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

JOHN DOE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 1:15-cv-00209-TSE/MSN**
	)	
THE RECTOR AND VISITORS OF GEORGE MASON UNIVERSITY, ANGEL CABRERA, *President of George Mason University, sued in his official capacity,* **and BRENT ERICSON and JULIET BLANK-GODLOVE,** *employees of George Mason University, sued in his or her official and individual capacity, jointly and severally*,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF JOHN DOE'S BRIEF PROPOSING A REMEDY

PRELIMINARY STATEMENT

The question presented by this brief is both one of staggering importance and, as far as undersigned counsel are aware, one of first impression throughout the nation: What is the proper equitable remedy for a student who has been expelled by a public university for sexual misconduct in violation of the student's procedural due process rights? In its Memorandum Opinion granting Mr. Doe's Motion for Summary Judgment, this Court has already recognized the enormous impact that expulsion for sexual misconduct has on the accused student. See Mem. Op. at 28 (noting that "the accused has . . . much at stake . . . in the context of university discipline of this magnitude"). That is certainly true for Mr. Doe. His life has been put on hold since Defendants expelled him. He should have graduated this May; because of what Defendants did, he will not. He should have started a new, full-time job this summer; because of

what Defendants did, he will not. He should, in short, have been able to start his adult life in two months with his college diploma in hand; because of what Defendants did, he will not. Given that he has missed no fewer than three semesters of school due to Defendants' actions, none of this can happen—he cannot start the life he should have been able to start—until at least the end of 2017. Mr. Doe will have lost 18 months of his life, all because Brent Ericson and Juliet Blank-Godlove wanted him gone and were willing to violate his constitutional rights to make that happen.

Mr. Doe sued to vindicate those rights, and he won. Now he stands before this Court seeking an equitable remedy—in both senses of the word. This Court cannot give him back lost time, and its qualified immunity ruling means that it cannot give him damages. What it can give him is no more, and no less, than a chance to put this all behind him and get on with his life. To put it in the simplest terms, Mr. Doe just wants to go back to college and get his degree like any other student, without having to look over his shoulder at what Defendants might do to him next.

This Court has recognized the extraordinary nature (and number) of the procedural due process violations that led to Mr. Doe's expulsion on a sexual misconduct charge. As this Court explained, Mr. Doe's case does not involve one or two technical mistakes; it does not involve a mere failure to "provide a specific form of notice" or to "structure proceedings in a particular manner." Mem. Op. at 26. Rather, Mr. Doe's case involves all of the following conduct on the part of Defendants, as described by this Court:

- Defendants looked beyond the sexual assault that was alleged to have occurred on October 27, 2013, to supposed instances of sexual assault *with which Mr. Doe was never even charged*, thereby "fail[ing] to provide [Mr. Doe] notice of the full scope of the factual allegations in issue." Id.

- Defendants failed to follow their own procedures in "permitting an appeal of a finding of no responsibility." Id.

- Defendant Ericson assigned himself Ms. Roe's appeal, despite having previously had "extensive *ex parte* contact with [Ms.] Roe," id. at 21, including "exchanging eighteen emails [with Ms. Roe] . . . more contact than [he] could recall having with any other complainant in the course of a GMU disciplinary proceeding," id. at 5.

- Defendant Ericson admitted to conducting a *de novo* review of the entire case "without affording [Mr. Doe] an adequate opportunity to mount an effective defense." Id. at 26.

- Defendant Ericson conducted "off-the-record and *ex parte* meetings with [Ms. Roe]" during his review of her appeal. Id.

- **Defendant Ericson admitted that he had "prejudged the case" and that he had "made up his mind so definitively that *nothing* [Mr. Doe] might have said at [their] meeting . . . could have altered [his] decision."** Id. at 21-22 (emphasis in original) (internal quotation marks omitted).

- Defendant Ericson "inform[ed] [Ms. Roe] of his decision to grant her appeal a full two days before informing [Mr. Doe]," in "violat[ion of] guidance from the U.S. Department of Education's Office for Civil Rights." Id. at 22-23.

- Defendants did all of this without providing any explanation whatsoever for what they did "such that meaningful review can occur." Id. at 26.

These fundamental flaws in the disciplinary process, this "accumulation of mistakes"—which, "[a]t almost every critical turn," the Defendants could have rectified at little or no cost and with little or no burden, Mem. Op. at 27—cries out for a meaningful equitable remedy. Such a remedy should be guided by three objectives:

- *First*, an appropriate remedy is one that will—to the greatest extent possible—**restore** Mr. Doe to the position he would have been in but for these egregious constitutional violations. In other words, it will restore him to his status as a GMU student who has been acquitted on all misconduct charges related to Ms. Roe's allegations.

- *Second*, an appropriate remedy is one that will **provide finality** to the disciplinary proceedings against Mr. Doe—who has already lost a year and a half of his career before that career has even begun, and who has already expended a fortune defending himself in GMU's disciplinary proceeding and vindicating his constitutional rights in federal court.

- And *third*, an appropriate remedy is one that will **not harm the public interest** by incentivizing state universities to violate the due process rights of their students in sexual misconduct proceedings—by signaling to them that even their most blatant constitutional violations can be cured in a "do over" hearing, or in a new round of disciplinary proceedings on similar charges that could have been brought the first time around.

The first two objectives have to do with Mr. Doe alone—how this Court can make *him* whole. But this Court should also be mindful of the third objective, which has to do with the broader impact of this case. Because the remedy question here is one of first impression, the remedy provided by this Court will be looked to by courts throughout the nation—the dockets of which continue to swell with more and more cases presenting these same issues[1]—and by university attorneys, who weigh the risks associated with violating students' due process rights against those associated with incurring the wrath of the U.S. Department of Education's Office for Civil Rights by not zealously pursuing allegations of sexual misconduct. Moreover, other wrongfully expelled students (and their attorneys) will look to this Court's remedy decision when they decide whether to pursue litigation to vindicate their rights. As in all decisions to pursue litigation, these students will have to weigh the substantial costs of litigation against the possible remedies that a court may order.[2]

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[1] See, e.g., Jake New, Court Wins for Accused, Inside Higher Ed (Nov. 5, 2015), https://www.insidehighered.com/news/2015/11/05/more-students-punished-over-sexual-assault-are-winning-lawsuits-against-colleges (last visited Mar. 5, 2016) (noting the existence of "50 other pending lawsuits filed by men who say they were unfairly kicked off campus after being accused of sexual assault"); Database: Due Process Lawsuits Against Colleges and Universities, Boys and Men in Education, https://boysmeneducation.knackhq.com/due-process-lawsuits (last visited Mar. 5, 2016) (listing more than 100 lawsuits filed by students throughout the United States, since 2010, alleging that they were wrongfully punished by their college or university for sexual assault).

[2] That refers, of course, only to those students who have *any* resources to pursue litigation. Unsurprisingly, most university students—generally young adults with little or no earnings or accumulated savings—simply cannot afford *any* amount of litigation to vindicate their due process rights.

There can be no doubt that the cost side of that scale is tremendously heavy. After all, the litigation of *this* case—in which there were no discovery disputes, in which there were only four contested motions,[3] in which the parties' attorneys enjoyed a very cooperative relationship in working to resolve the case quickly, and which was pursued in the most efficient district in the federal judiciary[4]—took twelve months to resolve on cross-motions for summary judgment. The following seven cases challenging campus sexual misconduct proceedings (each either decided since January 1, 2015, or still pending) show that—in other districts and in other circumstances—litigating a campus sexual misconduct case to the point of a favorable outcome for the accused student will undoubtedly take much longer, and cost much more:

Case	**Date Filed**	**Disposition**	**Length of Case in District Court**
Yu v. Vassar Coll., 13-cv-4373 (S.D.N.Y.)	06/25/2013	Summary Judgment Granted for Defendant	1 Year, 9 Months, 7 Days
Doe v. Columbia Univ., 14-cv-3573 (S.D.N.Y.)	05/19/2014	Motion to Dismiss Granted for Defendant	339 Days
Tanyi v. Appalachian State Univ., 14-cv-170 (W.D.N.C.)	10/17/2014	Settled Following Motion to Dismiss	11 Months, 5 Days
Doe v. Salisbury Univ., 14-cv-03853 (D. Md.)	12/10/2014	Settled Following Motion to Dismiss	1 Year

[3] Mr. Doe's motion to proceed pseudonymously (ECF No. 2); Defendants' motion to dismiss (ECF No. 29); Mr. Doe's motion to reconsider this Court's order dismissing Mr. Doe's substantive due process and Title IX claims (ECF No. 52); and the parties' cross-motions for summary judgment (ECF Nos. 72-73).

[4] See Table C-5, U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending March 31, 2015, Administrative Office of the U.S. Courts, available at http://www.uscourts.gov/file/18502/download (last accessed Mar. 6, 2016) (showing that, in the Eastern District of Virginia, the median time from the filing of a civil case to its disposition after a trial is 16 months). As this table also shows, that figure is much higher in three metropolitan districts that, like this district, contain a large number of universities—the Northern District of Illinois (28.8 months), the Southern District of New York (30.3 months), and the District of Massachusetts (27.8 months).

Doe v. Washington and Lee Univ., 14-cv-00052 (W.D. Va.)	12/13/2014	Settled Following Motion to Dismiss	1 Year, 1 Month, 30 Days
Prasad v. Cornell Univ., 15-cv-00322 (N.D.N.Y.)	03/19/2015	Still Pending	11 Months, 5 Days From Time of Filing to Ruling on Motion to Dismiss
Doe v. Brown Univ., 15-cv-144 (D.R.I.)	04/13/2015	Still Pending	10 Months, 9 Days From Time of Filing to Ruling on Motion to Dismiss

The substantial costs of litigating these cases make the availability of a robust remedy that much more important. Sovereign immunity and qualified immunity (in this relatively new and unsettled area of the law) almost always bars a wrongfully expelled student from recovering monetary damages. Besides attorneys' fees, injunctive relief is typically the *only* relief available to the wrongfully accused student. If the only injunctive relief a wrongfully accused student can expect to receive after long and costly litigation is a mere "do over," then students and their attorneys will be extremely hesitant to sue to vindicate their rights. And their hesitance would be well justified: given the government's superior resources and ability to endure long litigation, and the immunity that shields public universities and their employees from money damages, an accused student is already a David facing a well-armed Goliath. To limit injunctive relief to a do-over would be to take the sling from David and give Goliath a second sword. In practical terms, a narrow do-over remedy will mean that more innocent students are unlawfully expelled and that more of those unlawful expulsions will go unredressed.

As explained in greater detail below, the flexible principles of equity vest this Court with the discretion to avoid that unjust result, and to craft a remedy that accomplishes all three of the objectives discussed above: restoring Mr. Doe to the position he would have been in but for these due process violations, bringing finality to this dispute, and incentivizing public universities not

to blatantly violate the due process rights of their students. And, as further explained below, both the general context of campus sexual misconduct proceedings, and the specific, undisputed facts of Mr. Doe's case strongly demonstrate that providing such a remedy here would do substantial justice, both to the parties and to the public.[5]

ARGUMENT

Before turning to the specific circumstances that should be considered in crafting a remedy that appropriately redresses the constitutional violations that occurred in this case, it is worth reiterating a few of the guiding principles of equity well known to this Court. As this Court noted in its brief discussion of the remedies issue in its Memorandum Opinion, its discretion to craft an appropriate equitable remedy in this case is "not bound by the strict rules of the common law, but [rather it] can mold its decrees to do justice amid all of the vicissitudes and intricacies of life." Mem. Op. at 28 (quoting Bowen v. Hockley, 71 F.2d 781, 786 (4th Cir. 1934)). Indeed, the Supreme Court has routinely stressed—particularly in reviewing equitable decrees fashioned by lower courts to redress violations of constitutional rights—that principles of practicality and flexibility, rather than strict adherence to rigid rules, guide the analysis:

> In shaping equity decrees, the trial court is vested with broad discretionary power . . . . Moreover, in constitutional adjudication as elsewhere, **equitable remedies are a special blend of what is necessary, what is fair, and what is workable.** Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. . . . In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests . . . .

[5] This Court's order setting the briefing schedule on the remedy issue (ECF No. 93) notes that "a further order will issue setting a date for oral argument if such a hearing will aid the decisional process." Mr. Doe believes that oral argument will aid the decisional process, given the complex factual and equitable issues presented herein. Also, this brief addresses only the equitable decree sought by Mr. Doe. Mr. Doe intends to separately move for attorneys' fees incurred in this action, pursuant to 42 U.S.C § 1988.

Lemon v. Kurtzman, 411 U.S. 192, 200-01 (1973) (emphasis added) (citations and internal quotation marks omitted).

As that opinion suggests, the infringement of constitutional rights affects more than just the interests of the two parties; there is also a substantial *public* interest at stake in such cases. That is all the more true here. As discussed in the preliminary statement above, the public has a substantial interest in ensuring that public universities do not violate the due process rights of their students with impunity—a problem that is currently causing great concern nationwide. This Court can and should take that interest into account in fashioning an appropriate remedy. See E. Tennessee Nat. Gas Co. v. Sage, 361 F.3d 808, 826 (4th Cir. 2004) ("As the Supreme Court has said, courts of equity may go to greater lengths to give 'relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'") (quoting Va. Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552 (1937)).

With these general equitable principles and the public's substantial interest in mind, the remedies analysis turns to the particular due process violations that Defendants committed in this case. As this Court held in its Memorandum Opinion, because Defendants violated Mr. Doe's due process rights, and because those due process violations clearly caused Mr. Doe's expulsion, "there can be no doubt that it is appropriate here to vacate [those decisions] and to order that [Mr. Doe] be reinstated as a GMU student in good standing." Mem. Op. at 29.[6] The only questions remaining are "(i) whether GMU 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." Id.

[6] This Court further noted that Defendants "do not appear to contest this." Mem. Op. at 29.

In answering this Court's first two questions—whether a new round of disciplinary proceedings should be allowed and, if so, what allegations should be open for adjudication—the due process violation that dictates the analysis is the failure to provide Mr. Doe with adequate notice. This Court held that the undisputed facts in the record made it "perfectly clear" that "[Mr. Doe] was expelled because of "(i) alleged sexual misconduct occurring on dates *other than October 27, 2013*," the only incident of sexual assault for which Mr. Doe received constitutionally adequate notice, "and (ii) a text message [Mr. Doe] sent in March 2014 threatening suicide." Mem. Op. at 29 (emphasis added). Thus, while the Sexual Misconduct Board ("the Board") that originally found Mr. Doe not responsible on all charges had considered only allegations of which Mr. Doe had adequate notice, Defendants—for the first time on appeal—considered and adjudicated allegations of which Mr. Doe had *not* received adequate notice.

The analysis, therefore, should proceed in two steps: **First**, this Court should determine the appropriate remedy regarding the charges for which Mr. Doe did receive constitutionally adequate notice, and of which Mr. Doe was found not responsible by the Board in a hearing that was "fully adequate" for purposes of due process, Mem. Op. at 19. Those charges are (1) the allegation of sexual assault occurring on October 27, 2013, and (2) the sending of the March 2014 text message to Ms. Roe.

The appropriate remedy with regard to these two charges is clear: Because the Board found Mr. Doe not responsible for these charges following a hearing that was consistent with the requirements of due process, and because Ms. Roe's appeal of the Board's decision raised no substantial arguments for reversal—apart from the improper arguments on which Defendants relied (*i.e.*, allegations apart from the October 27, 2013, incident)—no additional proceedings on

these charges are necessary or appropriate. This Court should simply order that Defendants dismiss Ms. Roe's appeal and allow the Board's decision to become final. It should not just give Defendants a do-over.

Second, this Court should determine the appropriate remedy regarding Ms. Roe's generalized, non-specific allegations that Mr. Doe sexually assaulted her *on occasions apart from October 27, 2013*—the alleged conduct for which Defendants found Mr. Doe responsible for the first time on appeal, but of which Mr. Doe never received adequate notice. Because GMU never charged Mr. Doe with these allegations, an appropriate adjudication of them would require beginning GMU's disciplinary process entirely anew: Mr. Doe would have to be provided notice of the *specific* instances of sexual misconduct alleged by Ms. Roe; Mr. Doe would have to be given an opportunity to prepare and present a defense in a new Board hearing; and any appeal of that hearing would have to be adjudicated.

Such a process, if permitted by this Court, would be both highly impractical and grossly unfair to Mr. Doe. The process would have to be conducted by (presumably untrained) people outside of GMU's Office of Student Conduct, which has been thoroughly tainted by this litigation. But more importantly, the process would be conducted more than two and a half years after the alleged conduct. The extreme prejudice to Mr. Doe's defense caused by this delay is obvious, as is the fact that Defendants could have investigated and provided Mr. Doe adequate notice of these allegations before the original Board hearing in September 2014, but chose not to do so. Allowing GMU to do so now would be incredibly unfair to Mr. Doe and would not bring finality to this matter. This Court should enjoin Defendants from initiating any such proceeding.

As discussed in greater detail below, this Court has the authority to enter such decrees in this matter, and to do so would be to do justice in this case.

I. No Further Proceedings Are Necessary to Resolve Ms. Roe's October 27, 2013, Sexual Assault Charge and the March 2014 Text Message Charge.

The default equitable remedy for violations of procedural due process is an injunction that simply "invalidate[s] the illegal government action and restore[s] the status quo ante." Shaw v. Gwatney, 604 F. Supp. 880, 887 (E.D. Ark. 1985), aff'd in part, vacated in part on other grounds, 795 F.2d 1351 (8th Cir. 1986). But the reason that courts often provide this narrow remedy in procedural due process cases is that, in such cases—unlike in cases involving dismissal for First Amendment retaliation or for discrimination under Title VII or the Equal Protection Clause—"[t]he substantive dispute [is] *collateral* to the constitutional violation, and [thus] unnecessary [for the court] to resolve." Id. (emphasis added).

Take the example of a government employee's claim that he was terminated on the basis of race. In deciding this claim a court must *necessarily* determine the merits (*i.e.*, the substance) of the underlying employment decision—whether the employee was terminated for just cause. It is not necessary in such a case to remand to the employer for a new hearing on whether there was just cause because, if the decision was motivated by race, there was no just cause.

By contrast, a procedural due process claim posits that the *procedures* used to reach a decision, not the *substantive* basis for of the decision, were illegal.[7] Thus even where a court

[7] See, e.g., McNeill v. Butz, 480 F.2d 314, 326 (4th Cir. 1973) (ordering that a government employee be reinstated following her termination without procedural due process, but noting that this was "without prejudice to the right of the government to seek her discharge anew provided that it proceeds with full adherence to her right to procedural due process"). But in McNeill, unlike in Mr. Doe's case, the procedural due process violation involved a single, structural violation of procedural due process: the government's failure to allow the employee to "confront or cross-examine" the witnesses against her. And in McNeill, also unlike in Mr. Doe's case, nothing suggested that the record from the administrative proceeding under review made the outcome of a new hearing complying with due process a foregone conclusion.

finds a procedural due process violation, it does not automatically follow that the government's decision was incorrect on the underlying merits. However, as the court said in Shaw:

> In some cases, such as first amendment or discrimination cases, the court must resolve the substantive issues. *In other cases, the merits have been resolved by other tribunals. Under these circumstances, courts appropriately consider the resolution of the merits when determining the relief due for any procedural due process violations.*

Id. at 887 n.6 (emphasis added). In other words, where the merits of the dispute underlying a procedural due claim have already been decided by an administrative tribunal, a court finding a procedural due process violation can and should take that tribunal's findings into account when crafting an appropriate equitable remedy.

At least one district court has applied this principle in order to do justice to government employees who had been terminated by an incredibly hostile government employer in violation of the employees' due process rights. See Barachkov v. Lucido, No. 04-CV-73957, 2015 WL 5168616, at *12-13 (E.D. Mich. Sept. 3, 2015) (rejecting the government's argument that government employees discharged in violation of their procedural due process rights "[were] only entitled to a pre-termination hearing to dispute the charges against them," where "a jury [in the case] had determined that Plaintiffs . . . were not fired 'for cause'"). The court in Barachkov noted the substantial hostility of the government employer in finding that "any [new] hearing before [the government employer] . . . [would be] an empty gesture in every sense of the word." Id. at *12. And the court further noted that "to fail to implement the remedy of reinstatement to Plaintiffs—their only remedy [because of qualified immunity]—would reward the violation of their constitutional rights," especially given the great length of the litigation. Id. at *13.

Thus, the Barachkov court held that no new pre-termination hearing was necessary, given that the jury had already resolved—in the employees' favor—the merits of the underlying dispute as to whether the dismissals were for cause. And perhaps more importantly, the court

noted the need for finality given the length of the litigation and the utter futility of a new hearing before the hostile government employer—all factors that are also present here.

As in Barachkov, the undisputed facts in the summary judgment record here establish that the Board conclusively resolved—after a ten-hour hearing that fully complied with due process—the merits of Ms. Roe's October 27, 2013, allegation and the March 2014 text message charge. And, as in Barachkov, the Defendants have shown—through their numerous and flagrant violations of Mr. Doe's due process rights, and through their repeated attempts to, as this Court noted, characterize Mr. Doe as "disturbed, depraved, and dangerous, such that it is good that he was expelled," Mem. Op. at 27—that they will treat any new disciplinary proceeding as an invitation to kick Mr. Doe off campus once again, regardless of what the facts show. This Court should not allow that to happen, and it need not do so. As Barachkov demonstrates, this Court may take note that these charges have already been adjudicated by the Board, and that Ms. Roe's appeal raises no substantial reason—apart from the impermissible reasons relied on by Defendants—for modifying or reversing the Board's decision.

This result would be consistent not only with those procedural due process cases where the merits of the underlying dispute have already been resolved in a plaintiff's favor, but also with analogous principles of administrative law that permit courts to forgo a remand to an agency where additional agency proceedings are unnecessary.[8] Although reviewing courts "[g]enerally" should remand matters to administrative agencies to let them correct errors in the

[8] To be entirely clear on an obvious point, Mr. Doe does not contend that principles of administrative law (apart from those that follow from the requirements of procedural due process) *control* whether this Court may or may not provide the equitable relief he is proposing. Rather, Mr. Doe simply notes that because principles of equity allow courts broad discretion to craft a remedy that will do justice in a particular case, this Court can and should look to analogous situations in other areas of substantive law—such as administrative law—for guidance in crafting such a remedy.

first instance, see I.N.S. v. Ventura, 537 U.S. 12, 16-18 (2002), they may refuse to do so when remand would be futile or would work prejudice to a party who is likely to prevail on remand. See, e.g., Hussain v. Gonzales, 477 F.3d 153, 158 (4th Cir. 2007) (refusing to remand matter where only point of dispute was "a legal, not a factual conclusion" and the result on remand would be "a foregone conclusion"); George Hyman Const. Co. v. Brooks, 963 F.2d 1532, 1539 (D.C. Cir. 1992) (vacating and reversing where "only one disposition [on remand] is possible as a matter of law"); Rivera v. Sullivan, 923 F.3d 964, 970 (2d Cir. 1991) (vacating and reversing, rather than remanding, given strong evidence in petitioner's favor "and the length of time this litigation has already consumed").

The same applies when it is a state agency, as opposed to a federal one, whose decisions a federal court is reviewing. In Virginia Metronet, Inc. v. Board of Supervisors of James City County, Virginia, the court vacated and reversed a Virginia agency's decision to deny Virginia Metronet a permit to build a cell phone tower on a certain property in the county. 984 F. Supp. 966, 970 (E.D. Va. 1998). The agency took more than a year to deny the application and issued no written decision explaining its denial, as required by the Telecommunications Act, until six days after the complaint in the matter was filed. Id. The Court found the untimely explanation inadequate and refused to remand the matter to the agency for further consideration "[g]iven the extensive delay that has already occurred" and the agency's failure to abide by a federal law it knew it was bound by. Id. at 977.

As in these administrative law cases, any further consideration by GMU of Ms. Roe's October 27, 2013, allegation or the March 2014 text message charge would be futile. The Board conclusively resolved these charges after a ten-hour hearing that fully complied with due

process. And Ms. Roe's appeal raises no substantial reason—apart from the impermissible reasons relied on by Defendants—for modifying or reversing the Board's decision.

Apart from those improper arguments, Ms. Roe's appeal offers only two sentences alleging minor procedural irregularities at the hearing. First, Ms. Roe noted that "the panel asked and allowed [Mr. Doe] to ask many irrelevant questions, including, but by no means limited to, asking questions about my prior romantic relationships, whether or not I visited [Mr. Doe] at his dorm at [GMU] on different occasions, and who initiated the sexual relationship between me and [Mr. Doe]." Pl.'s Mot. for Summ. J., Ex. 15 at 3. And second, Ms. Roe stated that "[t]he panel also allowed [Mr. Doe's roommate] to testify at the hearing, despite [his] admission that he was not there and knew nothing of the violation on October 27, 2013. Id.

Nothing in the summary judgment record suggests that Defendants in any way relied upon either of these objections in their decision to find Mr. Doe responsible.[9] And more importantly, it is clear that neither of Ms. Roe's contentions actually has any merit. As to the supposedly irrelevant questions asked by the Board and Mr. Doe, common sense and a cursory review of the Board hearing transcript indicate that the context surrounding the rules of Mr. Doe's and Ms. Roe's BDSM relationship was relevant to whether Ms. Roe consented to the October 27, 2013, sexual encounter. And Mr. Doe's roommate testified for the same reason: he had knowledge of Mr. Doe's and Ms. Roe's BDSM relationship. See Pl.'s Mot. for Summ. J., Ex. 12 at 131:14-18 (transcript of Board hearing, in which Chairperson Crear notes, in clarifying the purpose of the roommate's testimony, that the Board was "asking for [his] observations about the relationship, not necessarily the character of [Mr. Doe]"). Moreover, as this Court noted,

[9] If even Defendant Ericson—who confessedly wanted Mr. Doe off campus before he adjudicated Ms. Roe's appeal, Pl.'s Mot. for Summ. J., Ex. 1 at 73:14-19—did not find these two arguments in Ms. Roe's appeal to have merit, then it is a foregone conclusion that an *unbiased* appeals officer would no find merit in them in any new review of the appeal.

neither of these alleged procedural irregularities were identified by the Board's hearing officer, Andre Clanton, "which is one of the prerequisites for allowing an appeal." See Mem. Op. at 22 (citing GMU's Code of Student Conduct, Pl.'s Summ. J. Mot., Ex. 11 at 17). For these reasons, this Court may order that Ms. Roe's appeal be dismissed and the Board decision be allowed to become final. Cf. Yusupov v. Att'y Gen., 650 F.3d 968, 993 (3d Cir. 2011) (vacating and reversing decision of the Board of Immigration Appeals rather than remanding, and noting that "[w]hen," as here, "the outcome is clear as a matter of law . . . remand is not necessary").

II. GMU's Pursuit of Any Other Charges Against Mr. Doe Based on Ms. Roe's Vague and Generalized Allegations of Sexual Misconduct on Dates Other Than October 27, 2013, Would Be Both Highly Impractical and Extremely Unfair to Mr. Doe, and Should Be Enjoined.

This Court found that Mr. Doe did not receive adequate notice that Ms. Roe's vague, generalized allegations of sexual misconduct, other than the one that allegedly occurred on October 27, 2013, were at issue. The upshot of this holding for any new disciplinary proceedings based on these allegations is completely clear: GMU would have to bring *entirely new charges*, and the process outlined in the Code of Student Conduct would start over *from the beginning*: Mr. Doe would have to be provided notice of the *specific* instances of sexual misconduct alleged by Ms. Roe (which, as noted above, may be impossible); a Board hearing would have to be scheduled and held to adjudicate such allegations pursuant to GMU's policies; and any appeal of that hearing would have to be adjudicated pursuant to GMU's policies.

Entirely new proceedings to adjudicate these allegations should not be allowed for at least three reasons. First, it would be highly impractical to conduct such proceedings given the necessary disqualification of the *entire* GMU Office of Student Conduct. Second, Mr. Doe's ability to defend himself in any such proceedings would be highly prejudiced—to the point where such proceedings would be fundamentally unfair—by the incredible delay in bringing

charges for conduct that allegedly occurred, as of now, no less than two and half years ago. Third, permitting new proceedings would incentivize other universities to "hold back" related charges of misconduct—especially where multiple incidents of sexual misconduct have been alleged to have occurred over the course of a long relationship—in order to get multiple bites at the apple. In short, when the stakes are this high, an accused student should not be forced to pay for a university's mistakes. Nor should universities be allowed to engage in gamesmanship, such as bringing related charges again and again until they get the desired result.[10]

First, while it is clear *what* procedures would have to be followed to bring and adjudicate charges against Mr. Doe based on Ms. Roe's non-October 27, 2013, allegations, it is not clear at all *who or what entity* would be responsible for undertaking them. The Office of Student Conduct is the GMU office responsible for accepting complaints of sexual misconduct, including officially charging students, advising the Board hearing panels adjudicating such charges, and adjudicating appeals of Board decisions. See generally Pl.'s Mot. for Summ. J., Ex. 11 at 13-14, 17-18 (Section XVI and XVIII of the Code of Student Conduct, discussing the procedures for accepting and adjudicating allegations of sexual misconduct).

[10] In any remand from a federal court, GMU is (like other universities) almost certain to initiate any new proceedings that are not specifically enjoined by this Court—no matter how futile, impracticable, or unfair. That may be due to gamesmanship or zeal on the part of university officials, but it is even more likely due to the practical constraints placed on a university's discretion to decline to pursue sexual misconduct charges by the U.S. Department of Education's Office for Civil Rights. See generally U.S. Department of Education, Dear Colleague Letter (Apr. 4, 2011), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (laying out specific guidance to universities about Title IX requirements applicable to sexual misconduct). Thus, unlike remanding a criminal case for a new, but likely impracticable or futile, criminal trial—which will often result in the prosecutor's declining to move forward with the second trial or giving a very generous plea bargain—a university is likely to pursue the new proceedings regardless of how futile or impracticable they would be. Moreover, the Department of Education has expressly forbidden any sort of mediation or plea bargaining in sexual assault cases, even if both parties want it—so it is literally all or nothing with respect to a new proceeding. Id. at 8 ("[I]n cases involving allegations of sexual assault, mediation is not appropriate *even on a voluntary basis*.") (emphasis added).

This office, however, is led by its Director, Defendant Ericson, and is supervised by the Dean of Students, Defendant Blank-Godlove. See Pl.'s Mot. for Summ. J., Ex. 1 at 9:10-11, 123:19-21; Ex. 2 at 9:7-9, 12:22-13:2. Given Defendants' unconstitutional conduct in this case and prominent positions in or above the Office of Student Conduct, that office clearly cannot be involved—in any capacity—in investigating or adjudicating any new disciplinary proceedings against Mr. Doe. Thus the process would have to be conducted by people outside GMU's Office Student Conduct. While these people could conceivably be untainted by knowledge of this litigation or by Mr. Doe's disciplinary history at GMU, they would also lack the training that hearing officers in the Office of Student Conduct undoubtedly receive—training in charging and adjudicating sexual misconduct cases under GMU's policies. It would therefore be highly impracticable to find people who both have the training to administer GMU's sexual misconduct process *and* are not tainted by knowledge of this litigation or Mr. Doe's disciplinary history.

Second, permitting new charges based on Ms. Roe's non-October 27, 2013, allegations would be highly unfair to Mr. Doe, given the prejudice to his ability to defend himself caused by the delay in bringing these charges—a delay that Defendants had entirely within their control to prevent. Even assuming GMU acted quickly in bringing these new charges,[11] that process would *only just be beginning* at this point, no less than two and a half years after the alleged assaults, and possibly as much as three and a half years after those alleged assaults, depending on when in the relationship they allegedly occurred, see Pl.'s Mot. for Summ. J., Ex. 19 at 18:19-19:4 (Mr.

[11] There is no question that there would be additional delay before GMU brought charges. GMU would likely need to investigate Ms. Roe's vague allegations further, in order to determine the *specific* details such that Mr. Doe can be provided a constitutionally adequate notice. If Ms. Roe's previous allegations are any guide, that process may take several months. See Mem. Op. at 5 (noting that Ms. Roe first made her allegations against Mr. Doe to GMU's police department in May 2014 and that misconduct charges were finally pursued in late August 2014).

Doe's deposition, noting that he believes he and Ms. Roe began dating "around December 2012").

As this Court noted, Ms. Roe's allegations of sexual misconduct turn on "[Ms.] Roe's consent, a complicated factual determination made all the more complex and nuanced by the unorthodox rules of [the] BDSM relationship," Mem. Op. at 25. Indeed, it is clear that the critical issue surrounding these allegations is one that is highly dependent on context: whether Mr. Doe *intentionally* ignored Ms. Roe's use of the safe word, or whether—as Mr. Doe testified in the previous Board hearing—Ms. Roe's use of the safe word simply did not register with him for a short period of time (15 to 30 seconds). See Mem. Op. at 23-24 (noting that Mr. Doe did not admit to intentionally ignoring the safe word) (citing Hearing Transcript, Pl.'s Mot. for Summ. J., Ex. 12 at 80:19-20); Pl.'s Mot. for Summ. J., Ex. 12 at 165:3-16 (Board hearing transcript, in which Mr. Doe notes that on the occasions in which he accidentally continued sexual activity after Ms. Roe used the safe word, he would "wait like a maximum 15 to 30 seconds and then immediately stop if it was used again"). Once GMU provides the *specific* notice of these alleged incidents that due process requires, Mr. Doe would have to then prepare his defense to the specific allegations. In making that defense, Mr. Doe will likely have to answer questions like: How long after Ms. Roe used the safe word did it register to you on *this specific* occasion? 15 seconds? 30 seconds?

The answers to such questions—critical to Mr. Doe's defense—turn on his and Ms. Roe's memories. The extreme prejudice to Mr. Doe's defense caused by a delay of as much as three and a half years is therefore obvious: memories of these complicated and nuanced sexual encounters (likely the only evidence) have undoubtedly faded. Witnesses to these encounters, if

there were ever any, have likely graduated from GMU and moved on. And Ms. Roe, of course, never attended GMU in the first place.

This prejudice could have been entirely avoided by Defendants. As this Court noted, Ms. Roe's narrative statement alludes to other incidents, although none of them are described with any specificity. See Mem. Op. at 15 (noting that Ms. Roe's narrative statement references multiple incidents in which Mr. Doe "forced sex on [her]") (citing Roe Statement, Pl.'s Mot. for Summ. J., Ex. 7). Defendants could have investigated these allegations further and provided Mr. Doe adequate notice of them well before the original Board hearing in September 2014. But they chose not to do so.

Third, allowing GMU to bring these charges now would not only be impractical and highly unfair to Mr. Doe, but it would also encourage universities to hold back clearly related charges in order to get a second bite at the apple should the first charge result in a finding of no responsibility. This is particularly likely where, as here, the allegations involve a number of similar instances of sexual misconduct occurring over the course of a long relationship.

In criminal prosecutions, the collateral estoppel principle embodied in the Double Jeopardy Clause serves to minimize the government's ability to engage in such gamesmanship, as the seminal case in this area, Ashe v. Swenson, 397 U.S. 436 (1970), demonstrates. In Ashe, the government prosecuted a defendant for the robbery of a six-person poker game played at the home of one of the players. See id. at 437-39. The government's first prosecution of the defendant was for one count of robbery only—that is, the government charged the defendant with robbing just one of the six poker players. See id.

After a jury acquitted the defendant, the government brought a second prosecution, charging the defendant with robbing one of the other five poker players. See Ashe, 397 U.S. at

439. The Court held that the second prosecution was barred by the principle of collateral estoppel embodied in the Double Jeopardy Clause. Id. at 445. The Court reasoned that given the evidence presented in the first trial, the jury must have concluded that the defendant did not rob the poker game. The government, therefore, was collaterally estopped from relitigating that issue in a second trial. Id. As the Ashe Court explained:

> One must experience a sense of uneasiness with any double-jeopardy standard that would allow the State this second chance to plug up the holes in its case. **The constitutional protection against double jeopardy is empty of meaning if the State may make 'repeated attempts' to touch up its case by forcing the accused to "run the gantlet" at [*sic*] many times as there are victims of a single episode.**

Id. at 459 (emphasis added). And the Court put it similarly in Green v. United States:

> The underlying idea [of the Double Jeopardy Clause], . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby **subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.**

355 U.S. 184, 187-88 (1957) (emphasis added).

Allowing GMU to pursue new disciplinary charges against Mr. Doe based on Ms. Roe's allegations of sexual assault other than the one that allegedly occurred on October 27, 2013—allegations they were fully aware of, but chose not to bring, the first time around—would fly in the face of the fairness principles espoused in Ashe, Green, and many other double jeopardy cases.[12] It would allow GMU to "touch up its case" with respect to Ms. Roe's allegations, after

[12] To be entirely clear once again, Mr. Doe does not contend that the criminal law doctrine of double jeopardy is directly applicable to campus disciplinary proceedings, nor does he contend that this doctrine would bar GMU from prosecuting Ms. Roe's non-October 27, 2013, allegations even if it *were* directly applicable. Rather, he contends that the process due to students charged with sexual misconduct is often guided by the principles of fairness underlying the double jeopardy doctrine. See, e.g., Tanyi v. Appalachian State Univ., No. 5:14-CV-170, 2015 WL 4478853, at *6 (W.D.N.C. July 22, 2015) (holding that a university's reversal of a hearing panel's decision finding a student not responsible for sexual misconduct merely because the

having already learned, during the original Board hearing, what Mr. Doe's defense to such charges would be: that, for example, he never intentionally ignored the safe word. Ashe, 397 U.S. at 459.[13] And more importantly, allowing GMU to pursue these charges would not bring finality to this matter; rather, it would require Mr. Doe to spend his remaining time as a GMU student in "a continuing state of anxiety and insecurity" knowing that, at any moment, GMU could bring charges based on Ms. Roe's allegations once again. Green, 355 U.S. at 187. This would be fundamentally unfair to Mr. Doe. Accordingly, this Court can and should enjoin Defendants from pursuing any proceedings against Mr. Doe for Ms. Roe's vague, generalized allegations that Mr. Doe sexually assaulted her on instances other than October 27, 2013.

CONCLUSION

Mr. Doe should have graduated this May. Instead, his life has been put on hold for more than a year, and the earliest that he could possibly graduate would be the end of 2017. He will

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university did not "adequately prove its case against [the student] at the first hearing" stated a procedural due process claim, and noting that "[a]lthough the double jeopardy clause does not apply to the student disciplinary context, the due process clause in all cases requires 'fundamentally fair procedures.'"). Thus, the principles underlying doctrines like double jeopardy can and should guide this Court's determination of what equitable remedy would most do justice in this case.

[13] Cf. also Londono-Rivera v. Virginia, 155 F. Supp. 2d 551, 562-63 (E.D. Va. 2001). In Londono-Rivera, the court criticized a task force of state and federal prosecutors who dismissed a federal indictment against a defendant on drug charges, after the federal court suppressed key evidence, and then brought a prosecution in state court in order to obtain a new suppression hearing, at which hearing the task force bolstered its case against suppression. The court noted that "the Task Force members, having 'gone to school' in the federal case and having failed there on the first iteration of evidence . . . appear to have improved on their testimony . . . . That, if true, is at odds with a central objective of [the collateral estoppel principle embodied in the double jeopardy clause:] . . . affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Id. at 563 (internal quotation marks and citations omitted).

also have to explain the three-semester gap in his educational record for the rest of his life.[14] And all of this happened because Defendants wanted Mr. Doe off campus and decided to railroad him out of school—something that he never would have known if he had not filed suit, see Mem. Op. at 26 ("It is worth noting also that certain key facts about the process afforded to plaintiff are known only because of discovery in this action.").

To vindicate his constitutional rights and secure reinstatement as a student, Mr. Doe has endured more than a year of litigation and expended a fortune in legal fees. If, after all that it has taken for Mr. Doe to get here, this Court simply gives Defendants a do-over or lets them try Mr. Doe on new charges, Mr. Doe's victory will be Pyrrhic indeed. Students across the country will know that suing a public school to vindicate their constitutional rights will be futile—sovereign immunity and qualified immunity will likely bar damages, and at best, the student will just be thrown back into further delay in his educational and occupational future. Colleges and universities will notice that, too, and act accordingly. They will have immunity from suit in all but name.

Such a result would be plainly inconsistent with long-established principles of equity. Instead, a narrowly tailored equitable remedy is appropriate—one that would not put a student whose rights have been violated in a worse position than he was when he started, and one that would do what remedies in equity are supposed to do: right a wrong. Accordingly, this Court's equitable decree should not only restore Mr. Doe to his status as a student in good standing at the

[14] See Jones v. Bd. of Governors of Univ. of N.C., 704 F.2d 713, 716 (4th Cir. 1983) (noting that barring a student from taking classes would cause irreparable harm as the student "will have a gap in her education which she will be forced to explain throughout her professional life"); Doe v. Middlebury Coll., No. 1:15-CV-192-JGM, 2015 WL 5488109, at *3 (D. Vt. Sept. 16, 2015) (finding that it constituted irreparable harm that "Plaintiff would have to explain, for the remainder of his professional life, why his education either ceased prior to completion or contains a gap").

University, but it should also bring finality to this matter. It can do so by (1) vacating Defendant Ericson's decision on Ms. Roe's appeal and reinstating, as the final decision in that matter, the Board's finding of non-responsibility, and (2) enjoining Defendants from initiating any new disciplinary proceedings on charges arising out of Ms. Roe's vague allegations—for which Mr. Doe *did not* receive notice—of sexual misconduct on dates other than October 27, 2013.

Accordingly, Mr. Doe respectfully requests that this Court enter a decree:

1. Vacating Defendant Ericson's October 10, 2014, appeal decision and Defendant Blank-Godlove's December 5, 2014, decision affirming Defendant Ericson's decision;

2. Ordering Defendants or any other appropriate GMU official[15] to dismiss Ms. Roe's September 19, 2014, appeal with prejudice, given that it did not meet any of the three grounds that GMU outlines for appeals;

3. Permanently enjoining Defendants and any other appropriate GMU official from continuing to enforce any sanction or punishment against Mr. Doe imposed as a result of Defendant Ericson's October 10, 2014, appeal decision and Defendant Blank-Godlove's December 5, 2014, decision affirming Defendant Ericson's decision;

4. Permanently enjoining Defendants or any other appropriate GMU official from making or maintaining any notation on Mr. Doe's transcript, or any educational record that Mr. Doe committed misconduct with respect to Ms. Roe's allegations, and from distributing any such records to any school or potential employer;

5. Ordering Defendants or any other appropriate GMU official to reinstate Mr. Doe as a student in good standing at the University; and

6. Permanently enjoining Defendants or any other appropriate GMU official from pursuing any further misconduct charges against Mr. Doe relating to any allegations made by Ms. Roe concerning Mr. Doe's conduct before the date of the Sexual Misconduct Board hearing on September 5, 2014.

[15] In its Memorandum Opinion, this Court noted that Defendant Angel Cabrera may not be necessary to afford complete relief to Mr. Doe. See Mem. Op. at 29-30 n.22. Mr. Doe does not oppose dismissal of Defendant Cabrera from this action provided that all of the relief Mr. Doe requests in this brief may be ordered in his absence—whether because Defendants Ericson and Blank-Godlove have the authority to carry out the requested decree, or because the All Writs Act, 28 U.S.C. § 1651(a), allows this Court to compel non-party GMU officials to do so.

This Court cannot give Mr. Doe the last year of his life back. It cannot, given its rulings on qualified immunity, give him money damages to compensate him for what Defendants did to him. But it can give him something very simple: the ability to go back to school and finish his degree without worrying that Defendants will concoct yet another reason to kick him off campus. It can, in short, give him closure and give him justice. For all of the reasons stated in this Brief, Mr. Doe respectfully asks this Court to do precisely that.

March 7, 2016

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2016, the foregoing Brief Proposing a Remedy was served on all counsel of record and registered users via the court's electronic filing system.

/s/
Adam R. Zurbriggen

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

JOHN DOE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 1:15-cv-00209-TSE/MSN**
	)	
THE RECTOR AND VISITORS OF GEORGE MASON UNIVERSITY, ANGEL CABRERA, *President of George Mason University, sued in his official capacity,* **and BRENT ERICSON and JULIET BLANK-GODLOVE,** *employees of George Mason University, sued in his or her official and individual capacity, jointly and severally*,	)	
	)	
Defendants.	)	

[PROPOSED] DECREE

This Court previously entered an order (ECF No. 93) granting Plaintiff's Motion for Summary Judgment. Upon consideration of Plaintiff's Brief Proposing a Remedy and any opposition thereto, the following decree is entered.

1. Defendant Brent Ericson's October 10, 2014, appeal decision and Defendant Juliet Blank-Godlove's December 5, 2014, decision affirming Defendant Ericson's decision, are hereby **VACATED**;

2. Defendants and any other appropriate officials of George Mason University ("GMU") are **ORDERED** to dismiss Jane Roe's September 19, 2014, appeal with prejudice;

3. Defendants and any other appropriate GMU officials are **PERMANENTLY ENJOINED** from continuing to enforce any sanction or punishment against Plaintiff imposed as

a result of Defendant Ericson's October 10, 2014, appeal decision and Defendant Blank-Godlove's December 5, 2014, decision affirming Defendant Ericson's decision;

4. Defendants and any other appropriate GMU officials are **PERMANENTLY ENJOINED** from making or maintaining any notation on Plaintiff's transcript, or any educational record that Plaintiff committed misconduct with respect to Ms. Roe's allegations, and from distributing any such records to any school or potential employer;

5. Defendants and any other appropriate GMU officials are **ORDERED** to reinstate Plaintiff as a student in good standing at GMU; and

6. Defendants and any other appropriate GMU officials are **PERMANENTLY ENJOINED** from pursuing any further misconduct charges against Plaintiff relating to any allegations made by Ms. Roe concerning Plaintiff's conduct before the date of the Sexual Misconduct Board hearing on September 5, 2014.

So **ORDERED.**

DATE:_____

_____
T.S. Ellis, III
United States District Judge