At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, by Microsoft Teams on the 21st day of August, 2026.

PRESENT: HON. MARK G. MASLER
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT COUNTY OF TOMPKINS

In the Matter of the Application of
JOHN DOE,

Petitioner,

v

CORNELL UNIVERSITY,

Respondent.

DECISION, ORDER, AND JUDGMENT

Index No. EF2026-0292

APPEARANCES:

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Via NYSCEF

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MARK G. MASLER, J. S. C.

Jane Roe filed a complaint with Cornell University alleging that she was the victim of a sexual assault involving multiple fraternity members that occurred during a party she attended at the Chi Phi fraternity house between October 19 and October 20, 2024. Petitioner was a student at Cornell University, a member of Chi Phi fraternity, a resident of the fraternity house, and present at the party during the time of the alleged assault. On November 22, 2024, Cornell issued a formal complaint charging seven fraternity members, including petitioner, with violating its Title IX policy (known as Policy 6.4). In the formal complaint, petitioner was "accused of violating Cornell University's Policy 6.4 prohibition against Sexual Exploitation [and] Sexual Assault" (NY St Cts Elec Filing [NYSCEF] Doc No. 19 at R-01046).[1] The formal complaint also advised that Cornell "may hold the Respondents accountable for violations of Policy 6.4 and other policies that are not referenced in the Formal Complaint but are learned about from evidence, testimony, or admissions during the investigation and adjudication process" (NYSCEF Doc No. 19 at R-01044, R-01050, R-01056).

An evidentiary hearing that lasted 12 days was held before a three-member hearing panel. Petitioner actively participated in the hearing. He was represented by counsel, who cross-examined numerous witnesses, and testified in his own behalf. The hearing panel issued a decision dated August 18, 2025 that, in relevant part, found that petitioner was not responsible for Sexual Assault or Sexual Exploitation, but that he was responsible for Attempted Sexual

[1] Cornell revised the formal complaint in January and March 2025, however the accusations against petitioner were not materially altered (*see* NYSCEF Doc No. 19 at R-01050 – R-01053; R-01056 – R-01059). In the copy of the initial formal complaint filed with the petition, complainant's name, the summary of alleged misconduct, and the names of others accused of violations arising from the incident were redacted (*see* NYSCEF Doc No. 4). The record, which is sealed pursuant to an order on stipulation, contains unredacted copies of the formal complaint and its revisions (*see* NYSCEF Doc No. 19 at R-01044 – R-01059).

Exploitation. Petitioner filed an administrative appeal raising several issues, including: (1) the contention that the hearing was compromised because panel member Savannah Bao was distracted during the hearing, including a 45-minute period when she was participating by videoconference while driving a car during the testimony of a witness to petitioner's conduct during the incident; (2) the objection that he had been found responsible for a violation that he had not been charged with; and (3) the contention that the finding he was responsible for Attempted Sexual Exploitation was clearly erroneous. A three-member appeal panel issued a decision dated January 14, 2026 denying the appeal in its entirety. Petitioner commenced this proceeding on March 30, 2026 seeking judgment annulling the decision finding him responsible for Attempted Sexual Exploitation, vacating all penalties imposed against him, and expunging all references to the underlying charges from his academic record.[2] In this proceeding, petitioner does not contend that the decision of the hearing panel was not supported by substantial evidence. Rather, he argues only that Cornell failed to follow relevant law and its own policy by finding him responsible for a violation that he was not charged with.[3]

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[2] The petition seeks declaratory judgment; however, petitioner did not file and serve a summons as required to commence a hybrid CPLR article 78 proceeding and action for a declaratory judgment (*see Matter of Nicholas v Martuscello*, 245 AD3d 1055, 1058 [3d Dept 2026]). In any event, "[a] trial court may decline to entertain an action for declaratory judgment where other adequate remedies are available, such as a CPLR article 78 proceeding to challenge an administrative determination" (*Matter of Gable Transp., Inc. v State of New York*, 29 AD3d 1125, 1127 [3d Dept 2006]). The request for a declaratory judgment has not been considered because it was not properly made and is duplicative and unnecessary in light of the remedy available through the CPLR article 78 proceeding (*see id.*).

[3] The petition also alleges that the hearing was compromised by the inattention of panel member Bao during testimony petitioner contends was critical to his defense (*see* NYSCEF Doc No. 1, petition, ¶¶ 38, 40-42, 44); however, petitioner does not rely on these allegations as a basis for challenging the administrative determination. In this regard, it bears emphasizing that no request for relief made in the petition was based on allegations regarding Bao's conduct during the hearing (*see* petition ¶¶ 46-74), nor was any argument seeking affirmative relief based on

Petitioner was found responsible for Attempted Sexual Exploitation, a charge that was not expressly mentioned in the formal complaint or any other pre-hearing notice that was provided to petitioner. As relevant here, Sexual Exploitation is defined as "intentionally engaging in . . . [o]bserving another person when that person is nude or engaged in sexual activity without the knowledge and consent of the person observed" (NYSCEF Doc No. 31, Policy 6.4 procedures, § 3.6). Attempting to Commit Prohibited Conduct is separately defined as occurring when, "with the intent to commit such conduct, [a] person engages in conduct directly tending toward completion of the prohibited conduct" (Policy 6.4 procedures § 3.2). Petitioner argues that Sexual Exploitation and Attempted Sexual Exploitation are distinct offenses because they are separately defined in Policy 6.4, and argues that "Cornell cannot simply add on lesser included offenses after the hearing is concluded" (NYSCEF Doc No. 36, petitioner's mem in reply, at 5). Cornell argues that the elements of prohibited conduct, such as Sexual Exploitation, and attempted prohibited conduct are the same, noting that the analysis of whether a person engaged in attempted prohibited conduct is necessarily based on the elements of the underlying specific violation charged. It further contends that the notice provided to petitioner was sufficient to apprise him of the facts on which the charges were based and to

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Bao's conduct made in petitioner's reply memorandum of law or at oral argument. Thus, it appears that the allegations made in the petition regarding Bao's conduct merely provide context by identifying all issues that were raised and decided in petitioner's administrative appeal of the decision of the hearing panel. Were this issue to be considered on the merits, there is no basis for finding that the chair of the hearing panel abused her discretion in denying petitioner's request to declare a mishearing based on Bao's conduct during the hearing (*see* Policy 6.4 procedures § 26.10.1). The time that Bao observed the hearing from her car amounted to only 45 minutes out of a 12-day hearing, and covered only 15 pages of the 1,732-page transcript. Bao stated she observed the testimony that was given while she was in her car, and she also observed the ensuing cross-examination of the witness by petitioner's attorney, which immediately followed and recapped much of the direct testimony. Finally, the decision of the three-member hearing panel was unanimous.

permit him to present a defense. Finally, it also argues that petitioner was informed from the beginning of the process that he could be held accountable for violations not referred to in the formal complaint, but that may be later identified during the investigation and adjudication process.

It is thus necessary to consider the extent of notice required to be provided to students accused of violating Policy 6.4. Education Law article 129-B, commonly known as the Enough is Enough Law, was enacted in 2015 to "require all colleges and universities in the State of New York to implement uniform prevention and response policies and procedures relating to sexual assault, domestic violence, dating violence, and stalking" (*Matter of Jacobson v Blaise*, 157 AD3d 1072, 1074 [3d Dept 2018] [internal quotation marks, ellipsis, and citation omitted]). As relevant here, the law provides standards for the minimum process to be afforded a student accused of "*sexual assault*, domestic violence, dating violence, stalking, *or sexual activity that may otherwise violate the institution's code of conduct*" (Education Law § 6444 [5] [b], [c] [emphasis added]). These requirements include being provided with (1) "notice . . . describing the date, time, location and factual allegations concerning the violation, a reference to the specific code of conduct provisions alleged to have been violated, and possible sanctions" (Education Law § 6444 [5] [b] [i]); and (2) written or electronic notice "of the specific rule, rules or laws alleged to have been violated and in what manner" (Education Law § 6444 [5] [c] [vii]).[4]

By its terms, Education Law § 6444 (5) specifies the notice required to be provided only when a student is accused, as relevant here, of sexual assault or sexual activity that may otherwise violate the institution's code of conduct. Respondent satisfied this requirement by

[4] A list of possible sanctions is provided within Policy 6.4 (*see* Policy 6.4 procedures § 26.13).

providing petitioner written notice in the formal complaint that he was accused of Sexual Assault. The formal complaint also referred to Policy 6.4's prohibition against Sexual Exploitation, an offense which is not included in those specifically enumerated in Education Law § 6444 (5). For purposes of the Enough is Enough Law, "sexual activity" is defined as having "the same meaning as 'sexual act' and 'sexual contact' as provided in 18 USC 2246 (2) and 18 USC 2246 (3)" (Education Law § 6439 [10]). In turn, "sexual act" and "sexual contact" are defined as a number of acts that require physical contact (*see* 18 USC 2246 [2], [3]). The offense of Sexual Exploitation does not fall within the statutory definition of sexual activity because the elements thereof do not include any of the activities listed in 18 USC 2246 (2) and (3) that require physical contact, and thus does not fall within the scope of "sexual activity that may otherwise violate the institution's code of conduct." Accordingly, neither Education Law § 6444 (5) (b) (i) nor § 6444 (5) (c) (vii) require that petitioner have been provided with notice that he could be found responsible for Sexual Exploitation or Attempted Sexual Exploitation.

Policy 6.4 does not expressly require that an accused student be notified of the specific code of conduct provisions, or rule or law, alleged to have been violated. Rather, it requires that an accused student be provided with notice of the "alleged prohibited conduct and its date, time, and location, to the extent known," and the "factual allegations pertaining to the prohibited conduct" (Policy 6.4 procedures § 18). It further provides that when a case is referred for a hearing, the notice of hearing must apprise an accused student of "the charges at issue" (Policy 6.4 procedures § 26.4).

The formal complaint identified the complainant, provided the dates and location of the incident, set forth a summary of alleged misconduct consisting of approximately two pages that identified the other students accused of violations arising from the incident, advised petitioner

that he was accused of violating the prohibitions against Sexual Assault and Sexual Exploitation, and set forth the specific facts applicable to the charges made against petitioner (NYSCEF Doc No. 19 at R-01044 – R-01059). Accordingly, the formal complaint provided petitioner with notice adequate to comply with Policy 6.4 and to satisfy due process (*see Matter of Jacobson v Blaise*, 157 AD3d at 1075; New York State Education Department, Complying with Education Law Article 129-B at 26 [The notice provided "should be specific enough to allow a reasonable person to present a defense, pursuant to institutional policy, but need not be so long and detailed that it negatively impacts the student conduct process"]).[5]

Petitioner's argument that finding him responsible for Attempted Sexual Exploitation is arbitrary and capricious because the formal complaint did not specifically provide notice that he was accused of violating that section of Policy 6.4 is also unavailing for the following additional reasons. First, petitioner was advised that he could be held accountable for violations not referred to in the formal complaint that may be identified during the investigation and adjudication process. The Department of Education has specifically noted that:

> "Nothing in the paragraph [Education Law § 6444 (5) (b)] prohibits an institution from holding students accountable for violations that are not referenced in the initial charge letter but are learned about from evidence, testimony, or admission at a hearing or during the investigatory process, consistent with institution policies and due process, where applicable" (New York State Education Department, Complying with Education Law Article 129-B at 26).

Second, as noted by Cornell, Attempted Sexual Exploitation adds no elements to Sexual Exploitation. Accordingly, the formal complaint provided petitioner with notice of alleged facts

[5] The New York State Education Department guidance document entitled "Complying with Education Law Article 129-B," which was cited by the Appellate Division, Third Department, in *Matter of Jacobson v Blaise* (157 AD3d at 1074), may be found at https://www.nysed.gov/sites/default/files/article-129-b-guidance.pdf (last accessed September 23, 2026).

relevant to his conduct to support the charge for Attempted Sexual Exploitation. The elements of Attempted Sexual Exploitation – the intent to commit Sexual Exploitation and affirmative acts tending toward its completion – were necessarily at issue in the evidentiary hearing, and petitioner had the opportunity to present relevant evidence, arguments, and defenses. Since the elements of prohibited conduct include the elements of attempted prohibited conduct the analysis of whether a person attempted prohibited conduct is necessarily based on the elements of the underlying specific violation charged. This is the same analysis employed in considering lesser included charges for criminal defendants, a concept that petitioner alluded to in arguments that compare the attempt charge to a "lesser included offense" (petitioner's mem in reply at 5, 9). In the criminal context, a lesser included offense is defined as follows:

> "When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a 'lesser included offense.' *In any case in which it is legally possible to attempt to commit a crime, an attempt to commit such crime constitutes a lesser included offense with respect thereto*" (CPL 1.20 [37] [emphasis added]).

Thus, the hearing panel's decision finding petitioner responsible for Attempted Sexual Exploitation is analogous to the imposition against a criminal defendant of a charge for the lesser included offense of attempting to commit the crime with which the defendant was indicted. If a criminal defendant, whose liberty interests are at stake, may be convicted of a lesser included offense with which he or she was not specifically indicted – including an attempt to commit the greater count – then the finding that petitioner was responsible for Attempted Sexual Exploitation cannot be considered to have been arbitrary and capricious.

Based on the foregoing, the petition is dismissed.

This decision constitutes the order and judgment of the court. The filing of this decision, order, and judgment, or the transmittal of copies hereof, by the court shall not constitute notice of

entry (*see e.g.* CPLR 2221 [d] [3]; 5513). The prevailing party shall serve notice of entry hereof as required by CPLR 2220 (b) and Uniform Rules for Trial Courts (22 NYCRR) § 202.5-b (h) (2).

Dated: September 23, 2026
Cortland, New York

ENTER

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Digitally signed by Hon. Mark G. Masler
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Date: 2026.09.23 09:37:46 -04'00'

HON. MARK G. MASLER
Supreme Court Justice

The following documents filed with the Clerk of the County of Tompkins via the New York State Courts Electronic Filing System were considered herein (*see* CPLR 2219 [a]):

Document Numbers 1-8; 10; 14-36.