V I R G I N I A:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

John Doe,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.:1:15-cv-00209-TSE/MSN
	)	
Angel Cabrera,	)	
Brent Ericson, and Juliet Blank-Godlove	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE BRIEF
FOR PROPOSING AN EQUITABLE REMEDY

The Defendants, Angel Cabrera, Juliet Blank-Godlove and Brent Ericson ("University"), by and through counsel, submit this memorandum in response to Plaintiff John Doe's Brief Proposing a Remedy. For the reasons contained herein and at oral argument, the University respectfully request this honorable Court to enter an order allowing the University to bring new disciplinary proceedings.

Mr. Doe is requesting an extraordinary remedy, however, the facts of this case and this Court's ruling mandate nothing extraordinary in terms of a remedy. If anything, the opposite is true and the ordinary remedy of a new hearing should be ordered by the Court. Under the continuing obligations of Title IX, the University is obligated to hear complaints of sexual misconduct, may not pick and choose to hear cases, and must do so no matter whether the complaining party is part of or outside of the University community. In the event that Ms. Roe or any other person were to come forward with new charges that Mr. Doe violated the sexual assault provisions of the Code of

Student Conduct, the University would have no choice but to resolve those charges under the Code of Student Conduct process. Until the Court orders that a new round of disciplinary charges are allowed, the University should not be forced to reach out to Ms. Roe and ask her to provide information for a process the parties have no idea whether or not will happen. Accordingly, the University requests the Court to enter an order allowing the University to bring new charges and provide for constitutionally adequate procedures within a reasonable amount of time.

I. PROCEDURAL HISTORY

On February 18, 2015, Mr. Doe filed his Complaint with this Court. Dkt. 1. In his Complaint, Mr. Doe alleged that the University violated his procedural due process rights under the U.S. Constitution and Commonwealth of Virginia Constitution (Counts I, II); negligence (Counts III, IV, V); gender discrimination under Title IX and the Equal Protection Clause of both the U.S. Constitution and Commonwealth of Virginia Constitution (Counts VI, VII, VIII).

With his Complaint, Mr. Doe contemporaneously file a Motion for Leave to Proceed Under Pseudonym and for Protective Order. Dkt. 2. Attached to his motion was a proposed order drafted by Mr. Doe's attorneys and was his Complaint. Mr. Doe sought not only anonymity but an order allowing the redaction of any document referring to Mr. Doe or Ms. Roe or leave to submit such documents under seal. Five days after the filing of the Complaint and Motion for Leave to Proceed Under Pseudonym and for Protective Order, retiring Magistrate Judge Thomas Rawles Jones, Jr. Dkt. 6. Prior to entry of the order, neither Mr. Doe or the Court noticed the motion for a hearing. The University and the public were never provided an opportunity to file a brief in response to the motion. See Local Rule 7(F)(1). In addition, the University had not been served or waived service at the time the Court entered the protective order. The University timely filed an objection to the

Court's order granting Mr. Doe leave to proceed anonymously. Dkt. 10, 11. The Court took the matter under advisement. Dkt. 25.

After Mr. Doe amended his Complaint twice adding a substantive due process and First Amendment free speech claim, on April 25, 2015, the University filed a Rule 12(b) motion to dismiss. On September 16, 2015, the Court granted in part and denied in part the University's motion to dismiss. The Court denied the University's motion to dismiss the federal procedural due process and First Amendment claims. The Court granted the University's motion regarding the substantive due process and gender discriminations claims without prejudice and leave to re-file.[1] The Court granted the University's motion regarding the state law negligence claims. The Court also granted the University's qualified immunity defense. Dkt. 50, 51.

After discovery closed the parties moved for summary judgment. On February 25, 2016, the Court granted Mr. Doe's motion and denied the University's motion, and, on the merits, found in favor of Mr. Doe for his procedural process and First Amendment claims. Dkt. 92, 93. The Court has requested briefs on the (i) whether the University should be allowed to pursue a new round of disciplinary hearings, (ii) if so, what allegations occurring before the date of judgment should be open for adjudication, and (iii) whether there should be any restrictions on the means by which the new disciplinary hearings, if any, are to be carried out, e.g., enjoining Ericson and Blank-Godlove from participating.

In his opening brief, Mr. Doe has argued that at a minimum, the October 27, 2013, incident and the text message charges are foreclosed from consideration given the Court's February 25, 2016, opinion and order. Mr. Doe argues further that given the October 27 incident and the text

[1] Mr. Doe chose not to re-file his substantive due process and gender discrimination claims.

message charges are foreclosed, the only charges left are the "other incidents," which are too vague to be the basis for new charges, not to mention unfair given the amount of time already passed since those incidents took place. Essentially, Mr. Doe is arguing that the Court's answer to question (i) should be in the negative. In response, the University submits that the appropriate remedy would be to order a new hearing, however, proposing what those charges are or should be is premature, and finally, the University is agreeable to enjoining Ms. Blank-Godlove and Mr. Ericson's participation and having any new hearing decided by nonbiased, impartial and objective external parties.[2]

II. ARGUMENT

A. The Court should allow the University to bring new disciplinary charges.

As a remedy, Mr. Doe argues that the Court should enter an order permanently prohibiting the University from bringing any charges against him regarding Ms. Roe's sexual misconduct complaints. What Mr. Doe is essentially arguing is that whenever someone's procedural due process rights have been violated, the appropriate remedy is to not only restore the interest that was deprived of, but to go one step further and guarantee the person will never be deprived of the interest again, even if adequate procedures are employed. Unfortunately for Mr. Doe, the Due Process Clause guarantees a constitutionally fair proceeding, not a particular result. *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1295 (11th Cir. Fla. 2005). And, as this Court pointed out in its February 25 opinion, "the Due Process Clause of the Fourteenth Amendment is not concerned with ends but with means." Dkt. 92, page 27. Mr. Doe's analysis can be applied to every deprivation, whether it be public employment, prisoner's rights or tenured faculty who were

[2] The external parties will either be administrators from another Virginia public university or college who are also Commonwealth employees. Alternatively, the external parties could be from a mediation group, consulting firm or law firm, whose services will be paid by the University.

terminated without fair procedures. Each due process case will involve an important interest at stake and a length of time the person was without such an interest; to extend a remedy in this case beyond the norm would mean to extend the remedy for all. The standard remedy for a due process violation will no longer be a constitutionally sufficient new hearing, but a full restoration of rights and interests with an injunction prohibiting the state actor to ever revisit the underlying issue that was previously decided under a constitutionally defective process. In other words, the plaintiff will be returned to status quo "plus", the "plus" being he or she enjoys rights greater then he or she ever had.

Although Mr. Doe would like to distinguish his case as one that is of first impression, it simply isn't. Courts throughout the nation have consistently ordered constitutionally adequate new hearings at colleges and universities that have been found to violate the Due Process Clause. *Furey v. Temple Univ*., 884 F. Supp. 2d 223 (E.D. Pa. 2012)(plaintiff shall be reinstated as a student at Temple University unless given a new hearing that comports with due process within sixty (60) days of this order); *Huntsinger v. Idaho State Univ*., No. 4:14-CV-00237-BLW, 2014 WL 5305573, at *2-3 (D. Idaho Oct. 15, 2014) (in case involving alleged student academic dishonesty, allowing new hearing to take place and adopting procedures proposed by defendants); *Oladokun v. Ryan*, No. 06 CV 2330 KMW, 2011 WL 4471882, at *3-4 (S.D.N.Y. Sept. 27, 2011) (in case involving deported Nigerian student accused of falsifying documents on a visa application, noting the Court's previous order that "reinstating Oladokun would be inappropriate given that it is unclear what the outcome of the Board's hearing would have been had Oladokun been provided due process" and concluding that "[t]he most obvious remedy in this case would be a new, constitutionally adequate, hearing, when and if Oladokun returns to the United States and requests one"); *Boyd v. State Univ. of New York at Cortland*, 110 A.D.3d 1174, 1176 (N.Y. App. Div. 2013)

(student accused of harassment was denied due process when school hearing panel failed to set forth detailed factual findings in its disciplinary determination; "remit[ting] the matter to SUNY Cortland for the Hearing Panel to provide a statement to petitioner detailing the factual findings supporting the determinations of guilt, after which petitioner shall be given the opportunity to challenge the determination administratively"); *Kalinsky v. State Univ. of New York at Binghamton*, 161 A.D.2d 1006, 1008 (N.Y. App. Div. 1990) (concluding that student accused of plagiarism was denied due process when not provided factual findings and evidence that was relied upon; holding that the "appropriate remedy in this case is remittal for a new hearing"); *Kalinsky v. State Univ. of New York at Binghamton*, 161 A.D.2d 1006, 1008 (N.Y. App. Div. 1990) (concluding that student accused of plagiarism was denied due process when not provided factual findings and evidence that was relied upon; holding that the "appropriate remedy in this case is remittal for a new hearing").

It doesn't matter what Mr. Doe was charged with, whether it is assault, sexual misconduct, arson, or drug distribution, the most appropriate remedy would be to remit the matter back to the school for a new hearing. As the Court observed earlier in this case, if there is a due process violation, quite simply "it goes back." Dkt. 64, page 12, lines 4-5.[3]

Mr. Doe presents compelling arguments for his extraordinary remedy request. For one, he states that he "lost 18 months of his life because Mr. Ericson and Ms. Blank-Godlove were willing to violate his constitutional rights." Yet Mr. Doe loss of educational opportunity can be seen as at least partially his own fault. Mr. Doe never requested a preliminary injunction and had the right and ability to do so at any stage of litigation. In addition, during this time, instead of taking courses elsewhere or applying to another school, Mr. Doe sat on his hands. Dkt. 72, Exhibit 19, Deposition

[3] The Court isn't bound by its earlier observation as it was not a ruling on the matter. However, its worth noting that the Court observed the typical remedy is to remit the matter back to the school early in this case.

of John Doe, page 213. Rather than improving himself instead of his case, Mr. Doe didn't even attempt to continue his educational career elsewhere. Moreover, Mr. Doe's procedural due process claim barely survived the University's motion to dismiss when this Court adopted the stigma plus analysis, an analysis never before applied to a student/public university relationship. Dkt. 50, pages 13-15. To argue that the Defendants "willingly" violated Mr. Doe's constitutional rights is inaccurate especially in light of the Court's ruling on the qualified immunity defense. *Id*., page 19.

Mr. Doe also presents the compelling argument (or arguments) that because students are usually of limited resources, litigation is costly and substantial in most cases, and other courts are not nearly as efficient as this Court (leaving constitutional deprivations un-remedied for long periods of time) the Court should fashion a "robust" remedy so that university administrators will take notice of such remedy and be forced to "toe the constitutional line" more diligently knowing that if sued, a second bite of the apple will not be guaranteed. As compelling these arguments are, they simply have no play in fashioning an equitable remedy in this particular case. The remedy should be catered to the case at hand, not other future cases not under consideration by this Court. If anything, filings in this Court will always be expeditious, complicated, highly contested or not. In addition, the plaintiff will always have the ability to file a motion for a preliminary injunction thereby decreasing any lost educational opportunity. Further, there is nothing to suggest Mr. Doe did not have the resources to litigate this case. The attorneys for both sides made it their mutual objective to keep costs minimal and were successful in large part. As the Court held, "it is clear that a remedy must be shaped to do justice ***on the specific facts of the instant case***." Dkt. 92, page 29, (emphasis added).

B. Determining the exhaustive list of charges is premature

The University is obligated to investigate all complaints of sexual misconduct. The investigation obligations are effectuated through the procedures in the Code of Student Conduct. Given the Court has invalidated the University's process, the University has to start over and attempt to investigate Ms. Roe's original complaint. Whether or not Ms. Roe will participate, provide more details or witnesses, the University does not currently know. Accordingly, at this stage, if the Court allows a new hearing, Ms. Roe would be invited by the University to participate in the new hearing. If the Court does not allow a new hearing, it would be pointless to reach out to her and force her to unnecessarily re-live the alleged traumatic events she endured while she was dating Mr. Doe.

The Court has asked the parties to assume a hypothetical, i.e., a new hearing, and based on that hypothetical identify what charges should be considered for this hypothetical new hearing. To make a ruling based on an endless list of unknown contingencies would be tantamount to this Court issuing an advisory opinion in violation of Article III. As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, "concrete legal issues, presented in actual cases, not abstractions," are requisite. *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (U.S. 1947).

C. The practicality, or lack thereof, is not a relevant consideration at this stage.

Whether a *potential* new round of disciplinary proceedings against Mr. Doe could prove impractical is speculative. Without knowing what the potential charges might be, the evidence in support of those charges, the narrative statements and the witnesses, the Court and the University have no way to evaluate such a claim, assuming such an analysis is relevant in the first place. Ms. Roe is not a party to this lawsuit, and without having a ruling from the Court as to whether or not the University would be allowed to move forward with another hearing, contacting her now would

be premature. The parties are simply not in a position to judge the practicality of a potential new round of disciplinary proceedings.

In addition, the University, not Mr. Doe, will bear the burden and expense of selecting and training impartial, objective and unbiased decision-makers, whether it be other internal employees, another university's employees, or a law firm, consulting agency, or mediation group that specializes in these type of adjudications. If Mr. Doe is unsatisfied with the result of the new disciplinary proceedings and feels the University didn't sufficiently train or select an appropriate outside party, then Mr. Doe has access to the Courts and may file once again.

Mr. Doe fails to explain how the practicality of training either internal or external adjudicators is relevant to the analysis. If it's a matter of expense, it shouldn't be of any concern of Mr. Doe simply because he will not have to bear the cost. If it is a matter of time, the Court can put a deadline as to when the University may bring any charges related to Ms. Roe and her relationship with Mr. Doe. Assuming the Court orders a reasonable time frame as the court did in *Temple*, Mr. Doe will not have to carry the burden of not knowing for an unreasonable amount of time.

D. Mr. Doe has access to the Courts if any unfair prejudice results in a new disciplinary proceeding.

Mr. Doe's argument that there might be unfair prejudice to Mr. Doe given the delay of bringing a whole new round of disciplinary charges is not without merit. However, in order to be able to evaluate any potential prejudice, the parties need to know more about the potential charges Ms. Roe may bring against Mr. Doe. The University is at a disadvantage (and presumably Mr. Doe as well) of not knowing the following:

1) if Ms. Roe will be interested in participating in the new proceedings;

2) if Ms. Roe will be able to give anymore specific information than she has already given about incidents of alleged sexual misconduct by Mr. Doe; and
3) if there are any other relevant witnesses that may assist in adjudicating the sexual misconduct charges against Mr. Doe.

Contacting Ms. Roe to answer hypothetical questions such as "if the Court allows new charges, what would they be and what facts would be offered in support of those charges?" would not only force Ms. Roe to feel pressured in bringing new charges, such a premature request may also unnecessarily force Ms. Roe to relive whatever trauma she feels she suffered at the hands of Mr. Doe. In other words, if the University asks those difficult questions and reports back such information to the Court, it is very possible the Court could still rule the reinstatement of Mr. Doe without any new round of disciplinary proceedings. The Court can, however, order a new hearing that simply complies with the constitutional due process. Much of the same unfairness and prejudice Mr. Doe now raises can be raised by Mr. Doe in a successive lawsuit attacking the new hearing if Mr. Doe is found responsible and is expelled.

E. Second Bite of the Appeal/Double Jeopardy Concerns are inapplicable and unwarranted in this case.

Mr. Doe argues that allowing a new round of disciplinary proceedings would only encourage universities and colleges to hold back all potential charges against students as a safety measure in case the first charge did not result in a successful disposition. If colleges and universities secretly wanted a particular result, there would be nothing but the opposite incentive at play, i.e., pile on as many charges as reasonable and practical. Each adjudications carries with it a quantifiable cost in terms of man hours and resources, especially adjudications that can lead to a suspension or expulsion. In addition, each adjudication carries with it an un-quantifiable costs in terms of

litigation risk exposure to the school, whether it is procedural due process, contract, Title VI or Title IX. Successive adjudications are already highly de-incentivized; awarding an equitable relief based on such concerns is unwarranted.

In addition, there is no legally cognizable claim for "double jeopardy" in the student discipline context. The double jeopardy clause of the Fifth Amendment "protects only against the imposition of multiple criminal punishments for the same offense." *Borovac v. Churchill County Sch. Dist*., 2012 U.S. Dist. LEXIS 9693, 7-8 (D. Nev. Jan. 27, 2012) citing *Hudson v. United States*, 522 U.S. 93, 99, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). Student discipline simply isn't equivalent to criminal prosecution; the interests at stake are entirely different.

III. CONCLUSION

In short, the Court doesn't need to make the fashioning of remedy in this case any more complicated than necessary. Deciding what charges, if any at all, that would be included in a new round of disciplinary proceedings is simply premature. Accordingly, the University respectfully requests that the Court order if the University decides to bring a new round of disciplinary charges against Mr. Doe, that it must simply comply with Procedural Due Process Clause of the Fourteenth Amendment.

_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of March, 2016, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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