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

JOHN DOE'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was tried before Chief Judge William E. Smith, sitting without a jury, from July 19, 2016 through July 22, 2016. Having heard the evidence and reviewed the relevant documents, John Doe proposes the following findings and conclusions pursuant to Rule 52(a)(1) of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

Jurisdiction

1. John Doe is a domiciliary of East Brunswick, New Jersey, and a student under suspension at Brown University who prepaid his tuition in full in the amount of $177,600.[1]

2. Brown University in Providence in the State of Rhode Island and Providence Plantations ("Brown"), is a Rhode Island non-profit corporation with a principal place of operation located in Providence, Rhode Island.[2]

[1] Vol II: 186-87.
[2] Docket item 25, para. 2.

The Contract

3. John applied for admission to Brown in the spring of 2013.[3]

4. Brown offered John admission to the class of 2017.[4]

5. John accepted Brown's offer of admission and prepaid four years of tuition.[5]

6. Brown enrolled John in classes and provided him a copy of the 2013-14 Code of Student Conduct, which set forth the offenses that violated the code and the procedures for conducting adjudications.[6]

7. The 2013-14 Code prohibited sexual misconduct in section III.[7]

8. John completed his first year and re-enrolled in the fall of 2014, at which time he was required to read the 2014-15 Code of Student Conduct.[8]

9. Section III and the definition of sexual misconduct remained unchanged in the 2014-15 Code of Student Conduct.[9]

10. As part of his orientation process, John attended training sessions that discussed sexual misconduct, consent, and coercion.[10]

11. Brown also displayed posters around campus. The posters that John saw did not address manipulation as an independent form of coercion or sexual misconduct.[11]

12. Brown introduced one power point slide presented at John's orientation as Exhibit 43. The slide addressed the issue of consent, and in fine print at the bottom of the slide was the

[3] Vol I: 128; Vol II: 186.
[4] Vol II: 187; Vol IV: 53.
[5] Vol II: 187.
[6] Ex 1; Vol II: 188.
[7] Ex 1: 4.
[8] Ex 1; Vol II: 188.
[9] Vol II: 200.
[10] Vol II: 216.
[11] Vol II: 221, 225-26.

following statement: "People who don't have good intentions may manipulate the language of consent to hurt someone."[12]

The Encounter

13. In the fall semester of 2014, in the early morning hours of November 10, John and Ann Roe had a sexual encounter in a storage room at Faunce House.[13]

14. During the encounter, John digitally penetrated Ann and Ann performed oral sex on John.[14]

15. The motion activated lights in the storage room came on while Ann was performing oral sex on John. Ann then walked over to the light switch, which was adjacent to an open, unlocked door. She struggled with the switch for a moment as John waited a few feet away with his pants around his ankles. Seeing her difficulty, John waddled over and turned off the lights with his pants still around his ankles. Ann then resumed giving John oral sex.[15]

16. John was not next to Ann the whole time she was at the switch, she could have left, and John was not free to stop her.[16]

17. As John neared ejaculation, he verbally asked Ann if he could do so in her mouth. Ann agreed.[17]

18. Over the course of the five days leading up to their sexual encounter, John and Ann exchanged over 130 pages of text messages that were frequently graphic and sexually charged.[18]

[12] Ex 43: 6.
[13] Ex 18: 1; Vol I: 32.
[14] Ex 18: 10.
[15] Ex 18: 11, 14.
[16] Vol II: 129-31.
[17] Ex 18: 11.
[18] Ex 19: 135.

19. Immediately after the encounter, Ann returned to her room and told a friend that she had "hooked up" with John.[19]

20. When her friend inquired if she and John had sex, Ann responded:

> No, but it was really hot. I mean, you know it wasn't reciprocal because he only fingered me - he didn't eat me out - but we might hook up again, I don't know.[20]

21. Ann further stated that she gave John a "blowjob" and her friend described her as her typical "happy, bubbly" self when she recounted these details.[21]

22. Following their encounter, John and Ann continued to exchange texts, many of which contained explicit banter concerning their encounter and Ann's express desire to meet with John again. John, however, rebuffed Ann and asked her to put in a good word for him with one of her best friends. Ann agreed.[22]

23. Ann subsequently took vengeful actions against John, such as signing him up for a farmers-only dating website and talking to John on Tinder while pretending to be someone else.[23]

The Complaint

24. Ann's position with respect to her encounter with John evolved over time.[24]

25. On October 30, 2015, nearly one year after their encounter, Ann filed a complaint with Brown's Title IX Office alleging that John coerced her to have sexual relations with him.[25]

[19] Ex 18: 16.
[20] Ex 18: 16.
[21] Ex 18: 16-17.
[22] Ex 19: 135-56; Vol II: 152.
[23] Vol II: 37-38, 152.
[24] Vol II: 73-74.
[25] Ex 5; Vol I: 31.

26. With her complaint, Ann submitted an incomplete set of her texts with John that omitted the post-encounter communications that showed that Ann continued to pursue John after the encounter and once apologized for spreading rumors about him after he rejected her.[26]

27. Amanda Walsh, Brown's Title IX Program Officer, met with John on November 2, 2015, and provided him a copy of Ann's complaint.[27]

28. John filed a written response denying Ann's allegations along with a complete set of his texts with Ann.[28]

Applicable Codes

29. In the time between Ann and John's sexual encounter and the filing of Ann's complaint, Brown enacted a new Title IX Complaint Process and a new Title IX Policy.[29]

30. It is Brown's policy regarding disciplinary matters to apply the code in effect at the time of the conduct at issue.[30]

31. Brown's Office of General Counsel therefore advised John on November 4, 2015, that with respect to procedure, the Title IX Complaint Process would apply, but as to substance, because the incident occurred in 2014, the 2014-15 Code of Student Conduct would control.[31]

32. The new Title IX Policy contains a significantly more expansive definition of consent which, Brown claims, is based on existing but unwritten community norms. Unwritten community norms are, by nature, amorphous and insufficient notice as to a violation that could result in suspension.[32]

[26] Vol II: 91.
[27] Vol I: 35.
[28] Ex 8; Vol II: 151.
[29] Vol I: 50, 145.
[30] Vol I: 37.
[31] Ex 7; Vol I: 37; Vol II: 189-90.
[32] Vol IV: 67.

33. The 2014-15 Code prohibited sexual misconduct in section III.[33]

34. With respect to sexual misconduct, the 2014-15 Code defined it as follows:

> III. Sexual Misconduct
>
> a. Sexual Misconduct that involves non-consensual physical contact of a sexual nature.
>
> b. Sexual Misconduct that includes one or more of the following: penetration, violent physical force, or injury.
>
> Comment: Offense III encompasses 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 . . . .[34]

35. The comment to section III served as a guide for students to understand what conduct section III prohibited.[35]

36. The 2014-15 Code also included substantive rights:

> B. To be assumed not responsible of any alleged violations unless she/he is so found through the appropriate student conduct hearing.
>
> E. To be informed of the evidence upon which a charge is based and accorded an opportunity to offer a relevant response.
>
> F. To be given every opportunity to articulate relevant concerns and issues, express salient opinions, and offer evidence before the hearing body or officer.
>
> J. To appeal a decision.[36]

37. Procedurally, Brown's new 2015-16 Complaint Process also afforded John certain evidentiary rights on which he was entitled to rely. Among these were that:

> Evidence includes any facts or information presented in support of an assertion and may include text messages, email exchanges, timelines, receipts, photographs, etc.

[33] Ex 2: 4.
[34] Ex 2: 4.
[35] Vol I: 45.
[36] Ex 2: 7.

> The investigator will produce a written report that contains the relevant information and facts . . . .[37]

38. Brown's community standard provides that consent is a continuous process.[38]

39. The 2015-16 Title IX Policy definition of coercion and prior norms require "verbal and/or physical conduct . . . that would reasonably place an individual in fear of immediate or future harm and that is employed to compel someone to engage in sexual contact."[39]

40. Brown's sexual assault task force did not introduce a new definition of coercion; fear is an element under the 2015-16 Title IX Policy and also was prior to its adoption.[40]

41. Brown's Title IX Council Chair, Prof. Gretchen Schultz, did not recall fear as an element of coercion, but repeatedly stated that her memory is poor. She was on six panels prior to adoption of the 2015-16 Title IX Policy, but had little memory of her pre-2015 training, no specific memory for dates, and stated that the cases tended to bleed together and into her experience as a member of Brown's sexual assault task force. She recalled that hearings were more difficult under the old code because panelists brought with them slightly differing opinions of consent. But she could not remember the particular areas of divergence.[41]

The Investigation & Report

42. Ms. Walsh retained Attorney Djuna Perkins to investigate Ann's complaint.[42]

43. The 2015 Complaint Process sets forth the role of the investigator.[43]

[37] Ex 3: 3-4.
[38] Vol II: 220; Vol III: 107.
[39] Ex 4:7.
[40] Vol I: 34; Vol II: 122; Vol IV: 94, 155.
[41] Vol IV: 31-32, 37, 44-45, 51, 57, 61-62, 83, 142.
[42] Ex 9; Vol I: 45.
[43] Ex 3: 3; Vol I: 47.

44. The role of the investigator is to collect information and prepare a report that gathers all relevant facts needed for the Title IX Council to render a decision.[44]

45. Ms. Perkins interviewed Ann, John, Witness 9 and approximately 13 other witnesses.[45]

46. In preparing her report, Ms. Perkins reviewed and referenced section 7 of the 2015-16 Title IX Policy and its definitions of consent and coercion, and then provided a first draft to Ms. Walsh.[46]

47. Ms. Walsh responded with a redline of the draft report containing procedural and substantive edits.[47]

48. Ms. Perkins' sharing of the draft report with Ms. Walsh and Ms. Walsh's edits to it are actions unaddressed in the 2015-16 Complaint Process; therefore, Ms. Walsh contended that these actions were permissible.[48]

49. Among Ms. Walsh's substantive edits was the deletion of all references to the 2015-16 Title IX Policy and its definitions.[49]

50. Ms. Walsh told Ms. Perkins that the 2015-16 Title IX Policy was not the relevant policy and Ms. Perkins incorporated her edits into the report before sharing it with John and Ann, who then provided feedback of their own.[50]

51. John requested removal of two pages of evidence concerning his alleged bad character and a no-contact order violation, and Ms. Perkins suggested to Ms. Walsh that the

[44] Ex 2: 3; Vol I: 47.
[45] Vol II: 98.
[46] Ex. 11: 2; Vol I: 57; Vol II: 102-03.
[47] Ex 12; Vol I: 61.
[48] Ex 3; Vol I: 78.
[49] Ex 12; Vol I: 61-62, 103.
[50] Ex 13; Vol II: 104-05, 107.

character evidence be removed if John would agree to drop his claim that Ann and Witness 9 were conspiring against him.[51]

52. Ms. Perkin's proposal to contact John in this regard is unaddressed in the 2015-16 Complaint Process; therefore, Ms. Walsh contended that the action was not permissible.[52]

53. John's conspiracy claim centered on a witness who overheard Ann and Witness 9 discuss their desire to get rid of John, and John requested that Ms. Perkins obtain a complete set of texts between Ann and Witness 9 to support his defense.[53]

54. Though Ms. Perkins agreed that there were likely, many, many texts between Ann and Witness 9 regarding John, she refused John's request.[54]

55. Ms. Perkins and Ms. Walsh, as well as one panelist, Professor Besenia Rodriguez, agreed at trial that the texts between Ann and Witness 9 may have been relevant.[55]

56. Ms. Perkins and Ms. Walsh agreed that Ann and Witness 9 admitted to significant conversations about John and animus toward him.[56]

57. As justification for her refusal to obtain the texts between Ann and Witness 9, Ms. Perkins claimed that to do so would be overly burdensome and unlikely to lead to the discovery of non-duplicative evidence.[57]

58. Ms. Perkins' retainer agreement would have allowed her to assign a paralegal to review the texts between Ann and Witness 9 for relevance, but Ms. Perkins declined to do so.[58]

[51] Vol I: 91-92; Vol II: 141-43.
[52] Vol I: 90, 94; Vol II: 55.
[53] Ex 16: 6-7; Vol I: 90.
[54] Vol I: 98; Vol II: 182.
[55] Vol II: 75, 182-84; Vol III: 107.
[56] Ex 18: 15 n.26; Vol II: 74-75, 182-84.
[57] Ex 18: 15-16, n.26.
[58] Ex 9.

59. Ms. Perkins' investigative report provided the following justification for her refusal to request a complete set of electronic communications between the Complainant and Witness 9:

> As discussed further below, Witness 9 and the Complainant freely admit that the Respondent's behavior was a frequent subject of discussion, and both freely admit that they harbor significant animus toward him. Neither is enough to suggest that the Complainant fabricated the facts underlying the allegations of the Complaint, as the Complainant's reaction is a typical response to perceived inappropriate behavior. More importantly, asking the Complainant and Witness 9 to disclose all their communications is overly burdensome where the central issue in this case is not whether certain sexual acts occurred or even whether the Complainant literally consented to them, but whether the consent was obtained through coercion. The 2014 Code of Student Conduct forbids "non-consensual physical contact of a sexual nature." Implicit in any common understanding of consent is that it is freely and voluntarily given. Thus, consent obtained by coercion does not constitute consent. Given the number of interviews and documents reviewed in this case, the complete communications between Witness 9 and the Complainant are unlikely to lead to the discovery of any non-duplicative evidence that tends to undermine the Complainant's claim that she was coerced.[59]

60. Ms. Perkins' statement that "Neither is enough to suggest that the Complainant fabricated the facts underlying the allegations of the Complaint," amounts to a directive to the Panel that Ann's version of the events is accurate. [60]

61. In the second to last paragraph of the investigative report, Ms. Perkins stated:

> By the Respondent's own admission, he treated the Complainant poorly, regardless of whether their sexual activity was consensual or not. The Complainant's dislike of him is therefore reasonable even if he didn't assault her, as is her desire to seek support from other like-minded individuals. The Complainant's and Witness 9's negative feelings toward the Respondent do not assist the panel in evaluating whether the Complainant's claims are fabricated. Neither does the conversation overheard by Witness 11, because there is no evidence that their reasons for "wanting to get him" were unfounded, or that they wanted to take any action other than that to which they were entitled. Moreover, fabricating allegations requires a person to make statements knowing them to be false.

[59] Ex 18: 15, n.26.
[60] Ex 18: 15, n.26; Vol II: 58.

> Thus, if the panel concludes that the Complainant genuinely believed she was coerced into sexual activity, her claims would not amount to fabrication even if the panel concludes that no sexual misconduct occurred."[61]

The Hearing

62. Ms. Walsh selected an all-female three-member panel to hear Ann's complaint. The panelists were Kate Trimble, Kimberly Charles, and Besenia Rodriguez.[62]

63. Kimberly Charles was in a class with John at the time of the hearing.[63]

64. The panel was selected from a pool of 19 members of Brown's Title IX Council.[64]

65. John expected that his hearing panel would be representative of the Brown community.[65]

66. Ms. Walsh is in charge of selecting people to be on the Title IX Council. She interviews them, vets them, and determines if they are appropriate for membership. At the time of the hearing, of its 19 members, all but three were female.[66]

67. The current level of male representation on Brown's Title IX Council is insufficient to meet expectations that panels reflect the make-up of the Brown community.[67]

68. As a result of Ms. Walsh's selection of an all-female panel, John's encounter with Ann was assessed from an entirely female point of view and took no account of the differing perspectives on sex and relationships between men and women.[68]

69. The panelists received five hours of training and were required to consider all facts contained in the investigation report.[69]

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[61] Ex 18: 29.
[62] Vol I: 101.
[63] Vol II: 195.
[64] Vol I: 101.
[65] Vol II: 195-96.
[66] Vol I: 101-02; Vol II: 157.
[67] Vol I: 158.
[68] Vol II: 195-96.
[69] Vol I: 158, 161; Vol III: 45.

70. In advance of the hearing, panelists received Ms. Perkins' report. Panelist Besenia Rodriguez read it, took note of information contained therein regarding John's violation of an unrelated no-contact order with Witness 9, and concluded that John was someone who did not respect boundaries.[70]

71. In advance of the hearing, Prof. Schultz read the report and made a note to herself, "John affirms that he manipulated Ann (=nonconsensual)."[71]

72. John's panel convened on the morning of April 14, 2016.[72]

73. Ms. Walsh provided packets for the panel members and its chair, Prof. Gretchen Schultz.[73]

74. Prior to the hearing and unbeknownst to John, Brown's Office of General Counsel suggested to Ms. Walsh that the panel could consider using the definition of consent found in the 2015-16 Title IX Policy despite its previous representation to John that the 2014-15 Code would apply. The 2015-16 Title IX Policy is the same policy that Ms. Walsh previously excised from Ms. Perkins' report.[74]

75. Ms. Walsh met with Prof. Schultz a half hour before the hearing commenced, advised her of General Counsel's suggestion, and included a copy of the Title IX Policy in her hearing packet.[75]

76. No one told John that the panel would be considering the 2015-16 Title IX Policy.[76]

[70] Vol III: 23-24.
[71] Ex 22: 3.
[72] Ex 24: 1.
[73] Vol I: 102-03.
[74] Ex 12: 1; Vol I: 37, 50, 61-62; Vol II: 33; Vol IV: 67.
[75] Vol I: 32, 103-04; Vol IV: 67-68, 70.
[76] Vol I: 50; Vol II: 194-95; Vol IV: 69.

77. Ms. Walsh attended the hearing and took notes that other witnesses have acknowledged as accurate.[77]

78. Prof. Schultz began the hearing with the question of the definition of consent that was to be used. Prof. Schultz informed the panel of General Counsel's suggestion, and the panel agreed that that would be an expedient way to proceed, that is, to apply the 2015-16 Title IX Policy with respect to the issue of consent.[78]

79. Prof. Schultz' memory failed her regarding the timing of the panel's discussion of the 2015 Title IX Policy definition of consent and the inclusion of that policy in her hearing packet. Prof. Schultz testified that she brought up the matter at the beginning of deliberations and did not have a hard copy of the 2015 policy. Ms. Walsh, through her notes and testimony, made clear that the panel addressed the matter prior to receiving Ms. Perkins or either party, and that she did provide Prof. Schultz with a copy of the new policy. In this manner, Brown reintroduced the policy that it had expressly assured John would not apply.[79]

80. The basis of the panel's decision to apply the 2015-16 Title IX Policy definition of consent was Prof. Schultz' statement that it was the opinion of General Counsel that the policy merely codified prior community standards, but the panel had no evidence in that regard.[80]

81. The panel then called in Ms. Perkins to discuss her report.[81]

82. In response to Prof. Schultz' question, "Doesn't someone have to be lying . . . [s]he says she said no and he says she's an enthusiastic partner," Ms. Perkins commented on John's credibility as follows:

[77] Ex 24; Vol II: 171; Vol III: 28; Vol IV: 133, 157.
[78] Ex 24: 1; Vol I: 125; Vol IV: 68-69.
[79] Ex 24: 1; Vol I: 32, 103-04; Vol IV: 72-73, 77.
[80] Vol IV: 68-69.
[81] Ex 24: 1; Vol I: 108.

> If you look at text messages, it does show that he is persistently making things sexual even though she is a willing participant at times. He does convert things into something sexual. He did say he asked for consent and she was enthusiastic, but that isn't consistent with the text messages where you can see her hesitation. The idea that she was willingly jumping into this sexual encounter doesn't match, but that's for the panel to decide. Her version appears to be more consistent with the pattern that is in the text messages. Her actions after the incident are difficult to reconcile. Specifically, there is the possibility that she would not have done anything about it or filed a Complaint, if a relationship had come from it. She may say she would have forgiven him or thought about the incident in a different way.[82]

83. In the foregoing response, Ms. Perkins again conveyed to the panel that she believed Ann rather than John, and despite her inability to reconcile Ann's post-encounter actions and communications, Ms. Perkins did not tell the panel that Ann might not be telling the truth.[83]

84. One of the panel members asked Ms. Perkins, "What is the basis for the Complainant's fear? That's not leaping out at me." Ms. Perkins responded: "That's not entirely clear." However, she never advised the panel that fear was required.[84]

85. Ms. Perkins' comment on credibility likely carried significant weight in the panel's deliberations.[85]

86. The panelists next called in John and then Ann. Whereas John addressed the 2014-15 Code set forth in Ms. Perkins' report, Ann addressed the 2015-16 Title IX Policy that the panel had decided to apply.[86]

87. John asked to offer a rebuttal to Ann's statement, but his request was denied.[87]

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[82] Ex 24: 2.
[83] Vol II: 173-75.
[84] Ex 24: 1.
[85] Vol II: 58.
[86] Ex 24: 4; Vol I: 110-11; Vol II: 44, 193.
[87] Ex 24: 2; Vol II: 36.

88. Rebuttals are unaddressed in the 2015-16 Complaint Process; therefore, Ms. Walsh contended that they are not permissible.[88]

89. After hearing from Ms. Perkins, John and Ann, the panel began its deliberations.[89]

90. Prof. Rodriguez and the panelists found the case difficult to decide because neither party was 100 percent credible and Ann had given John mixed signals.[90]

91. Due in part to her training at Brown, Prof. Rodriguez was "not at all" concerned about Ann's delay in reporting her allegation against John and the panel did not address that as an issue.[91]

92. As part of their preparation to be on the Title IX Council, Prof. Rodriguez and Prof. Schultz received mandatory training on "trauma theory," which maintains that due to the effects of trauma, sexual assault victims may act in ways that are counterintuitive and not objectively reasonable.[92]

93. Neither Prof. Rodriguez nor Prof. Schultz concluded that Ann suffered trauma.[93]

94. Nonetheless, on the basis of trauma theory, Prof. Rodriguez did not give face value to Ann's post-encounter texts in which she exchanged sexually charged banter with John regarding their encounter, Ann's desire to meet with John again, and Ann's retelling of their encounter to Witness 1 immediately afterward. Rather, she did not consider that evidence one way or another. She put those facts "on a shelf" and assigned them no significance.[94]

95. Ann's post-encounter texts included messages to John in which she stated, "remember to pretend you're not imagining fucking the shit out of me" and "no one will suspect

[88] Ex 3; Ex 24: 2; Vol II: 36.
[89] Ex 24: 4.
[90] Vol III: 23; Vol IV: 64-65.
[91] Vol III: 28-29; Vol IV: 83.
[92] Vol I: 158; Vol III: 42-43, 52, 56-57, 110-11; Vol IV: 33-34, 165.
[93] Vol III: 57; Vol IV: 36.
[94] Vol III: 42, 103, 105.

how much you want to cum inside of me . . . ." Having set these texts aside, Prof. Rodriguez had no sense that Ann wanted a sexual relationship with John after their encounter.[95]

96. Though she could not reconcile Ann's post-encounter actions, Prof. Rodriguez did not want to pass judgment on them. She did not want to challenge Ann on the basis of her texts. She explained that society often critiques victims of sexual assault and questions their credibility. According to Prof. Rodriguez, her training taught her that it is best not to judge that behavior.[96]

97. All panelists at Brown also learn, according to Prof. Schultz, "that prior sexual behavior, and I think sexting can be considered prior sexual behavior, has no bearing on subsequent sexual interactions." Therefore, the fact that Ann engaged in sexual banter with John before their encounter was also deemed irrelevant. Ann's texts, consequently, were only considered insofar as they suggested her hesitation, but not for the possibility of consent.[97]

98. In her trial testimony, Prof. Schultz agreed that the 2015-16 Title IX Policy definition of coercion was ambiguous and did not align with how she thinks of coercion. Moreover, in guiding the panel to a decision, she did not focus on fear as an element of coercion, and Ann did not appear to be in fear.[98]

99. The panel found no force, impairment, threats, intimidation or fear, but nonetheless found John responsible by a 2-1 vote on the theory of verbal manipulation. Prof. Schultz characterized such conduct as game playing or messing with someone's head. Prof. Rodriguez was among those who voted "responsible."[99]

[95] Ex 19: 135; Vol III: 90, 103.
[96] Vol III: 48, 57-58, 71, 99-100.
[97] Ex 24: 2; Vol IV: 135.
[98] Vol III: 65, 68; Vol IV: 95, 97.
[99] Ex 27; Vol III: 60, 65, 68, 87-88; Vol IV: 115.

100. John had insufficient notice that verbal manipulation was a basis on which the panel could find him responsible because the plain language of the 2014-15 Code and its comment do not address any conduct akin to manipulation.[100]

101. As a sanction, the panel suspended John until Ann graduates in 2018, at which time John may reapply for admission.[101]

102. The next day, April 15, 2016, Ms. Walsh sent John a letter assuring him that "the relevant policy is the 2014-2015 Code of Student Conduct" and that that was the code she provided to the panel members. Ms. Walsh made no mention of the 2015-16 Title IX Policy that she gave to Prof. Schultz and that the panel decided in her presence to apply.[102]

103. Prof. Schultz prepared and circulated among the panelists a findings letter that expressly addressed the 2015-16 Title IX Policy. It provided only half the definition of coercion - specifically leaving out reference to "conduct that would reasonably place an individual in fear of immediate or future harm and that is employed to compel someone to engage in sexual contact" - and all agreed that it captured their rationale.[103]

104. Ms. Walsh received the draft findings letter from Prof. Schultz the day before she sent the letter to John assuring him of application of the 2014-15 Code, but she claimed at trial to not have opened it.[104]

105. The findings letter was issued on April 19, 2016 and set forth the definition of consent found in section VIII of the 2015-16 Title IX Policy as the basis for the decision. The

[100] Ex 2: 4.
[101] Ex 28; Ex 37; Vol I: 128; Vol IV: 87.
[102] Ex 26; Vol 2: 44, 194.
[103] Vol IV: 85-86, 94.
[104] Vol I: 113-14.

findings letter is the official record of the panel's deliberations and accurately reflected the panel's decision.[105]

106. John and Ann both appealed.[106]

The Appeals

107. The 2015-16 Complaint Process limits appeals to two possible grounds: new evidence and substantial procedural error. There is no provision to appeal a decision that is arbitrary.[107]

108. The 2014-15 Code "normally" limited appeals to these grounds, which suggests that other grounds may be considered under appropriate circumstances.[108]

109. The remedy for a procedural error under the 2015-16 Complaint Process is a hearing before a new panel.[109]

110. In her appeal, Ann sought a harsher sanction for John.[110]

111. In his appeal, John alleged procedural errors regarding use of the 2015-16 Title IX Policy, inclusion of prejudicial character evidence in Ms. Perkins report, and her failure to obtain the texts between Ann and Witness 9. John also alleged that the panel's finding was arbitrary.[111]

112. John and Ann filed responses to each other's appeals.[112]

113. In her response, Ann attributed certain quoted text to the 2014-15 Code that does not exist in the code. John filed a sur-reply to point this out.[113]

[105] Ex 27; Vol III: 43; Vol IV: 86.
[106] Ex 29; Ex 30; Vol I: 129.
[107] Ex 3: 6; Vol III: 123; Vol IV: 17.
[108] Ex 2: 10.
[109] Ex 3: 6; Vol II: 8.
[110] Ex 29.
[111] Ex 30.
[112] Ex 32; Ex 33.
[113] Ex 33: 4; Ex 34: 1.

114. Brown's Title IX Office refused to provide John's sur-reply to the appeals panel.[114]

115. Sur-replies are unaddressed in the 2015-16 Complaint Process; therefore, Ms. Walsh contended that they are not permissible.[115]

116. Prof. Schultz was the chair of both the hearing and the appeal panels.[116]

117. Prof. Schultz advised the appeals panel that the 2015-16 Title IX Policy was written to reflect community standards already in effect in 2014 and that there were public documents available to confirm that. The appeals panel, however, did not see the public documents to which Prof. Schultz referred and relied on her statement to that effect.[117]

118. The appeals panel rejected both appeals, but did not re-evaluate the merits of Ann's complaint or the weight of the evidence.[118]

119. Prof. Schultz drafted the findings, circulated them to the appeals panel, and issued them to Ann and John.[119]

CONCLUSIONS OF LAW

Jurisdiction

120. This Court has subject matter jurisdiction over this controversy because John Doe has satisfied the requirements of 28 U.S.C. § 1332 as to citizenship and the amount in controversy. See *Milford-Bennington R.R. Co*. v. *Pan Am Rys., Inc*., 695 F.3d 175, 178 (1st Cir. 2012) (citing 28 U.S.C. § 1332 and setting forth its requirements of complete diversity and at least $75,000 as the amount in controversy).

[114] Ex 35.
[115] Vol I: 136.
[116] Vol III: 146; Vol IV: 29-30.
[117] Vol III: 147-48.
[118] Ex 36: 1.
[119] Vol IV: 137.

The Contract

121. The relationship between John and Brown was contractual in nature. See *Gorman v. St. Raphael Academy*, 853 A.2d 28, 34 (R.I. 2004); *Havlik* v. *Johnson & Wales Univ.*, 509 F.3d 25, 34 (1st Cir. 2007); *Mangla v. Brown Univ.*, 135 F.3d 80, 83 (1st Cir. 1998).

122. There is no justiciable issue of law or fact regarding the proper applicability of the 2014-15 Code to this matter, rather than the 2015-16 Title IX Policy, and the 2014-15 Code did not embrace manipulation as a means for committing sexual misconduct.

123. The terms of the contract are the substantive provisions set forth in the 2014-15 Code of Student Conduct and the procedures set forth in the 2015-16 Complaint Process. *Havlik*, 509 F.3d at 34, accord *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).

124. Among the substantive provisions of the 2014-15 Code that are contractually binding on Brown is section III regarding the offense of sexual misconduct. *Doe* v. *Brown Univ.*, 2016 U.S. Dist. LEXIS 21027, at 33 (D.R.I. Feb. 22, 2016) (holding that the determination of whether handbook terms are contractually binding hinges on their specificity).

125. Any uncertainty in the meaning of the terms of the 2014-15 Code are to be construed against Brown as the drafter. *Doe* v. *Brandeis Univ.*, 2016 U.S. Dist. LEXIS 43499, at 76 (D. Mass. Mar. 31, 2016).

126. Although the 2014-15 Code of Student Conduct lacks a definition of consent, the comments provide guidance as to the type of conduct that is prohibited.

127. The type of conduct prohibited under the 2014-15 Code of Student Conduct are "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."

128. As interpreted through the Brown community norms, the 2014-15 Code of Student Conduct could reasonably include coercion as a means of sexual misconduct insofar as it is akin to intimidation, a term that appears in the comments to the 2014-15 Code.

129. The 2015-16 Title IX Policy definition of coercion, while not a term of John's contract with Brown regarding Ann's complaint, is instructive because it was not intended to introduce a new community norm, but rather to reflect existing norms, and it requires conduct that places the complainant in reasonable fear of harm. Accordingly, reasonable fear is an element of coercion under the 2014-15 Code.

130. Manipulation is a subset of coercion and therefore also requires the element of reasonable fear. The determination of whether handbook terms are contractually binding hinges on their specificity. *Doe* v. *Brown Univ*., 2016 U.S. Dist. LEXIS 21027, at 33 (D.R.I. Feb. 22, 2016). The statement regarding manipulation in the power point slide that is Exhibit 43 lacks specificity and does not undermine this conclusion. Moreover, the 2014-15 Code is plausibly complete in that the comment to section III provides a guide to understanding the type of conduct that is prohibited, and verbal manipulation, described as "mind games" by Prof. Schultz, is dissimilar to the broad range of behaviors described in the comment.

131. In addition to section III, the 2014-15 Code reasonably afforded John the right to every opportunity to articulate relevant concerns and issues, express salient opinions, and offer evidence before the hearing body or officer, as well as an appeal on grounds that the hearing panel's decision was arbitrary.

132. Among the procedural provisions of the 2015-16 Complaint Process that are contractually binding on Brown are the rights to a written report that contains all relevant

information and facts, and the definition of evidence that includes any facts or information presented in support of an assertion.

133. In addition to these terms is the implicit understanding that the adjudicatory process will be fundamentally fair. See *Havlik* v. *Johnson & Wales Univ.*, 490 F. Supp.2d 250, 261 (D.R.I. 2007) ("contracts contain an implied duty of good faith and fair dealing"); *Doe* v. *Brandeis Univ.*, 2016 U.S. Dist. LEXIS 43499, at 72 ("school disciplinary hearings must be conducted with basic fairness"). A party may breach the covenant of good faith and fair dealing without breaching an express term of the contract; otherwise, the implied covenant would be a mere redundancy. *Doe* v. *Brandeis Univ.*, 2016 U.S. Dist. LEXIS 43499, at 122.

Brown's Breach

134. Brown's refusal to obtain a complete set of the texts between Ann and Witness 9 violated John's right to a written report that contains all relevant facts and information, and inhibited his ability to express salient opinions. Ms. Perkins' rationale that "fabricating allegations requires a person to make statements knowing them to be false" ignores the possibility that the texts may have shown such knowledge.

135. Ms. Perkins' statement that this additional evidence was insufficient to "suggest that the Complainant fabricated the facts underlying the allegations of the Complaint" violated John's right to have this adjudication decided by a fundamentally fair and impartial panel.

136. Ms. Perkins' statement that "there is no evidence that their [Ann and Witness 9's] reasons for 'wanting to get him' were unfounded" violated John's right to be assumed not responsible unless so found through an appropriate student conduct hearing.

137. Brown's refusal to remove the approximately two pages of evidence concerning John's character had an actual, prejudicial impact as evidenced by the testimony of Prof. Besenia Rodriguez, who stated that such information caused her to believe that John was someone who

did not respect boundaries. This tainted the hearing panel and violated John's right to a fundamentally fair hearing.

138. Brown's maintenance of a Title IX Council with a 5:1 female to male ratio fails to meet reasonable expectations that panels will reflect the make-up of the Brown community and take account of the perspectives of both genders. This circumstance resulted in John's encounter with Ann being assessed from an entirely female point of view with no account for the differing perspectives on sex and relationships between men and women, and violated John's reasonable expectation to a fundamentally fair hearing.

139. Brown's refusal to permit John to offer a rebuttal to Ann's statement at the panel hearing violated John's right to every opportunity to articulate relevant concerns and issues, express salient opinions, and offer evidence before the hearing panel. Moreover, Brown's explanation for its refusal on the basis that its Complaint Process does not address rebuttals and therefore prohibits them is inconsistent with Ms. Walsh's claim that her editing of Ms. Perkins' report was permissible because the Complaint Process does not address or forbid it.

140. Ms. Perkins' statement to the panel that Ann was more credible than John because his version of the event "doesn't match," violated John's right to have this adjudication decided by a fundamentally fair and impartial panel.

141. The panel's failure to address Ann's delay in reporting violated John's right to panel consideration of all relevant evidence, that is, any facts or information presented in support of his assertion that the encounter was consensual and that Ann was subsequently motivated by hard feelings. Moreover, it failed to consider that human memories are transient and susceptible to such factors as hindsight bias, suggestibility, and anger or hostility. *Doe* v. *Brandeis Univ*., 2016 U.S. Dist. LEXIS 43499, at 115.

142. Prof. Rodriguez' failure to accord Ann's post-encounter texts, communications and actions face value violated John's right to a fundamentally fair hearing and panel consideration of all relevant evidence.

143. The panel's determination that previous sexual conduct is irrelevant, including Ann's sexual banter with John, violated John's right to a fundamentally fair hearing and panel consideration of all relevant evidence.

144. Brown's consideration of Ann's pre-encounter actions and texts, but only as evidence of her hesitation, placed John's defense at a decided disadvantage and violated his right to a fundamentally fair hearing.

145. Prof. Rodriguez' disinclination to pass judgment on Ann's actions biased her in Ann's favor, thereby violating John's right to a fundamentally fair hearing and panel consideration of all relevant evidence.

146. The panel's failure to focus on reasonable fear as an element of coercion violated John's right to be adjudged under the 2014-15 Code and the then-existing community norm.

147. The panel's finding of "responsible" despite finding no force, threats, impairment, intimidation or fear violated John's right to be adjudged under the 2014-15 Code and the then-existing community norm.

148. Brown's refusal to provide John's sur-reply to the appeal's panel violated John's right to every opportunity to articulate relevant concerns and issues and express salient opinions. Moreover, Brown's explanation for its refusal on the basis that its Complaint Process does not address sur-replies and therefore prohibits them is inconsistent with Ms. Walsh's claim that her editing of Ms. Perkins' report was permissible because the Complaint Process does not address or forbid it.

149. The appeals panel's reliance on the 2015-16 Complaint Process in refusing to consider John's claim that the decision against him was arbitrary violated John's more expansive appellate rights under the 2014-15 Code. Moreover, Prof. Rodriguez' statement that the evidence gave her no sense that Ann wanted a sexual relationship with John after the encounter appears to take no account of her continued sexual banter with him.

150. Brown engaged in deceptive conduct and violated the covenant of good faith and fair dealing by advising John that the 2014-15 Code would apply, then purposefully reintroducing the 2015-16 Title IX Policy during the panel hearing, and subsequently assuring John that the panel remained true to its original representation.

John's Damages

151. As a result of Brown's breaches of contract, John has suffered damages in the form of his suspension until the fall of 2018.

ORDER

152. Brown's Title IX hearing process, as applied to John, was biased in favor of the complainant, and Brown is hereby enjoined from further adjudicating John's conduct by means of this fundamentally flawed process.

153. Despite finding John responsible, his hearing process found no force, threats, impairment, intimidation or fear. Section III of the 2014-15 Code requires at least one of these elements to support a finding of responsible for the offense of sexual misconduct. Seeing none, Brown is hereby enjoined from enforcing John's suspension.

154. Brown is further ordered to remove any notation from John's transcript and student records that he was found responsible for violating the 2014-15 Code of Student Conduct by engaging in non-consensual physical contact of a sexual nature with Ann.

155. Brown shall permit John to enroll in the 2016 fall semester.

156. The Court further awards John his reasonable attorney's fees under G.L. 1956, § 9-1-45 insofar as there is no justiciable issue of law or fact regarding the applicability of the 2014-15 Code and Brown's reliance on the 2015-16 Title IX Policy.

Dated: August 3, 2016

The Plaintiff, John Doe,
By his Attorneys,

/s/ J. Richard Ratcliffe

J. Richard Ratcliffe, #2603
Jeffrey Biolchini, #7320
Ratcliffe Harten Burke & Galamaga, LLP
40 Westminster Street, Suite 700
Providence, R.I. 02903
Tel: (401) 331-3400
Fax: (401) 331-3440
rratcliffe@rhbglaw.com
jbiolchini@rhbglaw.com

CERTIFICATE OF SERVICE

I, J. Richard Ratcliffe, certify that on August 3, 2016, this document was electronically filed. The following attorneys are registered with and may access these filings through the CM/ECF system:

Beverly E. Ledbetter
bel_atty@brown.edu

James M. Green
jmgreen@brown.edu

Thomas R. Bender
Thomas_Bender@brown.edu

Michael D. Grabo
michael_grabo@brown.edu

Steven M. Richard
srichard@nixonpeabody.com

/s/ J. Richard Ratcliffe