At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 8th day of September, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

In the Matter of the Application of

JOHN DOE,

Petitioner,

DECISION AND ORDER

Index No. EF2017-0146
RJI No. 2017-0337-M

FOR A JUDGMENT PURSUANT TO ARTICLE 78 OF THE CPLR

-against-

CORNELL UNIVERSITY,

Respondent.

APPEARANCES:

COUNSEL FOR PETITIONER:

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EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court upon a Verified Petition of John Doe ("Doe"), dated July 27, 2017, brought under CPLR Article 78, and an Order to Show Cause signed by this Court. Petitioner seeks: 1) a declaration that Respondent Cornell University ("Cornell") acted arbitrarily and capriciously in a disciplinary proceeding against Doe, by failing to substantially comply with its own rules, procedures and guidelines; 2) a declaration that the disciplinary determinations made against Doe were not supported by substantial evidence; and 3) a stay of the disciplinary determinations made against him. Petitioner also filed an Amended Verified Petition adding a claim that the determinations did not have a rational basis in the record. Cornell filed 2 motions in response- one to vacate the stay imposed in the Order to Show Cause, and the other to dismiss Count II of the Petition for failure to state a claim, arguing that the determinations questioned by Doe are not subject to the substantial evidence standard. Cornell also filed a Verified Answer and Objections in Point of Law, seeking to dismiss the remaining two Counts as well.

The case was previously before the Court to address Doe's separate Petition (Index No.: EF2016-0192) that Cornell had failed to process his complaint against the Title IX investigator, Elizabeth McGrath ("McGrath") for gender bias. The Court issued a Decision and Order on January 20, 2017 finding that Cornell's decision not to promptly investigate Doe's complaint was without a rational basis, and directing Cornell to immediately process and investigate Doe's discrimination complaint against the investigator. The Court issued an Amended Decision and Order dated March 13, 2017, which did not alter the substance of the Court's determination. Cornell retained outside counsel, Bruce Melton, Esq., to investigate Doe's complaint against McGrath. The outside counsel issued a report on March 10, 2017 concluding that gender bias was not a contributing factor in any decision made by the McGrath. The investigation into the Roe and Doe complaints continued.

This Court concludes that the substantial evidence standard of review does not apply in this case, and the matter should not be transferred to the Appellate Division pursuant to CPLR 7803(4). The challenged determination was not "made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law." This Court further concludes that Cornell substantially complied with its own policies and procedures and had a rational basis for its determinations.

BACKGROUND

This action challenges a decision of a Cornell University Disciplinary Hearing Panel ("Hearing Panel"), dated May 24, 2017, which found Doe responsible for sexual assault and retaliation. The findings were in connection with a complaint filed by another Cornell student, Sally Roe ("Roe"), who alleged that Doe had sexual intercourse with her while attending a party off-campus on August 19, 2016, when she was intoxicated to the point of incapacitation and unable to consent. There were a total of four complaints involved between Doe and Roe. The first was by Roe alleging sexual assault. The second was by Doe against Roe alleging she sexually assaulted him during the August 19, 2016 encounter. The third complaint was filed by Roe alleging that Doe filed his sexual assault complaint in retaliation to Roe's initial complaint. The fourth complaint was by Doe, based in part on allegations that Roe sought to have Doe suspended from college without good cause. In addition to finding Doe responsible for sexual assault, the Hearing Panel also found Doe filed his complaint in retaliation to the complaint filed by Roe. The Hearing Panel Decision also found that Roe was not responsible for sexual assault or retaliation.

Doe was an incoming freshman and Roe was starting her sophomore year when they both attended the off campus fraternity party in August, 2016. They met at the party while playing "beer pong" and after a short time, went inside and made their way to a second floor room where they had sex. Testimony was obtained from other witnesses at the party concerning the actions

and appearances of Roe, as well as Doe, prior to the sexual acts and subsequently. There was also testimony from Doe and Roe as to what transpired in the room during the sexual encounter, and two other witnesses who entered the room briefly as Doe and Roe were having sex. As noted by the Hearing Panel, and corroborated by testimony contained in the record, Roe had difficulty remembering details of the evening due to her level of intoxication.

The following day Roe sought medical treatment, and the Ithaca police were contacted regarding a possible rape allegation. On August 21, 2016, Ithaca Police Department Officer Christine Barksdale ("Detective Barksdale" or "Barksdale") went to interview Doe at his dormitory room. Unbeknownst to Doe, Detective Barksdale was actually tape recording that conversation. During that interview, among other things, Doe admitted that he and Roe had sex, but he claimed that she had initiated it. Doe also told Detective Barksdale that he had not been drinking, and that he had used a condom. Later, when interviewed by the Title IX investigator, he admitted that his statements about not drinking, and using a condom, were false.

Both parties also agree that once inside the bedroom, there was a conversation about birth control and a condom, but they disagree about exactly who said what, and whether it constituted evidence of consent. Following the sexual activity, Dow returned to the party, leaving Roe in the bedroom, where she was soon discovered by other party goers who found her on the bed in her bra and underwear. She was unconscious or disoriented.

Roe filed her complaint with Cornell's Title IX office a few days later on August 23, 2016, and the investigation into this claim started. The hearing was held on April 17, 2017, before a 3 member panel, and the non-voting Hearing Chair. Doe and Roe both testified in front of the Panel, as did three other live witnesses. Both parties presented written closing statements. The Hearing Panel issued its written decision on May 24, 2017 finding Doe responsible for sexual assault and retaliation, and finding Roe not responsible for sexual assault or retaliation. The Hearing Panel imposed a sanction of a two year suspension against Doe to begin on May 29,

2017. Doe appealed to the Appeal Panel, who issued a decision dated July 26, 2017, affirming the decision of the Hearing Panel. This Court ordered a stay of the sanctions when it signed the Order to Show Cause.

CORNELL'S SEXUAL MISCONDUCT POLICY AND PROCEDURES

The allegations of sexual offenses were investigated under Cornell's Policy 6.4 ("Prohibited Discrimination, Protected-Status Harassment, Sexual Harassment, and Sexual Assault and Violence"). Cornell's procedure for addressing complaints of sexual misconduct against students in violation of Policy 6.4 are incorporated in its "Procedures for Resolution of Reports Against Students Under Cornell University Policy 6.4." Following a formal complaint, pursuant to the Procedures, claims of sexual misconduct by students are investigated by Cornell University Title IX investigators, including interviews of the parties and witnesses, the collection of documents and other evidentiary materials. The investigator produces a draft investigative record which is provided to the parties for comment. At that point, the parties can submit comments about the content of the report, as well as request additional meetings or investigation. The investigator has discretion whether to act on any of those requests. The investigator ultimately provides a final Investigative Record and a report detailing the scope of the investigation and a summary of the findings. (Procedures at pp. 25-26). The investigator does not provide an opinion on responsibility, other than to indicate if the evidence is sufficient to warrant a hearing. (Procedures XIX. E., p. 26). If it is determined that the allegations are devoid of any merit, no hearing is directed and the file is closed. If there is sufficient evidence, the hearing is conducted by a panel of 3 members and a non-voting Hearing Chair. The parties are allowed to present brief opening statements, testify, present oral testimony and written closing statements, and make requests regarding testimony and questions. Once the Hearing Panel issues a decision, the parties may appeal that decision to a three member Appeal Panel. The decision of the Appeal Panel is final and binding.

As noted by Cornell, the procedure for addressing complaints of sexual misconduct have evolved over time. The most recent version of the Procedures was adopted on August 1, 2016, less than 3 weeks prior to the incident involved in this case. Under the new Procedures, the investigator collects and organizes the information and evidence, and provides it to the Hearing Panel to make a determination. Previously, the Investigator would provide credibility determinations and offer recommendations on the outcome. The amendment of the Procedures is no doubt influence by a 2015 amendment to the Education Law, known as the Enough is Enough Law, which will be discussed below.

LEGAL ANALYSIS AND DISCUSSION

A. SUBSTANTIAL EVIDENCE STANDARD- CORNELL'S MOTION TO DISMISS COUNT II OF THE COMPLAINT

The Court will first address Cornell's motion to dismiss Count II of the Amended Complaint, because the issue of transfer to the Appellate Division could preclude this Court's consideration of Petitioner's other arguments. *See e.g. Hull-Hazard, Inc. v. Roberts,* 129 AD2d 348 (3rd Dept. 1987); *Hoch v. NY State Dept. of Health,* 1 AD3d 994 (4th Dept. 2003); *Davis v. Kelly,* 145 AD2d 950 (4th Dept. 1988); *W1-Bay Plaza v. Environmental Control Bd.*, 2016 NY Misc LEXIS 3851 (Sup. Ct. NY County 2016). If there is no substantial evidence question presented, this Court should decline to transfer the matter to the Appellate Court. *See e.g. Matter of Cornelius v. City of Oneonta,* 71 AD3d 1282 (3rd Dept. 2010); *Civil Serv. Emples Ass'n v. NY State Empl. Rels. Bd.,* 300 AD2d 929 (3rd Dept. 2002); *Matter of Silverman v. Carrion,* 146 AD3d 570 (1st Dept. 2017); *Matter of Scott v. Village of Nyack Hous. Auth.*, 147 AD3d 957 (2nd Dept. 2017); *Matter of VanHouten v. Mount St. Mary Coll.*, 137 AD3d 1293 (2nd Dept. 2016); *Matter of Horace v. Annucci*, 133 AD3d 1263 (4th Dept. 2015).

CPLR 7804 (g) provides as follows:

> "Where the substantial evidence issue specified in [CPLR 7803 (4)] is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding. Where such an issue is raised, the court shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata, without reaching the substantial evidence issue. If the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced."

"'The mere fact that the petition alleges the lack of substantial evidence supporting the determination is not dispositive.'" *Matter of Cornelius*, 71 AD3d at 1284, *quoting Matter of Bonded Concrete, Inc. v. Town Bd. of Town of Rotterdam*, 176 AD2d 1137, 1137 (3rd Dept. 1991). "The appropriateness of a transfer turns upon Supreme Court's independent assessment of the type of hearing held preceding the administrative determination and whether the substantial evidence test is actually applicable, and not on a petitioner's characterization of the standard of review or issues to be raised." *Matter of Cornelius*, 71 AD3d at 1284 *citing* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7804:8, at 679. An issue specified in CPLR 7803 (4) "arises only where a quasi-judicial hearing has been held and evidence taken pursuant to law." *Matter of Bonded Concrete*, 176 AD2d at 1137 (emphasis added).

Doe contends that this case fits within CPLR 7803(4) because Cornell's determinations were made as a result of hearings held "pursuant to direction by law." Doe claims that since Cornell deemed that the four complaints should not be dismissed and should go to a hearing, that a hearing was "appropriate" under Policy 6.4, According to Doe, because a hearing was "appropriate", Cornell, and the hearing process, were bound to comply with the Enough is Enough Law, codified in Article 129-B of New York's Education Law, which grants the right to present evidence and testimony at a hearing, "where appropriate." Since the hearing was deemed appropriate by Cornell, it met the Education Law requirement, and was "pursuant to direction by law." Thus, argues Doe, it is subject to the "substantial evidence" standard under CPLR

§7803(4). Count II of the Amended Verified Petition seeks to have Cornell's determinations nullified on the grounds that they were not supported by substantial evidence. That would require transfer to the Appellate Division for decision.

Cornell argues that the substantial evidence standard does not apply to disciplinary determinations of private universities in New York State such as Cornell, and Cornell also argues that the Enough is Enough Law does not require a hearing to resolve sexual misconduct issues against students. Rather, Cornell's Procedures voluntarily provide a hearing, but that does not make it a hearing required by law.

The Enough is Enough Law (L 2015, Ch 76), mentioned above, was enacted in 2015, and "among other things, required colleges to adopt the standard of affirmative consent as part of their codes of conduct pertaining to sexual activity, and established procedures for related disciplinary proceedings." *Matter of Doe v. Skidmore Coll.*, 152 AD3d 932, 933 (3rd Dept. 2017) (*citing Education Law* §6441). "The Enough is Enough Law requires colleges to ensure that every student is afforded certain rights in proceedings involving accusations of sexual activity in violation of a college's code of conduct, including 'an opportunity to offer evidence during an investigation, and to present evidence and testimony at a hearing, *where appropriate*.'" *Skidmore* at 934 (emphasis in original) *citing* Education Law § 6444 [5] [b] [ii].

Due to the recent enactment of the law, there is little court guidance or interpretation of its requirements. However, the Third Department recently addressed it in the *Skidmore* case, which also involved a sexual misconduct complaint. The Third Department ultimately granted the Petition because the university did not substantially comply with its own policy (and the decision was therefore arbitrary and capricious), but the decision also noted that the Enough is Enough Law "does not require colleges to offer hearings as part of their disciplinary procedures for such violations. Instead, as indicated by the qualified statutory language and further clarified by guidelines issued by the Education Department, the Enough is Enough Law requires colleges to provide students with an opportunity to offer evidence, but permits them to do so by a method

other than a hearing, such as an investigatory process (see New York State Education Department, Complying with Education Law Article 129-B at 27 [2016])." *Skidmore* at 934. Further, the law "does not require a college to permit cross-examination of a complainant or a witness. The right to cross-examine witnesses is limited in administrative proceedings." *Id.* at 934 *citing Matter of Kosich v. New York State Dept. of Health*, 49 AD3d 980, 983 (3rd Dept. 2008), *lv dismissed* 10 NY3d 950 (2008). Importantly, the Third Department in the *Skidmore* case was not dealing with the case being transferred to it pursuant to CPLR §7804(g), but in the context of an appeal of whether the university had complied with its own policy, and whether the determination was rationally based.

In the present case, the fact that Cornell voluntarily adopted a policy which did permit a hearing to be conducted did not transform this into a situation where the hearing was "pursuant to direction of law." Cornell is a private not-for-profit corporation, with four state-sponsored SUNY colleges. "Although [Cornell] receives some financial assistance from the State, this alone does not constitute a sufficient degree of State involvement so as to allow an intrusion into defendant's disciplinary policies." *Stone v. Cornell University*, 126 AD2d 816 (3rd Dept. 1987); *see also Matter of Alderson v. New York State Coll. Of Agric & Life Sciences at Cornell Univ.*, 4 NY3d 225 (2005); *Matter of Stoll v. New York State Coll. of Veterinary Medicine at Cornell Univ.*, 94 NY2d 162 (1999). As a private university, the charged student is not "entitled to the 'full panoply of due process rights' ..., and [the university] need only ensure that its published rules are 'substantially observed'..." *Matter of Kickertz v. New York Univ.*, 25 NY3d 942, 944 (2015) (internal citiations omitted); *Skidmore, supra; see Tedeschi v. Wagner Coll.*, 49 NY2d 652 (1980). In contrast, public universities are subject to due process requirements, and the substantial evidence standard applies. *See e.g. Haug v. State Univ. of New York at Potsdam*, 149 AD3d 1200 (3rd Dept. 2017). With respect to private universities, however, the Court's role is much more limited, and private universities are given broad discretion in matters such as discipline against students. *Van Houten, supra.* "A court reviewing a private university's disciplinary determination must determine 'whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings so as to ascertain whether its

actions were arbitrary or capricious.'" *Skidmore*, 152 AD3d at 935, *quoting Matter of Rensselaer Socy. of Engrs. v Rensselaer Polytechnic Inst.*, 260 AD2d 992, 993 (3rd Dept. 1999); *VanHouten, supra.*

The Third Department has refused to apply the substantial evidence standard to review the determinations of private universities. *See e.g. Van Houten, supra; Rensselaer Soc. of Engrs., supra.* Since this court concludes that the private university standard, as opposed to a public or state university, applies in this case, then this is not a situation where transfer to the Appellate Division under CPLR §7803(4) and CPLR §7804(g) is applicable. There is nothing in the Enough is Enough Law which directs a substantial evidence standard in sexual misconduct cases involving private universities. The Third Department's recent decision in *Skidmore* (which appears to be the only case to date specifically addressing the Enough is Enough Law), was in the context of an appeal from the trial court's decision, and not pursuant to transfer under Article 78. The Third Department did not suggest the case should have been transferred to it, which supports the conclusion that the new Enough is Enough Law did not create a substantial evidence procedure. This Court concludes that Cornell's voluntary grant of a hearing does not transform this into a hearing pursuant to law. Thus, the substantial evidence standard does not apply, and therefore, the matter should not be transferred to the Appellate Division under CPLR 7803 (4) and CPLR 7804 (g).

Petitioner also makes a pragmatic argument for transfer to the Appellate Division, noting that if this Court were to transfer the case under Article 78, and that transfer is ultimately deemed improper, the Third Department could still retain jurisdiction and make a decision on the other aspects of the case. Cornell would not be harmed because it can still make the argument to the Appellate Division that this is not a substantial evidence review situation, and if Cornell is successful, then the Appellate Division could retain jurisdiction and decide the case on the merits. *See e.g. VanHouten, supra; Matter of Baker v. Mahon,* 72 AD3d 811 (2nd Dept. 2010). On the other hand, if this Court does not transfer the case and that is subsequently found to be error, then Doe could be significantly prejudiced, including his present and future education.

While there is some appeal to that Petitioner's argument, this Court cannot simply transfer this case if the necessary criteria are not met. Furthermore, there is no guarantee that the Appellate Court would exercise its jurisdiction and retain jurisdiction in an improperly transferred case. After careful review, this Court determines that the substantial evidence standard does not apply. Therefore this Court declines to transfer the case to the Appellate Division, and accordingly Count II is DISMISSED.

B. DID CORNELL ACT ARBITRARILY AND CAPRICIOUSLY BY NOT FOLLOWING IS OWN RULES AND POLICY (COUNT I OF THE VERIFIED PETITION)

Having reached the determination that transfer is not appropriate, the Court next turns to the other two counts raised in the Amended Verified Petition. Count I argues that Cornell acted arbitrarily and capriciously by failing to follow its own policies and procedures. Count III argues that Cornell's determinations on sexual assault and retaliation were arbitrary and capricious and without rational basis in the record.

Doe argues that Cornell failed to follow Policy 6.4 and as a result, it denied Doe a fair process of these sexual assault and retaliation claims. The Amended Verified Petition grouped these failures into seven general categories: 1) failure to ask questions of Roe at the hearing that could bear on her credibility and motive; 2) the lack of testimony from a Title IX investigator about the investigative report; 3) the Hearing Chair's refusal to take corrective action on inaccurate information in the Investigative Report, which Doe claims was one-sided, and the omission of evidence that could have benefitted him; 4) inclusion of a summary of a conversation between the Title IX investigator's and a police investigator; 5) Cornell's exclusion of a video taped interview of a witness, and transcript, which Doe contends was helpful to his case; 6) that a Title IX investigator had a conflict of interest but continued to work on the investigation; and 7) failure to provide Doe with notice of its sexual assault policy.

Doe provided arguments and examples of Cornell's failure to follow its own policies.

Cornell maintains that it did, in fact, act in substantial compliance with its policy, and offered its own arguments and explanations in support of that position. The Court concludes that Cornell did substantially comply with its policy.

"Judicial review of the actions of a private school in disciplinary matters is limited to a determination as to whether the school acted arbitrarily and capriciously, or whether it substantially complied with its own rules and regulations." *Matter of Van Houten*, 137 AD3d at 1295, *citing Tedeschi v. Wagner Coll.*, *supra; Matter of Khaykin v. Adelphi Academy of Brooklyn*, 124 AD3d 781, 782 (2015); *see also Doe v. Skidmore, supra*; *Matter of Ibe v. Pratt Inst.*, 151 AD3d 725 (2nd Dept. 2017). The university's decision "must be annulled only where there has been a lack of substantial compliance, or where the determination lacks a rational basis... Perfect adherence to every procedural requirement is not necessary to demonstrate substantial compliance." *Skidmore*, 152 AD3d at 935 (citations omitted).

With respect to the substantial compliance aspect, Doe lists a number of examples to support for his position that Cornell did not substantially comply with its own policy and procedures in this case. The Court will address them in the order they were raised by Doe.

1. Questions submitted by Doe for the Hearing Panel to ask Roe

Doe contends that, before the hearing, he submitted questions and topics that would bear on Roe's "false statements, material inconsistencies, plans for the party and motive to fabricate her claims" (Amended Verified Petition at ¶¶ 70-71), but the Hearing Panel failed, or refused, to ask any of those questions, or explore any of those topics. Doe specifically notes that he is not claiming that the Hearing Panel was obligated to ask any particular question in the form he requested, but rather, that the Procedures require some questioning in some form, on relevant topics, and that Cornell failed to do so. (Petitioner's Brief in Response filed 9/6/17 at p.3). As a result, Doe claims he was not given a fair opportunity to defend himself and was deprived of a fair hearing.

Both parties cite to the Procedures at p.31 titled "Second Pre-Hearing Submission-Questions and Topics" to support their respective positions. Doe emphasized the provision that states "[t]he Hearing Chair will approve in substance all questions or topics that are relevant and that are not prohibited by these procedures or applicable laws, unduly prejudicial, or cumulative of other evidence." He claims that if a question is relevant, and not prohibited, the Chair is obligated to approve it. However, the sentence immediately preceding that provision states "[t]he Hearing Chair, in consultation with the Hearing Panel, will determine which of the parties' requested questions will be asked or topics covered."

Doe exercised his right to submit proposed questions for Roe, and as the Appeals Panel observed, those proposed questions focused on two primary areas: 1) whether Roe had attended the party with the intention of possibly engaging in sexual activity and 2) false statements, inconsistencies and other factors that could bear on Roe's credibility.

In fact, Doe had raised these issues early on in the investigative process. (See, letter from Doe's parents to Title IX Coordinator dated October 3, 2016). It was claimed that Roe had recently broken up with her boyfriend, and made statements that she was going to "black out" at the party, and might even try to sleep with someone at the party. It was also alleged that a witness had claimed that Roe had an excellent memory, even when she "blacked out" from drinking. Doe contends that the Hearing Panel's refusal to ask any questions on Roe's credibility and her plans for the party were prejudicial as those items were vital to Does's defense and his own claims.

Cornell has offered varied arguments in opposition to Doe's assertion. The Hearing Panel's Decision stated that Doe's areas of inquiry were considered and questions were revised and combined. The Appeal Panel contended that Roe's plans for the party had no bearing on her ability to consent later that evening and that the voluminous record provided enough evidence as to her credibility. Cornell also argues at this juncture that Doe waived any challenge to the Hearing Panel's credibility determination.

The Court's review of the transcript from the Disciplinary Hearing shows that Doe is correct that Roe was not asked questions about her plans for the party, or other questions Doe posed relative to Roe's credibility. Doe argues that the failure of the Hearing Panel to inquire about them deprived Doe of his rights. However, the Court's inquiry is on whether Cornell substantially followed its Policy and Procedures. Although the questions would have been quite necessary in a cross examination context, the Procedures give broad discretion to the Hearing Panel on the questions which will be asked. Further, the record here shows that the topics raised by Doe were addressed elsewhere in the Investigative Record, including in prior testimony of the parties and other witnesses, and were available to the Hearing Panel. The Procedures permit the parties to offer suggested questions and topics, but the Hearing Panel is not obligated to ask all questions. To be sure, the Hearing Panel cannot ignore all arguments made by the parties, but in this case, the information and evidence was available from other sources, and the only thing Doe was deprived of was having the questions asked directly to Roe by the Hearing Panel. However, the right of confrontation or cross-examination is not directed or guaranteed under the Procedures. While it is clear that the Procedures do permit input from the parties, the ultimate decision as to what questions will be asked of the witnesses is reserved to the discretion of the Hearing Chair and the Hearing Panel.

2. Doe's request for the Title IX Investigator to testify

Doe requested that the new lead Title IX investigator[1] be present at the hearing to answer questions about the Investigative Report, and Doe sent a list of proposed questions. The Hearing Panel determined not to have the investigator testify because the Investigative Report is not considered evidence, and all the information and testimony referenced in the Investigative record would be available to the Hearing Panel. In essence, the Hearing Panel would be conducting a *de novo* review. The Hearing Chair also informed the parties that she felt the investigator's testimony would not assist the fact-finders, and would be irrelevant or cumulative.

[1]During the course of the investigation and hearing into these complaints, Kareem Peat took over as the lead investigator from Ms. McGrath.

Doe argues that the Procedures expressly state that the investigator will testify at the hearing, and will answer questions about the investigative report and record (Procedures at pp.31, 33) (emphasis added). In fact, the Procedures specifically state that the typical hearing format will have the investigator testify after the introductions, and prior to the testimony of other witnesses. (Procedures at p.33).

Nevertheless, as previously discussed, the Hearing Chair is vested with discretion under Policy 6.4 to determine what witnesses will be called to testify. In this case, the Hearing Chair determined, within her discretion, that the investigator's testimony would not be helpful to the Panel, and that the members had no questions for him. Instead, the Panel would conduct its own independent review of the records, and reach its own conclusions. Such a course of action is within the discretion afforded the Hearing Chair under the Policy and Procedures.

3. Doe's claim that the Investigative Report contains errors

Doe claims that the Investigative Report inaccurately describes a conversation between Doe and Roe about birth control and sexually transmitted infections (STI) just prior to the alleged sexual assault. Doe contends that the substance of the conversation is key to evaluating the consent issue, and in assessing the credibility/motivation of Roe. Doe sought to remedy the errors by seeking a direction from the Hearing Chair to the Panel members and/or through testimony from the Investigator.

Policy 6.4 does not mandate that the Chair evaluate the Investigative Report and offer opinions or corrective statements. Rather, the Procedures make that possible to the parties through opening and closing statements to reference any particular evidence, and any arguments they have regarding their accuracy, and conclusions to be drawn from all the evidence. In fact, Doe availed himself of the opportunity to highlight the alleged errors and point to any conflicting evidence to support his version. The Hearing Panel disagreed. Nothing more is required with respect to this. This is particularly true since the Hearing Panel is serving as fact finder, and any

statements in the Investigative Report are subject to corroboration in the record (to the Hearing Panel's satisfaction), and are subject to any arguments made by the parties to call into question those statements or findings. Here, even with the arguments made by Doe, the Hearing Panel made its own determinations as to what the record established, including the conversation about birth control and STIs, and the record as a whole.

4. Summary of a conversation between Title IX Investigator's and a City of Ithaca police investigator

As previously noted, on August 21, 2016, Doe was interviewed by Detective Barksdale, who secretly recorded the interview. The Ithaca police released that recording to Cornell in early February, 2017.

Meanwhile, in September, 2016, the Title IX investigators had a conversation with Barksdale, but Barksdale indicated that she would not be interviewed as a witness, and she would not be audio recorded and she would not appear at any hearing. Following the discussion/conversation, the Title IX investigators made a written summary of what Barksdale had stated to them. Doe contends that the Procedures require interviews to be audio recorded, and since Barksdale refused the audio recording, any reference to it should be removed from the record. In fact, the interview should have terminated when Detective Barksdale declined the audio recording. Doe also argues that Cornell changed the characterization of the Barksdale encounter from an interview to a conversation in order to avoid the recording requirement. Doe also contends that the Title IX investigator's report contained false information about what Doe had said to Barksdale (which became clear once the Barksdale audio tape surfaced). The Hearing Chair rejected Doe's request to have the written summary of the Barksdale conversation excluded from the record and gave no corrective guidance to the Panel.

While the Court is troubled by the written summary remaining in the record, as the written summary is inconsistent with the actual audio recording and is therefore of little probative value, it appears that the Hearing Panel did not place any weight on the investigator's

written summary of her conversation with Barksdale. In fact, the Hearing Panel had the transcript of the Barksdale/Doe interview and was able to evaluate that, independent of the Title IX investigator's summary of her own conversation with Barksdale. Further, the Hearing Panel's decision makes several references to the transcript of the Barksdale/Doe interview, but no references to the Title IX investigator's summary. This is evidence the Hearing Panel went to the source of the information, and not the inaccurate written summary of the Title IX investigator. Thus, the inclusion of the written summary did not impact the determinations.

5. Exclusion of video taped testimony

Doe additionally claims that the Hearing Chair improperly excluded video taped testimony he sought to introduce in March, 2017. After the City of Ithaca released the audio taped Barksdale conversation with Doe, the Title IX Coordinator advised the parties that the record would be re-opened to include that interview and to allow the parties to respond to that new evidence. Doe claims that the Procedure only allow the record to be open, or closed. It cannot be opened with limitations or restrictions. During the time that it was "re-opened", Doe sought to introduce a video taped conversation that one of Doe's lawyer had with Witness #4. That recording was made in September, 2016 but not submitted by Doe until March 5, 2017. Doe claims that the e-mail message about the investigation being re-opened contained no limitation on the submission of evidence, and in fact, nothing in Cornell's Policy would permit the limiting of the evidence that could be submitted, as long as the record is "open." Doe does not claim that his evidence was "newly discovered" and thus he is not relying on that portion of the Policy which allows for submission of "newly discovered" evidence. Rather, the investigation was open when he submitted his evidence.

By the time the Barksdale recording was received, the investigative process had concluded and the record had been provided to the parties. Upon receipt of the Barksdale recording, the Title IX Coordinator, Sarah Affel, sent an email to the parties on February 7, 2017 informing them of the receipt of the audio recording. She referenced the Procedures at pp. 33-34,

pertaining to "newly discovered" evidence. The parties were given until February 13, 2017 to request inclusion of the audio recording into the investigative record, and a request was made to have it included.

Thereafter, on February 22, 2017, the Hearing Chair sent an email to the parties informing them that the "audio recording, which was unobtainable during the investigation, constitutes newly discovered evidence, and should be admitted into the investigative record... [I]n accordance with the Procedures, Section XXI.J.1., I am directing that the investigative process be reopened and I have referred these requests to Investigator Peat, who is handling the matter."

Investigator Peat sent an email to the parties on March 6, 2017 stating that the investigation would remain open through March 7, 2017 and that the investigation would close shortly thereafter, and he would prepare a supplemental investigative report. Doe places emphasis on the Peat letter to show that the whole investigation was open, and therefore, Doe should also be allowed to submit the videotape he seeks to introduce. He points to pp. 23-24 of the Procedures that reference the parties' submission of evidence during the investigation.

However, it is evident from the emails of Affel and the Hearing Chair that the record was being re-opened under Section XXI.J.1, which provides, in pertinent part: "Where a newly discovered ... evidence is introduced ...the Hearing Chair will adjourn the hearing for the investigator to investigate the newly discovered witness or evidence", and the "Hearing Chair will also re-open the pre-hearing submission process so the parties may respond to the new information." (Emphasis added). Thus, the Court views the Procedure as allowing the record to be re-opened for the limited purpose of addressing the newly discovered evidence, and only that evidence. That is also the interpretation and message conveyed by Affel's email and the Hearing Chair's e-mail. The e-mail from Peat is less specific, but does not stand for the re-opening of the entire record. As Doe concedes his evidence is not newly discovered, it was proper for the Hearing Panel to refuse to accept it and make it part of the record.

6. Conflict of interest of the Title IX Investigator

Doe also argues that the initial Title IX investigator, Elizabeth McGrath, should have been removed from the investigation, because she had a conflict of interest stemming from the discrimination complaint Doe had filed against her. The mere filing of a discrimination complaint against the Title IX investigator cannot give rise to automatic disqualification, as that would clearly allow false accusations to lead to removal of investigators until one deemed favorable was appointed. On the other hand, it is also clear that a person against whom a discrimination complaint is filed may have a conflict of interest in the handling of the original complaint.

In this case, Cornell did hire an outside attorney to evaluate Doe's complaint against McGrath and found it did not have merit. The Hearing Panel also made its own determinations of fact, and did not base it on the Investigative Report, or on McGrath's work.

The Court finds insufficient evidence of an actual conflict, or that any perceived conflict had an impact on McGrath's work, or an impact on the Hearing Panel's determinations. Further, there is nothing specifically in Cornell's policy which would mandate the removal of McGrath from continuing to handle the investigation, which she had been involved with from the start of this case.

7. Alleged failure to provide Doe with notice of the sexual abuse policy

Doe claims that he did not receive notice about Cornell's sexual abuse policy until after this incident occurred, and was certainly unaware it could pertain to off-campus conduct. Specifically, the Title IX orientation for incoming students took place 2 days after this incident.

All incoming freshman receive a Cornell Family Guide, introducing the student and their families to Cornell and includes references to the Campus Code of Conduct. They also received

a message from the university police department providing safety information, and links to Cornell's Sexual Harassment and Assault Resources. Whether he, or any other student, went to those links to looked up the Campus Code of Conduct is doubtful. However, even without specifically doing so, the information about a sexual abuse policy was made known to incoming students, who could then follow up or not. It is at least sufficient to put a person on notice as to the existence of a Policy.

Based upon the discussion above, the Court concludes that Cornell substantially complied with its established policy, both with respect to the individual portions and claims noted above, and also as a collective whole. Accordingly, the Court finds that Count I of the Verified Petition should be DISMISSED.

C. WERE THE DETERMINATIONS SUPPORTED BY A RATIONAL BASIS (COUNT III OF THE VERIFIED PETITION)

Having determined that Cornell substantially followed its own policy with respect to the processing of these complaints, the Court next turns to the consideration of whether the determinations were supported by a rational basis. " 'An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts'" (*Matter of CDE Elec., Inc. v. Rivera*, 124 AD3d 1178, 1180 (3rd Dept. 2015), *quoting Matter of Peckham v. Calogero,* 12 NY3d 424, 431(2009); *Matter of Mallick v. New York State Div. of Homeland Sec. & Emergency Servs*, 145 AD3d 1172, 1174 (3rd Dept. 2016). "When a determination is supported by a rational basis, it must be sustained even if the reviewing court would have reached a different result." *Matter of CDE Elec.*, 124 AD3d at 1180.

In the present matter, the Hearing Panel was tasked with evaluating and ruling on four separate complaints. Two dealing with the sexual acts of August 19, 2016 and the remaining two dealing with retaliation. The Hearing Panel had a very large record, consisting of numerous

reports, documents and testimony from many different witnesses. As part of its deliberations, the Hearing Panel also made credibility determinations. While Doe and Roe have different accounts from that evening, and divergent views as to the proper application of the Procedures and interpretation of the evidence, there is ample evidence in the record to support the Hearing Panel's determinations.

In particular, there is evidence to support the conclusion that Doe violated Policy 6.4 by engaging in sexual activity with Roe at a time when she was unable to consent, by virtue of her intoxication, and that Doe knew, or should have known, that Roe was incapacitated. The Hearing Panel described the testimony and evidence it relied upon in making this determination, including: testimony of witnesses who observed and interacted with Doe and Roe before they went upstairs; testimony from witnesses who observed Roe shortly after and noted her level of intoxication; testimony from witnesses who entered the room, and observed the sexual encounter; text messages from various individuals, and the testimony of Doe and Roe themselves. The Hearing Panel also found Doe to lack credibility based upon untruthful statements he made to Barksdale and other statements he made throughout the case.

To be sure, Doe has presented his own evidence that could have reasonably supported a different conclusion. However, the Hearing Panel was charged with the responsibility of reaching conclusions in this case, and part of that involved making credibility determinations and determining how much weight to give various pieces of evidence. The Hearing Panel's decision provides sufficient bases to support the conclusions it reached, and is therefore rationally based on the evidence.

Similarly, the Hearing Panel had a sufficient basis for reaching a determination that Doe was responsible for retaliation. The Hearing Panel concluded that Doe filed his sexual assault complaint against Roe in retaliation for her filing her complaint. The Hearing Panel concluded that Doe filed his complaint as a tactical maneuver, and discredited Doe's claim of lack of consent as "specious." The Hearing Panel noted that Doe had not mentioned his alleged lack of

consent to Barksdale just two days after the sexual acts. That, and other factors, led to the conclusion that Doe's complaint was filed in retaliation. There is sufficient basis in the record to support that conclusion.

Based upon all the foregoing, the Court finds that the Hearing Panel's determinations had a rational basis, and that Count III of the Amended Verified Complaint is DISMISSED.

DOE'S REQUEST FOR A STAY

Subsequent to the oral argument on the Petition, Doe filed a motion on September 27, 2017 seeking a stay of enforcement of any adverse decision by this Court to maintain the status quo pending an appeal, or to stay enforcement for a period of time in order to allow Doe to seek a stay from the Appellate Division. Cornell objected, and pointed out that Petitioner is essentially making a "conditional" motion in the event the Court's decision is adverse to him. The Court wrote to the parties and informed them there would be no oral argument on the motion, and the Court would address the stay when it renders its Decision.

This Court did issue a stay when the action was commenced in July, 2017, in order to maintain the status quo, and to prevent substantial, if not irreparable harm, to Doe that could have resulted from the enforcement of the disciplinary proceedings. The purpose of the stay was to maintain the status quo while the Court considered the merits. The Court has concluded that consideration and rendered its own Decision and Order, which will result in dismissal of the Petition. The rendering of this Decision and Order concludes this Court's role in the process. The Petitioner's avenue to challenge this Court's Decision and Order would be through the appellate process.

The effect of the Court's Decision and Order will leave intact the determinations made by Cornell. For the Court to conclude that Cornell's determinations should not be overturned, and then conclude that Cornell should be further restrained from enforcing those determinations

would be incongruent. There is no reason to maintain an ongoing status quo once the merits have been reached and the determinations made by Cornell have been upheld by this Court. Further, with the dismissal of the Petition, there is no action to which the injunction can apply.

Accordingly, Petitioner's September 27, 2017 motion for a stay is DENIED. The temporary stay imposed as part of this Court's signed Order to Show Cause filed on July 28, 2017 is hereby VACATED.

CONCLUSIONS

The Court finds that this matter is not subject to transfer to the Appellate Division under CPLR §§ 7803, 7804. The Court also finds that Cornell substantially complied with its Policy and Procedures in handling these complaints, and that its determinations were rationally based.

Accordingly, the Petition is **DISMISSED.** The stay previously imposed is **VACATED**.

This constitutes the Decision and Order of the Court. The transmittal of copies of this Decision and Order shall not constitute notice of entry (see CPLR 5513).

Dated: December 15, 2017
Ithaca, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice

The following papers were received and reviewed by the Court in connection with this Petition:

1) Verified Petition sworn to on July 27, 2017, with attached exhibits A-BB; affirmation of Alan E. Sash, Esq., dated July 27, 2017, and Memorandum of Law dated July 27, 2017;

2) Cornell's Notice of Motion dated August 16, 2017, seeking to vacate the stay imposed as part of the Court's Order to Show Cause dated July, 28, 2017, with affidavit of Wendy E. Tarlow, Esq., sworn to on August 15, 2017, with two exhibits, and Memorandum of Law dated August 16, 2017;

3) Cornell's Notice of Motion dated August 16, 2017 seeking an Order dismissing Count II of the Verified Petition for failure to state a claim pursuant to CPLR §7803; with affidavit of Wendy E. Tarlow, Esq., sworn to on August 15, 2017, with two exhibits, and Memorandum of Law dated August 16, 2017;

4) First Amended Verified Petition sworn to on August 25, 2017, with attached exhibits A-BB; affirmation of Alan Sash, Esq., dated August 25, 2017, and Memorandum of Law dated August 25, 2017;

5) Cornell's Notice of Motion dated August 30, 2017 seeking an Order dismissing Count II of the First Amended Verified Petition for failure to state a claim pursuant to CPLR §7803; with affidavit of Jared M. Pitttman, Esq., sworn to August 30, 2017, with two exhibits, and Memorandum of Law dated August 30, 2017;

6) Affirmation of Alan E. Sash, Esq., sworn to on September 1, 2017, in opposition to Cornell's Motion to dismiss Count II of the Petition;

7) Affirmation of Alan E. Sash, Esq., sworn to on September 1, 2017, with exhibits 1-5, in opposition to Cornell's motion to vacate the temporary stay;

8) Cornell's Verified Answer sworn to on September 1, 2017, with Memorandum of Law dated September 1, 2017, and exhibits 1-79;

9) Petitioner's Brief in Response to Cornell's Memorandum in opposition to the First Amended Petition and Stay, dated September 6, 2017;

10) Petitioner's Verified Reply in support of First Amended Petition, sworn to on September 6, 2017;

11) Cornell's Reply Memorandum of Law in further support of Motion to vacate injunctive relief, dated September 6, 2017;

12) Cornell's Reply Memorandum of Law in further support of Motion to dismiss Count II of the First Amended Verified Petition, dated September 6, 2017;

Following oral argument, the Court also permitted each side to present short summaries, resulting in these additional submissions:

13) Letter from Petitioner's counsel dated September 15, 2017;

14) Letter from Cornell's counsel dated September 22, 2017, in reply to Petitioner's letter.