Supreme Court
State of New York

Eugene D. Faughnan
Justice

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January 20, 2017

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Re: John Doe v. Cornell University
Tompkins Index No.: EF2016-0192

Dear Counselors:

Enclosed for the parties is a copy of the Court's signed Decision and Order in the above captioned matter. The original signed Decision and Order is being forwarded to the Tompkins County Clerk for filing in the electronic case file. Plaintiff remains responsible for service of the Decision and Order.

Thank you for your time and attention.

Very truly yours,

John D. Denmon
Principal Law Clerk to
HON. EUGENE D. FAUGHNAN

Enclosure

cc: Maureen Reynolds, Tompkins County Clerk
Mary Hodges, Chief Clerk, Supreme and County Court

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 30th day of November, 2016.

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,

FOR A JUDGMENT PURSUANT TO
ARTICLE 78
AND SECTION 3001 OF THE CPLR

-against-

CORNELL UNIVERSITY and SARAH AFFEL,
in her official capacity as the Title IX Coordinator
at Cornell University,

Respondents.

DECISION AND ORDER

Index No. EF2016-0192
RJI No.

COUNSEL FOR PETITIONER:

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COUNSEL FOR RESPONDENTS:

CORNELL UNIVERSITY
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AND SECRETARY OF THE CORPORATION
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EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court upon a Verified Petition filed by John Doe ("Petitioner") pursuant to CPLR Article 78 dated November 10, 2016 and an Order to Show Cause signed by this Court. Petitioner seeks a declaration that Cornell University and Sarah Affel (collectively "Respondents", and individually "Cornell" and "Affel" respectively) are unlawfully refusing to process Petitioner's complaint of sex discrimination pursuant to Respondent's Policy 6.4 and an order directing Respondent's to immediately process this same complaint. Respondents seek dismissal, arguing that the matter is not ripe for adjudication and, in the alternative, Respondents decision to defer a determination of Petitioner's complaint was not arbitrary or capricious.

The relevant facts are not in serious dispute. Petitioner and another student, "Jane Roe" accused each other of sexual offenses which were investigated under Cornell's Policy 6.4. That policy, among other things, governs investigations and discipline for matters involving claims of sexual misconduct by students[1]. Following a formal complaint, pursuant to Policy 6.4, claims of sexual misconduct by students are investigated by Cornell University Title IX investigators. The investigator then gathers evidence which is summarized in a draft investigative report that is provided to the parties for comment. The investigator then provides a final investigative report, including a threshold determination as to whether a hearing is warranted, to a hearing panel.

During the investigation, Petitioner identified numerous instances of what he believed to be gender based bias on the part of the Title IX investigator tasked with the complaints filed by Petitioner and Jane Roe. These concerns were brought to the attention of Affel, Cornell's Title

[1]There is also a Policy 6.4 which applies to claims against Cornell faculty and Staff.

IX Coordinator, by Petitioner's parents in a letter dated October 3, 2016.[2] On October 14, 2016, Laurie Johnston ("Johnston"), Deputy Title IX Coordinator for Faculty and Staff, provided Petitioner with a form with regard to a Policy 6.4 complaint against Cornell faculty and staff. In the email accompanying the complaint form, Johnston advised it is Cornell's "practice" that "when issues are raised in another matter, 6.4 or other, specifically when the resolution of the pending 6.4 matter may resolve those issues, we allow the pending 6.4 matter to be completed before we proceed with the second matter". Effectively, Cornell would not investigate or pursue Petitioner's complaint against the Title IX investigator until the underlying complaint against Petitioner is resolved. Petitioner submitted a Policy 6.4 complaint for sex discrimination against the Title IX investigator dated October 16, 2016.

On October 25, 2016, Affel responded to Petitioner's complaint, and reiterated that the processing of the complaint against the investigator would occur after the conclusion of the complaint against Petitioner, and advising that any claims of bias or discrimination by the investigator could be raised in the underlying complaint against Petitioner. Petitioner's counsel submitted a letter to Affel dated October 27, 2016 inquiring about any appeal rights with regard to this determination. Affel responded on November 1, 2016 that her determination to defer processing of Petitioner's complaint could not be appealed.

In the instant action, Petitioner argues that Respondents must follow their own policies and procedures, and by deferring action on Petitioner's complaint, Cornell is violating its own Policy 6.4 provisions. Respondents argue that they acted consistent with Policy 6.4 with regard to Petitioner's complaint and that the issue is not ripe as no determination has been made regarding that complaint.

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[2]Much of the October 3, 2016 letter is redacted.

Pursuant to Policy 6.4, as it pertains to faculty and staff, an investigation is to be conducted promptly and completed, absent good cause, within 60 days. The policy specifically recognizes that the "more time that lapses, the more difficult it is to obtain information, contact witnesses, or the alleged perpetrator may no longer be affiliated with the university".

The Court will first address Respondent's argument regarding ripeness since a determination that the matter is not ripe for adjudication would render Petitioner's arguments academic.

"[I]n order to warrant a determination of the merits of a cause of action, [the] party requesting relief must state a justiciable claim—one that is capable of review and redress by the courts at the time it is brought for review". *Hussein v. State of New York*, 81 AD3d 132, 135 (3rd Dept. 2011). Typically, in the context of an Article 78 proceeding for review of administrative action, "[a]n administrative determination becomes 'final and binding' when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies." *Walton v. NYS Dept. Of Correctional Services*, 8 NY3d 186, 194 (2007).

To determine if the action is ripe for review, the Court we must first consider whether it "is final and whether the controversy may be determined as a 'purely legal' question" *Church of St. Paul & St. Andrew v. Barwick*, 67 NY2d 510, 519 (1986); *Adirondack Council, Inc. v. Adirondack Park Agency*, 92 AD3d 188, 190 (3rd Dept. 2012). An action will be deemed final if "a pragmatic evaluation [establishes that] 'the decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury'" *Church of St. Paul & St. Andrew, supra* at 519 (citations omitted). If "'the anticipated harm is insignificant, remote or contingent[;] ... if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party', the matter is not ripe." *Adirondack Council* at 190 *quoting Church of St. Paul & St. Andrew v. Barwick*, 67 NY2d at 520. "That is, if the claimed harm 'is contingent upon events which may not come to pass, the claim ... is nonjusticiable as wholly

speculative and abstract'" *Adirondack Council* at 190 *quoting Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v. Cuomo*, 64 NY2d 233, 240 (1984); *see Matter of Federation of Mental Health Ctrs. v. DeBuono*, 275 AD2d 557, 561-562, 712 NYS2d 667 (2000).

In the present matter, Respondent has determined that investigation of Petitioner's complaint against the Title IX investigator should be deferred until his underlying student Policy 6.4 matter has been resolved. Respondent reasons that the claims of sex discrimination can be addressed to the hearing panel in the context of his objections to the investigators report. Affel specifically advised Petitioner that there is no appeal of her decision to defer investigation of Petitioner's complaint.

The Court concludes that the present petition addresses the purely legal question whether Respondents, pursuant to Policy 6.4, may defer investigation of a complaint. Counsel for Respondent conceded at oral argument that there is no provision of Policy 6.4 which permits such a deferral. The Court finds that the determination to defer is a final determination since Affel specifically advised Petitioner that there was no appeal of her determination to defer investigation of his complaint. Finally, for the reasons more fully set out *infra*, the Court does determine that the Petitioner has suffered actual harm due to Respondents determination.

Having established that the petition is ripe for adjudication, the Court now turns to the merits.

"It is well established that once having adopted rules or guidelines establishing the procedures to be followed in relation to suspension or expulsion of a student, colleges or universities--both public and private--must substantially comply with those rules and guidelines" *Schwarzmueller v. State Univ. of N.Y. at Potsdam*, 105 AD3d 1117, 1118 (3rd Dept. 2013), *quoting Weidemann v. State Univ. of N.Y. Coll. at Cortland,* 188 AD2d 974, 975 (3rd Dept. 1992) [citations omitted];

see Tedeschi v. Wagner Coll., 49 NY2d 652(1980). "To suggest...that the college can avoid its own rules whenever its administrative officials in their wisdom see fit to offer what they consider as a suitable substitute is to reduce the guidelines to a meaningless mouthing of words". *Tedeschi* at 662.

At oral argument, counsel for Respondents conceded that there is no provision in Policy 6.4 which allows for deferral of the investigation. Rather, it is Respondent's position that its deferral of investigation allows for a more efficient determination of all claims.[3] However, Respondent ignores the reality that it has placed Petitioner in a procedurally more vulnerable position. Rather than pursuing his complaint as the aggrieved party, Petitioner is required to pursue his claim while simultaneously defending himself against both his accuser and the investigator who found sufficient evidence to warrant a hearing. Further, by forcing Petitioner to pursue his complaint in the context of his defense in the first instance, he is denied the opportunity to have his complaint promptly investigated and adjudicated on its own merits. Further, pursuant to Policy 6.4, the "more time that lapses, the more difficult it is to obtain information, contact witnesses, or the alleged perpetrator may no longer be affiliated with the university". The Court finds no provision in Policy 6.4 which would require, much less permit, Respondent to treat Petitioner any differently than any other student filing a complaint against a member of the faculty or staff pursuant to Policy 6.4.

Respondent also argues that it is entitled to great deference in the interpretation of its own rules. As a general proposition, "an agency's interpretation of its own regulation is entitled to deference". *See e.g. Matter of IG Second Generation Partners L.P. v. New York State Div. of Hous. & Community Renewal*, 10 NY3d 474, 481 (2008). However, such interpretations cannot

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[3]Respondents may find it more efficient and desirable to require Petitioner to pursue his sex discrimination claim against a staff member in the context of his own defense, but nothing in Policy 6.4 permits deferring the investigation of the complaint.

be made out of whole cloth. "[C]ourts are not required to embrace a regulatory construction that conflicts with the plain meaning of the promulgated language" *Matter of Visiting Nurse Serv. of N.Y. Home Care v. New York State Dept. of Health*, 5 NY3d 499, 506 (2005) (citation omitted). As previously noted, there is no provision in Policy 6.4 to defer an investigation of a claim of sex discrimination. Any reading of such authority into Policy 6.4 lacks any rational basis as it is directly contradicted by the plain language of Policy 6.4.

The Court concludes that Respondents' determination to defer investigation of the Petitioner's Policy 6.4 is arbitrary and capricious and without a rational basis. Once Respondents promulgated policies and procedures for the adjudication of complaints of misconduct, they are not permitted to ignore them for administrative, procedural or any other reason. The Court concludes that Respondents improperly deferred investigation into Petitioner's claim of sex discrimination in contravention of their established policies and procedures.

Therefore, the Respondent's motion to dismiss is **DENIED** and Petitioner's application seeking a direction compelling Respondents to investigate Petitioner's complaint of sex discrimination is **GRANTED.**

Accordingly, Respondents are directed to immediately process and investigate Petitioner's sex discrimination complaint against the Investigator, pursuant to Cornell Policy 6.4.

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

Dated: January 20, 2017
Ithaca, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice