IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN DOE,	:	
Plaintiff,	:	Case No. 4:15-cv-2072-MWB
v.	:	
	:	Judge: Matthew W. Brann
THE PENNSYLVANIA STATE UNIVERSITY, ERIC BARRON, and DANNY SHAHA,	:	Complaint filed: 10/27/2015
Defendants.	:	***Electronically Filed***
	AND	
	:	
JOHN DOE II,	:	Case No. 4:15-cv-02108-MWB
Plaintiff,	:	***Consolidated with Case No. 4:15-cv-2072-MWB***
vs.	:	
	:	Judge: Matthew W. Brann
THE PENNSYLVANIA STATE UNIVERSITY, ERIC BARRON and DANNY SHAHA,	:	Complaint filed: 11/3/2015
Defendants.	:	***Electronically Filed***

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR EMERGENCY TEMPORARY RESTRAINING ORDER/PRELIMINARY INJUNCTION

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I. STATEMENT OF FACTS

Defendant, The Pennsylvania State University ("Penn State"), is a state-related university organized and existing under the laws of the Commonwealth of Pennsylvania. Penn State strives to provide a safe educational environment, and to protect its students from sex discrimination, sexual harassment, and sexual assault.

To that end, Penn State developed an investigative process for addressing complaints of sexual assault by students. That process is designed to be fair, to keep the parties informed of the results of the investigation, and to afford an opportunity to review and respond to the evidence as it is developed. Students accused of sexual misconduct have notice of the allegations against them, and ample opportunity to present their side of the story.

Addressing Complaints of Sexual Misconduct

Through its Office of Student Conduct, Penn State has implemented procedures to address misconduct by University students. With respect to situations that involve potential sexual misconduct allegations, one option available under these procedures is the "Investigative Model." The Investigative Model was utilized in the instant case. Per this model, the case is assigned to an investigator who is trained to investigate complaints involving allegations of sexual misconduct. The investigator meets separately with the Complainant and the Respondent to collect information relevant to the allegations, including factual

statements, witness names, and other information. The Complainant and Respondent are permitted to have an advisor, which can be an attorney, present with them throughout the investigative process. The investigator also communicates with and obtains information from witnesses and other available information relevant to the case. Once this information is obtained, the investigator prepares an Investigative Packet. Thereafter, the investigator determines whether or not the information supplied reasonably supports a Code of Conduct violation. If so, charges are assigned against the accused student and both the Complainant and Respondent are provided written notice of the charges. Both the Complainant and Respondent are also afforded an opportunity to provide a response to the charges.

Thereafter the Complainant and the Respondent are afforded an opportunity to review the Investigative Packet and to provide a response, ask questions (through the investigator) of the witnesses, including the parties, and to provide any other relevant information. The investigator thereafter amends the Investigative Packet as appropriate and/or conducts additional investigation warranted by the new information. The Complainant and Respondent are then afforded an opportunity to review and respond to any revisions. This process continues until no new information is offered. When no new information is offered, the Packet is finalized and the investigation is complete.

The Investigative Packet, together with any responses to the charges, is forwarded to the Title IX Decision Panel (the "Panel"). The Panel reviews the case, and makes a decision regarding the accused students' responsibility. The Panel also determines appropriate sanctions if the student is found responsible. The Panel issues a final decision, along with a written rationale for the decision. Both the Complainant and Respondent are informed of the Panel's decision and their rights to appeal, if applicable under the Student Code of Conduct. Appeals are made to the Student Conduct Appeals Officer. Either party may request an appeal, and then the other party is notified and may also choose to submit an appeal. Thereafter, the Appeals Officer reviews the case and any additional information that is submitted. The Appeals Officer then rules on the appeal and the Respondent and Complainant are notified in writing. Appeals are final decisions. Once an appeal is decided, no further review is provided under the procedures. (ECF No. 5-1, pp. 10-19).

Penn State University

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX") prohibits discrimination on the basis of sex. As a recipient of federal financial assistance made available through the United States Department of Education (DOE), Penn State is subject to Title IX. DOE requires Penn State to investigate and promptly resolve student complaints of sexual harassment. 34

C.F.R. § 106.8. Once a university has notice that a student was sexually harassed, Title IX requires the university to take action or face potential civil liability. See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292 (1998) (recognizing a private cause of action where an institution's response to known harassment constitutes "deliberate indifference").

In 2011, the DOE's Office for Civil Rights (OCR), issued a "Dear Colleague letter." The letter suggested that colleges and universities should do more to combat the prevalence of sexual assault on campuses and in university communities. The letter also prompted a national dialogue amongst universities about addressing sexual misconduct.

Penn State endeavored to create a model for addressing sexual misconduct that was tailored to meet the needs of Penn State and its community. Penn State believes the Investigative Model is fairest for all participants. Both the Complainant and Respondent(s) are afforded early and frequent access to the information developed by the trained investigator, and are afforded full and fair opportunities to respond to that information in a thoughtful and unhurried way. The use of the trained investigator helps assure that the proper questions will be asked and information developed before the investigation is completed. The use of Panel Members who are trained in, and who have previously participated in sexual misconduct cases affords a consistent and informed approach to the resolution of

charges. The "single investigator" model utilized by Penn State has received favorable review within the United States Executive Branch. See NOT ALONE REPORT, p. 14 (April 2014, available online at https://www. notalone.gov/assets/report.pdf).

The Incident of Sexual Misconduct

The instant action arises from misconduct charges that followed an incident in the early morning hours of December 5, 2014. The Complainant was a female first year student at Penn State. She attended a fraternity party on the evening of December 4, 2014 and the early morning hours of December 5, 2014. The Complainant complained she was a victim of non-consensual sexual misconduct that occurred in the early morning hours of December 5, 2014.

When Penn State learned about the complaint, it followed the Investigative Model procedures outlined above. A Title IX Decision Panel determined John Doe[1] was responsible for the charges of sexual misconduct he faced, and sanctions were imposed, including a two semester suspension. Doe appealed this determination, but the Appeals Officer denied the appeal. Doe thereafter initiated the instant action. By order dated October 28, 2015, this Court enjoined the

[1] On December 8, 2015, this Court consolidated John Doe I and John Doe II (No. 4:15-cv-2108). This Brief addresses the issues presented in the now-consolidated case, generally without distinguishing Doe I from Doe II (referred to collectively as "Doe"). However, the irreparable harm section relating to deportation issues relates only to Doe I. This Brief should not be construed as an admission that Doe I and Doe II are otherwise in identical positions, only that the issues may be briefed collectively for purposes of the preliminary injunction determination based on the information presented thus far.

disciplinary sanctions and restored Doe's status as an enrolled student, subject to the disposition of Doe's Preliminary Injunction Motion. (ECF No. 12).

II. ARGUMENT

This case presents the substantive issue of the *level* of procedural protection the Fourteenth Amendment's Due Process Clause requires before a university may suspend a student. This litigation does not afford Doe an opportunity to relitigate the underlying merits of the sexual misconduct allegations. Penn State provided Doe with notice of the allegations, an opportunity to present his side of the story, and numerous other procedural safeguards throughout an extensive and interactive investigatory process. Penn State provided Doe with all of the process that the Constitution requires, and more.

Doe seeks a preliminary injunction, which requires a showing of a likelihood of success on the merits. This case presents no such likelihood. Further, both Penn State's and the public's interests would be harmed by stalling the disciplinary suspension during litigation. This would undermine the disciplinary process generally, and could result in Doe avoiding any discipline at all should he graduate before the litigation is finally resolved. Therefore this Court should deny Doe's request for the extraordinary remedy of a preliminary injunction.

A. Entitlement to Injunctive Relief

To be entitled to injunctive relief, a party must demonstrate: (1) a likelihood of success on the merits; (2) that he or she will suffer irreparable harm if the injunction is denied; (3) that granting relief will not result in even greater harm to the non-moving party; and (4) that the public interest favors such relief. Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District, 386 F.3d 514, 524 (3d Cir. 2004). See also Coulter v. East Stroudsburg University, 2010 WL 1816632, at *1 (M.D. Pa. May 5, 2010).

Furthermore, preliminary injunctive relief is viewed as an "extraordinary remedy." P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstore, LLC, 428 F.3d 504, 508 (3d Cir. 2005). In Yonkers, the Court recognized that "the burden lies with plaintiff to establish every element in its favor, where the grant of a preliminary injunction is inappropriate." Id. Whether to grant or deny a preliminary injunction is within the sound discretion of the court. Kershner v. Mazurkiewicz, 670 F.2d 440, 443 (3d Cir. 1982).

B. Likelihood of Success on the Merits

1. Prima Facie *Case*

To state a claim for a procedural due process violation under §1983, a plaintiff must show: (1) he was deprived of protected property or liberty interest; (2) the deprivation was without due process; (3) defendant subjected or caused

plaintiff to be subjected to this deprivation without due process; (4) the defendant was acting under color of state law; and (5) the plaintiff suffered injury as a result. Borrell v. Bloomsburg University, 955 F.Supp.2d 390, 402 (M.D. Pa. 2013) (quoting Sample v. Diecks, 885 F.2d 1099, 1113-14 (3d Cir. 1989)). In this circuit, courts have assumed, but have not specifically held, that a student has a property interest in continuing his or her education. Ross v. The Pennsylvania State University, 445 F.Supp. 147, 152 (M.D. Pa. 1978)(in the graduate student context).

Doe briefly alleges that he has a liberty interest in his good name and reputation. To make out a due process claim for deprivation of a liberty interest in his reputation, a plaintiff must allege that the defendants made a false stigmatizing statement, and that the stigmatizing statement was made *publicly*. Hill v. Borough of Kutztown, 455 F.3d 225, 236 (3d Cir. 2006). Here, Doe cannot point to any *public* statements by Penn State and therefore this case does not implicate a "liberty" interest. Assuming that Doe maintains a property interest in continuing his education, he still must prove that Penn State denied him of this right "without due process."

2. Penn State afforded Doe "due process" sufficient to meet its Fourteenth Amendment obligations in this context.

a. Introduction

Disciplinary proceedings at public schools are generally not subject to strict rules of judicial procedure, and courts should not interfere with internal procedure

and discipline unless real prejudice, bias or denial of due process is present. Psi Upsilon of Philadelphia v. University of Pennsylvania, 591 A.2d 755, 760, 404 Pa. Super. 604, 614 (1991), alloc. denied, 598 A.2d 994 (Pa. 1991); see also, Linwood v. Board of Educ. of the City of Peoria, 463 F.2d 763, 770 (7th Cir. 1972), cert. denied, 409 U.S. 1027 (1972) (process due in a disciplinary proceeding is not to be equated with that due in a criminal trial or court delinquency proceeding); Coleman v. Monroe, 977 F.2d 442 (8th Cir 1992) (school regulations are not measured by the standards which prevail for criminal procedure); Nash v. Auburn Univ., 812 F.2d 655 (11th Cir. 1987) (student rights in the disciplinary context "are not coextensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial."). Decades ago, the Third Circuit recognized that there is no constitutional right in a student disciplinary proceeding to be heard by a particular tribunal, and "the requirements of due process frequently vary with the type of proceeding involved." Sill v. The Pennsylvania State University, 462 F.2d 463, 469 (3d Cir. 1972). After Sill, courts have recognized that there is no specific format that university disciplinary proceedings must follow so long as the university provides sufficient protections to comply with due process. Osei v. Temple University, 2011 WL 4549609, at *8 (E.D. Pa. Sept. 30, 2011), aff'd. 518 Fed. Appx. 86 (3d Cir. 2013); Phat Van Le v. Univ. of Medicine & Dentistry of N.J., 379 Fed. Appx. 171, 174 (3d Cir. 2010).

In considering the process that is due for public school students facing suspensions of 10 days or more, courts have generally applied the factors from Mathews v. Eldridge, 424 U.S. 319 (1975): (1) the private interest that will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substantive procedural requirement would entail. Johnson v. Temple University, 2013 WL 5298484, at *7 (E.D. Pa. Sept. 13, 2013), reconsideration denied, 2014 WL 3535073 (E.D. Pa. July 17, 2014). Student codes of conduct prescribed by educational institutions are not required to satisfy the same rigorous standards as criminal statutes in the criminal justice/law enforcement system. Sill, 462 F.2d 463, citing Soglin v. Kauffman, 418 F.2d 163, 168 (7th Cir. 1969).

Courts further recognize that a state-related institution, such as Penn State, is entitled to establish its own rules and regulations, including rules for disciplinary proceedings. Courts should only interfere where it is clear that constitutional rights have been infringed. Johnson, supra at *6 (quoting Osei, 2011 WL 4549609, at *8). See also, Gati v. University of Pittsburgh, 91 A.3d 723, 731 (Pa. Super. Ct. 2014) alloc. denied, 105 A.3d 737 (2014) (schools have broad discretion to implement and enforce disciplinary rules and regulations). Additionally, schools

enjoy a presumption of impartiality and fairness in favor of school administrators in a disciplinary proceeding setting. Furey, 884 F.Supp.2d at 255; Osei, 2011 WL 4549609, at *11). Doe bears the burden of rebutting this presumption with sufficient evidence. Furey, 884 F.Supp.2d at 255 (allegations of prejudice of university hearing bodies must be based on more than mere speculation and tenuous inferences.).

Significantly, the United States Supreme Court has stopped short of requiring "even truncated trial-type procedures" that might overwhelm a school's limited resources. Goss v. Lopez, 419 U.S. 565, 583, 95 S. Ct. 729, 740-41 (U.S. 1975); see also, Furey, 884 F.Supp.2d at 246. For example, there is generally no right to be actively represented by counsel at a disciplinary hearing because such a requirement "would force student disciplinary proceedings into the mold of adversary litigation.[2] Furey, 884 F.Supp.2d at 253 (quoting Osteen v. Henley, 13 F.3d 221 (7th Cir. 1993)); and Johnson, 2013 WL 5298484, at *7. Procedural Due Process rights do not allow for relitigation in federal court of the underlying merits of a disciplinary determination. Wood v. Strickland, 420 U.S. 308, 326, 95 S. Ct. 992, 1003 (1975)("§1983 does not extend the right to relitigate in federal court

[2] A possible exception to this rule occurs when a student is also facing criminal charges for the same underlying conduct. See, Furey, 884 F.Supp.2d at 253; Johnson, 2013 WL 5298484, at *10. In the instant matter, neither plaintiff faced criminal charges.

evidentiary questions arising in [public high] school disciplinary proceedings or the proper construction of school regulations.").

b. Cross-examination

As a general rule, the rights to confront and cross-examine witnesses have not been deemed necessary elements of due process in the university disciplinary context. Osei, 2011 WL 4549609, at *10 (citing Furey, supra). See also Gorman v. University of Rhode Island, 837 F.2d 7 (1st Cir. 1988) (holding that there is no constitutional right to unlimited cross-examination nor necessarily a right to tape record proceedings in the context of an expulsion). In cases involving short disciplinary suspensions[3], the Supreme Court expressly "stop[ped] short of construing the Due Process Clause to require . . . the opportunity to . . . confront and cross-examine witnesses supporting the charge." Goss, 419 U.S. at 583. Other courts have similarly concluded that "due process" does not require cross-examination of witnesses in school disciplinary cases. Jaksa v. Regents of Univ. of Michigan, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984)(" The Constitution does not confer on plaintiff the right to cross-examine his accuser in a school disciplinary proceeding.") aff'd, 787 F.2d 590 (6th Cir. 1986); Winnick v. Manning, 460 F.2d 545, 549 (2d Cir.1972) ("The right to cross-examine witnesses generally has not

[3] The suspension in Goss was a ten-day suspension from high school. That suspension was shorter than the suspension at issue here, but involved the interruption of mandatory, public education.

been considered an essential requirement of due process in school disciplinary proceedings.").

Doe did not have any constitutional right to cross-examine witnesses in the instant matter. Nevertheless, Penn State *did* afford him an opportunity to effectively cross-examine witnesses. Throughout the investigative process, Doe was informed of the evidence that the Investigator had collected and he had an opportunity to review the entire investigatory packet that was submitted to the Decision Panel. Penn State's investigative model afforded Doe an opportunity to respond to the information by making comments or posing questions, through the Investigator. In fact, Doe was free to choose the form of his response to the Investigative Packet; no specific form of response was mandated. The burden falls on Doe to establish that this interactive process was constitutionally insufficient. Numerous courts have concluded that students facing suspension do not have a constitutional right to cross-examination, let alone in-person cross-examination by an attorney.

c. Live Testimony

Doe complains that he was denied due process because witnesses did not appear before the Panel in person, but rather spoke with the Investigator who supplied the Panel with summaries of the witnesses' testimony. This, Doe contends, denied the opportunity for live witness observation, the opportunity for

direct cross-examination, and the opportunity for personal appearances by witnesses, including Doe and/or witnesses who would be favorable to Doe. (See, generally, ECF No. 2 (Doe II), at ¶¶82-86 and ECF No. 1 (Doe I), at ¶¶ 91-95). Notably, Doe was unable to identify any case law supporting this requirement in the student disciplinary context.

Courts have recognized that due process does not necessarily require ***in-person*** testimony before the fact-finding panel. For example, in the public employment context, the United States Supreme Court recognized:

> The essential requirements of due process, and all that Respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 105 S. Ct. 1487, 1495 (1985)(emphasis added), see also, Flaim v. Medical College of Ohio, 418 F.3d 629, 35 (6th Cir. 2005)(discussing medical school expulsion hearing "whether . . . live or not" and, "If the hearing is live."). Doe relies on Goss, 419 U.S. at 582, and claims that it is "strongly implied" that the right to be heard includes a face-to-face encounter. Doe's reliance is misplaced. The cited text refers to a "discussion," but is devoid of language that implies a face-to-face meeting is required. In fact, the Goss court emphasized the scope of its holding, stating, "We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the

student first be told what he is accused of doing and what the basis of the accusation is." Here, it is undisputed Doe had notice of the allegations against him and an opportunity to "explain his version of the facts." Id.; see also Palmer by Palmer v. Merluzzi, 868 F.2d 90, 95 (3d Cir. 1989).

In-person hearings are not required to assess credibility and comport with Due Process in other areas of the law as well. For example, under Pennsylvania law, the Unemployment Compensation Board of Review ("UCBR") is the ultimate fact-finder. The UCBR has the authority to make credibility determinations despite not receiving live testimony, which is presented to a referee. The Supreme Court of Pennsylvania has concluded that this process is constitutional:

> [A]ppellant's proposition that the referee should have the exclusive power to resolve credibility issues is based on the notion that credibility evaluations depend on the observation of live witnesses while they testify. Such observation is often important, but it is not the only factor to be considered in deciding who is to evaluate credibility on conflicting evidence. Considerations of expertise, uniformity of decision and control over policy are also relevant. Besides, a rule embodying that proposition would preclude a factfinder from weighing depositions against live evidence, or documents or exhibits against witness's testimony, a practice common and necessary in both administrative and judicial fact finding.

Peak v. UCBR, 501 A.2d 1383, 1389-90 (Pa. 1985).

Doe relies primarily on Gray Panthers v. Schweiker, 652 F.2d 146 (D.C. Cir. 1980). This case is inapposite because it comes from another circuit and addresses a subject that is irrelevant – Medicare claims – which has its own federal

regulatory scheme and requirements. Furthermore, even the Court in Gray Panthers emphasized that "we do not hold that oral process is always due in Medicare review proceedings." Id. at 148 fn. 4.

Here, Doe was provided with several opportunities to respond to allegations against him. The trained investigator could make in-person assessments and follow-up with questions to the witnesses. Doe also had an opportunity to respond to the Investigative Packet as he saw fit, and pose questions if he so desired. Furthermore, Doe and the other witnesses did have face-to-face interactions with the investigator who assembled the Investigative Packet. Doe was afforded a full opportunity to present his side of the story in response to notification of the allegations against him. The Constitution's Due Process Clause does not require that the Decision Panel conduct a live trial.

d. Conclusion

As Doe admits in his brief, "[t]he fundamental requirements [of due process] are, of course, notice and an opportunity to be heard." (ECF No. 4, p. 10, citing Goss, 419 U.S. at 579). The Constitution does not require universities to provide trial-like hearings to students facing suspension for sexual misconduct. Doe was not entitled to have his attorney conduct in-person cross-examination, and due process does not require that the Panel hear live testimony.

The Due Process Clause does not require in-person hearings, but rather only an opportunity for Doe to present his version of events. Here, Doe was provided with the fundamental requirements of notice of the allegations and an opportunity to be heard. Accordingly, Doe was given a full opportunity to present his version of events to respond to the allegations against him, and therefore Penn State has not violated his due process rights.

C. Irreparable Harm

A showing of irreparable harm generally requires a "clear showing of immediate irreparable injury." Continental Group. Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 359 (3d Cir.1980) (quotations and citation omitted). The harm must be of a type that money damages will not adequately compensate the plaintiff. Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801-02 (3d Cir. 1989). "[T]he irreparable harm must be actual and imminent, not merely speculative." Johnson v. Ebbert, 2015 WL 1638612, at *2 (M.D. Pa. Apr. 13, 2015), quoting Angstadt ex rel. Angstadt v. Midd–West Sch., 182 F.Supp.2d 435, 437 (M.D.Pa.2002). "[M]ore than a risk of irreparable harm must be demonstrated. The requisite for injunctive relief has been characterized as a 'clear showing of immediate irreparable injury,' or a 'presently existing actual threat.'" Id., quoting Continental Grp., Inc. v. Amoco Chems. Corp., 614 F.2d 351, 359 (3d Cir.1980).

Doe's suspension from school does not constitute irreparable harm because monetary damages can compensate him for a two-semester delay in entering the workforce should he ultimately prevail on the merits. "The relief for such time lost, if on the merits the appellant should prevail, would be money damages." Schulman v. Franklin & Marshall Coll., 538 A.2d 49, 52 (1988).[4] With regard to any "gap" in his education, should Doe ultimately prevail, the Court may simply direct Penn State to remove any reference to sanctions effectively removing any blemish from his transcript. Id.

Doe I also relies on his *possible* deportation to Syria, which is contingent on his *possible* denial of entry into Kuwait and seems to ignore the possibility that there may be "some other country that would accept him." (ECF No. 3, ¶18). As Attorney Hirsch acknowledges in his affidavit, "[o]nce [Doe's] situation comes to the attention of ICE, it will be up to the agency to decide a course of action." (ECF No. 3, ¶15). "Depending upon circumstances and resources, the report of academic suspension . . . may lead to a call-in letter from ICE or even a pick-up by ICE." (ECF No. 3, ¶16). After ICE determines his status, "if circumstances

[4] *Contra,* Coulter v. E. Stroudsburg Univ., 2010 WL 1816632, at *1 (M.D. Pa. May 5, 2010)("If [the student] is not allowed to take the exams, she will have lost all the time and effort expended in her courses during the Spring 2010 semester, which she can never get back.").

warrant" then Doe will receive a charging document, which is just "the first step in a removal (deportation) proceeding. (Id.).[5]

Doe I must show more than a risk of deportation; he must show that deportation is "actual and imminent, not merely speculative." Johnson, supra. There is little to suggest that he faces an "actual and imminent" risk of immediate deportation. To the contrary, the affidavit makes clear that a series of events, which may or may not occur, must take place before Doe I even receives the notice constituting the first step in removal. This is not enough to establish irreparable harm for a preliminary injunction. Absent irreparable harm, neither Doe I nor Doe II is entitled to a preliminary injunction.

D. Penn State and the public share a strong interest in providing a safe educational community and conserving resources.

A preliminary injunction in this matter would undercut Penn State's efforts to combat sexual misconduct within its community. Students who face disciplinary action – after having been adjudicated to have engaged in misconduct that violates the Code of Conduct and potentially affects the safety of others on campus – may simply obtain a preliminary injunction, and then complete their degrees while the litigation is pending. At that point, Penn State would be effectively precluded from imposing any discipline even if the litigation later resolves in the university's favor. A student found responsible for serious

[5] For the purposes of the instant submission, Defendants assume, without accepting, that Hirsch would provide competent and admissible testimony consistent with his affidavit.

misconduct would be permitted to remain on campus as if the misconduct had never occurred.

Penn State has a significant interest in disciplining students for misconduct. Both the Third Circuit and the Supreme Court have recognized "the need for maintaining order and discipline in our schools without prohibitive costs and in a manner that will contribute to, rather than disrupt, the educational process." Palmerat 95, citing Goss, supra. Another court recognized that a state-related university "must maintain safety on its campus and protect its student body from intimidation, threats, and sexual assault." Johnson v. Temple Univ., supra at *8, citing Furey, supra. Furthermore, "The University also has an interest in reducing the fiscal and administrative burdens that a more adversarial litigation system would impose." Id. These same interests impact the safety and well-being of the public that is served by these universities, and the public funding they receive. Penn State also has an obligation under Title IX to investigate and address sexual misconduct, with severe consequences should it fail to meet its obligations. Both Penn State and the public have a strong interest in maintaining a safe educational environment and conserving scarce resources.

III. CONCLUSION

Penn State has an extraordinary interest in providing a safe educational environment that is free from sexual misconduct. Students facing disciplinary suspension are presumed to enjoy certain Fourteenth Amendment procedural Due Process protections. However, those procedural safeguards are limited, and students are not entitled to the full panoply of trial procedures provided in the criminal law context. The available precedent holds that the fundamental protections provided by the Due Process Clause in this context are merely the right to notice of the allegations, and a right to be heard. Penn State's investigative model provides both and more, by also ensuring, for both complainants and respondents, the right to appeal. Therefore, Doe fails to meet his burden of proving a likelihood of success on the merits.

While Doe raises serious concerns about deportation, his risk of harm is speculative and not imminent as required to justify the extraordinary relief of injunction. By contrast, both Penn State and the public have a strong interest in maintaining a safe campus for Penn State students while recognizing the financial burden that a more adversarial trial-like procedure would impose. Doe fails to establish a likelihood of success on the merits or irreparable harm, and the harm to Penn State and the public should this Court grant the preliminary injunction is

great. We respectfully request that the Court deny Doe's request for the extraordinary relief of a preliminary injunction.

Respectfully submitted,

McQUAIDE BLASKO, INC.

Dated: December 11, 2015

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IN THE UNITED STATES DISTRICT COURT
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Defendants.	:	***Electronically Filed***

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Defendants' Brief in Opposition to Plaintiff's Motion for Emergency Temporary Restraining Order/Preliminary Injunction in the above-captioned matter was served via ECF this 11th day of December, 2015, to the attorneys/parties of record as follows:

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