

**Matter of Doe v Columbia Univ. in the City of N.Y.**

2020 NY Slip Op 30600(U)

January 6, 2020

Supreme Court, New York County

Docket Number: 101688/18

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, IAS PART 11

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In the Matter of the Application of JOHN DOE,

Petitioner,

Index No.: 101688/18

-against-

COLUMBIA UNIVERSITY IN THE CITY OF  
NEW YORK and TRUSTEES OF COLUMBIA  
UNIVERSITY IN THE CITY OF NEW YORK,

Respondents,

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JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner, a former student at respondent Columbia University of the City of New York (“Columbia”), challenges the respondents’ decision in a disciplinary proceeding arising from a Gender Based Misconduct (“GBM”) violation involving sexual assault and a violation of the Columbia’s email usage policy and policies prohibiting falsification, retaliation, and harassment. Respondents oppose the petition and move pursuant to CPLR 3211(a)(1) and (7) and 7804(f) to dismiss the petition. For the reasons below, respondents’ motion to dismiss is granted.

Background<sup>1</sup>

This petition arises out of an encounter between petitioner, who is male, and a female student at Columbia (“female student” or “complainant”) on December 13, 2017. Petitioner and the female student, who, at the time, were both fourth year students, met at a fraternity formal after-party on December 12, 2017. Before the incident, the two did not know each other. Petitioner alleges that at the formal, he consumed seven alcoholic beverages in approximately 45

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<sup>1</sup>The following facts are based on the allegations in the petition, the record of the disciplinary proceedings, and policy and rules governing the proceedings.

minutes, causing him to blackout, and his last memory was of entering an Uber at approximately 1:00 am.

According to petitioner, when he woke up on the morning of December 13, 2017, he did not know where he was or how he had arrived there, whose bed he was in, or who was in bed with him. Petitioner left the location and returned to his dorm room. On the evening of December 14, 2017, another Columbia student contacted petitioner on behalf of the female student to discuss the previous day's events, and petitioner alleges he began to have flashes of memory regarding the gap in time, and recalled speaking to the female student and her roommate but not what was discussed. In addition, petitioner alleges he recalled that upon entering the female student's bedroom he believed that the female student initiated physical contact by kissing him, helped him get undressed and sought oral sex, and that she retrieved a condom from somewhere, and that he and the female student engaged in sexual intercourse.

That day petitioner alleges that he called his father to discuss what had occurred and expressed distress and shame that he had been taken advantage of in his intoxicated state. Petitioner's father discouraged petitioner from reporting the incident to Columbia and told him it was better to try to work it out with the female student.

On December 20, 2017, the female student filed a complaint with Columbia's GBM Office alleging that petitioner had sexually assaulted her. Specifically, she alleged that the initial consensual sex with petitioner soon became nonconsensual, that petitioner did not use protection and would not stop when she told him to, even though it was evident that she was in pain. On January 29, 2018, petitioner filed a complaint with the GBM Office alleging that the female student sexually assaulted him by engaging in sexual intercourse with him without his affirmative consent as he was incapacitated by alcohol, and that he had blackout due to alcohol. On February 26, 2018, petitioner amended his complaint to add an allegation of sexual

exploitation, alleging that the female student had purposefully given him an alcoholic drink while he was already intoxicated for the purpose of engaging in sexual conduct with him when he was unable to provide proper consent.

In response to these complaints, the GBM Office, in accordance with GBM Policy, performed an initial assessment to determine whether the alleged conduct, if substantiated, constituted violations of Columbia's policies, and whether there was reasonable basis to proceed with the disciplinary process. Petitioner's sexual exploitation claim against the female student was not investigated, as the GBM Office determined that petitioner had not submitted sufficient information in support of the claim. However, both parties' sexual assault allegations were found to be sufficient to require an investigation. Respondents conducted an investigation, which entailed interviewing petitioner, the female student, and fifteen witnesses, and reviewing 54 pieces of evidence, including photographs, text messages, security camera footage, Uber receipts, and call logs.

The investigative team provided both parties with an opportunity to review the facts that the team had gathered and offer any additional information, point out any flaws, and to ask the other party any additional questions. After completion of the investigation, respondents issued the factual portion of its investigative report and gave both the female student and the petitioner an opportunity to review it and point out any inaccuracies and propose additional evidence. Following any corrections and additions of any evidence, the investigative report was finalized and the investigative team made its assessment, recommending that petitioner be found not responsible under Columbia's Gender-Based Misconduct Policy for Students (the "GBM Policy"): for one violation of Sexual Assault: Intercourse (mouth to vagina), and responsible for one violation of Sexual Assault: Intercourse (penis to vagina), and that the female student be

found not responsible for the two violations of Sexual Assault based on petitioner's incapacitation.

Following the notification of petitioner and the female student of the results of the investigation, petitioner requested a hearing, which was held before a three-person panel (the "Hearing Panel") on June 26, 2018. On June 29, 2018, the Hearing Panel issued its decision, finding petitioner not responsible for Sexual Assault: Intercourse (mouth to vagina), but responsible for Sexual Assault: Intercourse (penis to vagina). The Hearing Panel found the female student not responsible for the allegation of sexual assault asserted against her by petitioner ("the GBM Decision"). As a result of the GBM Decision, petitioner was issued a two-year suspension. Petitioner appealed the GBM Decision (hereinafter "the GBM Appeal"), asserting that the Hearing Panel failed substantially to adhere to its own standards and guidelines, failed to support its findings with substantial evidence, engaged in disparate treatment due to gender bias, and issued an excessive sanction.

On June 29, 2018, respondents informed petitioner that they had received a report that petitioner had committed certain violations of the Student Conduct Code not related to violations of the GBM Policy. Specifically, these violations concerned allegations that petitioner hacked into the e-mail account of another student who had filed a sexual assault complaint against him, and, posing as the owner of the e-mail account, e-mailed Columbia's Title IX Coordinator stating that the previously reported sexual assault allegations against petitioner were retaliatory and that the student wished to withdraw the complaint. Petitioner did not deny engaging in this conduct. On July 9, 2018, petitioner presented for a Dean's Discipline Hearing in connection with the e-mail hacking incident and, on July 20, 2018, while his appeal of the GBM Sanction was still pending, petitioner was found responsible for violating three of Columbia's University Policies, specifically the Email Usage Policy, Falsification, and Retaliation.

In light of these violations, petitioner was subject to Dean's Discipline Sanctions. Petitioner was advised, however, that because he had recently appealed the GBM Decision, respondents would not impose Dean's Discipline Sanctions against him until the GBM Appeal was decided. On July 24, 2018, petitioner informed respondents via email that he objected to their failure to issue sanctions while his appeal of the GBM Decision was pending as such delay was prejudicial and not supported by the Student Conduct Code. On July 31, 2018, petitioner was informed that his GBM Appeal was denied. On August 2, 2018, petitioner received notice from the Student Conduct and Community Standards Office that he was being expelled from Columbia as a result of his Dean's Discipline Sanction.

On August 13, 2018, petitioner appealed the Dean's Discipline Sanction, citing additional evidence indicating that he was suffering from Serotonin Syndrome for a longer time than previously known when he initiated the actions leading to the Dean's Discipline Sanction. Petitioner also maintained that respondents violated to Student Conduct Code by failing to consider the mitigating circumstances of petitioner's medical condition and by delaying the issuance of the Dean's Discipline Sanction while GBM Appeal was pending. On August 28, 2018, respondents denied petitioner's appeal of his Dean's Discipline Sanction and confirmed his expulsion from Columbia.

#### Article 78 Proceeding

In this Article 78 proceeding, petitioner seeks to annul the Dean's Discipline Sanction, GBM Sanction, and GBM Decision, and a judgment and order declaring these sanctions and decisions invalid on the grounds that they are arbitrary and capricious, and based on Columbia's failure to follow its own rules and guidelines. Petitioner also seeks affirmative relief including reinstating him in good standing at Columbia, issuing him a diploma, expunging his disciplinary record, and awarding him restitution and/or damages.

The first cause action alleges that respondents failed to substantially comply with their own published rules and guidelines when determining if the female student withdrew her consent to sexual intercourse with petitioner, and in dismissing petitioner's allegations of sexual exploitation and sexual assault. With regard to the issue of the withdrawal of consent, it is alleged that respondents did not follow their GBM Policy and, in particular, that while the GBM Policy "contains numerous examples of when sexual activity should cease" none of the examples include those at issue in this action such as "the utterance of the word 'ow' or ambiguous body language that may show engagement mid-coitus, such a shifting position indicates withdrawal of consent." It is further alleged that "[b]y utilizing these words and actions as evidence of the Complainant's withdrawal of consent, respondents improperly and arbitrarily imposed a standard not contained within the [GBM] Policy on petitioner." It is also alleged that respondents improperly shifted the burden from respondents to petitioner to show withdrawal of consent, including at what specific point during intercourse complainant told petitioner to stop, and what actions petitioner took after he allegedly was told to stop .

As for the dismissal of petitioner's claims of sexual assault based on incapacitation from alcohol, it is alleged that respondents failed to comply with their own procedures "by improperly applying their definition of incapacitation." In this connection, the petition quotes the GBM Policy regarding incapacitation which provides that "[t]he use of alcohol or other drugs is never an excuse for committing gender-based misconduct and never diminishes anyone's responsibility to obtain informed consent and freely given consent." It is alleged that respondents "focused on the first clause of the policy when determining that petitioner was responsible for committing sexual assault but failed to apply the second clause to the Complainant when considering Petitioner's claim that she sexually assaulted him [and] were required to analyze whether complainant obtained informed and freely given consent from

petitioner in light of her knowledge of petitioner's high level of intoxication." It is further alleged that respondents' decision failed to credit petitioner's testimony regarding his partial memory loss, presumably because he is male, in light of other cases in which respondents credited statements of female complainants with partial blackouts.

It is also alleged that respondents failed to consider relevant factors required by the GBM Policy in issuing the GBM Sanction by not taking into account petitioner's state of mind and circumstances accompanying complainant's alleged lack of informed consent. It is further alleged that the Student Conduct Code does not permit respondents to delay the issuance of a sanctions while another unrelated disciplinary matter is pending, and that respondents "impermissibly waited until the [GBM] Appeal was resolved, thereby establishing an additional disciplinary history, before issuing the Dean Disciplinary Sanctions."

The second cause of action alleges that respondents failed to base the GBM Decision on a rational interpretation of relevant evidence. With respect to petitioner's claim of incapacitation, it is alleged that respondents "failed to properly consider the conclusions of petitioner's expert and evidence that clearly indicated that [p]etitioner was incapacitated pursuant to the [GBM] Policy, [and] ...ignored testimony from a witness called by complainant that petitioner was too drunk to provide affirmative consent to engage in sexual intercourse with the complainant." As for complainant's claim that she withdrew her consent, it is alleged that respondents "arbitrarily disregarded text messages from complainant stating that she 'wasn't very loud' about her alleged withdrawal of consent..[and] dismissed evidence from a witness that complainant told her that [p]etitioner did not seem to realize that he had done anything wrong." It is also alleged "the Hearing Panel improperly found that petitioner was aware of, and then disregarded complainant's clear withdraw of consent [and that] [e]ven if the Hearing Panel credited complainant's claim that she said stop,...respondents failed to address petitioner's repeated

contention that he did not hear her say stop as well as complainant's admission that she was not very loud when she allegedly withdrew consent."

The third cause of action alleges that the GBM Decision finding that petitioner sexually assaulted complainant was arbitrary and capricious as it failed to substantially comply with respondents' own published rules and guidelines and failed to based this determination on a rational interpretation of relevant evidence.

The fourth cause of action alleges that the Dean's Disciplinary Sanction issued by respondents was arbitrary and capricious and failed to comply with respondents' own procedures when respondents failed to take into account petitioner's state of mind and the circumstances accompanying complainant's alleged lack of consent when issuing the GBM Decision, and when it delayed the issuance of the Dean Disciplinary Sanction until after the GBM Appeal was decided.

Respondents move to dismiss the petition, arguing that there is no basis for annulling the the GBM Decision, which was made in accordance with GBM Policy and was rationally based, as was petitioner's expulsion based on the finding that petitioner hacked into another student's email account for the purpose of fraudulent notifying Columbia's Title IX Coordinator that the student wished to withdraw her complaint of sexual assault against petitioner.

Petitioner opposes the motion, asserting that respondents' finding that petitioner was responsible for sexually assaulting complainant was made in violation of Columbia's policies and procedures and was arbitrary and capricious as respondents shifted the burden to petitioner to show that the complainant affirmatively consented to sex and did not withdraw her consent, and disregarded evidence that complainant did not withdraw her consent and/or that petitioner was unaware she withdrew her consent. As for respondents' dismissal of petitioner's claim for sexual assault and sexual exploitation, petitioner argues that respondents improperly applied the

definition of incapacitation as it pertained to petitioner, ignored petitioner's expert's testimony and also applied different standards for determining incapacitation and sexual assault based on petitioner's gender, and did not adequately investigate the claims against the female student or afford petitioner the presumption of innocence. Petitioner also argues that respondents violated their own procedures by delaying their determination of the sanction in the Dean's Disciplinary Proceeding until after the GBM Appeal was decided so that a harsher sanction could be imposed, and that the sanction imposed was unfair and excessive under the circumstances.

### Discussion

Case law reviewing disciplinary determinations of educational institutions "reflects the policy that [these] administrative decisions... involve the exercise of highly specialized professional judgment and [that] these institutions are, for the most part, better suited to make relatively final decisions concerning wholly internal matters." Maas v. Cornell University, 94 NY2d 87, 92 (1999)(internal citation omitted). In this connection, "it is well established that judicial review of an educational institution's disciplinary determination involving nonacademic matters is limited to whether the institution substantially adhered to its own published rules and guidelines and was not arbitrary and capricious." Matter of Quercia v. New York University, 41 AD3d 295, 296 (1<sup>st</sup> Dept 2007)(internal citations omitted); see also, Fernandez v. Columbia University, 16 AD3d 227, 228 (1<sup>st</sup> Dept 2005) (upholding disciplinary sanction where private university "substantially abide by its own governing rules and regulations").

"Perfect adherence to every procedural requirement is not necessary to demonstrate substantial compliance." Doe v. Skidmore College, 152 AD3d 932, 935 (3d Dept 2017). Furthermore, a student subjected to disciplinary proceedings at a private university is not entitled to the "full panoply of due process rights," and the educational institution need only ensure that its rules are "substantially observed." See Ebert v. Yeshiva University, 28 AD3d 315,

315 (1st Dept 2006); See also Kickertz v. New York University, 25 NY3d 942, 944 (2015). As for judicial review of sanctions imposed by a university for disciplinary violations, the standard is whether the “penalty imposed is so excessive that it shock’s one’s sense of fairness.” Matter of Powers v. St. John’s University School of Law, 25 NY3d 210, 216 (2015).

Under these standards, the court finds that the petition must be dismissed.<sup>2</sup> First, with regard to respondents’ finding that petitioner was responsible for sexually assaulting petitioner based on her withdrawal of consent, while petitioner asserts that respondents failed to substantially comply with GBM Policy as they shifted the burden to petitioner with respect to these issues, such assertion is unavailing. While under the GBM Policy, the investigative team must show by a preponderance of evidence that the person accused of GBM committed such conduct,<sup>3</sup> it cannot be said that respondents did not comply with this requirement. In this regard, the GBM Policy defines “[c]onsensual sexual conduct requires affirmative consent [which is] ...define[d] as a knowing, voluntary, and mutual decision among the participants involved.”<sup>4</sup> It also provides that “[i]t is important not to make assumptions about consent..[and that] [i]f there is confusion or ambiguity, participants need to stop the sexual activity and communicate about each other’s willingness to continue.” Of particular relevance here, the policy states that

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<sup>2</sup>While the parties dispute whether certain documents submitted in support of respondents’ motion constitute documentary evidence for the purposes of CPLR 3211(a)(1), the court need not reach this issue as it may properly consider the administrative record and applicable disciplinary policy and standards in determining whether respondents failed to substantially comply with such policy and standards, and whether respondents’ determination, including the sanction imposed, was arbitrary, capricious or irrational.

<sup>3</sup> Specifically, GBM Policy provides “the Investigative Team must determine, based on the evidence presented, whether [the person accused of misconduct] was more likely than not to have engaged in the conduct at issue.” In addition, it provides that the “Investigative Team bears the burden of showing evidence to support its recommendation of responsibility [and that][t]he burden is not on the [person] accused of misconduct to prove that they did not engaged in gender based misconduct.”

<sup>4</sup>It further provides that “[c]onsent can be given by words or actions, as long as those words or actions clearly communicate willingness to engage in sexual activity.”

“[c]onsent can be withdrawn can be withdrawn at any time, including after it is initially given. When consent is withdrawn ... sexual activity must stop. ”

Applying these definitions, complainant’s testimony as to her body language (attempting to push petitioner off of her, inching her pelvis away from him, and squirming) and by her words (saying “stop” and “ow” repeatedly), is sufficient to support respondents’ determination that complainant withdrew her consent and, at the very least, that the circumstances created ambiguity as to consent, and that petitioner did not stop in response to complainant’s actions and words. Respondents also cited text messages sent by complainant (i.e. her text that the sex “turned non-consensual”) after the event that were found to support complainant’s testimony in this regard. Moreover, contrary to the allegations in the petition, based on the GBM Policy, even if complainant’s words and/or actions withdrawing consent were ambiguous, petitioner was required to stop the sexual activity and communicate with complainant.

To the extent petitioner asserts that he did not understand that complainant withdrew her consent and that certain text messages sent by complainant after the incident show that petitioner was not aware that she withdrew her consent (i.e. her texts describing the sex as “questionably consensual at points” and that she “wasn’t very loud” or “assertive” enough when she was saying “stop”) such assertions raise issues as to the sufficiency and weight of evidence as well as petitioner’s credibility, which issues were addressed in the investigative report and by the Hearing Panel and determined against petitioner. Contrary to petitioner’s argument, these issues do not provide a basis for granting Article 78 relief. See. Flores v. New York University, 79 AD3d 502, 502 (1<sup>st</sup> Dept 2010). In particular, the evidence on which petitioner relies to argue that complainant did not withdraw her consent does not render respondents’ determination arbitrary and capricious or irrational.

As to petitioner's argument that respondents did not substantially comply with GBM Policy in dismissing petitioner's claims of sexual misconduct as they improperly applied the definition of incapacitation, such argument is unavailing. The GBM Policy states that "[i]ncapacitation occurs when an individual lacks the ability or knowledge to knowingly chose to participate in sexual conduct. A person who is incapacitated cannot make a rational, reasonable decision because the person lacks the ability to understand his or her decision." It also states that "[w]hether sexual conduct with an incapacitated person constitutes gender-based misconduct depends on whether [the party allegedly committing such misconduct] knew or had reason to have known of [the other party's] incapacitation based on objectively and reasonably apparent indications when viewed from the perspective of a sober, reasonable person in the position of [the party accused of misconduct]."

Here, respondents' finding that petitioner was not incapacitated was consistent with these standards and was based on interviews by the investigative team of four students who interacted with petitioner on the date in question both at the fraternity formal and that morning, petitioner's testimony, video evidence from the night in question, and petitioner's text messages during the time at issue. In this regard, the investigative report noted that witnesses who spoke to petitioner on the night of the incident stated that petitioner did not have trouble talking, standing or walking and that he did not otherwise exhibit outward signs of intoxication, while the security camera tapes showed that petitioner was walking without difficulty, and a text message sent by petitioner at 2:15 am on December 14, 2017, used correct spelling and punctuation, and contained complete words and phrases.

The investigative report also indicates that respondents considered petitioner's testimony regarding his conduct that evening, including that he spoke in a German accent and falsely said

that his family members were Nazis, but noted that it could not corroborate his assertions that he showed outward signs of incapacitation, including slurred speech and difficulty walking, which would have put complainant on notice of his incapacitation. As for petitioner's contention that respondents did not take into account petitioner's expert's report regarding petitioner's intoxication level at the time of the sexual activity, this contention is belied by the investigative report which indicates the expert's analysis of whether petitioner was incapacitated was considered.<sup>5</sup>

Moreover, it cannot be said that respondents applied a different standard for determining petitioner's credibility in light of his incapacitation from that applied to female complainants who had gaps in memory. In this connection, the investigative report shows that the petitioner's credibility was assessed based on particular circumstances of the case and on various factors, including inconsistencies in petitioner's testimony. And, insofar as petitioner argues that respondents' determination regarding his incapacitation was the result of bias against him as a male is supported by other GBM cases decided by Columbia involving female complainants who asserted gaps in memory due to incapacitation, but were found to be credible, such cases were not part of the record below and cannot be considered in this Article 78 proceeding. See 72A Realty Associates v. New York City Environmental Control Board, 275 AD2d 284, 286 (1<sup>st</sup> Dept 2000)(“the court may not consider arguments or evidence not contained in the administrative record”)(internal quotations and citations omitted). In addition, while petitioner alternatively seeks discovery as to these cases, the court finds that discovery is not warranted as respondents have provided a rational basis for their determination with respect to petitioner's asserted

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<sup>5</sup>The investigative report stated, however, that petitioner's expert did not examine any party in the matter and that the expert's report was limited to the specific questions posed to the expert by petitioner.

incapacitation. See Price v New York City Board of Education, 51 AD3d 277 (1<sup>st</sup> Dept), lv denied 11 NY3d 702 (2008)(where Board of Education's opposition to petitioner's challenge to the no cell phone policy was credibly supported its determination, the court did not abuse its discretion in denying petitioner's motion for discovery).

As for the sexual exploitation claim, petitioner asserts that respondents violated their own policy by not adequately investigating this claim against complainant, which was based on allegations that complainant served petitioner alcohol before the two had sex. GBM defines sexual exploitation, as *inter alia*, “[i]nducing incapacitation for the purpose of making another person vulnerable to gender-based misconduct.” GBM Policy states that “[a]fter receiving a report of gender-based misconduct the [GBM] Office conducts an initial assessment to evaluate, if substantiated, the conduct constitutes a Policy violation and whether there is a reasonable basis to engage the disciplinary process.” Of significance, “[r]easonable basis is defined as some credible evidence to support each element of the violation.” Here, it cannot be said that respondents did not substantially comply with the GBM Policy in deciding that there was no reasonable basis for the claim. As indicated in the investigative report, while, in his first interview, petitioner stated that he believed he was drinking an alcoholic beverage in petitioner's apartment, in a later interview he stated that he only remembered holding a cup with a beverage, and he never stated that the complainant gave him an alcoholic beverage, nor was there other evidence to this effect.<sup>6</sup>

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<sup>6</sup>And, while petitioner points out that there were photographs showing Coke bottles on the refrigerator at the complainant's apartment, and witness testimony that there was usually alcohol in the apartment, such evidence is insufficient grounds for finding that the dismissal of petitioner's sexually exploitation claim was not in substantial compliance with the GBM Policy.

With regard to petitioner's argument that the investigative report shows that petitioner was not afforded the presumption of innocence based on a statement in the report that anyone accused of a violation has a motive to lie, such argument ignores that the report discusses that both parties had a motive to lie.

Petitioner next argues that respondents did not act in accordance with their own rules when they delayed issuing the Dean Disciplinary Sanctions until the GBM Appeal had been decided, and that this was done in an attempt to build a history of violations against petitioner so that Columbia could issue harsher sanctions against him. Columbia's Standards and Discipline, Student Conduct and Community Standards ("Standards and Discipline rules"), which governed the Dean Disciplinary proceeding, provide, *inter alia*, with respect to sanctions that "[i]f a student is found responsible for a violation of prohibited conduct, sanctions will be issued in consideration of the specific circumstances of the case, institutional precedent, disciplinary history, aggravating and mitigating circumstances, including student's state of mind (intentional, knowing, bias-motivated, reckless, negligent, etc) and/or community impact."

The Standards and Discipline rules do not specifically address whether the issuance of sanctions in one disciplinary proceeding may be delayed pending a determination of an appeal of a decision in another disciplinary proceeding. Nonetheless the court finds that respondents substantially complied with the Standards and Discipline rules, and that, in any event, petitioner was not prejudiced by the deferring of the determination of the sanction until the GBM Appeal was decided. See Ebert v. Yeshiva University, 28 AD3d at 315 (upholding expulsion from private university where determination had been made pursuant to "informal processes and limitations" set forth in disciplinary rules); Zartoshti v. Columbia University, 79 AD3d 470 (1st Dept 2010), lv denied 17 NY3d 702 (2011) (upholding two-year suspension where private

university “substantially complied with its own guidelines” and petitioner “demonstrated no prejudice resulting from the deviation from literal compliance with the Student Handbook procedures”); compare Kickertz v. New York University, 99 AD3d 502 (1<sup>st</sup> Dept 2012), modified on other grounds 25 NY3d 942 (2015)(holding that respondent did not substantially comply with its own published guidelines and policies when it expelled dental student who was not “given a fair opportunity to cross examine her accusers and key procedural rulings were made or influenced by [an assistant dean for student affairs and admissions]”); Doe v. Skidmore College, 152 AD3d at 935 (annulling respondent’s determination that student was guilty of violating respondent’s Sexual and Gender Based Misconduct policy where the record showed that there were “multiple failures” to comply with respondent’s policy and procedures, including notice requirements and policies as to certain witness interviews and statements, and the student was prejudiced as a result).

As noted by respondents, the Standards and Discipline rules permit “minor modifications may be made to procedure as necessary” as long as there is “reasonable notice...to the parties involved.” Here, petitioner was given notice of the delay in issuance of the sanctions, and the delay was only 13 days, i.e. from July 20 to August 2, 2013. Although petitioner argues that he was prejudiced by the delay in imposing the Dean Disciplinary Sanction as the GBM Decision could not be considered part of his disciplinary history until the GBM Appeal was decided, this argument is unsupported by any provision in the Standards and Discipline rules. In addition, respondents consistently maintained and informed petitioner that the GBM Decision remained part of his disciplinary history despite his appeal.<sup>7</sup>

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<sup>7</sup>The court also notes that the Standards and Discipline rules provide that in addition to a student’s “disciplinary history,” “subsequent violations of policy” may be considered in issuance of sanctions.

As for petitioner's argument that respondents' failure to issue petitioner a diploma even though he met Columbia's academic requirements for graduation is arbitrary and capricious, and that students with similar disciplinary histories have received lesser punishment, the court notes that the standard applied in assessing the disciplinary sanction is whether the "penalty imposed is so excessive that it shock's one's sense of fairness." Matter of Powers v. St. John's University School of Law, 25 NY3d at 216. Under the circumstances here, the sanction of expulsion cannot be said to shock the conscience or a sense of fairness where petitioner was found to have violated Columbia's GBM Policy by engaging in sexual intercourse after a student withdrew her consent and its Standards and Discipline rules by hacking into another student's email account and sending a fraudulent email to Columbia's Title IX Coordinator in an attempt to have another sexual assault complaint against him withdrawn. See e.g. Lipsky v. Ferkauf Graduate School of Psychology, 127 AD3d 582, 583 (1<sup>st</sup> Dept 2015)(dismissal of petitioner from respondent's Ph.D. program was not irrational and did shock the court's sense of fairness where petitioner "failed to comply with a number of respondents' rules and procedures, failed to conduct herself in an ethical and professional manner, and, despite being given ample opportunities to change her behavior, ... failed to meet the expectations of the school"); Aguidio v. State University of New York, 164 AD3d 986, 987-988 (3d Dept 2018)(holding that dismissal from State University was not "disproportionate to offense" where petitioner violated the code by engaging in "disruptive conduct; threatening or abusive behavior; and forgery, fraud, [and] dishonesty"); Dequito v. New School for General Studies, 68 AD3d 559, 559 (1<sup>st</sup> Dept 2009)(upholding respondent's expulsion of student for plagiarism of Masters Thesis).

Finally, although petitioner met Columbia's academic requirements for graduation, the sanction of expulsion is expressly allowable under the Standards and Discipline rules which

provide that “[t]he continuation of each student on the rolls of the University, the receipt of academic credits, graduation, and the conferral of any degree or granting of any certificate are strictly subject to the disciplinary powers of the University.”<sup>8</sup>

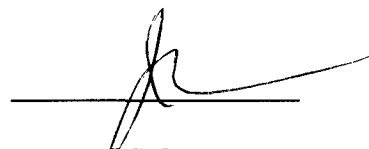
Conclusion

In view of the above, it is

ORDERED that respondents’ motion to dismiss is granted; and it is further

ORDERED and ADJUDGED that the petition is denied and dismissed.

Dated: January 6, 2020

  
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J.S.C.  
**HON. JOAN A. MADDEN**  
J.S.C.

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<sup>8</sup>Petitioner’s argument that Columbia should be estopped from denying petitioner his diploma as a disciplinary sanction is without legal basis and the precedent relied on by petitioner is not to the contrary. See Olsen v. Board of Higher Education of the City of New York, 49 NY2d 408 (1980)(holding that “judicial awarding of an academic diploma is an extreme remedy which should be reserved for the most egregious of circumstances” in connection with an arbitrary academic determination).