UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JOHN DOE, Plaintiff,	:	
v.	:	C.A. No.: 16-17-S
BROWN UNIVERSITY, Defendant.	:	

DEFENDANT BROWN UNIVERSITY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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This matter was tried before Chief Judge William E. Smith, sitting without a jury, from July 19, 2016 through July 22, 2016. Based upon the record evidence, Defendant Brown University ("Brown" or the "University"), submits its proposed findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52.

SUMMARY OF THE CASE BEFORE THE COURT

Plaintiff John Doe ("John"), a Brown undergraduate student, challenges the University's disciplinary proceeding that adjudicated him to be responsible for sexual misconduct charges, relating to an incident that occurred on November 10, 2014 with another undergraduate student, Ann Roe ("Ann"). Ann filed her complaint against John with the University on October 30, 2015. During the intervening nearly one-year period between the date of the incident and Ann's filing of the Complaint, Brown convened a Task Force on Sexual Assault that extensively reviewed the University's practices, policies, and procedures addressing the issues of sexual assault and sexual misconduct. The Task Force's recommendations led to Brown's establishment of its Title IX Office, hiring of a Title IX Program Officer, and adoption of a Title IX Policy.

Based upon the date of the incident, Brown charged John with offenses under the University's 2014-15 Code of Student Conduct, not the Title IX Policy that took effect in September 2015. Based upon the filing date of Ann's complaint, the University conducted the disciplinary proceedings under its Title IX Complaint Process, which took effect at the start of the 2015-16 academic year.

Brown respectfully submits that the Court's role is not to determine whether John's or Ann's version of the incident is more credible or to review the disciplinary record and process *de novo*. Rather, the Court's limited role is to determine whether Brown breached any contractual obligation to John during the disciplinary process. For reasons stated below in Brown's

proposed findings of fact and conclusions of law, Brown did not breach any aspect of its university-student contractual relationship with John.

The central issue concerns what a Brown student should have reasonably understood, as of November 10, 2014, to encompass the "broad range of behaviors" that could constitute non-consensual sexual conduct and subject the student to charges under Offense III of the 2014-15 Code. As was clear in John's contentions throughout the disciplinary process and as he reiterated at trial, John has maintained a totally subjective and unreasonably narrow view of the "broad range of behaviors." John's interpretation contravenes Brown's well-articulated community standards regarding prohibited non-consensual sexual conduct, standards that became part of John's educational contract – supplementing the 2014-15 Code – when they were conveyed to John, upon his matriculation and continuing thereafter, through a new student tutorial, a video titled "Brown students ask for consent," his freshman orientation, subsequent trainings, and posters across the campus.

During the Title IX Council's deliberations to adjudicate the disciplinary proceeding, the hearing panel decided within its discretion to refer to the Title IX Policy's definition of "consent" as a reference regarding Brown's community standards and especially because the 2014-15 Code itself does not define "consent." John complains that the panel should not have referred to the Title IX Policy at all. Yet, John addressed the Title IX Policy several times during the disciplinary process - before, during, and after Title IX Council's hearing. While denying consistently that he engaged in any non-consensual activity with Ann, John also argued that he could not possibly be held responsible under the 2014-15 Code because it encompassed a narrower range of behaviors than the current Title IX Policy.

John's comparison of the 2014-15 Code and Title IX Policy is unreasonable. The Title IX Policy codified Brown's pre-existing and clearly articulated community standards with

respect to the meaning of consensual sexual activity, which existed as of the November 10, 2014 incident.

If the Court were to find a breach of contract, any such breach was merely procedural, requiring a remand back to Brown at the appropriate level (hearing panel or appeal panel) for further disciplinary proceedings consistent with the Court's instructions. The record evidence does not show any arbitrary or capricious actions by Brown that could constitute a substantive contractual breach.[1]

John offered no proof of any compensatory damages, particularly any alleged future losses. Finally, John's claim for attorneys' fees under R.I. Gen. Laws § 9-1-45 is misplaced, as there are many justiciable legal and factual issues in this litigation.

PROPOSED FINDINGS OF FACT

I. John Doe's Training Regarding Brown's Community Standards Relating to Consent in Sexual Relationships

A. Brown's New Student Tutorial and John Doe's Introduction to Brown's Community Principles

1. In September 2013, John enrolled in Brown as a freshman student. (Tr. II at 186:15 - 187:6).

2. Before his arrival on campus and during the summer of 2013, John completed Brown's 2013 New Student Tutorial ("Tutorial"), which was required for all incoming students. (Tr. II at 209:18-23).

[1] Brown incorporates by reference its pretrial memorandum, which analyzes the nature of the university-student contractual relationship, the proper interpretation and review of the contractual relationship, and the limited available remedies if a breach is found to have occurred. (ECF No 43).

3. In the Tutorial's first sentence, Brown informed John that, "[p]rior to your arrival as a student at Brown, it is essential that you understand the values and principles of our community." (Ex. 40 at 1; Tr. II at 210:14-24).

4. John understood that the Tutorial was his introduction to Brown's community principles. (Tr. II at 210:21-24).

5. Section 4 of the Tutorial, captioned "Discrimination, Harassment, and Assault," informed John:

> Brown University takes issues of discrimination, harassment, sexual assault, and abuse very seriously. It is incumbent upon the University to foster an atmosphere of trust and respect in order to meet its academic and educational goals. Discrimination and unlawful harassment are detrimental to fostering such an atmosphere and cannot be tolerated in a community aspiring to achieve an open learning environment. The next set of questions refer to information about Brown's policies and procedures that you may find on the web in the following locations: Brown University Sexual Harassment Policy, Brown University Code of Student Conduct, Brown University Office of Health Education.

(Ex. 40 at 17).

6. Question 95, section 4.7 of the Tutorial instructed John to provide "True" or "False" responses to a series of statements, and John responded "True" to the following "statements about sexual consent":

- Lack of consent to sexual activity is a critical part of defining sexual assault or misconduct
- Assuming consent to sexual activity is not a good idea
- Lack of consent may include physical resistance or verbal refusal, but does not require physical resistance or verbal refusal
- Someone who is asleep or very drunk may be considered, by Rhode Island Law and Brown policy, to be unable to give consent sexually
- Consent may be invalid if there is ***coercion***, intimidation, or threat, or if advantage is gained because a person is mentally or physically unable to communicate unwillingness.

(Tr. II at 211:5-13; Ex. 40 at 23) (emphasis added).

7. By completing the Tutorial, John understood that, under Brown's community principles, coercion may invalidate consent. (*Id*. at 211:14-18).

B. "Brown Students Ask For Consent" Video

8. While completing the Tutorial, John watched a video titled "Brown Students Ask For Consent." (Ex. 46; Tr. II at 213:18-20).

9. John understood that the video states values and principles of the Brown community. (Tr. II at 213:21-24).

10. In the video, Brown students answer a series of questions: "What is consent?"; "What is not consent?"; "Do I have consent?" and "How do I ask for consent?" (Ex. 46).

11. The students answer "What is consent?" as follows:

- Consent is talking about sex with my partner and about how far I want to go whether I'm in a relationship or just hooking up.
- It's about talking about things I like, and being open about things I don't like.
- It's about setting my boundaries and doing only what I am comfortable doing.
- Consent is knowing that my partner wants me just as much as I want them.
- Consent is knowing when to stop.
- Consent is listening and being listened to.
- Consent is about open communication, respect and caring.
- Consent is asking, and hearing a yes.
- Consent is about being on the same page as the person I am intimate with.
- Consent is based on choice.
- Consent is active not passive. It means being fully engaged and not just going along.
- Consent is giving permission without feeling pressured.

- Consent is positive cooperation and the exercise of free will.
- Consent is when everyone involved is fully conscious, is mutually participating, is equally free to act, has positively and clearly communicated their intent, can say no at any time, and have that choice accepted and respected.

(Ex. 46 at 0:46 to 1:51).

12. The students answer "What is not consent?" as follows:

- I do not have consent if my partner is passed out or asleep, or drunk, or silent.
- I cannot have consent if my partner is incapacitated by drugs or alcohol.
- I do not obtain consent by pressuring someone, by threatening someone, ***by coercing someone***, or by forcing someone.

(Ex. 46 at 1:52 to 2:17) (emphasis added).

13. The students answer "Do you have consent?" as follows:

- Ask (stated three times).
- No means no.
- Not now, means no.
- I don't know if I want to, means no.
- No does not mean slow down.
- No does not mean keep trying. It means stop.
- I've had too much to drink, means no.
- I'm not sure if I'm ready, means no.
- I'm scared, means no.
- Silence is not consent. People sometimes freeze and cannot speak.

- The absence of yes, means no.

(Ex. 46 at 2:18 to 3:00)

14. The students offer the following examples of questions to confirm another's consent: "Can I kiss you?; Is this okay?; Are you comfortable with this? What would you like me to do to you?; Do you like it when I touch you there?; Do you want to have sex?" (Ex. 46 at 3:01 to 3:14).

15. The video concludes with a chorus of students emphasizing that "Brown students ask for consent." (Ex. 46 at 3:15 to 4:43).

C. The Brown's 2013 Orientation Program

16. As an incoming freshman at the start of the 2013-14 academic year, John attended Brown's new student orientation program. (Ex. 42; Tr. II at 214:19 – 215:4).

17. During the evening of September 2, 2013, John attended a ninety-minute orientation session held at the Pizzitola Sports Center and titled "Speak About It: A Performance about Consent, Boundaries and Healthy Relationships." (Ex. 42; Tr. II at 216:1 - 217:4).

18. The session addressed the following topics:

> Based on true stories shared by college students, Speak About It offers a nuanced look at what healthy sex and relationships can and should look like. Issues including how to negotiate consent, the dynamics of sexual assault, and how to help support friends will be addressed. You will also learn about sexual assault laws, Brown's policies, and resources on an off campus. Please visit www.brown.edu/healthed for a list of supportive resources available to all students.
>
> Immediately following this meeting, join your unit and RPL (Residential Peer Leader) team in a small group discussion about the topic. Check with your RPLs for the location.

(Ex. 42 at p. 17).

19. The students were shown the "Brown Students Ask for Consent" video, which marked the second time that John watched the video. (Tr. II at 213:25 to 214:3, 214:19-22).

20. The session also conveyed information through a PowerPoint slide presentation, including the final slide titled "Brown students ask for consent" and depicting statements and questions relating to consent (e.g., "I'd like to talk about this first," "Are you okay with this?," "If you change your mind, we'll stop."). (Ex. 43, final page). The presenters gave examples of ways to confirm consent with a partner. (Tr. II at 217:23 - 218:2). The presentation noted that that consent is "active," "enthusiastic" and "freely given." (Ex. 43, final page). Also, the presentation offered guidance "to help well-meaning people take care of themselves and each other in sexual situations" and warned that "[p]eople who don't have good intentions may manipulate the language of consent to hurt someone." (*Id.*). The presentation further directed students to Brown's health education webpage for more information. (*Id.*).

21. The session also included a play depicting how to confirm consent in a sexual relationship. (Tr. II at 216:2-9).

22. After the session in the Pizzitola Sports Center, John participated in a smaller group interactive session hosted by residential peer leaders and attended by students in his residence hall, which spanned approximately forty minutes and addressed sexual relationships and consent. (Tr. II at 219:21 - 220:6). The students discussed how "sexual encounters required consent and what would constitute a non-consensual encounter" (*Id.* at 220:4-6) and how "giving and receiving consent is a continuous process, one where both parties are actively and enthusiastically involved in the decision-making." (*Id.* at 220:10-18).

23. Through both orientation sessions held on September 2, 2013, John attended over two hours of training on Brown's community standards applicable to sexual relationships and consent. (Tr. II at 220:16-24).

D. The "Brown students ask for consent" Posters

24. Brown published on campus posters identical to the "Brown students ask for consent" slide, and John saw the posters "all around campus." (Tr. II at 218:3-4, 225:20-22).

E. John's Additional Training at Brown Regarding Consent

25. During the spring of 2013 or fall of 2014, John attended another training session at Brown addressing consent in sexual relationships. (Tr. II at 220:25-221:3). Although John cannot recall the exact date of the session, he confirmed that the training occurred prior to November 10, 2014. (*Id*. at 221:4-8). The training included a discussion of the impact of coercion upon consent. (*Id*. at 221:9-12).

II. Brown's Code of Student Conduct

26. Early in his freshman year at Brown, John read the Code of Student Conduct at Brown University 2013-14 ("2013-14 Code") in its entirety. (Ex. 1; Tr. II at 188:3-17, 199:11-17).

27. Early in his sophomore year at Brown, John read the Code of Student Conduct at Brown University 2014-15 ("2014-15 Code") in its entirety. (Ex. 2; Tr. II at 188:18-189:8, 199:18-20).

28. The 2013-14 and 2014-15 Codes are identical in all material respects, particularly their language stating the Principles of the Brown Community and codifying Offense III (Sexual Misconduct). (Compare Ex. 1 at 1, 3-4 and Ex. 2 at 1, 3-4).

29. By November 10, 2014, John had read the entire 2014-15 Code. (Tr. II at 199:21-23).

30. As stated in the Code's "Principles of the Brown University Community," Brown is dedicated to maintaining "individual integrity and self-respect" and "respect for the privileges of others." (Ex. 1 at 1, Ex. 2 at 1). Brown expects that its community members will "respect the

freedom and privileges of others" and advance "mutual respect, tolerance, and understanding." (*Id*.). Brown's "socially responsible community provides a structure within which individual freedoms may flourish without threatening the privileges or freedoms of other individuals or groups." (*Id*.).

31. Within the Code's Standards of Student Conduct, Offense III prohibits sexual misconduct 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. Harassment, without physical contact, will not be deemed sexual misconduct under these provisions. Violations of Offense IIIb will result in more severe sanctions from the University, separation being the standard. Note: Some forms of sexual misconduct may also contain sexual assault under Rhode Island criminal laws and are subject to prosecution by State law enforcement authorities – which can take place independent of charges under the University's Code of Student Conduct.*

(Ex. 1 at 4, Ex. 2 at 4) (italics in original).

32. "The comments contained [in the Code] are offered as a guide to understanding the University's policies, and are not to be confused with the policies themselves. As such these comments are not binding upon the University or its designated representatives." (Ex. 1 at 6, Ex. 2 at 6).

III. John's Subjectively Narrow and Unreasonable Interpretation of the "Broad Range of Behaviors" Encompassed in Offense III (Sexual Misconduct)

33. As stated on page 17 of John's pretrial memorandum, John interprets narrowly the "broad range of behaviors" that can constitute a sexual misconduct violation of Offense III under the 2014-15 Code. (ECF No. 44 at 17).

34. During all phases of the disciplinary process and before the Court, John has contended that the "Comment" to Offense III states the exclusive list of the "broad range of behaviors" for which a sexual misconduct violation may be charged under the 2014-15 Code. (Tr. II at 201:17-24). Specifically, John has asserted that Brown may ask only the following four questions to determine whether John committed a sexual misconduct offense against Ann under Offense III: (1) Did John use physical force to overpower Ann?; (2) Did John threaten Ann?; (3) Did John intimidate Ann or place her in fear?; and (4) Was Ann mentally incapacitated or impaired? (*Id.*; *see also* Ex. 30 at 3-4 (John's April 29, 2016 appeal)).

35. During cross-examination, John was asked whether he understood, as of November 10, 2014, that "coercion" falls within the "broad range of behaviors" encompassed by Offense III. John responded "[i]t depends … [on] how you define the word." (Tr. II at 221:13-21).

36. The Court questioned John whether he believes that Brown's 2014-15 Code permits coercive behavior to obtain sex that does not involve force or intimidation. (Tr. II at 229:20 – 233:2). John responded that, in his view, such behavior is consensual sex, falls outside the scope of Offense III, and cannot be the basis for a sexual misconduct violation under 2014-15 Code. (*Id.*).

37. When the Court questioned whether all of Brown's training information and materials on its community standards are irrelevant to the interpretation of Offense III, John

responded "It's certainly not irrelevant. I think it's something that students should follow but it's not a policy violation." (Tr. II at 235:16-22).

38. As summarized below and discussed in more detail *infra*, before, during, and after the April 14, 2016 Title IX Council disciplinary hearing, John adhered to his totally subjective and unreasonably narrow interpretation of whether and how "coercion" may be one of the "broad range of behaviors" encompassed by Offense III:

- In John's March 4, 2016 response to Djuna Perkins' draft investigative report, he contended that, to fall within Offense III, "coercion" must entail "use of force or intimidation to obtain compliance." (Ex. 16 at 1-2).

- During John's appearance before the Title IX Council on April 14, 2016, he contended that the "investigator conflates the two different policies [Brown's 2014-15 Code and its Title IX Policy adopted in 2015-16]. [The Title IX Policy] covers all aspects of sexual assault. [The 2014-15 Code] requires force or threat of force …. If Complainant attempts to allege that there were [attempts at coercion], they wouldn't fall under [2014-15 Code]." (Ex. 24 at 3).

- In John's appeal dated April 29, 2016, he argued that the four examples stated in the Comment to Offense III are the only types of conduct that may be charged as a non-consensual, sexual misconduct violation under the 2014-15 Code. (Ex. 30 at 2-4).

IV. Brown's Task Force on Sexual Assault

39. During the fall 2014 semester, Brown convened a Task Force on Sexual Assault ("Task Force") charged with undertaking a comprehensive review of Brown's practices, policies, and procedures addressing issues of sexual assault and sexual misconduct. (Tr. I at 144:25 – 145:12, Tr. IV at 125:10-21). The Task Force actively sought broad campus-level input and feedback on Brown's policies, as well as specific recommendations regarding how the University should proceed going forward. (Tr. I at 144:25 – 145:12).

40. The Task Force included members of Brown's administration, faculty and student body. (Tr. IV at 125:11-14).

41. The Task Force issued two reports – an interim report in December 2014 and a final report in April 2015. (Tr. I at 144:25 – 145:8, Tr. IV at 126:15-19).

V. Brown's Establishment of its Title IX Office and Hiring of a Title IX Program Officer

42. During the spring of 2015 and as recommended by the Task Force, Brown established a centralized Title IX Office under the administration of a new University officer, the Title IX Program Officer. (Tr. I at 26:20 – 27:22, 144:25 – 145:24).

43. After an extensive selection process, Brown hired Amanda Walsh ("Walsh") as the Title IX Program Officer, who began the position on about May 4, 2015. (Tr. I at 26:21-22, 144:11-13).

44. Brown's Title IX Program Officer has institutional responsibility for overseeing Title IX compliance, training and education, and informal and formal complaint resolution processes. (Ex. 4 at 2; Tr. I at 27:2-16, 146:1-10).

VI. Brown's Adoption of its Title IX Policy and Complaint Process at the Start of the 2015-16 Academic Year

A. The Title IX Policy

45. The Task Force recommended that Brown adopt a *Sexual and Gender-Based Harassment, Sexual Violence, Relationship and Interpersonal Violence and Stalking Policy* ("Title IX Policy"). (Tr. I at 148:5-13). The Task Force published a draft Title IX Policy, which was extensively reviewed and commented upon by Brown's administration, community members, and legal counsel. (*Id.*).

46. In September 2015, Brown's corporation approved and adopted the finalized Title IX Policy. (Ex. 4; Tr. I at 30:1-3, 147:24 – 148:13). The Title IX Policy applies to the entire Brown community in furtherance of maintaining the University's "safe learning, living and

working environment where healthy, respectful, and consensual conduct represents the campus cultural norm." (Ex. 4 at 1).

47. The Title IX Policy states Brown's expectations of conduct in accordance with its community standards. (Tr. I at 152:24 – 153:1).

48. Section VII of the Title IX Policy states "Prohibited Conduct Under This Policy," including "Sexual Assault" as codified at Section VII(B):

> Sexual assault is having or attempting to have sexual contact with another individual without consent (*see below definition of consent*).
>
> Sexual contact includes:
>
> (i.) Sexual intercourse (anal, oral, or vaginal), including penetration with a body part (e.g., penis, finger, hand, or tongue) or an object, or requiring another to penetrate himself or herself with a body part or an object, however slight; or
>
> (ii.) Sexual touching, including, but not limited to, intentional contact with breasts, buttocks, groin, genitals, or other intimate part of an individual's body.

(Ex. 4 at 5) (italics in original).

49. Sections VIII (A) and (B) of the Title IX Policy state definitions of "Consent" and "Coercion":

> A. Consent
>
> Consent is an affirmative and willing agreement to engage in specific forms of sexual contact with another person. Consent requires an outward demonstration, through mutually understandable words or actions; indicting that the person has freely chosen to engage in sexual contact. ***Consent cannot be obtained through: (1) manipulation; or (2) the use of coercion or force***; or (3) by taking advantage of the incapacitation of another individual.
>
> Silence, passivity, or the absence of resistance does not imply consent. It is important not to make assumptions; if confusion or ambiguity arises during a sexual interaction, it is essential that each participant stops and clarifies the other's willingness to continue.
>
> Consent can be withdrawn at any time. When consent is withdrawn, sexual activity must cease. Prior consent does not imply current or future consent; even in the context of an

> ongoing relationship, consent must be sought and freely given for each instance of sexual contact.
>
> An essential element of consent is that it be freely given. Freely given consent might not be present, or may not even be possible, in relationships of a sexual or intimate nature between individuals where one individual has power, supervision or authority over another. More information, policy and guidance regarding such relationships can be found below.
>
> In evaluating whether consent was given, consideration will be given to the totality of the facts and circumstances, including but not limited to the extent to which a complainant affirmatively uses words or action indicating a willingness to engage in sexual contract, ***free from manipulation, intimidation, fear, or coercion***, whether a reasonable person in the respondent's position would have understood such person's words or acts as an expression of consent; and whether there are any circumstances, known or reasonably apparent to the respondent, demonstrating incapacitation or fear.
>
> B. Coercion or Force
>
> Coercion is ***verbal and/or physical conduct***, including ***manipulation***, intimidation, unwanted contact, and express or implied threats of physical, emotional, or other harm, 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.
>
> Force is the use or threat of physical violence or intimidation to overcome an individual's freedom of will to choose whether or not to participate in sexual contact.

(Ex. 4 at 7) (emphasis added).

50. Unlike the Title IX Policy, the 2014-15 Code and earlier iterations of the Code of Student Conduct did not state a definition of consent. (Tr. II at 79:12-17). When adjudicating student disciplinary cases involving sexual misconduct charges, the Student Conduct Boards would look to available sources to define "consent" for purposes of their deliberations. (*Id*.).

51. When the Task Force determined that Brown should explicitly define "consent" in the Title IX Policy, it received input from a range of Brown community members, including Student Conduct Board panelists who adjudicated charges under the Code of Student Conduct and members of Brown's Health Services Department, as to the already existing community standards for consent. (Tr. II at 80:2-22).

B. The Complaint Process

52. In addition to its Title IX Policy, Brown adopted in September 2015 its *Complaint Process Pursuant to the University Sexual and Gender-Based Harassment, Sexual Violence, Relationship and Interpersonal Violence and Stalking Policy* ("Complaint Process"), which delineates the process for the receipt, investigation, and informal and formal resolution of complaints alleging student sexual misconduct that violates Title IX. (Ex. 3 at 1; Tr. II at 4:5-24).

53. Walsh drafted the Complaint Process with assistance and review by Brown's Office of General Counsel, outside legal counsel, and the Task Force's chairpersons. (Tr. II at 4:5-15). During the drafting, Walsh "pulled information heavily from the final report of the Sexual Assault Task Force." (Tr. I at 148:20-23).

54. As the Title IX Program Officer, Walsh oversees the procedural steps during each student sexual misconduct disciplinary case and ensures their compliance with the Complaint Process. (Tr. II at 4:25 – 5:3).

55. The Complaint Process states that if a potential complainant wishes to proceed with a resolution process, he or she should submit a written complaint to the Title IX Office. (Ex. 3 at 1-2). The Title IX Program Officer or a designee reviews the complaint to determine whether the respondent is a covered person under the Title IX Policy and whether the allegations, if substantiated, constitute a violation of the Title IX Policy. (*Id*. at 2). If the answers to both questions are affirmative, Brown's Title IX Office has the authority to investigate and resolve the complaint. (*Id*.).

56. Given the wide spectrum of behaviors that can constitute violations of University policies, Brown's Title IX Office may elect to resolve reports informally based upon the circumstances. (Ex. 3 at 2).

57. If a formal resolution process is deemed appropriate, the Title IX Office notifies the respondent of the complainant's allegations and allows the respondent five (5) business days to submit a statement. (Ex. 3 at 3).

58. As the disciplinary process ensues, the Title IX Office advises both the complainant and respondent of available student support resources, including counseling services and academic assistance. (Ex. 3 at 2, Ex. 4 at 10, Tr. I at 149:1 – 150:24).

59. Both the complainant and respondent may be accompanied and assisted by an advisor during the resolution process. (Ex. 3 at 2). A student may elect to have an attorney serve as an advisor. (*Id.*).

60. Advisors often contact the Title IX Office during the disciplinary process, and Brown's Title IX Office seeks to include the student in any communications responding to an advisor. (Tr. II at 81:18-24). At times, attorneys acting as advisors raise legal inquiries or positions that are more appropriately addressed and responded to by Brown's Office of General Counsel. (*Id*. at 81:24 – 82:3).

61. Brown engages a trained investigator to interview the complainant, respondent, and witnesses, gather relevant information, and produce a comprehensive report of the investigation. (Ex. 3 at 3). Brown adopted the investigative model in direct response to community concerns reported by the Task Force that the Code of Student Conduct Board process was often traumatic for student complainants and respondents, who had to interact with one another during the disciplinary process and hearing. (Tr. I at 171:13 -172:5). Other colleges and universities have similarly adopted an investigator model in their disciplinary processes. (Tr. II at 57:6-24).

62. The investigator's role is to gather "information through interviews of the complainant, respondent, and witnesses and synthesize the information in a report. The

investigator has the discretion to determine the relevance of any witness or other evidence and may exclude information in preparing the investigation report if the information is irrelevant, immaterial, or more prejudicial than informative." (Ex. 3 at 3).

63. Under the Complaint Process, Brown has established a Title IX Council to adjudicate charges and review appeals. (Ex. 3 at 5).

64. At the hearing to adjudicate charges, the Chair of the Title IX Council presides as a non-voting panelist and three members of the Title IX Council preside as voting panelists. (Ex. 3 at 5).

65. The Title IX Council Chair "is responsible for the administration of the hearing process, including procedural matters and decisions leading up to the hearing, determinations about information that will be considered or not, appropriate and inappropriate lines of questioning, and the overall decorum and conduct of the proceedings." (Ex. 3 at 5).

66. The panel's role is "to review the information presented in the investigation report and to determine if an individual or individuals violated the University policy (and, if yes, to determine an appropriate sanction)." (*Id*.).

67. During the hearing, the panel convenes with the investigator (although the Chair has the discretion to determine if a meeting with the investigator is not necessary) and raises any questions regarding the investigator's report. (Ex. 3 at 5). The complainant and respondent are not allowed in the hearing room during this phase of the proceeding. (*Id*.)

68. The panel may also request to hear from one or more witnesses. The Chair has complete discretion to approve or deny those requests. (Ex. 3 at 5).

69. The complainant and respondent appear separately before the panel to make an oral statement regarding the facts and be questioned by the panel. (Ex. 3 at 5).

70. Throughout the hearing process, "the presumption is that the investigator has identified and interviewed all relevant witnesses and supplied the information necessary for the hearing panel to render its decision and determine sanctions." (Ex. 3 at 5).

71. The panel convenes to deliberate and render a decision, by majority decision of the voting members, regarding whether or not the respondent has violated University policy by a preponderance of the evidence. (Ex. 3 at 5).

72. Under the Complaint Process, Brown attempts as best as possible to complete the investigation and the panel hearing within sixty (60) days in accordance with guidance from the Department of Education's Office for Civil Rights. (Ex. 3 at 6-7; Tr. I at 164:5-17). The sixty day targeted period is not firm because the complexity and unique factors of each case, such as availability of critical witnesses or a concurrent law enforcement investigation, can impact the course of a case. (*Id.*). Consequently, the Title IX Program Officer may alter timeframes under the Complaint Process for good cause. (*Id.*).[2]

73. Within three (3) business days after notice of the outcome of the hearing, both the complainant and respondent have the right to appeal a Title IX Council panel's "final determination of responsibility and/or the resulting sanctions based upon the limited grounds of substantial procedural error that materially affected the outcome and/or material new evidence not reasonably available at the time of the hearing." (Ex. 3 at 6). A student may file a written response to the other student's appeal. (*Id.*).

74. When drafting the Complaint Process, Brown considered the inclusion of a third ground for an appeal, which would have allowed a student to file an appeal asserting that a ruling

[2] As Brown addresses *infra*, the University applied the Complaint Process' formal resolution steps during its receipt of Ann's complaint and John's response, investigation, and panel hearing.

is against the weight of the evidence. (Tr. II at 7:22 – 8:19). Brown declined to include that ground in the finalized Complaint Process because it could significantly broaden the number and scope of filed appeals. (*Id.*).

75. The Complaint Process does not permit an appealing student to submit a written reply to the other student's response to the appeal. As Walsh testified, the "steps have to end somewhere." (Tr. II at 7:7-17). Brown's Title IX Office recognizes that there may be procedural requests outside the steps expressly stated in the Complaint Process and retains the discretion to address them as deemed appropriate. (*Id.*).

76. Appeals are reviewed by a Title IX Council panel comprised of the Title IX Council Chair as a nonvoting member and three voting members. (Ex. 3 at 6). The panel's "responsibility will be strictly limited to determining whether there was a substantial procedural error that materially affected the outcome and/or new evidence not reasonably available at the time of the hearing. (*Id.*) If either or both are found by the appeals panel, the appeal will be granted. If the appeal is denied, the matter is closed." (*Id.*)

77. If the appellate panel grants an appeal based upon a substantial procedural error, the matter will be heard by a new hearing panel. (Ex. 3 at 6).

78. If the appellate panel grants an appeal based upon the discovery of new evidence, the matter will be remanded back to the same panel that initially heard the case for reconsideration in light of the new evidence. (Ex. 3 at 6).

79. In the event of a reconsideration following the granting of the appeal, the appeals panel will provide the hearing panel with instructions to structure the nature and extent of its

reconsideration. (Ex. 3 at 6). "Following reconsideration, the finding of the hearing panel or the sanction imposed by the decision-maker will be final and not subject to further appeal." (*Id.*).[3]

VII. The Selection and Training of Title IX Council Members

80. Gretchen Schultz ("Schultz"), a tenured professor of French Studies, serves as the Title IX Council Chair. (Tr. II at 29:5-12; Tr. IV at 30:11-13). Schultz previously served on the Task Force and presided on Student Conduct Board panels that adjudicated sexual misconduct charges. (Tr. IV at 32:19-22, 45:2-5).

81. Brown's Title IX Council is comprised of faculty, staff, undergraduates, graduate students, and a medical student. (Tr. I at 153:11-16).

82. Beginning in the summer of 2015 and during the 2015-16 academic year, Walsh addressed on a rolling basis the Title IX Council's membership. (Tr. I at 157:19-23).

83. The Title IX Council did not hear any cases during the fall 2015 semester, and its first panel presided in February 2016. (Tr. I at 157:25 – 158:3). By the completion of the spring 2016 semester, the Title IX Council had reached 18 members, most of whom are female. (Tr. I at 158:2-9).

84. Student government bodies, not Walsh, select the Title IX Council's student members. (Tr. I at 153:25 – 154:12). Specifically, Brown's Undergraduate Council of Students selects the Title IX Council's undergraduate members, the Graduate Student Council selects the graduate student members, and the Medical School Senate selects its member. (Tr. I at 154:1-

[3] As Brown addresses *infra*, the University applied the Complaint Process properly during its review of the appeals filed by both John and Ann. Also, Brown specifically addresses John's effort to rewrite the Complaint Process by contending that he should have been allowed to file a sur-reply in support of his appeal and that Brown should have applied a "weight of the evidence" standard.

14). Walsh consults with the student governing bodies to ensure that they vet their selections for any biases. (*Id*. at 154:15 – 156:4).

85. Throughout the 2015-16 academic year, Walsh oversaw the selection of the Title IX Council's faculty and staff members. (Tr. I at 156:24 - 157:1). She sought members who would approach the cases fairly and offer balanced viewpoints. (*Id*.) Walsh met with candidates individually to determine whether they would be a good fit to serve and strive that the Title IX Council would have a representative group of faculty and staff. (*Id*.)

86. All of the Title IX Council members were required to complete at least five hours of training before becoming eligible to serve on a hearing panel. (Tr. I at 158:24 – 159:19).

87. Walsh presented a two-hour training session overviewing Title IX legal issues and Brown's Title IX policies and procedures, and she reviewed a detailed PowerPoint presentation titled *Title IX & You: Building a community of responsibility, equality and safety*. (Tr. II at 162:14 – 163:9; Ex. 45).

88. During her training presentation, Walsh referenced a slide titled "Brown's Policy – Community Standard," which instructed members that "[o]ur legal obligation is only **one** reason why it is important for us to take on issues of sexual and gender-based harassment. The University disciplines behavior that does not align with our values all of the time. At the most basic level, Title IX exists so that everyone studying and working at an educational institution is *equally valued*." Citing the Task Force's report, Walsh noted that Brown's community standards promote "a campus culture in which all members are equally valued." (Ex. 45 at 10th slide; Tr. I at 165:14 – 166:2).

89. Walsh addressed "Barriers to Reporting at Brown," which referenced the Task Force's work and community feedback regarding Brown's former Student Conduct Board Process. (Tr. I at 167:23 – 168:5).

90. Walsh trained members regarding the Title IX Council's role and challenges, informing them that while they may believe a complainant or feel sympathy for him or her, it does not necessarily mean that they should find the respondent to be "responsible." (Tr. I at 169:17 – 170:10). Walsh stressed that a preponderance of the evidence must support each responsible finding. (*Id*.)

91. Alana Sacks ("Sacks"), a Sexual Harassment & Assault Resources & Education ("SHARE") advocate, presented a training session to Title IX Council members regarding the impacts of trauma on sexual assault victims. (Tr. I at 160:1-16).

92. Brown provided the SHARE advocate's session to the Title IX Council members in compliance with guidance documents issued by the United States Department of Education's Office for Civil Rights, which state that decision-makers in Title IX processes should understand the potential impacts of trauma. (Tr. I at 160:7-16).

93. As Sacks testified during her deposition (Ex. 48), she did not caution the Title IX Council members that they must draw certain judgments about sexual assault survivors in each case. Rather, she sought to ensure that the members are informed about the potential impacts of trauma. (Ex. 48 at 85:1-16.). As Sacks made clear in her presentation, "every survivor responds differently." (*Id*. at 86:1-2).

94. During Sacks' training presentation, she reviewed a PowerPoint presentation titled "Invisible Vectors. *Power, Dynamics, Coercion and the Impact of Trauma*." One of the presentation's slides was the "Brown students ask for consent" slide, which John saw during his September 2013 new student orientation and in posters across Brown's campus. (Ex. 47 at 15th slide; Ex. 48 at 87:7-10).

95. At another training session, Mark Peters, Brown's Men's Health Coordinator, addressed the social norms and expectations of males. Walsh arranged this session to offer "another point of view or additional contextual information." (*Id*. at 160:17-23).

96. The Title IX Council members also participated in a mock hearing addressing a fictional disciplinary case. (Tr. I 161:14-21). The Title IX Council members saw how a hearing proceeds and deliberated as part of this training session. (*Id*. at 162:9-13).

97. Walsh attended each training session presented to the Title IX Council. (Tr. II at 160:24 – 161:1). At the beginning of each session, Walsh introduced the topics and their context. (Tr. I at 160:24 – 161:13). At the end, she reminded the Title IX Council members that each disciplinary case will be fact specific and that they should consider all aspects of their training when they preside. (*Id*.).

VIII. Ann's Complaint and John's Response

98. During late September or early October 2015, Ann met with Walsh to discuss an experience that Ann had with John during November 2014. (Tr. II at 9:9-19). Ann asked about options available to her. (*Id*. at 9:20-23). Walsh reviewed Brown's remedial and safety resources, such as confidential SHARE advocates, the chaplain's office, and counseling and psychological services. (*Id*. at 9:24 – 10:6). Walsh also indicated that Ann may file a report with Brown's Title IX Office, as well as with the Providence Police Department or Brown's Department of Public Safety. (*Id*. at 10:6-9).

99. In early October 2015, John requested and received a meeting with Walsh, following a meeting he had with Dean Maria Suarez of Brown's Office of Student Life. (Tr. II at 16:3-8). Dean Suarez had issued two no-contact orders against John relating to Ann and Kay

Styles ("Kay")[4] (*Id*. at 16:8-14). John thought that Walsh requested the issuance of the no contact orders, so he wanted to discuss them with her. (*Id*. at 16:14-15). Walsh informed John, that the Title IX Office had not received any complaint against him, that she did not request the no-contact orders, and that the Office of Student Life was responsible for the issuance and enforcement of the no-contact orders. (*Id*. at 16:16-22).

100. On Friday, October 30, 2015, Ann filed a complaint in the Title IX Office alleging that John sexually assaulted her on November 10, 2014. (Ex. 5; Tr. I at 32:22). Ann's complaint against John described and attached text messages that two students exchanged between November 5, 2014 and November 10, 2014, an allegedly non-consensual sexual incident during the early morning hours of November 10, 2014 at Faunce Hall on Brown's campus, and her post-incident interactions with John. (Ex. 5 at 1-3). Ann also alleged that John had sexually harassed two other female students (Kay and a sophomore transfer student). (*Id*. at 3-4).

101. Consistent with the Complaint Process, Walsh promptly contacted John to inform him of Ann's complaint. (Tr. I at 32:22-23; Tr. II at 10:10-12). During the evening of Sunday, November 1, 2015, Walsh sent an email to John requesting that he meet with her the next day. (Tr. I at 32:23 – 33:1-2; Tr. II at 12-14).

102. On Monday, November 2, 2015, Walsh met with John to discuss Ann's complaint. (Tr. I at 33:3- 34:19; Tr. II at 10:22 – 11:12; Ex. 6). Walsh provided John with a copy of Ann's complaint. (Ex. 6). Walsh also provided John with a copy of the Complaint Process. (*Id*.). She informed John that if he needed academic assistance, he should contact Dean Suarez in Brown's Office of Student Life. (*Id*.). Walsh informed John of his right to an

[4] Kay has also been referenced as "Witness 9" during this litigation.

advisor. (*Id*.). She further alerted John that he could seek confidential support at Counseling and Psychological Services (CAPS). (*Id*.; Tr. I. at 35:1-15; Tr. II at 11:2-22).

103. Under the Complaint Process, a respondent has five business days to submit a statement in response to a complaint. (Ex. 3 at 3). Walsh agreed to John's request for an extension due to his course work and a mock trial tournament during the response period. (Ex. 5). Walsh granted a twenty-four hour extension, allowing John to file his statement by 5 p.m. on Tuesday, November 10, 2015. (*Id*.; Tr. II at 12:1-12).

104. On November 10, 2015, John filed his statement responding to Ann's Complaint. (Ex. 8; Tr. I at 43:15-22). John claimed that Ann consented to their November 10, 2014 sexual encounter. (Ex. 8 at 1-4). John also attached "a complete, unedited log of [their text messages], noting that the log "begins a day earlier than what Ann provided [with her Complaint] and includes subsequent texts that she deleted from what she provided." (Ex. 8 at 1). John claimed that Ann continued to pursue him after November 10, 2014 and that she offered no reasonable explanation for her delay in filing the complaint. (Ex. 8 at 4-5).

105. As permitted under the Complaint Process, Ann and John retained attorneys to act as their advisors. (Tr. II at 5:16-17). Ann selected Attorney Laura Dunn of SurvJustice as her advisor, who was assisted by Attorney Myka Held of that organization. (*Id*. at 5:21-25). John selected Attorney J. Richard Ratcliffe as his advisor. (*Id*. at 5:19-20).

106. Shortly after John's receipt of Ann's complaint, Brown informed Attorney Ratcliffe on November 4, 2015 that the University would apply the Complaint Process to investigate and adjudicate the matter. (Ex. 7). Because the November 10, 2014 incident between John and Ann occurred during the 2014-15 academic year, however, the substantive charges were based on the 2014-15 Code. (*Id*.).

IX. The Investigation

107. Consistent with the Complaint Process, Brown hired an external investigator, Attorney Djuna Perkins ("Perkins"), to investigate Ann's allegations and John's defenses. (Ex. 9). Perkins has substantial prior experience trying cases and conducting investigations in sexual assault matters, and she has more recently conducted approximately forty Title IX investigations for colleges and universities. (Tr. II. at 83:12-85:3, 148:1-25).

108. Perkins' investigation spanned over four months from her engagement by Brown on November 4, 2015 (Ex. 9) to her completion of her report on March 12, 2015 (Ex. 17). She spent over eighty hours conducting the investigation and drafting the report. (Tr. II at 144:21-25).

109. Perkins interviewed Ann on November 13, 2015, January 8, 2016, and February 17, 2016. (Ex. 18 at 1). She interviewed John on November 19, 2015 and February 2, 2016. (*Id*.). Between December 3, 2015 and February 12, 2016, Perkins interviewed eleven witnesses identified by Ann and John. (*Id*. at 1-2). She attempted to reach three other witnesses who did not respond or declined to be interviewed. (*Id*. at 2).

110. Perkins reviewed substantial documentation during her investigation. (Ex. 18 at 2-3). She reviewed the entire set of text messages between John and Ann. (Ex. 18 at 3, n.3). She also reviewed sets of text messages involving John and two female witnesses (Witnesses 8 and 9). (*Id*. at 2-3). Perkins reviewed, but elected not to consider, other text messages between John and two female students (Witnesses 9 and 10), due to a concern that their prejudicial impact to John would outweigh their probative value. (*Id*. at 3). Perkins further declined to consider communications that John sent to mock trial members and its governing board during the summer of 2015, again out of concern about their potential prejudicial impact to John. (*Id*.).

Finally, Perkins declined to consider a Facebook posting provided by Witness 9 because it was not directly relevant to the allegations in Ann's complaint against John. (*Id*.).

111. On February 29, 2016, Perkins sent an initial draft of the investigation report to Walsh for the Title IX Program Officer's review. (Exs. 10 and 11). Walsh responded that day with her red-lined revisions and comments. (Exs. 11and 12).

112. In a section titled "*Relevant Policy Sections*," Perkins' draft stated citations to (a) offenses VII.A and VII.B and the definitions of consent and coercion in Brown's Title IX Policy and (b) Brown's 2014-15 Code. (Ex. 10). When she wrote the initial draft, Perkins used a template that she had received from the Title IX Office as a sample. (Tr. II at 100:21-12).

113. In her revisions, Walsh rewrote the language under the "*Relevant Policy Sections*" to cite only to Offense III of the 2014-15 Code. (Ex. 12). Walsh deleted the citations to offenses under the Title IX Policy because the disciplinary case involved charges against John under the 2014-15 Code. (Tr. II at 21:15-19). Walsh deleted the citations to the Title IX Policy's definitions of consent and coercion because she felt that their inclusion "would have indicated to [the Title IX Council hearing panelists] that they were required to review those [definitions in the Title IX Policy], which they weren't because definitions weren't contained in the '14-'15 Code, but there were no definitions for those terms in the '14-'15 Code." (*Id*. at 21:20-25).

114. During their communications relating to the initial draft, Walsh and Perkins addressed a section titled "The Respondent's claim of conspiracy to fabricate allegations against him" stated on pages 26-29. (Ex. 11, Ex. 12 at 26-29). Walsh wanted to understand the reasons for the inclusion of what could be character evidence. (Ex. 11; Tr. II at 23:6 – 24:12).

115. As Perkins informed Walsh, during the investigator's interviews with John, he asserted adamantly a defense that Ann and Witness 9 conspired against him to fabricate sexual misconduct and harassment allegations. (Ex. 11 at 1). Based upon John's defense, Perkins

concluded that it was appropriate to include factual information, with appropriate disclaimers regarding the information's purpose, summarizing John's interactions with Witness 9. (*Id*.).

116. In light of John's defense, Walsh agreed that the report should provide appropriate factual context regarding his interactions with Witness 9. (Ex. 11 at 1; Tr. II at 23:23 – 24:12). Walsh concluded that it would be improper and possibly a Title IX violation for Brown to suggest to John or advise him in any way to withdraw his conspiracy defense. (Tr. II at 24:2-12).

117. After receiving Walsh's input, Perkins revised the draft. (Tr. II at 104:16-21). On March 1, 2016, a draft of the investigation report was shared with John and Ann, consistent with the Complaint Process. (Exs. 13). Consistent with their rights under the Complaint Process, on March 4, 2016, John and Ann submitted their comments and proposed revisions to the draft report. (Exs. 14 and 16).

118. Ann's proposed revisions were sent to Walsh and Perkins by Ann's legal counsel, Attorney Dunn, and were stated in two parts – a response statement that addressed sequentially the contents of the draft report and a "complainant's response statement" that outlined "specific arguments for Brown to consider especially regarding investigator discretion regarding commentary in final reports." (Ex.14).

119. On March 7, 2016, Walsh wrote an email to Perkins, noting that Ann's proposed revisions state matters that are largely up to the investigator. (Ex. 15 at 2). Walsh does not recall that she responded to Attorney Dunn. (Tr. I at 80:22 – 81:6).

120. In a March 4, 2016 letter to Perkins, John stated his comments and proposed revisions to the draft report. (Ex. 16). As his first point, John cited to Offense III in 2014-15 Code, claiming that it is "vastly different" than what it is stated in the current Title IX Policy. (Ex. 16, 3/4/16 Ltr. at 1).

121. John addressed page 15, footnote 22 of the draft report (Ex. 13 at 15, n. 22), stating the following:

> Quite a bit of your report, including footnote 22, focusses on the possibility that I coerced [Ann] to engage in sexual conduct. That, however, is not part of the 2014 definition of this offense. The term coerce does not appear in that definition, so I respectfully suggest that your statement in footnote 22 that "the central issue in this case . . . . [is] whether the consent was obtained through coercion" is incorrect. In any event, because panels are now trained to apply a different definition of sexual misconduct than what applies in my case, this distinction is important and should be conspicuously set forth in your report. Furthermore, your report does not contain a definition of "coercion," which is the "use of force or intimidation to obtain compliance." There is absolutely no evidence that I intimidated or threatened the Complainant in order to satisfy my sexual desires."

(Ex. 16, 3/4/16 Ltr. at 1-2).

122. John's statements reflect his subjective and unreasonably narrow interpretation of the "broad range of behaviors" prohibited by Offense III of the 2014-15 Code. John contended that the 2014-15 Code addressed a narrower range of non-consensual sexual misconduct than the current Title IX Policy. John offered no specific support for his generalized contention that "panels are now trained to apply a different standard of sexual misconduct."

123. When asked at trial to explain why he alluded to the Title IX Policy in his March 4, 2016 letter to the investigator, John stated that he did so "because Djuna Perkins essentially alluded to that policy in her draft report." (Tr. II at 200:23 – 201:9). When asked why he addressed the definition of coercion in his letter, John stated that he did so "[b]ecause it was a word that Djuna had used." (*Id*. at 202:5-11). He felt that "coercion in the sense that she had used it" was within the broad range of offenses prohibited by Offense III of the 2014-15 Code. (*Id*. at 202:12-14). John contended that Perkins used "coercion" "synonymously with manipulation." (*Id*. at 202:15-19). John reiterated his consistently narrow interpretation that "coercion" means "the use of a threat of force," and that Perkins was "not using it to mean that" in her draft report. (*Id*. at 202:22-25).

124. In his March 4, 2016 letter, John referred to the final pages of the draft report, which address his interactions with Witness 9. (Ex. 15 at 2-6). John contended that "these paragraphs far outweigh any relevance they have to the issues the panel must consider and should be removed." (*Id*. at 6).

125. Citing again to page 15, footnote 22 of the draft report, John claimed that the investigator should have obtained a full set of text messages between Ann and Witness 9 based upon his defense that Ann fabricated her claim against him with encouragement and assistance from Witness 9. (Ex. 15 at 6).

126. After considering both students' comments and incorporating certain of their proposed revisions, Perkins finalized her report and issued it on March 12, 2016. (Exs. 17 and 18).

127. In response to John's comments, Perkins rewrote footnote 22 in the draft report, which became footnote 26 in the final report. (*Compar*e Ex. 13 at 15, n.22 and Ex. 18 at 15-16, n.26). Among her revisions, Perkins added language in the footnote stating that "[t]he 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 equal consent." (Ex. 18 at 15-16, n. 22)."

128. Perkins evaluated John's request that she should obtain and review a complete set of text messages between Ann and Witness 9. (Tr. II at 112:7 to 113:22). Perkins evaluated this request from "John's point of view," considering "on his best day what he'd be hoping to find in those text messages." (*Id*. at 113:2-4). Perkins analyzed the existing evidence, which shows that Ann "couldn't stand" John, came to her apparent realization that she was sexually assaulted based upon a reported conversation with Witness 9, and "had already locked herself into a version of events with Witness 9." (*Id*. at 113:4-9). Perkins concluded that the text messages,

even if they could be obtained, would not add to or contradict the version of events already in the investigative record. (*Id*. at 113:10-22).

129. Given John's continuing assertion of his conspiracy defense, Perkins included in the final report a revised section addressing the "Respondent's claim of conspiracy to fabricate allegations against him." (Ex. 18 at 26-29). In that section, Perkins stated the following regarding the limited purpose of this evidence:

- In the body of page 27, the investigator wrote "[t]he incidents on the following pages (through the second to last paragraph before the Conclusion on the last page) are relevant only to the extent that they provide context for the Complainant's and Witness 9's state of mind toward the Respondent and the Complainant's motives in bringing the Complaint. They are not relevant for any other purpose and should not be considered as evidence that the Respondent committed the acts alleged in the complaint.

- In footnote 43 on page 27 relating to a September 26, 2015 interaction between John and Witness 9, the investigator wrote "[t]his incident is relevant to the extent that it provides context for the Complainant's and Witness 9's state of mind toward the Respondent and the Complainant's motives in bringing the Complaint. It is not relevant for any other purpose and should not be considered evidence that the Respondent committed the acts alleged in the Complaint.

(Ex. 18 at 27).

X. The Title IX Council Hearing

130. After Perkins' issuance of the finalized investigation report, Walsh addressed the composition of the Title IX Council that would preside at the hearing. (Tr. II at 26:1-3).

131. Walsh reviewed those Title IX Council members who had no conflicts in the matter, had completed the required five hours of training, and had scheduling availability. (Tr. II at 26:4-14, 26:24 – 27:6).

132. Walsh considered as panelists all three male Title IX Council members who had completed five hours of training, but each had a conflict that precluded him from presiding. (Tr. I at 102:4-5; Tr. II at 27:16 – 28:5). Specifically, a male undergraduate on the Title IX Council

participated in the mock trial program and knew John and Ann. (Tr. II. at 27:16-21). Another male undergraduate had a friendly relationship with Ann. (*Id*. at 27:22-23). A male administrator, Brown's Director of Student Activities, was familiar with the mock trial program and its participants. (*Id*. at 27:23 – 28:5).

133. Walsh scheduled the Title IX Council hearing to occur on April 14, 2016 before Schultz, as the Title IX Council Chair and a non-voting panelist, and the following three voting panelists: Besenia Rodriguez, Brown's Assistant Dean for the College of the Curriculum; Kate Trimble, Deputy Director of Brown's Swearer Center, and Kimberly Charles, a senior undergraduate student. (Tr. II at 27:9-14).

134. In his trial testimony, John stated that he and Kimberly Charles were once enrolled in the same course, but he offered no testimony suggesting that he and Ms. Charles knew each other or that there was any reason that would have required her disqualification. (Tr. II at 195:15 – 196:4). John's testimony was inconsistent regarding when the class occurred, stating at one point that the class was during "that spring semester" and then recalling that it was "the 2013 class." (*Id*.) Regardless, John testified that he did not even know the panelist by name. (*Id*.).

135. Consistent with the Complaint Process, the panelists received the record materials more than five days before the April 14, 2016 hearing, which included the investigator's report and the various appendices attached to it (including all of the text messages between John and Ann). (Tr. II at 30:1-17; Tr. III at 72:23 – 73:5). They received copies of the 2014-15 Code and the Complaint Process. (Tr. I at 102:18-20; Tr. II at 30:5-10).

136. Walsh also provided within Schultz, as the Title IX Council Chair, two items that were not presented to the voting members of the panel. (Tr. II at 32:16 – 34:2). One was John's conduct history because such information would be considered in the sanctioning

deliberations, if the voting panelists found John to be responsible for the charges. (Id. at 32:16-18). The other was the Title IX Policy. (Id. at 32:19-21).

137. Walsh included the Title IX Policy in Schultz's materials because there was no definition of consent within the 2014-15 Code. (Tr. II at 32:23 to 34:2). Walsh provided the Title IX Policy solely as an option that the panel could consider during its deliberations if it elected to do so, and Walsh reminded Schultz that the panel was not required to reference the Title IX Policy's definitions. (*Id*. at 33:11 to 34:2). Walsh testified that "[b]y excluding it from [the panelists' packets] and including it in [the Title IX Council Chair's packet], I felt like this was hopefully making that clear." (*Id*. at 33:25 to 34:2).

138. On April 14, 2016, Walsh and Schultz met before the start of the Title IX Council hearing. (Tr. I at 103:18-20; Tr. II at 34:5-9). Walsh told Schultz that the Chair's information included the Title IX Policy, which the other panelists did not receive. (Tr. I at 103:21 – 104:1; Tr. II at 34:5-9).

139. During the April 14, 2016 Title IX Council hearing, Walsh took notes of the proceedings on her laptop computer. (Ex. 24; Tr. I at 10:12; Tr. II at 34:15-19).

140. The Chair, three voting panelists, and Walsh convened at the start of the hearing. (Ex. 24 at 1). Schultz reviewed a hearing checklist (Ex. 23), which addresses the "standard of evidence, clearance of conflicts, the Chair's role to administer the hearing process, the voting panelists' roles, confidentiality, and sanctions upon a finding of responsibility. (Ex. 23 at 1-2, Ex. 24 at 1).

141. After reviewing the checklist's items, Schultz reminded the panelists that the charges against John were brought under the 2014-15 Code because the incident at issue occurred on November 10, 2014, and Schultz read through Offense III of the 2014-15 Code. (Ex. 24 at 1).

142. Schultz reminded the panel that the 2014-15 Code did not define consent, and she read the current definition of consent in the Title IX Policy. (Ex. 24 at 1). Schultz instructed the panel that they were not required to reference the Title IX Policy's definition of consent, but noted that "it may be helpful in thinking about how the University has viewed Consent." (*Id.*).

143. The panel convened with Perkins to review her investigation report. (Ex. 24 at 1). The panelists asked a range of questions, including the reasons why Ann stated that she came forward with a complaint nearly a year after the incident. (*Id.*). The Chair inquired about Ann's explanation for not leaving the room in Faunce House on November 10, 2014, when she apparently had chances to leave. (*Id.*). A panelist asked about the basis for Ann's fear during the November 10, 2014 incident. (*Id.*). Perkins' responses to these inquiries are noted in Exhibit 24.

144. The Chair inquired of the investigator "[d]oesn't someone have to be lying? [Ann] said no and [John] says she's an enthusiastic partner." (Ex. 24 at 2). Perkins responded by referencing the text messages between Ann and John, noting that John persistently raised sexual desires. (*Id.*). Ann was a willing participant at times during the texting, but she also expressed hesitation. (*Id.*). Perkins stated that Ann's version appeared to her to be more consistent with the pattern in the text messages, but stressed "that's for the panel to decide." (*Id.*).

145. After the panel's session with the investigator, the Chair asked the panelists whom they would like to hear from next – John or Ann. The panelists decided to meet first with John. (Ex. 24 at 2).

146. When John and his advisor appeared before the panel, Ann and her advisor were in another room and listened by telephone. (Ex. 24 at 2). John began by asking if he would be allowed to present a rebuttal after Ann's presentation, and Walsh responded that the process does not permit rebuttal statements and the panel exercised its discretion to hear him first. (*Id.*).

147. John denied any non-consensual sexual misconduct, calling the case a "lie that got bigger." (Ex. 24 at 3). He stated his version of the events leading up to, during and after the November 10, 2014 incident. (Id.).

148. John specifically compared the 2014-15 Code and the Title IX Policy, stating the following as recorded in Walsh's notes:

> Investigator conflates the two different policies. Current policy covers all aspects of sexual assault. Old policy [the 2014-15 Code] requires force or threat of force. Not indicating there is sexual assault. Mentioning it to clarify that regardless of the fact that there was consent, there are references to attempts of coercion. If Complainant attempts to allege that there were [attempts of coercion], they wouldn't fall under the old policy [2014-15 Code].

149. At trial, John admitted to the accuracy of Walsh's notes regarding his comparison of the 2014-15 Code and Title IX Policy. (Tr. II at 206:1-6). As he confirmed during cross-examination, John asserted that the investigator "conflated" the two policies through her use of the word "coercion" in her report. (*Id*. at 206:4-6). John then restated at trial his interpretation that "coercion" must involve "the use of force or threat or use of force" and "[t]hat's not how Djuna Perkins used the word in her report." (*Id*. at 206:7-11). When asked to explain what he meant when he told the panel that the Title IX Policy "covers all aspects of sexual assault," John responded that he was referring to "the inclusion of manipulation . . . in the 2015-16 Title IX Report." (*Id*. at 206:12-15). John again stated his narrow view that the "broad range of behaviors" encompassed and prohibited under Offense III of the 2014-15 Code may only arise out the specific examples cited in the comment section. (*Id*. at 16-23).

150. Just as he earlier asserted during the disciplinary process in his March 4, 2016 comments to Perkins' draft report (Ex. 16), John articulated again before the Title IX Council panel a narrow interpretation of the 2014-15 Code, which contravenes the training that he had received at Brown, including the Tutorial (Ex. 40 at 23), the "Brown students ask for consent

video" (Ex. 46), the new student orientation in September 2013 (Ex. 42), the additional training that he attended during either the spring or fall of 2014 prior to November 10, 2014 (Tr. II at 220:25 - 221:3); and the "Brown students ask for consent" posters that he saw all over campus (Ex. 43).

151. Ann next appeared before the panel with her advisor, while John and his advisor adjourned to another room and listened by telephone. (Ex. 24 at 2). Ann offered a different version of the events regarding the November 10, 2014 incident, claiming that John sexually assaulted her. (*Id*. at 3). Ann alluded to the definition of consent under the Title IX Policy and stated that consent cannot be obtained through manipulation, coercion or force. (*Id*.).

152. Following Ann's appearance, the panel prepared to proceed to its deliberations. Before the panel deliberated, Walsh responded as follows to a panelist's question about the consideration of any prior conduct issues involving John:

> Prior conduct history is not relevant to whether a policy violation occurred in this instance. If there is a prior conduct history in any case, the Faculty Chair (Schultz) will disseminate that only if the panel determines that the Respondent is "responsible." Otherwise, that information will not be shared.

(Ex. 24 at 5).

153. Walsh offered a few comments to the panel before exiting the hearing, as the Title IX Program Officer does not observe or participate in the panel's deliberation. (Ex. 24 at 5). Walsh reminded the panel that they were provided the 2014-15 Code because the case involves a November 10, 2014 incident. (*Id*.). They were provided with the Complaint Process because its procedural measures were in effect as of the filing of Ann's complaint on October 30, 2015. (*Id*.). Because Ann referenced the Title IX Policy during her statement, Walsh clarified that the offenses were filed against John under the 2014-15 Code. (Tr. II at 41:16-21). Walsh left the hearing room after these comments. (Id. at 41:22 – 42:2).

XI. The Title IX Council's Deliberations and Decision

154. During the panel's deliberations, Schultz, as the Title IX Council Chair, acted as a facilitator of the discussions by asking questions, offering suggestions regarding the process to review the record evidence, and conducting straw votes of the three voting panelists. (Tr. III at 82:22 – 83:7; Tr. IV at 134:7-21).

155. As Besenia Rodriguez, one of the voting panelists, testified, the panel spent "quite a while" in its deliberations and "a lot of time" discussing the case. (Tr. III at 81:4-7). Schultz likewise testified that the deliberations were "lengthy." (Tr. IV at 134:13).

156. The panel spent a significant amount of time reviewing the extensive text messages that John and Ann exchanged. (*Id*. at 81:10-12). Specifically, the panel sought to determine "whose version of events seemed to be the most credible based upon the nature of their interaction via text message." (*Id*. at 81:23 – 82:1). The panel also considered carefully the investigator's report and the information provided from the several interviewed witnesses. (*Id*. at 82:5-9).

157. The panel spent considerable time deliberating regarding the credibility of John and Ann, especially because there "were so many texts" that had to be reviewed to assess whether "her story was more credible than his was." (Tr. III at 82:10-21).

158. As Rodriguez testified, the panel "was trying to determine whether we believed it was consensual or not and whether there was any kind of manipulation." (Tr. III at 84:20-22). In making that determination, Rodriguez noted that she used her own "common sense definition of consent" and that the panel "really focused on the question of the power dynamic" between John and Ann. (*Id*. at 84:23 – 85:17). Specifically, the panel discussed the fact that John was an older student "who had positions of implied and then actual leadership with [the] mock trial group and that this group was very important to both of them." (*Id*. at 85:18-22).

159. Rodriguez summed up the panel's deliberations as follows: "We just tried to understand all of the factors that would have gone into whether or not there was consent." (Tr. III at 86:6-8).

160. The panel decided to review the definitions in the Title IX policy, as helpful guidance. (Tr. III at 63:13-18). As Rodriguez testified, "I wouldn't say that we believed that we couldn't make a determination without [the Title IX Policy's definition of consent]." (*Id*. at 63:16-18). Rodriguez testified that the panel based its deliberations upon Offense III of the 2014-15 Code and looked to the Title IX Policy for clarification. (*Id*. at 58:24 – 59:1).

161. Schultz suggested to the voting panelists that it would be within their discretion to refer to the Title IX Policy as a definitional guide regarding Brown's community standards. (Tr. IV at 90:14-25). Schulz made her suggestion based upon her experience serving on prior student conduct disciplinary panels and her service on the Task Force. (*Id*. at 91:3-4).

162. After its detailed review of the evidence, the panel voted on the question of whether John was responsible for the charged offenses. (Tr. III at 88:6-9). By a 2-1 vote, the panel held John responsible. (*Id*.).

163. Rodriguez voted to hold John responsible after reviewing all of the evidence in what she viewed to be a difficult case. (Tr. 87:22-23). Rodriguez found most salient John's text messages, which helped her get a sense of what motivated his behavior on the night of the incident. (*Id*. at 87:24 – 88:5). She concluded that John continuously brought the topic back to sexual nature throughout the texts, Ann put up barriers at times in her responses, and John persisted in pushing past Ann's boundaries. (*Id*. at 76:18-24).

164. In her determination, Rodriguez considered the post-incident texts between John and Ann. (Tr. III at 77:11-25). She grappled with their significance and weight. (*Id*. at 77:18-19). Rodriguez acknowledged that she felt somewhat limited in her personal ability to evaluate

whether the post-incident texts, and decide whether they showed Ann was lying about not consenting or acting in response to trauma. (*Id*. at 77:11-25). Ultimately, after looking at the texts, Rodriguez concluded that it did not seem to her that Ann wanted a relationship with John or that a desire for such a relationship motivated Ann's post-incident conduct. (*Id*. at 78:11-24).

165. Following the determination of John's responsibility, the panel addressed the sanction. (Tr. III at 88:15-89:24). Schultz advised the panel that John had previously been placed on probation by the University for no-contact order violations. (*Id*.). The panel determined that John should be suspended and kept off campus until after Ann graduated. (*Id*.).

166. While the panel deliberated, Walsh returned to her office to attend to another matter. (Tr. II at 42:3-6). Also, Ann and her advisor met with Walsh because Ann had safety concerns about being near John. (*Id*. at 42:6-24). Because the results of the hearing were not known at that time, Walsh discussed with Ann and her advisor how Ann's safety concerns would be affected if John were found responsible or not responsible. (*Id*.). Walsh also reminded Ann and her advisor that John was charged under the 2014-15 Code, not the Title IX Policy. (*Id*.). Walsh did so because of Ann's statements to the panel explicitly referencing the Title IX Policy. (*Id*.; see also Ex. 24 at 4).

167. After the panel completed its deliberations and adjourned, Walsh and Schultz crossed paths shortly thereafter at University Hall. (Tr. II at 43:16-25). Schultz returned the panelists' non-redacted record materials to Walsh for shredding. (*Id*.) Because Walsh and Schulz were in an open and non-private space, Schultz merely stated the result – "responsible" and "suspension" and Walsh responded "okay." (*Id*.).

168. During the afternoon of April 14, 2016, Schultz prepared a draft of the Title IX Council's findings. (Ex. 25). At 2:00 p.m. that day, she sent an email to the three voting panelists attaching the draft decision for their review and comments. (*Id*.). Later, at 6:30 p.m.,

she forwarded the email and its attachment to Walsh. (*Id*.). Walsh, who was not on campus that evening, does not recall receiving the communication and specifically recalls that she did not open the attachment. (Tr. I at 115:9 – 116:4).

169. On April 15, 2016, Walsh sent an identical letter to John and Ann, as a follow up to the Title IX Council hearing held the day before. Walsh wrote as follows:

> During both statements [by John and Ann] references were made to the relevant policy and procedures applicable to this matter. As Djuna Perkins cites in her investigation report, the relevant policy is the *2014-2015 Code of Student Conduct*. The relevant process is Brown's *Complaint Process*, which was in effect at the time of the Complaint was submitted. 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.
>
> I've attached both documents for your reference. Please let me know if you have any questions.

(Ex. 26).

170. Walsh wrote this letter to the students because of Ann's statements to the panel referencing the Title IX Policy. (Tr. II at 44:8-23). Also, during Walsh's meeting with Ann and her advisor on April 14, 2016 after the hearing, Walsh told them several times that the "panel was under no obligation to use the 'consent' definition [in the Title IX Policy] and that the applicable Code was '14-'15 Code," but it seemed to Walsh that Ann and her advisor were still not clear on this issue. (*Id*.).

171. On April 19, 2016, Schultz issued the panel's written decision. (Ex. 27). The decision stated the rationale for finding John responsible for sexual misconduct in violation of Offenses III a & b of the 2014-15 Code, and the suspension sanction from Brown until such time as Ann graduates. (*Id*.). The panel issued its decision within five (5) business days after the hearing as required by the Complaint Process. (Ex. 3 at 3).

172. The "Rationale" section of the decision states:

> 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).

(Ex. 27 at 1).

173. The panel's rationale set forth its factual support, including that John stated his intent to manipulate Ann in the text messages. Moreover, the panel concluded that the text messages conveyed both Ann's assertion that she was not interested in sexual activity and John's refusal to accept her boundaries. (Ex. 27 at 1-2).

174. In determining the sanction, the panel was guided by the 2014-15 Code and its statement that separation is the standard to address violations. (Ex. 27 at 2). The panel also considered prior University findings that John had violated the Code and no-contact orders. (*Id*.).

XII. The Court's Entry of a Temporary Restraining Order

175. Under the Complaint Process, if a respondent is found responsible and the sanction includes separation, the responsible student will be immediately removed from campus residentially and (depending on the circumstances) either severely restricted in his or her movements on campus (e.g., only able to attend classes and labs) or barred completely during the entirety of the appeal process. (Ex. 3 at 6).

176. On April 20, 2016 (one day after the panel's issuance of the decision), John obtained a temporary restraining order from the Court (ECF No. 15) to prevent the enforcement of the panel's decision and preserve the status quo.

XIII. The Appeals Filed by John and Ann

177. As allowed by the Complaint Process, both Ann and John appealed the panel's decision within three business days. (Ex. 3 at 6). Both students filed appeals on April 25, 2016. (Exs. 29 and 30).

178. Ann appealed the imposed sanction, arguing that John should have been expelled from Brown. (Ex. 29). She cited to a Facebook posting that John made within a few hours after the issuance of the decision, which she claimed was seen by many students and sought to perpetuate a hostile educational environment and retaliate against her. (Ex. 29).

179. John based his appeal on "substantial procedural error and the overwhelming weight of the evidence that is contrary to the Panel's finding." (Ex. 30 at 1).

180. John claimed that the hearing panel should not have referenced the Title IX Policy because it "substantially changed the definition of sexual misconduct." (Ex. 30 at 2). He claimed that "manipulation" was not within the broad range of behaviors encompassed in Offense III of the 2014-15 Code, but is now within the scope of the Title IX Policy. (Id.). He contended that "'manipulation' is incompatible to the examples of sexual misconduct provided in the 2014 Code." (*Id*.).

181. Once again, John articulated his narrow interpretation of Offense III of the 2014-15 Code, asserting that the cited examples stated in the comment were the exclusive scope of its encompassed broad range of behaviors. (Ex. 30 at 2-3). John claimed that the 2014-15 Code merely informed students what was not permissible and everything else not explicitly stated was therefore permissible. (*Id*. at 3).

182. John argued that only the following questions and analysis should have controlled the panel's deliberations:

> [D]id John Doe use physical force to overpower Ms. Roe? The answer would have been no. Did John Doe threaten Ann? Again, the answer would have been no. Did John Doe threaten Ms. Roe or place her in fear?[5] The answer again, would have been no. There is no contention that Ms. Roe was mentally incapacitated or impaired. Therefore, the Panel's task should have ended there, and it should have found me *not responsible*. Instead, the Panel borrowed the 2015 Title IX Policy's definition of consent, decided that my conduct did not fit into that definition, and therefore determined it to be a violation. This cast a wider net than the 2014 Code intended, and again, it is a substantial procedural error that materially affected the Panel's decision.

(Ex. 30 at 3-4) (italics in original).

183. As John confirmed during his cross-examination, he was contending again in his appeal that only the examples cited in the Offense III's comments could form the basis of a sexual misconduct disciplinary charge. (Tr. II at 208:25 – 209:4).

184. John also asserted on appeal that the panel's ruling was a "patently ridiculous decision" that was against the weight of the evidence. (Ex. 30 at 4-6).

185. Further, John argued that procedural errors occurred during Perkins' investigation, specifically the fact that the investigator did not obtain and review texts between Ann and Witness 9. (Ex. 30 at 6). John also challenged Perkins' inclusion on pages 27-28 of the report relating to Witness 9, which Perkins kept in based upon John's assertion of a conspiracy defense. (*Id.*).

186. On April 26, 2016, Walsh wrote a letter to Schultz to update her that the Court had entered a temporary restraining order against Brown. Walsh informed Schultz that, as the Title IX Council Chair who would preside over the appeal panel, "[i]t would be in the

[5] The comment to Offense III does not include the word "fear." John's reference to "fear" dispels his contention that the 2014-15 Code is limited to its four corners and the comment's cited examples.

University's best interests to address the Court's concerns regarding any procedural errors before the case becomes final." (Ex. 31). Walsh and Schultz also met a day or two later to discuss the upcoming appellate process because it was the first appeal to be heard by the Title IX Council under the Complaint Process. (Tr. I at 132:2-6).

187. On April 29, 2016, Walsh took a maternity leave from the University. (Tr. I at 132:24-25).

188. As allowed under the Complaint Process (Ex. 3 at 6), John and Ann filed responses to the other party's appeal. (Exs. 32 and 33).

189. John's response claimed that the Facebook posting cited by Ann was irrelevant and taken out of context. (Ex. 32).

190. Ann filed a detailed appeal responding to each of John's asserted grounds for his appeal. (Ex. 33).

191. John submitted a sur-reply to Ann's response to his appeal, which he submitted to Jessica Katz ("Katz") of the Title IX Office. (Ex. 34). Specifically, John contended that Ann made a misrepresentation on page 4 of her response, where she wrote that "[u]nder the 2014-15 Code of Student Conduct, sexual misconduct is committed 'against a person's will' . . . ." (*Id*. at 1). John argued that Ann had purposefully misstated the Code's language and should be sanctioned by the University. (Id.). In fact, John wanted his letter to serve as a "formal complaint" against Ann. (*Id*. at 2).

192. On May 9, 2016, Katz informed John that the Complaint Process does not allow for a sur-reply, so the Title IX Office would not be sharing John's filing with the appeal panel. (Ex. 35). She also noted that that the Title IX Office does not handle complaints of misrepresentation, which are addressed in Brown's Office of Student Life. (*Id*.). Katz advised

John to contact the Office of Student Life if he had any questions regarding its process in handling misrepresentation complaints. (*Id*.).

193. Schultz, as the Title IX Chair, presided over the appeal panel as a non-voting member. The three voting panelists were Amariah Becker, a graduate student, Alexandra Karppinen, Manager of Athletic Parents and Stewardship Advancement at the Brown Sports Foundation, and Colin Sullivan, Brown's Deputy Director of Athletics. (Ex. 36).

194. Prior to the appeal board's meeting, Schultz had shared with the panelists Walsh's letter regarding the Court's entry of the temporary restraining order. (Tr. IV at 8:16 – 9:21).

195. The appeals panel met for over two hours to review the students' respective appeals. (Tr. IV at 10:1-2).

196. As the Title IX Council Chair, Schultz acted as the moderator and facilitated the appeal panel's discussions. (Tr. III at 130:11-22; Tr. IV at 10:4-5).

197. As Amariah Becker ("Becker"), one of the panelists, testified at trial, the decision letter dated May 18, 2016 (Ex. 36) accurately reflects the appeal panel's deliberations and conclusions. (Tr. IV at 22:17-20). The panel denied both students' appeals. (Ex. 36).

198. Regarding Ann's appeal, the appeal panel decided that the referenced Facebook post was not pertinent. (Ex. 36; Tr. IV at 11:10-24).

199. The appeal panel considered carefully each of John's asserted appellate grounds. (Tr. IV at 11:25 – 12:1). The first ground related to John's contention that the hearing panel improperly referenced the Title IX Policy's definition of "consent." (Ex. 36 at 1).

200. Schultz told the panel that the Title IX Policy's definition of consent was written to reflect Brown's community values. (Tr. III at 140:15 – 143:18; Tr. IV at 90:1-14).

201. As Becker testified, there was a discrepancy between the 2014-15 Code and Title IX Policy that the appeal panel had to address. The 2014-15 Code used the word "consent" without defining it, and the Title IX Policy defined "consent." The appeal panel wanted "to get at the heart of that discrepancy, which included talking about where [the Title IX Policy's] definition came from." (Tr. III at 141:24 -142:3). As Becker further elaborated, consent was required under the 2014-15 Code, but its provisions "did not have a clear definition of what 'consent' meant." (Tr. IV at 13:1-4).

202. The appeal panel focused not only on the policy provisions in evaluating the consent issue, but also reviewed the extensive text messages between John and Ann. (Tr. at 13:15 – 14:5).

203. The appeal panel focused on the issue of "manipulation" and whether it was reasonable for the hearing panel to consider that term in its decisionmaking. The appeal panel concluded that the hearing panel appropriately included "manipulation" within the broad range of behaviors encompassed under Offense III of the 2014-15 Code, based upon their personal definitions of "consent" and the definition in the Title IX Policy. (Tr. IV at 14:20 – 15:3). The appeal panel determined unanimously that it was reasonable for the hearing panel to define consent by factoring in the impact of manipulation. (*Id*. at 15:5-8).

204. The appeals panel, however, split on the decision of whether or not to grant John's appeal on his first ground. (Tr. IV at 15:8-25). The panel voted 2-1 to deny this aspect of his appeal. (*Id*.).

205. The panel voted upon separately on John's other grounds. (Tr. IV at 16:16-21).

206. Regarding John's second ground that the hearing panel's decision was against the weight of the evidence and "patently ridiculous," the appeal panel decided unanimously that the

Complaint Process explicitly allows two grounds for an appeal and that John's weight of the evidence challenge is not one of them. (Tr. IV at 17:1-13).

207. The appeal panel addressed John's claims of deficiencies in the investigator's report, which he characterized as substantial procedural error. (Tr. IV at 17:14-22). The appeal panel discussed specifically the role of the investigator and the fact that there have to be bounds to the investigation. (Tr. IV at 18:24 – 19:9).

208. Regarding John's contention that the investigator should have obtained the texts between Ann and Witness 9 because of his conspiracy defense, the panel concluded unanimously that the investigator's judgment regarding those texts was not a substantial procedural error. (Ex. 36 at 2; Tr. IV at 19:12 – 20:1).

209. Finally, the appeal panel determined unanimously that the investigator did not commit a substantial procedural error by declining John's demand that several pages at the end of the report be deleted. (Ex. 36 at 2; Tr. IV at 20:18 – 21:11). The appeal panel concluded that the investigator may exercise reasonable judgment regarding what should be included in the final report and that it is ultimately the hearing panel's responsibility to determine what is most pertinent for its deliberations and decisionmaking. (Ex. 36 at 2; Tr. IV at 20:18 – 21:8).

210. After the denial of the appeal, the Title IX Office issued a Suspension/Expulsion Authorization Form, which has the effect of placing a transcript notation that John has been suspended from Brown for disciplinary reasons. (Ex. 37).

XIV. The Absence of Proof of Monetary Damages

211. Although John's complaint in this litigation seeks an award of compensatory damages, he presented no proof at trial to substantiate any such monetary award.

212. John merely testified that his family pre-paid four years of Brown tuition, and he has completed three years of education at Brown. (Tr. II at 186:8-12, 187:10-18).

PROPOSED CONCLUSIONS OF LAW

I. The Court's Limited Role

1. John challenges a disciplinary ruling by Brown, a private university, finding him responsible for sexual misconduct against another student. The United States Supreme Court has warned that "courts should refrain from second-guessing the disciplinary decisions made by school administrators." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999) (internal citation omitted). *See also Havlik v. Johnson & Wales Univ.*, 509 F.3d 25, 25 (1st Cir. 2007) (citing *Wood v. Strickland*, 420 U.S. 308, 326 (1975) ("It is not the role of the federal courts to set aside decisions of [public] school administrators which the court may view as lacking a basis in wisdom or compassion.")).

2. Despite what he seeks in this litigation, John cannot retry Brown's disciplinary proceeding or appeal its conclusions to the Court. *Sill v. Pennsylvania State Univ.*, 462 F.2d 463, 470 (3d Cir. 1972) (stating that it was not for the district court, "as it is not for us, to retry the charge against" the students); *Yu v. Vassar Coll.*, No. 13-CV-4373, 2015 U.S. Dist. LEXIS 43253, at *26-27 (S.D.N.Y. Mar. 31, 2015) ("This Court's role, of course, is neither to advocate for best practices or policies nor to retry disciplinary proceedings.") (citing *Doe v. Univ. of the South*, 687 F. Supp. 2d 744, 755 (E.D. Tenn. 2009)); *Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 14 (D. Me. 2008) (same).

3. This is not a civil lawsuit between John and Ann. In fact, John has filed a separate lawsuit against Ann asserting defamation claims. *See* C.A. No. 16-164-S. Similarly, this is not a criminal proceeding, so the Court is not called upon to make an independent determination regarding what happened between John and Ann during the early morning of November 10, 2014. The Court's role is not determine whether a sexual assault occurred, whether Ann consented to the alleged conduct, or who, as between John and Ann, gave

the more credible account during Brown's disciplinary process. *Univ. of the South*, 687 F. Supp. 2d at 755.

4. The limited questions before the Court concern whether Brown breached its educational contract with John, a question that is governed by Rhode Island law. John's first amended complaint pleads only a breach of contract claim. On the eve of trial, John moved to file a second amended complaint adding a promissory estoppel claim and a prayer for an award for attorneys' fees under R.I. Gen. Laws § 9-1-45 (ECF No. 45), which Brown opposed (ECF Nos. 46-47). The Court has not ruled on John's motion to amend as of this post-trial filing.

II. The University-Student Contractual Relationship

5. Under Rhode Island law, "[t]he relationship between 'a student and private university [ ] is essentially contractual in nature' but presents 'unique qualities' that require courts to 'construe [the contract] in a manner that leaves the school administration broad discretion to meet its educational and doctrinal responsibilities.'" *Jane Doe v. Brown Univ.*, C.A. No. 15-239-M, 2016 U.S. Dist. LEXIS 82845, at * 26 (D.R.I. June 27, 2016) (quoting *Gorman v. St. Raphael's Acad.*, 853 A.2d 28, 34 (R.I. 2004)). *See also John Doe v. Brown Univ.*, C.A. No. 2015-144-S, 2016 U.S. Dist. LEXIS 21027, at *32-33 (D.R.I. Feb. 22, 2016).

6. "'A voluntary association [including private educational institutions] may, without direction or interference by the courts, . . . adopt . . . rules and regulations which will control all questions of discipline . . . and its right to interpret and administer the same is as sacred as the right to make them.'" *Jane Doe v. Brown Univ.*, 2016 U.S. Dist. LEXIS 82845, at *26 -27 (quoting *Edwards v. Indiana State Teachers Ass'n*, 749 N.E. 2d 1220, 1225 (Ind. Ct. App. 2001)).

7. The university-student contract is dynamic in its nature. The contract's collective terms may be found in statements in student manuals and registration materials; written

guidelines, policies and procedures submitted to the students over their course of enrollment; and bulletins, circulars and regulations made available to students. *John Doe v. Brown Univ.*, 2016 U.S. Dist. LEXIS 21027, at *32-33 ("The relevant terms of the contractual relationship between a student and university typically include language found in the university's handbook.") (quoting *Havlik*, 509 F.3d at 34). *See also David v. Neumann Univ.*, C.A. No. 15-4098, 2016 U.S. Dist. LEXIS 48174, at *5 (E.D. Pa. Apr. 11, 2016) ("The contract is 'comprised of the written guidelines, policies, and procedures as contained in the written materials, distributed to the student over the course of their enrollment in the institution'") (citation omitted); *Suhail v. Univ. of the Cumberlands*, 107 F. Supp. 3d 748, 755 (E.D. Ky. 2015) ("The nature of an implied contract between a University and its students is determined by looking at 'brochures, course offering bulletins, and other official statements, policies and publications of the institution.'") (citation omitted).

8. "Rhode Island courts 'interpret such contractual terms in accordance with the parties' reasonable expectations, giving those terms the meaning the university should reasonably expect the student to take from them.'" *John Doe v. Brown Univ.*, 2016 U.S. Dist. LEXIS 21027, at *33 (internal citation omitted) (quoting *Havlik*, 509 F.3d at 34-35).

9. The Court should apply an objective "reasonable student" standard. *Walker v. President and Fellows of Harvard Coll.*, 82 F. Supp. 3d 524, 528-29 (D. Mass. 2014). Just as the interpretation of contracts generally is a question of law for a court, *see, e.g., Allstate Ins. Co. v. Ahlquist*, 59 A.3d 95, 98 (R.I. 2013), so is the interpretation of a private educational contract. *Walker*, 82 F. Supp. 3d at 529.

10. "Whether an expectation is reasonable often hinges on the specificity of the terms in the university's documents; courts may not read terms into the contract." *John Doe v. Brown Univ.*, 2016 U.S. Dist. LEXIS 21027, at *33.

11. When a student alleges a breach of a procedural right under a private educational contract, the contract is reviewed to determine whether the procedural right "fall[s] within the range of reasonable expectations of one reading the relevant [materials]." *See Cloud v. Trustees of Boston Univ.*, 720 F.2d 721, 724-25 (1st Cir. 1983); *Walker*, 82 F. Supp. 3d at 350.

12. "[C]ourts are chary about interfering with academic and disciplinary decisions made by private colleges and universities. A university is not required to adhere to the standard of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts. A college must have broad discretion in determining appropriate sanctions for violations of its policies." *Schaer v. Brandeis Univ.*, 432 Mass. 474, 735 N.E.2d 373, 381 (2000) (internal quotations and citations omitted).

III. John Has Not Proven A Procedural Violation of His Educational Contract

13. To succeed on a breach of contract claim under Rhode Island law, a plaintiff must prove (1) an agreement existed between the parties, (2) the defendant breached the agreement, and (3) the breach caused (4) damages to the plaintiff. *Barkan v. Dunkin' Donuts, Inc.*, 627 F.3d 34, 39 (1st Cir. 2010) (citing *Petrarca v. Fid. Cas. Ins. Co.*, 884 A.2d 406, 410 (R.I. 2005)).

14. As articulated in John's pretrial memorandum and his presentation at trial, he alleges that Brown violated procedural rights in his educational contract as follows:

- The Title IX Council hearing panel adopted and applied a "novel definition" of consent in the Title IX Policy to adjudicate the charges against John under the 2014-15 Code;
- The investigator exceeded the scope of her engagement and discretion under the Complaint Process;
- Brown's presentation of "trauma-based" training to the Title IX Council unduly influenced the disciplinary proceeding;
- The hearing panel did not give proper weight to all of the evidence;

- On appeal, the Title IX Office should have accepted John's sur-reply, and the panel should have applied a weight of the evidence standard; and
- The Title IX Council lacks a male perspective.

Based upon the above-stated findings and for the reasons addressed below, John has failed to prove any breach of the university-student contractual relationship.

A. The Hearing Panel Did Not Adopt and Apply a "Novel Definition" of Consent.

15. The central contractual question concerns what a Brown student's reasonable expectation should have been, as of November 10, 2014, regarding the meaning of the "broad range of behaviors" encompassed by Offense III of the 2014-15 Code.

16. John contends that hearing panel adopted and applied "the novel definition of consent contained in the 2015-16 Title IX policy retroactively to John's encounter 2014 encounter with Ann." (Pre-Trial Mem., ECF No. 44 at 16). The evidence at trial, however, shows that the Title IX Policy effectively codified a standard of consent that was conveyed to John starting when he matriculated to Brown.

17. The Title IX Policy's definitions of "consent" and "coercion" were a codification of a pre-existing community standard. Contrary to John's contention, they were not "novel" and "retroactively applied." The definitions codified in the Title IX Policy in September 2015 reflected Brown's existing community standards, which Brown published and presented to John consistently and continuously prior to his November 10, 2014 incident with Ann – through the Tutorial introducing John to "values and principles of [Brown's] community" during the summer of 2013 (Ex. 40), the "Brown students ask for consent" video that John saw at least twice before November 10, 2014 (Ex. 46), the two-plus hours of training that John received during his freshman orientation in September 2013 (Ex. 42), the additional sexual relationship and consent

training that John attended at Brown before November 10, 2014 (Tr. II at 220:25 - 221:12), and the "Brown students ask for consent" posters that John saw across Brown's campus (Ex 43).

18. John wrongly contends that the 2014-15 Code is limited only to its four corners. On the contrary, all of the training that John received at Brown is also an essential part of his educational contract with the University as a member of its community. Contrary to John's testimony at trial, the training is highly relevant to the proper interpretation of the "broad range of behaviors" encompassed under Offense III of the 2014-15 Code.

19. Further, even if John were correct that the 2014-15 Code stands alone (which it does not), his interpretation of Offense III is inconsistent with what a Brown student reasonably should have expected the encompassed "broad range of behaviors" to mean as of November 10, 2014. Throughout the disciplinary process and this litigation, John has wrongly claimed that the exclusive list of the "broad range of behaviors" entails only the four examples following the word "including" in Offense III's comment. His interpretation is inconsistent with the clear language of the comment, as well as the extensive training that he and all students within the Brown community received "non-consensual physical conduct of a sexual nature."

20. John testified that he was "shocked" when he read the panel's written decision referencing the Title IX Policy's definitions. (Tr. II at 197:8-13). Yet, John himself referenced the Title IX Policy during his statement before the hearing panel. (Ex. 24 at 3; Tr. II at 206:1-21). During cross-examination, John was asked what he meant when he told the hearing panel that the investigator "conflates the two policies" and that the "current policy [the Title IX Policy] covers all aspects of sexual assault." (Tr. II at 206:1-15). John responded "I meant … the inclusion of manipulation." (*Id*. at 206:14-15). When he appeared before the hearing panel, John recognized that "manipulation" could be a consideration in evaluating whether his conduct toward Ann constituted a policy violation. Essentially, John is protesting that the panel did not

agree with his contention that the Title IX policy now covers a broader range of behaviors than the "broad range" encompassed by Offense III of the 2014-15 Code.

21. Based upon the record evidence, John's subjective and narrow interpretation of the "broad range of behaviors" subject to Offense III of the 2014-15 Code is inconsistent with what any Brown student should have reasonably understood the scope of the Code to encompass.

B. <u>The Investigator Acted Within Her Role and Exercised Discretion Within Her Scope.</u>

22. John contends that he had a reasonable expectation under the Complaint Process that Perkins, as Brown's investigator, would obtain and review "all" relevant evidence. Yet, the adoption of John's position would constitute a judicial rewriting of the Complaint Process, which allows the investigator to exercise her discretion in determining the scope of the investigation:

> The role of the investigator will be to gather additional information [beyond the initial submissions of the complainant and respondent] through additional interviews of the complainant, respondent, and witnesses and synthesize the information in a report that will be provided to the Title IX Council. *The investigator has the discretion to determine the relevance of any witnesses or other evidence and may exclude information in preparing the investigation report if the information is irrelevant, immaterial, or more prejudicial than informative.* (Ex. 3 at 3) (italics added).

No "reasonable student" should read that language and conclude that the investigator must obtain, review, and address "all" evidence that John as the respondent deems to "relevant."

23. Likewise, John misinterprets and seeks to unduly restrain the scope of discretion that the investigator has in drafting a report, which is clearly stated as follows in the Complaint Process:

> The investigator will produce a written report that contains the relevant information and facts learned during the investigation, and *may include* direct observations and reasonable inferences drawn from the facts and any consistencies or inconsistencies between the various sources of information. The investigator *may exclude* statements of personal opinion by witnesses and statements as to the general reputation for any character trait, including honesty. The investigator *will not make* a finding or recommended finding of responsibility. The investigator's report *will include* credibility assessments based on

> their experience with the complainant, respondent, and witnesses, as well as the evidence provided. (Ex. 3 at 4) (italics added).

24. For reasons stated above in the factual findings, Perkins' report and presentation at the hearing adhered to these boundaries, and she acted within the University's delegation of reasonable discretion to the investigator under the Complaint Process. (Exs. 18 and 24).

C. The SHARE Advocate's Training Was Consistent with Federal Title IX Guidance.

25. As Walsh testified, the Title IX Council members' training included a session presented by Alana Sacks, a Brown SHARE advocate, addressing impacts of trauma upon sexual assault victims. Brown provided such training consistent with guidance issued by the United States Department of Education's Office for Civil Rights ("OCR").

26. As an example of the federal government's guidance, on April 29, 2014, OCR issued a "significant guidance document" titled *Questions and Answers of Title IX and Sexual Violence*,[6] which "OCR issue[d] to provide [federal funding] recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that [OCR] enforce[s]." The guidance document includes the following question: "What type of training should a school provide to employees who are involved in implementing the school's grievance procedures?" and states the following answer:

> All persons involved in implementing a school's grievance procedures (e.g., Title IX coordinators, others who receive complaints, investigators, and adjudicators) must have training or experience in handling sexual violence complaints, and in the operation of the school's grievance procedures. The training should include information on working with and interviewing persons subjected to sexual violence; information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence; the proper standard of review for sexual violence complaints (preponderance of the

[6] http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf

> evidence); information on consent and the role drugs or alcohol can play in the ability to consent; the importance of accountability for individuals found to have committed sexual violence; the need for remedial actions for the perpetrator, complainant, and school community; how to determine credibility; how to evaluate evidence and weigh it in an impartial manner; how to conduct investigations; confidentiality; ***the effects of trauma including neurobiological change;*** and cultural awareness training regarding how sexual violence may impact students differently depending on their cultural background.

Questions and Answers on Title IX and Sexual Violence at 40 (emphasis added).

27. There is no credible record evidence proving that John had any reasonable contractual expectation regarding the scope and topics of training that Brown would present to its Title IX Council members, or more specifically, that it would not include the impact of trauma on sexual assault victims. Therefore, there is no evidence that any aspect of Brown's training breached any contractual obligation owed to John during the disciplinary process. To the contrary, the evidence demonstrates that Brown complied with federal guidance regarding the scope of the training provided to the Title IX Council members, as panelists "who are involved in implementing the school's grievance procedures."

D The Hearing Panelists Considered All of the Record Evidence, and John Merely Disagrees With How They Weighed the Evidence.

28. John presented trial testimony from one of the three voting hearing panelists, Dean Besenia Rodriguez. As noted above in the factual findings, Rodriguez testified that she considered all of the record evidence, while acknowledging that *she did not assign the same weight* to Ann's post-incident interactions with John as she did to other pieces of evidence, particularly John's pre-incident texts to Ann.

29. John essentially argues that he had a contractual expectation that each panelist would consider and weigh the evidence consistent with his subjective assessments of the most probative evidence – his side of the story, not Ann's.

30. The Complaint Process appropriately does not place restrictions or impose specific instructions on how panelists must weigh each piece of record evidence. Each hearing panelist is entitled to weigh the evidence factoring in his or her experiences in Brown's community, trainings, and credibility assessments, similar to how juries deliberate in trials before the Court. It is undisputed that the three hearing panelists carefully reviewed and considered the voluminous record in this disciplinary proceeding, as evidenced by their lengthy deliberations. This was a difficult case with conflicting evidence, and the hearing panelists' full and careful consideration of the evidence is further evidenced by their split 2-1 vote on the ultimate issue of responsibility. John's disagreement with their deliberative process and final result does not equate to a breach of contract.

E. Brown Addressed And Decided John's Appeals Consistent with the Appellate Process.

31. "[I]f the university explicitly promises an appeal process in disciplinary matters, that process must be carried out in line with the student's reasonable expectations." *John Doe v. Brown Univ.*, 2016 U.S. Dist. LEXIS 21027, at *33 (quoting *Havlik*, 509 F.3d at 34-35).

32. Brown's Complaint Process clearly states the permissible grounds for an appeal, so that a student can reasonably understand the actual scope of appellate review. Specifically, "[t]he complainant and respondent have the right to appeal final determination of responsibility and/or the resulting sanction based on *the limited grounds* of substantial procedural error that materially affected the outcome and/or material, new evidence not reasonably available at the time of the hearing." (Ex. 3 at 6) (emphasis added).

33. Under the Complaint Process' clearly stated terms, John did not have a reasonable expectation that he could appeal the hearing panel's determination of responsibility and/or sanction based upon a "weight of the evidence" ground. Nothing in the Complaint Process

afforded him such appellate rights, and the Court should not read terms into the contract. *Havlik*, 509 F.3d at 35; *John Doe v. Brown Univ.*, 2016 U.S. Dist. LEXIS 21027, at *33.

34. Likewise, the Complaint Process clearly states the permitted written filings, so that a student can reasonably understand the appellate filing process. Specifically, "[w]ritten requests for appeal must be submitted within three (3) business days following delivery of the notice of the outcome. Each party may respond in writing to any appeal submitted by the other party. Written responses must be submitted within three days following delivery of notice of the written appeal. Written requests for appeal submitted by one party will be shared with the other party." (Ex. 3 at 6).

35. John and Ann exercised their right to file written appeals, each student received a copy of the other's appeal, and each was allowed to file a written response. The appellate process took its proper course in the allowed filings. (Exs. 29, 30, 32, 33).

36. John did not have a reasonable expectation that he was entitled to file a "sur-reply" after Ann responded to his appeal. Nothing in the Complaint Process gave John that appellate right, and the Court may not read terms into the contract. *Havlik*, 509 F.3d at 35; *John Doe v. Brown Univ.*, 2016 U.S. Dist. LEXIS 21027, at *33.

F. John Had No Reasonable Contractual Expectation Of An Undefined "Male Perspective" on the Title IX Council.

37. John asserted in his pre-trial memorandum that "men and women have different perspectives on sex and relationships" (ECF No. 44 at 21), and he testified about his belief that "men and women inherently have different perspectives regarding issues of … sex essentially" (Tr. II at 196:9-11). From his subjective belief, John makes a huge and unsubstantiated leap in his generalized assertion that the Title IX Council lacks a proper "male perspective."

38. John's contentions appear to be more synonymous with a Title IX claim, which he has not pled. *See, e.g, Yusuf v. Vassar College*, 35 F.3d 709, 714 (2d Cir. 1994); *John Doe v. Brown Univ.*, 2016 U.S. Dist. LEXIS 21027, at *14-32.

39. There is nothing in the record proving or defining any purported contractual right to an unspecified "male perspective" within the Title IX Council and what precisely that perspective reasonably means.

40. The Complaint Process states that "Brown University is committed to providing an adequate, impartial, and reliable response to Complaints." (Ex. 3 at 1). During the disciplinary process, "[t]he role of the University Title IX Council is to review the information presented in the investigation report and to determine if an individual or individuals violated University policy (and, if yes, to determine an appropriate sanction). An appropriate hearing panel of three (3) members from the Council will be formed for each case." There is nothing stated in the Complaint Process that would give a student any reasonable expectation that he or she is contractually entitled to a minimum number of male or female panelists in a disciplinary proceeding.

41. Further, there is no evidence whatsoever that the gender of the panelists influenced the hearing or appeal panels' decisions. John's claim is nothing more than pure speculation. In fact, Brown made reasonable efforts to have a male panelist preside at the April 14, 2016 hearing, but all three eligible male Title IX Council members were disqualified because they knew the parties or witnesses in the case. The female hearing panelists split by a 2-1 vote on the issue of responsibility. By the time of John's appeal, another male member of the Title IX Council, Colin Sullivan, had completed the required five hours of training, and he sat on the appeals panel. Sullivan voted to deny John's appeal, while the two female members split on the question of whether to grant John's appeal.

IV. If a Procedural Breach Occurred that Materially Impacted the Result, the Remedy is a Remand for a Rehearing Consistent with the Court's Instructions.

42. The appropriate remedy, if there is a finding that the University breached any procedural right, is a remand back to Brown for a rehearing at the appropriate level (hearing panel or appeal panel), where any identified mistakes/breaches will be corrected consistent with the Court's instructions. *See Doe v. Rector and Visitors of George Mason Univ.*, 2016 WL 1574045 (E.D. Va. 2016). *See also* Brown's Pre-Trial Memo. (ECF No. 43) at 18-20 (analyzing the appropriate procedural remedies).

V. John's Claims Challenging the Overall Sufficiency of the Evidence Entail a Substantive Breach of Contract Claim, Which Requires Proof that the Result Was Arbitrary and Capricious.

43. Distinct from John's claims that Brown breached his procedural rights under the education contract, John further seeks the Court's review of the sufficiency of the evidence supporting the ultimate sexual misconduct finding. Only if there is no procedural breach can the court consider the sufficiency of the evidence supporting the University's finding. (For an analysis of the legal standards applicable to John's substantive breach of contract claim, *see* Brown's Pre-Trial Memo. (ECF No. 43) at 20-23).

44. The standard of the court's review is substantially circumscribed; it may not conduct a *de novo* review of the evidence or simply substitute its view of the evidence for that of the panel.

45. Under Rhode Island law, the Court is limited to reviewing the evidence to determine if the decision based upon the evidence was "arbitrary or capricious."

46. A decision is not arbitrary and capricious if there is "any discernible rational basis" that supports it.

47. There is sufficient record evidence, in what by all panelists' accounts was a difficult disciplinary case, providing a rational basis to support the results at both the hearing and appeal levels of the disciplinary process.

VI. Plaintiff's Proffered Promissory Estoppel Claim is Futile.

48. Under the doctrine of promissory estoppel, a court will enforce an agreement that does not meet the formal requirements of a contract if there existed: a clear and unambiguous promise, reasonable and justifiable reliance upon that promise, and a detriment to the promise caused by his reasonable reliance on the promise. *Filippi v. Filippi*, 818 A.2d 608, 626 (R.I. 2003). A quasi-contractual cause of action would apply only in the absence of a contract. *Tantara Corp. v. Bay State Neighbors Ass'n, LLC*., C.A. No. NC-11-55, 2012 R.I. Super. Court LEXIS 155, at *10-11 (R.I. Super. Jan. 8, 2012) (Silverstein, J.).

49. The existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter. *R & B Elect. Co. v. Amco Const. Co.*, 471 A.2d 1351, 1355 (R.I. 1984).

50. "Here, there is no dispute that the student-university relationship is governed by contract, which includes the reasonable expectations of students based on the Code." *John Doe v. Brown Univ.*, C.A. No. 15-144-S, 2016 U.S. Dist. LEXIS 21027, at *46-47 (D.R.I. Feb. 22, 2016). Accordingly, John's proposed promissory estoppel claim is legally futile.

VII. There is no Basis to Award Attorneys' Fees.

51. The Rhode Island Supreme Court has "staunch[ly] adhere[d] to the 'American rule' that requires each litigant to pay its own attorney's fees absent statutory authority or contractual liability." *Shine v. Moreau*, 119 A.3d 1, 8, (R.I. 2015) (quoting *Moore v. Ballard*, 914 A.2d 487, 489 (R.I. 2007)). The Legislature has determined that, in only very limited circumstances, attorney's fees may be available to the prevailing litigant.

One such limited circumstance is provided in Rhode Island General Laws § 9-1-45, but only if the trial justice "finds that there was a complete absence of a justiciable issue of either law or fact."

52. There are many justiciable issues of law and fact in this litigation, as evidenced by the substantial discovery, significant briefing, and four full days of trial developing a record containing 47 exhibits and over 700 transcript pages of testimony. There is no basis for the Court to consider any award of attorneys' fees under § 9-1-45 to either party.

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CERTIFICATE OF SERVICE

I certify that on August 5, 2016, I caused a copy of Brown University's Proposed Findings of Fact and Conclusions of Law to be filed and served electronically through the Court's ECF/CM system.

/s/ Steven M. Richard