

RESOLUTION AGREEMENT

Wesley College Complaint No. 03-15-2329

In order to resolve the above-referenced complaint filed with the U.S. Department of Education, Office for Civil Rights (“OCR”), under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and its implementing regulations at 34 C.F.R. Part 106 (“Title IX”), Wesley College (the “College”) agrees to take the steps set forth below. This Resolution Agreement has been entered into voluntarily by the College and does not constitute an admission by the College. OCR recognizes that the College has cooperated with OCR during the course of its investigation.

The term “complainant” used throughout this Agreement refers to an individual who is the subject of alleged sex discrimination, regardless of how the report comes to the attention of the College, or someone who has made a report of sex discrimination to the College.

A. SEXUAL MISCONDUCT/TITLE IX GRIEVANCE PROCEDURES

The College will revise its policies and procedures that address complaints of sex discrimination (including sexual harassment, sexual assault, and sexual violence), including but not limited to the Title IX Policy, Title IX information page, and Student Code of Conduct. Some of the provisions below are already included in one or more of the College’s policy and procedure documents; with regard to such provisions, the College will retain them in the revised procedures, and will revise all related policies and procedures and other materials to ensure compliance with Title IX. The College will ensure that notice is provided to students and employees of the existence of the revised policies and procedures, and that these are widely distributed.

Specifically, the College will address the following items to ensure its policies and procedures are in compliance with Title IX:

1. Notice that the procedures apply to complaints alleging all forms of sexual misconduct (including sex discrimination and/or sexual harassment/violence) filed against employees, students, or third parties;
2. An explanation of how to file a complaint of sexual misconduct (which includes sex discrimination and/or sexual harassment/violence) pursuant to the policy and procedures;
3. The name or title, office address, electronic mail (email) address, and telephone number of the individual with whom to file a complaint;
4. Definitions and examples of what types of actions may constitute sexual misconduct (including sex discrimination and/or sexual harassment/violence);

5. Definitions and identification of employees who are: a) responsible employees (i.e., mandatory reporters); b) confidential employees; or c) employees who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers, including front desk staff, and students and other staff with similar functions (who should report incidents of sexual violence in a way that does not identify students without their consent);
6. A requirement that responsible employees promptly report sexual misconduct that they observe or learn about;
7. Provisions providing for an adequate, reliable and impartial investigation of all complaints prior to a hearing, which will include interviews with the victim and the accused, and any relevant witnesses, and a review of any other relevant evidence;
8. Provisions providing for the adequate, reliable, and impartial investigation of all complaints, including an equal opportunity for the parties to present witnesses and other evidence and equal access to information being considered in the grievance process (consistent with FERPA);
9. An explicit statement that the College will consider the effects of off-campus conduct when evaluating whether there is a hostile environment on campus;
10. The College's obligation to make reasonable efforts to investigate and address instances of sexual misconduct when it knows or should have known about such instances, even when a complainant chooses not to participate in an investigation, and to respond to complaints, reports, or information about incidents of sexual misconduct to stop prohibited sexual misconduct, eliminate any hostile environment, take steps to prevent the recurrence of sexual misconduct and address any effects on campus from such conduct;
11. A description of "mediation," "resolution without a hearing," and "formal hearing," as well as an explanation that mediation is not available when the allegations include sexual violence;
12. A description of the appropriate use of informal resolutions, if any, including: when informal resolution may be inappropriate (e.g., mediation is prohibited in cases of sexual assault and those involving a student complaining of sexual harassment against an employee in a position of authority over the student); that the parties must be notified of the available informal options, and that they are voluntary; and the right to end the informal process at any time and begin the formal complaint process;

13. Provisions prohibiting parties from personally cross-examining each other during the hearing processes;
14. A statement that the preponderance of the evidence standard will be used for investigating and making findings relating to allegations of sexual misconduct;
15. A provision excluding the participation of students on hearing panels or, to the extent that students are ever permitted to participate as hearing panel members, a description of how their training will adequately address concerns related to this practice;
16. Designated and reasonably prompt timeframes for the major stages of the sexual misconduct grievance process that apply equally to the parties of the complaint, including the fact gathering, complaint resolution, and appeal processes, if any;
17. A description of the rights of complainants and available resources and reporting options, including confidential resources, support resources, such as counseling, disciplinary options, and the option to file or decline to file a complaint with a local law enforcement agency;
18. A description of the rights of students, including the accused, and available resources, including complete information about the hearing process and confidential counseling and support services;
19. Notice of the availability of interim measures (such as counseling, housing assistance, academic adjustment or other academic assistance, and stay away orders), including how they can be obtained, to protect and support the complainant during the College's investigation period, to provide for the safety of the complainant(s) and the campus community and the avoidance of retaliation;
20. A provision noting that requests for interim measures may be made by or on behalf of the complainant to any College official responsible for Title IX compliance, who will be responsible for ensuring the implementation of appropriate interim steps and coordinating the College's response to these requests with the appropriate offices on campus;
21. A statement that interim measures will not disproportionately impact the complainant, and that interim measures are available even if the complainant does not file or continue to pursue a complaint of sexual misconduct;
22. A provision indicating that the College will comply with law enforcement requests for cooperation, that such cooperation may require the College to temporarily suspend for a short period the fact-finding aspect of a sexual misconduct/Title IX investigation while the law enforcement agency is in

the process of gathering evidence, and that the College will promptly resume its sexual misconduct/Title IX investigation as soon as it is notified by the law enforcement agency that it has completed the evidence gathering process;

23. An explanation of the College's confidentiality policy, which includes an assurance that the College will keep the complaint and investigation private to the extent possible, explains what type of information will be shared with the accused if a complaint is filed, and states that the College's obligations under Title IX do not end because a victim has requested to not proceed with a Title IX investigation;
24. Revisions to the College's procedures to clarify that, while discretion remains important, parties are not restricted from discussing and sharing information related to their complaints with others that may support or assist them in presenting their case;
25. Concurrent written notification to both parties of the outcome of the College's investigation and any appeal;
26. A provision requiring that, if requested by the complainant, the College will promptly implement a one-way no contact order (with the burden of no contact on the accused) if the College has made a finding of responsibility under the sexual misconduct policy, even if an appeal may be filed, or has been filed and is pending;
27. Notice of the opportunity for both parties to file an appeal, to the extent the procedures allow appeals, and for both parties to participate equally in the appeal process, even if the party has not herself or himself filed an appeal;
28. An assurance that the appeal will be conducted in an impartial manner by an impartial decision-maker trained in issues of sexual misconduct/Title IX;
29. Examples of the range of possible disciplinary sanctions and the types of remedies available to the complainant and others;
30. An explanation that the rights of students, including the accused and the risk of threat to the school community will be taken into consideration, along with ensuring the sufficient level of inquiry, in determining the appropriateness of interim suspensions;
31. An explanation of how disciplinary actions, if any, relating to a sexual misconduct complaint (e.g., underage drinking before a sexual assault) will be handled in the complaint procedure;

32. A statement that the complainant's past sexual history will typically not be used in determining whether sexual misconduct occurred; except where consent is at issue, prior consensual activity between the two parties, while not determinative, may be relevant to determining whether consent was sought and given, recognizing that consent to one sexual act does not constitute consent for another sexual act; in addition, the past sexual history may be relevant under limited circumstances, for example, to explain injury;
33. A statement that medical and counseling records are privileged and confidential documents that students will not be required to disclose; and
34. A statement that retaliation is prohibited against any individual who files a complaint of sexual misconduct/Title IX, participates in a complaint investigation in any way, or opposes in a reasonable manner an act or policy believed to constitute sex discrimination.

Reporting Requirements:

By January 1, 2017, the College will provide for OCR's review and approval a draft of the revised procedures and any additional policies or informational documents that address complaints alleging discrimination on the basis of sex (including sexual harassment, sexual assault, and sexual violence). OCR will review these grievance procedures and related materials in order to ensure that they comply with Title IX and this Agreement.

Within 45 calendar days of written notification from OCR of its approval of the revised sexual misconduct/Title IX grievance procedures, the College will provide written confirmation to OCR that the revised procedures were adopted and implemented and that faculty, staff, and students were provided with written notice regarding the grievance procedures for resolving sexual misconduct/Title IX complaints, together with information on how to obtain a copy of the grievance procedures. The College will confirm to OCR that it has, at a minimum, made this notification through: the College's website; electronic mail messages to faculty, staff, and students; as well as by any other additional means of notification the College has deemed effective to ensure that the information is widely disseminated. The College will provide to OCR copies of, or a link to, its revised student handbooks and any other publications that contain the procedures, as well as a link to its webpage where the revised sexual misconduct/Title IX procedures are otherwise located.

B. NONDISCRIMINATION STATEMENT

The College will revise its notice of non-discrimination (the "Notice") to state that the College does not discriminate on the basis of sex in its programs, activities, or employment. The Notice will include the name, title, office address, telephone number, and electronic mail (email) address of the College's designated Title IX Coordinator(s). The Notice will include a statement

that inquiries regarding the application of Title IX and its implementing regulations may be referred to the Title IX Coordinator(s) or to OCR.

The College will broadly publish its revised Notice, including on the College's website and in its promotional materials, student and employee handbooks, application forms and its other published materials in accordance with 34 C.F.R. § 106.8(a). Inserts may be used pending reprinting of the publications.

Reporting Requirement:

By January 1, 2017, the College will provide for OCR review and approval, a copy of its amended notice of nondiscrimination.

Within 45 days of OCR's approval of the Notice, the College will provide to OCR a list of the titles of the publications in which the its notice of nondiscrimination appears (e.g., College catalog, website, student handbook); and a copy of at least one publication disseminated to the campus community, or printouts, or a link to an online publication containing the Notice.

C. POLICY REVIEW

The College will review and revise, the Student Code of Conduct, to ensure that it is consistent with Title IX. Specifically, the College will clearly define each employee category, and will remove any inappropriate burden placed on students to assess each College staff and faculty member's duties and ability to maintain their privacy prior to talking to them, and ensure that incidents reported to non-confidential employees are reported to the Title IX Coordinator.

Reporting Requirement:

By March 31, 2017, the College will submit to OCR its assessment regarding the Student Code of Conduct's consistency with Title IX, and any proposed revisions. Within sixty (60) days after OCR's approval of the revised Student Code of Conduct, the College will provide OCR with documentation confirming that the College has publicized and disseminated its revised Student Code of Conduct, as well as a description of how it was distributed, a copy of its revised student handbook(s), and a link to its webpage where the revised Student Code of Conduct is located.

D. TITLE IX COORDINATOR

The College will review and revise the current responsibilities of its Title IX Coordinator and Deputy Coordinators (collectively, "Title IX Coordinators") to ensure that their responsibilities are consistent with Title IX. Based on the Title IX Coordinators' responsibilities, the College will develop a description of corresponding mandatory training requirements for its Title IX Coordinators. The responsibilities and training requirements will include the following:

1. The Title IX Coordinators will have expert knowledge of the College's Title IX grievance procedure(s) and oversee all Title IX reports received by the Title IX Coordinators and all other departments, offices, and

individuals identified as responsible employees or delegated the responsibility for receiving and/or investigating reports of sex discrimination, including sexual harassment and sexual violence, and will address any patterns or systematic problems that arise during the review of such reports and assess overall efficacy of coordination and overall response by the College to sexual harassment and sexual violence, including the implementation and efficacy of interim measures, steps taken to stop sex discrimination/harassment found to have occurred and prevent its recurrence, eliminate any hostile environment that has been created for students, and steps taken to remedy any discriminatory effects on the complainant and others, as appropriate.

2. The Title IX Coordinator will retain ultimate oversight responsibility for any Deputy Coordinators the College designates to assist the Title IX Coordinator. The College also will develop specific statements of roles and responsibilities for each Deputy Coordinator that clearly delineate the scope of each Deputy Coordinator's duties and their subordinate roles to the Title IX Coordinator.
3. The Title IX Coordinators will have ultimate responsibility for: the prompt investigation of reports alleging sexual harassment and sexual violence; adjudication of whether sexual harassment or sexual violence has occurred in individual cases; the identification of remedies (including interim measures) necessary to address sexual harassment or sexual violence, eliminate any hostile environment, and prevent its recurrence; and consultation, as necessary, on any matter where it has been determined that sexual harassment or sexual violence has occurred to ensure the College's compliance with Title IX. To the extent that any of these duties will be delegated to other individuals at the College, the statement will clearly state what will be delegated to whom and how the Title IX Coordinators will retain oversight of any delegated responsibilities.
4. The Title IX Coordinators will oversee the provision of initial and ongoing training to any Deputy Coordinators and any other individuals from any College department or office delegated the responsibility for receiving and/or investigating reports of sex discrimination, including sexual harassment and sexual violence. The Title IX Coordinator will also have sufficient experience or training in these same concepts. The training content will include the substantive requirements of Title IX and how to investigate reports under Title IX that allege sex discrimination, including sexual harassment and sexual violence.
5. The Title IX Coordinators will have responsibility for the development, coordination, and implementation of regular events hosted by or supported by the College leadership on grounds to raise awareness in the College community about all forms of sex discrimination (including sexual harassment and sexual violence) and the College's policies and procedures

regarding such matters, so as to reinforce to the College community the importance of this issue to the College administration.

6. The Title IX Coordinators will be responsible for providing information to students and employees regarding their Title IX rights and responsibilities, including information about the resources available on and off College property, the formal and informal resolution processes, the availability of interim measures, and the ability to file a complaint with local law enforcement and the College simultaneously.
7. The Title IX Coordinators will be responsible for the development, coordination, and implementation of periodic Title IX training for the College community (i.e., staff, faculty, resident assistants, coaches, students, etc.).
8. The Title IX Coordinators will be responsible for periodic review and assessment of the College's Title IX procedures, and any related policies and procedures, to ensure that they are consolidated to the maximum extent possible to provide an efficient resource for students, faculty, and staff.
9. Neither the Title IX Coordinator nor any Deputy Coordinators shall have other job responsibilities that create a conflict of interest with regard to their duties and responsibilities under Title IX. This includes serving in any capacity during the appeals process, if the Title IX Coordinator or any Deputy Coordinator participates in the administrative or board hearing, even in a non-voting capacity.
10. The Title IX Coordinators will be responsible for coordinating communications with the Dover Police Department regarding the College's obligations under Title IX and for serving as a resource on Title IX issues.
11. The Title IX Coordinators will be responsible for coordinating the development and implementation of periodic assessments (i.e. surveys) of campus climate with regard to sexual harassment and sexual violence.
12. The Title IX Coordinators will coordinate with appropriate administrators, student services personnel, and law enforcement officers to identify and address any patterns or systemic problems under Title IX and to assess the overall efficacy of the coordination among these various offices.
13. The Title IX Coordinators will annually review all reports of discrimination on the basis of sex, including sexual harassment and sexual violence, in order to identify and address any patterns or systemic problems (such as how many reports involved particular groups of students (e.g., first-year students, athletes, graduate students, members of student organizations); whether any individuals or organizations engaged

in repeated misconduct; whether there are any patterns of barriers to reporting for any group of students; and/or if reports were not processed promptly and equitably in compliance with the applicable policies and procedures).

Reporting Requirement:

By September 1, 2017, the College will provide for OCR review and approval, a copy of the Title IX Coordinators' responsibilities and corresponding training requirements,

Within 60 days of OCR's approval, the College will revise the Title IX Coordinators' responsibilities and corresponding training requirements.

Within 45 days of revising the Title IX Coordinators' responsibilities and corresponding training requirements, the College shall provide OCR with the revised Title IX Coordinators' responsibilities and corresponding training requirements, and documentation substantiating that the College implemented and distributed the revised Title IX Coordinators' responsibilities and corresponding training requirements to the College's Title IX Coordinators.

E. SEXUAL MISCONDUCT/TITLE IX TRAINING

1. Training for Employees Responsible for Recognizing and Reporting Sexual Misconduct

The College will provide training to all staff responsible for recognizing and reporting incidents of sexual harassment (including but not limited to resident advisors (RAs), campus police, faculty, administrators, counselors, general counsels, athletic coaches, health personnel, and any other responsible employees, to the extent they are not confidential resources under policy or applicable law).

The training will cover, at a minimum: (1) the revised grievance procedures; (2) the obligation of staff to report sexual misconduct including what should be included in a report, any consequences for the failure to report, and the procedure outlining their responsibility to students' requests for confidentiality; (3) how to report sexual misconduct pursuant to Title IX and the revised grievance procedures; (4) the person(s) to whom sexual misconduct must be reported; (5) how to recognize and identify sexual misconduct and the behaviors that may lead to and result in sexual misconduct; (6) the College's responsibilities under Title IX to address such allegations; (7) and the relevant resources available. The training should also include information on the reporting obligations of College staff; the complainant's option to request that their identifying information not be shared with the respondent or that no action be taken; the existence of available confidential advocacy, counseling, or other support services; and the right to file a sexual harassment complaint with the College and to report a crime to campus or local law enforcement; the attitudes of bystanders that may allow conduct to continue; the potential for victimization of students who may have experienced sexual misconduct and its effects on students; appropriate methods for responding to a student who may have experienced sexual misconduct; and the impact of trauma on students who experience sexual misconduct.

During the training, the College will provide copies of the revised sexual misconduct/Title IX grievance procedures to all attendees or refer them to their location within the publications they already possess.

Reporting Requirement:

By September 30, 2017, and by the same date in 2018 and 2019, the College will provide documentation to OCR demonstrating that the College has provided the training referenced in Section E(1) above. The documentation will include, at a minimum, the date(s) of the training; the name(s) and title(s) of the trainer(s); a copy of any materials used or distributed during the training; and a sign-in sheet with the names and titles of the individuals who attended the training.

2. Training for College Community Members Involved In Implementation of Sexual Misconduct/Title IX Grievance Procedures

The College will provide its Title IX Coordinators and any other College officials/students directly involved in receiving, processing, investigating, adjudicating, and/or resolving complaints of sexual misconduct with training on the College's sexual misconduct/Title IX grievance procedures; the College's obligations regarding the investigation of complaints; guidance from OCR; and Title IX's prohibitions on retaliation. The training will also include instruction on how to conduct and document adequate, reliable, and impartial sexual misconduct/Title IX investigations for those charged with investigative duties, including 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 of allegations of sexual misconduct (preponderance of the evidence); information about coordination and communication between the College and the local external law enforcement; information on consent and the role drugs and alcohol can play in the ability to consent; the importance of accountability for individuals found to have committed sexual misconduct; the need for remedial actions for the respondent, complainant, and school community; how to determine credibility; how to evaluate evidence and weigh it in an impartial manner; how to conduct sexual misconduct; confidentiality; the College's responsibilities under Title IX even in instances where the victim declines to proceed with an investigation; information related to the employee categories and the mandatory reporting requirements of all employees not designated as confidential employees; the effects of trauma; and cultural awareness training regarding how sexual misconduct may impact students differently depending on their backgrounds.

Reporting Requirement:

By August 31, 2017, and by the same date in 2018 and 2019, the College will provide documentation to OCR demonstrating that it has provided the training referenced in Section E (2) above. The documentation will include, at a minimum, the date(s) of the training; the name(s) and title(s) of the trainer(s); a copy of any materials used or distributed during the training; and a sign-in sheet with the names and titles of the individuals who attended the training.

3. Training for Board Hearing Panel Members

All Board Hearing panel members appointed by the College must receive training before they can participate in the review of a case. The College will develop and provide training to all Board Hearing panel members. This training will be conducted annually during the monitoring period, and will address the College's sexual misconduct/Title IX grievance procedures, guidance from OCR, and Title IX's prohibitions on retaliation. The training will also 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 of allegations of sexual misconduct (preponderance of the evidence); information on consent and the role drugs and alcohol can play in the ability to consent; the importance of accountability for individuals found to have committed sexual misconduct; the need for remedial actions for the respondent, complainant, and school community; how to determine credibility; how to evaluate evidence and weigh it in an impartial manner; confidentiality; the effects of trauma; and cultural awareness training regarding how sexual misconduct may impact students differently depending on their backgrounds. The training will also address the appropriate standard of review to employ when reviewing cases of sexual misconduct (the preponderance of the evidence standard).

Reporting Requirement:

By August 31, 2017, and by the same date in 2018 and 2019, the College will provide documentation to OCR demonstrating that it has provided the training referenced in Section E(3) above. The documentation will include, at a minimum, the date(s) of the training; the name(s) and title(s) of the trainer(s); a copy of any materials used or distributed during the training; and a sign-in sheet with the names and titles of the individuals who attended the training.

4. Training for Students

The College will provide training to all students, including graduate students, on the College's sexual misconduct/Title IX grievance procedures, the College's obligations regarding the investigation of complaints, including the College's responsibilities under Title IX even in instances where the victim declines to proceed with an investigation, guidance from OCR, and Title IX's prohibitions on retaliation. The training will also include information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence, and information on consent and the role drugs and alcohol can play in the ability to consent. The training will also make students aware of the College's prohibition against sexual harassment, sexual violence and retaliation; educate students on how to recognize such forms of sex discrimination when they occur; inform students regarding how and to whom any incidents of sexual harassment, sexual violence and retaliation should be reported, including information related to the employee categories and the mandatory reporting requirements of all employees not designated as confidential employees; and provide a general overview of Title IX, the rights this law confers on students, the resources available to students who have experienced sexual harassment, sexual violence and retaliation, and the role and authority of OCR to enforce Title IX. This training will be presented in lay terms familiar to College students. The College will assess how to make sure all of the student body and community receive training.

Reporting Requirement:

By August 31, 2017, and by the same date in 2018 and 2019, the College will provide documentation to OCR demonstrating that it has provided the training referenced in Section E(4) above. The documentation will include, at a minimum, the date(s) of the training; the name(s) and title(s) of the trainer(s); a copy of any materials used or distributed during the training; and a sign-in sheet with the names and titles of the individuals who attended the training.

F. DISSEMINATION OF INFORMATION REGARDING SEXUAL MISCONDUCT (INCLUDING SEX DISCRIMINATION AND/OR SEXUAL HARASSMENT/VIOLENCE)

The College will, as appropriate, revise its existing materials or develop new materials on sexual misconduct to be distributed to students during orientation and upon receipt of complaints of sexual misconduct. The materials will contain information on what constitutes sexual misconduct, what to do if a student has been subjected to sexual misconduct, and contact information for on- and off-campus resources for students who have been subjected to sexual misconduct. In addition, the College will include information on how to file a complaint of sexual misconduct with the College; the name and contact information for the College's Title IX Coordinator or the individual with whom complaints are filed, and a description of the Title IX Coordinator's role; information on how to obtain counseling and academic assistance in the event of sexual misconduct; and information on what interim measures can be taken to protect a complainant and how to request interim measures if the alleged perpetrator lives on campus and/or lives in the same dorm and/or attends the same classes as the complainant.

Reporting Requirement:

By March 1, 2017, the College will submit for OCR's review and approval, the materials referenced in Section F, above.

Within 60 days of OCR's approval of the materials, the College will provide documentation to OCR demonstrating that it has implemented Section F above, including a link to where the material is posted on the College's website. The documentation will include information about which of the College offices will be responsible for distributing the materials upon receipt of a complaint of sexual misconduct (including sex discrimination, sexual harassment, and/or sexual assault/violence).

G. CAMPUS-BASED COMMITTEE

The College will create a Committee consisting of: (i) the College's Title IX Coordinator(s); (ii) an additional College-level administrator with knowledge, responsibilities and authority relevant to the duties of the Committee; (iii) representative administrators, faculty members and students; (iv) representatives from any community-based organizations which provide services to the College related to sexual harassment/violence prevention; and (v) such other individuals as the College determines appropriate, such as College counselors or health-service workers. The Committee will develop a plan to be implemented at the College for educating students and

employees about issues related to sexual harassment, including what constitutes sexual harassment and the impact it has on individual students and the educational environment, the prohibition of sexual harassment in the educational setting, the importance of reporting sexual harassment, how and to whom to report incidents of sexual harassment, the College's obligation to respond appropriately to notice of sexual harassment, and potential consequences and corrective action if harassment is found. The College will implement the plan and monitor its effectiveness.

Reporting Requirements:

By March 30, 2017, the College will provide OCR with a list of names and titles of the members of the Committee, meeting dates and meeting minutes.

By August 1, 2017, and by the same date in 2018 and 2019, the College will submit to OCR for review a list of recommendations submitted by the Committee, as well as a list of the recommendations that were adopted by the College. In particular, this list will include a copy of the Committee's recommended actions relating to the procedures, outreach, and training, and/or other College practices addressed by this Agreement, together with supporting information that explains the bases for the recommendation (such as climate checks), and the College's plans with respect to those recommendations (including timeframes for such plans).

H. CLIMATE CHECKS

The College will conduct a climate check with students to assess the steps and measures taken pursuant to this Resolution Agreement and otherwise by the College to achieve its goal of a campus free of sexual misconduct, in particular sexual assault/violence. The climate check may be accomplished in many ways, including focus groups, open forum information session, publicized walk-in hours for campus community input or through a written or electronic survey, provided that students receiving the survey also are notified of a contact person, such as a counselor, should they wish to discuss this issue in person. Any survey used should contain questions about the student's knowledge of sexual misconduct (including sex discrimination and/or sexual harassment/violence), any experiences with sexual misconduct while attending the College, and the student's awareness of the College's sexual misconduct/Title IX policies and procedures.

The College will submit for OCR review and approval a description of the tools used for conducting a climate check or series of climate checks. The description will include the College's strategy for implementing the climate check(s) and analyzing the results. Information gathered during these climate checks will be used to inform future proactive steps taken by the College to provide an environment that is safe and supportive to all students and in compliance with Title IX. Finally, part of the College's ongoing climate checks will include informing students about to whom they can report concerns of sexual misconduct (including sex discrimination and/or sexual harassment/violence), such as the Title IX Coordinator or a counselor, as described in other provisions of this Agreement. The College will submit proposed future revisions to its climate check tool(s) for OCR review and prior approval during the monitoring of the Agreement.

Reporting Requirement:

By June 1, 2017, and by the same date in 2018 and 2019, the College will provide documentation to OCR demonstrating implementation of Section H above, including a description of how the climate check(s) were completed, summary frequency tables of the student responses formatted in a manner that does not disclose the responses of individual students; and proposed actions, if appropriate, that the College plans to take in response to the information gathered during the climate checks.

I. COMPLAINT REVIEWS

1. Review of Complaints from May 2015 to Present

In accordance with Title IX and the standards outlined in Section A of this Agreement, the College will review the complaints and reports of sexual harassment and/or sexual assault made from May 2015 through the date of this Agreement (each, a “Complaint”), in order to determine whether each Complaint was investigated promptly and equitably, including but not limited to, assessing whether:

1. the appropriate definitions and analyses were used under Title IX;
2. the appropriate evidence standard in investigating allegations of sexual misconduct was applied;
3. the interim relief provided to protect the complainant during the pendency of the investigation was appropriate;
4. the written notice of the outcome (including any appeal) and appeal rights was provided to the complainant and the accused; and
5. the steps taken to prevent the recurrence of sexual misconduct and to address any hostile environment created by the harassment and/or assault were sufficient.

Reporting Requirement:

By June 30, 2017, prior to issuing any determinations, the College will submit to OCR for review and approval the results of its findings regarding each Complaint, as well as the action, if any, that the College proposes to address any problems identified in the manner in which these Complaints were handled, including appropriate remedies that still may be available for the complainants and/or accused students in those cases.

Within 45 days of OCR’s approval, the College will take appropriate action to address any problems identified in its reviews.

2. Review of Identified Incidents.

In accordance with Title IX and the standards outlined in Section A of this Agreement, the College will review the following complaints of sexual harassment and/or sexual assault made from the 2012-2013 through the 2014-2015 academic years, and will make the following assessments:

- (a) Interim Suspensions.
 - (i) By April 1, 2017, the College will assess whether the interim suspensions imposed upon the Student and Students 1, 2, and 3, were the result a sufficient level of inquiry and consideration of the rights of students, including the accused, the victim, and the risk of threat to the school community.
 - (ii) If the College determines that it did not engage in a sufficient level of inquiry prior to imposing the interim suspensions, it will consider providing a written offer to the Student and/or Students 1, 2 or 3 to remove each expulsion from all relevant educational records, including each student's transcript, as well as an offer to allow the Student and/or Students 1, 2, or 3 to complete their degrees at the College and reimburse them the documented costs incurred for enrollment at a different educational institution and any other appropriate measure, including counseling.
 - (iii) Within 45 days of the date of OCR's approval of the College's determination, the College will issue, by certified mail, an offer of the steps it is prepared to take to fully and effectively address the error.
- (b) Investigation Relating to the Student, and Students 1, 2, and 3.
 - (i) By April 1, 2017, the College will conduct and/or complete its investigation of the allegations under its revised Title IX policies and procedures referenced in Section A above.
 - (ii) As part of this process, the College will determine whether new witnesses need to be interviewed, whether previously interviewed individuals need to be brought in for follow-up questioning, and whether further documentation needs to be obtained.
 - (iii) The College will ensure that the investigation is adequate, reliable and impartial in accordance with its revised procedures, and the College will provide each party with a written summary of its findings.
 - (iv) If the College determines that its investigation did not comply with the requirements of Title IX, it will consider appropriate remedies

including providing a written offer to the Student and/or Students 1, 2 or 3 to remove each expulsion from all relevant educational records, including each student's transcript, as well as an offer to allow the Student and/or Students 1, 2, or 3 to complete their degrees at the College and reimburse them the documented costs incurred for enrollment at a different educational institution and any other appropriate measure, including counseling, and will submit its proposed remedies to OCR for review and approval.

- (v) Within 45 days of the date of OCR's approval of the College's determination, the College will issue, by certified mail, an offer of the steps it is prepared to take to fully and effectively address the error.

Reporting Requirements:

By April 1, 2017, prior to issuing any determinations, the College will submit to OCR for review and approval the results of its review conducted pursuant to Section I(2)(a-b), including all supporting materials relating to the College's reviews, and the College's planned action(s) to address any problems identified in the reviews.

Within 45 days of OCR's approval, the College will take appropriate action to address any problems identified in its review of the complaint involving the Student and Students 1, 2 and 3.

Within 90 days of OCR's approval, the College will provide OCR with documentation of its notice to the parties, pursuant to Section I(2)(a-b).

- (c) Investigation of Incidents 2, 3, 7, 9, 11-13.
 - (i) For Incidents 2, 3, 7, 9, 11, 12 and 13, the College will assess whether, in conducting its initial investigation, both parties were provided with the opportunity to present witnesses and other evidence.
 - (ii) In the event that the College determines that any party in any of the above-referenced incidents was denied this opportunity, the College will reinvestigate the incident under its revised Title IX policies and procedures referenced in Section A above.
 - (iii) As part of this process, the College will determine whether new witnesses need to be interviewed, whether previously interviewed individuals need to be brought in for follow-up questioning, and whether further documentation needs to be obtained.
 - (iv) The College will ensure that the investigation is adequate, reliable and impartial in accordance with its revised procedures, and the

College will provide each party with a written summary of its findings.

- (v) If the College identifies deficiencies in the manner that it processed and resolved Incidents 2, 3, 7, 9, 11, 12 or 13, the College will take such actions necessary to appropriately address the revised finding.
- (vi) Within 45 days of OCR's approval of the proposed resolution, the College will issue, by certified mail, an offer of the steps it is prepared to take to fully and effectively address any identified deficiencies, including, but not limited to, counseling.
- (d) For Incidents 1, 2, 3, 7, 10, 11 and 13, the College will assess whether there are any appropriate remedies that may still be available for the complainants in these cases, such as counseling or academic adjustments, and, if appropriate, will make an offer in writing to the complainant for the provision of such services.
- (e) For Incidents 1-3, 5, 7, and 9-13, the College will provide written notice to both parties of the outcome of its additional investigation of the complaint.
- (f) For Incidents that will be reinvestigated, the College will offer counseling or other appropriate services to individual students during its reassessment of these incidents.

Reporting Requirements:

By June 30, 2017, prior to issuing any determinations, the College will submit to OCR for review and approval the results of its review conducted pursuant to Section I(2)(c-f), including all supporting materials relating to the College's reviews, and the College's planned action(s) to address any problems identified in the reviews.

Within 45 days of OCR's approval, the College will take appropriate action to address any problems identified in its reviews.

Within 45 days of OCR's approval, the College will provide OCR with documentation of its notice to the parties, pursuant to Section I(2)(c-f).

J. TRACKING OF COMPLAINTS

By August 1, 2017, and by the same date in 2018 and 2019, the College will provide OCR with documentation concerning its responses and handling of all sexual misconduct/Title IX allegations reported during the previous year, including incident and complaint files, a summary of the allegations reported to the College and information about the individual(s) who received and processed the initial complaints, the outcome of the sexual misconduct/Title IX investigations, as well as the outcome of any disciplinary matters related to the allegations, and any supporting documentation. Each incident and complaint will also indicate status, including

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JOHN DOE,)
)
)
 Plaintiff,)
)
 v.) C.A. No. 16-017 S
)
 BROWN UNIVERSITY,)
)
 Defendant.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WILLIAM E. SMITH, Chief Judge.

This case arises out of a disciplinary proceeding in which Brown University ("Brown" or "University") found John Doe ("John" or "Doe") responsible for sexual misconduct against fellow student Ann Roe ("Ann").¹ The parties agreed to waive the jury demand and hold an expedited consolidated bench trial on both the merits of Plaintiff's case and his request for a preliminary injunction, which was conducted on July 19-22, 2016. The parties submitted Proposed Findings of Fact and Conclusions of Law (ECF Nos. 50 ("Doe's Post-Trial Brief") and 55 ("Brown's Post-Trial Brief")), and the Court heard closing arguments on

¹ Prior to trial, Doe filed a motion to proceed pseudonymously (ECF No. 48), which the Court granted. The parties agreed to use the students' true first names at trial for the convenience of the witnesses; however, in spite of the fact that it is arguably paternalistic, to preserve the students' anonymity, the Court uses "John Doe" for Plaintiff and "Ann Roe" for the alleged victim throughout its Findings of Fact and Conclusions of Law.

August 16, 2016. On August 23, 2016, the Court found that Doe "is likely to succeed (at least partially) on the merits of his breach of contract claim" and issued a preliminary injunction, allowing John to return to Brown for the fall semester under the same conditions previously imposed. (Preliminary Injunction Order 2, ECF No. 57.)

It is important to make it unequivocally clear at the outset that the Court's only role in this case is to determine whether Doe's disciplinary "process [was] carried out in line with [the Plaintiff] student's reasonable expectations" based on the policies in place at the time of the incident. Havlik v. Johnson & Wales Univ., 509 F.3d 25, 34 (1st Cir. 2007). It is not the Court's role to determine the facts of what happened between John and Ann; to decide whether the Court would have, in the panel's position, found John responsible for sexual misconduct; to evaluate whether the Court would have made the same judgment calls on evidence and other issues as Brown did; or to determine whether the procedure John received was optimal. This Court is not a super-appeals court for sexual misconduct cases, nor is it an advisor to Brown on how it should handle these messy and unfortunate situations.

Moreover, the Court is an independent body and must make a decision based solely on the evidence before it. It cannot be swayed by emotion or public opinion. After issuing the

preliminary injunction this Court was deluged with emails resulting from an organized campaign to influence the outcome. These tactics, while perhaps appropriate and effective in influencing legislators or officials in the executive branch, have no place in the judicial process. This is basic civics, and one would think students and others affiliated with a prestigious Ivy League institution would know this. Moreover, having read a few of the emails, it is abundantly clear that the writers, while passionate, were woefully ignorant about the issues before the Court. Hopefully, they will read this decision and be educated.

Although a very close call, for the reasons explained below, the Court finds that certain procedures Brown employed in conducting Doe's hearing fell outside of a student's reasonable expectations based on the Code of Student Conduct at Brown University 2014-15 (the "2014-15 Code"), and that these procedural errors likely affected the panel's decision in Doe's case.² Accordingly, Doe is entitled a new hearing that remedies these infirmities. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court makes the following findings of fact and conclusions of law. To the extent that any finding of

² This is not to say that the Court passes judgment on whether the outcome - that Doe was found responsible - was an error. The Court makes no finding as to Doe's responsibility; that is for the Brown panel to decide if it chooses to re-present the matter after correcting the errors cited.

fact reflects a legal conclusion, it should be to that extent deemed a conclusion of law, and vice versa.

I. Findings of Fact

A. Doe's Enrollment and Orientation at Brown

Doe applied for admission to Brown in the spring of 2013. (Trial Tr., vol. II, 186:15-16, ECF No. 52.) He was accepted, chose to enroll, and his family prepaid four years of tuition, totaling \$177,600. (Id. at 187:2-20.)

Prior to arriving on campus, Doe completed Brown's 2013 New Student Tutorial ("Tutorial"), which dealt with sexual encounters and relationships and was required for all incoming students. (Id. at 209:18-23.) While completing the Tutorial, Doe watched a video entitled "Brown Students Ask For Consent." (Id. at 212:13-15, 213:18-20; Ex. 46.) In the video, Brown students are interviewed and answer a series of questions: "What is consent?"; "What is not consent?"; "Do you have consent?"; and "How do you ask for consent?" (Brown Students Ask for Consent Video, Ex. 46.) The students' responses to these questions included the following:

Consent is asking and hearing a yes. . . . Consent is active, not passive. It means being fully engaged and not just going along. Consent is giving permission without feeling pressured. . . . I do not obtain consent by pressuring someone, by threatening someone, by coercing someone, or by forcing someone. . . . Not now, means no. No does not mean keep trying. It means stop. . . . I'm not sure I'm ready, means no. .

. . Silence is not consent. People sometimes freeze and cannot speak. The absence of yes, means no.

(Id.) Doe testified at trial that he understood that the video stated values and principles of the Brown community. (Trial Tr., vol. II, 213:21-24, ECF No. 52.)

Doe also completed a series of questions with the Tutorial. Question 95, section 4.7 of the Tutorial instructed Doe to provide "True" or "False" responses to a series of statements. Doe responded "True" to the following "statement[]" about sexual consent": "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." (Tutorial 23, Ex. 40; Trial Tr., vol. II, 211:5-13, ECF No. 52.) Doe testified that, by completing the Tutorial, he understood that under Brown's community principles, coercion may invalidate consent. (Trial Tr., vol. II, 211:14-18, ECF No. 52.) However, he understood coercion to require "force or threat of force." (Id. at 214:10-11.)

Doe attended freshmen orientation at Brown in the fall of 2013. (Id. at 187:21-23.) As part of the orientation, Doe was provided with a copy of the Code of Student Conduct at Brown University 2013-2014 (the "2013-14 Code"), which he reviewed. (Id. at 187:24-188:5.) Doe also attended a 90-minute session about consent, during which he again watched the "Brown Students

Ask for Consent" video. (Id. at 213:25-214:3, 214:19-22.) The presentation included a PowerPoint, the last slide of which was likewise titled "Brown students ask for consent" and depicted 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."). (Id. at 217:5-6; Brown Consent Presentation 6, Ex. 43.) This slide was also made into a flyer and posted around campus. (Trial Tr., vol. II, 218:3-4, 225:20-22, ECF No. 52.) The bottom of the slide has a sentence in small print that states: "This is meant to help well-meaning people take care of themselves and each other in sexual situations. People who don't have good intentions may manipulate the language of consent to hurt someone." (Trial Tr., vol. II, 225:5-9, ECF No. 52; Brown Consent Presentation 6, Ex. 43.) Other than this quote, Brown did not present any evidence that "manipulation" was addressed at the orientation.

In addition to the 90-minute presentation, Doe participated in a smaller group interactive session about sexual relationships and consent, which was hosted by residential peer leaders and lasted about 40 minutes. (Trial Tr., vol. II, 219:21-220:20, ECF No. 52.) Prior to November 10, 2014, Doe attended another training session at Brown addressing consent in sexual relationships. (Id. at 220:25-221:8.) The training included a discussion of the impact of coercion upon consent.

(Id. at 221:9-12.) However, there was no discussion of manipulation at any of these trainings. (Id. at 221:22-24.)

B. The 2014-15 Code of Student Conduct

Doe completed his freshman year and re-enrolled in the fall of 2014, at which time Brown emailed him the 2014-15 Code. (Id. at 188:18-189:4.) The 2014-15 Code 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 constitute 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 Student Code of Conduct.

(2014-15 Code 4, Ex. 2.)³ The Code also notes that its comments "are offered as a guide to understanding the University's

³ Section III and the definition of sexual misconduct are identical in the 2013-14 and 2014-15 Codes of Student Conduct. (Compare 2014-15 Code 5, Ex. 2, with 2013-14 Code 4, Ex. 1.)

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.” (Id. at 3 n.1.) Doe read the 2014-15 Code in its entirety. (Trial Tr., vol. II, 199:18-20, ECF No. 52.)

Doe claims that his interpretation of the “broad range of behaviors” identified in the Comment to Section III only includes conduct enumerated in the Comment, namely force, threat, intimidation, or incapacitation (Id. at 201:17-24.) He admitted at trial that, under his interpretation, offering a poor student \$1,000 or a recovering drug addict drugs in exchange for sex would not be considered sexual misconduct. (Id. at 229:20-232:4.)

The 2014-15 Code also gives students a number of rights in disciplinary proceedings, including “[t]o be assumed not responsible of any alleged violations unless she/he is so found through the appropriate student conduct hearing” and “[t]o be given every opportunity to articulate relevant concerns and issues, express salient opinions, and offer evidence before the hearing body or officer.” (2014-15 Code 7, Ex. 2 (emphasis added).) Regarding appeals, the 2014-15 Code states:

Appeals will normally be considered only when: (1) there is relevant new evidence that was not reasonably available to be presented to the original hearing authority and that in the judgment of the Appeal Officer the introduction of the information may have

changed the finding by the original hearing authority; or (2) when a substantial procedural error by the University or hearing body/officer is demonstrated and in the reasonable judgment of the Appeal Officer such error is sufficient enough that it may have affected the decision of the original hearing authority.

(Id. at 10-11.)

C. The Sexual Assault Task Force and the New 2015-16 Title IX Policy and Complaint Process

During the fall 2014 semester, Brown convened a Task Force on Sexual Assault ("Task Force"), which included members of Brown's administration, faculty, and student body, to review Brown's practices, policies, and procedures addressing issues of sexual assault and sexual misconduct. (Trial Tr., vol. I, 144:25-145:12, ECF No. 51; Trial Tr., vol. IV, 125:10-21, ECF No. 53.) Based on the Task Force's recommendations, in the fall of 2015, Brown adopted a new Sexual and Gender-Based Harassment, Sexual Violence, Relationship and Interpersonal Violence and Stalking Policy ("Title IX Policy") (Ex. 4). (Trial Tr., vol. I, 147:24-148:13, ECF No. 51.)

The Title IX Policy defines "consent" as follows:

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, indicating that an individual 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 actions indicating a willingness to engage in sexual contact, 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.

(Title IX Policy 6-7, Ex. 4.) Coercion is defined as "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." (Id.

at 7.) Unlike the Title IX Policy, the 2014-15 Code did not give a specific definition of consent. (Trial Tr., vol. II, 79:6-17, ECF No. 52.) When adjudicating student disciplinary cases involving sexual misconduct charges under the 2014-15 Code, the Student Conduct Boards would look to available sources to define "consent" for purposes of their deliberations, including the dictionary and Brown's sexual education website. (Id. at 75:11-76:11.)

In the fall of 2015, Brown also adopted a new Complaint Process Pursuant to the Title IX Policy ("Complaint Process") (Ex. 3), which delineates the procedures for the receipt, investigation, and informal and formal resolution of complaints alleging student sexual misconduct. (Trial Tr., vol. II, 4:5-24, ECF No. 52.) Unlike the previous model where evidence was presented directly to a hearing panel, the new Complaint Process uses an "investigator model" for handling sexual misconduct cases. (Trial Tr., vol. I, 38:1-12, ECF No. 51.) Under this model, there is a single investigator, whose role is to gather "information through interviews of the complainant, respondent, and witnesses and synthesize the information in a report." (Complaint Process 3, Ex. 3.) "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.” (Id.) The Complaint Process dictates that “[t]he investigator’s report will include credibility assessments based on their experience with the complainant, respondent, and witnesses, as well as the evidence provided.” (Id. at 4.) However, it also states that “[t]he investigator will not make a finding or recommend a finding of responsibility.” (Id.) The investigator model has become increasingly popular among colleges and universities, particularly “peer institutions of Brown.” (Trial Tr., vol. II, 57:15-20, ECF No. 52.)

Under the Complaint Process, Brown has established a Title IX Council to adjudicate charges and review appeals. (Complaint Process 5-6, Ex. 3.) 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. (Id. at 5.) 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.” (Id.) 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.)

During the hearing, the panel “convene[s] 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. (Id.) The complainant and respondent are not allowed in the hearing room during this phase of the proceeding. (Id.) The panel may also request to hear from one or more witnesses, however, the Chair has complete discretion to approve or deny those requests. (Id.) The complainant and respondent may appear separately before the panel to make an oral statement regarding the facts and be questioned by the panel. (Id.) Throughout the hearing process, “[t]he 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.” (Id.) The panel convenes to deliberate and render a decision, by majority vote, regarding whether or not the respondent has violated University policy by a preponderance of the evidence. (Id.) This process marks a significant departure from Brown’s former adjudication system, in which the panel would review all of the evidence and hear the witnesses live, and then make findings. (Trial Tr., vol. IV, 139:21-140:14, ECF No. 53.)

Under the Complaint Process, Brown seeks to complete the investigation and the panel hearing within 60 days in accordance with guidance from the Department of Education's Office for Civil Rights ("OCR"). (Id. at 6-7; Trial Tr., vol. I, 164:5-17, ECF No. 51.) Both the complainant and respondent have the right to appeal a Title IX Council panel's decision "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." (Complaint Process 6, Ex. 3.) Each student may file a written response to the other student's appeal. (Id.)

Appeals are reviewed by an appellate panel comprised of the Title IX Council Chair as a nonvoting member and three voting members. (Id.) If the appellate panel grants an appeal based upon a substantial procedural error, the matter will be heard by a new hearing panel. (Id.) 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. (Id.) "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.)

D. Selection and Training of Title IX Council Members

Gretchen Schultz, a tenured professor of French Studies, serves as the Title IX Council Chair. (Trial Tr., vol. II, 29:5-12, ECF No. 52; Trial Tr., vol. IV. 30:11-13, ECF No. 53.) Schultz previously served on the Task Force and presided on Student Conduct Board panels that adjudicated sexual misconduct charges under the Code. (Trial Tr., vol. IV, 32:19-22, 45:2-5.) Brown's Title IX Council is comprised of faculty, staff, undergraduates, graduate students, and a medical student. (Trial Tr., vol. I, 153:11-16, ECF No. 51.) Throughout the 2015-16 academic year, Brown's Title IX Officer, Amanda Walsh, oversaw the selection of the Title IX Council. (Id. at 153:10-156:4.) She attempted to find members who would approach the cases fairly and offer balanced viewpoints. (Id.)

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. (Id. at 158:24-159:19.) Walsh presented a two hour training session, which gave an overview of Title IX and Brown's policies and procedures. (Id. at 162:14-163:9; Walsh Title IX Presentation, Ex. 45.) Walsh testified that she informed panelists 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." (Trial Tr., vol. I, 169:17-170:10, ECF No. 51.)

Walsh emphasized that a finding of "responsible" must be supported by a preponderance of the evidence. (Id.) During training, panelists were also instructed that they are "supposed to consider all of the evidence." (Trial Tr., vol. III, 45:9-12, ECF No. 54.)

Alana 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. (Trial Tr., vol. I, 160:1-16, ECF No. 51.) Brown states that it provided this training to comply with guidance documents issued by OCR, which state that decision-makers in Title IX processes should understand the potential impacts of trauma. (Id. at 160:7-16.) During her presentation, Sacks stated that some reactions of sexual assault survivors might be counterintuitive, for example not being able to recount a consistent set of facts, or "communicating with someone who has assaulted them or having any kind of interaction with someone who has assaulted them." (Tr. of Deposition of Alana Sacks, 72:23-74:11, Ex. 48.)

At another training session, Mark Peters, Brown's Men's Health Coordinator, addressed the social norms and expectations of males. Walsh testified that she chose this session to offer "another point of view or additional contextual information." (Trial Tr., vol. I, 160:17-23, ECF No. 51.) The Title IX

Council members also participated in a mock hearing addressing a fictional disciplinary case. (Id. at 161:14-21.)

E. Ann's Complaint and Doe's Response

During late September or early October 2015, Ann met with Walsh to discuss an encounter that Ann had with Doe approximately one year prior, in November 2014. (Trial Tr., vol. II, 9:9-19, ECF No, 52.) 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 9:24-10:5.) 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.)

On Friday, October 30, 2015, Ann filed a complaint in the Title IX Office alleging that Doe had sexually assaulted her on November 10, 2014. (Ann's Complaint, Ex. 5; Trial Tr., vol. I, 32:22, ECF No. 51.) Specifically, Ann alleged the following:

On November 10, [2014] I got into campus very late due to travel delays. Around 2am, I met [John] at the campus center to watch a movie in a public place. When I arrived at the campus center he brought me back to a secluded room and had his laptop up for the movie. Once he started the movie, he physically grabbed my face to kiss me. I immediately turned my head away to indicate my lack of consent and verbally told him that I don't want to kiss him. This also was meant to confirm that his sexual advances were unwanted. Rather than respecting my wishes, [John]

kissed me on the cheek and then asked, "may I?" I was upset and confused, so asked, "may I what?" [John] then forced his fingers into my vagina to sexually assault me. I froze and did not respond. In my head, all I could think is that I wanted this to be over with, so when he kept kissing me I didn't resist. During the assault he said, "I know you want to fuck me right now." Fearing he would do more to me, I told him I really couldn't as an attempt to avoid him raping me. He replied, "well at least give me a blowjob then." I repeatedly stated that I did not want to and tried to avoid angering him by stating "I really shouldn't" and "I wasn't sure," but I never wanted to and wanted to leave as soon as possible. [John] kept replying, "I know you want to" and I knew I wasn't going to be able to leave unless it happened. I felt I had no choice to avoid being raped, so submitted to this coercive badgering out of fear and gave him oral sex. At one point, I stopped the oral sex and he said "put my dick back in your mouth." Around 3 a.m., I finally could leave and told him on the way out, that he was the kind of person that makes people do things they don't want to do. He again said, "I know you wanted to" as I was leaving. I then went home in shock and upset about what happened and just wanted to sleep.

(Ann's Complaint 2, Ex. 5.) Ann's Complaint also described and attached numerous text messages that the two students had exchanged leading up to the encounter, many of which are very sexually explicit. (Id. at 1-2; see Text Messages 1-133, Ex. 19.) Ann acknowledged that she had "engaged in some banter" and "discussed a fantasy," but stated that she had made clear that she did not want to have a sexual relationship with John. (Ann's Complaint 1-2, Ex. 5.) Ann's Complaint did not include any text messages from after the incident. (Trial Tr., vol. II, 91:3-6, ECF No. 52.)

Walsh promptly contacted Doe to inform him of Ann's Complaint. (Trial Tr., vol. II, 10:10-14, ECF No. 52.) During the evening of Sunday, November 1, 2015, Walsh sent an email to Doe requesting that he meet with her the next day. (Id.) On Monday, November 2, 2015, Walsh met with Doe to discuss Ann's Complaint. (Id. at 10:22-11:12.) Walsh provided Doe with a copy of Ann's Complaint and the Complaint Process; informed Doe that if he needed academic assistance, he should contact Dean Suarez in Brown's Office of Student Life; informed Doe of his right to an advisor; and alerted Doe that he could seek confidential support at Counseling and Psychological Services (CAPS). (Id. at 11:2-22; 11/3/15 Letter from Walsh to Doe, Ex. 6.)

Under the Complaint Process, a respondent has five business days to submit a statement in response to a complaint. (Complaint Process 3, Ex. 3.) Walsh agreed to Doe's request for an extension due to his course work and a mock trial tournament during the response period. (11/3/15 Letter from Walsh to Doe, Ex. 6.) Walsh granted a 24 hour extension, allowing Doe to file his statement by 5 p.m. on Tuesday, November 10, 2015. (Id.; Trial Tr., vol. II, 12:1-12, ECF No. 52.)

On November 10, 2015, Doe filed his statement responding to Ann's Complaint. (Doe's Response to Complaint, Ex. 8; Trial Tr., vol. I, 43:15-22, ECF No. 51.) Doe presented a different

interpretation of the text messages, noting that, based on Ann's participation in explicit sexual banter and discussion of fantasies, "she did appear open to a sexual relationship with me." (Doe's Response to Complaint 2, Ex. 8.) He also had a very different version of the encounter on November 10, 2014, stating that "[Ann] was an active participant, got up two or three times to turn off the lights, and then cuddled with me. Had she been afraid at any point, she could have yelled for help as there were other people in the building, or simply left. She did neither. In fact, she seemed to enjoy herself." (Id. at 4.) According to Doe, he and Ann were "squeez[ing] each other tightly and vigorously kiss[ing]" and "Ann pushed me on my back and got on top of me with her legs straddling me." (Id.) Doe continued, "I reached my hand into Ann's pants after she told me that I could. She subsequently lifted her butt up and pulled her sweatpants down as I helped her. . . . After I finished fingering [Ann] she told me that it was her turn. She unzipped my pants and together we pulled them down to my ankles. She then proceeded to give me oral sex." (Id. at 4-5.) He also noted that "[t]he lights came back on" several times through the encounter, "and each time, Ann got up, turned them off, and came back over to me." (Id. at 4.) Doe further explained that Ann continued to pursue him after November 10, 2014, and that she offered no reasonable explanation for her delay in filing her

Complaint. (Id. at 4-5.) He 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.” (Id. at 1.) These text messages included the following exchange several days after the incident:

Respondent: Remember to pretend like you didn’t give me a mind blowing blowjob [winking emoji]

Complainant: Only if you remember to pretend you’re not imagining fucking the shit out of me the whole time . . .

Respondent: Only if I pretend like you don’t want me to fuck you until you orgasm the whole time

Complainant: Good. So no one will suspect how much you want to cum inside me in Cali [smiling emoji]

Respondent: And no one will suspect how much you want me to make you my little slut for a night

Complainant: Perfect, sounds like we’ve got a plan [winking emoji] [I]m super pumped for the drunk scrimmage but more excited to see you finally! Haha

(Perkins Report 23, Ex. 18 (quoting Text Messages 134-35, Ex. 19).)

As permitted under the Complaint Process, Ann and Doe retained attorneys to act as their advisors. (Trial Tr., vol. II, 5:16-17, ECF No. 52.) Ann selected Attorney Laura Dunn of SurvJustice, who was assisted by Attorney Myka Held of that organization, and Doe selected Attorney J. Richard Ratcliffe. (Id. at 5:19-25.) Shortly after Doe received 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. (11/4/15 Email from Michael Grabo to Ratcliffe, Ex. 7.) Because the November 10, 2014 incident between Doe and Ann occurred during the 2014-15 academic year, however, the substantive charges were based on the 2014-15 Code. (Id.)

F. The Investigation

Consistent with the Complaint Process, Brown hired an external investigator, Attorney Djuna Perkins, to investigate Ann's allegations and Doe's defenses. (Perkins Engagement Letter, Ex. 9.) Perkins' investigation spanned over four months from her engagement by Brown on November 4, 2015 to the completion of her report on March 12, 2016. (See id.; 3/12/16 Email from Perkins to Doe attaching Final Report, Ex. 17.) Perkins spent 80-100 hours conducting the investigation and drafting her report. (Trial Tr., vol. II, 144:21-25, ECF No. 52.)

Perkins interviewed Ann on November 13, 2015, January 8, 2016, and February 17, 2016. (Perkins Final Report 1, Ex. 18.) She interviewed John on November 19, 2015 and February 2, 2016. (Id.) Between December 3, 2015 and February 12, 2016, Perkins interviewed 11 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.)

One of the witnesses whom Perkins interviewed had seen Ann shortly after the incident and recounted the following:

Witness 1 said she told the Complainant about her day, and then the Complainant said, "Oh my God, I have to tell you something. Do you guys remember that guy [the Respondent] I've been telling you about?" When Witness 1 and the Complainant's roommate said they did, Witness 1 said the Complainant said, "I just hooked up with him. It was like really weird because we were just in Faunce and hooked up." The Complainant told them she and the Respondent had gone to some out-of-the-way room in Faunce and turned the lights off. Witness 1 said the Complainant made the whole thing sound "sexy and cool." Witness 1 said [Ann's roommate] asked if they had sex and the Complainant said, "No, but it was really hot. I mean, you know it wasn't reciprocated because he only fingered me - he didn't eat me out - but we might hook up again, I don't know." Witness 1 said the Complainant made it sound as if she wished they had done more. The Complainant also said she had given the Respondent a "blowjob." Witness 1 could not recall if the Complainant provided any other details of their encounter. Witness 1 said when the Complainant told the story, she was her typical "happy, bubbly" self. Witness 1 did not recall the Complainant saying she did not want any of the sexual activity to occur, and never mentioned that the Respondent had pressured her into hooking up or doing any of the things they did.

(Perkins Final Report 16-17, Ex. 18.)

Perkins reviewed and included in her report the entire set of text messages between John and Ann. (Id. at 2-3 n.3.) She also included an excerpt of a set of text messages involving John and another female student (Witness 8), for the limited purpose of corroborating the fact that Ann had put in a "good

word" for John with Witness 8; and an excerpt of text messages between John and Ann's friend, Witness 9, to be considered "only to the extent they may shed light on the Respondent's state of mind on the night of November 10, [2015], and to the extent they may shed light on the Respondent's claim that the Complainant conspired with Witness 9 to fabricate the allegations." (Id. at 2-3.) Perkins reviewed, but elected not to present to the panel, other text messages between John and Witness 9, and between John and another female student (Witness 10), due to a concern that their prejudicial impact 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 him. (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.)

As noted above, John claimed that Ann and Witness 9 had a "conspiracy" to fabricate the claim against him. He based this allegation on the following conversation overheard by Witness 11:

On October 30, 2015, [Witness 11] states that he was in the Ratty in line to get food when he recognized the Complainant directly ahead of him in line. The Complainant was talking to a female friend. The friend was crying and the Complainant was comforting

her. The friend said, "We failed. We messed up. It didn't work. Every time we try and get him on something it doesn't work." Witness 11 states that several times he heard the Complainant and her friend say the Respondent's name. He also recalled the Complainant saying, "We'll get him. My uncle is an important lawyer in New York and [the Respondent] can't keep countersuing us." Witness 11 also heard one of them say, "We'll figure this out, we'll get [Witness 14] to do something."

(Id. at 28-29.) Ann and Witness 9 described a series of events leading up to this conversation in which John had behaved badly, including the violation of a no-contact order. (Id. at 27-29.)⁴

On February 29, 2016, Perkins sent an initial draft of the investigation report to Walsh for review. (See Perkins Report First Draft, Ex. 10; 02/29/16 Email Chain between Walsh and Perkins, Ex. 11.) Walsh responded that day with her red-lined revisions and comments. (See 02/29/16 Email Chain between Walsh and Perkins, Ex. 11; Walsh Redline of Draft Report, Ex. 12.) In a section entitled "Relevant Policy Sections," Perkins' listed: (1) Offenses VII.A and VII.B and the definitions of consent and coercion in Brown's Title IX Policy, and (2) Brown's 2014-15 Code. (Perkins Report First Draft 1, Ex. 10.) In her revisions, Walsh rewrote the language under the "Relevant Policy Sections" to cite only to Offense III of the 2014-15 Code. (Walsh Redline of Draft Report 1, Ex. 12.) Walsh stated that she deleted the citations to the offenses and definitions under

⁴ For ease of reference, the Court will refer to this information about John as the "character evidence."

the Title IX Policy because the disciplinary case involved charges against Doe under the 2014-15 Code. (Trial Tr., vol. II, 21:15-19, ECF No. 52.)

Perkins also informed Walsh that "the Respondent's 'conspiracy' claim . . . forced me to include some information about the Respondent's interaction with [Witness 9]. I felt it was important to include some discussion of the claim because he was so adamant about me interviewing [Witness 11] and I think it is this conversation that convinced him there was some sort of conspiracy against him." (02/29/16 Email Chain between Walsh and Perkins 1, Ex. 11.) She added that "if, now that he sees this explanation, he accepts it, I thought it would be easy to simply redact that section so that there is no mention of the [Witness 9]-Respondent interactions." (Id.) Walsh concurred with this decision. (Id.; Trial Tr., vol. II, 23:23 - 24:12, ECF No. 52.)

After receiving Walsh's input, Perkins revised the draft. (Trial Tr., vol. II, 104:16-21, ECF No. 52.) On March 1, 2016, a draft of the investigation report was shared with John and Ann, consistent with the Complaint Process. (See Perkins Report Second Draft, Ex. 13.) On March 4, 2016, John and Ann submitted their comments and proposed revisions to the draft report. (See Ann's Request for Revisions, Ex. 14; John's Request for Revisions, Ex. 16.)

As his first point, John cited to Offense III in the 2014-15 Code, claiming that it is "vastly different" than what is stated in the current Title IX Policy. (Doe's Request for Revisions 1, Ex. 16.) John also took issue with footnote 22 of the draft report, stating the following:

Quite a bit of your report, including footnote 22, focusses [sic] 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.

(Id. at 1-2.) Citing again to footnote 22 of the draft report, John further claimed that the investigator should have obtained a full set of text messages between Ann and Witness 9 based upon his conspiracy claim. (Id.) Doe's letter also referred to the character evidence in the section of the Report about his conspiracy claim. (Id. at 3-6.) Doe contended that "[t]hese paragraphs far outweigh any relevance they have to the issues the panel must consider and should be removed." (Id. at 6.)

Ann requested a number of changes to the report as well. (See Ann's Request for Revisions, Ex. 14.) Her advisor also wrote a letter requesting certain changes, including that the excluded text messages between Doe and Witness 9 be considered as evidence of a pattern of behavior. (See id. at 19-20.)

After considering both students' comments and incorporating certain of their proposed revisions, Perkins finalized her report and issued it on March 12, 2016. (See 03/12/16 Email from Perkins to Doe, Ex. 17; Perkins Final Report, Ex. 18.) In response to Doe's comments, Perkins rewrote footnote 22 in the draft report, which became footnote 26 in the final report. (Compare Perkins Report Second Draft 15, n.22, Ex. 13, with Perkins Final Report 15-16, n.26, Ex. 18.) 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 constitute consent." (Perkins Final Report 15-16 n.26, Ex. 18.)

Perkins did not request the text messages between Ann and Witness 9. When questioned about this decision at trial, Perkins stated that early on, Ann had texted Witness 9 about what happened with John, and Witness 9 stated "OMG, that's sexual assault." (Trial Tr., vol. II, 181:9-13, ECF No. 52.)

Perkins concluded that "once [Ann] has locked herself into that version of events with her friends, very unlikely that there's going to be some piece of evidence later on, some text message that said, yes, it's true, I really had a super fun time and we're just going to keep going on this because he's a jerk."

(Id. at 181:18-23.) Additionally,

because these two were so close, it was likely that it was going to really be that there would be many, many messages and that it would really bog down the investigation. And these are, unlike in a civil case, where of course you'd get access to that because maybe there'd be some nugget that would either lead you to that conclusion or some other relevant conclusion, these cases are supposed to be completed within 60 days. There had already been significant delay in the case

(Id. at 182:5-13.) Perkins also noted that because she did not have subpoena power, the students would have been free to refuse that request. (Id. at 153:17-19.)

Perkins decided not to remove the character evidence; however, the Final Report contained the following limiting instruction:

The 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.

(Perkins Final Report 27, Ex. 18.) In footnote 43 relating to a September 26, 2015 interaction between Doe and Witness 9, the Report likewise stated "[t]his incident is relevant to the extent 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," but "[i]t is not relevant for any other purpose and should not be considered evidence that the Respondent committed the acts alleged in the Complaint." (Id. at 27 n.43.)

G. The Title IX Council Hearing

After Perkins' issuance of the finalized investigation report, Walsh addressed the composition of the Title IX Council panel that would preside at the hearing. (Trial Tr., vol. II, 26:1-3, ECF No. 52.) Walsh reviewed all of the Title IX Council members who had no conflicts in the matter, had completed the required training, and had scheduling availability. (Id. at 26:4-14, 26:24-27:8, 27:15-18.) Walsh stated that she 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. (Id. 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; another male undergraduate had a friendly relationship with Ann; and a male administrator, Brown's Director of Student

Activities, was familiar with the mock trial program and its participants. (Id. at 27:16-28:5.)

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 Associate Dean for Curriculum; Kate Trimble, Deputy Director of Brown's Swearer Center; and Kimberly Charles, a senior undergraduate student. (Id. at 26:16-18, 27:10-14, 29:5-6; Panel Findings 1, Ex. 27.) Consistent with the Complaint Process, the panelists received the investigation report and the various appendices attached to it (including all of the text messages between John and Ann) prior to the hearing. (Trial Tr., vol. II, 30:1-17, ECF No. 52; Trial Tr., vol. III, 72:23-73:5, ECF No. 54.) They also received copies of the 2014-15 Code and the Complaint Process. (Trial Tr., vol. I, 102:18-20, ECF No. 51; Trial Tr., vol. II, 30:5-9, ECF No. 52.) Walsh additionally provided Schultz, as the Title IX Council Chair, with two items that were not included in the panelists' packets. (Trial Tr., vol. II, 32:11-34:2, ECF No. 52.) One was John's conduct history because such information would only be considered in the sanctioning deliberations if the voting panelists found John to be responsible for the charges. (Id. at 32:16-19.) The other was the Title IX Policy. (Id. at 32:19-21). Walsh stated that she included the Title IX Policy in

Schultz's materials because there was no definition of consent in the 2014-15 Code, and she wanted the panelists to have the Title IX Policy as an option to consider during their deliberations if they elected to do so. (Id. at 32:23-34:2.) She did not include the Title IX Policy in the panelists' packets because she did not want them to think that they were required to consider it. (Id.)

On April 14, 2016, Walsh and Schultz met before the start of the Title IX Council hearing. (Id. at 30:20-32:5, 34:5-9; Trial Tr., vol. I, 103:18-20, ECF No. 51.) Walsh told Schultz that the Chair's packet included the Title IX Policy, which the other panelists did not receive. (Trial Tr., vol. I, 103:21-104:1, ECF No. 51; Trial Tr., vol. II, 34:5-9, ECF No. 52.) Schultz, the three voting panelists, and Walsh convened at the start of the hearing. (Hearing Notes 1, Ex. 24.) Throughout the hearing, Walsh took detailed notes on her laptop computer. (Hearing Notes, Ex. 24; Trial Tr., vol. I, at 104:10-12, ECF No. 51; Trial Tr., vol. II, at 34:15-18, ECF No. 52.) Schultz first reviewed a hearing checklist, which addressed 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. (Hearing Notes 1, Ex. 24; Hearing Checklist 1-2, Ex. 23.) 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. (Hearing Notes 1, Ex. 24.) Schultz reminded the panel that the 2014-15 Code did not define consent. (Id.) She then read the current definition of consent in the Title IX Policy and told the panel that, although they were not required to use that definition, "it may be helpful in thinking about how the University has viewed consent." (Id.)

Perkins appeared before the panel and answered a number of questions, which are documented in Walsh's notes. (Id. at 1-2.) Among the questions was an inquiry from Schultz after Perkins stated that she found both Doe and Ann credible: "Doesn't someone have to be lying? [Ann] says she said no and [John] says she's an enthusiastic partner." (Id. at 2.) Perkins responded as follows:

If you look at [the] text messages, it does show that [John] is persistently making things sexual even though [Ann] is a willing participant at times. He does convert things into something sexual. He did say he asked for consent and she was enthusiastic, but that isn't consistent with the text messages where you can see her hesitation. The idea that she was willingly jumping into this sexual encounter doesn't match, but that's for the panel to decide. Her version appears to be more consistent with the pattern that is in the text messages.

(Id.)

After the panel's session with the investigator, the Chair asked the panelists whether they would like to hear from John or Ann next. (Id.) The panelists chose to meet with John first. (Id.) When John and his advisor appeared before the panel, Ann and her advisor were in another room and listened by telephone. (Id.) 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 had decided to hear him first. (Id.)

John denied any non-consensual sexual misconduct, calling the case a "lie that got bigger." (Id. at 3.) He stated his version of the events leading up to, during and after the November 10, 2014 incident. (Id.) John also argued that the investigator's references to "coercion" were improper under the 2014-15 Code. (Id.) He contended that the 2014-15 Code "requires force or threat of force" and "[i]f Complainant attempts to allege that there were [attempts of coercion], they wouldn't fall under [the Code]." (Id.)

Ann next appeared before the panel with her advisor, while John and his advisor adjourned to another room and listened by telephone. (Id. at 4.) Ann described the November 10, 2014 incident very differently, claiming that John sexually assaulted her. (Id.) Ann referred to the definition of consent under the

Title IX Policy and stated that consent cannot be obtained through manipulation, coercion or force. (Id.)

Following Ann's appearance, the panel prepared to proceed to its deliberations. (Id.) Walsh reminded the panel that they were provided the 2014-15 Code because the case involved a November 10, 2014 incident. (Id. at 5.) 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.) Walsh left the hearing room after these comments, as the Title IX Officer does not participate in the panel's deliberations. (Id.; Trial Tr., vol. II, 41:22-42:2, ECF No. 52.)

H. The Panel's Deliberations and Decision

During the panel's deliberations, Schultz, as the Title IX Council Chair, acted as a facilitator of the discussions by asking questions, offering guidance, and conducting straw votes of the three voting panelists. (Trial Tr., vol. III, 82:22-83:5, ECF No. 54; Trial Tr., vol. IV, 134:7-21, ECF No. 53.) Schultz also told the voting panelists that the Title IX Policy had codified Brown's community standards. (Trial Tr., vol. IV, 90:20-25, ECF No. 53.)

Schultz testified that the panel's deliberations were "lengthy." (Trial Tr., vol. IV, 134:13, ECF No. 53.) Panelist Besenia Rodriguez likewise testified that the panel spent "quite

a while" in its deliberations and "a lot of time" discussing the case. (Trial Tr., vol. III, 81:4-7, ECF No. 54.) In addition, Perkins, Rodriguez, and Schultz all felt that this case was "difficult." (Trial Tr., vol. II, 178:15-18, ECF No. 52; Trial Tr., vol. III, 23:7-9, ECF No. 54; Trial Tr., vol. IV, 64:17-20, ECF No. 53.) Both Schultz and Rodriguez testified that Ann gave John "mixed signals" or "mixed messages" in her texts, both before and after the incident. (Trial Tr., vol. III, 23:13-15, ECF No. 54; Trial Tr., vol. IV, 65:12-14, ECF No. 53.) Schultz found both parties to be "unappealing" (Trial Tr., vol. IV, 65:15-18, ECF No. 53), and Rodriguez did not find either witness wholly credible. (Trial Tr., vol. III, 23:10-12, ECF No. 54.)

Rodriguez testified at trial that she did not consider any of Ann's post-encounter conduct, including the text messages and the testimony of Witness 1, as "evidence as to whether or not [Ann] had been sexually assaulted one way or another." (Trial Tr., vol. III, 42:17-22, 45:5-8, ECF No. 54.)⁵ This was, at least in part, based on the SHARE Advocate training about counterintuitive behaviors exhibited by sexual assault survivors. (Id. at 42:23-43:17, 52:11-25.) Rodriguez concluded, based on the SHARE presentation, "that it was beyond

⁵ Although Rodriguez repeatedly attempted to walk back her testimony by stating that she did in fact consider all the evidence, the Court finds her initial statements on the subject the most credible.

[her] degree of expertise to assess [Ann]'s post-encounter conduct . . . because of a possibility that it was a response to trauma." (Id. at 55:16-21.) Rodriguez also testified that she had considered the fact that Doe had previously violated a no-contact order as evidence that he "did not accept boundaries." (Id. at 24:4-7, 26:9-16.)

The panel decided to use the definitions in the Title IX policy, and by a 2-1 vote, found Doe responsible. (Panel Findings 1, Ex. 27; Trial Tr., vol. III, 88:6-8, ECF No. 54.) They next addressed the sanction. (Id. at 88:12-89:23.) 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.)

Schultz informed Walsh of the panel's decision. (Trial Tr., vol. II, 43:16-25, ECF No. 52.) During the afternoon of April 14, 2016, Schultz prepared a draft of the Title IX Council's findings and sent it to the panelists for review. (04/14/16 Email from Schultz to Panelists and Walsh, Ex. 25.) She later forwarded the email and its attachment to Walsh. (Id.) The next day, Walsh sent the following letter to John and Ann:

During both statements [at the hearing], references were made to the relevant policy and procedures applicable in 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 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.

(04/14/16 Letter from Walsh to Doe and Ann, Ex. 26.) Walsh stated that she wrote this letter to the students because of Ann's statements to the panel referencing the Title IX Policy. (Trial Tr., vol. II, 44:8-22, ECF No. 52.) Also, during a meeting that Walsh had 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.)

On April 19, 2016, Schultz issued the panel's written decision, which states as follows:

Because the 2014-15 Code of Student Conduct does not explicitly define consent, the panel referred to the current [Title IX] 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