

At a Special Term of the Rensselaer County  
Supreme Court, held in and for the County  
of Rensselaer, in the City of Troy, New  
York, on the 6<sup>th</sup> day of November, 2017.

PRESENT: HON. RAYMOND J. ELLIOTT, III  
JUSTICE

STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF RENSSELAER

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IN THE MATTER OF JOHN DOE,

Petitioner,

For a Judgment Pursuant to Article 78 of the  
Civil Practice Law and Rules

DECISION AND ORDER  
INDEX NO. 254952

-against-

RENSSELAER POLYTECHNIC INSTITUTE, AND  
LARRY HARDY AS TITLE IX COORDINATOR FOR  
RENSSELAER POLYTECHNIC INSTITUTE,

Respondents.

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APPEARANCES:   BRETT D. FRENCH, ESQ.  
                  COOPER ERVING & SAVAGE, LLP  
                  39 North Pearl Street  
                  Albany, New York 12207  
                  Attorney for the Petitioner

MICHAEL E. GINSBERG, ESQ.  
PATTISON SAMPSON GINSBERG & GRIFFIN, PC  
22 First Street  
P.O. Box 208  
Troy, New York 12181  
Attorney for Respondents

RAYMOND J. ELLIOTT, III   J.S.C.

In this CPLR Article 78 proceeding, the Petitioner, John Doe, seeks an order: annulling

Respondents' initial determination that Petitioner violated RPI's Student Sexual Misconduct Policy; enjoining Respondents from subjecting Petitioner in any way to RPI's Student Sexual Misconduct Policy, including but not limited to Respondents finding fault on the part of Petitioner; declaring that Respondents are not obligated under Title IX to publish the complaint and the associated investigative materials produced by Respondents in response to the complaint to Petitioner's academic institution; enjoining Respondents from publishing the complaint and the associated investigative materials produced by Respondents in response to the complaint to Petitioner's academic institution or any other private or public party unless ordered to do so by the Courts.

Respondents have opposed the application.

By Order to Show Cause, Petitioner requested a temporary restraining order and an immediate stay of: Respondents' initial determination that Petitioner violated RPI's Student Sexual Misconduct Policy; staying Respondents from publishing a complaint made against Petitioner and all investigative records and reports within their possession alleging that Petitioner committed sexual assault and raped a student of RPI. The Court granted the temporary restraining order and the stay on December 20, 2016, as sought in the Order to Show Cause. The Court restrained and enjoined Respondents from applying RPI's Student Sexual Misconduct Policy and Procedure to Petitioner, including but not limited to the running of any time limitations for challenging Respondents' initial determination that Petitioner violated RPI's Student Sexual Misconduct Policy, or subjecting Petitioner to a hearing and/or sanctions and/or making a final determination that Petitioner violated RPI's Student Sexual Misconduct Policy and from publishing any and all complaints, transcripts, investigative records, and/or

investigative reports alleging and/or finding sexual misconduct by Petitioner to Petitioner's academic institution.

Petitioner is a graduate student at an academic institution, which is not RPI, nor has Petitioner ever been an RPI student. Petitioner and Complainant were involved in a relationship from early summer of 2015 through early October, 2015.

In either June or July, 2016, Complainant filed a complaint with RPI that during the 2015/2016 academic year, she had been in "an extremely abusive relationship since September with someone who goes to [\*\*\*\*\*]\*\*\*\* ... [and] was raped and abused by [her] former partner."

Respondent, pursuant to its Student Sexual Misconduct Policy, began an investigation of the complaint which included interviews and obtaining documents for review.

On November 22, 2016, Respondents issued their investigative report and determined that based on a preponderance of the evidence that it was more likely than not that Petitioner had violated its Student Sexual Misconduct Policy.

Respondents notified Petitioner of the outcome and that they would be contacting his academic institution to inform them of the complaint and provide them with access to a reacted copy of the investigation report and investigation record documents.

Petitioner's counsel contacted Respondents by correspondence dated December 1, 2016. Respondents replied by correspondence dated December 7, 2017, and Petitioner's counsel responded by his own correspondence dated December 7, 2016.

The parties and Petitioner's counsel met at RPI's offices of The Division of Human Resources on December 13, 2016, and Petitioner's counsel was allowed to review Respondents'

investigation record and report.

Petitioner then filed the instant Article 78 proceeding.

The Court has thoroughly reviewed the verified petition, verified answer, affidavits, affirmations, memorandums of law and exhibits, including those submitted for in camera review.

CPLR §7803 (2) and (3) state: "The only questions that may be raised in a proceeding under this article are: ...

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed;".

"Decisions made by private educational institutions both in the area of academics and non academics are subject to judicial review, although different standards are applied depending on the nature of the decision" (*Stapor v. Wagner College*, 2014 NY Slip Op 31787[U] [Sup. Ct. Richmond Co. 2014] citing *Tedeschi v. Wagner Coll.*, 49 N.Y.2d 652 [1980]). "[A] court reviewing a private university's disciplinary determination must determine 'whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings so as to ascertain whether its actions were arbitrary or capricious'" (*Matter of Doe v. Skidmore Coll.*, 152 A.D.3d 932, 936 [3d Dept. 2017] quoting *Matter of Rensselaer Socy. of Engrs. v. Rensselaer Polytechnic Inst.*, 260 A.D.2d 992, 993 [3d Dept. 1999]).

Petitioner contends that Respondents lacks jurisdiction over him as he is not an RPI student and the Student Sexual Misconduct Policy only applies to RPI students. Petitioner

further argues that Respondents' determination that they are obligated to investigate under Title IX and the U.S. Department of Education Office of Civil Rights' instructive article "Questions and Answers on Title IX and Sexual Violence" does not result in jurisdiction because Petitioner is unaffiliated with RPI, all alleged acts of sexual assault and rape occurred while Petitioner and Complaint were together off campus and the alleged acts do not stem from some connection between RPI and Petitioner's academic institution.

The Court has reviewed the RPI Student Sexual Misconduct Policy with a revision date of August, 2015. Under I Introduction, B. Jurisdiction, it states: "This policy applies to any allegation of Sexual Misconduct made against a student of the Institute, regardless of where the alleged Sexual Misconduct occurred, as long as the conduct giving rise to the Complaint is related to an Institute sanctioned or sponsored event including but no limited to all Rensselaer academic, educational, athletic or extracurricular programs or activities. If you are a student of the Institute and a Complaint has been filed against you, the investigation and adjudication process set forth in this Policy will apply."<sup>1</sup>

The Court finds that based upon the facts presented in this proceeding that RPI does not have jurisdiction over Petitioner under the RPI Student Sexual Misconduct Policy with a revision

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<sup>1</sup> The Court reviewed the Student Sexual Misconduct Policy on the RPI website and noticed that the Policy had been revised in August, 2017. The Court notes that the Jurisdiction section was revised and now reads: "This Policy applies to allegations of Sexual Misconduct involving a Rensselaer student, regardless of where the alleged Sexual Misconduct occurred. If you are a student of the Institute and a Complaint has been filed against you, or a student filing a Complaint against another student, the investigation and adjudication processes set forth in this Policy will apply. In the event that a Rensselaer student files a complaint involving a student of another university or school, the matter will be investigated pursuant to this policy and Title IX, and the other university or school shall be notified of the Complaint and any finding of a violation of Title IX by their student."

date of August, 2015, the version in place at the time of the alleged incident. Both parties recognize that Petitioner is not an RPI student and that the alleged sexual misconduct is alleged to have taken place off campus and was not related in anyway to an Institute sanctioned or sponsored event including but not limited to all Rensselaer academic, educational, athletic or extracurricular programs or activities.

Title IX of the Education Amendments of 1972 is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. All public and private elementary and secondary schools, school districts, colleges, and universities receiving any federal financial assistance must comply with Title IX. On April 4, 2011, the Office for Civil Rights in the U.S. Department of Education issued a Dear Colleague Letter on student-on-student sexual harassment and sexual violence. The Dear Colleague Letter explained a school's responsibility to respond promptly and effectively to sexual violence against students in accordance with the requirements of Title IX. On April 29, 2014, the U.S. Department of Education, Office for Civil Rights, issued a Questions and Answers on Title IX and Sexual Violence. Assistant Secretary of Civil Right, Catherine E. Lhamon, indicated in the cover letter that "The following questions and answers further clarify the legal requirements and guidance articulated in the DCL and the 2001 Guidance and include examples of proactive efforts schools can take to prevent sexual violence and remedies schools may use to end such conduct, prevent its recurrence, and address its effects."

The Questions and Answers on Title IX and Sexual Violence at paragraph B-5 asks the Question: "How should a school respond to sexual violence when the alleged perpetrator is not

affiliated with the school?" and provides "Answer: The appropriate response will differ depending on the level of control the school has over the alleged perpetrator. For example, if an athlete or band member from a visiting school sexually assaults a student at the home school, the home school may not be able to discipline or take other direct action against the visiting athlete or band member. However (and subject to the confidentiality provisions discussed in Section E), it should conduct an inquiry into what occurred and should report the incident to the visiting school and encourage the visiting school to take appropriate action to prevent further sexual violence. The home school should also notify the student of any right to file a complaint with the alleged perpetrator's school or local law enforcement. The home school may also decide not to invite the visiting school back to its campus. Even though a school's ability to take direct action against a particular perpetrator may be limited, the school must still take steps to provide appropriate remedies for the complainant and, where appropriate, the broader school population. This may include providing support services for the complainant, and issuing new policy statements making it clear that the school does not tolerate sexual violence and will respond to any reports about such incidents. For additional information on interim measures see questions G-1 to G-3."

The Questions and Answers on Title IX and Sexual Violence at paragraph F-4 asks the Question: "Is a school required to process complaints of alleged sexual violence that occurred off campus?" and provides "Answer: Yes. Under Title IX, a school must process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity. A school must determine whether the alleged

off-campus sexual violence occurred in the context of an education program or activity of the school; if so, the school must treat the complaint in the same manner that it treats complaints regarding on-campus conduct. In other words, if a school determines that the alleged misconduct took place in the context of an education program or activity of the school, the fact that the alleged misconduct took place off campus does not relieve the school of its obligation to investigate the complaint as it would investigate a complaint of sexual violence that occurred on campus. Whether the alleged misconduct occurred in this context may not always be apparent from the complaint, so a school may need to gather additional information in order to make such a determination. Off-campus education programs and activities are clearly covered and include, but are not limited to: activities that take place at houses of fraternities or sororities recognized by the school; school-sponsored field trips, including athletic team travel; and events for school clubs that occur off campus (e.g., a debate team trip to another school or to a weekend competition). Even if the misconduct did not occur in the context of an education program or activity, a school must consider the effects of the off-campus misconduct when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity because students often experience the continuing effects of off-campus sexual violence while at school or in an off-campus education program or activity. The school cannot address the continuing effects of the off-campus sexual violence at school or in an off-campus education program or activity unless it processes the complaint and gathers appropriate additional information in accordance with its established procedures. Once a school is on notice of off-campus sexual violence against a student, it must assess whether there are any continuing effects on campus or in an off-campus education program or



activity that are creating or contributing to a hostile environment and, if so, address that hostile environment in the same manner in which it would address a hostile environment created by on-campus misconduct. The mere presence on campus or in an off-campus education program or activity of the alleged perpetrator of off-campus sexual violence can have continuing effects that create a hostile environment. A school should also take steps to protect a student who alleges off-campus sexual violence from further harassment by the alleged perpetrator or his or her friends, and a school may have to take steps to protect other students from possible assault by the alleged perpetrator. In other words, the school should protect the school community in the same way it would had the sexual violence occurred on campus. Even if there are no continuing effects of the off campus sexual violence experienced by the student on campus or in an off-campus education program or activity, the school still should handle these incidents as it would handle other off-campus incidents of misconduct or violence and consistent with any other applicable laws. For example, if a school, under its code of conduct, exercises jurisdiction over physical altercations between students that occur off campus outside of an education program or activity, it should also exercise jurisdiction over incidents of student-on-student sexual violence that occur off campus outside of an education program or activity.”

The Court finds again that Respondents do not have jurisdiction over Petitioner under Title IX based upon the facts presented in this proceeding. The Court recognizes Respondents’ obligation under Title IX to determine whether conduct occurred on campus or off campus and, if off campus, whether it was part of a educational program or activity of the school. “Under Title IX, a school must process all complaints of sexual violence, regardless of where the conduct

occurred, to determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity.”

The Office for Civil Rights recognized that schools may not have control or authority over all alleged incidents or alleged perpetrators and that would limit a school’s ability to take action.

Accordingly, a school must first determine, where conduct occurs off campus, whether they have any level of control over the alleged perpetrator.

In the instant proceeding, the alleged sexual misconduct took place off campus and was not in anyway related to an educational program or activity of RPI. Respondents would have learned this from the complaint itself and statements made by the complainant. Furthermore, it is a stretch in this particular alleged incident for Respondents to argue that they had to determine whether the conduct had continuing effects on campus or in an off-campus education program or activity. The Petitioner and Complainant were involved in a relationship which was not connected in any way to a relationship or a nexus between the Petitioner’s and Complainant’s academic institutions. The alleged sexual misconduct did not stem from an incident that would have continuing effects on campus or in an off-campus education program or activity.

The Court finds that Respondents investigated the complaint and took certain steps that were acceptable in providing an appropriate remedy for the Complainant under Title IX. Respondents provided support services to Complainant, informed Complainant that Complainant could file a complaint with Petitioner’s academic institution and/ or local law enforcement, issued a notice of Persona Non Grata to Petitioner on any property owned or leased by RPI, and issued a revised Student Sexual Misconduct Policy in August, 2017, specifically dealing with jurisdiction.

However, as the Court has found that Respondents had no jurisdiction over Petitioner through either the RPI Student Sexual Misconduct Policy or Title IX, the statement made by Petitioner to Respondents on July 26, 2016, is null and void. Respondents had no jurisdictional basis in which to subject Petitioner to the interview, and they should have never taken his statement. The Court finds that Petitioner's statement given on July 26, 2016, is to be deleted and purged from the investigation and not considered in anyway. The Court is fully aware of the reliance by Respondents on Petitioner's statements in Respondents' investigation and finding. Based on the deletion and purging of Petitioner's statement given on July 26, 2016, from the investigation, the Court will further annul Respondents' initial determination of November 22, 2016, that based on a preponderance of the evidence, it was more likely than not that Petitioner had violated its Student Sexual Misconduct Policy.

In addition, the Court finds that Respondents have no legal authority or obligation under either RPI's Student Sexual Misconduct Policy or Title IX to report, inform, publish or share any information or documentation with Petitioner's academic institution regarding this alleged incident, and that Respondents' determination that they have the authority to do so is arbitrary and capricious. The "Questions and Answers on Title IX and Sexual Violence" does not direct schools to report or inform other schools where the allegations are not related to an established connection between the two schools, such as a visiting school relationship with sporting competition or academic groups.

Even if the Court were to have found that RPI had jurisdiction over Petitioner, the procedure followed by RPI in this case was arbitrary, capricious and in clear violation of Petitioner's rights. It is obvious to the Court from a reading of Petitioner's interview,

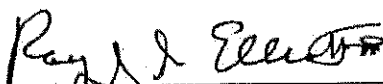
Petitioner's Affidavit and exhibits in the record before the Court; that there existed a language and a possible cultural barrier that resulted in miscommunication and misunderstanding between Petitioner and Respondents' interviewers. Respondents contacted Petitioner and requested a meeting and never notified him of the reason for the meeting. Before the meeting began, the interviewers informed Petitioner that he was the subject of a sexual misconduct complaint, and gave Petitioner a number of important documents relating to the investigation and his rights, and only gave him moments to consider them. The Court finds that the conduct demonstrated by Respondents towards Petitioner during the initial course of this investigation was a clear violation of his constitutional rights.

Accordingly, based on the foregoing, the Petition is granted.

This shall constitute the Decision, Order and Judgment of the Court. This Decision, Order and Judgment is being returned to the attorneys for Petitioner. All original supporting documentation is being filed with the County Clerk's Office, except those submitted for in camera review. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

**SO ORDERED AND ADJUDGED.  
ENTER.**

Dated: November 6, 2017  
Troy, New York

  
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RAYMOND J. ELLIOTT, III  
Supreme Court Justice

**Papers Considered:**

1. Order to Show Cause with Immediate Stay of Enforcement of determination Pursuant to CPLR 7805 dated December 20, 2016; Verified Petition sworn to December 19, 2016, with annexed Exhibits A-I; Affirmation of Brett D. French, Esq., in Support of Article 78 Petition dated December 20, 2016; Memorandum of Law dated December 20, 2016.
2. Verified Answer sworn to January 18, 2017, with annexed Exhibits A-C; Memorandum of Law on Behalf of the Respondents dated January 19, 2017; Respondents' Exhibits IC-1 and IC-2 submitted for *in camera* review.
3. Affidavit of John Doe sworn to January 30, 2017; Memorandum of Law dated January 30, 2017, with annexed Exhibit A.