

Plaintiff, a fourth-year engineering student, will suffer immediate and irreparable harm to his education and career if the suspension is not stayed. Of more immediate concern, Plaintiff is a Syrian national who has lived in Kuwait as a lawfully-present immigrant since childhood. Plaintiff's ability to be lawfully present in Kuwait depends on maintaining his status as a student. Because Plaintiff is no longer a student at Penn State, his F1 visa is invalid and he cannot lawfully remain in the United States. He is now subject to deportation. If he returns to Kuwait and is denied entry because he is no longer a student, he will be sent to Syria where two of his relatives recently perished in the pervasive violence consuming that country. There can be no more urgent need for immediate injunctive relief.

FACTS

1. *Penn State implements an "Investigative Model" for adjudicating claims of student sexual assault.*

Less than two months after beginning his presidency of the Pennsylvania State University,¹ Eric Barron announced the formation of a task force² to reform the University's sexual misconduct investigation and hearing policies. This was done, apparently in part, to ensure compliance with Title IX, a statute whose prohibition on gender-based discrimination in education has been construed as providing relief for even a single instance of student-on-student sexual assault or harassment. President Barron explained that the mission of the Task Force was to establish Penn State as "a true leader in the prevention of sexual assault and in investigating and adjudicating student-on-student sexual assault cases while best protecting the wishes, and where appropriate and possible, the confidentiality of the survivors."³

¹ Hereafter "Penn State."

² Hereafter "the Task Force."

³ *Barron Announces Steps to Address Pressing University Concerns*, The Daily Collegian, July 3, 2014, <http://news.psu.edu/story/320046/2014/07/03/administration/barron-announces-steps-address-pressing-university-issues>.

The Task Force released a 267 page report in late January of 2015.⁴ Its recommendations included a "move away from the traditional hearing process [to] embrace instead an investigative model for resolving sexual misconduct cases."⁵ This model⁶ "would rely upon a professional investigator, rather than a hearing board, to conduct the required fact finding in [sexual misconduct] cases."⁷ According to the Task Force, the Investigative Model would strike a balance between obtaining fair, accurate outcomes while avoiding the "undue stress and other harm too often caused by the current hearing model."⁸ President Barron adopted all 18 of the Task Force's recommendations.⁹

Thereafter, Penn State revised its disciplinary procedures for sexual assault complaints. The new Investigative Model, described by Defendant Shaha as "not adversarial," would "remove barriers" causing "more people [to] feel comfortable coming forward."¹⁰ Whereas its long standing process¹¹ (which remains in effect) required a hearing where witnesses testified in-

⁴ Hereafter "the Report," a copy of which is attached as Exhibit 1 to the Verified Complaint.

⁵ Report at 27.

⁶ Hereafter "the Investigative Model."

⁷ Report at 27.

⁸ *Id.* at 28.

⁹ Susan Snyder, *PSU President to Implement All 18 Task Force Recommendations on Sexual Assault*, The Philadelphia Inquirer, Feb. 17, 2015, http://www.philly.com/philly/blogs/campus_inq/PSU-president-to-implement-all-18-task-force-recommendations-on-sexual-assault.html

¹⁰ *University Implements New Model for Investigating Sexual Assault Cases*, Penn State News, April 29, 2015, <http://news.psu.edu/story/355163/2015/04/29/administration/university-implements-new-model-investigating-sexual-assault>

¹¹ Hereafter "the Hearing Model."

person before a fact-finder and were subject to cross-examination, the Investigative Model dispensed with this requirement.¹² Under the new regime, no live witnesses with firsthand knowledge appear before the fact-finder. Rather, an investigator meets with the Complainant and the respondent, both of whom "may provide written statements, witness names, and other information related to the allegation."¹³ The investigator then "meet[s] and obtain[s] information from possible witnesses."¹⁴ Following this "initial investigative stage," the investigator produces "an Investigative Packet" available for review by both the Complainant and respondent. Either party may, after review of the Packet, respond to its contents. After this review and response, the investigator "address[es] and correct[s], if appropriate, any factual inaccuracies, misunderstanding, etc., and may also conduct additional investigation as appropriate."¹⁵

If the information in the Investigative Packet "does not reasonably support a Code of Conduct violation, the case is closed without charges."¹⁶ If, on the other hand, "the acquired information reasonably supports a Code of Conduct violation," charges are assigned and both the Complainant and the respondent are "given an opportunity to provide a response to the charges."¹⁷ Upon receipt of these responses, the Investigative Packet is forwarded to the Title IX Decision Panel,¹⁸ defined as

¹² The Investigative Model is described in an electronic document titled "Procedures" on Penn State's Office of Student Conduct website, <http://studentaffairs.psu.edu/conduct/Procedures.shtml>. A copy of this document is an exhibit to the Verified Complaint.

¹³ Procedures at 10.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 10.

¹⁷ *Id.* at 11.

¹⁸ Hereafter "Panel."

a specific group of faculty and staff authorized by the Senior Director to review cases alleging Title IX violations that have been assigned to it, to determine whether a student has violated the Student Code of Conduct, and to assign sanctions in response to violation(s).¹⁹

The "Senior Director" is the "Senior Director of the Office of Student Conduct who is designated by the University President to be responsible for the administration of the Code of Conduct and the student conduct process."²⁰

On the basis of its consideration of the Investigative Packet, the Title IX Panel "review[s] the case and make[s] a decision of responsibility/ non-responsibility based on the preponderance of evidence standard." When "responsibility" is assigned, the Panel also determines appropriate sanctions.²¹

2. *The Investigative Model is used to suspend John Doe from Penn State for receiving oral sex from a female student.*

On December 4, 2014, Penn State student Jane Roe (hereafter "Complainant") attended a party at the Alpha Chi Rho fraternity (hereafter "the Fraternity"). A friend of Complainant and Complainant's sister accompanied her to the Fraternity party. Complainant eventually made her way to the basement of the Fraternity, where she listened to music with Plaintiff and three other brothers. While in the basement with the four Fraternity brothers, Complainant suggested having a "fivesome." After announcing "no pictures or video," Complainant performed oral sex on three of the Fraternity brothers, including Plaintiff.²²

¹⁹ Procedures at 2.

²⁰ *Id.*

²¹ *Id.* at 11.

²² Verified Complaint ¶¶50-51.

Police investigated the incident after being informed of it by Complainant's sister later that month, but declined to file charges. On May 1, 2015, Penn State's Office of Student Conduct sent Plaintiff a "Notice of Investigation" informing him that that "the Office of Student Conduct [was] investigating an allegation that he was involved in behaviors that violated the Student Code of Conduct."²³ The document identified, without elaboration or factual detail, "sexual harassment and misconduct" as the "code category" that Plaintiff had violated. The Notice informed Plaintiff that he would be contacted by Office of Student Conduct staff member Spencer Peters for the purpose of "discuss[ing] the allegation" and providing Plaintiff with "the opportunity to share [his] perspective."²⁴

While the Notice explained to Plaintiff that he was not "obligated to share information" with Peters, it warned that he was "required to participate [and that] [f]ailure to do so could result in a separate Student Code of Conduct violation, specifically ... Failure to Comply." The Notice further informed Plaintiff of the following:

- that he was being subjected to disciplinary process under the "Investigative Model" as defined by the Section V, Subsection D, of the Student Conduct Procedures;
- that he would be entitled to an advisor of his choosing to "accompany" him throughout the process;
- that he was not permitted to record any meetings during the process, nor could he photograph or remove any documents that he was permitted to review "related to the investigation";
- that he would be "permitted to review and comment on the investigative packet prior to it being finalized";
- that Peters was a "neutral fact finder" to whom Plaintiff would "be able to provide all evidence, documentation, witnesses, etc., to assist in the investigative process";

²³ Complaint Exhibit 8.

²⁴ *Id.*

- that he was "strongly encouraged" to supply such materials to Peters;
- that he would be permitted to ask Peters "questions related to the investigative process";
- that he "should expect to be asked questions" and that his "honesty [was] expected";
- that the information obtained during the process was confidential "by federal law" and would only be used in accordance with such.²⁵

Peters conducted an investigation that culminated in the preparation of a report, in draft form, summarizing the information he reported receiving from the complainant, witnesses, and three other accused students. Peters permitted Plaintiff to review and comment on this report, but would not permit Plaintiff to have a copy of it. In early August of 2015, Plaintiff submitted to Peters a narrative statement of the events of December 4-5, 2014, supported by exhibits, that gave rise to Complainant's accusation that she had been assaulted.²⁶ Plaintiff's statement emphasized that Complainant did not appear to be impaired when she performed oral sex on him:

During my albeit brief contact with [Complainant], she was articulate, clear in her speech, clear in expressing what she wanted and imposing conditions, demonstrated coordination and balance, was able to assist another person who was significantly impaired if not incapacitated, and never had a drink in her hand or appeared to be drinking. These observations were, in large part, in line with what her friend described and her appearance on photos taken shortly before the incident.²⁷

Complainant, by contrast, contended that she was "too drunk" to consent; did not recall many details and therefore could not have consented; "felt really far gone"; "probably" was unable to stand at times during the incident; did not recall leaving the Fraternity but recalled waking up the next morning; and was in the basement without clothes on.

²⁵ *Id.*

²⁶ Complaint Exhibit 9.

²⁷ *Id.*

According to Peters' report, Complainant stated that, just prior to the incident, she ate a cheese steak, was "hanging out" with other people, and was functioning "pretty fine." Complainant did not vomit that night, nor did she feel sick. During the State College Police investigation, Complainant stated that "the males would not have known that she did not consent."

Peters' report further recounted that a friend who had been with Complainant on the night of the incident accompanied Complainant on a walk to another fraternity shortly before the incident. According to the friend, Complainant appeared "fine," was aware of her location, walked without assistance, and communicated appropriately. When the two returned to the Fraternity, Complainant similarly walked without assistance, was able to use her phone, and appeared to be functioning without impairment. Shortly after arriving at the Fraternity, this friend decided to leave. Complainant told her that she did not want to leave and would remain at the Fraternity. The friend related to Peters that she left the Fraternity without Complainant and was not concerned about Complainant, noting that she would not have left Complainant alone had she felt otherwise.

Peters presented the foregoing in written form to the Title IX Decision Panel, along with other material. The Panel reviewed Peters' report and issued its decision on September 4, 2015, finding that Plaintiff was "responsible" for committing two Code of Conduct violations: nonconsensual oral sex and sexual misconduct involving an incapacitated person.²⁸ The Panel concluded that Complainant was "incapacitated at the time of the incident and therefore unable to consent" because she "indicat[ed] that" she had "experienced some black-out moments"; "fell on the floor and was then helped by somebody [Complainant did] not remember"; and "exhibited outrageous and unusual behavior." The Panel further concluded that Complainant's account was

²⁸ Complaint Exhibit 10.

"in good agreement with" "the rest of the testimonies in the investigative packet." Although Plaintiff never appeared before the Panel, the Panel nonetheless concluded that he "seemed insensitive to the nonconsensual nature of the sexual acts" and recommended that he be suspended from Penn State for two semesters.

On October 2, 2015, Plaintiff appealed the Panel's decision in accordance with Penn State's procedures. That appeal was denied by letter dated October 20, 2015.²⁹

3. *The immigration consequences of the suspension.*

Plaintiff's suspension from Penn State carries dire immigration consequences. His F-1 student visa is dependent on his enrollment at Penn State. Since that enrollment has ceased, "he will be subject to removal, also known as deportation."³⁰ Plaintiff is a Syrian citizen who has resided in Kuwait since childhood. His residency status in Kuwait depends on the renewal of his "civil ID card" every six months. That "civil ID card" is presently valid solely by virtue of his status as a student.³¹

If Plaintiff is denied entry to Kuwait, he will be sent to Syria.³² According to the State Department,

[n]o part of Syria should be considered safe from violence. The potential for hostile acts exists throughout the country, including kidnappings and the use of chemical warfare against civilian populations. Shelling and aerial bombardment, including of densely populated urban areas, have significantly raised the risk of death or serious injury. The destruction of infrastructure, housing,

²⁹ Complaint Exhibit 13.

³⁰ Declaration of Matthew Hirsch at ¶10. This Declaration is an exhibit to the Motion for a Temporary Restraining Order/ Preliminary Injunction.

³¹ Verified Complaint at ¶¶40-42.

³² Hirsch Declaration at 18.

medical facilities, schools, and power and water utilities has also increased hardships inside the country.³³

ARGUMENT

Defendants should be enjoined from enforcing the disciplinary sanctions imposed on Plaintiff because the Investigative Model violates the Due Process Clause of the Fourteenth Amendment.

To obtain a temporary restraining order or preliminary injunction, Plaintiff must prove by a preponderance of the evidence³⁴ that he is (1) likely to succeed on the merits of his claim; (2) that he will suffer irreparable harm in the absence of injunctive relief; (3) that the grant of a preliminary injunction will not result in harm to the nonmoving party that is greater than the harm to plaintiff; and (4) that the public interest favors such relief.³⁵ *Miller v. Mitchell*, 598 F.3d 139, 147 (3d Cir. 2010). "It is well established that 'a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.'" *Kos Pharmaceuticals Inc. v. Andrx Corporation*, 369 F.3d 700, 718 (2004) (citing *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)).

A. *Plaintiff is likely to succeed on the merits claims because Penn State's "paper-only" adjudication of sexual misconduct claims violates the Due Process Clause.*

Student disciplinary proceedings at state-funded universities must be conducted in conformity with the Due Process Clause of the Fourteenth Amendment. *Goss v. Lopez*, 419 U.S. 565 (1975). The fundamental requirements are, of course, notice and an opportunity to be heard. *Id.* at 579. But the exact nature of the process due is context-specific for "(t)he very nature of due process negates a concept of inflexible procedures universally applicable to every imaginable situation." *Id.*, quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

³³ Syria Travel Warning, <http://travel.state.gov/content/passports/en/alertswarnings/syria-travel-warning.html>

³⁴ See *O'Neill v. Secretary of Navy*, 76 F.Supp.2d 641, 645 (W.D. Pa. 1999)

To identify "the specific dictates of due process,"³⁶ our district courts consider the three factors identified in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976):

First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Even a cursory consideration of the second factor, the risk of erroneous deprivation through the challenged procedures, demonstrates a reasonable likelihood that Plaintiff will prevail. Plaintiff recounted that during the "fivesome" incident Complainant was "articulate, clear in her speech, clear in expressing what she wanted and imposing conditions, [and] demonstrated coordination and balance"; Complainant, by contrast claimed that she experienced some black-out moments and was "too drunk" to have consented. To compound the credibility calculus, Complainant's friend described Complainant as "fine,"-- aware of her location, able to walk without assistance, able to communicate appropriately, and able to use her phone-- shortly before the incident. In the face of these conflicting descriptions, how was the fact-finder, the Title IX Decision Panel, to accurately assess which witnesses to believe?

It is long-settled that the personal appearance of witnesses before the fact-finder is indispensable to the assessment of their credibility:

Trial on oral testimony, with the opportunity to examine and cross-examine witnesses in open court, has often been acclaimed as one of the persistent, distinctive, and most valuable features of the common-law system. For only in such a trial can the trier of the facts (trial judge or jury) observe the witnesses' demeanor; and that demeanor- or deposition- is recognized as an important clue to witness' credibility.

³⁶ *Furey v. Temple University*, 730 F.Supp. 380, 394 (2010). The District Court in *Furey* determined, on the basis of *Biliski v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 574 F.3d 214 (3d Cir. 2009), that the *Mathews v. Eldridge* factors should be considered in determining the process that is due in school disciplinary proceedings.

Zig Zag Spring Co v. Comfort Spring Corp., 89 F. Supp. 410, 413 (D.N.J. 1950). Thus, in the procedural due process context, *Goldberg v. Kelley*, 397 U.S. 254 (1970) held that an oral hearing was required prior to suspension of welfare benefits. *Id.* at 269. Other Supreme Court cases have so held,³⁷ and *Goss v. Lopez*, 419 U.S. 565 (1976), the seminal case about due process in student disciplinary proceedings, strongly implied that the "opportunity to be heard" is to be read literally as the opportunity to respond orally in a face-to-face encounter with the decisionmaker. *Id.* at 582.

The Court of Appeals for the District of Columbia undertook a detailed examination of a "paper-only" due process claim in *Gray Panthers v. Schweiker*, 652 F.2d 146 (1980). In that case the Circuit Court reviewed the constitutionality of a procedure whereby challenges to denied Medicare claims in an amount less than \$100 were reviewed purely on the basis of written submissions, "with no further review, and ... [no] opportunity to present one's case personally to the decisionmaker." *Id.* at 149. In holding that the procedure failed to comport with due process requirements, the Circuit Court examined "the value of oral hearings." *Id.* at 159-161. The Court observed that:

[t]here seem to be at least three societal goals served by an oral "kind of hearing"[:] the desire for accuracy, the need for accountability, and the necessity for a decisionmaking procedure which is perceived as "fair" by the citizens. Most often mentioned in the courts is the notion that an oral hearing provides a way to ensure accuracy when facts are in dispute, *especially if credibility is an issue*. Justice Frankfurter believed that "no better instrument has been devised for arriving at truth" than the notice and hearing requirement. Even if credibility is not likely to be directly in issue, personal, oral hearings are an effective way to eliminate misunderstandings and focus issues. Ambiguities which are not readily apparent on the face of a document can be disclosed and clarified with a few moments of oral exchange between the individual and the decisionmaker.

Id. at 161-162 (emphasis added, citations omitted).

³⁷ See, e.g., *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (holding that due process required that a municipal utility afford "an opportunity for a meeting with a responsible employee empowered to resolve the dispute" before terminating service for non-payment of bills, *id.* at 18).

Allegations of alcohol-fueled sexual misconduct at a university inevitably generate grave questions of credibility. Plaintiff had a right under the Due Process Clause to have those questions of credibility, on which his fate depended, answered by the personal appearance of all witnesses subject to questioning before the fact finder. Because he was deprived of this right, he is likely to succeed on the merits of the claims asserted in his Verified Complaint.

B. *Failure to enjoin Plaintiff's removal from Penn State will cause him irreparable harm.*

Irreparable harm is easily demonstrated when a student confronts removal from a university. In *Jones v. Board of Governors of University of North Carolina*, 704 F.2d 713 (4th Cir. 1983), the Fourth Circuit affirmed the grant of a preliminary injunction ordering reinstatement of a nursing student pending resolution of her due process challenge to disciplinary action taken against her. The Court found that the following considerations demonstrated irreparable harm:

[Plaintiff Jones] will be barred from taking courses during the spring semester, delaying the time at which her ability to work as a nurse will come to fruition; she will have a gap in her education which she will be forced to explain throughout her professional life; and she will be deprived of the opportunity to complete her education with her fellow classmates.

Id. at 716. The same is true of Plaintiff. He is presently barred from finishing his coursework in a demanding curriculum, and will be two semesters behind if he manages to obtain the necessary immigration clearance to return to the United States to complete his education. He will have a "gap" of an entire academic year to explain to his employers, and he will be unable to finish his education with his fellow classmates in a demanding curriculum where peer support is an integral aspect of the educational process.

The most immediate injury will be revocation of Plaintiff's student visa and voluntary departure or removal from the United States, possibly to the horrors of Syria if he is denied entry to Kuwait. The process of obtaining a student visa is tedious, at best, and Plaintiff's removal from the United States will compromise his ability to return here.

C. *The grant of a preliminary injunction will not cause greater harm to Penn State than to Plaintiff.*

Defendants can point to no evidence that Defendants will suffer any semblance of the catastrophic consequences confronting Plaintiff. So far as Defendants may claim that Plaintiff is a "danger" to the student community, that assertion is simply negated by the fact that Plaintiff has never been subjected to any other disciplinary claims or proceedings, has never been arrested or charged criminally, and has maintained good standing in a difficult curriculum.

Nor can Defendants claim harm from being enjoined in their efforts to establish a revolutionary "Investigative Model" regime in university disciplinary proceedings. Because Defendants are state actors, they have no cognizable interest in maintaining an adjudicatory regime that dispenses with traditional safeguards and rights long recognized as essential to the procedural due process guaranteed by the Fourteenth Amendment.

D. *It is in the public interest to enforce constitutional norms of due process.*

The public interest almost always favors the applicant for relief if the applicant demonstrates both a likelihood of success on the merits and irreparable injury. *AT & T Co. v. Winback & Conserve Program*, 42 F.3d 1421, 1427 n. 8 (3d Cir. 1994). Most significantly, however, it is simply axiomatic that the public interest *always* favors the application of constitutional norms.

Respectfully Submitted,

October 26, 2015

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