

September 28, 2018

David Rhodes
President
School of Visual Arts
209 East 23rd Street
New York, New York 10010

Re: Case No. 02-18-2156
School of Visual Arts

Dear President Rhodes:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), regarding the above-referenced complaint filed against the School of Visual Arts (the School). The complainant alleged that the School discriminated against him, on the basis of his sex, by failing to respond appropriately to complaints of dating violence and sexual assault made against him on XXXXXXXXXXX X, 2017, and XXXXXXXXXXX X 2017, respectively; and, his counterclaim of dating violence, made on XXXXXXXXXXX XX, 2017, against the female student who filed the complaint against him (student A) (Allegation 1). The complainant also alleged that the School retaliated against him for requesting, on XXXXXXXXXXX X, 2017, and participating in, on XXXXXXXX XX, 2018, a hearing regarding the dating violence and sexual assault complaints filed against him, and his counterclaim, by increasing his sanction from suspension to expulsion on XXXXXXXXXXX X, 2018 (Allegation 2).

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. § 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in programs and activities receiving financial assistance from the U.S. Department of Education (the Department). The School is a recipient of financial assistance from the Department. Therefore, OCR has jurisdictional authority to investigate this complaint under Title IX.

The regulation implementing Title IX, at 34 C.F.R. § 106.71, incorporates by reference 34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, which provides that no recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint,

testified, assisted or participated in any manner in an investigation, proceeding or hearing held in connection with a complaint.

The regulation implementing Title IX, at 34 C.F.R. § 106.31(a), provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity operated by a recipient. Sexual harassment that creates a hostile environment is a form of sex discrimination prohibited by Title IX. Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances; requests for sexual favors; and, other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence. Sexual harassment of a student creates a hostile environment if the conduct is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the recipient's program.

When responding to alleged sexual harassment, a recipient must take immediate and appropriate action to investigate or otherwise determine what occurred. If an investigation reveals that discriminatory harassment has occurred, a recipient must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring. Pending the outcome of an investigation, Title IX requires a recipient to take steps to avoid further harassment as necessary, including taking interim steps before the final outcome of the investigation. The recipient should undertake these steps promptly once it has notice of a sexual harassment allegation. Interim measures are individualized services offered as appropriate to either or both parties involved in the alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending. Interim measures include counseling, extensions of time or other course-related adjustments, modifications of work or class schedules, campus escort services, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar accommodations.

The regulation implementing Title IX, at 34 C.F.R. § 106.8(b), requires that a recipient adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action prohibited by the regulation implementing Title IX. OCR has identified a number of elements in determining if grievance procedures are prompt and equitable, including whether the procedures provide for: (a) notice to students and employees of the procedures, including where complaints may be filed, that is easily understood, easily located, and widely distributed; (b) application of the procedures to complaints alleging discrimination or harassment carried out by employees, students, and third parties; (c) an adequate, reliable, and impartial investigation, including an equal opportunity to present witnesses and evidence; (d) designated and reasonably prompt timeframes for major stages of the grievance process; (e) notice to parties of the outcome and any appeal; and, (f) an assurance that the recipient will take steps to prevent further harassment and to correct its discriminatory effects on the complainant and others, if appropriate. Title IX does not require a recipient to provide separate grievance procedures for sexual harassment complaints; however, a recipient's grievance procedures for handling discrimination complaints must comply with the prompt and equitable requirements of Title IX.

The regulation implementing Title IX, at 34 C.F.R. § 106.8(a), requires each recipient to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the regulation implementing Title IX, including any investigation of any complaint communicated to the recipient alleging any actions that would be prohibited by the regulation implementing Title IX. It also requires each recipient to notify all of its students and employees of the name, office address, and telephone number of the employee or employees so designated.

The regulation implementing Title IX, at 34 C.F.R. § 106.9(a), requires each recipient to implement specific and continuing steps to notify applicants for admission and employment, students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational program or activity which it operates, and that it is required by Title IX not to discriminate in such a manner. Such notification shall state, at a minimum, that the requirement not to discriminate in the education program or activity extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of Title IX and this part to such recipient may be referred to the employee designated pursuant to § 106.8, or to OCR's Assistant Secretary. Section 106.9(b) requires each recipient to include the notice of non-discrimination in each announcement, bulletin, catalog, or application form which it makes available to the types of persons described in § 106.9(a), or which is otherwise used in connection with the recruitment of students or employees.

During the course of the investigation, OCR reviewed documentation that the complainant and the School submitted, including the School's sexual harassment and sexual assault/violence policies and procedures. OCR also interviewed the complainant and School personnel, including the Director of Student Affairs, who is also the Assistant Title IX Coordinator (Assistant Title IX Coordinator); the Assistant Director of Special Programs in the Office of Admissions (the Assistant Director); and, the Associate Director of Residence Life and Title IX Coordinator (the Title IX Coordinator). OCR made the following determinations.

1. Designation and Notice of Title IX Coordinator

OCR determined that the School has designated a Title IX Coordinator. The School's 2017-2018 Handbook, which is available in printed form and online, includes as part of its "Discrimination, Discriminatory Harassment and Retaliation" policy, the Title IX Coordinator's name, title, campus building location, telephone number and electronic mail (email) address, as the resource for student complaints; and, the name, title, campus building location, telephone number and email address of the Executive Director of Human Resources (the Director), as the resource for faculty and administrative staff complaints.¹ The Handbook also includes an additional statement regarding the School's Policy Against Sex-Based Discrimination, Harassment, Title IX and Sexual Misconduct, which prohibits discrimination based on sex in employment and student services, including admission, and provides prominent notice of the Title IX Coordinator's name, title, campus building location, telephone number and email address. The School also provides notice of the Title IX Coordinator's name, title, campus

¹ <https://www.sva.edu/downloadFile/2017-2018-sva-handbook> pp. 69-71 (last visited July 24, 2018)

building location, telephone number and email address as part of its Policy Against Sex-Based Discrimination, Harassment, and Sexual Misconduct (the Policy).² The Title IX Coordinator is the primary person responsible for responding to and/or investigating reports and complaints of sexual harassment, including sexual assault/violence; however, there also are three assistant Title IX coordinators who are assigned cases.

Based on the foregoing, OCR determined that the School has designated a Title IX Coordinator, and has effectively notified all students, employees and third parties of the name, title, campus building location, telephone number and email address of the Title IX Coordinator in the Handbook and on its website. Therefore, OCR has determined that the School is in compliance with the requirements of 34 C.F.R. § 106.8(a).

2. Notice of Nondiscrimination

The School included a nondiscrimination notice in its 2017-2018 Handbook (Notice 1), under the subsection titled “Discrimination, Discriminatory Harassment and Retaliation,” which also is available on the School’s website.³ Notice 1 states that the School “does not discriminate on the basis of race, color, religion, creed, sex, sexual orientation, gender (including gender identity or expression), pregnancy, age, disability, national origin, military or veteran status, marital status, parental or familial status, alienage or citizenship status, domestic violence status, genetic predisposition or carrier status, partnership status or any other legally protected characteristic in employment, academic, student admission, and/or financial aid decisions, or in any other programs or activities.” It further states that student questions or complaints should be referred to the Title IX Coordinator, and to the Director for employees.⁴ The requisite contact information for the Title IX Coordinator and Director are included with this statement; however, Notice 1 does not state that inquiries concerning the application of Title IX may also be referred to OCR.

The notice of nondiscrimination also is available in two other places on the School’s website:⁵ (1) as part of the Policy (Notice 2); and (2) on the “Sexual Misconduct Policies and Procedures” webpage (Notice 3).⁶ Notice 2, contained in the Policy, states the following: “[The School] does not discriminate on the basis of race, color, religion, creed, sex, sexual orientation, gender (including gender identity or expression), pregnancy, age, disability, national origin, military or veteran status, marital status, parental or familial status, alienage or citizenship status, domestic violence status, genetic predisposition or carrier status, partnership status or any other legally protected characteristic (“protected characteristics”) in employment, student admission, or any other programs or activities.” The requisite information regarding the Title IX Coordinator is not provided with Notice 2, but is provided on the next page of the Policy; and, on the following page, there is a statement that inquiries can also be made by contacting OCR.

² <http://www.sva.edu/students/sexual-misconduct> (last visited July 24, 2018)

³ <https://www.sva.edu/downloadFile/2017-2018-sva-handbook>, p.69 (last visited July 24, 2018)

⁴ The Title IX Coordinator stated that she also handles employee complaints. The Policy also lists the Director of Student Affairs, the student’s advisor, a faculty or staff member, or their department chair as additional resources for students to contact with complaints.

⁵ As stated above, the School also posts the Handbook, which contains a notice of nondiscrimination, on its website.

⁶ <http://www.sva.edu/students/sexual-misconduct> (last visited July 24, 2018)

Notice 3 states that “the School does not discriminate on the basis of race, color, religion, creed, sex, sexual orientation, gender (including gender identity or expression), pregnancy, age, disability, national origin, military or veteran status, marital status, parental or familial status, alienage or citizenship status, domestic violence status, genetic predisposition or carrier status, partnership status or any other legally protected characteristic (“protected characteristics”) in employment, student admission, or any other programs or activities.” Notice 3 does not include information about the Title IX Coordinator or OCR within the notice; however the requisite contact information for the Title IX Coordinator and OCR are available below Notice 3, by clicking links titled, “Title IX Coordinator” and “Additional Government Resources.”

Based on the foregoing, OCR determined that the School has published a nondiscrimination notice in its Handbook (Notice 1) and on the School’s website (Notice 2 and Notice 3), stating that it does not discriminate on the basis of sex (and other bases). However, the notices of nondiscrimination do not consistently state that inquiries can be made to the Title IX Coordinator or to OCR.

3. Grievance Procedures

The Policy is easily located on the School’s website on the “Sexual Misconduct Policies and Procedures” webpage, and provides notice that is easily understood of where complaints of discrimination on the basis of sex, including sexual harassment and sexual misconduct, can be filed.⁷ The Policy states that it applies to applicants, students and employees, including faculty and staff, as well as third parties doing business with the School or attending School-sponsored programs or activities.

Pursuant to the Policy, any member of the School community who believes he or she has been subjected to sexual misconduct should submit a complaint, if possible in writing, to the Title IX Coordinator or the Assistant Title IX Coordinator. Under the Policy, there is no time limit for filing a complaint; however, the Policy notes that “a delay in reporting could weaken [the School’s] ability to gather information that will be used to determine whether a person is responsible for sexual misconduct. Furthermore, the ability of [the School] to take action may be limited by the matriculation or employment status of the responding party.” It also specifies that a determination will be made regarding whether it is “more likely than not that a policy violation occurred.” It further explains under the section titled “Student’s Bill of Rights,” that all students have the right to be “protected from retaliation by the institution, any student, the responding party and/or their friends, family and acquaintances within the jurisdiction of the institution.” The Policy further states that the School “prohibits retaliation against any person for complaining of a violation of this policy or for participating in any investigation or proceedings related to an alleged violation.”

Upon receipt of the complaint, the Title IX Coordinator makes an initial assessment to determine if the allegations could constitute a violation of the Policy; if she requires additional information

⁷ The Policy defines discriminatory harassment, sexual or sex-based harassment, sexual assault (including non-consensual sexual contact and non-consensual sexual intercourse), in detail; and also includes information about domestic violence, dating violence, stalking, sexual exploitation, sexual misconduct, intimidation and affirmative consent.

to make this determination she will meet with the reporting party to gather additional information. If the Title IX Coordinator determines that the allegations could constitute a violation of the Policy, she will discuss with the reporting party and the responding party separately the available options for proceeding, including providing a copy of the Policy; possible discipline against the responding party; remedial actions to correct the effects of any misconduct; interim measures; and, information about support resources. The Policy states that “As soon as possible but no later than two business days after determining that a policy violation may have occurred, the Title IX Coordinator or an Assistant Title IX Coordinator will contact the responding party” to identify the provision of the Policy the responding party has been accused of violating, as well as the information noted above.

The Policy describes interim measures that the School may take to respond immediately to a complaint, including issuing a no contact order; housing changes or suspensions; changes in academic schedules or other academic accommodations; changes in work schedules, locations or reporting lines; campus restrictions; changes in the School-provided transportation arrangements; and, interim suspension. The School also, among other things, may provide campus escorts.

The School considers mediation for certain kinds of complaints with the consent of the reporting party, but mediation is not allowed for complaints of sexual assault, domestic violence, or dating violence. The Policy states that if it becomes clear that a mediated resolution will not be possible, the matter will be investigated; however, the Policy does not state that the parties will be notified of their right to end this informal process and begin the formal process at any time. Additionally, a timeframe is not provided for the initiation or conclusion of the mediation.

The “Formal Investigation” states that “[w]ithin seven days of receiving a complaint which has been determined to allege a potential violation of [School] policy, the Title IX Coordinator, the Assistant Title IX Coordinator or a designated Title IX Investigator will commence an investigation.” The investigation includes conducting interviews of the reporting party, the responding party, material witnesses, and gathering “all relevant documentary and/or physical evidence from the reporting party, the responding party, and witnesses (This may include, but is not limited to texts, emails, photos, social media posts, voicemail messages, etc.)” Both parties have the right to identify witnesses and have an advisor assist them throughout the process. The investigation is to be completed in a timely manner, without unnecessary deviation from the intended timeline; and, the investigator is required to maintain communication with the reporting and responding parties on the status of the investigation and overall process. The intended timeline for completion of the investigation is within 60 days or sooner, excluding appeals, from the receipt of the complaint; however, if it lasts longer than 60 days, the Title IX Coordinator is required to provide an updated timeline to all parties.

Prior to making a determination as to whether the alleged violation occurred, the investigator will present each party with a written recitation of the facts and evidence the investigator collected. Upon receipt of the investigator’s written summary, each party has two business days to correct any inaccuracies or misstatements in the written summary. Following the investigation, the investigator will determine whether, based on the evidence collected, it is “more likely than not” that the alleged violation occurred. If the investigator finds the responding party responsible for violating the School’s policy, “the [i]nvestigator will propose an

appropriate disciplinary sanction after considering the relevant factors, which include the severity of the violation, the circumstances surrounding the lack of consent (such as force, threat, coercion, intentional incapacitation, etc.), the responding party's state of mind (intentional, knowing, reckless, negligent, etc.), the responding party's history of misconduct, including prior findings of sexual misconduct, the ongoing impact on the complainant, the ongoing impact on the campus environment, and any ongoing threat to the campus community."⁸ Sanctions may range from a warning or reprimand to training, revocation of privileges and/or a degree, suspension, or expulsion.

The Title IX Coordinator (or Title IX Officer⁹ in cases where the Title IX Coordinator acted as the investigator), reviews the investigator's report, findings and recommended sanctions; and, the Title IX Officer or Coordinator can accept, reject or modify the investigator's findings and/or sanctions. If the investigator's findings are not accepted, the investigator may be directed to collect additional information and submit a supplemental report. The Title IX Coordinator/Officer will share the final notice of determination and sanctions, if any, with the parties.¹⁰

Either party can submit an appeal of the Title IX Coordinator's/Officer's decision to the Title IX Coordinator in a written statement within two weeks of receipt of the final determination. When a written appeal has been submitted, the Title IX Coordinator will convene a Title IX Adjudication Hearing Panel (the adjudication hearing panel) and proceed to an adjudication hearing.¹¹ Although the Policy states that "[t]he scheduling and timing of hearing sessions shall be undertaken with due regard to the importance of completing the hearing in an expeditious manner and with consideration of the schedules and commitments of all participants," it does not set forth a timeframe within which the adjudication hearing panel will be convened, and the hearing will be scheduled.

The Policy states that the parties and their respective advisors, the adjudication hearing panel, witnesses (with the exclusion of character witnesses), and necessary School personnel may be present at the hearing. If either of the parties cannot be physically present for the hearing, arrangements can be made for them to participate remotely or not be in the same room. The hearing can also be held if a party chooses not to participate in the hearing, and no negative inference will be inferred by the adjudication hearing panel as a result. During the hearing, the adjudication hearing panel questions the investigator; each of the parties; and the witnesses, in that order; and both parties are allowed to make a closing statement, which may include an impact statement. It also provides that parties will not be permitted to question each other or

⁸ The investigator may not consider prior conduct violations in determining whether a policy violation occurred; however, such information may be considered by the investigator, Title IX Coordinator, adjudication hearing panel or appeal panel in determining appropriate sanctions.

⁹ As stated above, the Director is the Title IX Officer.

¹⁰ In cases of sexual assault, dating violence, domestic violence, and/or stalking, the reporting party and the responding party will be informed simultaneously and in writing of any sanctions imposed. In other cases of sexual misconduct, the reporting party will only be informed of the discipline to the extent such sanctions relate to the reporting party.

¹¹ The adjudication hearing panel is composed of three School staff members who receive annual training on the School's Policy. The panel members elect one of the panel members to serve as the chairperson of the panel (the Chairperson).

witnesses directly. Rather, parties provide questions to the adjudication hearing panel, and panel members question the parties and witnesses.¹² The adjudication hearing panel “will then evaluate the evidence and determine whether it is more likely than not that a policy violation occurred. If a policy violation is found, the adjudication hearing panel determines the appropriate sanction.” The Title IX Coordinator stated that the adjudication hearing panel strives to issue a determination within five business days of the hearing; however, no timeframe is provided in the Policy for when the adjudication hearing panel will render its decision. The Title IX Coordinator informs the parties of the adjudication hearing panel’s decision.

Either party can submit to the appeal panel a written appeal of the adjudication hearing panel’s decision after receiving written notification of the decision. The written appeal should be submitted to the Title IX Coordinator within two weeks of the letter informing the parties of the adjudication hearing panel’s decision. The Policy outlines the particular grounds on which an appeal may be filed. The Policy states that: “If the appeal letter identifies arguable grounds for appeal, within two business days of receipt of the appeal letter, the Title IX Coordinator will (i) appoint a Title IX Appeal Panel of three trained [School] employees and (ii) provide the other party with an opportunity to review the appeal. The party who is not appealing the decision will have five calendar days from receipt of the appeal to submit materials in response.” The appeal panel will review the investigator’s report; findings; recommended sanctions; the Title IX Coordinator’s final notice of determination; the adjudication hearing panel’s determination, including the hearing record; and, any subsequent materials submitted by the parties for the appeal. After a review of all of the information and evidence presented, the appeal panel may: affirm the decision of the adjudication hearing panel; remand the matter to the adjudication hearing panel or investigator to reevaluate the decision in light of the appeal panel’s findings; reopen the investigation; or, modify the sanctions imposed by the adjudication hearing panel. The appeal panel’s final decision will be issued in writing to the reporting party, the responding party, and the Title IX Coordinator simultaneously, within 15 business days of the non-appealing party’s submission. The determination of the appeal panel is final.

The Policy describes the difference between confidential and non-confidential communications, and informs students that many School employees are “responsible employees” with respect to reporting claims of sexual misconduct or sexual assault, even if the reporting student requests confidentiality.¹³ The Policy states that information provided to a non-confidential resource will be relayed only as necessary to the Title IX Coordinator. The Policy includes information regarding on-campus and off-campus resources available to assist and support victims of sexual assault, domestic violence, dating violence and stalking; including counseling and medical services, academic accommodations, safety plans, and legal assistance.

¹² The adjudication hearing panel has the discretion to determine which witnesses to call and whether to ask the questions proposed by the parties. The hearing is also audio-recorded or transcribed.

¹³ The Policy states the following: “If the reporting party wants to tell the responsible employee what happened but also maintain confidentiality, the employee should tell them that [the School] will consider the request, but cannot guarantee that [the School] will be able to honor it. In reporting the details of the incident to the Title IX Coordinator, the responsible employee will also inform the Title IX Coordinator of the reporting party’s request for confidentiality.”

The Policy also states that the School is obligated to investigate incidents of sexual misconduct or sexual assault/violence even when the reporting individual wishes to maintain confidentiality or does not consent to an investigation; and that the Title IX Coordinator will weigh the reporting individual's wishes against the School's obligation to provide a safe and nondiscriminatory environment to the community in determining whether an investigation will occur even when the reporting individual wishes to maintain confidentiality or does not consent to an investigation. If the School receives an anonymous complaint, it will investigate the complaint and take action to the extent practicable.

Based on the foregoing, OCR determined that the School's Title IX grievance procedures, in effect for academic year 2017-2018, provided for: (1) notice to students and employees of the grievance procedures, including where complaints can be filed; (2) application of the grievance procedures to complaints alleging discrimination on the basis of sex, including sexual harassment or sexual assault/violence carried out by students, employees, and third parties; (3) notice to the reporting party and responding party of the outcome of the complaint; (4) assurances that the School would take steps to remedy any harassment, misconduct or assault; and, (5) the opportunity for the reporting party and responding party to present witnesses and evidence. OCR determined that the Policy provides timeframes for most major aspects of the process, including a timeline for completion of the investigation within 60 days or sooner from the receipt of the complaint, excluding any appeal. However, OCR determined that the Policy does not provide a timeframe for the initiation or conclusion of mediation, nor does the Policy state that the parties will be notified of their right to end the informal mediation process and begin the formal process at any time. The Policy also does not set forth the timeframe within which the adjudication hearing panel will be convened, the hearing will be scheduled, or the adjudication hearing panel will render its decision.

4. Complainant's Allegations

Allegation 1

OCR determined that the complainant was a student at the School during academic years 2016-2017 and 2017-2018, and began dating student A in or around XXXXX 2017. The complainant alleged that the School discriminated against him, on the basis of his sex, by failing to respond appropriately to complaints of dating violence and sexual assault made against him on XXXXXXXXXXX X and XXXXXXXXXXX X 2017, respectively; and, his counterclaim of dating violence, made on XXXXXXXXXXX XX, 2017, against student A. Specifically, the complainant asserted that the adjudication hearing panel was biased in favor of female students; therefore, the School "falsely" found him responsible for violating the School's code of conduct after student A reported that he sexually assaulted her, even though the preponderance of the evidence did not support that finding. The complainant stated that the Title IX Coordinator treated his and student A's allegations "unequally." Specifically, he stated that the Title IX Coordinator, received both his and student A's claims of "being hit by each other. For [student A's] case, the Title IX Coordinator spent considerably (sic) amount of time gathering evidence, going back and forth interviewing him and [student A]. However, for [his] allegation against [student A], [the Title IX Coordinator] had never given [him] any feedback or asked for any evidence or witness (which [he] later provided in the adjudication hearing). [The Title IX Coordinator] merely told

[him] that she did not find [student A] responsible and had dropped the case WEEKS AFTER (emphasis in the original) the final determination came out.” The complainant further stated that he and his advisor provided a witness “who proved [he] was hit by [student A],” and new information and evidence. He stated that despite all of the information they provided and that student A “refused to attend the hearing” or provide information, the adjudication hearing panel decided to permanently expel him from the School. The complainant also stated that when the adjudication hearing panel was discussing the case, he and his advisor were not allowed to be in the room with the hearing panel, but that the Title IX Coordinator was in the room, which he alleged was a violation of the Policy.

OCR determined that on XXXXXXXXXX X, 2017, student A met with the Title IX Coordinator and reported that the complainant had struck her in the face during an argument in late XXXXX 2017 (incident 1).¹⁴ Consistent with her practice, the Title IX Coordinator reviewed with student A the process for addressing complaints of sexual misconduct, requested witnesses and any other supporting documentation, and provided information regarding counseling and other interim measures.

By email dated XXXXXXXXXX X, 2017, the Title IX Coordinator notified the complainant that she had received a report of an incident related to the School’s Policy of which he may have knowledge and/or involvement, and requested to meet with the complainant on XXXXXXXXXX XX, 2017, to discuss the incident. The letter also stated that a no-contact order (NCO) and a restriction on the complainant’s and student A’s being in the same class had been put in place.¹⁵ The letter further advised the complainant where he could obtain on and off-campus counseling services.

By letter dated XXXXXXXXXX X, 2017, student A informed the Title IX Coordinator that the complainant had “raped” her in her apartment one night between XXXXX X and XXXXX XX, 2017 (incident 2). Student A also stated in the letter, in part, that the complainant knew that he was raping her and told her “it did not count if it was in a relationship.” She further stated that she “passed out” after he raped her, and that she asked him to leave her apartment; however, he did not leave for a few days.

The Title IX Coordinator first interviewed the complainant on XXXXXXXXXX XX, 2017, during which meeting she informed the complainant about student A’s allegation regarding incident 1. Consistent with her practice, the Title IX Coordinator reviewed with the complainant the process for addressing complaints of sexual misconduct, requested witnesses and any other supporting documentation, and provided information regarding counseling and other interim measures. The complainant did not provide her with the names of witnesses or submit any other information at that time. The Title IX Coordinator stated that she did not notify or question the complainant

¹⁴ At the time of student A’s report to the Title IX Coordinator, the complainant was on probation effective XXXXX X, 2017, through XXX 2018, for XXXXXXXXXX XX XXXXXXXXXX XXXXXX that he had XXXXXXXXXX XXXXXXXXXX XXXXXXXXXX of XXXXXXXXXX XXXXXXXXXX student (student B) XXX X XXXXXXXXXX. The Title IX Coordinator also determined that both the complainant and student B had XXXXXXXXXX XXXX XXXXXXXXXX XX XXX XXXX and both were given written warnings that any subsequent actions could result in further disciplinary action. The complainant did not appeal the Title IX Coordinator’s decision regarding the incidents with student B.

¹⁵ The Title IX Coordinator also notified student A that she should have no contact with the complainant, and confirmed that they were not enrolled in the same classes.

about incident 2 during this meeting because she had not yet met with student A regarding the allegation. The Title IX Coordinator informed OCR that the complainant “asked a couple of times, can I make a complaint against her, because she hit me?” The Title IX Coordinator advised OCR that she told the complainant that he could make a complaint, and she would handle it separately. The Title IX Coordinator advised OCR that the complainant stated: “She could have killed me.” The Title IX Coordinator stated that she told the complainant that she “considered it as his report within my investigation” and that she “just sort of included it in this one.” In the Title IX Coordinator’s proposed summary to the complainant of their meeting, the Title IX Coordinator wrote, “[the complainant] asked what would happen to [student A] because she had thrown a chair at him and could have killed him. He expressed that he wanted her to be held responsible for her actions. He said after a verbal fight, she threw a chair at him and hit him in the face. The Title IX Coordinator said that student A told her he had hit her, and he said “she hit me first, so it was self-defense. He didn't purposely hit her as he was only trying to fend her off with his arms. Even if during this process his hand incidentally contacted her body. He then said that student A is small but had the capacity to kill him if she wanted to.” The Title IX Coordinator advised the complainant that “[she] would be considering this allegation as well, and separately from the current allegations.”

On XXXXXXXXXX XX 2017, the Title IX Coordinator met with student A, who provided details regarding incident 2, and told the Title IX Coordinator that she wished to proceed with an investigation. OCR determined that the Title IX Coordinator did not inform student A at this meeting that the complainant had alleged that student A had hit him, or request information from student A about this allegation, even though she had requested information from the complainant regarding student A’s allegation about the alleged hitting when the Title IX Coordinator met with the complainant on XXXXXXXXXX XX, 2017.

Subsequently, during a meeting on XXXXXXXXXX XX, 2017, the Title IX Coordinator informed the complainant that student A had reported incident 2, and after the complainant’s denial and assertion that he did not know to what student A was referring, informed him that she would contact student A to obtain more information about incident 2, and contact him again.¹⁶

On XXXXXXXXXX XX, 2017, the Title IX Coordinator met again with student A, who provided additional information regarding incident 2 during the meeting and in an email she sent the Title IX Coordinator on that same date. The Title IX Coordinator stated that she asked student A more about the “rape in a relationship comment,” and student A tried to explain, but followed up more in an email. Student A’s email to the Title IX Coordinator, dated XXXXXXXXXX XX, 2017, stated, in pertinent part: “The exact phrase [the complainant] used might be more accurate as ‘rape in a marriage,’ [The complainant] said ‘it’s like rape in a marriage.’” The Title IX Coordinator stated that student A indicated that she told the complainant during the incident that she did not want to continue with the sexual intercourse. The Title IX Coordinator also stated that student A told her that there was no consent sought before the intercourse started. It is not clear whether the Title IX Coordinator notified student A at this time that the complainant had

¹⁶ The Title IX Coordinator did not recall whether she provided the complainant with the range of dates during which incident 2 was alleged to have occurred.

made an allegation against her. By email dated XXXXXXXXXX XX, 2017, student A provided the names of three witnesses to the Title IX Coordinator.¹⁷

On XXXXXXXX XX, 2017, the Title IX coordinator met with the complainant to interview him further regarding incident 2. The Title IX Coordinator informed the complainant that she had spoken to student A to gather more details regarding the alleged sexual assault. Specifically, she told the complainant that student A informed her that student A told him that she wanted the intercourse to stop and withdrew consent; however, he did not stop. The complainant told the Title IX Coordinator that student A had never withdrawn consent at any time and that all of their sexual intercourse was consensual. The Title IX Coordinator also asked the complainant if he told another student (student C) that he “had done something bad to [student A] and wanted to make it up.” The complainant responded that he did not speak to anyone about sex, and if he spoke to student C it was not about sex. The complainant also denied making the “rape in a marriage” comment. He also asked the Title IX Coordinator what would happen to student A since she threw a chair at him.

On XXXXXXXX XX, 2017, the Title IX Coordinator interviewed one of student A’s witnesses, student C, regarding student A’s accounts of incidents 1 and 2, and the complainant’s assertions that student A hit him first and threw a chair at him. Student C informed the Title IX Coordinator that student A called her and asked if the complainant was still in their apartment, and when she told student A that he was, student A responded that something “horrible” happened the night before, and that he hit her in the head. Student C also stated that the complainant stayed in the apartment for at least a week more; would not leave; and, it seemed that the complainant and student A were not communicating during this time. Student C further stated that it seemed that the complainant’s decision to stay in their apartment was related to knowing that something was wrong. Student C further stated that she asked the complainant how everything was, and he told her that something bad happened, which he felt bad about. Student C stated that she asked the complainant to leave their apartment, and he went back to his dormitory. Student C stated that the complainant appeared in front of their apartment door at some point later, and student C asked him to leave; and, the complainant gave student C a letter to give to student A, which she did. Student C stated that she never heard the complainant and student A fighting. The Title IX Coordinator stated that student C appeared “genuinely surprised” when she told her that the complainant alleged that student A threw a chair at him, and stated that she never heard or saw student A throw a chair. The Title IX Coordinator also reviewed a letter the complainant wrote to student A subsequent to incident 1, which student A submitted in support of her allegation. OCR reviewed the letter which stated, in relevant part, “I (sic) never forgive myself for what I’ve done;” “I realize the way I deal with things was so wrong. I apologize and feel so horrible for losing control and gentleness;” and “I can’t forgive the way I treated you.”

On XXXXXXXX XX, 2017, and on XXXXXXXX XX, 2017, respectively, the Title IX Coordinator sent the complainant and student A written summaries of their positions and allowed them to propose revisions to their respective summaries. The Title IX Coordinator concluded in her

¹⁷ The Title IX Coordinator determined that two of the three were “character” witnesses who had no knowledge of the alleged conduct that was the subject of student A’s reports. The Title IX Coordinator determined that they would not be helpful to the investigation and elected to not interview the two character witnesses.

investigative report dated XXXXXXXX XX, 2017, that based on a preponderance of the evidence there was sufficient evidence to determine that the complainant was responsible for violating the Policy prohibiting dating violence and sexual assault with regard to both incidents 1 and 2. In the report, the Title IX Coordinator stated that she found student A's account of what occurred more credible; namely, student A provided specific, logical and chronological details regarding both incidents, whereas the complainant's account lacked detail, was inconsistent in parts, particularly with regard to incident 1, and he simply denied student A's allegations. Moreover, the Title IX Coordinator found student C credible, and deemed the complainant's statements in the letter to student A to be an admission that he recognized that his actions had been inappropriate. In the Title IX Coordinator's investigative summary, she also concluded that student A was found "not responsible" for a Policy violation regarding Dating Violence. The Title IX Coordinator stated in the report that student A's account of what happened included more detail and was presented in a more "sequential, logical manner;" whereas, although the complainant admitted to hitting student A, he presented conflicting information about what happened. Specifically, the report stated that the complainant provided different reasons for why it happened; namely, the complainant stated: "she hit me first;" and "at a later meeting, [the complainant] stated that he was acting in self-defense and felt that [student A] might seriously harmed (sic) him." The report further stated: "Then, in a letter he provided to the Title IX office, [the complainant] described his interaction with [student A] by stating that he did not intentionally hit her, but his hand incidentally contacted her body because he was trying to 'fend her off with his arms.'" Furthermore, the report stated that the "[the complainant] claimed that [student A] threw a chair at him, which student A denied. When [the Title IX Coordinator] asked [student C] about this allegation, she expressed immediate and unrehearsed surprise and disbelief. Her reaction supported [student A's] denial, particularly in light of the inconsistent stories [the complainant] provided during the investigation." The Title IX Coordinator's report also stated that the complainant's letter to student A after their break up was an admission that "he recognized that his actions had been inappropriate." Therefore, she did not find credible his assertion that student A had hit him or thrown a chair at him.

As a result of finding the complainant responsible for violating the Policy regarding incidents 1 and 2, and due to the incidents having occurred less than one year after the previously reported incident relating to student B, the Title IX Coordinator determined that "a suspension from the [School] is now warranted based on the severity of the current violation as well as [the complainant's] conduct history and current judicial status." The Title IX Coordinator also determined that the NCO would remain in place through the duration of the complainant's and student A's enrollment at the School.

The complainant and student A were notified of the Title IX Coordinator's determination by email dated XXXXXXXX X, 2017. The parties were informed that they could appeal the investigative findings by submitting a written statement to the Title IX Coordinator within two weeks of the date of the determination letter; upon receipt of the appeal, a Title IX adjudication hearing panel would be convened and the case would proceed to an adjudication hearing. On XXXXXXXX X, 2017, the complainant sent an email to the Title IX Coordinator requesting an

adjudication hearing “as soon as possible.”¹⁸ The School informed OCR that, subsequently, in a meeting in XXXXXXXX 2017, the Title IX Coordinator informed the complainant that she had not found student A responsible for violating the Policy.¹⁹

The adjudication hearing panel convened on XXXXXXXX XX, 2018, during which the complainant, and student A, through the Title IX Coordinator, had the opportunity to present evidence and witnesses; ask questions of witnesses through the hearing panel members, but not directly; provide a closing statement or impact statement; and, have an advisor present. The complainant had his legal representative present with him during the hearing; however, student A did not attend the hearing. With respect to the complainant’s assertion that he and his advisor were not allowed to be in the room with the adjudication hearing panel when they were discussing the case, but that the Title IX Coordinator was allowed to be in the room, which he alleged violated the Policy, OCR’s review of the Policy found no prohibition against the Title IX Coordinator’s being present in the room with the adjudication hearing panel. OCR determined that the Title IX Coordinator was in the room with the adjudication hearing panel because she presented information to the hearing panel, who questioned her about her investigation.

On XXXXXXXX X, 2018, after deliberation, the adjudication hearing panel determined that the complainant was responsible for violating the Policy, based on a preponderance of the evidence, with regard to both incidents 1 and 2. The adjudication hearing panel did not make a finding of responsibility with regard to the complainant’s counterclaim against student A. Pursuant to the Policy, the adjudication hearing panel determines the sanction based on the findings (i.e., the severity of the conduct for which a respondent is found responsible) and any prior disciplinary history and sanctions. The Chairperson of the complainant’s adjudication hearing panel stated that no deference is afforded the Title IX Coordinator’s proposed sanction. Once the adjudication hearing panel found the complainant responsible for violating the Policy, the Title IX Coordinator provided the hearing panel with information about the complainant’s prior violation and sanction regarding the Policy. The Policy states that a student’s previous case history cannot be used to determine whether a responding party violated the Policy; however, it can be considered to determine the sanction if a violation is found. Based on the complainant’s current and past violations of the Policy, the adjudication hearing panel determined that the complainant was a “detriment to the community,” and expelled him from the School.

By email dated XXXXXXXX X, 2018, the Title IX Coordinator notified the complainant and student A of the adjudication hearing panel’s determination that the complainant was responsible for violating the Policy’s provisions against dating violence and sexual assault, that the complainant was expelled from the School, and that the NCO remained in place. The letter also

¹⁸ By email dated XXXXXXXX XX, 2017, the Title IX Coordinator notified the complainant that she was attempting to schedule the hearing the week of XXXXXXXX X, 2018. The complainant confirmed that holding the hearing during the week of XXXXXXXX X, 2018, was acceptable.

¹⁹ The School also informed OCR that, at the time of the meeting, the complainant had already reviewed the Title IX Coordinator’s investigative summary, which included the finding with regard to the complainant’s allegation that student A had hit him first and thrown a chair at him.

informed both parties that either could appeal the determination.²⁰ The letter did not address the complainant's counterclaim of dating violence by student A.

The complainant submitted his letter of appeal to the Title IX Coordinator by email on XXXXXXXX XX, 2018. In his appeal, the complainant stated: "I was assigned the sanction of [School] suspension on XXXXXXXX XXX, 2017, after the previous investigation. However, the sanction was increased to expulsion after me and my advisor had provided new evidence including court fles (sic), witness and other informations (sic) in order to prove my innocence during the adjudication hearing. In additional (sic), the reporting party did not attend the hearing or provide any new evidence and the [S]chool's right to increase the sanctions after reporting (sic) party's appeal was never expressly provided for in the relevant procedure. Also, the sanctions were not appropriate according to the ongoing impact on the reporting party, the ongoing impact on the campus environment, and any ongoing threat to the campus community. I've been assigned no contact orders from both the [S]chool and the court and have never failed to comply. The charge brought by the reporting party against me was also dismissed by court. I have never been a threat to the campus community or created any negative environment at [S]chool. Above all, I believe that the sanctions would be more likely decreased and if not, stay the same. And from what I understand, an appeal may never be used as an opportunity to punish the student for appealing the decision, and it should not result in any increase in penalties as this may deter individuals from appealing." The complainant did not reference his counterclaim against student A in his appeal; however, the adjudication hearing panel had not addressed it in their finding.

The appeal panel convened on XXXXX X, 2018, and affirmed the adjudication hearing panel's decision, including the decision to expel the complainant. An appeal panel member stated that the appeal panel concurred with the adjudication hearing panel's decision to expel the complainant because the complainant was already on probation for a similar violation of the Policy, and the appeal panel believed that the complainant's behavior was a "pattern" and that he was not "safe for the community." The Title IX Coordinator sent the final determination to the complainant and student A on XXXXX X, 2018, in which she notified the parties that the complainant was dismissed from the School, and that the NCO would remain in place.²¹

Furthermore, OCR reviewed a list of eight complaints (excluding the complaints filed against the complainant by students A and B), of sexual harassment, dating violence, and sexual assault filed against male students from XXXXXXXX XX, 2016, through XXXXX XX, 2018. OCR determined that two of the eight male students were found "not responsible" for violations of the Policy. One of the reporting female students appealed the Title IX Coordinator's decision to the adjudication hearing panel, which upheld the Title IX Coordinator's decision in favor of the male respondent.

²⁰ The grounds for appeal include: "new evidence, which was not available at the time the Investigator completed their review, has come to light; an error in the process as outlined by the [Policy], which materially impacted the outcome; and/or, the sanction(s) imposed were not appropriate in light of the evidence presented."

²¹ A notation was also placed on the complainant's transcript that he had been "dismissed after a finding of responsibility for a code of conduct violation."

Based on the foregoing, OCR determined that the School promptly and equitably responded to student A's complaint against the complainant regarding incidents 1 and 2, and offered the complainant and student A interim measures, including counseling.²² The School also promptly issued an NCO prohibiting the complainant and student A from contacting each other and ensured that the complainant and student A were not enrolled in the same classes. OCR determined that both parties were treated equitably during the course of the investigation of student A's complaints, the adjudication panel hearing, and the appeal. Both parties were notified of the Title IX Coordinator's investigative findings, the adjudication hearing panel's decision, and the appeal panel's determination. The School determined that a preponderance of the evidence substantiated student A's allegations of dating violence and sexual assault. The adjudication hearing panel treated the complainant differently, however, in that it did not make a determination regarding the complainant's counterclaim.

Therefore, OCR concluded that there is insufficient evidence to substantiate the complainant's allegation that the School discriminated against the complainant, on the basis of his sex, by failing to respond appropriately to complaints of dating violence and sexual assault made against him on XXXXXXXXXX X, 2017, and XXXXXXXXXX X, 2017, respectively. OCR determined, however, that the adjudication hearing panel did not treat the complainant equitably in that it failed to make a formal determination regarding his counterclaim of dating violence against student A.

Allegation 2

The complainant alleged that the School retaliated against him for requesting, on XXXXXXXXXX X, 2017, and participating in, on XXXXXXXXXX XX, 2018, a hearing regarding the dating violence and sexual assault complaints filed against him, and his counterclaim, by increasing his sanction from suspension to expulsion on XXXXXXXXXX X, 2018. Specifically, the complainant stated that on XXXXXXXXXX X, 2017, he requested an adjudication hearing; however, on XXXXXXXXXX X, 2018, after the hearing, the adjudication hearing panel retaliated against him by increasing his sanction to expulsion, "despite the fact that [he] provided new evidence, a witness and information proving [his] innocence during the hearing and [student A] did not even attend the hearing or provide any new information[s] (sic) regarding to the case (sic)." The complainant stated that "an appeal should never be used as an opportunity to punish the student for appealing the decision, and it should not result in any increase in penalty as this may deter individuals from asserting his or her right[s]."

In analyzing whether retaliation occurred, OCR must first determine whether the three prima facie elements of retaliation can be established: (1) whether a recipient or other person subjected an individual to an adverse action; (2) whether the recipient or other person (a) knew that the individual engaged in a protected activity or (b) believed that the individual might engage in a protected activity in the future; and, (3) there is some evidence of a causal connection between the adverse action and protected activity. When a prima facie case of retaliation has been established, OCR then determines whether there is a facially legitimate, non-retaliatory reason for the adverse action; and if so, whether the facially legitimate, non-retaliatory reason is a pretext for retaliation. A protected activity involves making a complaint, testifying, assisting or

²² The complainant did not raise any concerns to OCR or the School regarding the promptness of the process.

participating in any manner in an investigation, proceeding or hearing under the regulations OCR enforces or similar activities, such as advocating for rights guaranteed by these regulations.

OCR determined that the complainant engaged in protected activity by requesting, on XXXXXXXX X, 2017, and participating in, on XXXXXXXX XX, 2018, a hearing regarding the dating violence and sexual assault complaints filed against him, and his counterclaim. OCR also determined that the Title IX Coordinator, the adjudication hearing panel members and the appeal panel members were aware of the complainant's protected activity. OCR determined that the complainant was subjected to an adverse action when the adjudication hearing panel increased his sanction from a suspension to an expulsion on XXXXXXXX X, 2018.

As stated above regarding Allegation 1, pursuant to the Policy, sanctions for violations of the Policy may range from a warning to an expulsion, depending on the severity of the conduct for which a student is found responsible, and the student's prior disciplinary history. Also pursuant to the Policy, the adjudication hearing panel may determine the sanction to be imposed on the respondent based on the findings (i.e., the severity of the conduct for which the respondent is found responsible) as a result of the hearing, and the respondent's prior disciplinary history and sanctions; no deference is afforded the Title IX Coordinator's proposed sanction. The adjudication hearing panel determined that, given the severity of incidents 1 and 2 for which the complainant was found responsible, and that the complainant had engaged in similar behavior for which he already was on probation, the complainant was a detriment to the community and an expulsion was warranted.²³ The appeal panel concurred with the adjudication hearing panel's determination for similar reasons.

OCR reviewed a list of eight complaints of sexual harassment, dating violence, and sexual assault made against students from XXXXXXXX XX, 2016, through XXXXX XX, 2018, as referenced in Allegation 1.²⁴ OCR determined that one other respondent (respondent A) also engaged in protected activity when he appealed the Title IX Coordinator's determination to the adjudication hearing panel; the adjudication hearing panel found respondent A responsible for violating the Policy, and imposed the same sanction as the Title IX Coordinator recommended.

Based on the foregoing, OCR determined that the School proffered a legitimate, non-retaliatory reason for changing the complainant's sanction to expulsion on XXXXXXXX X, 2018; namely, the adjudication hearing panel determined, consistent with the Policy, that based on its finding that the complainant was responsible for violating the Policy regarding incidents 1 and 2, and the complainant's prior violation of the Policy for similar conduct, the complainant's expulsion was warranted. OCR did not find evidence that the proffered reason was pretextual, because the Policy provides for the adjudication hearing panel to make its own determination regarding the appropriate sanction to be imposed; it does not require the adjudication hearing panel to give deference to Title IX Coordinator's recommended sanction; and, the sanction was consistent with the Policy. OCR also determined that another respondent who engaged in protected activity by appealing the Title IX Coordinator's determination was not given a more severe sanction by the adjudication hearing panel. Therefore, OCR determined that there was insufficient evidence

²³ As previously stated, the Policy states that a student's previous case history can be considered to determine the sanction if a violation of the Policy is found.

²⁴ The complainant was the only respondent on probation at the time of the investigation.

to substantiate the complainant's allegation that the School retaliated against the complainant for requesting, on XXXXXXXX X, 2017, and participating in, on XXXXXXXX XX, 2018, a hearing regarding the dating violence and sexual assault complaints filed against him, and his counterclaim, by increasing his sanction from suspension to expulsion on XXXXXXXX X, 2018.

To address the compliance issues that OCR identified with respect to the notice of nondiscrimination, the grievance procedures, and Allegation 1, on September 18, 2018, the School signed the enclosed resolution agreement to resolve this complaint. OCR will monitor the School's implementation of the resolution agreement.

This letter should not be interpreted to address the School's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the School may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual may file a complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions regarding OCR's determination, please contact R. Colin Power, Compliance Team Attorney, at (646) 428-3832 or r.colin.power@ed.gov; or Tracey Beers, Senior Compliance Team Attorney at (646) 428-3804 or tracey.beers@ed.gov.

Sincerely,

/S/

Timothy C.J. Blanchard

Encl.

cc: Pinchos Goldberg, Esq.