APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

State of New York
Court of Appeals

Decided and Entered on the
thirty-first day of March, 2020

Present, Hon. Janet DiFiore, *Chief Judge, presiding*.

Mo. No. 2019-1000
In the Matter of Matthew Jacobson,
Appellant,
v.
Butterfly Blaise, &c., et al.,
Respondents.

Appellant having moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is denied with one hundred dollars costs and necessary reproduction disbursements.

/s/_____
John P. Asiello Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of
MATTHEW JACOBSON,

Appellant,

-against-

BUTTERFLY BLAISE, Title IX Coordinator, SUNY Plattsburgh, et al.,

Respondents.

Motion No. 2019-1000

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true copy of the Order in this action filed in the Clerk's Office of the New York State Court of Appeals on March 31, 2020.

Dated: Albany, New York
April 9, 2020

LETITIA JAMES Attorney General of the State of New York Attorney for Respondents
The Capitol
Albany, New York 12224-0341

By: /s/_____
ALLYSON B. LEVINE
Assistant Solicitor General
Telephone: (518) 776-2018
Fax: (518) 915-7723 (Not for service of papers)

TO: Barry S. Jacobson, Esq.
26 Court Street, Suite 810
Brooklyn, New York 11242

Printed (Reproduced] on Recycled Paper

APPENDIX B

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: September 12, 2019 527084

In the Matter of MATTHEW JACOBSON,
Petitioner,
v.

BUTTERFLY BLAISE, as Title IX Coordinator of the State University of New York at Plattsburgh, et al.,
Respondents.

MEMORANDUM AND JUDGMENT

Calendar Date: August 21, 2019
Before: Garry, P.J., Egan Jr., Clark, Mulvey

and Pritzker, JJ.

Barry S. Jacobson, New York City, for petitioner.

Letitia James, Attorney General, Albany (Allyson B. Levine of counsel), for respondents.

Clark, J.

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Clinton County) to review a determination of the State University of New York at Plattsburgh finding petitioner guilty of sexual misconduct in violation of its Student Conduct Manual.

In May 2016, respondent Larry Allen – the Director of Student Conduct at the State University of New York at Plattsburgh (hereinafter SUNY) – issued a statement of judicial charges to petitioner, a SUNY student, charging him with having violated the provisions of SUNY's Student Conduct Manual that prohibited students from committing acts of sexual violating a criminal or civil law. The charges were based on allegations that, over a roughly seven-hour period on October 31, 2015, petitioner "initiated

sexual intercourse" with a female student (hereinafter the reporting individual) "three different times without establishing affirmative consent." After a hearing, SUNY's Student Conduct Board found petitioner to be "responsible" for both charges and imposed a disciplinary sanction of dismissal. The determination was upheld on administrative appeal. Petitioner thereafter commenced a CPLR article 78 proceeding, which was transferred to this Court. In January 2018, this Court annulled the determination and remitted the matter to SUNY for a new hearing (Matter of Jacobson v Blaise, 157 AD3d 1072 [2018]).

In March 2018, petitioner was again charged with violating the same two provisions of SUNY's Student Conduct Manual based upon his reported initiation of sexual intercourse with the reporting individual three times on October 31, 2015 without affirmative consent. Following a hearing, the Student Conduct Board found petitioner responsible for the charge of sexual violence, but not responsible for the charge of violating a civil or criminal law, and imposed a disciplinary sanction of a three-year suspension from SUNY. Upon administrative appeal, SUNY's Judicial Appeal Board upheld the determination. Petitioner thereafter commenced this CPLR article 78 proceeding to once again challenge the determination.

The proceeding was transferred to this Court. [1]

Petitioner claims that, as a result of numerous alleged due process violations, he was deprived of a fair hearing. However, our review of the record confirms that petitioner was afforded adequate notice of the allegations and disciplinary charges against him and a meaningful opportunity to be heard at a fair and impartial hearing (see Education Law 6443, 6444 [5] [b], [c] [iii]). Petitioner provides no evidence to support his bare assertion that Allen or any of the individual members of the Student Conduct Board were biased against him (see Matter of Agudio v State Univ. of N.Y., 164 AD3d 986, 991 [2018]; Matter of Weber v State Univ. of N.Y., Coll. at Cortland, 150 AD3d 1429, 1433-1434 [2017]). Contrary to petitioner's contention, Allen's participation in the hearing after having participated in the prior administrative proceeding does not establish bias or otherwise violate principles of due process (see Matter of Weber v State Univ. of N.Y., Coll. at Cortland, 150 AD3d at 1434). Moreover, "an appearance of impropriety," even if there were one, "is insufficient to set aside an administrative determination" (id. at 1433 [internal quotation marks and citations omitted]).

Petitioner also challenges SUNY's

---

[1] With two Justices dissenting, this Court denied petitioner's motion for a stay pending determination of this proceeding (2018 NY Slip Op 81537[U]).

determination that he violated the Student Conduct Manual's prohibition against sexual violence. Under the Student Conduct Manual, as published at the time of the underlying incidents, "sexual violence" is defined as "[p]hysical sexual acts perpetrated against a person's will or perpetrated where a person is incapable of giving consent" and includes such acts as "rape, sexual assault, sexual assault with an object, sodomy, fondling, incest, and statutory rape." Education Law § 6441 (1), which was enacted shortly before the underlying incidents (see L 2015, ch 76, § 1), sets forth a definition of affirmative consent that all educational institutions are required to adopt. Specifically, affirmative consent is defined as "a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent" (Education Law § 6441 [1]). The Student Conduct Manual additionally states that "[c]onsent cannot be given when a person is incapacitated" and that "[i]ncapacitation occurs when an individual lacks the capacity to fully, knowingly choose to decide about participating in sexual activity, whether due to a disability that limits informed sexual decision-making, or because of impairment due to drugs or alcohol . . . , the lack of consciousness or being asleep." The Student Conduct Manual further provides that "[c]onsent to any sexual act or prior consensual sexual activity

between or with any party does not necessarily constitute consent to any other sexual act." In reviewing SUNY's disciplinary determination, made after a hearing, we are limited to assessing whether the determination is supported by substantial evidence (see CPLR 7803 [4]; Matter of Haug v State Univ. of N.Y. at Potsdam, 32 NY3d 1044, 10451046 [2018]; Matter of Lambraia v State Univ. of N.Y. at Binghamton, 135 AD3d 1144, 1146 [2016]).

SUNY's determination was based upon its finding that the reporting individual could not affirmatively consent to sexual activity with petitioner because she was asleep or unconscious and, therefore, "incapacitated during the time period in question." In that respect, the reporting individual stated that, over a roughly four-hour period, she had consumed three or four 24-ounce cans of malt liquor, as well as an unknown quantity of alcohol from a friend's drink. Statements made by petitioner, both at the hearing and during an interview conducted by respondent Butterfly Blaise, SUNY's Title IX Coordinator, as reflected in a written summary of that interview, corroborated the reporting individual's account that she had been drinking prior to and during her encounter with petitioner. In fact, as reflected in the interview summary, petitioner recalled observing the reporting individual stumbling in the hallway and mumbling her words. Additionally, the reporting individual asserted that she had significant gaps in her memory regarding her encounter with petitioner, stating that she

remembered certain parts but that "other parts fe[lt] 'black'." Specifically, she recalled letting petitioner into her building, but could not recall how they ended up in her room or how or when the first and second incidents of sexual intercourse began. She stated that, "[a]t times[,] I think I must have been sleeping or blacked out a bit. Though, I... do not think I blacked out from alcohols, but] from pain if that is possible." In our view, this and other evidence in the record supported SUNY's finding that the reporting individual was incapacitated – and, therefore, unable to give affirmative consent – during at least one of the three instances of sexual intercourse.

SUNY further found that, even if she were not incapacitated during the period in question, the reporting individual never affirmatively consented to sexual intercourse with petitioner. In that regard, the reporting individual stated that she recalled telling petitioner that she "just wanted to cuddle" and having a conversation with petitioner about her not being the "type of girl" to "sleep around." The reporting individual further attested to several actions that she believed expressed her unwillingness to engage in sexual activity with petitioner, including her vocalization that she was in pain. SUNY flatly rejected petitioner's assertions that the reporting individual had numerous opportunities to put an end to the sexual contact, emphasizing that silence or a lack of resistance does not demonstrate consent to sexual activity (see

Education Law § 6441 [1]). Overall, SUNY found the reporting individual to be more credible than petitioner and, to the extent that petitioner presented conflicting evidence on the issue of affirmative consent, the resolution of any such issue was within the exclusive province of SUNY (see Matter of Haug v State Univ. of N.Y. at Potsdam, 32 NY3d at 1046; Matter of Lambraia v State Univ. of N.Y. at Binghamton, 135 AD3d at 11451146; Matter of Lampert v State Univ. of N.Y. at Albany, 116 AD3d 1292, 1294 [2014], lv denied 23 NY3d 908 [2014]). Accordingly, in view of the foregoing, we find that substantial evidence exists to support SUNY's determination that petitioner violated the Student Conduct Manual's prohibition against sexual violence (see Matter of Haug v State Univ. of N.Y. at Potsdam, 32 NY3d at 1045-1046; Matter of Lambraia v State Univ. of N.Y. at Binghamton, 135 AD3d at 1146).

Petitioner further argues, without citation to any legal support, that Education Law article 129-B, commonly known as New York's Enough is Enough Law (see L 2015, ch 76, § 1), is unconstitutionally vague on its face and as applied to him. With respect to his facial challenge, we find that Education Law article 129-B contains sufficiently clear standards so as to afford a student of ordinary intelligence fair notice of the meaning of its provisions and to whom it applies and, further, that the provisions are sufficiently clear to prevent its arbitrary enforcement (see Foss v City of Rochester, 65 NY2d

247, 253 [1985]; Matter of Griffiss Local Dev. Corp. v State of N.Y. Auth. Budget Off., 85 AD3d 1402, 1403 [2011], lv denied 17 NY3d 714 [2011]). Petitioner wholly fails to identify how the challenged statute is unconstitutionally vague as applied to him.

Furthermore, to the extent that petitioner challenges the sanction imposed upon him, we do not find a three-year suspension to be so disproportionate to the offense as to be shocking to one's sense of fairness (see Matter of Haug v State Univ. of N.Y. at Potsdam, 166 AD3d 1404, 1405 [2018]; Matter of Weber v State Univ. of N.Y., Coll. at Cortland, 150 AD3d at 1430). Thus, we decline to modify the sanction. Finally, any arguments not specifically addressed herein have been reviewed and found to be without merit.

Garry, P.J., Egan Jr., Mulvey and Pritzker, JJ., concur.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

ENTER:

/s/

Robert D. Mayberger
Clerk of the Court

APPENDIX C

PLATTSBURGH
STATE UNIVERSITY OF NEW YORK

June 5, 2018

Matthew Jacobson

NOTICE OF JUDICIAL OUTCOME REVIEW

1. Procedural Background

On March 26, 2018, you received a Statement of Judicial Charges via your SUNY Plattsburgh email notifying you of your rights as a charged individual and indicating that you were charged with violating the following provisions of the SUNY Plattsburgh 2015-2016 Code of Conduct ("2015-16 Code"):

Section 26: Violations of Civil or Criminal Law: Violation of Federal, state, or local laws in a way that affects the College community's pursuit of its educational purposes is prohibited and may subject students to disciplinary action. Such violation may be established independent of and prior to a criminal conviction.

Section 27.02: Sexual Violence, as outlined in Section I of this document (2015-16 Code) is prohibited.

Section I of the 2015-16 Code defines Sexual Violence as follows: Physical sexual acts perpetrated against a person's will or perpetrated where a person is incapable of giving consent. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual assault with an object, sodomy, fondling, incest, and statutory rape.

In the Statement of Judicial Charges, you were informed that charges were filed by the College, and, specifically, Title IX Coordinator, Butterfly Blaise, because "[i]t was reported that on 10/31/15, in 142 Harrington Hall, between 12:30AM-8AM, you initiated sexual intercourse with another student three different times without establishing affirmative consent." (A hearing on these charges was first held in May 2016.) In response to the Statement of Judicial Charges, you submitted via email to Larry Allen on March 28, 2018 at 10:18 a.m. a signed "Disposition of Charges" (dated 3/27/18) in which you confirm that you reviewed the charges and your rights with the Director of Student Conduct. You indicated on the form and in the email that you enter a plea of "Not Responsible" to the two charges and request a hearing.

Prior to the hearing, you had several email communications with Larry Allen. Those communications are occasionally referenced herein.

A hearing was held on April 27, 2018 at 2 p.m. The proceeding was held pursuant to the procedures set forth in the current 2017-2018 Student Conduct Manual ("2017-18 Code"). In reaching its determination, the Student Conduct Board utilized the substantive definitions from the 2015-16 Code for the violations set forth in Sections 26 (Violation of Civil or Criminal Law) and 27.02 (Sexual Violence) due to the fact that the conduct was alleged to have occurred during the time the 2015-16 Code was in effect. The information in this paragraph was previously communicated to you in an email from Larry Allen entitled "Response to Fax Sent on 3/28/18" dated April 5, 2018.

Individuals present at the hearing were Larry Allen (Director of Student Conduct) as the facilitator of the hearing, Butterfly Blaise (Title IX Coordinator) serving as the Complainant, K.H. serving as the Reporting Individual, and you, Matthew Jacobson, serving as the Respondent. The Student Conduct Board ("Student Conduct Board") members present were William Peters, Steven Vedder, Molly Shoder, Taeko Kelly, and Matthew Zehl. Pursuant to Education Law Article 129-B and the Student Conduct Manual, you and K.H. were permitted to have up to two advisors present. You were accompanied by attorney, Barry Jacobson, and K.H. was accompanied by Joshua Plante.

The Complainant submitted the Report of Investigation ("Report") dated May 10, 2016. You were previously emailed a copy of the Report on

April 24, 2018. The following documents, as identified by the Complainant during the hearing, were included in the Report:

Copy of the No Contact Order between the Respondent and K.H.

Statement given by K.H.

Statement given by the Respondent

Text messages provided by the Respondent
Photograph provided by K.H.

The Complainant, Reporting Individual, and Respondent all elected to fully participate in the hearing. Larry Allen informed each party of their right to "remain silent," or, in other words, voluntarily participate to the extent they choose to and/or not to answer questions during any part of the proceeding. Each party gave an opening and closing statement and all were afforded the opportunity to and elected to ask and answer questions posed. Each party was permitted to ask their questions without limits on time or the number of questions. The Student Conduct Board also asked questions of the parties.

Pursuant to the Student Conduct Manual, the standard of evidence in all cases adjudicated via the Student Conduct Office is preponderance of the evidence.

The proceeding lasted approximately 2 hours and 15 minutes, which does not include time provided for numerous recesses that occurred throughout the

proceeding. The parties were granted all recesses requested.

On May 3, 2018, you were notified by Larry Allen via an email entitled "Student Conduct Board Finding" of the following: "[Based on statements made at the hearing and evidence presented at the hearing on 4/27/18, the Student Conduct Board found you, Matthew, to be Responsible for violating Section 27.02 (Sexual Violence) and Not Responsible for violating Section 26 (Violation of Civil or Criminal Law). The justification for the Board's decision will be conveyed in the official outcome letter which will include the established sanction. As stated in Section IV.E. of the Student Conduct Manual, ...the Director of Student Conduct or designee decides the sanction..."

In his email, Mr. Allen advised you of the option to submit a letter speaking to the impact such finding would have on you, which is referred to in section VII(Z) of the 2017-18 Code as a Letter Supporting/Contesting the Outcome of the case. He also advised you of the possible sanctions for students found Responsible for violating Code Section 27.02 (Sexual Violence), which include "Suspension for one, two, three, four, five, six, seven, or eight semesters or Dismissal." On May 6, 2018, you emailed your Letter Contesting the Outcome of the case to Mr. Allen. K.H. also submitted a letter speaking to the impact of the finding.

On May 9, 2018, you were notified in writing by Larry Allen of the official outcome of your Student

Conduct Board hearing held on April 27, 2018 ("Notice of Judicial Outcome Letter" or "Outcome Letter"). The letter informed you that, after listening to and considering all relevant information provided by the Complainant, Respondent, and Reporting Individual at the hearing, the Student Conduct Board found you Responsible for violating the Student Conduct Manual. Specifically, the Board found you Responsible for engaging in sexual violence as defined in section 27.02 (Sexual Violence) and Not Responsible for violating section 26 (Violation of Civil or Criminal Law). As expressed in the Outcome Letter and pursuant to the Code, the standard of evidence in all cases adjudicated via the Student Conduct Office is preponderance of the evidence.

You appealed the finding of the Student Conduct Board, as discussed below.

2. Appeal to Judicial Outcome Review Board

Based on the outcome of the Student Conduct Board hearing, you requested a Judicial Review pursuant to section (IV)(F) of the 2017-18 Code. The role of the Judicial Outcome Review Board ("JORB" or "Board") during Phase 1 is to review all statements and evidence presented at your original hearing. Upon a majority vote and a preponderance of the information presented, the JORB establishes a finding of either Responsible or Not Responsible for each individual charge levied against you (Code section III(CX2)(c)), thereby either upholding or overturning the finding of the initial hearing with

respect to each individual charge (Code section (IV)(F)). The role of the JORB during Phase 2 is to review the sanctions of the initial outcome. For findings of Responsible, the JORB makes recommendations of appropriate sanctions to the Chair of the JORB (Code section III(C)(2)(d)).

Between May 23, 2018 and May 24, 2018, the JORB met to conduct "Phase 1" of the review. The Board upheld the finding of the initial hearing panel. On May 24, 2018, you were notified that "Phase 2" (Reviewing the Sanctions of the Initial Outcome (for findings of and pleas of Responsible)) of your Judicial Outcome Review was scheduled for Wednesday, May 30, 2018. On May 25, 2018, you submitted written questions to my secretary, which I received when you re-submitted them to me on May 28th. On May 28, 2018, you also confirmed your intent to participate in the May 30th Phase 2 meeting at 9 a.m. via phone. On May 29, 2018, I addressed your questions, again notifying you that the JORB conducted a review of the finding of the initial hearing based on your request and submission dated May 18, 2018 (Phase 1), the Board completed Phase 1, upheld the finding, and moved on to Phase 2.

I further informed you of the following: "Phase 2 occurs prior to a determination of a sanction and gives the review board the opportunity to ask questions to determine appropriate sanctions. Your participation in Phase 2 is completely optional. This optional appearance via phone is essentially an opportunity for you to orally express to this review board what you

stated in your written letter (Letter Supporting/Contesting the Outcome) speaking to the impact that this finding/sanction would have on you and any other information you feel is relevant to the determination of sanctions. During the phone call, you will have the opportunity to address the board directly-no other parties will be present. The Judicial Outcome Review Process does not include a new hearing. Your advisor may participate the same way he has throughout this process he may speak to you directly, but may not speak to the board on your behalf. The College will record the meeting, just as it recorded the initial hearing. Again, Phase 2 is limited to a review of the sanction and information that will aid the board in its determination of an appropriate sanction. The Judicial Outcome Review Board may uphold, decrease, or increase the initial sanction. A letter setting forth the full decision of the board will be communicated to you within 5 business days of the completion of Phase 2. The decision of the Judicial Outcome Review Board is final."

On May 30, 2018, you participated in Phase 2 via phone. K.H. also participated via phone.

Based on the foregoing, the full results of the Judicial Outcome Review are as follows:

Phase 1

Based on a preponderance of evidence presented at your original hearing, the JORB upheld the finding of RESPONSIBLE for the following charge: Code Section 27.02 (Sexual Violence). The JORB upheld

the finding of NOT RESPONSIBLE for the following charge: Code Section 26 (Violation of Civil or Criminal Law). The rationale of the JORB for upholding the finding of the initial hearing is as follows:

In your appeal, you allege a number errors—both procedural and substantive-made by the Student Conduct Board during the initial hearing. This Board notes that many of the issues you raise in your appeal were addressed by Larry Allen in the Notice of Judicial Outcome Letter dated May 9, 2018. The Board will address each in turn.

a. Renewed Objections

You state, "I reaffirm and renew each and every objection made in both our pre-hearing correspondence and the hearing itself." As stated above, the objections you raised during the hearing (which were largely the same as those raised through pre-hearing correspondence) were addressed by Larry Allen in the May 9, 2018 Outcome Letter. The Board finds Mr. Allen's responses to be reasonable and appropriate under the Code, and elaborates on many of them herein.

Specifically, the Board notes that pre-hearing correspondence (dated 3/28/18) requests that the College produce "not only all witness statements that the college intends to submit in evidence, but the entire 'evidence packet' intended to be introduced." (Some correspondence was submitted by your attorney, Barry Jacobson, on your behalf).

Subsequent correspondence (dated 4/3/18) directs the College to produce "written statements or recorded oral statements of any party or witness to this proceeding regarding any matter addressed either directly or indirectly related to the matter to be examined in the forth coming hearing" and "any documents produced under the exclusive dominion or control of the college including but not limited to any relevant documents in the University Police files, Title IX Office file or any other college related office..." It is well-settled that there is no general right to discovery in administrative proceedings. In an email dated April 5, 2018, Mr. Allen properly informed you that the evidence to be presented at the hearing would be "exactly the same evidence that was utilized for the original case and hearing" and that "[t]he only individual the College plans to invite to serve as a witness is the Reporting Individual, K.H.." In an email dated April 9, 2018, you confirmed that you (and your advisor) understood this to mean that the same documents submitted in nthe [sic] previous 'evidence packet will be used and that Butterfly Blaise will testify and that K.H. will be 'invited to serve as a witness."

Though the College was under no obligation to do so, you were also emailed a copy of the Report of Investigation ("Report") or "evidence packet" as you refer to it-on April 24, 2018, and, as Mr. Allen notes in the Outcome Letter, you initially received the same report in 2016. You also had the opportunity to

review the Report, on file with the Student Conduct Office, any time prior to the hearing. Mr. Allen informed you of this on April 24, 2018.

The Board also notes that your objection to the setup of the room (all parties facing the panel; but not one another) as an accommodation for the Reporting Individual is undermined by your prehearing correspondence in which you "[r]ecognize the college's right to make any suitable accommodations for her testimony consistent with the legal decisions governing such." Mr. Allen was correct to not permit you and your advisor to face K.H.. Mr. Allen did let your advisor move to sit in a location where he could clearly hear K.H. speaking, to which he stated, "fair enough, thank you." Even in criminal cases, we can find no requirement that an attorney be permitted to physically confront a victim witness and we appreciate your attorney advisor's understanding of the intimidating nature inherent in such a physical confrontation.

Again, the Board finds Mr. Allen's response to the objections as set forth in the Outcome Letter to be appropriate (see pages 2-4).

b. Bias of Larry Allen

You claim that the Director of Student Conduct, Larry Allen, who acted as the facilitator of the hearing, is biased against you. You claim that such bias affected Mr. Allen's procedural and evidentiary rulings. To support this claim, you reference the fact that Mr. Allen is a named Respondent in "previous

litigation" against the College and "[c]onsidering the Court's less than favorable evaluation of his ability to conduct the previous hearing, any reasonable person would conclude that he must harbor at least some resentment of me, the individual he would hold responsible for his public rebuke and should not be conducting this hearing."

It is true that, under the Code, you are entitled to an unbiased determination. However, the Board finds that you have offered no evidence to suggest that Mr. Allen, in his role as facilitator, was, in fact, biased. The fact that you perceive bias and/or the appearance of impropriety is insufficient. Indeed, you must provide factual support for your claim of bias and prove that the outcome flowed from that bias. You have failed to do so. To the contrary, the very fact that Mr. Allen reduced your sanction, as you note, would tend to support the opposite conclusion. Additionally, the fact that Mr. Allen made evidentiary and procedural rulings that were adverse to you is not, in and of itself, evidence of bias. The Board notes that Mr. Allen made several rulings in your favor.

You claim that Mr. Allen must be biased because he is a named Respondent in previous litigation. By that logic, one need simply name individuals in a lawsuit to disqualify them. Courts routinely send decisions back to the same judges who were tasked with hearing the underlying case, and the same is routinely done in administrative proceedings. It is not contrary to due process to allow administrators

who have had their initial decisions reversed on appeal to consider and decide the same questions a second time around.

Again, absent any evidence of actual bias, this claim is unsubstantiated.

C. Bias of Bryan Hartman, Butterfly Blaise, Student Conduct Board, and the Institution

You question the propriety of participation in the conduct process by Bryan Hartman and Butterfly Blaise. Again, you point to the "appearance of impropriety" as the reason for a flawed decision, but fail to provide factual support for this claim. Therefore, for the same reasons set forth above, the Board finds this claim to be unsubstantiated.

With respect to Ms. Blaise, you claim that she "was thoroughly humiliated by the Court" and that “it is inconceivable that she would not be highly prejudiced and biased against me as the individual who exposed her to the world and at the very least calls her judgement as the investigator into question.” This conclusory statement is not evidence of bias. The Board has reviewed the entire record and finds Ms. Blaise's participation in the hearing to be fair, honest, and impartial. Even so, Ms. Blaise's role in the hearing is not that of a decision-maker.

You further claim that the bias of Ms. Blaise permeates the entire Student Conduct Board; however, you still fail to show that Ms. Blaise had actual bias and that the outcome flowed from that bias. To the contrary, you acknowledge that the

Student Conduct Board was "comprised of different people from the prior Board" and observe that the college has attempted to diminish [Blaise's] influence over them based on changes to procedure." You also confirm that your questioning of the Board revealed that "they were not trained by or substantially exposed to Blaise personally, and had no knowledge of the previous litigation." The Board agrees and, therefore, finds this claim of bias unsubstantiated as well.

Please note that the College officials individually mentioned in the appeal have several decades of combined experience in the student disciplinary process. One single case does not have the devastating impact on these parties that you claim it does.

You claim institutional bias by SUNY, however, the reasons for such claim are unclear from your submission. Accusations without evidence are not actionable by this Board,

d. Larry Allen's Hearing Rulings

A.

i. You object to the admission of Butterfly Blaise's Investigation Report. Mr. Allen addressed this objection in his Outcome Letter, stating: "You objected to the presentation of the 'Summary of Contact with the Respondent' (hereinafter referred to as "Respondent's Statement"), which was part of Complainant's Report. According to Butterfly Blaise, this document was created during an in-person interview that she conducted with you, Matthew Jacobson, on February 18, 2016. You claimed that,

under the 2017-18 Code, the Respondent's Statement was not admissible because it did not have a signature on it. I allowed this document to be considered by the Board to which you asked me to note your exception and I did. The language from the 2017-18 Code that you cited in support of your objection reads as follows: 'A list of intended Advisors/Witnesses along with any special accommodations to be considered must be submitted to the Student Conduct Office no later than 24 hours prior to the hearing in order to be permitted at the hearing unless otherwise authorized by the Director of Student Conduct or designee. In order to be considered at the hearing, witness statements must include the following: date the document is signed, printed name of author, and signature of the author.' Please note that this language pertains to witness statements where the witness is unable to be present at the hearing and is intended to assist in validating the authenticity of such statement when the witness is not present. This would not apply when the witness is present at the hearing and can speak to the document personally. Even so, the Report is an official record of the College—not a witness statement—and was appropriately admitted into the record, as determined by the Director of Student Conduct." The Board finds Mr. Allen's assessment correct, and does not find error here. The Investigation Report, including the statements contained therein, was created at the time and dated accordingly. In order to preserve the integrity of the documents from the first hearing to the second, the College did not alter the

Report in any way. It is apparent that you have had the documents in your possession for years and never questioned their authenticity. Mr. Allen did express that current Code procedure would be utilized, but that does not require the College to alter the integrity of the documents. Also, the fact that all parties who gave statements were present to give live testimony to the hearing panel renders this objection moot, and your advisor can be heard acknowledging this point on the recording. You also confirm in your closing statement to the hearing panel, "and, sure, the evidence comes in through testimony," thereby undermining your own objection.

ii. You object to Larry Allen allowing K.H. to give testimony at the hearing, referring to her as "the surprise' last minute witness without any stated justification for again ignoring the rules governing 24 hour advance submission of witnesses and advisors." The Board does not find error in allowing K.H. to testify, but finds that you had ample notice that the College was calling her as a witness. On April 5, 2018 (22 days before the hearing), Mr. Allen emailed you and informed you that the evidence to be presented at the hearing would be exactly the same evidence that was utilized for the original case and hearing" and that "[t]he only individual the College plans to invite to serve as a witness is the Reporting Individual, K.H..” In an email to Mr. Allen dated April 9, 2018, you confirmed that you and your advisor) understood this to mean that the same documents submitted in nthe [sic] previous "evidence packet” will be used and that Butterfly Blaise will testify and that K.H will be

'invited to serve as a witness." You also confirm Mr. Allen's statement that "all witness participation is voluntary" and that you "take this to mean that you [Mr. Allen] have no authority or power to compel witness appearance." Further, in a letter dated March 28, 2018 from your advisor on your behalf, you submit that K.H. was a witness to the events in question and made sure to "call her as [Respondent's] witness...so as to alleviate any misconception or mis-characterization by counsel in any judicial review." Based on the foregoing, it is clear that you had sufficient prior notice that K.H. was a witness and may elect to appear and participate in the hearing.

B. You object to allowing "both witnesses to remain in the hearing room during the testimony and questioning of the other, allowing them to hear each other's responses and comments." During the hearing, Mr. Allen noted your objection and stated that "Butterfly Blaise serving as the Complainant in this case is entitled and required to be here. [K.H.], serving as Reporting Individual has the same right to be here as the Respondent and both therefore are entitled to be here throughout the entirety of the hearing at the same time that the Respondent is here." His "ruling" was that if Ms. Blaise and K.H: chose to remain during questioning, they would be permitted to do so. Indeed, under NYS Education Law § 6444, "any rights provided to a reporting individual must be similarly provided to a respondent and any rights provided to a respondent must be similarly

provided to a reporting individual." The Board finds no error with Mr. Allen's rule, which is consistent with governing law. You also claim that: allowing both individuals to be present during the hearing "allowed for collusion and the tailoring of...evidence" and "encouraged recent fabrication." But, again, allegations without evidence are not actionable by this Board. The Board has listened to the entire audio recording of the hearing, and does not find that the Reporting Individual mimicked Blaise "like a parrot," as you claim. Further, what you refer to as K.H.'s "dramatically admirable performance," the hearing panel found to be a credible and genuine account of what occurred. Thus, the Board finds from the record that no such fabrication took place.

C.

i. You object to Mr. Allen's ruling that, in your words, "none of the witnesses would have to answer any question they chose not to." You state, "While I have the right to remain silent pursuant to the governing law, but chose not to, the reporting individual has the right to certain accommodations to protect her from direct confrontation. However, as Mr. Allen says in the Outcome Letter, she voluntarily chose to testify face to face in an open setting, thereby waiving her right to not answer questions regarding the statement she adopted as her own whether or not it was really written by her. Blaise...had no right to refuse or decline to answer anything of relevance and bearing on her veracity and credibility. Witnesses cannot pick and choose what to answer, especially

their memory, veracity or credibility is involved" (emphasis added). Again, the Board finds that affording equal rights to the Respondent and Reporting Individual means that if you, Matthew, have the right to remain silent," K.H. shares that same right. You confirmed that you understood the principle that all witness participation is voluntary—the College may not compel witnesses to appear at the hearing as much as it may not compel them to answer questions during the hearing.

Mr. Allen, as the facilitator, has discretion to determine the relevancy of information presented at the hearing. Based on the record, the Board finds that he exercised that discretion appropriately. With respect to your claim that "limiting instructions should have been given to the panel, such instructions are not contemplated in the Code and are not part of the hearing process. The Board does not find error in Mr. Allen's failure to compel witnesses to answer questions nor in his failure to issue limiting instructions.

ii. You claim that no evidence could be tested through cross examination. The Board has listened to the entire hearing audio, and finds that, in fact, you spent a substantial portion of the hearing (which lasted over 2 hours) questioning any and all evidence presented—both through Ms. Blaise and K.H.. Mr. Allen prompted you multiple times if you had further questions. There is no evidence that you were cut off or limited in time or number of questions. Therefore, the Board finds that you were able to test all evidence

through questioning that lasted a substantial portion of the hearing.

D. You object to Mr. Allen's ruling that, in your words, "nothing from the previous hearing or litigation or other outside statements made could be mentioned, even including prior inconsistent statements by either witness or any outside statements made indicating bias, prejudice or recent fabrication even if they would refute or impeach their present testimony." What Mr. Allen actually stated in the hearing was that "the only testimony that will be utilized for determination in this case is that which is presented here today for review by this board. Anything said in a prior hearing is not relevant to these proceedings." Again, it is within Mr. Allen's discretion to determine the relevancy of such information. He appropriately determined in the moment that the prior hearing was not relevant to the information being presented at the current hearing. Nonetheless, that Ms. Blaise

was not necessarily impeached based on prior inconsistent statements is harmless given the fact that the hearing panel relied primarily on the live testimony of you, Respondent, and K.H., Reporting Individual, in reaching its determination. Thus, the Board finds it to be inconsequential that Ms. Blaise did not answer questions about the prior hearing.

Overall, based on its review of the entire record, the Board finds that you were afforded a fair hearing.

e. Substantive Due Process

You claim that the Student Conduct Board's finding that the Reporting Individual was incapacitated

during the time period in question is "ludicrous in relation to the witness statement they find credible." The Board does not quite understand your arguments with respect to "black outs," but you seem to be asserting that the Reporting Individual did not properly use the term in her testimony. The Board points out that the Reporting Individual did not testify as an expert in toxicology, but rather as a lay witness who is permitted to use common language to explain experiences to the best of her recollection. Additionally, you provide no support or evidence for your articulated understanding of "black outs." If your argument is—as it appears to be—that an individual must be either completely capacitated or completely incapacitated, again, you provide no support or evidence for this assertion. In fact, the record supports that the Reporting Individual has fragmentary memory of the events in question—a concept consistent with incapacitation.

The Board notes your claim that the Reporting Individual "committed a number of violations, including drinking in a dorm room and having and allowing me to join her in this endeavor," and declines to address it as doing so would be a violation of NYS Education Law & 6442, which you even note in your appeal. State law requires us to reject this argument on its face.

You claim that the Student Conduct Board could not establish who the initiator" responsible for obtaining affirmative consent was. To the contrary, the Board makes it quite clear that you initiated vaginal sex while the Reporting Individual was sleeping or

unconscious. To that end, the Outcome Letter states the following:

The Reporting Individual also stated that she recalls that she "must have been sleeping or blacked out" and that she "blacked out from pain" and remembers "it being very painful, then waking up later." She further stated, "I do not recall how the intercourse was initiated the first time. I do not know the time, but remember waking up having intercourse with him." The Board credits this testimony and finds that it is evidence to support that the Reporting Individual was indeed physically asleep or unconscious and therefore incapacitated by definition—when she awoke to Respondent engaged in sexual intercourse with her.

[T]he Board finds, based on testimony from the Reporting Individual, that at one point during the evening, she was physically asleep or unconscious when she awoke to Respondent engaged in intercourse with her. Respondent's Statement indicates—and he does not contest—that he engaged in vaginal sex in the missionary position twice with the Reporting Individual during the middle of the night (prior to the third encounter that occurred the next morning). The Board finds that testimony and statements from both Respondent and Reporting Individual are consistent in that regard and that the Reporting Individual was asleep or unconscious during at least one of the times Respondent initiated vaginal sex with her.

The Board also points out that, through your testimony, you exhibited an incorrect understanding

of affirmative consent, the definition of which was read verbatim from NYS Education Laws 6441 by Ms. Blaise during the hearing. This Board finds that Ms. Blaise did not use any "erroneous" definitions as it relates to the correct standard for consent.

You claim that "any reasonable person reviewing the evidence presented could only conclude that it shows two somewhat intoxicated people having consensual sex." This Board disagrees and upholds the rationale of the hearing panel set forth in the outcome Letter (see pages 4-6). Again, in your appeal, you fail to offer evidence of consent, stating instead that "[t]his was clearly not a case of use of force or duress." You seem to imply that the conduct is not actionable in the absence of force or duress. You were charged with sexual violence, which is defined as "[p]hysical sexual acts perpetrated against a person's will or p person is incapable of giving consent." The Board is unclear as to your claim that the concept of rape was "now out of the bag" during the hearing, but points out that the word "rape" is set forth within the definition of sexual violence as an example of an act falling within that category. If your argument is that because you were not charged criminally with rape, you are not subject to administrative action, that is incorrect. The Board finds that you continue to misapprehend the concept of consent as set forth by law.

You claim that a plain and reasonable reading of [K.H.'s] statement, as she adopted it at the hearing shows someone who apparently drinks and has sex on a regular basis and her actions that night were

consistent with her normal behavior." The Board declines to address this point as doing so would be in violation of NYS Education Law & 6444, which gives students the right to "exclude their own prior sexual history with persons other than the other party in the judicial or conduct process." There is no evidence that K.H. has affirmatively waived that right and, therefore, this line of your argument is barred by law. Furthermore, as the Code clearly states, consent is not determined by past sexual activity or by silence.

Phase 2

In accordance with section (IV)(F) of the Code, the JORB undertook a review of the sanctions of the initial outcome and determined that consistent with the Code and past cases of this nature—the appropriate sanction is SUSPENSION from the College for the period indicated in the Outcome Letter (5/19/2018 at 4 p.m. through 5/15/2021). The sanction of suspension is consistent with past cases at the College in which a student was found of violation of Section 27.02 (Sexual Violence).

The Student Conduct Office operates under the assumption that a person's behavior should demonstrate respect for self, respect for others, respect for the community, and responsibility for one's own actions. This Suspension is intended to make clear the limits of acceptable behavior and to give you the opportunity to more fully understand them, accept them, and reflect on how your conduct precipitated your separation from the college community.

The Board hopes that you will take time to reflect on your actions. It is never acceptable to have sexual intercourse or any other sexual activity without the other individual's clear, unambiguous consent. No one has the right to determine whether another's bodily integrity can be infringed because of prior activity or other circumstances. Such lack of respect for each person's dignity will not be tolerated at the College. The Board cannot caution you strongly enough that, in the future, only when there is clear and unambiguous mutual agreement to engage in sexual activity should you do so.

During the period of your Suspension, you may not enter the SUNY Plattsburgh campus without express written authorization from the Student Conduct Office. If you are found on the College campus without authorization from the Student Conduct Office, you will be subject to arrest for trespass.

If you wish to return to this College as a student following the period of your Suspension, it will be necessary for you to file an application for readmission through the Admissions Office by May 1, 2021. Should you apply for readmission to SUNY Plattsburgh, you will not be eligible to live on campus.

Please let me know if you have any questions.

Sincerely,

/s/

Bryan Hartman Vice President for Student Affairs

CC: Reporting Individual
Complainant

APPENDIX D

PLATTSBURGH
STATE UNIVERSITY OF NEW YORK

*M*ay 9, 2018

Matthew Jacobson
******This letter supercedes previously sen*t e*mail*

NOTICE OF JUDICIAL OUTCOME

On March 26, 2018, you received a Statement of Judicial Charges via your SUNY Plattsburgh email notifying you of your rights as a charged individual and indicating that you were charged with violating the following provisions of the SUNY Plattsburgh 2015-2016 Code of Conduct ("2015-16 Code"):

Section 26: Violations of Civil or Criminal Law: Violation of Federal, state, or local laws in a way that affects the College community's pursuit of its educational purposes is prohibited and may subject students to disciplinary action. Such violation may be established independent of and prior to a criminal conviction.

Section 27.02: Sexual Violence, as outlined in Section 1 of this document (2015-16 Code) is prohibited.

Section 1 of the 2015-16 Code defines Sexual Violence as follows: Physical sexual acts perpetrated against a person's will or perpetrated where a person is incapable of giving consent. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual assault with

an object, sodomy, fondling, incest, and statutory rape.

Reference: It was reported that on 10/31/15, in 142 Harrington Hall, between 12:30AM-SAM, you initiated sexual intercourse with another student three different times without establishing affirmative consent.

In the Statement of Judicial Charges, you were informed that charges were filed by the College, and, specifically, Title IX Coordinator, Butterfly Blaise, because "list was reported that on 10/31/15, in 142 Harrington Hall, between 12:30AM BAM, you initiated sexual intercourse with another student three different times without establishing affirmative consent." In response to the Statement of Judicial Changes, you submitted via email to me on March 28, 2018 at 10:18 a.m. a signed "Disposition of Charges" (dated 3/27/18) in which you confirm that you reviewed the charges and your rights with the Director of Student Conduct. You indicated on the form and in the email that you enter a plea of "Not Responsible" to the two charges and request a hearing,

This letter is to inform you of the decision of the Student Conduct Board regarding your hearing held on April 27, 2018. The hearing began at 2 p.m. The proceeding was held pursuant to the procedures set forth in the 2017-2018 Student Conduct Manual ("2017-18 Code"). In reaching its determination, the Student Conduct Board utilized the substantive definitions from the 2015-16 Code for the violations set forth in Sections 26 (Violation of Civil or

Criminal Law) and 27.02 (Sexual Violence) due to the fact that the conduct was alleged to have occurred during the time the 2015-16 Code was in effect.

Those present were the undersigned, Larry Allen (Director of Student Conduct) as the facilitator of the hearing, Butterfly Blaise (Title IX Coordinator) serving as the Complainant, K.H. serving as the Reporting Individual, and you, Matthew Jacobson, serving as the Respondent. The Student Conduct Board members present were William Peters, Steven Vedder, Molly Shoder, Taeko Kelly, and Matthew Zehi. Pursuant to Education Law Article 129-B and the Student Conduct Manual, you and K.H. were permitted to have up to two advisors present. You were accompanied by attorney, Barry Jacobson, and K.H. was accompanied by Joshua Plante.

The Complainant submitted the Report of Investigation ("Report") dated May 10, 2016. Yo*u* were previously emailed a copy of the Report on April 24, 2018. (Also, you initially received this same report in 2016). The following documents, as identified by the Complainant during the hearing, were included in the Report:

Copy of the No Contact Order between the Respondent and K.H.

Statement given by K.H.

Statement given by the Respondent

Text messages provided by the Respondent

Photograph provided by K.H.

The Complainant, Reporting Individual, and Respondent all elected to fully participate in the

hearing. Each party was informed of the right to remain silent and/or not answer questions during any part of the proceeding. Each party gave an opening and closing statement and all were afforded the opportunity to and elected to ask and answer questions posed.

Pursuant to the Student Conduct Manual, the standard of evidence in all cases adjudicated via the Student Conduct Office is preponderance of the evidence.

The proceeding lasted approximately 2 hours and 15 minutes, which does not include time provided for numerous recesses that occurred throughout the proceeding.

You made several objections/exceptions during the course of the hearing, and they were addressed as follows:

You asked to voir dire the board. I denied your request because that is not part of the College's standard student conduct proceedings. You objected and asked me to note your exception and I did. Subsequently, I did allow you to ask questions to ascertain whether the Board members had any recognized bias for or against you, Respondent. It was established that they did not.

You objected to me, Larry Allen, serving as the facilitator of the hearing given that I was a named Respondent in previously concluded litigation. I stated that it is perfectly acceptable given my professional title and role in overseeing the Student Conduct Office as Director of Student Conduct at the College. Additionally, when asked if previous

litigation would affect my ability to facilitate the current hearing, I responded, "Absolutely not." Furthermore, I am the only person on this campus that has the requisite training in facilitating Student Conduct Board hearings. You asked me to note your exception and I did.

You objected when the Complainant, Butterfly Blaise, began to present her case. You began to ask questions during the proceeding when, outside procedural questions, questions are not permitted. You asked what federal, state, or local law you allegedly violated and what specific violation under Section 27.02 (Sexual Violence) were you charged with. I informed you that you that as part of our proceedings, you would have an opportunity later in the hearing to ask questions of Butterfly Blaise as previously explained. Additionally, you were given notice of the charges against you well in advance of the hearing, and you signed and dated the Disposition of Charges confirming that you reviewed such charges. The charges had not changed in any way since the Statement of Judicial Charges was sent and received. You asked me to note your exception and I did.

When the Reporting Individual began to give her statement, after being granted your request for your advisor to move to a different seat to better hear the Reporting individual, you alleged that Butterfly Blaise was "specifically blocking" and "purposefully blocking your advisor's view of the Reporting Individual. I stated that the allegation was incorrect, that the room was intentionally arranged, and that I

would not permit your advisor to stand or to move to another seat to be able to face the Reporting Individual Pursuant to state and federal law, and as state*d* in the Student Conduct Manual; "in cases involving Sexual Assault, the Reporting individual will be afforded reasonable accommodations at any hearings resulting from the case, to ensure their safety and to facilitate their involvement." The setup of the room was an accommodation for the Reporting individual. You asked me to note your exception and I did.

You objected to the presentation of the "Summary of Contact with the Respondent" (hereinafter referred to as "Respondent's Statement"), which was part of Complainant's Report. According to Butterfly Blaise, this document was created during an in-person interview that she conducted with you, Matthew Jacobson, on February 18, 2016. You claimed that, under the 2017-18 Code, the Respondent's Statement was not admissible because it did not have a signature on it. I allowed this document to be considered by the Board to which you asked me to note your exception and I did. The language from the 2017-18 Code that you cited in support of your objection reads as follows, "A list of intended Advisors/Witnesses along with any special accommodations to be considered must be submitted to the Student Conduct Office no later than 24 hours prior to the hearing in order to be permitted at the hearing unless otherwise authorized by the Director of Student Conduct or designee. In order to be considered at the hearing, witness statements must

include the following: date the document is signed, printed name of author, and signature of the author." Please note that this language pertains to witness statements where the witness is unable to be present at the hearing and is intended to assist in validating the authenticity of such statement when the witness is not present. This would not apply when the witness is present at the hearing and can speak to the document personally. Even so, the Report is an official record of the College--not a witness statement-and was appropriately admitted into the record, as determined by the Director of Student Conduct.

You objected to my statement that "...for the purposes of the board making their decision, they will have to determine What incapacitation is so Matthew's definition of incapacitation is irrelevant as it relates to the board coming to a finding." I noted your objection and stated that "it was not my intent to say your definition is irrelevant but it's the board's definition...and the school's definition." You then stated, "And we agree." I later reminded all parties present that the Board would be utilizing the definitions in the Student Conduct Manual to make any determinations.

You requested that while you were questioning the Complainant and Reporting Individual that the one who was not being questioned be barred from the room. I denied this request on the grounds that in their respective roles at the hearing, they both had the right to be present as much as you, the Respondent, did for the entirety of the proceedings. I

further stated that if the Complainant and Reporting Individual chose to remain during questioning, they would be permitted to do so. You asked me to note your exception and 1 did.

You asked Complainant, "What degrees do you have?" I informed Complainant that she did not need to answer the question. I further indicated that her degrees were not relevant to the proceedings. You asked me to note your exception and I did.

You asked Complainant a question pertaining to what she testified to at a previous hearing regarding the definition of initiation. I stated that statements made at the prior hearing are not relevant to the current proceedings. I further stated that "The only testimony that will be utilized for determination in this case is that which is presented here today for review by this Board." You asked me to note your objection and exception and I did.

You objected to Complainant stating, "Next question, please." In response, i stated that "She can decide whether or not she answers the question" and "If she says, 'I'm not answering that question' then therefore it would be proceeding to the next question." You then asked if Butterfly Blaise was "in effect acting as the presenting agency or the prosecutor?" Butterfly Blaise said, "No" and I stated, "That is not correct" and "She is the complainant in this case as already covered." You asked me to note your exception and I did.

When it was your opportunity to ask questions, you asked if you and your advisor could move from where you were seated so that you could face the Reporting

individual, K.H. I denied your request. You further stated that you felt you and your advisor had "the right to clearly hear her answers and observe her responses." I stated, "Yo*u* have the right to ask questions and to have those questions either be answered or not answered--that does not mean that you have the right to face the person." My ruling was that you were not permitted to position yourselves to be able to face her, but that you would be permitted to ask your questions from where you were positioned at the time of your request. This ruling is consistent with state and federal law.

The following is the finding of the Student Conduct Board ("Board"):

After listening to and considering all relevant information provided by the Complainant, Respondent, and Reporting Individual at the hearing, the Board finds you, Matthew Jacobson, Responsible for violating the Student Conduct *M*anual. Specifically, the Board finds you Responsible for engaging in sexual violence as defined in section 27.02 (Sexual Violence) and Not Responsible for violating section 26 (Violation of Civil or Criminal Law).

Pursuant to Education Law Article 129-B (N.Y. Educ. Law $ 6441) and the Student Conduct Manual, affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in sexual activity. Silence or lack of resistance in and of itself,

does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.

Consent to any sexual act or prior consensual activity between or with any party does not necessarily constitute consent to any other sexual act.

Consent is required regardless of whether the person initiating the act is under the influence of drugs and/or alcohol.

Consent may be initially given but withdrawn at any time.

Consent cannot be given when a person is incapacitated, which occurs when an individual lacks the ability to knowingly choose to participate in sexual activity. Incapacitation may be caused by the lack of consciousness or being asleep, being involuntarily restrained, or if an individual otherwise cannot consent. Depending on the degree of intoxication, someone who is under the influence of alcohol, drugs, or other intoxicants may be incapacitated and therefore unable to consent.

Consent cannot be given when it is the result of coercion, Intimidation, force, or threat of harm.

When consent is withdrawn or can no longer be given, sexual activity must stop.

"Non-consent" is defined as follows:

Silence, in and of itself, and/or lack of resistance cannot be interpreted as consent.

Consent cannot be given when it is the result of any coercion, intimidation, force, or threat of harm.

Consent to any sexual act or prior consensual sexual activity between or with any party does not constitute consent to any other sexual act. Consent cannot be given when a person is incapacitated.

Incapacitation occurs when an individual lacks the capacity to fully, knowingly choose to decide about participating in sexual activity, whether due to a disability that limits informed sexual decision-making, or because of impairment due to drugs or alcohol (whether such use is voluntary or involuntary), the lack of consciousness or being asleep, being involuntarily restrained, If any of the parties are under the age of 17, or otherwise cannot consent.

I. The Board finds that affirmative consent could not be established because the Reporting Individual was incapacitated during the time period in question.

First, the Board finds the information contained in the "Summary of Contact with the Respondent" from Complainant's *n-person interview with Respondent ("Respondent's Statement"), dated February 18, 2016, to be reliable and consistent with statements he made during the hearing. While, during the hearing, Respondent contested some of what was contained in the Respondent's Statement, he confirmed for the Board that the statements contained in quotations were his own (stating to the Board, "almost anything in quotes is what I said"). The Board credits Complainant's statement during the hearing of, "I typed out what was told to me" and Respondent likened her to a "reporter of information.

The Board further finds that when Respondent met with Complainant to give a statement, he had sufficient time and opportunity to review such statement, contest any information that was inaccurate, and make any edits to the document that he felt were necessary. This finding is supported by statements given by Complainant and Respondent at the hearing. During the hearing, Complainant asked Respondent, "When I met with you, how long did I spend with you going back over word for word everything that you said to me at the time that you were in my office?" Respondent answered, "I don't believe it being longer than half an hour." Complainant also stated during the hearing, "Which is why I spent an extended period of time with you going back over your words repetitively." In response to Respondent's question of "Did you go over that statement with me?", Complainant answered, "Yes, when you were in my office. The Board credits these statements.

The Board finds that, according to Respondent's Statement, the Respondent said the following: "We both were stumbling around the hallway"; "We both said we were pretty drunk"; and "Her speech was somewhat mumbled, but I am not sure if it was because she was drunk."

Furthermore, the Reporting individual stated that she consumed at least two 24oz Twisted Teas (stating, she "may have had three at this point") and drank some of her friends' alcohol as well (stating, "I do not know how much"), all within a two hour period. She further stated that she consumed another 24oz.

Twisted Tea sometime between 1:21am and 1:37am. The Board finds that this was a significant amount of alcohol for an individual to consume during the time frame indicated.

The Reporting Individual also stated that she recalls that she "must have been sleeping or blacked out" and that she "blacked out from pain" and remembers "it being very painful, then waking up later." She further stated, "I do not recall how the intercourse was initiated the first time. I do not know the time, but remember waking up having intercourse with him." The Board credits this testimony and finds that it is evidence to support that the Reporting Individual was indeed physically asleep or unconscious and therefore incapacitated by definition-when she awoke to Respondent engaged in sexual intercourse with her.

Overall, the Board finds that behaviors exhibited by the Reporting Individual, as described by both Respondent and Reporting Individual, are consistent with signs of incapacitation, namely slurred speech, stumbling or difficulty maintaining balance, and unconsciousness.

II. <u>The Board also finds that, even if the Reporting Individual was not incapacitated, there is no evidence that affirmative consent was obtained or even sought by the Respondent.</u>

Here, the Board finds that statements by the Reporting Individual indicate her unwillingness to consent to sexual intercourse. The Reporting Individual stated that she told the Respondent, "I

just wanted to cuddle but cannot recall how many times I said that." Also, prior to the third instance of sexual activity, the Reporting Individual stated that she believed the Respondent "tried to take my shirt off, but I did not want to because I'm very self-conscious of my body." She further stated, "I think he said he already saw parts of my body I told him I was uncomfortable with last night and he liked them and then he took my shirt off." The Board credits these statements and finds that they are evidence that the Respondent decided to proceed with sexual activity without affirmative consent from the Reporting Individual.

Through her written statements and live testimony, the Reporting Individual does not offer any evidence of "words or actions that created "clear permission regarding willingness to engage in sexual activity." To the contrary, she states, "In multiple ways in my opinion, I said no, I expressed it through my actions. And I'm wondering, why you would continue?" She recalls telling Respondent that she wasn't wet enough" and that "it hurt." Specifically, the Reporting Individual recalls the third time more clearly and stated, "I remember when it began again thinking it did not matter because it already happened twice and just feeling sort of hopeless. She recalls "just waiting for it to be over and then he ejaculated on my stomach again."

Respondent responded to the Reporting Individual that her actions and words "did not indicate that you wanted to stop such activity" and "obviously, you would have said you did not want to continue to do it

and I would have stopped." However, Respondent was unable to articulate to the Board what specific words or actions by the Reporting Individual indicated "clear permission regarding willingness to engage in sexual activity" stating to her instead that "You had multiple opportunities to put an end to this eight hour transaction" and "You went to the windows to close the shades because there were people outside; you never yelled out or said anything to them." The Board finds that the Reporting Individual's alleged failure to run away or yell out does not, under the plain language of New York State law, constitute affirmative consent to the sexual activities with Respondent, as silence or lack of resistance, in and of itself, does not demonstrate consent.

As evidence of consent, Respondent points out to the Board that, in his opinion, the fact that the Reporting Individual "specifically declined to use a condom indicates to me that she was consenting to the sex that occurred." Additionally, he states, "We were progressing toward some sort of sexual activity and at no time did you say or do anything that would say you were not specifically interested in the activities that you voluntarily engaged in" and "You never said no nor did you indicate no." Again, the Board finds that under the plain language of New York State law, this information is insufficient to establish consent to the sexual activities.

Furthermore, the Board finds, based on testimony from the Reporting Individual, that at one point during the evening, she was physically asleep or

unconscious when she awoke to Respondent engaged in intercourse with her. Respondent's Statement indicates and he does not contest-that he engaged in vaginal sex in the missionary position twice with the Reporting Individual during the middle of the night (prior to the third encounter that occurred the next morning). The Board finds that testimony and statements from both Respondent and Reporting Individual are consistent in that regard and that the Reporting individual was asleep or unconscious during at least one of the times Respondent initiated vaginal sex with her.

Lastly, under the plain language of New York State law, even if there was affirmative consent to certain sexual activity (and it is not clear that there was), consent to one type of activity does not become blanket consent for all activity or any other specific activity. The responsibility for seeking consent always lies with the individual initiating the sexual activity.

III. **Credibility**

Even crediting your testimony as described above, overall, the Board finds the Reporting Individual's testimony to be more credible for the following reasons:

The Reporting Individual's testimony at the hearing remained more consistent with what she reported in her statement as compared to the Respondent's testimony. The Board also found her testimony to be more genuine.

The Respondent was inconsistent in his accounts as it related to there being three separate acts of sexual

activity vs. one long act of sexual activity. He also varied his description as to the level of his intoxication.

The Respondent, who was represented by counsel, was unable to articulate an understanding of affirmative consent as it applied to the sexual activity that occurred during the time in question. Because of this, the Board questioned his ability to appropriately interpret whether affirmative consent was established during the reported sexual acts. This negatively impacted the Respondent's credibility.

IV. **Sanction**

Consistent with the Student Conduct Manual and sanctions imposed in past cases of this nature, you are hereby Suspended until 5/15/2021, effective 5/19/18 at 4pm. As a result of your Suspension, you may not enter the SUNY Plattsburgh campus during the period of your Suspension without express written authorization from my office. If you are found on the college campus without authorization from my office, you will be subject to arrest for trespass.

Pursuant to Section VII(K) of the 2017-18 Code, "Students who are Suspended or Dismissed for serious violations of the Student Code of Conduct, including hazing, will have the following permanent statement placed on their transcript as appropriate: "Suspended after a finding of Responsibility for a Code of Conduct violation" or "Dismissed after a finding of Responsibility for a Code of Conduct violation."

You have the right to request a review of this outcome within 5 days of the time you were notified of the decision. Please refer to the Student Conduct Manual found via the link below for more detailed information regarding the Outcome Review Process (Section IV(F)). Your Outcome Review Request is due no later than 4pm on Friday, May 18, 2018. Please note that a hold has been placed on your transcript and the conferral of your degree.

The link to the Student Code of Conduct is: web.plattsburgh.edu/files/38/files/Student Code of Conduct 2017 2018(2).pdf

/s/_____

Larry Allen
Director of Student Conduct
CC: Bryan Hartman, VP for Student Affairs
Butterfly Blaise, Title IX Reporting Individual
Registrar/Student Accounts

APPENDIX E

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 11, 2018 524159

In the Matter of MATTHEW JACOBSON,
Petitioner,
v.

BUTTERFLY BLAISE, as Title IX Coordinator of the State University of New York at Plattsburgh, et. al.,
Respondents.

MEMORANDUM AND JUDGMENT

Calendar Date: October 20, 2017
Before: McCarthy, J.P., Lynch, Devine, Clark, and Pritzker, JJ.

Barry S. Jacobson, New York City, for petitioner.
Eric T. Schneiderman, Attorney General, Albany (Victor Paladino of counsel), for respondents.

Lynch, J.

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Clinton County) to review a determination of the State University of New York at Plattsburgh finding petitioner guilty of sexual misconduct in violation of its Student Conduct Manual.

In the early morning hours of October 31, 2015, petitioner, who was a student at the State University of New York at Plattsburgh (hereinafter SUNY), engaged in sexual intercourse with a female student (hereinafter the reporting individual) in. her dorm room on three different occasions over an approximately seven-hour period. Five days later, the reporting individual went to SUNY's health center and reported that she had been sexually assaulted. The nurse at the health center referred the reporting individual to respondent Butterfly Blaise, SUNY's Title IX Coordinator (see 34 CFR 106.2), and filed a report with SUNY'S police department. On November 6, 2015, the reporting individual met with Blaise and gave a statement detailing the events of October 31, 2015. On February 17, 2016, Blaise notified petitioner via email that there was a "no contact order" issued on a "matter pertaining to [him]" that she wanted to discuss with him. The two arranged to meet the next day. On February 18, 2016, petitioner met with Blaise and gave her a statement detailing his recollection of the events of October 31, 2015. Blaise prepared a written summary of the statements given

by both petitioner and the reporting individual.

On May 2, 2016, petitioner received a statement of judicial charges issued by respondent Larry Allen, SUNY's Director of Student Conduct. Therein, petitioner was notified that Blaise was charging petitioner with violating two provisions of SUNY'S Student Conduct Manual because "[i]t was reported that on 10/31/15, in 142 Harrington Hall, between 12:30 am - 8:00 am, [petitioner] initiated sexual intercourse with another student three different times without establishing affirmative consent." Further, the statement notified petitioner that if he decided to plead "not responsible" to the charge, he could bring witnesses and question the "person making the charge" and directed petitioner to appear "for a [r]eview of [j]udicial [c]harges and [p]rocedures" the following day. It is not clear from the record whether petitioner availed himself of that review. On May 4, 2016, petitioner was notified that a hearing before respondent Student Conduct Board (hereinafter the Board) was scheduled for May 10, 2016. On May 6, 2016, in response to his request information, Allen sent petitioner a judicial form that included a condensed version of the reporting individual's statement to Blaise, which was characterized as the "details of [the] violation." The hearing was held as scheduled and, on May 10, 2016, petitioner was notified that the Board determined that he was "responsible" for the charges, and the sanction of dismissal was thereafter imposed. In accordance with the student conduct procedures, petitioner submitted an impact statement with

regard to the sanction and, on May 11, 2016, petitioner was notified that, as a result of the Board's determination, he would be dismissed from school. Petitioner submitted a timely appeal and, on May 24, 2016, petitioner was notified that SUNY's Judicial Appeal Board upheld the findings of the Board and the sanction of dismissal. Thereafter, petitioner commenced this proceeding pursuant to CPLR article 78, which was transferred to this Court.

In 2015, New York enacted article 129-B of the Education Law, known as the Enough is Enough Law (see L 2015, ch 76*)*. The purpos*e* of this law was to "require all colleges and universities in the State of New York to implement uniform prevention and response policies and procedures relating to sexual assault, domestic violence, dating violence and stalking" (Sponsor's Mem, Senate Bill S5965 [2015]). The disciplinary process is outlined in Education Law & 6444 (5) (b). *As e*xplained by the Department of Education, "[t]his section should not be read to extend to private colleges the constitutional due process rights that apply to public colleges. It establishes minimum requirements for cases of sexual and interpersonal violence covered by [article] 129-B, but institutions may offer more rights and requirements" (New York State Education Department, Complying with Education Law article 129-B at 26 [2016], available at http*://w*ww.highered.nysed.gov*/oc*u*e/do*cuments/A*r*ticle129-BGuidance.pdf). Particularly relevant here, the law sets forth a definition of affirmative consent

– that all educational institutions shall adopt – as "a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent" (Education Law § 6441 [1]). Although the version of SUNY's Student Conduct Manual in effect during the 2015-2016 academic year did not include this express definition of affirmative consent, the parties do not dispute that it was proper for SUNY to apply the standards of the Enough is Enough Law when it responded to the reporting individual's accusation[1]

---

[1] The Enough is Enough Law went into effect October 5, 2015 (see L 2015, ch 76, § 1).

Rather, petitioner contends that SUNY'S determination should be annulled because he was not afforded due process, the Board was not properly advised as to the definition of affirmative consent and the determination was arbitrary and capricious and not supported by substantial evidence.

We begin by considering petitioner's claim that he was not afforded due process[2]. In general, the Enough is Enough Law requires that colleges and universities implement a "students' bill of rights" that includes the right to "[p]articipate in a process that is fair, impartial, and provides adequate notice and a meaningful opportunity to be heard" (Education Law § 6443; see Education Law § 6444 [5] [c] [iii]). More specifically, the law provides that the minimum process to be afforded an accused student is: (1) notice of the "date, time, location and factual allegations concerning the violation," as well as the "specific code of conduct provisions alleged to have been violated, and possible sanctions"; (2) "an opportunity to offer evidence during an investigation, and to present evidence and testimony at a hearing, where appropriate"; and (3) an ability to appeal the initial determination (see Education Law § 6444 [5] [b]). Further, in order to "effectuate an appeal, [an

---

[2] Because petitioner raised the majority of these claims as part of his administrative appeal, they are preserved for our review (see Matter of Monnat v State Univ. of N.Y. at Canton, 12 AD3d 1176, 1176-1177 [2015]).

accused student] . . shall receive written notice of the findings of fact, the decision and the sanction..., as well as the rationale for the decision and the sanction" (Education Law § 6444 [5] [b]). Throughout the proceedings, an accused student enjoys "the right to a presumption that [he or she] is 'not responsible' until a finding of responsibility is made" (Education Law § 6444 [5] [c] [ii]).

We reject petitioner's claim that he did not receive adequate notice of the charge against him. The record confirms that he was first made aware of the reporting individual's claim in February 2016 when the no contact order was issued. Immediately following his meeting with Blaise in February 2016, petitioner provided copies of text messages that he exchanged with the reporting individual during the days leading up to and immediately preceding the events of October 31, 2015, presumably to support his claim that the alleged conduct was consensual. During the evening following his meeting with Blaise, petitioner emailed her to add that he "vaguely remember[ed] asking [the reporting individual] if she was ok during the second time and she said yea[h] I'm fine. I'm not sure if this helps but I vaguely recall that happening." Although petitioner received the formal charges one week prior to the hearing, he consented to the hearing date and did not ask for an adjournment.

As for petitioner's complaint that he did not receive an "evidence packet" until the hearing, there

is no "general constitutional right to discovery in... administrative proceedings" (Matter of Weber v State Univ. of N.Y., Coll. at Cortland, 150 AD3d 1429, 1432 [2017] [internal quotations and citation omitted]), and the Enough is Enough Law does not alter this general rule. In context, after receiving this packet at the hearing, petitioner - who was accompanied by his "advisor of choice" (Education Law § 6444 [5] [c] [i]) - requested a "10-15 minute recess to go over [it]" and he then received 10 minutes to review the packet prior to presenting his response. Notably, this packet included petitioner's statement, the text messages that petitioner had provided to Blaise, the no contact order and the reporting individual's statement as recorded by Blaise. At the close of the hearing, petitioner was granted the five minutes that he had requested to prepare a closing statement. To the extent that he claims that he was not afforded adequate time to prepare an appeal, we note that three days before the Judicial Appeal Board met, petitioner did not contend that he lacked sufficient information, but instead declined an invitation to appear, choosing to rely on a written submission. Under the circumstances, we find that petitioner was given adequate notice of the charges, and that such notice afforded him the ability to defend himself at the hearing before the Board (see Education Law § 6444 [5] [b]; New York State Education Department, Complying with Education Law article 129-B at 25 [2016]; Matter of Lambraia v State Univ. of N.Y. at

Binghamton, 135 AD3d 1144, 1146 [2016]; Matter of Lampert v State Univ. of N.Y. at Albany, 116 AD3d 1292, 1294 [2014], lv denied 23 NY3d 908 [2014]).

We also reject petitioner's claim that he was denied due process because he was not permitted to cross-examine the reporting individual. In general, there is a limited right to cross-examine an adverse witness in an administrative proceeding (see Matter of Weber v State Univ. of N.Y., Coll. at Cortland, 150 AD3d at 1432), and "[t]he right to cross [-] examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings" (Winnick v Manning, 460 F2d 545, 549 [1972); see Blanton v State Univ. of N.Y., 489 F2d 377, 385 [1973]). The Enough is Enough Law does not require such cross-examination (see Matter of Doe v Skidmore Coll., 152 AD3d 932, 934 [2017]).[3] To the contrary, in the event that charges are filed after a report of a violation is made, a reporting individual is not obligated to participate in the hearing (see Education Law $$ 6443, 6444 [1] [f]). Under the "Students' bill of rights" section in the Education Law, the reporting person has the right to

[3] In their brief, respondents cited to the United States Department of Education's administrative guidance as support for the premise that due process does not entitle a petitioner to cross-examine a reporting individual. In a letter to the Court prior to oral argument, respondents advised that the federal administrative guidance has since been withdrawn (see Dear Colleague Letter, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf). That said, the Enough is Enough Law remains intact.

"[m]ake a decision about whether or not to... participate in the judical or conduct process . . . free from pressure by the institution" (Education Law $ 6443). This protection is twofold, meaning that reporting person is entitled to participate or not in the conduct process as he or she sees fit, without pressure from the institution. Contrary to the observation in the dissent, it would be undue pressure for an institution to advise a reporting person that a decision not to participate would hinder the conduct process. Moreover, the reporting person is entitled to keep his or her identity private at all times (see Education Law § 6444 [a] [f]) and to "[w]ithdraw a complaint or involvement from the institution process at any time" (Education Law & 6444 [1] [i]). While a reporting person may request that formal charges be filed against the student accused of violating an educational institution's code of conduct, it is the institution that determines whether such charges are warranted (see Education Law § 6444 [5] [a]; New *Y*ork State Education Department, Complying with Education La*w* article 129-B at 25 [2016]), and it was SUNY, not the reporting individual, that had to demonstrate that the facts supported the charge. Here, petitioner was afforded the right to question and did question Blaise, who was the "complainant" and the individual who decided that charges were warranted, albeit on the basis of the reporting individual's statement. This was proper inasmuch as it was Blaise, not the reporting individual, who could

explain her conclusion that the evidence demonstrated a lack of affirmative consent (see Matter of Boyd v State Univ. of N.Y. at Cortland, 110 AD3d 1174, 1175 [2013]).

We recognize that in our decisions in both Matter of Doe v Skidmore Coll. (supra) and Matter of Weber v State Univ. of N.Y., at Cortland (supra), an alternative format for presenting questions was made available to the accused student. Specifically in Doe, during the investigatory stage, the accused student was permitted to submit written questions to be answered by the reporting person if deemed relevant and appropriate by the investigator (Matter of Doe v Skidmore College, 152 AD3d at 934). In Weber, which involved a hearing conducted in 2014 attended by both the reporting person and the accused student, the accused student submitted questions through the hearing officer who reworked the question "into a more neutral form" (Matter of Weber v State Univ. of N.Y., Coll. at Cortland, 150 AD3d at 1432). We are mindful that Weber preceded the Enough is Enough Law and that Doe involved a private institution.

The dichotomy we confront is whether an accused student should be allowed to present questions to the reporting person, who is statutorily entitled to refrain from participating in the conduct process." At the start of this hearing, Allen, the Hearing Officer, informed petitioner that "[t]he reporting individual ... is participating via Skype,] ... simply observing the

proceedings today and not participating in the hearing." Petitioner was informed that he could cross-examine Blaise as the complainant, but not the reporting individual. We conclude that this limitation on petitioner's ability to question the reporting individual did not compromise his right to a fair hearing. A close reading of the statements reveals that there was no material factual conflict between the relatively consistent accounts given by the participants. To illustrate, neither participant was able to recall which one initiated the sexual activity and certainly both conceded that they had been drinking. Given this consistency, there is no need to further detail the conduct at issue. The actual question here is whether affirmative consent was established through the colloquy and conduct outlined in the statements, together with the statements made before the Board. Resolution of this question necessarily called the conclusions drawn by Blaise into issue. For this reason, we conclude that petitioner's due process rights were not compromised. By comparison, where a material factual conflict exists between the statements of a reporting person and an accused student, a mechanism should be made available for the accused student to present questions for the reporting person to address, akin to that utilized in Doe or Weber.

Turning to the issue of affirmative consent, the definition specifically provides that consent to engage in sexual activity "can be given by words or actions"

(Education Law § 6441 [1]). In accordance with both common sense and the requirements of the Enough is Enough Law, SUNY's Student Conduct Manual provides further guidance to explain that consent to one sexual act does not necessarily constitute consent f*or* any subsequent sexual act, that consent is necessary even if the person initiating an act is intoxicated, that consent cannot be given by a person who is incapacitated by loss of consciousness, sleep, drugs or alcohol, and that consent to sexual conduct, even if once given, may thereafter be withdrawn at any time (see Education Law § 6441 [2]). Silence or lack of resistance alone is not consent to sexual conduct (see Education Law § 6441 [1]).[4]

During the hearing, petitioner asked Blaise to define affirmative consent and she read the statutory definition, including that "consent can be given by words or actions as long as those words or actions create clear permission regarding willingness to engage in sexual activity." Petitioner then asked, "So affirmative consent can be implied or referred [sic] from conduct?", and Blaise responded, "[O]nly if the direct question is: Can I have sex with you? So you must ask directly what it is that you want to do to that person. ... And the answer affirmatively must be yes." This explanation was incorrect. The error was

---

[4] This is markedly distinguishable from the Penal Law (see Penal Law $ 130.05 [2]; see also New York State Education Department, Complying with Education Law article 129-B at 10 [2016]).

compounded when petitioner next inquired whether the consent standard applied to both parties, and Blaise explained that the obligation applied to the person initiating the sexual activity. When petitioner asked, "How do you define initiation?" Blaise explained "that you initiated sexual intercourse by penetrating her." This, too, was erroneous for the concepts of consent and initiation pertain to either verbal communication or the conduct between the participants, not simply the physical act of penetration.

Blaise's mistakes raise a concern with regard to the Board's determination, which was, simply, that petitioner was responsible for violating the Student Conduct Manual because he "initiated sexual intercourse with another student three different times without establishing affirmative consent." By this determination, the Board failed to provide the requisite "findings of fact ... [and] rationale for the decision and the sanction" (Education Law § 6444 [5] [b]). As a consequence of Blaise's erroneous interpretations, we, like petitioner, are unable to discern whether the Board properly determined that petitioner initiated the sexual activity or even considered whether affirmative consent was given based on the reporting individual's conduct.

On this record, we believe that remittal for a new hearing is the appropriate remedy (see Matter of Monnat v State Univ. of N.Y. at Canton, 125 AD3d at 1177; Matter of Boyd v State Univ. of N.Y. at

Cortland, 110 AD3d at 1176; Matter of Kalinsky v State Univ. of N.Y. at Binghamton, 161 AD2d 1006, 1007-1008 [1990]). Upon such remittal, SUNY must provide a process that complies with the mandates of the Enough is Enough Law. As a final matter, we are unable to conclude, on this record, that the facts presented fail to support the violation, but we otherwise decline to consider petitioner's challenge to the sufficiency of the evidence presented to the Board.

McCarthy, J.P., and Clark, J., concur.

Devine, J, (concurring in part and dissenting in part.)

We agree with our colleagues that respondent Butterfly Blaise, in her capacity as Title IX Coordinator at the State University of New York at Plattsburgh (hereinafter SUNY), prejudicially misled respondent Student Conduct Board (hereinafter the Board) as to what it meant to say that a person initiated sexual activity and whether the student accusing petitioner of sexual assault (hereinafter the reporting individual) could give affirmative consent to sexual activity through her actions. We part ways on the issue of whether petitioner's due process rights were violated when he was denied an opportunity to question the reporting individual as opposed to Blaise. We believe that they were and, moreover, view that deprivation as so egregious that annulment without remittal is called for.

Our colleagues point out, and we agree, that "the Enough is Enough Law [L 2015, ch 76] does not

require a college to permit cross-examination of a complainant or a witness" (Matter of Doe v Skidmore Coll., 152 AD3d 932, 934 [2017]). The Enough is Enough Law does, however, entitle an accused student to a "fair, impartial (process that] provides adequate notice and a meaningful opportunity to be heard" (Education Law § 6443 [4]). It also entitles a reporting individual, who may or may not be the actual victim (see Education Law § 6439 [9]), to file a report and "remain private at all times" if he or she wishes to do so (Education Law § 6444 [1] [f]). That being said, an assurance of privacy under the law only prevents the disclosure of information "necessary to comply with ... applicable laws" (Education Law 6439 [6]). It therefore does not prevent disclosure of information needed, as information from a reporting individual may be, to comply with statutory provisions ensuring that an accused student receive notice of "the date, time, location and factual allegations concerning the violation" and have an opportunity to participate in the investigation (Education Law § 6444 [5] [b] [i]). More importantly, where disciplinary charges of sexual misconduct are involved, the information may well have to be disclosed for the accused student's "review [of] ... available [and relevant] evidence in the case file, or otherwise in the possession or control of the institution" and at the hearing itself (Education Law § 6444 [5] [c] [v]; see Education Law & 6444 [5] [b] [ii]).

There is accordingly nothing in the law that prevents a reporting individual from participating in a disc hearing. Indeed, a reporting individual is only afforded the right to decide whether to participate without "pressure by the institution" (Education Law 6443 [3]). It is not institutional pressure to say that a reporting individual will need to participate in the disciplinary process or risk hindering it, perhaps fatally so. If accounts of what transpired materially differ, for example, the testimony of a reporting individual may be needed to overcome the "presumption that the [accused student] is 'not responsible'" (Education Law § 6444 [5] [c] [ii]).

Provisions of SUNY's Student Conduct Manual, in fact, suggest that the testimony of a reporting individual is to be anticipated. The manual affords an accused student the right to a hearing, "[t]he right to bring witnesses" and "[t]he right to question any witnesses presented." The manual also directs that, in cases involving accusations of sexual assault, "reasonable accommodations" be made to "facilitate" the questioning of a reporting individual at a hearing without imperiling his or her safety.

In any event, as the Department of Education has recognized - and contrary to the assertion of our colleagues – provisions of the Enough is Enough Law dictating the appropriate response to reports of misconduct only set the "minimum requirements for cases of sexual and interpersonal violence" to be followed by all institutions and do not speak to "the

[c]onstitutional due process requirements that apply to public colleges" (New *Yo*rk State Education Department, Complying with Education Law article 129-B at 26 [2016], available at http*://w*ww.highered.nysed.go*v/ oc*u*e*/do*cument*s/A*rticle129-BGuidance.pdf). *A* right to due process is afforded to accused students by the Student Conduct Manual but, even if it were not, "[a] public university must also provide its students with the full panoply of due process guarantees" in disciplinary matters (Matter of Nawa*z* v State Univ. of N.Y. Univ. at Buffalo School of Dental Medicine, 295 AD2d 944, 944 [2002] [internal quotation marks and citation omitted]; see US Const, amend XIV, $ 1; NY Const, art I, § 6; Matter of Mary M. v Clark, 100 AD2d 41, 43 [1984]; cf. Matter of Doe v Skidmore Coll., 152 AD3d at 934-935 [addressing student discipline at a private institution]).

"Due process is, of course, a flexible concept that calls for such procedural protections as the particular situation demands" (People v Aviles, 28 NY3d 497, 505 [2016]; see Mathews v Eldridge, 424 US 319, 334-335 [19761). In order to determine what protections are appropriate in a given situation, the factors to be considered are: "(A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (c) the governmental interest at stake" (Nelson v Colorado, _ US _, _, 137 S Ct 1249, 1255 [2017]; see Mathews v Eldridge, 424 US at 335; Matter of State of New York

v Floyd Y., 22 NY3d 95, 105 [2013]). In the student disciplinary context, due process entitles an accused student to "the names of the witnesses against him or her), the opportunity to present a defense, and the results and finding of the hearing" (Matter of Gruen v Chase, 215 AD2d 481, 481 [1995]; accord Matter of Lambraia v State Univ. of N.Y. at Binghamton, 135 AD3d 1144, 1146 [2016]; see Matter of Schwarzmueller v State Univ. of N.Y. at Potsdam, 105 AD3d 1117, 1119 [2013]). There is only "a limited right to [confront and] cross-examine adverse witnesses" in administrative proceedings, however, so the question is whether the balance of interests in this case afforded that right to petitioner (Matter of Weber v State Univ. of N.Y., Coll. at Cortland, 150 AD3d 1429, 1432 [2017] [internal quotation marks and citations omitted); see Matter of Gordon v Brown, 84 NY2d 574, 578 [1994]; see also Winnick v Manning, 460 F2d 545, 550 [2d Cir 1972]). [1]

Cross-examination is not required in all school disciplinary proceedings for the reason that these proceedings lie along a spectrum of seriousness, with

---

[1] The opportunity to cross-examine an adverse witness is guaranteed by statute in situations where a public agency is obliged to hold an adjudicatory hearing (see State Administrative Procedure Act $$ 102 [3]; 306 [3]). A hearing is not required under the minimum requirements set by Education Law § 6444 (5) (b) (see Matter of Doe v Skidmore Coll., 152 AD3d at 934), rendering the protections of the State Administrative Procedure Act inapplicable (see Matter of Gruen v Chase, 215 AD2d at 481; Matter of Mary M. v Clark, 100 AD2d at 43).

many involving picayune offenses and resulting in penalties that involve little beyond temporary embarrassment and a setback such as suspensions for weeks or months (see Blanton v State Univ. of N.Y., 489 F2d 377, 381-382 [2d Cir 1973]; Winnick v Manning, 460 F2d at 547-548; see also Goss v Lopez, 419 US 565, 584 [1975] ["rudimentary procedures" in disciplinary proceedings will suffice for students facing short suspensions, but "[l]onger suspensions or expulsions ... may require more formal procedures"]). The disciplinary proceeding here lies on the extreme end of that spectrum and its outcome was of great personal importance to petitioner, as "[a] finding of responsibility for a sexual offense can have a 'lasting impact' on [his] personal life, in addition to his 'educational and employment opportunities,' especially" because an established finding of sexual violence would and did result in permanent dismissal from SUNY (Doe v University of Cincinnati, 872 F3d 393, 400 [6th Cir 2017], quoting Doe v Cummins, 662 Fed Appx 437, 446 [6th Cir 2016]; see Plummer v University of Houston, 860 F3d 767, 773 [5th Cir 2017]).

SUNY has important countervailing interests in ensuring that reports of sexual misconduct are adequately addressed (see Education Law § 6443 [2]), preventing the "potential emotional trauma" the reporting individual might face should she be hauled into the hearing room to testify (Doe v University of Cincinnati, 872 F3d at 403) and "preserving its

limited administrative resources" (Plummer v University of Houston, 860 F3d at 773; see Goss v Lopez, 419 US at 580). That being said, producing reporting individual could have been accomplished with little impact on those concerns. The reporting individual was observing the hearing electronically and could have related her version of events to the Board in the same way. Indeed, respondent Larry Allen, SUNY's Director of Student Conduct and the Hearing Officer, was empowered under SUNY's Student Conduct Manual to make this "reasonable accommodation[]" to "facilitate" her participation or, alternatively, could have allowed her to testify "with a room partition" separating her from petitioner "or [by] asking/responding to questions indirectly via the [H]earing [O]fficer.[2]

---

[2] At the time of the hearing, the administrative guidance provided by the United States Department of Education warned against allowing an accused student unfettered cross-examination (see United States Department of Education Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence at 31 [Apr. 29, 2014), available at https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf). The guidance has since been rescinded due to, among other things, concerns that the procedures it recommended were fundamentally unfair to accused students (see United States Department of Education Office of Civil Rights, Dear Colleague Letter at 1 [Sept. 22, 2017], available at https://www2.ed.gov/ about/offices/list/ocr/ letters/colleague-title-ix-201709.pdf). In any event, even the 2014 guidance found that cross-examination would be appropriate if it was conducted through procedures akin to those set forth in SUNY's Student Conduct Manual (see United States Department of Education Office for Civil Rights,

As for the risk of erroneous deprivation absent confrontation, it was significant. Petitioner and the reporting individual made statements to Blaise about the incident that were related by Blaise at the hearing and the hearsay statements materially differed as to how the sexual contact was initiated and what the reporting individual did and said throughout. For example, Blaise related how she was drunk, did not recall who made the telephone call that resulted in petitioner coming to her room and may have blacked out when sexual intercourse was initiated. Blaise reported the statements of petitioner, in contrast, that he and the reporting individual were "pretty drunk," but that gave no hint as to whether either was insensible. Petitioner instead allegedly told Blaise that he and the reporting individual began making out after he arrived at her room. He asked the reporting individual about anal sex but dropped the subject when she expressed ambivalence, after which she removed her own clothes except for a short shirt, the two engaged in foreplay that included her manually stimulating him and she told him to "[b]e careful" due to his girth when he began engaging in vaginal sex. The Board was asked to determine which of these

---

Questions and Answers on Title IX and Sexual Violence at 31 [Apr. 29, 2014], available at https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title ix.pdf).

accounts should be believed, a task that was hampered by its inability to hear the reporting individual offer her account firsthand and have that account, including her claims of extreme intoxication and lack of recollection, challenged by cross-examination. Blaise's trusted role as trainer, advisor and presenter compounded this problem, adding the imprimatur of authority and truthfulness to the hearsay that she was repeating, concomitantly impeaching petitioner. As such, Blaise ostensibly vouched for and bolstered the credibility of the absent reporting individual, enhancing the impact of the hearsay. She further submitted her findings of fact and conclusions of law at the hearing. In essence, "that's what she told me" became "that's what happened" and this alone was deemed sufficient to overcome the presumption that petitioner was "not responsible" (Education Law $ 6444 [5] [c] [ii]). It is troubling that the Board, duty bound to determine who to believe when faced with competing of events, resolved this fundamental credibility issue without having had the opportunity to directly gauge the reporting individual's credibility. Indeed, petitioner voiced his frustration with this situation on the record, asserting that Blaise had misrepresented his own account and that he did not remember who initiated sexual activity, but that the reporting individual had "encouraged . . . all activities" over the course of their night- and morning-long encounter. He further disputed various details of the reporting

individual's account, but stated that he felt forced to "assume that everything [the reporting individual] said [to Blaise] was true" in the absence of a chance to question her and observe her demeanor. In this swirl of confusion as to the accuracy of Blaise's hearsay account of her interviews with the reporting individual and petitioner, as well as what the two actually remembered about the encounter, there is no doubt that allowing petitioner "to confront and question" the reporting individual in one form or another "would have .....aided the truth-seeking process and reduced the likelihood of an erroneous deprivation" (Doe v University of Cincinnati, 872 F3d at 404).

The manner in which petitioner conducted himself at times throughout these proceedings – while unfortunate – does not take away from the need to provide a fair and just process. After balancing the relevant factors in a case that "had resolved itself into a problem of credibility" begging for cross examination to resolve, we cannot escape the conclusion that due process demanded an opportunity for petitioner to conduct it directly or via a method set forth in SUNY's Student Conduct Manual (Winnick v Manning, 460 F2d at 550; see Goldberg v Kelly, 397 US 254, 269 [1970]; Gomes v University of Maine Sys., 365 F Supp 2d 6, 27 [D Me 2005); Matter of Hecht v Monaghan, 307 NY 461, 470 [1954]; cf. Flaim v Medical Coll. of Ohio, 418 F3d 629, 641 [6th Cir 2005]). The Hearing Officer deprived petitioner of that right without a

second thought - notwithstanding that the reporting individual was electronically present – and prevented the Board from hearing readily available testimony that was key to its assessment of credibility. Particularly in conjunction with the Hearing Officer's further willingness to allow Blaise to offer an inaccurate and prejudicial definition of affirmative consent and the term initiate, we "see no justification for remitting the matter for a new hearing and, thus, affording [SUNY] a second opportunity to establish a competent case against petitioner" (Matter of DiCaprio v Trzaskos, 203 AD2d 759, 761 n [1994]; see Matter of Girard v City of Glens Falls, 173 AD2d 113, 117-118 [1991], lv denied 79 NY2d 757 [1992]). We would therefore annul the determination and expunge all references to this matter from petitioner's school record.

Pritzker, J., concurs

ADJUDGED that the determination is annulled, without costs, and matter remitted to the State University of New York at Plattsburgh for further proceedings not inconsistent with this Court's decision.

ENTER:

/s/

Robert D. Mayberger
Clerk of the Court

APPENDIX F

CONSTITUTION AND STATUTES

CONSTITUTION OF THE UNITED STATES
Article. IV, Section 2.
The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

Amendment V.
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be

twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1.
All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U. S. Code Section 1257, State courts; certiorari.
(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or

authority exercised under, the United States.

APPENDIX G

Education Law S6441. Affirmative consent to sexual activity

Effective: October 5, 2015

1. Every institution shall adopt the following definition of affirmative consent as part of its code of conduct: "Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression."

2. Each institution's code of conduct shall reflect the following principles as guidance for the institution's community:

a. Consent to any sexual act or prior consensual sexual activity between or with any party does not necessarily constitute consent to any other sexual act.

b. Consent is required regardless of whether the

person initiating the act is under the influence of drugs and/or alcohol.

c. Consent may be initially given but withdrawn at any time.
d. Consent cannot be given when a person is incapacitated, which occurs when an individual lacks the ability to knowingly choose to participate in sexual activity. Incapacitation may be caused by the lack of consciousness or being asleep, being involuntarily restrained, or if an individual otherwise cannot consent. Depending on the degree of intoxication, someone who is under the influence of alcohol, drugs, or other intoxicants may be incapacitated and therefore unable to consent.
e. Consent cannot be given when it is the result of any coercion, intimidation, force, or threat of harm.
f. When consent is withdrawn or can no longer be given, sexual activity must stop.

STATE OF NEW YORK

5965

2015-2016 Regular Sessions

IN S E N A TE

June 14, 2015

Introduced by Sen. LAVALLE -- (at request of the Governor) -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the education law, in relation to the implementation by colleges and universities of sexual assault, dating violence, domestic violence and stalking prevention and response policies and procedures; and to amend the civil practice law and rules, in relation to privacy of name in certain legal challenges to college/university disciplinary findings; and making appropriations therefor

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The education law is amended by adding a new article 129-B to read as follows:

ARTICLE 129-B

IMPLEMENTATION BY COLLEGES AND UNIVERSITIES OF SEXUAL ASSAULT, DATING VIOLENCE, DOMESTIC VIOLENCE AND STALKING PREVENTION AND RESPONSE POLICIES AND PROCEDURES

S 6439. DEFINITIONS. AS USED IN THIS ARTICLE, THE FOLLOWING TERMS HAVE THE FOLLOWING MEANINGS:

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [] is old law to be omitted.

1. "INSTITUTION" SHALL MEAN ANY COLLEGE OR UNIVERSITY CHARTERED BY THE REGENTS OR INCORPORATED BY SPECIAL ACT OF THE LEGISLATURE THAT MAINTAINS A CAMPUS. IN NEW YORK

2. "TITLE IX COORDINATOR" SHALL MEAN THE

TITLE IX COORDINATOR AND/OR HIS OR HER DESIGNEE OR DESIGNEES.
3. "BYSTANDER" SHALL MEAN A PERSON WHO OBSERVES A CRIME, IMPENDING CRIME, CONFLICT, POTENTIALLY VIOLENT OR VIOLENT BEHAVIOR, OR CONDUCT THAT IS IN VIOLATION OF RULES OR POLICIES OF AN INSTITUTION.
4. "CODE OF CONDUCT" SHALL MEAN THE WRITTEN POLICIES ADOPTED BY AN INSTITUTION GOVERNING STUDENT BEHAVIOR, RIGHTS, AND RESPONSIBILITIES 11 WHILE SUCH STUDENT IS MATRICULATED IN THE INSTITUTION.
5. "CONFIDENTIALITY" MAY BE OFFERED BY AN INDIVIDUAL WHO IS NOT REQUIRED BY LAW TO REPORT KNOWN INCIDENTS OF SEXUAL ASSAULT OR OTHER CRIMES TO INSTITUTION OFFICIALS, IN A MANNER CONSISTENT WITH STATE AND FEDERAL LAW, INCLUDING BUT NOT LIMITED TO 20 U.S.C. 1092 (F) AND 20 U.S.C. 1681 (A). LICENSED MENTAL HEALTH COUNSELORS, MEDICAL PROVIDERS AND PASTORAL COUNSELORS ARE EXAMPLES OF INSTITUTION EMPLOYEES WHO MAY OFFER CONFIDENTIALITY.
6. "PRIVACY" MAY BE OFFERED BY AN INDIVIDUAL WHEN SUCH INDIVIDUAL IS UNABLE TO OFFER CONFIDENTIALITY UNDER THE LAW BUT SHALL STILL NOT DISCLOSE

INFORMATION LEARNED FROM A REPORTING INDIVIDUAL OR BYSTANDER TO A CRIME OR INCIDENT MORE THAN NECESSARY TO COMPLY WITH THIS AND OTHER APPLICABLE LAWS, INCLUDING INFORMING APPROPRIATE INSTITUTION OFFICIALS. INSTITUTIONS *M*AY SUBSTITUTE ANOTHER RELEVANT TERM HA*V*ING THE SAME MEANING, AS APPROPRIATE TO THE POLICIES OF THE INSTITUTION.

7. "ACCUSED" SHALL MEAN A PERSON ACCUSED OF A VIOLATION WHO HAS NOT YET ENTERED AN INSTITUTION'S JUDICIAL OR CONDUCT PROCESS.

8. "RESPONDENT" SHALL MEAN A PERSON ACCUSED OF A VIOLATION WHO HAS ENTERED AN INSTITUTION'S JUDICIAL OR CONDUCT PROCESS.

9. "REPORTING INDIVIDUAL" SH*A*LL ENCOMPASS THE TERMS *V*ICTIM, SURVIVOR, COMPLAINANT, CLAIMANT, WITNESS WITH VICTIM STATUS, AND ANY OTHER TERM USED BY AN INSTITUTION TO REFERENCE AN INDIVIDUAL WHO BRINGS FORTH A REPORT OF A VIOLATION.

10. "SEXUAL ACTIVITY" SHALL HAVE THE SAME MEANING AS "SEXUAL ACT" AND "SEXUAL CONTACT" AS PROVIDED IN 18 U.S.C. 2246 (2) AND 18 U.S.C. 2246 (3).

11. "DOMESTIC VIOLENCE", "DATING VIOLENCE", "STALKING" AND "SEXUAL

ASSAULT" SHALL BE DEFINED BY EACH INSTITUTION IN ITS CODE OF CONDUCT IN A MANNER CONSISTENT WITH APPLICABLE FEDERAL DEFINITIONS.

S 6440. GENERAL PROVISIONS.

1. EVERY INSTITUTION SHALL:

A. ADOPT WRITTEN RULES IMPLEMENTING THIS ARTICLE BY AMENDING ITS CODE OF CONDUCT OR OTHER COMPARABLE POLICIES;

B. ANNUALLY FILE WITH THE DEPARTMENT ON OR BEFORE THE FIRST DAY OF JULY, BEGINNING IN TWO THOUSAND SIXTEEN, A CERTIFICATE OF COMPLIANCE 44 WITH THE PROVISIONS OF THIS ARTICLE; AND

C. FILE A COPY OF ALL WRITTEN RULES AND POLICIES ADOPTED AS REQUIRED IN THIS ARTICLE WITH THE DEPARTMENT ON OR BEFORE THE FIRST DAY OF JULY, TWO THOUSAND SIXTEEN, AND ONCE EVERY TEN YEARS THEREAFTER, EXCEPT THAT

THE SECOND FILING SHALL COINCIDE WITH THE REQUIRED FILING UNDER ARTICLE ONE HUNDRED TWENTY-NINE-A OF THIS CHAPTER, AND CONTINUE ON THE SAME CYCLE THEREAFTER.

2. ALL INSTITUTIONAL SERVICES AND PROTECTIONS AFFORDED TO REPORTING INDIVIDUALS UNDER THIS ARTICLE SHALL BE

AVAILABLE TO ALL STUDENTS AND APPLICABLE TO CONDUCT THAT HAS A REASONABLE CONNECTION TO THAT INSTITUTION. WHEN SUCH CONDUCT INVOLVES STUDENTS OR EMPLOYEES FROM TWO OR MORE 55 INSTITUTIONS, SUCH INSTITUTIONS MAY WORK COLLABORATIVELY TO ADDRESS THE CONDUCT PROVIDED THAT SUCH COLLABORATION COMPLIES WITH THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT CODIFIED AT 20 U.S.C. 1232G; 34 C.F.R. 2 PART 99.

3. IF AN INSTITUTION FAILS TO FILE A CERTIFICATE OF COMPLIANCE ON OR BEFORE SEPTEMBER FIRST BEGINNING IN TWO THOUSAND SIXTEEN, SUCH INSTITU- TION SHALL BE INELIGIBLE TO RECEIVE STATE AID OR ASSISTANCE UNTIL IT FILES SUCH A CERTIFICATE. THE DEPARTMENT SHALL CONDUCT AUDITS OF INSTITUTIONS BY RANDOM SELECTION, AT ANY TIME AFTER SEPTEMBER FIRST, TWO THOUSAND SIXTEEN, TO ENSURE COMPLIANCE WITH THE PROVISIONS OF THIS ARTICLE, AND SHALL POST INFORMATION AND STATISTICS REGARDING COMPLIANCE WITH THIS ARTICLE ON THE DEPARTMENT'S WEBSITE.

4. A COPY OF SUCH RULES AND POLICIES SHALL BE PROVIDED BY EACH INSTITUTION TO ALL STUDENTS ENROLLED IN SAID INSTITUTION USING A METHOD AND MANNER

APPROPRIATE TO ITS INSTITUTIONAL CULTURE. EACH INSTITUTION SHALL ALSO POST SUCH RULES AND POLICIES ON ITS WEBSITE IN AN EASILY ACCESSIBLE MANNER TO THE PUBLIC.

5. THE PROTECTIONS IN THIS ARTICLE APPLY REGARDLESS OF RACE, COLOR, NATIONAL ORIGIN, RELIGION, CREED, AGE, DISABILITY, SEX, GENDER IDENTITY OR EXPRESSION, SEXUAL ORIENTATION, FAMILIAL STATUS, PREGNANCY, PREDISPOSING GENETIC CHARACTERISTICS, MILITARY STATUS, DOMESTIC VIOLENCE VICTIM STATUS, OR CRIMINAL CONVICTION.

6. THE PROVISIONS OF THIS ARTICLE SHALL APPLY REGARDLESS OF WHETHER THE VIOLATION OCCURS ON CAMPUS, OFF CAMPUS, OR WHILE STUDYING ABROAD.

7. INSTITUTIONS SHALL, WHERE APPROPRIATE, UTILIZE APPLICABLE STATE AND FEDERAL LA*W*, REGULATIONS, AND GUIDANCE IN WRITING THE POLICIES REQUIRED PURSUANT TO THIS ARTICLE.

8. NOTHING IN THIS ARTICLE SHALL BE CONSTRUED TO LIMIT IN ANY WAY THE PROVISIONS OF THE PENAL LAW THAT APPLY TO THE CRIMINAL ACTION ANALOGOUS TO THE STUDENT CONDUCT CODE VIOLATIONS REFERENCED HEREIN. ACTION PURSUED THROUGH THE CRIMINAL JUSTICE PROCESS

SHALL BE GOVERNED BY THE PENAL LAW AND THE CRIMINAL PROCEDURE LAW.
9. NOTHING IN THIS ARTICLE SHALL BE CONSTRUED TO CREATE A NEW PRIVATE RIGHT OF ACTION FOR ANY PERSON.
10. NOTHING IN THIS ARTICLE SHALL BE CONSTRUED TO PREVENT AN INSTITUTION FROM CONTINUING AN INVESTIGATION WHEN REQUIRED BY LAW TO CONTINUE SUCH INVESTIGATION.
S 6441. AFFIRMATIVE CONSENT TO SEXUAL ACTIVITY.
1. EVERY INSTITUTION SHALL ADOPT THE FOLLOWING DEFINITION OF AFFIRMATIVE CONSENT AS PART OF ITS CODE OF CONDUCT: "AFFIRMATIVE CONSENT IS A KNOWING, VOLUNTARY, AND MUTUAL DECISION AMONG ALL PARTICIPANTS TO ENGAGE IN SEXUAL ACTIVITY. CONSENT CAN BE GIVEN BY WORDS OR ACTIONS, AS LONG AS THOSE WORDS OR ACTIONS CREATE CLEAR PERMISSION REGARDING WILLINGNESS TO ENGAGE IN THE SEXUAL ACTIVITY. SILENCE OR LACK OF RESISTANCE, IN AND OF ITSELF, DOES NOT DEMONSTRATE CONSENT. THE DEFINITION OF CONSENT DOES NOT VARY BASED UPON A PARTICIPANT'S SEX, SEXUAL ORIENTATION, GENDER IDENTITY, OR GENDER EXPRESSION."
2. EACH INSTITUTION'S CODE OF CONDUCT SHALL REFLECT THE FOLLOWING PRINCIPLES

AS GUIDANCE FOR THE INSTITUTION'S COMMUNITY :

A. CONSENT TO ANY SEXUAL ACT OR PRIOR CONSENSUAL SEXUAL ACTIVITY BETWEEN OR WITH ANY PARTY DOES NOT NECESSARILY CONSTITUTE CONSENT TO ANY OTHER SEXUAL ACT.

B. CONSENT IS REQUIRED REGARDLESS OF WHETHER THE PERSON INITIATING THE ACT IS UNDER THE INFLUENCE OF DRUGS AND/OR ALCOHOL.

C. CONSENT MAY BE INITIALLY GIVEN BUT WITHDRAWN AT ANY TIME.

D. CONSENT CANNOT BE GIVEN WHEN A PERSON IS INCAPACITATED, WHICH OCCURS WHEN AN INDIVIDUAL LACKS THE ABILITY TO KNOWINGLY CHOOSE TO PARTICIPATE IN SEXUAL ACTIVITY. INCAPACITATION MAY BE CAUSED BY THE LACK OF CONSCIOUSNESS OR BEING ASLEEP, BEING INVOLUNTARILY RESTRAINED, OR IF AN INDIVIDUAL OTHERWISE CANNOT CONSENT. DEPENDING ON THE

DEGREE OF INTOXICATION, SOMEONE WHO IS UNDER THE INFLUENCE OF ALCOHOL, DRUGS, OR OTHER INTOXICANTS MAY BE INCAPACITATED AND THEREFORE UNABLE TO CONSENT.

E. CONSENT CANNOT BE GIVEN WHEN IT IS THE RESULT OF ANY COERCION, INTIMIDATION, FORCE, OR THREAT OF HARM.

F. WHEN CONSENT IS WITHDRAWN OR CAN NO LONGER BE GIVEN, SEXUAL ACTIVITY MUST STOP.

S 6442. POLICY FOR ALCOHOL AND/OR DRUG USE AMNESTY.

1. EVERY INSTITUTION SHALL ADOPT AND IMPLEMENT THE FOLLOWING POLICY AS PART OF ITS CODE OF CONDUCT: "THE HEALTH AND SAFETY OF EVERY STUDENT AT THE INSTITUTION IS OF UTMOST IMPORTANCE. INSTITUTION RECOGNIZES THAT STUDENTS WHO HA*V*E BEEN DRINKING AND/OR USING DRUGS (WHETHER SUCH USE IS VOLUNTARY OR INVOLUNTARY) AT THE TIME THAT VIOLENCE, INCLUDING BUT NOT LIMITED TO DOMESTIC *V*IOLENCE, DATING VIOLENCE, STALKING, OR SEXUAL ASSAULT OCCURS MAY BE HESITANT TO REPORT SUCH INCIDENTS DUE TO FEAR OF

POTENTIAL C*O*NSEQUENCES FOR THEIR OWN CONDUCT. INSTITUTION STRONGLY ENCOURAGES STUDENTS TO REPORT DOMESTIC VIOLENCE D*A*TING VIOLENCE, STALKING, OR SEXUAL ASSAULT TO INSTITUTION OFFICIALS. A BYSTANDER ACTING IN GOOD FAITH OR A REPORTING INDIVIDUAL ACTING IN GOOD FAITH THAT DISCLOSES ANY INCIDENT OF DOMESTIC VIOLENCE, DATING VIOLENCE, STALKING, OR SEXUAL ASSAULT TO {INSTITUTION'S} OFFICIALS OR LAW ENFORCEMENT WILL NOT BE SUBJECT TO {INSTITUTION'S} CODE OF CONDUCT ACTION FOR VIOLATIONS OF ALCOHOL AND/OR DRUG USE POLICIES OCCURRING AT OR NEAR THE TIME OF THE COMMISSION OF THE DOMESTIC VIOLENCE, DATING VIOLENCE, STALKING, OR SEXUAL ASSAULT."

2. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO LIMIT AN INSTITUTION'S ABILITY TO PROVIDE AMNESTY IN ADDITIONAL CIRCUMSTANCES.

S 6443. STUDENTS' BILL OF RIGHTS.

EVERY INSTITUTION SHALL ADOPT AND IMPLEMENT THE FOLLOWING "STUDENTS' BILL OF RIGHTS" AS PART OF ITS CODE OF CONDUCT WHICH SHALL BE DISTRIBUTED ANNUALLY TO STUDENTS, MADE A*V*AIL ABLE ON EACH INSTITUTION'S WEBSITE, POSTED IN

CAMPUS RESIDENCE HALLS AND CAMPUS CENTERS, AND SHALL INCLUDE LINKS OR INFORMATION TO FILE A REPORT AND SEEK A RESPONSE, PURSUANT TO SECTION SIXTY-FOUR HUNDRED FORTY-FOUR OF THIS ARTICLE, AND THE OPTIONS FOR CONFIDENTIAL DISCLOSURE PURSUANT TO SECTION SIXTY-FOUR HUNDRED FORTY-SIX OF THIS ARTICLE: "ALL STUDENTS HAVE THE RIGHT TO:

1. MAKE A REPORT TO LOCAL LAW ENFORCEMENT AND/OR STATE POLICE;

2. HAVE DISCLOSURES OF DOMESTIC VIOLENCE, DATING VIOLENCE, STALKING, AND SEXUAL ASSAULT TREATED SERIOUSLY;

3. MAKE A DECISION ABOUT WHETHER OR NOT TO DISCLOSE A CRIME OR VIOLATION AND PARTICIPATE IN THE JUDICIAL OR CONDUCT PROCESS AND/OR CRIMINAL JUSTICE PROCESS FREE FROM PRESSURE BY THE INSTITUTION;

4. PARTICIP*A*TE IN A PROCESS THAT IS FAIR, IMPARTIAL, AND PROVIDES ADEQUATE NOTICE AND A MEANINGFUL OPPORTUNITY TO BE HEARD;

5. BE TREATED WITH DIGNITY AND TO RECEIVE FROM THE INSTITUTION COURTEOUS, FAIR, AND RESPECTFUL HEALTH CARE AND COUNSELING SERVICES, WHERE *A*VAILABLE;

6. BE FREE FROM ANY SUGGESTION THAT THE REPORTING INDIVIDUAL IS AT FAULT WHEN THESE CRIMES AND VIOLATIONS ARE COMMITTED, OR 48 SHOULD HAVE ACTED IN A DIFFERENT MANNER TO AVOID SUCH CRIMES OR VIOLATIONS;
7. DESCRIBE THE INCIDENT TO AS FEW INSTITUTION REPRESENTATIVES AS PRACTICABLE AND NOT BE REQUIRED TO UNNECESSARILY REPEAT A DESCRIPTION OF THE INCIDENT;
8. BE PROTECTED FROM RETALIATION BY THE INSTITUTION, ANY STUDENT, THE ACCUSED AND/OR THE RESPONDENT, AND/OR THEIR FRIENDS, FAMILY AND ACQUAINTANCES WITHIN THE JURISDICTION OF THE INSTITUTION;
9. ACCESS TO AT LEAST ONE LEVEL OF APPEAL OF A DETERMINATION;
10. BE ACCOMPANIED BY AN ADVISOR OF CHOICE WHO MAY ASSIST AND ADVISE A REPORTING INDIVIDUAL, ACCUSED, OR RESPONDENT THROUGHOUT THE JUDICIAL OR CONDUCT PROCESS INCLUDING DURING ALL MEETINGS AND HEARINGS RELATED TO SUCH PROCESS; AND
11. EXERCISE CIVIL RIGHTS AND PRACTICE OF RELIGION WITHOUT INTERFERENCE BY THE INVESTIGATIVE, CRIMINAL JUSTICE, OR JUDICIAL OR CONDUCT PROCESS OF THE

INSTITUTION."

S 6444. RESPONSE TO REPORTS. 1. EVERY INSTITUTION SHALL ENSURE THAT REPORTING INDIVIDUALS ARE ADVISED OF THEIR RIGHT TO:

A. NOTIFY UNI*V*ERSITY POLICE OR CAMPUS SECURITY, LOCAL LAW ENFORCEMENT, AND/OR STATE POLICE;

B. HAVE EMERGENCY ACCESS T*O* A TITLE IX COORDINATOR OR OTHER APPROPRIATE OFFICIAL TRAINED IN INTERVIEWING VICTIMS OF SEXUAL ASSAULT WHO SHALL BE AVAILABLE UPON THE FIRST INSTANCE OF DISCLOSURE BY A REPORTING INDIVIDUAL TO PRO*V*IDE INFOR*MA*TION REGARDING OPTIONS TO PROCEED, AND, WHERE APPLICABLE, THE IMPORTANCE OF PRESERVING EVIDENCE AND OBTAINING A SEXUAL ASSAULT FORENSIC EXAMINATION AS SOON AS POSSIBLE, AND DETAILING THAT THE CRIMINAL JUSTICE PROCESS UTILIZES DIFFERENT STANDARDS OF PROOF AND EVIDENCE AND THAT ANY QUESTIONS ABOUT WHETHER A SPECIFIC INCIDENT VIOLATED THE PENAL LAW SHOULD BE ADDRESSED TO LAW ENFORCEMENT OR TO THE DISTRICT ATTORNEY. SUCH OFFICIAL SHALL ALSO EXPLAIN WHETHER HE OR SHE IS AUTHORIZED TO OFFER THE REPORTING INDIVIDUAL CONFIDENTIALITY OR PRIV*ACY,*

AND SHALL INFORM THE REPORTING INDIVIDUAL OF OTHER REPORTING OPTIONS;
C. DISCLOSE CONFIDENTIALLY THE INCIDENT TO INSTITUTION REPRESENTATIVES, WHO MAY OFFER CONFIDENTIALITY PURSUANT TO APPLICABLE LAWS AND CAN ASSIST IN OBTAINING SERVICES FOR REPORTING INDIVIDUALS;
D. DISCLOSE CONFIDENTIALLY THE INCIDENT AND OBTAIN SERVICES FROM THE STATE OR LOCAL GOVERNMENT;
E. DISCLOSE THE INCIDENT TO INSTITUTION REPRESENTATIVES WHO CAN OFFER PRIVACY OR CONFIDENTIALITY, AS APPROPRIATE, AND CAN ASSIST IN OBTAINING RESOURCES FOR REPORTING INDIVIDUALS;
F. FILE A REPORT OF SEXUAL ASSAULT, DOMESTIC VIOLENCE, DATING VIOLENCE, AND/OR STALKING AND THE RIGHT TO CONSULT THE TITLE IX COORDINATOR AND OTHER APPROPRIATE INSTITUTION REPRESENTATIVES FOR INFORMATION AND ASSISTANCE. REPORTS SHALL BE INVESTIGATED IN ACCORDANCE WITH INSTITUTION POLICY AND A REPORTING INDIVIDUAL'S IDENTITY SHALL REMAIN PRIVATE AT ALL TIMES IF SAID REPORTING INDIVIDUAL WISHES TO MAINTAIN PRIVACY;
G. DISCLOSE, IF THE ACCUSED IS AN EMPLOYEE OF THE INSTITUTION, THE

INCIDENT TO THE INSTITUTION'S HUMAN RESOURCES AUTHORITY OR THE RIGHT TO REQUEST THAT A CONFIDENTIAL OR PRIVATE EMPLOYEE ASSIST IN REPORTING TO THE APPROPRIATE HUMAN RESOURCES AUTHORITY*;*

H. RECEIVE ASSISTANCE FROM APPROPRIATE INSTITUTION REPRESENTATIVES IN INITIATING LEGAL PROCEEDINGS IN FAMILY COURT OR CIVIL COURT; AND

I. WITHDRAW A COMPLAINT OR INVOLVEMENT FROM THE INSTITUTION PROCESS AT ANY TIME.

2. EVERY INSTITUTION SHALL ENSURE THAT, AT *A* MINIMUM, AT THE FIRST INSTANCE OF DISCLOSURE BY A REPORTING INDIVIDUAL TO AN INSTITUTION REPRESENTATIVE, THE FOLLOWING INFORMATION SHALL BE PRESENTED TO THE REPORTING INDIVIDUAL:

"YOU HAVE THE RIGHT TO MAKE A REPORT TO UNIVERSITY POLICE OR CAMPUS SECURITY, LOCAL LAW ENFORCEMENT, AND/OR STATE POLICE OR CHOOSE NOT TO REPORT;

TO REPORT THE INCIDENT TO Y*O*UR INSTITUTION;

TO BE PROTECTED BY THE INSTITUTION FROM RETALIATION FOR REPORTING AN INCIDENT;

AND TO RECEIVE ASSISTANCE AND RESOURCES FROM YOUR INSTITUTION."

3. EVERY INSTITUTION SHALL ENSURE THAT REPORTING INDIVIDUALS H*A*VE INFORMATION ABOUT RESOURCES, INCLUDING INTERVENTION, MENTAL HEALTH COUNSELING, AND MEDICAL SERVICES, WHICH SHALL INCLUDE INFORMATION ON WHETHER SUCH RESOURCES ARE A*V*AILABLE AT NO COST OR FOR A FEE. EVERY INSTITUTION SHALL ALSO PROVIDE INFORMATION ON SEXUALLY TRANSMITTED INFECTIONS, SEXU AL ASSAULT FORENSIC EXAMINATIONS, AND RESOURCES AVAILABLE THROUGH NEW YORK STATE OFFICE OF *V*ICTIM SERVICES, ESTABLISHED PURSUANT TO SECTION SIX HUNDRED TWENTY-TWO OF THE EXECUTIVE LAW.

4. EVERY INSTITUTION SHALL ENSURE THAT INDIVIDUALS ARE PROVIDED THE FOLLOWING PROTECTIONS AND ACCOMMODATIONS:

A. WHEN THE ACCUSED OR RESPONDENT IS A STUDENT, TO HAVE THE INSTITUTION ISSUE A "NO CONTACT ORDER" CONSISTENT WITH INSTITUTION POLICIES AND PROCEDURES, WHEREBY CONTINUED INTENTIONAL CONTACT WITH THE REPORTING INDIVIDUAL WOULD BE A VIOLATION OF INSTITUTION POLICY SUBJECT TO ADDITIONAL CONDUCT CHARGES; IF THE ACCUSED OR RESPONDENT AND A REPORTING 10 INDIVIDUAL OBSERVE

EACH OTHER IN A PUBLIC PLACE, IT SHALL BE THE RESPONSIBILITY OF THE ACCUSED OR RESPONDENT TO LEAVE THE AREA IMMEDIATELY AND WITHOUT DIRECTLY CONTACTING THE REPORTING INDIVIDUAL. BOTH THE ACCUSED OR RESPONDENT AND THE REPORTING INDIVIDUAL SHALL, UPON REQUEST AND CONSISTENT WITH INSTITUTION POLICIES AND PROCEDURES, BE AFFORDED A PROMPT REVIEW, REASONABLE UNDER THE CIRCUMSTANCES, OF THE NEED FOR AND 16 TERMS OF A NO CONTACT ORDER, INCLUDING POTENTIAL MODIFICATION, AND SHALL BE ALLOWED TO SUBMIT EVIDENCE IN SUPPORT OF HIS OR HER REQUEST. INSTITUTIONS MAY ESTABLISH AN APPROPRIATE SCHEDULE FOR THE ACCUSED AND RESPONDENTS TO ACCESS APPLICABLE INSTITUTION BUILDINGS AND PROPERTY AT A TIME WHEN SUCH BUILDINGS AND PROPERTY ARE NOT BEING ACCESSED BY THE REPORTING INDIVIDUAL;

B. TO BE ASSISTED BY THE INSTITUTION'S POLICE OR SECURITY FORCES, IF APPLICABLE, OR OTHER OFFICIALS IN OBTAINING AN ORDER OF PROTECTION OR, IF OUTSIDE OF NEW YORK STATE, AN EQUIVALENT PROTECTIVE OR RESTRAINING ORDER;

C. TO RECEIVE A COPY OF THE ORDER OF PROTECTION OR EQUIVALENT WHEN RECEIVED BY AN INSTITUTION AND HAVE AN OPPORTUNITY TO MEET OR SPEAK WITH AN INSTITUTION REPRESENTATIVE, OR OTHER APPROPRIATE INDIVIDUAL, WHO CAN EXPLAIN THE ORDER AND ANSWER QUESTIONS ABOUT IT, INCLUDING INFORMATION FROM THE ORDER ABOUT THE ACCUSED'S RESPONSIBILITY TO STAY *AWA*Y FROM THE PROTECTED PERSON OR PERSONS;

D. TO AN EXPLANATION OF THE CONSEQUENCES FOR VIOLATING THESE ORDERS, INCLUDING BUT NOT LIMITED TO ARREST, ADDITIONAL CONDUCT CHARGES, AND INTERIM SUSPENSION;

E. TO RECEIVE ASSISTANCE FROM UNIVERSITY POLICE OR CAMPUS SECURITY IN EFFECTING AN ARREST WHEN AN INDIVIDUAL VIOLATES AN ORDER OF PROTECTION OR, IF UNIVERSITY POLICE OR CAMPUS SECURITY DOES NOT POSSESS ARRESTING POWERS, THEN TO CALL ON AND ASSIST LOCAL LAW ENFORCEMENT IN EFFECTING AN ARREST FOR VIOLATING SUCH AN ORDER, PRO*V*IDED THAT NOTHING IN THIS ARTICLE SHALL LIMIT CURRENT L*A*W ENFORCEMENT JURISDICTION AND PROCEDURES;

F. WHEN THE ACCUSED OR RESPONDENT IS A STUDENT DETERMINED TO PRESENT A

CONTINUING THREAT TO THE HEALTH AND SAFETY OF THE COMMUNITY, TO SUBJECT THE ACCUSED OR RESPONDENT TO INTERIM SUSPENSION PENDING THE OUTCOME OF A JUDICIAL OR CONDUCT PROCESS CONSISTENT WITH THIS ARTICLE AND THE INSTITUTION'S POLICIES AND PROCEDURES. BOTH THE ACCUSED OR RESPONDENT AND THE REPORTING INDIVIDUAL SHALL, UPON REQUEST AND CONSISTENT WITH THE INSTITUTION'S POLICIES AND PROCEDURES, BE AFFORDED A PROMPT REVIEW, REASON ABLE UNDER THE CIRCUMSTANCES, OF THE NEED FOR AND TERMS OF AN INTERIM SUSPENSION, INCLUDING POTENTIAL MODIFICATION, AND SHALL BE ALLOWED TO SUBMIT EVIDENCE IN SUPPORT OF HIS OR HER REQUEST;

G. WHEN THE ACCUSED IS NOT A STUDENT BUT IS A MEMBER OF THE INSTITUTION'S COMMUNITY AND PRESENTS A CONTINUING THREAT TO THE HEALTH AND SAFETY OF THE COMMUNITY, TO SUBJECT THE ACCUSED TO INTERIM MEASURES IN ACCORDANCE WITH APPLICABLE COLLECTIVE BARGAINING AGREEMENTS, EMPLOYEE HANDBOOKS, AND RULES AND POLICIES OF THE INSTITUTION;

H. TO OBTAIN REASONABLE AND AVAILABLE INTERIM MEASURES AND ACCOMMODATIONS THAT EFFECT A CHANGE IN ACADEMIC, HOUSING, EMPLOYMENT, TRANSPORTATION

OR OTHER APPLICABLE ARRANGEMENTS IN ORDER TO HELP ENSURE SAFETY, PREVENT RETALIATION AND AVOID AN ONGOING HOSTILE ENVIRONMENT, CONSISTENT WITH THE INSTITUTION'S POLICIES AND PROCEDURES. BOTH THE A*CC*USED OR RESPONDENT AND THE REPORTING INDIVIDUAL SH*A*LL, UPON REQUEST AND CONSISTENT WITH THE INSTITUTION'S POLICIES AND PROCEDURES, BE AFFORDED A PROMPT REVIEW, REASONABLE UNDER THE CIRCUMSTANCES, OF THE NEED FOR AND TERMS OF ANY SUCH INTERIM MEASURE AND ACCOMMODATION THAT DIRECTLY AFFECTS HIM OR HER, AND SHALL BE ALLOWED TO SUBMIT EVIDENCE IN SUPPORT OF HIS OR HER REQUEST.

5. EVERY INSTITUTION SHALL ENSURE THAT EVERY STUDENT BE AFFORDED THE FOLLOWING RIGHTS:

A. THE RIGHT TO REQUEST THAT STUDENT CONDUCT CHARGES BE FILED AGAINST THE ACCUSED IN PROCEEDINGS GOVERNED BY THIS ARTICLE AND THE PROCEDURES ESTABLISHED BY THE INSTITUTION'S RULES.

B. THE RIGHT TO A PROCESS IN ALL STUDENT JUDICIAL OR CONDUCT CASES, WHERE A STUDENT IS ACCUSED OF SEXUAL ASSAULT, DOMESTIC VIOLENCE, DATING VIOLENCE, STALKING, OR SEXUAL ACTIVITY THAT MAY

OTHERWISE VIOLATE THE INSTITUTION'S CODE OF CONDUCT, THAT INCLUDES, AT A MINIMUM:

(I) NOTICE TO A RESPONDENT DESCRIBING THE DATE, TIME, LOCATION AND FACTUAL ALLEGATIONS CONCERNING THE VIOLATION, A REFERENCE TO THE SPECIFIC CODE OF CONDUCT PROVISIONS ALLEGED TO HAVE BEEN VIOLATED, AND POSSIBLE SANCTIONS;

(II) AN OPPORTUNITY TO OFFER EVIDENCE DURING AN INVESTIG*A*TION, AND TO PRESENT EVIDENCE AND TESTIMONY AT A HEARING, WHERE APPROPRIATE, AND HA*V*E ACCESS TO A FULL AND FAIR RECORD OF ANY SUCH HE*A*RING, WHICH SHALL BE PRESERVED AND MAINTAINED FOR AT LEAST FIVE YEARS FROM SUCH A HEARING AND M*A*Y INCLUDE A TRANSCRIPT, RECORDING OR OTHER APPROPRIATE RECORD; AND

(III) ACCESS TO AT LEAST ONE LEVEL OF APPEAL OF A DETERMINATION BEFORE A PANEL, WHICH M*A*Y INCLUDE ONE OR MORE STUDENTS THAT IS FAIR AND IMPARTIAL AND DOES NOT INCLUDE INDIVIDUALS WITH A CONFLICT OF INTEREST. IN ORDER TO EFFECTUATE AN APPEAL, A RESPONDENT AND REPORTING INDIVIDUAL IN SUCH CASES SHALL RECEIVE WRITTEN NOTICE OF THE FINDINGS OF FACT, THE DECISION AND THE SANCTION, IF ANY, AS WELL AS THE

RATIONALE FOR THE DECISION AND SANCTION. IN SUCH CASES, ANY RIGHTS PROVIDED TO A REPORTING INDIVIDUAL MUST BE SIMILARLY PROVIDED TO A RESPONDENT AND ANY RIGHTS PROVIDED TO A RESPONDENT MUST BE SIMILARLY PROVIDED TO A REPORTING INDIVIDUAL.

C. THROUGHOUT PROCEEDINGS INVOLVING SUCH AN ACCUSATION OF SEXUAL ASSAULT, DOMESTIC VIOLENCE, DATING VIOLENCE, STALKING, OR SEXUAL ACTIV ITY THAT MAY OTHERWISE VIOLATE THE INSTITUTION'S CODE OF CONDUCT, THE RIGHT:

I. FOR THE RESPONDENT, ACCUSED, AND REPORTING INDIVIDUAL TO BE ACCOM PANIED BY AN ADVISOR OF CHOICE WHO MAY ASSIST AND ADVISE A REPORTING INDIVIDUAL, ACCUSED, OR RESPONDENT THROUGHOUT THE JUDICIAL OR CONDUCT PROCESS INCLUDING DURING ALL MEETINGS AND HEARINGS RELATED TO SUCH PROCESS. RULES FOR PARTICIPATION OF SUCH ADVISOR SHALL BE ESTABLISHED IN THE CODE OF CONDUCT.

II. TO A PROMPT RESPONSE TO ANY COMPLAINT AND TO HAVE THE COMPLAINT INVESTIGATED AND ADJUDICATED IN AN IMPARTIAL,

TIMELY, AND THOROUGH MANNER BY INDIVIDUALS WHO RECEIVE ANNUAL TRAINING IN CONDUCTING INVESTI-GATIONS OF SEXUAL VIOLENCE, THE EFFECTS OF TRAUMA, IMPARTIALITY, THE RIGHTS OF THE RESPONDENT, INCLUDING THE RIGHT TO A PRESUMPTION THAT THE RESPONDENT IS "NOT RESPONSIBLE" UNTIL A FINDING OF RESPONSIBILITY IS MADE PURSUANT TO THE PROVISIONS OF THIS ARTICLE AND THE INSTITUTION'S P OLICIES AND PROCEDURES, AND OTHER ISSUES INCLUDING, BUT NOT LIMITED TO DOMESTIC VIOLENCE, DATING VIOLENCE, STALKING OR SEXUAL ASSAULT.

III. TO AN INVESTIGATION AND PROCESS THAT IS FAIR, IMPARTIAL AND PROVIDES A MEANINGFUL OPPORTUNITY TO BE HEARD, AND THAT IS NOT CONDUCTED BY INDIVIDUALS WITH A CONFLICT OF INTEREST.

IV. TO HAVE THE INSTITUTION'S JUDICIAL OR CONDUCT PROCESS RUN CONCUR RENTLY WITH A CRIMINAL JUSTICE INVESTIGATION AND PROCEEDING, EXCEPT FOR TEMPORARY DELAYS AS REQUESTED BY EXTERNAL MUNICIPAL ENTITIES WHILE LAW

ENFORCEMENT GATHERS EVIDENCE. TEMPORARY DELAYS SHOULD NOT LAST MORE THAN TEN DAYS EXCEPT WHEN LAW ENFORCEMENT SPECIFICALLY REQUESTS AND JUSTIFIES A LONGER DELAY.

V. TO REVIEW AND PRESENT AVAILABLE EVIDENCE IN THE CASE FILE, OR OTHERWISE IN THE POSSESSION OR CONTROL OF THE INSTITUTION, AND RELEVANT TO THE CONDUCT CASE, CONSISTENT WITH INSTITUTION POLICIES AND PROCEDURES.

VI. TO EXCLUDE THEIR OWN PRIOR SEXUAL HISTORY WITH PERSONS OTHER THAN THE OTHER PARTY IN THE JUDICIAL OR CONDUCT PROCESS OR THEIR OWN MENTAL HEALTH DIAGNOSIS AND/OR TREATMENT FROM ADMITTANCE IN THE INSTITUTION DISCIPLINARY STAGE THAT DETERMINES-RESPONSIBILITY. PAST FINDINGS OF DOMESTIC VIOLENCE, DATING VIOLENCE, STALKING, OR SEXUAL ASSAULT MAY BE ADMISSIBLE IN THE DISCIPLINARY STAGE THAT DETERMINES SANCTION.

VII. TO RECEIVE WRITTEN OR ELECTRONIC NOTICE, PROVIDED IN ADVANCE PURSUANT TO THE COLLEGE OR UNIVERSITY P*O*LICY AND REASONABLE UNDER THE

CIRCUMSTANCES, OF ANY MEETING THEY ARE REQUIRED TO OR ARE ELIGIBLE TO ATTEND, OF THE SPECIFIC RULE, RULES OR LAWS ALLEGED TO H*AV*E BEEN VIOLATED AND IN WHAT MANNER, AND THE SANCTION OR SANCTIONS THAT MAY BE IMPOSED ON THE RESPONDENT BASED UPON THE OUTCOME OF THE JUDICIAL OR CONDUCT PROCESS, AT WHICH TIME THE DESIGNATED HEARING OR INVESTIGATORY OFFICER OR PANEL SHALL PROVIDE A WRITTEN STATEMENT DETAILING THE FACTUAL FINDINGS SUPPORTING THE DETERMINATION AND THE RATIONALE FOR THE SANCTION IMPOSED.

VIII. TO MAKE AN IMPACT STATEMENT DURING THE POINT OF THE PROCEEDING WHERE THE DECISION MAKER IS DELIBERATING ON APPROPRIATE SANCTIONS.

IX. TO SIMULTANEOUS (AMONG THE PARTIES) WRITTEN OR ELECTRONIC NOTIFICATION OF THE OUTCOME OF A JUDICIAL OR CONDUCT PROCESS, INCLUDING THE SANCTION OR SANCTIONS.

X. TO BE INFORMED OF THE SANCTION OR SANCTIONS THAT MAY BE IMPOSED ON THE RESPONDENT BASED UPON THE OUTCOME OF THE JUDICIAL OR CONDUCT PROCESS AND THE

RATIONALE FOR THE ACTUAL SANCTION IMPOSED.

XI. TO CHOOSE WHETHER TO DISCLOSE OR DISCUSS THE OUTCOME OF A CONDUCT OR JUDICIAL PROCESS.

XII. TO HAVE ALL INFORMATION OBTAINED DURING THE COURSE OF THE CONDUCT OR JUDICIAL PROCESS BE PROTECTED FROM PUBLIC RELEASE UNTIL THE APPEALS PANEL MAKES A FINAL DETERMINATION UNLESS OTHERWISE REQUIRED BY LAW.

6. FOR CRIMES OF VIOLENCE, INCLUDING, BUT NOT LIMITED TO SEXUAL VIOLENCE, DEFINED AS CRIMES THAT MEET THE REPORTING REQUIREMENTS PURSUANT TO THE FEDERAL CLERY ACT ESTABLISHED IN 20 U.S.C. 48 1092 (F) (1) (F) (I) (I) - (VIII), INSTITUTIONS SHALL MAKE A NOTATION ON THE TRANSCRIPT OF STUDENTS FOUND RESPONSIBLE AFTER A CONDUCT PROCESS THAT THEY WERE "SUSPENDED AFTER A FINDING OF RESPONSIBILITY FOR A CODE OF CONDUCT VIOLATION" OR "EXPELLED AFTER A FINDING OF RESPONSIBILITY FOR A CODE OF CONDUCT VIOLATION." FOR THE RESPONDENT WHO WITHDRAWS FROM THE INSTITUTION WHILE

SUCH CONDUCT CHARGES ARE PENDING, AND DECLINES TO COMPLETE THE DISCIPLINARY PROCESS, INSTITUTIONS SHALL MAKE A NOTATION ON THE TRANSCRIPT OF SUCH STUDENTS THAT THEY "WITHDREW WITH CONDUCT CHARGES PENDING." EACH INSTITUTION SHALL PUBLISH A POLICY ON TRANSCRIPT NOTATIONS AND APPEALS SEEKING REMOVAL OF A TRANSCRIPT
App. 115
NOTATION FOR A SUSPENSION, PROVIDED THAT SUCH NOTATION SHALL NOT BE REMOVED PRIOR TO ONE YEAR AFTER CONCLUSION OF THE SUSPENSION, WHILE NOTATIONS FOR EXPUL SION SHALL NOT BE REMOVED. IF A FINDING OF RESPONSIBILITY IS VACATED FOR ANY REASON, ANY SUCH TRANSCRIPT NOTATION SHALL BE REMOVED.

7. INSTITUTIONS THAT LACK APPROPRIATE ON-CAMPUS RESOURCES OR SERVICES SHALL, TO THE EXTENT PRACTICABLE, ENTER INTO MEMORANDA OF UNDERSTANDING, AGREEMENTS OR COLLABORATIVE PARTNERSHIPS WITH EXISTING COMMUNITY-BASED ORGANIZATIONS, INCLUDING RAPE-CRISIS CENTERS AND DOMESTIC VIOLENCE SHELTERS AND ASSISTANCE ORGANIZATIONS, TO REFER STUDENTS FOR ASSISTANCE OR MAKE SERVICES AVAILABLE TO STUDENTS, INCLUDING COUNSELING, HEALTH, MENTAL

HEALTH, VICTIM ADVOCACY, AND LEGAL ASSISTANCE, WHICH MAY ALSO INCLUDE RESOURCES AND SERVICES FOR THE RESPONDENT.

8. INSTITUTIONS SHALL, TO THE EXTENT PRACTICABLE, ENSURE THAT STUDENTS HAVE ACCESS TO A SEXUAL ASSAULT FORENSIC EXAMINATION BY EMPLOYING THE USE OF A SEXUAL ASSAULT NURSE EXAMINER IN THEIR CAMPUS HEALTH CENTER OR ENTERING INTO MEMORANDA OF UNDERSTANDING OR AGREEMENTS WITH AT LEAST ONE LOCAL HEALTH CARE FACILITY TO PROVIDE SUCH A SERVICE.

9. NOTHING IN THIS ARTICLE SHALL BE DEEMED TO DIMINISH THE RIGHTS OF ANY MEMBER OF THE INSTITUTION'S COMMUNITY UNDER ANY APPLICABLE COLLECTIVE BARGAINING AGREEMENT.

APPENDIX H

Matthew Jacobson Hearing - May 10, 2016 – Transcription

Transcribed by Sherri Kowalowski 8/17/16
/s/_____

Good morning. This is Larry Allen, Director of Student Conduct. It is *5/10/*16 at about 9:07 am. We are here for a Student Conduct Board Hearing for Matthew Jacobson and he has been charged with violating sections 26, 27.02. The complainant in this case is Butterfly Blaise from the Title IX Office. And I'll come back to the reference in a moment. How we are going to proceed today is, in a moment I will have Butterfly present her case after which Matthew you will present your case. For the record Matthew has an attorney present today. He is here per our code of conduct to properly advise Matthew. From there, after Matthew presents his opening statements, the board members here today will have a chance to ask any questions of either Buttererfly or Matthew. Once they have asked their questions, I will turn over to Butterfly who will have the opportunty to ask Matthew questions. Once she is done that, Matthew, you will have a chance to ask questions of Butterfly.

From there, the Board will have another opportunity to ask any questions that they have of either Matthew or Butterfly. From there I will allow closing statements to be made and then should you wish to do so, after which the board and I will stay back so that the board can deliberate. And Matthew and Butterfly and his attorney will exit and go about their day. From there the board will deliberate and based on the preponderance of the evidence and majority vote they will determine whether or not Matthews's responsible for each charge. Once that finally is established, that will be relayed to Butterfly and Matthew and the reporting individual. I will explain that process further once we get there. So before proceed any further, I want to ask, Matthew, do you have any reason to object to any of the people serving as board members here today?
M: Can I ask who comprises the Board?
L: Sure. Each of them can introduce, I can introduce who they are as a name.
M: Alright.
L: Otherwise, is there any reasonable reason why you would object to anybody after I ask. Ultimately I'll need you to answer to anybody serving in this capacity. All board members are trained through my office and Title IX office for serving in this capacity. Our board members today are: Susan Millett, Elizabeth Bernat, Keri Lubold, Angie Cipriano. Did I pronounce that right? Cipriano. Those are our board members today comprised of, faculty, staff and

students and so otherwise having introduced the board members, do you have any reason to object to any of them of serving in this capacity? Do you know them personally in other words or anything like that?
M: Since I don't know who they are I have no reason to object or not object.
L: So we will proceed. On top of that Matthew, e*v*erything I have covered up to this point. In a moment I will read the reference that you were sent initially but do you understand the process as its been laid out explaining to you at this point?
M: Is the complaining witness going to be here to testify?
L: The Complainant is here. The reporting individual as I will cover in a moment is participating via Skype. They are simply observing the proceedings today. They are not participating in this hearing.
M: So I cannot cross examine the complainant?
L: The complainant is here.
M: I mean the reporting individual
L: Correct. The only person you can ask questions of today is the complainant.
1: Ok
L: And vice versa. Also, for the record since we have brought that up. I have already somewhat covered that the reporting individual is participating via Skype observing the case. Any concerns that my Intern Jake Goldblum, who is essentially chaperoning the other room and maintaining that we have adequate technical devices working. He will be

communicating with me via text message should we need to adjust any volume or there is a loss of a connection or something like that so I will be checking my phone for that. Also, if at any point we need to take a recess throughout the proceedings of course as permitted within reason and that will be established at that time and that pertains to anybody participating in this room or observing from another room. So Butterfly or myself might receive a message if that should be the requested and then I will make a decision as to whether or not that's appropriate and then how long that recess will be. So, moving forward as I stated earlier Matthew is charged with violating sections 26 and 27.02. 26 reads: Violation of Federal, state, or local laws in a way that affects the College community's pursuit of its educational purposes is prohibited and may subject students to disciplinary action. Such violation may be established independent of and prior to a criminal conviction. *27*.02- the second charge against Matthew Jacobson is: Sexual Violence, as outlined in Section 1 of the Student Conduct Manual is prohibited. His reference reads as follows: It was reported that on 10/3*1*/15 in 142 Harrington Hall, between 12:30am-8:am you initiated sexual intercourse with another student three different times without establishing affirmative consent. So, at this point, if you would please, Butterfly present your case: B: So I am going to provide this to you Larry for the board. It is copies of everything that I have. Sorry.

Ok. So there is an investigation report that goes with along with the different statements that I took so I am going to read that with per that investigation report. So, Introduction of Summary of Allegations, I Butterfly Blaise, Title IX Coordinator at SUNY Plattsburgh conduct a Title IX investigation regarding a charge of sexual violence filed in the Title IX office by K.H. against Matthew Jacobson, both students at SUNY Plattsburgh. The following is the introduction of the summary of the complaint provided by K.H. and filed through formal action on April 25th, 2016 with the title IX office: It is reported that on 10*/30/2*015, both K.H. and Matthew Jacobson attended a party at Theta Gamma, which is located at 6 Helen St, Plattsburgh, NY 12901. It is reported by both K.H. and Matthew Jacobson that on the early morning (around 12:30am) of 10*/31/1*5, Matthew Jacobson came to K.H.'s residence hall - Harrington Hall. K.H. reported consenting to Matthew coming to her room on this night, but not consenting to any sexual interaction that occurred during this time that Matthew was there. It is reported by both K.H. and Matthew that Matthew initiated sexual intercourse with K.H. 3 separate times - this included Matthew performing oral sex on K.H. "Fingering her" (which is manually stimulating her through penetration in her vaginal opening). It is further shown by statements taken by both K.H. and Matthew that all three times of sexual initiation included penetration - that is penetration with Matthew's penis with Matthew engaging in sex

with K.H. from the missionary position and that would be Matthew on top K.H. and that each of the three sexual acts did not include attempt or confirmation of affirmative consent. It is additionally reported that on two separate occasions, on the same night 1*0/*3*1/1*5, Matthew Jacobson tried to initiate, but did not perform, anal sex on K.H.. Additional statements, I'll go over those in a minute, So in response to the formal charge and as part of the Title IX investigation, a series of statements, interviews and information gathering was completed and is included as record in this report and is supported by attachments A-E which you will have access to after the hearing. In accordance with SUNY Plattsburgh policies and procedures, the Title IX Coordinator is responsible for investigating complaints of gender discrimination, including complaints of sexual misconduct and assault. The Title IX Coordinator, which is myself, Butterfly Blaise, contacted the Respondent with notice of the complaint and investigation, which included the general allegation of the complaint, on February 18, 2016 via in-person delivery of a 72-hr No Contact Order, as well as on February 21, 2016, in person when the Extended No Contact Order. I conducted the following interviews pursuant to the investigation. There were only 2 interviews conducted for this investigation because there were only 2 people present when the sexual interactions occurred. The first was taken by K.H. who is the reporting individual

and the second was taken from Matthew Jacobson who is the respondent and sitting here at the table. So I am going to reference attachment A which is the no contact order which was completed between Matthew Jacobson and K.H. and is on file and now I am going to read for the board K.H.'s statement. "Around 9:30pm on the night of October 30, 2015, I went to my sisters (theta Alpha Lambda Sorority) apartment where most of the girls were drinking before heading out. Around 10pm we went to the Theta Gamma fraternity for a list party. I had told Matt the night before I was coming in text and we planned to meet up there. He asked me to dance through text, but we were both intoxicated. On October 30, 2015 I saw him at the door and he let us (Me and my friends in) Then I began to drink. I finished one 24oz Twisted Tea of 5% alcohol and left his fraternity house at around 11:05pm. We went to the Sig Tau Gamma house and I drank another 24 oz 5%. I may have had 3 at this point though I do not recall, but I do recall at least 2. I also drank more of my friends alcohol but I do not know how much, or the alcohol content. I left around 12:50am October 31, 2015. I was at my friends dorm upstairs of mine (Harrington Hall) and I recall hanging out for a bit there. We (Matt &I) - and that's documented and attachments D which are text messages (which were provided by Matthew Jacobson) texted throughout the night, and around 1am at some point I recall a phone call but am not sure if I called Matthew or he called me. I do not recall what I said

but assume we arranged plans to meet up at my dorm. I think he may have said he was at his fraternity house working at some point whether that was a phone call or beforehand. At 1:21am on October 31, 2015 Matt texted me "hey" and I assume the phone call was after that as then texted him at 1:27am "where ate you have". I assume I meant to say "where are you at"? Then I texted him "are you there yet?" Are you here yet? At 1:35 am in which he replies with "I'm leaving now" and this is also outlined in the text messages which were provided by Matthew Jacobson. I do remember my friend had another unopened *2*4oz 5% Twisted Tea I started to drink at some point during this time. I recall having to answer the door for him because he lives in Macdonough and I believe he said he cannot get in past midnight which I never knew of or *f*org*o*t due to incapacitation. I recall having the Twisted Tea in my bag, and carrying a lot of things when I opened the door including my shoes. We then went to my room and went inside. I continued to drink the drink but do not recall how it came out of my bag again. I assume we were just hanging out, but remember laying down with the lights on or off. I told him I just wanted to cuddle but cannot recall how many times I said that. I do remember he said "Jen" told him that I was not that type of girl because I explained in some way that I do not sleep around. I tend to do that when I am drunk (talk about not wanting to sleep with people) and am not sure why I

do it a lot, this was one of the first things I said."
Now I am going to move into what's reported as incident #1 and 2 of sexual intercourse. "I do not recall how the intercourse was initiated the first time. I do not know the time but I recall walking up to having intercourse with him. Parts and bits are faded and I do not know how to explain what I felt. I remember certain parts and other parts feel black or like I just woke up. I guess like when you just woke up on the morning but it fades in and out. At times I think I must have been sleeping or blacked out. Though I couldn't have the do not think I blacked out from alcohol think I blacked out from pain if that is possible because I remember being in pain and when like it becomes faded to me I just remember it being very painful then waking up later. I cannot decipher what happened between the first or the .second time. I do remember certain things but do not know which time they occurred (first or second - there were 3 times) The first 2 times occurred in the middle of the night time unsure but between 2-4am. I remember continuing to drink the Twisted Tea and remembers saying something like I am not drunk enough for this which I also say when I become intoxicated sometimes. I was wearing my Halloween costume, and I dressed up as an Indian which I really just wore a dress. I do not recall my clothes coming off, except I do recall him taking my underwear off, and possibly spanx. Assuming this was before the oral sex, I recall I think

it must have been the first time I believe Matt was engaging in oral sex on my behalf. I do not remember this being initiated as a whole, so I must have blacked out somewhere before things. I remember my underwear coming off then seeing this. This is the first part I think I remember. I then recall him flipping me upwards somewhere where I believe it was over his face. I recall hearing people yell and screaming outside which was common on the weekends. Though I do not remember, I looked and the blinds were open. I remember telling him to shut them and he said something like it was okay and I said no. I think I shut them. I think this was after he was penetrating me. Though I do not recall if I blacked out here. I recall him asking if I wanted to use a condom and I do remember saying no. I think he may have penetrating me before he asked this but think that is where I blacked out. I recall discussing that I did not want to get pregnant and he said I could use Plan B as previous partners did. Though this is where everything really just is in and out from here I cannot say what is the first time or second. I went to the bathroom either before the second time or after I recall my vaginal area being very red and inflamed. I may have said no during certain times but do not recall if I did. Saying it hurt a lot and he responded with I was really tight, and I think that it felt good for him. I remember saying it was not wet a lot and I remember once he actually stopped penetration and began to engage in oral sex due to it not being lubricated I

I assume. I assume he continued after but I do not remember. I remember crying at some point but I do not know if he was aware but I believe penetration was either still occurring or had happened at least once. I think I did not want him to see me crying.
I recall giving oral sex (painfully on my behalf) but saying I can't which I do not know how many times I said that. I remember faintly telling him I have a chronic illness and cannot open my jaw that big. I remember he said something like - well, what are you going to do then. I assume this might have been after the first time but recall at first he was okay with not ejaculating. Later I think he wanted to do something to help him, he wanted me to do something to help him ejaculate or just help him in general. I remember telling him I do not know what I was going to do. It is hard to say but I think it may have affected my jaw a lot because it is a severe condition that I have. Therefore it is not normal behavior I would act on and I am unaware of how it was initiated. I recall saying Matt because I spilled my drink everywhere at some point and asking him to pick it up. I think I changed my clothes between the first and second time. The second time I do recall him ejaculating and he wanted to do it on my face or mouth or something and I said no. He asked me where and I recall saying I did not care. It was on my stomach but I wiped it off with a washcloth and then threw that on the ground. I assume because there was a washcloth there when I

woke up. At some point I went to sleep and woke up later that morning. I recalled saying if we date I would have sex a lot but only if we dated. Which at some point I do recall he tried to engage in anal sex and I said no. I do not know if it ever occurred the 1st or 2nd time but I know if did not occur the 3rd time. I remember his weight on me. Whenever I had previously engaged in sexual activity I guess I never thought of this aspect until this was happening. I remember he was heavy on top of me and I think I kept telling him that." This is moving into incident 3

The next morning I think I still may have been intoxicated. He asked me if I remembered last night, and I think I was embarrassed mainly, and said like I did not want to. I do remember saying I was really sore from last night, and I. remember this time more clearly that it did hurt a lot. I remembered when it began again thinking it did not matter because it already happened twice, and just feeling sort of hopeless. I believe he tried to take my shirt off and I said I did not want to because I am very self-conscious of my body. I think he said he already saw my body parts and I was uncomfortable with last night, and he liked them, and then took my shirt off.

I recall he wanted to do other positions, and asked me to move in them. I remember I guess feeling obligated to and moved into positions but then felt really uncomfortable and moved back to the original position. I remember he wanted to have anal sex this time and it did not happen and I said no. I do not

think there was a discussion of protection. I remember my legs hitting the wall and feeling almost embarrassed that my floormates would have to hear that. I remember just waiting for it to be over, and then he ejaculated on my stomach again and I wiped it off with a washcloth. I am not sure what time this was but I think he left around 9 or 10 am. So I assume all 3 time spans were in the span of 2-3am-10am. I recall him leaving and then I had an event that day I think around 11am. I remember going to the mirror and seeing the large hickey on my neck (that is attachment E-which is a photograph provided by K.H. Then as I recall this moment in the bathroom I link everything sort of hit me all at once. I noticed my, vaginal area and saw it was bruised purple. I was quite worried, and recall talking to my friends of what happened later." That's the end of K.H.'s statement.
Going into Matt Jacobson's statement, on February 18, 2016 Matthew Jacobson met with me at my office, Hawkins 151 to respond to a complaint made against him through the Title IX office by K.H. Below is a summary of a voluntary statement given to me on 2*/18/2*016 by Matthew Jacobson. Matthew Jacobson reported that he is currently a student at SUNY Plattsburgh who resides at 343W Macdonough Residence Hall on SUNY Plattsburgh campus. It was reported by Matthew Jacobson that on October 30, 2015 around 8pm he began drinking at his fraternity Theta Gammas' house located at 6 Helen St,

Plattsburgh, NY. Matthew reported that between 8pm and 12am he had drank 5 tall boys of Natural ice which are 25oz each of beer. Matthew reported that a party began at the house at ten with K.H. arriving at the party around 10:30. Matthew reported being unsure of whether or not he had spoken to K.H. before she arrived, and while he saw K.H. arrive at the party, Matthew reported that he and K.H. did not speak while at the party that night. Matthew reported that around 11:30 the party got busted by cops, so K.H. left and Matthew stayed behind at 6 Helen St until around 12 (midnight) Matthew reported that he received a message from K.H. around 12 midnight and they talked through text message about how they were both drunk. Matthew reported K.H. that asked him to come over to her residence hall - Harrington Hall, where he went a little after midnight on October 31, 2015. Matthew reported that on October 31st, 2015 he engaged in sexual intercourse with K.H.on 3 separate occasions. Each incidence of sexual penetration is described by Matthew Jacobson to have been initiated by Matthew.

Reported incident #1

Once at K.H.'s room, 142 Harrington Hall Matthew reported that K.H. was there and that K.H. was drinking a "tall · boy" which was reported to be a 25oz container of Twisted Tea, which is hard iced tea malt beverage. Matthew, when asked if K.H. appeared to be intoxicated at that time, responded –

yes, we texted that we were both pretty drunk. Matthew reported that he and K.H. started making out by kissing on the mouth. He reported that before engaging in any sexual activity he had asked K.H. if she would engage in anal sex, to which she is reported to have responded. "I never really thought about it". Matthew reported that there was no anal sex, but that after continuing to make out we (K.H. and Matthew) got naked. Matthew reported that he was fully naked and that K.H. had been wearing a costume, but she took it off and put on a short shirt. Matthew reported that while he and K.H. were making out, K.H. had given Matthew a hand job. He described this to be K.H. manually stimulating him with her hand, up and down the shaft of his penis. He reported that they were on K.H.'s bed and she was on the side, while Matthew was on his back. Matthew reported that he then performed oral sex on K.H. without prompting from her or communication about doing so. After performing oral sex on K.H. Matthew reported that he got on top of K.H. in missionary style and engaged in vaginal sex with her. When asked to describe any communication during this interaction, he stated that the only thing said was by K.H. she said you have a big penis. Be careful. Matthew reported that he did not wear a condom when having sex with K.H. and when it came time to ejaculate, he did so on her stomach. When asked what indicated to him that she wanted to have sex, he said- she said to be careful.

Reported incident #2

It was then reported that shortly after having sex the first time Matthew had made out with K.H. again. He stated that he then rubbed his penis on her clitoris at which time I slowly slid it back in to her vagina after I had jerked my penis off for a bit in order to get the excess semen off. When asked again if there was communicated consent, the response was no. When asked if there was any conversation about having sex, Matthew responded no. Matthew reported that this time he again was on top of K.H. in the missionary position and can't recall if I ejaculated a second time. When asked what indicated to him that she wanted to have sex, he stated, - it just continued from the first time.

Reported incident #3

Matthew reported that he and K.H. had fallen asleep at some point after the second sexual encounter but then woke up in the morning and that he started making out with her again by kissing he and fingering her. He reported that he started having vagina sex with her again. When asked again about conversation during or before sexual interaction, Matthew reported that he had only spoke to K.H. by saying - I asked if she would do it doggie style and asked about having anal sex. She said - talk to me again tonight when I am drunk. Matthew reported that he asked K.H. if she had remembered about last night and she (K.H.) just laughed it off. Matthew reported that he finished missionary style and again

ejaculated on her stomach when I was done. When asked what indicated to him that K.H. wanted to have sex he stated that she (K.H.) made out with me. Matthew further reported that after sexual intercourse the 1st, 2nd, and 3rd time, K.H. had used a shirt to clean herself off. He additionally reported on signs that may have been indication that K.H. was intoxicated. We both were stumbling around the hallway, we both said we were pretty drunk, her speech was somewhat mumbled, but I am not sure if it was because she was drunk.

Those are the end of the statements.

L: At this time I will turn it over to Matthew to present his side of the case.

M: Can I keep by me as I do this to make sure, oh, can I keep them permanently? Are they my copies?

L: You can ask. Butterfly can provide you copies of those. The Board will need those to deliberate so that after the board has deliberated, my office can make copies of those.

M: No matter what I want copies of these. Can we have a 10-15 minute recess to go over this?

L: I will grant 10 at most. We will stop now for 10 minutes.

Ok we have just returned from an approximately 10 minute recess and I'm turning it over to Matthew to present his opening statements.

M: Since the reporting individual is not in the room, the board cannot see how she reacts to what I say or what has been said or what will be said, so let's

assume that everything she said was true in her intoxicated position. It appears here that the Title IX representative seems to be making it to be my responsibility to achieve consent because I initiated sex. The reporting individual herself said she doesn't remember who initiated sex. In the summary Ms. Blaise presented it said I initiated the sex. I couldn't have said that because I don't remember who initiated the sex. And as for who is responsible and while I am not sure the reporting individual, I'm pretty sure is 21 and I'm 19. Who's to be considered the more responsible party here? W*e* *w*ere both intoxicated maybe me more. I was drinking til whenever I left the house that night and natty I was drinking as early as 250z of natty ice which is 6% alcohol I believe and I never asked K.H. to dance, I don't think I followed her, she never told me I just want to cuddle. I don't really remember asking her about a condom but I have never had a previous girl use Plan B. She never told me it hurt and she never gave me oral sex. I believe she said she didn't want to do it and kept apologizing for it. But she never gave me oral sex. *A*s to the time of the morning when she said I either, we, either I don't remember if she said I moved her or she moved into another position, she never moved into another position. And in the morning, I never asked for anal. I asked her if she wanted to try doggie and her response was - ask me again tonight when I'm drunk. I'm more open to do things. At no time throughout all of this did she say

no, stop or attempt to end this. At one point during the night, I got up and left the room, at one point during the night I think she got up and left the room and in the morning someone walked in. She could have locked me out, she could have went away or she could have said to the person something to the person who went to the room, at no point was it indicated that I was hurting her or anything like that. On the contrary she encouraged and acquiesced in all activities. That's it.

L: At this point I will turn it over to the Board members who will have the opportunity to ask either Butterfly or Matthew any questions. Board members, I'll turn it over to you.

BM: Ms. Blaise, did K.H. ever say that she pushed away Matt or showed that she didn't want sex?

BB: No, but under affirmative consent, she doesn't have to say no or push him away.

BM: Both sides seem to be confused as to if a call was made, prior to Matt's arrival at Harrington Hall, that wasn't able to be confirmed on their phones?

BB: No, because what happened before they got into Harrington Hall, is irrelevant to the charges that were brought. What happened before he got to Harrington Hall is irrelevant to the charges that were brought against him. That was just to provide context.

L: Board members, as you know, you will have another opportunity to ask questions, so if you don't at this time we can move on to questions between

BM: And we'll get to see documentation?
L: Before deliberations.
BM: And you said you provided text message documentation?
BB - Umhum. I'll pass that around.
BM: Didn't the text messages occur before they got to Harrington Hall?
3B: They did.
BM: So why wouldn't the phone call, which occurred before that? I'm just a little confused.
BB: So, that just shows the time frame because they are both identifying a timeframe that he got to the room, so the text messages confirm when got, what time he got to Harrington Hall and what time she let him in.
BM: Ok.
L: So unless any of the board members object, we will move on to questions between Butterfly and Matthew. At this time Butterfly, you have the opportunity to ask Matthew questions.
BB: I only have one question - At one point, when you did your opening statement, you said she told me she didn't want to do it, what did she tell you she didn't want to do?
M: Oral sex
BB: Ok
L: Any other questions?
BB: No
L: Matthew, do you have any questions for Butterfly?
M: You said, um, under affirmative consent she

doesn't have to say no or push me away, what constitutes affirmative consent?
BB: So, a Title IX investigation is a civil rights investigation, so Title IX in Enough is Enough is a NY State Law which defines affirmative consent as a universal definition that all campus community members must function under. So when you sign the Student Code of Conduct, that definition is part of that expectation. So I will read for you what affirmative consent is. Affirmative consent is a knowing voluntary and mutual decision among all
participants to engage in sexual activity. Consent can be given by words or actions as long as those words or actions create clear permission regarding willingness to engage in sexual activity. Meaning a specfic sexual activity is requested. Silence or lack of resistance in it of itself does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression. Consent to any sexual act or prior consensual sexual activity between or with any party does not necessarily constitute consent to any other sexual act. Means it must be ongoing. You must get consent for every single sexual interaction. Consent is required regardless of whether the person initiating the act is under the influence of drugs and/or alcohol. Consent may be initially given but withdrawn at any time. Consent cannot be given when a person is incapacitated which occurs when an individual lacks the ability to knowingly choose to

participate in sexual activity. Incapacitation may be caused by the lack of consciousness, or being asleep, being involuntarily restrained, or if an individual otherwise cannot consent. Depending upon the degree of intoxication, someone who is under the influence of alcohol, drugs or other intoxicants maybe incapacitated and therefore unable to consent. Consent cannot be given when it is the result of coercion, intimidation, force, or threat of harm. When consent is withdrawn or can no longer be given, sexual activity must stop.

M: So affirmative consent can be implied or referred from conduct?

BB: Only if the direct question is: Can I have sex with you? So you must ask directly what it is that you want to do to that person. So, for instance If you wanted to perform oral sex on someone, you must say, can I perform oral sex on you. And you must get an affirmative yes. If you want to penetrate someone vaginally, you must say, may I have, in some way or another, vaginal sex with you? And the answer affirmatively must be yes.

M: So that goes for both parties correct?

BB: It goes for the person initiating the sexual activity - yes. So whoe*v*er is initiating the sex.

M: How do you define initiation?

BB: Well, in specifically your case, you clearly define in your statements that you initiated sexual intercourse by penetrating her from the missionary position. So in that situation you are initiating that

activity. So whoever is engaging in the sexual intercourse that would look differently if sex was going the other way. So, who's initiating the sexual intercourse - are yo*u* penetrating the person or are they initiating the sexual intercourse?
M: No more questions.
L: Ok, I'll turn it over to the board; do you have any questions at this time for either Butterfly or Matthew? So, it appears that the board has no questions. Does any board member object to moving to closing statements? Please know that moving on you will forfeit any time to ask questions afterwards. Any objections? None. I move to closing statements.
M: Can I have a 5 minute recess to prepare my closing statement?
L: Sure, I'll grant that. 5 minutes starting now. It is 9:58am. We have just returned from a 5 minute recess. Since 1 have started the line of questioning with Butterfly I will start with Matthew as your opportunity to leave a closing statement after which Butterfly will do the same. And then we'll go from there. So, Mathew, I turn it over to you:
M: *W*hen I was first notified of this hearing, I was angry of what I thought the reporting individual might have made up about me. I'm no longer angry at her. Because she was reporting what happened as best she could considering her intoxicated condition. Just as I have told you my best recollection from the same condition. What I am angry about now is political correctness on steroids. The Title IX Coordinator has

taken the definition of affirmative to consent to the absurd. Sex whether intoxicated or not is usually, is usually a gradual step from one sexual activity to another. It can be stopped at any point by either party simply saying no. But to expect both parties to mutually say go to the next step, is not only outrageous but ridiculous on its face. The bottom line here is the sex that occurred was consensual. I am sorry that the young lady felt embarrassed after this encounter but that doesn't make what happened an offense.
L: Is that the end of your statement?
M: Yes
L: Ok, Butterfly, I'll turn it over to you.
BB: So, I'd like to remind that board that this isn't a criminal hearing, this is a judicial hearing. So under the Student Code of Conduct, my job is to do a human rights investigation and see what under the code of conduct was or was not violated. So, like it or not, the affirmative consent definition is not created by the Title IX Office. It is created by NY State and every single college in NY State must follow that definition and that's the what we must use today when we are looking at these statements and doing a preponderance of evidence. So if you go to the findings, you will see, #9 Matthew Jacobson engaged in sex with K.H. (incident #1) without affirmative consent, this is based on K.H.'s statements and Matthews statement that was provided to my off*i*ce. #10 Matthew Jacobson engaged in sex with K.H. (incident #2) without

affirmative consent. #11 Matthew Jacobson engaged in sex with K.H. (incident #3) without affirmative consent. Under the mandate of Title IX, Violence Against Women Act and the NYS Enough is Enough Legislation 129B, we must ensure that SUNY Plattsburgh is stopping, preventing, and remedying sex discrimination, harassment, domestic violence, dating violence, stalking, and sexual assault in an immediate and effortable manner. One of the roles of the Title IX Office, University Police, and other campus security officials, is to assess campus safety risk in regards to individual and group behavior. It is identified through statements taken from both K.H. and Matthew Jacobson. That affirmative consent was not given or asked of or by K.H. when Matthew Jacobson engaged in 3 separate sexual acts of penetration. This meets the definition of sexual violence, per the SUNY Plattsburgh Student Code of Conduct which defined as such: Physical, sexual acts perpetrated against a persons will, or perpetrated where a person is incapable of giving consent. A number of different acts fall into the category of sexual violence including rape, which is what those 3 incidents define would apply under that definition. Sexual assault, sexual assault with an object, sodomy, fondling, incest and statutory rape. SUNY Plattsburgh believes in fostering a safe, educational environment where violence against others will not be tolerated. It is the policy of the college to hold perpetrators accountable for their actions through

campus judicial or personnel procedures if appropriate and by working with community agencies in law enforcement as appropriate. End of my statement.
L: Ok, so at this time I will conclude the hearing. The board will stay back and deliberate. I will oversee that process. The board will make a majority vote and being that we have 4 board members, should there be a tie, secret ballot, I will be the tiebreaking vote. From there, once a decision of responsibility is rendered for each section, or respectfully not responsible for each section, once that is determined, the outcome will be relayed to the 3 parties involved and each will have the opportunity. I will contact them via email notifying them of the outcome and they will each have the opportunity to submit an impact statement to me personally before a decision is rendered on sanction if appropriate. In other words, if a need for a sanction is appropriate. That will, everything from there will be coordinated with my office should there be a need to. Otherwise, that concludes our hearing.
L= Larry Allen, M=Michael Jacobson, BB=Butterfly Blaise, BM=Board Member

CERTIFICATION

I certify that the foregoing transcript of disciplinary proceedings was transcribed by Sherri Kowalowski, Secretary at SUNY Plattsburgh, and that it is accurate and transcribed to the best of my ability.

/s/_____

Sherri Kowalowski
SUNY Plattsburgh
August 31, 2016

Sworn to before me this 31st day of August, 2016

/s/_____
JULIE M: COLINS
Notary Public, State of New York
No. *4*949189
Qualified in the County of Cliniton
My Commission Expires 4-3- 19