

B.B v The New School
2018 NY Slip Op 33493(U)
September 26, 2018
Supreme Court, New York County
Docket Number: 159163/2017
Judge: Paul A. Goetz
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

----- X
B.B.,

Plaintiff - Petitioner,

For Judgment pursuant to Art. 78, CPLR
and statutory and common law claims,

Index No.: 159163/2017

-against-

THE NEW SCHOOL,

Defendant - Respondent.

----- X

PAUL A. GOETZ, J.:

Petitioner/plaintiff B.B. commenced this hybrid Article 78 proceeding against respondent/defendant The New School (TNS) for monetary and equitable relief, including a judgment declaring that the actions of TNS in issuing the determination of misconduct and suspending petitioner from the academic program were arbitrary, capricious, were made in bad faith or in violation of lawful procedure. Further, petitioner seeks to be reinstated to the program, to have his records expunged and to be reimbursed for the tuition lost. He also requests an award of money damages, based on a claim that TNS breached several agreements with him during the investigation and hearing process. TNS answers and requests that the amended petition be dismissed in its entirety.

BACKGROUND AND FACTUAL ALLEGATIONS

In the fall of 2016, petitioner enrolled in TNS, “to pursue a Master of Fine Arts Degree in Creative Writing with a concentration in fiction.” Petitioner’s aff, ¶ 2. TNS is a “not-for-profit institution of higher education located in Manhattan.” TNS’s memo of law at 2. On February 21, 2017, a female student at TNS spoke to Jennifer Francone (Francone), the Assistant Vice

President for the Student Equity and Access at TNS and requested that TNS issue a “no contact” order against petitioner. Petitioner was advised to refrain from having any contact with the Reporting Party (RP). Petitioner confirmed receipt of this request and asked for a reciprocal no contact order, which was also issued.

In April 2017, RP met with Francone and advised her that she was ready to file a complaint against petitioner. RP had reported that she and petitioner were in a relationship in the Fall of 2016 that included sexual activity. RP alleged several instances of nonconsensual physical contact and physical and emotional abuse by petitioner. Francone states that, during the interview, RP identified another student who observed interactions between her and petitioner. Francone interviewed this student witness (SW) on April 25, 2017. SW described an incident at a bar where petitioner started to punch the wall next to where SW and RP were standing and talking. SW was “confused” at the time but later thought petitioner punched the wall because he was upset that SW was talking to RP or because petitioner “wanted to be violent with RP.” TNS’s exhibit A, Respondent’s Record (RR) at 0125. SW further stated that petitioner punched and slapped him twice. While petitioner may have thought of it as “horseplay,” SW thought it was strange. Also, on a later date, SW received a text message from petitioner that he felt was “menacing.” *Id.*

On April 24, 2017, petitioner was informed that he could be in violation of school policies because he had been the subject of a reported incident to the Office of Student Conduct and Community Standards (SCCS). The email stated the following, in pertinent part:

“My office received information from a complaint submitted by a New School student, that, if accurate, may place you in violation of the University Code of Conduct Sections 1.A.1 (General Misconduct), 1.A.2 (Disorderly Conduct), 1.A.3 (Harassing Conduct), 1.A.4 (Physical Harassment), 1.A.33 (Bullying), and 1.A.34 (Physical Assault). In addition, you may also be in violation of the university’s Sexual Misconduct Policy for dating violence, non-consensual sexual contact, sexual assault and sexual exploitation.

"Attached to this email are copies of the Student Bill of Rights, Student Code of Conduct, Sexual Misconduct and Violence Policy, and Non-Academic Disciplinary Procedures.

"My Office is in the process of reviewing the information and would like to discuss the matter with you."

Id. at 0008.¹

Petitioner notes that, at the time of his enrollment, he was provided with a copy of TNS's Student Code of Conduct, which included the Non-Academic Disciplinary Procedures for TNS. Petitioner aff, ¶ 3. The provisions of the Non-Academic Disciplinary Procedures are in place to "review incidents involving violations of the University policies governing student conduct or behavior and other non-academic policy violations where the responding party is a student . . ."

Id. at RR073. Students who live off campus are also subject to these disciplinary procedures.

The Non-Academic Disciplinary Procedures advise that "[a]ny member of the university community may report an alleged violation of the policies governing student conduct or behavior . . ." *Id.* at RR079. Upon receiving the initial alleged violation, the SCCS has the authority to conduct a preliminary review and investigate the allegations. This investigation includes notifying the responding party about the complaint and providing the party with information

¹ The Student Code of Conduct prohibits certain behaviors. In relevant part, General Misconduct is defined as "conduct unbecoming of a student member." *Id.* at RR0098. Disorderly Conduct includes, but is not limited to, "conduct which adversely affects the student's suitability as a member of the university . . ." *Id.* Harassing Conduct consists of "verbal or written actions that are abusive to any person" that are not sexual in nature. *Id.* Physical Harassment includes "inappropriate touching of any person or similar conduct that threatens or endangers the physical or emotional health or safety of any person that is not sexual in nature." *Id.* Bullying behaviors consist of "verbal, written and physical abuse." *Id.* at RR0100. Physical Assault is defined as "Intentionally inflicting bodily harm upon any person; taking reckless action that results in harm to any person; . . ." *Id.* at RR0101.

The Sexual Misconduct & Violence Policy defines Sexual Assault as "non-consensual sexual intercourse." *Id.* at RR0085. Sexual Exploitation "occurs when one person takes non-consensual or abusive sexual advantage of another . . ." *Id.* Dating Violence "means violence by a person who has been in a romantic or intimate relationship with the victim." *Id.* at RR0086. Regarding consent, "[t]he presence of consent involves explicit communications and mutual approval for the act in which the parties are/were involved." *Id.*

about the disciplinary procedures. The SCCS may interview the responding party and also any parties “thought to have knowledge of the particular incident.” *Id.*

If the SCCS believes that there is a sufficient basis to support the complaint, it will provide the responding party with a copy of the complaint. After the responding party has received the complaint, the SCCS may meet with the parties on a one-on-one basis to gather all the facts about the incident. According to the procedure for filing a complaint, as relevant here, after the initial investigation and review by the SCCS, a disciplinary review panel may be required due to the nature of the incident. If a disciplinary review panel is warranted, the “student has a right to review the file with a support person and/or attorney.” *Id.* at RR0081. At the hearing, students may bring “a support persons. Support persons may not participate or intervene in the review process.” *Id.* The disciplinary actions are reviewed under a preponderance of the evidence standard. Further, suspension is one of the possible penalties for a violation of “the policies governing student conduct or behavior.” *Id.* at RR0074.

On April 26, 2017, petitioner met with Francone so that he could respond to each specific allegation. Francone states that petitioner was then provided with the notes from his meeting and asked to check if there were any factual inaccuracies.

Petitioner submitted his corrections to their interview transcript from the April 26, 2017 meeting. Petitioner states that, from October 16, 2016 to February 8, 2017, he had been in a consensual sexual relationship with RP. In addition, petitioner submitted other documentary evidence that included, among other things, text messages between himself and RP, personal information about RP, and photos to illustrate the alleged abuse he was subjected to by RP. With respect to SW, petitioner stated that he and SW were “good friends” and that he may have patted or slapped him on the shoulder but did not hit him. Petitioner denied punching the wall.

A disciplinary hearing was scheduled for May 5, 2017. On May 2, 2017, petitioner advised TNS that he had retained counsel in connection to the disciplinary hearing and that he would like to postpone the hearing. TNS informed petitioner that his request to postpone the hearing had been granted, but that it needs all his materials in response to the allegations by May 10, 2017. The email also advised that, “[p]er our process, you can review all the materials in preparation for the hearing. Please note that while students can have support persons, including attorneys, during and leading up to the hearing, support persons cannot speak for or otherwise represent students during any university proceedings.” *Id.* at RR0030. Francone’s notes taken during her interviews with the three students became part of the investigative record.

On May 11, 2017, petitioner received a letter from TNS memorializing the recent events and advising him that the disciplinary hearing was scheduled for May 16, 2017. The letter indicated that petitioner provided a statement, corrections to the meeting notes and other materials. Petitioner was reminded that he had previously received the Student Code of Conduct, Sexual Misconduct Policy, Student Bill of Rights and Non-Academic Disciplinary Procedures. The letter summarized the allegations made against petitioner and the parties’ contentions. By way of example, some, but not all, of the allegations made by RP included the following:

“According to [RP] the two of you were in a brief relationship during the Fall of 2016 that included sexual activity. Ms. RP reported the following: during sex, you have choked her and subsequently, the choking would get more and more intense. You would say things such as, “Do you like knowing I could kill you?” or “Do you like knowing that your life is in my hands?” Ms. RP said that on a number of occasions she would need to hit you several times before you stop[ed] choking her. She wouldn’t be able to speak. You would be choking her so hard that she was beginning to be in distress. You have also slapped her across the face without her consent on one occasion. . . . The next day, there was a swollen spot on her cheek, it was tender, and some small blood vessels had broken. During another sexual encounter, the two of you were having sex standing up when you threw her at the window sill. She hit her head on the window and became dazed. You did not notice and penetrated her without her consent. Ms. RP has also said

that you've said to her "You're an easy target"; "It's convenient to be with you"; "You're stupid enough to care for me"; "You're a failure and trash"; "You're a stupid person"; "I only needed you to survive"; "You're the most boring person to argue with"; "Why do you sound so unintelligent?" and "You're not even smart enough to argue with me."

Id. at RR0197.

The letter further memorialized petitioner's contentions as follows:

"At our meeting, you said that you and the other student were in a consensual sexual relationship. You said this several times. You explained that the other student was attempting to create a narrative to make it seem like she was trying to end the relationship when, in fact, you were the one trying to leave it. You denied making many of the comments the student reported You also stated that you did not choke her, you only held her by her neck. She did ask you to slap her across [sic] during sex once. You . . . denied hitting her friend, SW. You provided my office with a statement, a list of corrections to our meeting notes, and other supportive materials."

Id. at RR0198.

The letter concluded, "[b]ased on the review of all the information reported, this matter has been referred to the Disciplinary Review Panel who will convene to evaluate this matter. The panel will determine if you are in violation of the university's Student Code of Conduct and the Sexual Misconduct and Violence Policy." *Id.*

Petitioner and his counsel reviewed the file on May 15, 2017. Petitioner's disciplinary hearing was held on May 16, 2017 in front of a five-member disciplinary review panel (panel). Francone states "TNS's typical practice is to stagger student appearances so that the Reporting Party and Responding Party do not appear simultaneously, and that is what we did here." Francone aff, ¶ 38. The panel interviewed RP first, then SW and then petitioner.

By letter dated May 17, 2017, Francone informed petitioner that he was being suspended for one academic year as a result of the outcome of the disciplinary hearing. She explained that the panel "determined based on a preponderance of the evidence and the credibility assessments of the witnesses that [petitioner] violated the university's Sexual Misconduct and Violence Policy for Non-consensual Sexual Contact, Sexual Exploitation, and Domestic Violence and the

Student Code of Conduct Sections II.A.1, II.A.2, II.A.3, II.A.4, II.A.33, and II.A.34.² The Disciplinary Panel found you not responsible for Sexual Assault under the Sexual Misconduct and Violence Policy.” Petitioner’s exhibit 2 at 1. Francone advised that the panel found RP to be a more credible witness and that her credibility was “bolstered” by the other student witness’s statements. *Id.* “The panel felt that [RP] was clearly distressed by her experience and that [petitioner] took advantage of her. The panel found [petitioner] lacking in empathy and therefore [] not credible.” *Id.*

Petitioner was advised that he had the right to appeal the determination within 10 days to Michelle Relyea (Relyea), Vice President for Student Success. He was further informed that, as he was found responsible for Domestic Violence under the Sexual Misconduct and Violence Policy and received a penalty of suspension, a notation would be added to his transcript. Petitioner was also advised that he was able to file an appeal to remove this notation.

Shortly after receiving Francone’s letter, petitioner appealed the panel’s outcome. Petitioner argued that TNS did not have jurisdiction over the matter because he and RP did not live on campus and because none of the allegations occurred on campus. Petitioner further alleged that he was not given the opportunity to review the testimony provided by the student witness or to cross-examine him. In addition, petitioner stated that he was not given an opportunity to present a witness to the panel like RP was able to do.

In his appeal, petitioner maintained that the panel has “still not identified any specific instances to support the finding that [he] violated the Code of Conduct. . . . Just one example is that no specific instance of physical harassment or non-consensual sexual contact has been identified.” Petitioner’s exhibit 3 at 2. Petitioner argued that RP had crafted support for her

²The sections should be listed as 1.A.1, 1.A.2, 1.A.3, 1.A.4, 1.A.33, and 1.A.34. This discrepancy has no bearing on the proceeding.

allegations after the relationship was terminated. He stated, “[t]he timing of these allegations, at the end of the semester and following my ending our relationship with RP reflects negatively on the credibility of these allegations.” *Id.* According to petitioner, it was irrational for the panel to rely on the parties’ emotions at the hearing instead of the evidence presented. He continued that the documentary evidence demonstrated that he was in a consensual sexual relationship with RP and that he ended the relationship. In addition, petitioner claimed that the panel failed to consider the information petitioner presented regarding RP’s psychological state and the “verbal, physical and sexual abuse she subjected me to.” *Id.* at 3.

Finally, petitioner maintained that the penalty of suspension was shocking and that it was a violation of due process to include a notation on his transcript with this information.

Petitioner’s appeal was denied. In relevant part, Relyea found that petitioner was not denied a fair review as he was given notice of the allegations brought and the policies that they may violate. Further, Relyea noted that petitioner was given two extensions of time to get advice from counsel, gather evidence and “perhaps find witnesses.” Petitioner’s exhibit 4 at 1. The letter concluded with the following, in relevant part: “This is clearly a situation, where if the allegations are shown to have violated a university policy, they affect your suitability as a member of our community. Therefore, under our procedures, we have jurisdiction over the allegations to see if a policy violation occurred.” *Id.* at 2.

After receiving this determination, petitioner commenced the instant article 78 proceeding by filing an order to show cause and a verified petition. The verified petition included an article 78 claim, a claim alleging that TNS failed to follow the procedures and

regulations promulgated under Title IX of the Education Amendments of 1972 (Title IX), and a breach of contract claim.³

On October 30, 2017, TNS removed the proceeding to the United States District Court for the Southern District of New York (District Court), on the basis that Title IX presented a federal question. Petitioner filed an amended complaint/petition on November 29, 2017. TNS moved to dismiss the amended complaint/petition. The District Court granted TNS's motion to dismiss the Title IX claim and remanded the remaining two state law claims to Supreme Court, New York, New York.

After remand, the proceeding was restored to the calendar. To begin, petitioner argues that TNS lacked jurisdiction over RP's allegations because neither party lived on campus, they did not have classes together in the Spring of 2017, and none of the allegations related to TNS or took place on campus. Petitioner further alleges that the panel's finding was not supported by evidence. He reiterates that he and RP had a consensual sexual relationship and RP did not file a complaint until after petitioner had ended the relationship. In addition, he believes that RP crafted support for her allegations after the end of the relationship. However, according to petitioner, although he testified credibly at the hearing, the panel relied solely on the emotions of RP, instead of the evidence presented.

According to petitioner, the evidence presented indicates that he did not violate TNS's rules and regulations. He states, "[t]o find Plaintiff guilty of these stigmatizing violations, suspend Plaintiff for one year, and have Plaintiff's transcript permanently marked with these

³ Specifically, petitioner asserted that TNS "deprived [petitioner], on the basis of his sex, his rights to due process and equal protection through improper administration" of its rules and regulations. Petition, ¶ 42. He continued that TNS conducted a biased investigation and review, in favor of RP. Further, TNS "had no intention of following its own policies and procedures for [petitioner] as the male accused of sexual misconduct when it erroneously found [petitioner] responsible for sexual misconduct despite the able [sic] of any reliable or credible evidence." *Id.*, ¶ 44.

findings based solely on the basis that, 'the panel felt the Accuser was clearly distressed by her experience and that Plaintiff took advantage of her,' does not provide sufficient support for the panel's findings." *Id.*, ¶ 20.

Petitioner claims that "[a]ll of the findings made against the Plaintiff were unsupported by any factual finding or evidence, to meet the definitions as set forth by the New School Sexual Misconduct and Violence Policy and the The New School Code of Conduct." *Id.*, ¶ 21. For instance, after citing to the definition of Disorderly Conduct in the Student Code of Conduct, petitioner maintains that the "finding of guilt made by Defendant of 'Disorderly Conduct' states no time, place of details of any action by Plaintiff that fits the definition as set forth in the Student Code of Conduct." *Id.*, ¶ 27. Moreover, according to petitioner, "[n]ot a single instance of misconduct was identified" prior to or during his panel hearing. *Id.*, ¶ 20.

Petitioner states, "[t]he denial of the opportunity to review all of the evidence against him and rebut it is a direct violation of Plaintiff's due process rights and Title IX." *Id.*, ¶ 19. In support of his contentions, petitioner argues that he was denied due process when RP could present a witness to the panel while he was not given the opportunity to present one. Further, petitioner was unable to cross-examine this witness or review this testimony.

The first cause of action, entitled "CPLR Article 78," petitioner alleges that TNS "breached its own terms and conditions set forth for graduation and acted arbitrarily and capriciously, irrationally, and in bad faith toward Plaintiff in issuing the findings of misconduct and suspending Plaintiff." *Id.*, ¶ 37.

The remaining cause of action, grounded in breach of contract, alleges that TNS created express and implied contracts with petitioner when he enrolled at TNS and that TNS breached several agreements with petitioner during the investigation and hearing process. For instance,

petitioner argues that he was denied an equal opportunity to present evidence and witnesses and was denied the opportunity to defend himself. In addition, TNS “failed to apply the definitions, as set forth above, as set forth in the Sexual Misconduct and Violence Policy and the Student Code of Conduct, in disciplining Plaintiff for the violations set forth in the findings.” *Id.*, ¶ 67.

TNS’s Opposition:

TNS argues that petitioner received all the due process to which he was entitled, and that petitioner has not identified any basis to disturb the panel’s determination. To begin, TNS maintains that, due to his enrollment at TNS, TNS had jurisdiction over the disciplinary proceedings. It continues that petitioner was advised of this in the Student Handbook. Further, TNS notes that “New York State’s ‘Enough is Enough’ Law explicitly requires academic institutions to investigate and discipline sexual misconduct occurring off-campus.” TNS’s memo of law at 13.

According to TNS, petitioner cannot establish that TNS failed to substantially comply with its procedures. Among other things, although petitioner claims that he was denied due process when his counsel was not allowed to speak during the hearing, TNS was following its procedures, which do not allow support persons to speak during the hearing. TNS’s procedures also do not guarantee that petitioner may cross-examine or present witnesses. Francone stated that, during the investigation, petitioner never identified a fact witness. Moreover, when the panel asked petitioner if he had any additional information that it should be aware of, he did not suggest that any witnesses be brought in to testify.

TNS further argues that petitioner fails to demonstrate that the panel’s determination was irrational or made in bad faith. On the other hand, TNS contends that the panel made a rational determination based on the evidence and testimony presented. TNS notes that the panel was

provided with, among other things, text messages between the parties and photographs submitted by RP showing injuries she sustained from petitioner. The panel was able to question the parties regarding the evidence. For instance, the panel asked petitioner to explain the circumstances surrounding a potentially threatening text message.

Francone, who was present at the hearing and recorded it, stated the following in relevant part:

“The Panel ultimately believed the Reporting Party . . . Her emotion during the Hearing led the Panel to conclude that she was a victim of the conduct as she had alleged. The Panel also felt that her description of Petitioner’s aggressive and violent conduct during their sexual activity was consistent with that described by the student witness, who related his first-hand experience with Petitioner’s aggressive conduct during the bar incident.

“In contrast, Petitioner was not considered to be as credible a witness in the Panel’s opinion. The Panel believed that he was evasive in answering their questions, and in some instances, he did not directly deny the alleged behavior (although he maintained generally that his actions were appropriate). During the Hearing, Petitioner contended that he was ‘the victim,’ and that the Reporting Party introduced sexual violence to their relationship. The Panel concluded that there was no support for this contention.”

Francone aff, ¶¶ 45, 46.

TNS concludes that the panel was able to make a rational analysis, given that it interviewed the parties and evaluated their conflicting stories. Further, the court may not substitute its own judgment regarding the credibility determinations of the witnesses.

With respect to the breach of contract claim, TNS argues that it should be dismissed as duplicative of the article 78 claim.

DISCUSSION

Private schools are given broad discretion with how they conduct their programs, including decisions relating to the suspension and dismissal of students. *Matter of Khaykin v Adelphi Academy of Brooklyn*, 124 AD3d 781, 782 (2d Dept 2015). “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.” *Id.*

Petitioner’s argument that TNS did not have jurisdiction over the allegations because, among other things, he and RP lived off campus and none of the allegations were related to TNS, is belied by the record. The Student Code of Conduct advises all students that the disciplinary procedures are “designed . . . to review incidents involving violations of the University policies where the responding party is a student” *See* RR0073. Students are further informed that they are subject to reasonable disciplinary action for breach of university rules or policies, under certain circumstances, even if this breach occurs off-campus, if the conduct “affects the student’s suitability as a member of the academic community.” *Id.*

“A student subject to disciplinary action at a private educational institution is not entitled to the full panoply of due process rights. Such an institution need only ensure that its published rules are substantially observed.” *Matter of Kickertz v New York Univ.*, 25 NY3d 942, 944 (2015) (internal quotation marks and citations omitted).

Here, the record reflects that TNS complied with the procedures set forth for disciplinary proceedings prior to, during, and after the hearing. In pertinent part, as referenced above, petitioner was advised about the nature of the complaint made against him, and then submitted his own rebuttal and evidence. Petitioner and his counsel reviewed the entire investigative record presented to the panel, including the statements made by SW in connection to RP’s allegations. Petitioner was afforded the opportunity to bring a support person and his attorney attended the hearing. The Student Code of Conduct sets forth that, although a student may bring a support person to the hearing, the support person may not participate in the review process. Each party testified without the other students in attendance, as is customary during disciplinary

proceedings. The panel made a determination based on a preponderance of the evidence and the credibility assessments of the witnesses. Petitioner was provided with an opportunity to appeal the determination, and he did so. Accordingly, TNS has established that it “substantially observed” its published rules for suspension. *Matter of Kickertz v New York Univ.*, 25 NY3d at 944.

Petitioner alleges that he was denied due process based on TNS’s failure to provide him with an equal opportunity to present information and witnesses. However, petitioner’s arguments that he was denied due process during the hearing are unavailing. Petitioner’s inability to cross-examine the witnesses did not deprive him of due process because “[t]he right to cross-examine witnesses is limited in administrative proceedings.” *Matter of Doe v Skidmore Coll.*, 152 AD3d 932, 934 (3d Dept 2017). In addition, “the right of confrontation or cross-examination is not directed or guaranteed under respondent’s procedures . . .” *Matter of Doe v Cornell Univ.*, 163 AD3d 1243, 1245 (3d Dept 2018).

Petitioner further claims that he was denied due process when RP was given the opportunity to present a witness, while he was not. However, petitioner failed to preserve this argument as he did not raise it at the hearing when the panel asked him if there was anything else that he would like to add. See e.g. *Matter of Agudio v State Univ. of N.Y.*, ___ AD3d ___, 2018 NY Slip Op 05647, *3 (3d Dept 2018) (“Petitioner’s characterization that the investigator improperly offered expert testimony on racial bias is waived and unpreserved because she did not attend the hearing and raise an objection”). Regardless, despite reviewing the file with counsel, petitioner did not identify a fact witness prior to the hearing. In addition, as with the right to cross-examination, the right to present a witness is not guaranteed under TNS’s procedures.

Petitioner argues that he was denied due process as TNS allegedly failed to identify any instance of misconduct. Further, he claims that the determination of guilt does not set forth how his actions meet the definitions provided in the Student Code of Conduct for the specific violations charged. However, petitioner's arguments regarding an alleged lack of specificity are disingenuous and without merit. As noted in the facts, prior to the hearing, petitioner was provided with a comprehensive and graphic description of the allegations. See RR0197-RR0199. In the same letter, he was provided with the exact sections of the Student Code of Conduct and the Sexual Misconduct and Violence Policy that he would be in violation of if the subject allegations were proven to be accurate. It is undisputed that petitioner received copies of the Sexual Misconduct and Student Code of Conduct, among other materials. The definitions of the violations, as provided to petitioner in the various TNS policies, are straightforward and can logically be linked to the various allegations.⁴

The panel then complied with TNS's procedures when it made "a determination of responsibility and a recommendation of sanction(s)," which was subsequently reviewed by Francone and sent to petitioner. See RR0081. The letter set forth the violations the panel believed petitioner was responsible for, and the resulting sanctions. Accordingly, petitioner received all the due process to which he was entitled during the disciplinary proceedings. See *e.g. Matter of Fernandez v Columbia Univ.*, 16 AD3d 227, 228 (1st Dept 2005) (Petitioner's due process rights were not violated when, during the course of a disciplinary proceeding in a private school, petitioner was given notice of the charges and an opportunity to be heard prior to the determination and imposition of sanctions, "petitioner was thereafter provided an opportunity to take an internal appeal; and that in proceeding against petitioner respondent substantially abided by its own governing rules and regulations").

⁴For example, a proven allegation of choking would constitute 1.A.34 (Physical Assault).

According to petitioner, the panel did not rely on either the evidence presented or petitioner's credible testimony in making its determination, and solely relied on the emotions of RP. During the hearing, petitioner did not explicitly deny some of the sexual acts but maintained that RP was the aggressor in the relationship and that the two parties were in a consensual relationship. As presented in the record, the panel believed that RP was sincere in her testimony and noted that her description of petitioner's aggressive conduct during their relationship was consistent with SW's interaction with petitioner. Furthermore, although the determination noted that petitioner was not credible because he lacked empathy, it also indicated that, based on the review of the materials and the testimony of RP, which was bolstered by SW's interactions with petitioner, RP was a more credible witness. The court sees "no basis for disturbing the [panel's] credibility determination. In a school disciplinary proceeding, evidence may consist of hearsay, and reasonable inferences drawn will be sustained if the record supports the inference, which it does here." *Matter of Ebert v Yeshiva Univ.*, 28 AD3d 315, 316 (1st Dept 2006) (internal citation omitted).

Petitioner further challenges the appropriateness of the penalty, given that he was suspended for one year and received a notation on his transcript. "In making [a determination about the appropriateness of the sanction], a court must look to whether the punishment imposed is so disproportionate as to shock one's sense of fairness." *Matter of Quercia v New York Univ.*, 41 AD3d 295, 297 (1st Dept 2007). Petitioner was advised in the Student Code of Conduct that suspension is a possible sanction for students who violate policies governing student conduct or behavior. Among other violations, the panel found that petitioner was responsible for domestic violence under TNS's Sexual Misconduct and Violence Policy, and it recommended the penalty of a one-year suspension. The Student Code of Conduct further notes that the penalty of

suspension as a result of violating TNS's Sexual Misconduct and Violence Policy includes a notation on the transcript. Accordingly, the court will not disturb the administrative penalty herein "since that sanction was premised on the seriousness of the offenses and the circumstances under which the petitioner was found responsible, and the penalty was not so disproportionate to the offenses as to shock the Court's sense of fairness." *Matter of Ferraro v State Univ. of N.Y. at Purchase Coll.*, 162 AD3d 766, 767 (2d Dept 2018).

"In situations involving nonacademic discipline, when a university acts within its jurisdiction, not arbitrarily but in the exercise of an honest discretion based on facts within its knowledge that justify the exercise of discretion, a court may not review the exercise of its discretion." *Matter of Powers v St. John's Univ. Sch. of Law*, 110 AD3d 888, 889 (2d Dept 2013), *aff'd* 25 NY3d 210 (2015) (internal quotation marks and citations omitted). Here, the panel listened to the testimony, reviewed the record, deliberated and voted on each charge. TNS's determination that petitioner violated several sections of the Student Code of Conduct "was based upon the exercise of honest discretion after a full review of the operative facts and was therefore neither arbitrary nor capricious." *Matter of Simkovich v Vassar College*, 249 AD2d 551, 551 (2d Dept 1998) (internal quotation marks and citations omitted).

Accordingly, the court will not disturb TNS's decision to suspend petitioner and his request for article 78 relief is denied.

Breach of Contract

Petitioner's remaining breach of contract cause of action alleges that TNS created express and implied contracts with petitioner when he enrolled and paid tuition fees. According to petitioner, TNS breached several agreements with petitioner during the investigation and hearing process by, among other things, denying him the opportunity to defend himself.

Although petitioner set forth a separate cause of action for breach of contract, he has not identified any additional requested relief that is actionable under a breach of contract claim.

Petitioner's main contention is that TNS "failed to comply with its internal rules and procedures. That claim is properly asserted and evaluated as a cause of action under CPLR article 78." *Matter of Zanelli v Rich*, 127 AD3d 774, 775 (2d Dept 2015); see also *Matter of Kickertz v New York Univ.*, 110 AD3d 268, 274 (1st Dept 2013) (internal quotation marks and citation omitted) ("Thus, to the extent plaintiff's breach of contract claim challenges NYU's decision to expel her based on a violation of its disciplinary rules and seeks specific performance in the form of an award of a DDS degree, it is not cognizable in a breach of contract action"). Accordingly, as petitioner's breach of contract claim is "not cognizable," it is dismissed.

CONCLUSION

Accordingly, it is hereby

ADJUDGED that the amended petition/complaint is denied and the proceeding is dismissed, with costs and disbursements to respondent; and it is further

ADJUDGED that respondent, having an address at n/a, do recover from petitioner, having an address at n/a, costs and disbursements in the amount of \$ waived, as taxed by the Clerk, and that respondent have execution therefor.

Dated: 9/26/2018

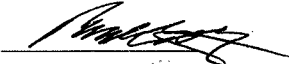
ENTER:

FILED

OCT 29 2018

COUNTY CLERK'S OFFICE
NEW YORK

Page 18 of 18


Hon. Paul A. Goetz, JC


clear