard for interpreting the contractual terms is that of 'reasonable expectation – what meaning the party making the manifestation, the university, should reasonably expect the other party to give it.'" *Id*., quoting *Giles v. Howard University*, 428 F. Supp. 603, 605 (D.D.C. 1977)).

In the spring of 2013, Brown offered John admission to the Class of 2017. (Compl. ¶ 8). As part of its admissions packet, Brown provided John with copies of its school policies, including the 2013-2014 Code of Student Conduct. (Compl. ¶ 89). John accepted and paid Brown tuition. Brown accepted John's tuition payments and enrolled him in classes. (Compl. ¶ 89.)

Upon information and belief, the relevant portions of the 2013-2014 version of the Code remained unchanged over the 2014-2015 academic year. (Compl. ¶ 89.) Again, for the 2014-2015 academic year, John paid tuition and fees each semester. (Compl. ¶ 87.) Accordingly, John's payment of tuition and enrollment in classes in the 2014-2015 academic year created a

contract between him and Brown for that year, the terms of which are set forth in the 2014-2015 Code of Student Conduct.

B. *Brown breached its contract by applying a policy that did not exist at the time of the alleged violation and that Brown told John it would not apply.*

As a member of the Brown University community in 2014-2015, John reasonably expected that Brown and he were equally bound by the 2014-2015 Code of Student Conduct. On November 4, 2015, Brown's associate counsel, Attorney Michael Grabo, advised John's counsel in writing as follows:

> We will be using the new Complaint Process that I emailed to you yesterday to resolve the complaint against your client [John]. However, since the alleged incident took place last year, the provisions of last year's Code of Student Conduct will apply. I have attached a copy of that Code for your reference

Despite the foregoing, and the fact that the new *Sexual and Gender-Based Harassment, Sexual Violence, Relationship and Interpersonal Violence and Stalking Policy* did not exist on November 10, 2014, Brown's Title IX Panel reneged on Mr. Grabo's promise and applied the new 2015-2016 policy in adjudicating Ann's complaint. In its findings, the Panel Chairwoman wrote:

> Because the 2014-15 Code of Student Conduct does not explicitly define consent, the panel referred to the current Sexual and Gender-Based Harassment, Sexual Violence, Relationship and Interpersonal Violence and Stalking Policy, which codified Brown University's existing community standards with respect to "maintaining a safe learning, living, and working environment where healthy, respectful, and consensual conduct represents campus cultural norms" (II).
>
> The current policy defines consent as "an affirmative and willing agreement to engage in specific forms of sexual contact with another" (VIIIa). Moreover, "consent cannot be obtained through (1) manipulation or (2) the use of coercion." Coercion is then defined as involving "verbal and/or physical conduct, including manipulation, intimidation, unwanted contact" (VIIIb).

She then went on to observe that John admittedly was trying to manipulate Ann into having sex with him, and conceded in a text message to her, "I'm trying to manipulate you a lot." When

Ann replied at one point that she just wanted to be friends, John texted back, "'I get it. Just not accepting." Therefore, the Chairwoman stated:

> Given the Respondent's refusal to accept "no" during his text exchanges with the Complainant, the panel determined that, during their encounter in the locker room, it was more likely than not that a) the Complainant held to this limit, b) the Respondent persisted in his refusal to accept it, and c) the Respondent did not ask for or receive consent as he claims to have done.

The conclusion that John would not take no for an answer entirely ignores the texts presented to the Panel in which John wrote on November 10, 2014, "maybe we shouldn't, because I know I'll be tempted to make a move." John repeated, "maybe we shouldn't hangout until you're ready." It also ignores that Ann does not dispute that she got up, turned off the lights, and returned to John during the encounter. In addition, applying a retroactive definition of consent that eschews manipulation is beyond unreasonable. The entire North American advertising industry is based on manipulation. Yet, by this Panel's reckoning, telling your date she is pretty voids consent at Brown University if, in fact, you really think she is not.

Moreover, the Panel bungled its analysis. On April 15, 2016, Amanda Walsh wrote in a letter to John that "The panel was provided with the 2014-2015 Code of Student Conduct and instructed to review Section III (Sexual Misconduct) of the listed Offenses when determining whether a violation of the policy occurred." See Exhibit D. There, sexual misconduct is defined as "nonconsensual physical contact of a sexual nature." This conduct includes:

> a broad range of behaviors, including acts using force, threat, intimidation, or advantage gained by the offended student's mental or physical incapacity or impairment of which the offending student was aware or should have been aware.

See *Code of Student Conduct at Brown University*, p. 4, § III (2014-2015), attached as Exhibit E.

The Panel did not limit itself to the 2014-2015 Code of Student Conduct. Rather, it determined that because "the 2014-15 Code of Student Conduct does not explicitly define consent" it should adopt the definition in the 2015-16 *Sexual and Gender-Based Harassment, Sexual*

Violence, Relationship and Interpersonal Violence and Stalking Policy. Its focus on consent is misplaced. The focus must be on whether John engaged in "nonconsensual physical contact of a sexual nature" as defined in the 2014-15 Code. To do otherwise violates John's contractual rights, the representations in the Code as well as assurances from the general counsel that John relied on.

The term "manipulation" appears nowhere in Brown's 2014-2015 definition of "nonconsensual physical contact of a sexual nature," and it is not analogous to a threat, act of force, or intimidation. Yet, manipulation is the basis of the Panel's finding. Effectively, it found that John persuaded Ann to engage in sexual activity. However, it is neither fair nor reasonable for Brown to add "manipulation" to the definition of "non-consensual" without first giving fair notice to its students. John did not have fair notice, and therefore the Panel's resort to the new *Sexual and Gender-Based Harassment, Sexual Violence, Relationship and Interpersonal Violence and Stalking Policy* is a procedural error that voids the result. Moreover, the decision is manifestly contrary to the overwhelming weight of the evidence.

C. *John has suffered, and will continue to suffer, substantial damages from this breach.*

John's suspension is only the beginning of the harm he will suffer from Brown's breach of its contractual obligations. He has been found responsible for sexual misconduct, a finding that has resulted in John's suspension from Brown until, at the soonest, the fall of 2018, unless of course Ann chooses to pursue graduate studies at Brown in which event John's suspension would be extended. Therefore, the sanction effectively terminates John's academic career at Brown University. Though he had a solid defense to the charge, the Panel looked elsewhere to find definitions that better suited it. Though an appeal is possible, the requirement that John vacate campus upon 24-hours' notice without any place else to go affords John exceedingly little time to present an effective appeal. Moreover, with only one month of the semester remaining, John

is being denied the ability to complete the semester. Though John had law school ambitions, he will likely be asked to explain his failure to complete his schooling at Brown. His explanation will in all likelihood factor into admissions decisions. It may even be a factor in his gaining admission to the bar. Based on the foregoing, Brown's actions have and will continue to cause John significant damages. Thus, there is a reasonable likelihood that John's breach of contract claim will meet success.

II. John Will Suffer Irreparable Harm to His Reputation, Education and Professional Aspirations if Injunctive Relief is Not Granted.

Monetary damages will not adequately compensate John for the harms he will suffer if injunctive relief is not granted. At stake are John's reputation, his education, his ability to pursue an effective appeal, and thus his right to continue, complete and obtain a Brown University undergraduate degree. In sum, John's academic future and professional aspirations are at stake. The extent of these damages defy monetary quantification. This type of threatened reputational damage and resulting loss of opportunities is "precisely the type of irreparable injury for which an injunction is appropriate." *The Fund for Community Progress*, 695 A.2d at 523.

III. The Balance of Equities Tilts Significantly in John's Favor, As Brown Will Suffer Little or No Damage if Relief is Granted, and the Public Interest Supports Upholding Contractual Rights.

Against this clear threat of irreparable harm to John, very little is balanced on the other side of the scale. Sexual misconduct is to be determined in accordance with a fair, standardized procedure, a procedure which has been given to the students prior to enforcement. Thus, at stake for Brown is little more than indiscriminate freedom of action in this disciplinary matter, a freedom it has expressly contracted away.

IV. Injunctive Relief is Necessary to Maintain the Status Quo

This court possesses "broad discretionary power to take provisional steps restoring the status quo pending the conclusion of a trial." *Cohen v. Brown University*, 991 F.2d 888, 906 (1st Cir. 1993). The status quo is generally defined as "the last peaceable status prior to the controversy." *E.M.B. Associates, Inc. v. Sugarman*, 372 A.2d 508, 509 (R.I. 1977) citing 11A *Wright and Miller, Federal Practice and Procedure*, § 2948. In this case, the status quo is before John was summarily suspended and told to vacate campus.

As described above, John faces the destruction of his reputation, education at Brown, and future aspirations if injunctive relief is denied. In denying John the rights set forth in the Code of Student Conduct and removing him from campus, Brown has affirmatively sought to alter the status quo and change the rules that apply to his disciplinary process. It additionally seeks to immediately achieve his removal – despite a remaining right to appeal. Thus, absent injunctive relief, Brown will succeed in having changed the rules of the game. John will have no real ability to appeal, will lose his ability to complete his undergraduate education at Brown University, and face extraordinary obstacles in pursuing his law school ambitions. There is no fair or just reason for imposing such dire consequences. Therefore, this Court should act to preserve the status quo by granting injunctive relief.

WHEREFORE, the Plaintiff, John Doe, respectfully requests that this Honorable Court restrain and enjoin the Defendant, Brown University, from enforcing its decision of April 20, 2016 finding John responsible for sexual misconduct as alleged in the Title IX complaint of student Ann Roe, and specifically:

1. From requiring John to move out of his residence hall and off campus no later than tonight, Thursday, April 21, 2016, while contemporaneously preparing his

appeal of the Title IX Panel's decision which is due no later than Monday, April 25, 2016;

2. From prohibiting John from completing the current semester which ends on approximately May 20, 2016; and

3. From deviating from its prior representation that it would not apply the 2015 *Sexual and Gender-Based Harassment, Sexual Violence, Relationship and Interpersonal Violence and Stalking Policy* in adjudicating the complaint of student Ann Roe, which concerns conduct that predates adoption of that policy.

Dated: April 21, 2016

The Plaintiff, John Doe,
By his Attorneys,

/s/ J. Richard Ratcliffe

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CERTIFICATE OF SERVICE

I, J. Richard Ratcliffe, certify that on April 21, 2016, this document was electronically filed. The following attorneys are registered with and may access these filings through the CM/ECF system:

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