

**ATTORNEY GENERAL  
DEPARTMENT OF JUSTICE**

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December 15, 2017

County Attorney Patricia G. Conway  
Rockingham County Attorney's Office  
P.O. Box 1209  
Kingston, NH 03848

Re: Phillips Exeter Academy Investigation

Dear County Attorney Conway,

I am writing to inform you of the conclusion of this office's review of the investigation into Phillips Exeter Academy, and specifically your decision to decline to prosecute Dean of Students Melissa Mischke and Dean of Residential Life Arthur Cosgrove. As you are aware, this office received an inquiry about the investigation and your decision, which resulted in my review of the case file at your office on November 21 and 22.

Having completed my review of your case file, I have concluded that your office did not abuse its prosecutorial discretion in deciding not to prosecute Deans Mischke and Cosgrove. Based on the evidence gathered during your investigation, your decision not to proceed with charges was reasonable under the totality of the circumstances.

As you are aware, there is a factual dispute as to what the victim disclosed and when disclosures were made. Deans Mischke and Cosgrove both claimed that at their first meeting in October of 2015 the victim did not disclose acts which would constitute sexual assault. The victim's advisor, history teacher Amy Schwartz, would corroborate their recollection, that the victim did not disclose acts which would constitute a physical or sexual assault. The victim's recollection differed, in that she believed that at that first meeting she had disclosed to Deans Mischke and Cosgrove, and to Ms. Schwartz the details of acts that constituted sexual assault. Another student present at that meeting corroborated the victim's recollection. Given the state of the evidence, and the divergent recollections of those present at the initial meeting, it was

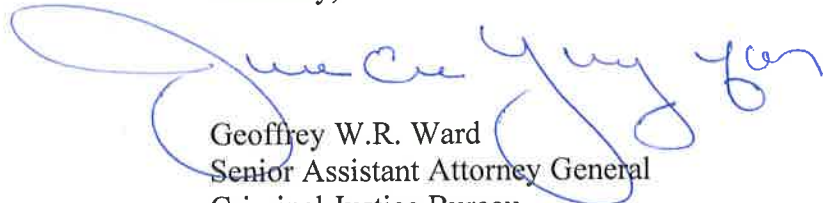
reasonable to conclude that the State could not meet its burden to prove that Deans Mischke and Cosgrove were guilty of violating RSA 169-C:29, beyond a reasonable doubt.<sup>1</sup>

Nor was it unreasonable for your office to conclude that a prosecution of Deans Mischke and Cosgrove would not be successful even if Deans Mischke and Cosgrove were charged under a theory that they violated RSA 169-C:29 after the victim made a further report in April of 2016, and before they made a report to law enforcement in May of 2016. While it appears undisputed that the victim provided Deans Mischke and Cosgrove, and Ms. Schwartz with a detailed account of the commission of a sexual assault in April of 2016, at that time the victim was 18-years-old. As you are aware, arguably Deans Mischke and Cosgrove had no legal obligation to report disclosures made by the victim when she was no longer a juvenile. Nevertheless, in May of 2016 Deans Mischke and Cosgrove did report the crimes committed against the victim to the Exeter Police Department. That Deans Mischke and Cosgrove had also proffered through counsel that they intended to rely on a defense of "advice of counsel" to any charge alleging a failure to report between April and May of 2016, would have further diminished the possibility of a successful prosecution in this matter.

Therefore, as outlined, it was not unreasonable for your office to conclude that it would be unable to prove charges against Deans Mischke and Cosgrove beyond a reasonable doubt. Accordingly, the decision not to pursue charges against these individuals cannot be said to have been an abuse of prosecutorial discretion.

Thank you for your time and the attention that you have given to this matter. Please feel free to contact me if you have any questions or wish to discuss this matter further.

Sincerely,



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Copy to: Deputy Attorney General Ann M. Rice  
Associate Attorney General Jane E. Young  
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<sup>1</sup> See American Bar Association *Standards for Criminal Justice: Prosecution Function*, Standard 3-3.9, entitled "Discretion in the Charging Decision" which states in relevant part, "A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction."