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

JOHN DOE,	:	**No. 4:17-01315**
	:	**Honorable Matthew W. Braun**
Plaintiff,	:	
-against-	:	
THE PENNSYLVANIA STATE UNIVERSITY, THE PENNSYLVANIA STATE UNIVERISTY BOARD OF TRUSTEES, ERIC J. BARRON, individually and as agent for The Pennsylvania State University, **PAUL APICELLA,** individually and as agent for The Pennsylvania State University, **KAREN FELDBAUM,** individually and as agent for The Pennsylvania State University, **KATHARINA MATIC,** individually and as agent for The Pennsylvania State University,	:	
Defendants.	:	

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR CIVIL CONTEMPT AS AGAINST THE PENNSYLVANIA STATE UNIVERSITY, DANNY SHAHA AND KAREN FELDBAUM

PRELIMINARY STATEMENT

Defendants' opposition is more about what it doesn't say than what it purports to say. Simply because Defendants state repeatedly that they did not violate Your Honor's August 18, 2017 Memorandum Opinion and Order doesn't make it true. Penn State's arrogance that they can do whatever they please permeates their opposition and is highlighted by their own words. On page five (5) of their opposition, Defendants write "**Penn State *chose* to remedy the potential violations highlighted by Your Honor by taking the following actions:"**. (Emphasis added). It is this exact attitude that Penn State believes they can do whatever, whenever they choose that forced the Plaintiff to seek the Court's intervention. .

Additionally, as discussed further below, the absolute silence by the Defendants in failing to address the numerous and perverse due process violations throughout the investigation of the Plaintiff is most telling and deafening. Further, Defendants do not dispute that Danny Shaha is subject to being held in contempt and do not refute Plaintiff's right to recover costs and attorney's fees upon a finding of contempt by this Honorable Court.

ARGUMENT

I. DEFENDANTS DID IN FACT VIOLATE THE LETTER AND SPIRIT OF YOUR HONOR'S AUGUST 18, 2017 MEMORANDUM OPINION AND ORDER

Defendants' position that unilaterally vacating their June 27, 2017 suspension and exclusion of the Plaintiff from the Penn State-Jefferson seven (7) year pre-med program and re-trying him based upon the same deficient Investigative Report is "entirely

consistent" (page one (1) paragraph three (3) defendants' opposition) with Your Honor's directive is simply without merit. Your Honor ordered that the Plaintiff was to be registered and allow to ***participate*** in the Penn State-Jefferson seven (7) year pre-med program. Your Honor **did not** at any time note, mention or contemplate with the parties vacating the suspension and allowing the Defendants to utilize the same wholly deficient and constitutionally flawed Investigative Report against the Plaintiff. At no time in their opposition do the Defendants explain how vacating the present findings and scheduling a "second panel hearing" to suspend the Plaintiff comply with Your Honor's prior directives. It is respectfully submitted that it doesn't and that is why Defendants are silent on this point.

Defendants' own words and actions verify the fact that they know their unilateral attempt to retry the Plaintiff and suspend again is in contempt of Your Honor's directives. Defendants in their opposition, for the first time, allege they that were going to seek the Court's approval before suspending the Plaintiff a second time following such a sanction in the second hearing.

A review of the evidence demonstrates clearly that the Defendants never held any intention to seek the Court's intervention and or approval. Defendants are only now, following Plaintiff's filing of this instant application, desperately attempting to avoid being held in Contempt of Court, that they say that they were going to seek the Court's intervention. Nowhere in Defendants' e-mails to the Plaintiff or to his attorneys (see Exhibits "F", "K" and "M" of Plaintiff's Motion) did they ever mention this. Moreover, if as according to the Defendants, they have every right to conduct a "second panel

hearing" then why would they even seek the Court's intervention **after the fact**? If they always intended to seek the Court's intervention, why not do so before hand? Their opposition is once again completely silent on these points.

It is respectfully submitted that the answer lies in the fact that the Defendants **never** had any intention of involving Your Honor, as they continue to believe they can do whatever they want. Their only goal is to divest this Court of jurisdiction and to suspend the Plaintiff. It is respectfully submitted, that the credible evidence fully supports this position. How can retrying the Plaintiff and issuing a new suspension be consistent with the Court's unambiguous directives?

II. DEFENDANTS' FAILURE TO ADDRESS ANY OF PLAINTIFF'S OVERWHELMING EVIDENCE AS TO DEFENDANTS' DUE PROCESS VIOLATIONS THROUGHOUT THE INVESTIGATIVE PROCESS SPEAKS VOLUMES OF THEIR CONTEMPT OF THIS COURT'S AUGUST 18, 2017 MEMORANDUM OPINION AND ORDER

Defendants in their opposition attempt to use the Court's words against Your Honor in defending their indefensible position. Defendants argue that as Your Honor did not specifically outline each of the numerous due process violations that occurred during Defendants' investigation, that they can use the same biased, fatally flawed Investigative Report to retry the Plaintiff. Defendants argue that they are not in contempt because they are inserting into the Investigative Report Plaintiff's unredacted June 1, 2017 Response to Charges. Apparently, the Defendants believe that since Your Honor did not specifically address all of the due process violations committed by the Defendants, as established at the TRO hearing, that they do not have to remedy any of them because Your Honor did not list all of them in the August 18, 2017 Memorandum Opinion and Order. Defendants

take this baseless position despite the fact Your Honor unambiguously stated: "my reasoning is **based on both (1) significant and unfair deviations from policy during the *investigation* and hearing**…" (See Exhibit "D", pages 16-17). (Emphasis added). Moreover, as established in Plaintiff's moving papers, Your Honor found:

> "I specifically note that, during the hearing, Ms. Matic stated repeatedly that her ultimate role is 'be impartial and objective to both parties' and that is this goal necessities that she redact information provided. **I preliminarily find that those statements to be in conflict and may work to violate Doe's due process"**. " (See pages 25-26 of **Exhibit "D"**). (Emphasis added).
>
> "I note further that this function has a funneling **effect whereby information deemed irrelevant by the Investigator**, an allegedly neutral party, is thereafter disallowed from submission to the Title IX decision panel—the ultimate, and I believe proper, arbiter of both relevance and the accused's fate" (See pages 26 of **Exhibit "D")** (Emphasis added).
>
> Based on the above deviations in conjunction with what **I view as the questionable role of the Investigator in redacting information**, I find that Doe has demonstrated the necessary showing of likelihood of success on the merits of his due process claim" (See page 27 of **Exhibit "D"** (Emphasis added).

Defendants' opposition is not only completely silent as to the numerous due process issues Your Honor voiced as to the Ms. Matic, the Investigator, but Defendants failed to address the due process violations regarding the change of policy models during the course of the investigation. Defendants do not even address the fact that they changed the rules in the middle of the investigation **without** ever notifying the Plaintiff. A fact that was admitted to by Defendant Feldbaum on the stand during the TRO hearing. Defendants ignore the fact that Defendants' Investigative Report, which they intend to use again, lacks any direct statements by Jane Roe regarding the events in question, as

she steadfastly refused to provide the Defendants with a statement, and only contain redacted statements put together by a third person not authorized to be part of the investigation. (See page 14 of Plaintiff's moving Memorandum of Law).

Incredibly, Defendants in their opposition never once address or discuss the numerous investigative due process violations established by the Plaintiff (see pages 12-16 of his Memorandum of Law in Support of this Motion). Despite the lack of any acknowledgement to the abundant amount of due process and constitutional violations associated with Defendants' Investigative Report, Defendants are again trying to use the same report in retrying the Plaintiff. Clearly, this attempt is contemptuous conduct on behalf of the Defendants and Danny Shaha.

III. DEFENDANTS' UNILATERAL ATTEMPT TO CONDUCT A "SECOND PANEL HEARING" IS NOT THE APPROPRIATE REMEDY.

It is very puzzling that Defendants' write "Penn State owes a duty not just to John Doe, but to the broader campus community generally and Ms. Roe specifically to adjudicate her complaint to conclusion ***in a timely manner***". (See page 12 of Defendant's Brief) (Emphasis added). Did Defendants forget that it took **over nine (9) months** (despite the former guidelines calling for the investigation to be completed in 60 days) to find the Plaintiff responsible during the initial investigation? Where was the Defendants' concern for Jane Roe and a speedy resolution last year?

Additionally, where were the Defendants on August 19, 2017- September 25, 2017? If they were so concerned for Jane Roe and the campus as a whole, why did they

wait over six (6) weeks to vacate the initial findings and schedule a "second panel hearing"?

It is respectfully submitted that the answer lies in the fact that on September 22, 2017, the Department of Education's Office ("DOE") for Civil Rights issued a new "Dear Colleague Letter" to colleges and universities **withdrawing** the prior administration's "April 4, 2011 Dear Colleague Letter" and its "April 29, 2014 Question and Answers". Defendant Feldbaum has already testified at the TRO hearing that Penn State changed their policy to coincide with the old "April 2011 "Dear Colleague Letter"

Therefore, based upon the DOE's September 22, 2017 announcement and Your Honor's finding of Plaintiff's likelihood of success on the merits, Defendants are eager to divest Your Honor of jurisdiction as they have every right to anticipate a negative outcome at the time of trial. This would explain Defendants' actions the very next business day following the DOE's action.

How can the Defendants, in good conscious, argue that their actions are for the good of the "broader campus" when they fully know that the Plaintiff has been a model student and has co-existed with Jane Roe and the entire Penn State community, without a single allegation of impropriety for the past almost fourteen (14) months? This is just another baseless, disingenuous argument put forth in an attempt to justify an unjust position.

Defendants reliance on the case law cited in their Brief is as well without merit. The cases cited simply are inapplicable to the case at bar. In *Doe v. Alger*, 2017 WL 1483577 (W.D. Virginia 2017) the Court was addressing a post Summary Judgment

decision and sought the **input from all parties** to the remaining issues. However, in the case at bar, Penn State took it upon itself, as judge, jury and executioner, to make its own rules. Moreover, the established due process violation in *Alger* consisted of the processing of an appeal and a lack of an explanation for its findings. (*Alger,* page 3). Clearly, the case at bar deals with much more extensive fundamental due process violations which would allow for "second panel hearing".

The holding in *Doe v GMU*, 179 F. Supp 3d 583, is more analogous with the facts of this case. In *GMU* the Court did not permit the University to conduct a second hearing as the school's policies did not possess a right of appeal. As demonstrated below, Penn State similarly has no internal policy procedures to allow Penn State to vacate the initial findings and unilaterally decide to conduct a "second panel hearing".

The facts and circumstances in *Huntsinger v. Idaho State University* 2014 WL 5305573 are so factually different as to render it inapplicable to the facts before this Honorable Court. *Huntsinger* involved an academic cheating allegation and a 10-day suspension. Moreover, in *Huntsinger* the Court also sought the input from both parties. As demonstrated above, Defendants have attempted to circumvent not only the Plaintiff but Your Honor in unilaterally vacating the initial suspension and scheduling a "second panel hearing" despite failing to cure the voluminous due process violations associated with their Investigative Report. As such, the cases and accompanying legal argument put forth by the Defendants are unpersuasive and without support.

Defendants state (page 15-16 of their Opposition Brief) that "{T}there is no reason to believe that Penn State is incapable of providing a constitutionally **adequate** process

with these new protections in place". (emphasis added). First and foremost, based solely on Penn State's history not only in this case but in another similar case previously before Your Honor, Penn State's ability to be fair, impartial and to provide the Plaintiff with a fair and unbiased investigation and hearing is highly suspect. It's very troubling that an alleged elite University like Penn State, with the stakes so high, only strives for adequacy in protecting an accused's constitutionally protected due process rights.

Moreover, Penn State has already trampled the Plaintiff's due process rights and plans to so again, by utilizing the same biased and fatally flawed Investigative Report to retry him. Yet, Penn State expects the Plaintiff and this Honorable Court to believe that they can provide the Plaintiff with a constitutionally **adequate** process. Respectfully, Plaintiff strongly disagrees.

IV. DEFENDANTS' LACK ANY SUPPORT WITHIN THEIR OWN PROCEDURES FOR THEIR UNILATERAL DECISION TO ATTEMPT TO CONDUCT A "SECOND PANEL HEARING" OF THE PLAINTIFF

As in Defendants' counsel's e-mail to Plaintiff's counsel, Defendant' opposition contains a string of words and phrases from Penn State's voluminous Student Code that have absolutely nothing to do with the issue before this Court, namely whether Penn State's policy provides them with the unilateral right to *sua sponte* vacate a responsibility finding against a student so they can retry him again. The evidence establishes that the answer is no.

The words cut and pasted by the Defendants simply fail to prove that the Defendants possess any authority to do what they are attempting to do. Again, this fact is supported by Defendants' complete lack of opposition to the evidence put forth by the

Plaintiff in his moving papers. It is undisputed that Plaintiff timely and properly filed an Appeal with regards to his June 6, 2017 panel hearing and subsequent sanctions. Further, it is undisputed that **this Appeal was denied** by Defendants on June 27, 2017.

Both Defendants' April 25, 2016 and November 3, 2016 Code of Conduct and Student Conduct Procedures contain the following provisions:

> h. The Appeals Officer will forward his/her decision and rationale to the Senior Director or designee within five (5) business days of receiving the appeal request
>
> i. The respondent and complainant, if applicable, will be notified in writing.
>
> j. **If an appeal is denied, *no further review will occur*.** (Emphasis added).

(See, pages 19-20 of Exhibit **"**G**"** and pages 18-19 of Exhibit "H") (emphasis added)

Following the June 27, 2017 denial, Plaintiff's case was over in the eyes of Penn State's Policy. There is simply no mechanism for which Defendants and Danny Shaha can justify their outrageous conduct in attempting to *sua sponte* vacate the decision and conduct a new hearing. The procedures clearly and unambiguously state ***no further review will occur.*** Defendants and Mr. Shaha have no authority to retry the Plaintiff.

V. PLAINTIFF IS ENTITLED TO ALL COSTS ASSOCIATED WITH THIS APPLICATION

As noted above, Defendants' Brief is totally devoid of any opposition to the imposition of sanctions and costs upon the finding of Defendants' Contempt by this Honorable Court. As such, as set forth in Plaintiff's moving papers, upon Your Honor's finding that Defendants and Danny Shaha are in Contempt of Court for violating the

Court's August 18, 2017 Memorandum Opinion and Order, Plaintiff respectfully requests that Defendant The Pennsylvania State University be sanctioned and made to bear all of Plaintiff's costs and legal fees associated with this application *Marshak v. Treadwell*, 595 F.3rd 478, 494 (3rd Cir 2009

CONCLUSION

The Defendants throughout their opposition chose to ignore the abundance of evidence establishing the Defendants' Contempt of Court. Based upon Plaintiff's moving papers and the evidence established above, it is respectfully submitted that Defendants and Danny Shaha have violated Your Honor's August 18, 2017 Memorandum Opinion and Order. There cannot be any legitimate or logical interpretation of Your Honor's August 18, 2017 Opinion and Order that justifies the unilateral action being attempted by the Defendants and Mr. Shaha. Their attempt to utilize the procedurally deficient Investigative Report for a second time to retry the Plaintiff is a clear violation of this Court prior Memorandum Opinion and Order.

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an Order of Civil Contempt of Court as against The Pennsylvania State University, Karen Feldbaum and non-party Danny Shaha as a result of their violation of the Court's August 18, 2017 Memorandum Opinion and Order. Plaintiff respectfully requests that the Court enter an Order enjoining The Pennsylvania State University, Karen Feldbaum and non-party Danny Shaha from conducting a "second panel hearing" currently scheduled for October 25, 2017 and/or seek to take any further action as against Plaintiff from any allegations associated with this pending litigation and Plaintiff's alleged September 7,

2016 violation of Defendant, The Pennsylvania State University's Code of Conduct. Plaintiff respectfully requests that the Court enter an Order against Defendant The Pennsylvania State University awarding all costs to the Plaintiff associated with this motion.

Dated: October 23, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2017, a copy of the foregoing was filed electronically with this Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ Stuart Bernstein
Stuart Bernstein, Esq.