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

JOHN DOE,	:	No. 17-CV-01315
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Plaintiff,	:	(Judge Brann)
	:	
v.	:	
	:	
THE PENNSYLVANIA STATE UNIVERSITY, THE PENNSYLVANIA STATE UNIVERSITY BOARD OF TRUSTEES, ERIC J. BARRON, individually and as agent for The Pennsylvania State University, PAUL APICELLA, individually and as agent for The Pennsylvania State University, KAREN FELDBAUM, individually and as agent for The Pennsylvania State University, KATHARINA MATIC, individually and as Agent for The Pennsylvania State University,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

AUGUST 18, 2017

Before the Court for disposition is Plaintiff John Doe's Motion for a Temporary Restraining Order and Preliminary Injunction. Following a hearing on August 10–11, 2017 and upon thoughtful consideration of the parties' arguments, this Motion will be granted in accordance with the reasoning set forth below.

I. BACKGROUND

A. The Complaint

On September 7, 2016, Jane Roe ("Roe"), a student in the joint program between The Pennsylvania State University ("Penn State") and the Sidney Kimmel Medical College at Thomas Jefferson University,[1] made an initial complaint to Resident Life Coordinator Kyle Kowal of alleged[2] sexual misconduct by Plaintiff John Doe ("Doe").[3] Roe specifically alleged that Doe, a fellow student in this joint program, had, earlier on that same day, attempted to kiss her "a couple of times," and touched her with his hands under her clothes.[4] She further alleged that, during this encounter, she was "unable to fight," "afraid to scream," and, as result, was "bleeding a little" from digital penetration of her vagina.[5]

Following this complaint by Roe, two immediate actions were taken. First, Doe was issued, on September 8, 2016, a "Notification of Administrative Directive" by Mr. Kowal stating that he was to have no contact with Roe.[6] Second,

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1 This program is a highly competitive, accelerated seven year program in which students must complete three years at Penn State, followed by four years at Thomas Jefferson in Philadelphia. *See* ECF No. 31-6, at 3.

2 Here, Doe and Jane Roe vigorously disagree about what happened during the incident in question on September 7, 2016. However, despite this disagreement, the facts surrounding Defendant The Pennsylvania State University's handling of the complaint, the true subject of this litigation, are largely undisputed.

3 *See* ECF No. 31-6, at 30.

4 *Id.*

5 *Id.* at 30, 33.

6 *See* ECF No. 31-7.

Doe received an email on September 12, 2016 from Penn State's Title IX Coordinator, Defendant Paul Apicella ("Mr. Apicella"), requesting his presence at a meeting that afternoon to discuss a report of an incident that "may implicate the University's policy against sexual and gender-based harassment and misconduct."[7] Doe attended the meeting alone and was informed that he would be removed from his current English course, Biology course and Biology lab and reassigned to other sections because Jane Roe was a student in the same classes.[8] Doe was also given a document listing his procedural rights as a respondent in this student conduct matter.[9]

B. The Investigation

On September 21, 2016 John Doe received an email from the Senior Title IX Compliance Specialist, Defendant Katharina Matic ("Ms. Matic"), requesting a meeting for the following day.[10] During that meeting, ultimately held on September 23, 2016, Doe was informed (1) about Penn State protocol; (2) that Roe would be submitting a written statement and that Doe would have the opportunity to read the statement and then respond; (3) that Investigator Matic would "strive to complete the investigation in 30 days"; and (4) that if he were found responsible,

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7 Compl. (ECF No. 1) ¶ 74, at 25.

8 *Id.* ¶ 76, at 26.

9 *Id.* ¶ 77, at 26.

10 *Id.* ¶ 78, at 26.

Penn State policy was "more educational than punitive."[11] John Doe was further told by the Investigator that he could find the Code of Conduct and Student Conduct Policy and Procedures online.[12] He then reported to Ms. Matic that there had been a breach of confidentiality by Jane Roe's father who openly notified parents of students in the pre-med program using a group chat text that one of the students had committed "forcible sex offenses" against another premed student.[13] Ms. Matic later had a meeting with Roe in which she "strongly encourage[d] her to talk to her parents" about the messages.[14]

On September 28, 2016, John Doe again met with Ms. Matic, the Investigator, during which he was first informed of the general substance of Jane Roe's allegations. He was specifically informed that Residence Life had gone to Jane Roe's room to meet with her and her roommate on the afternoon of September 7, 2016. During that meeting, Jane Roe had stated that John Doe had "attempted to kiss her, that she was afraid to scream, that there was touching of a hand up under her clothes and that she might be bleeding a bit."[15] Doe denied these

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[11] *Id.* ¶ 79, at 26–27.

[12] *Id.* The document online on September 23, 2016 was identified as the "Code of Conduct and Student Conduct Procedures, Revised 4/25/2016". Compl. (ECF No. 1) ¶ 80, at 27.

[13] Compl. (ECF No. 1) ¶ 81-82, at 27–28.

[14] *See* Preliminary Injunction Hearing Transcript, Volume II (ECF No. 43) at 150:15-24.

[15] Compl. (ECF No. 1) ¶ 83, at 28.

allegations by stating that it was Roe who had twice attempted to kiss him, and that he had rebuffed both of these advances.[16]

John Doe met with Ms. Matic again on October 5, 2016. While Roe had not yet submitted a written report, Ms. Matic stated that, based upon the incident report from Residence Life, Roe was alleging that John Doe was responsible for nonconsensual digital penetration.[17] The following day, on October 6, 2016, Doe submitted a written statement to Ms. Matic detailing his version of the events on September 7, 2016.[18] Doe had two additional meetings with Ms. Matic, on October 21, 2016 and November 16, 2016, respectively, in which he learned that, despite declining to submit a written statement for review, Roe had nevertheless expressed to Ms. Matic verbally that Doe "had his hand on her inner thigh."[19] Doe denied the accusation.[20] At the subsequent meeting with Ms. Matic held on November 16, 2016, Doe noted that, despite the investigation now eclipsing the 60 day timeline embodied in Penn State's Code of Conduct and Student Conduct Procedures, Revised 4/25/2016, he had not yet been provided with a written statement of the allegations by Roe.[21]

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16 *Id.* ¶ 84, at 28.

17 *Id.* ¶ 86, at 29.

18 *Id.* ¶ 87, at 29.

19 *Id.* ¶ 88, at 29.

20 Compl. (ECF No. 1) ¶ 88, at 29.

21 *Id.* ¶ 89, at 30.

On December 16, 2016, John Doe was allowed to see the preliminary investigation report compiled by Ms. Matic for a limited time in her office and under her supervision.[22] This report stated that the allegations against Doe were based upon Jane Roe's verbal statements made to her Resident Advisor and to the university police, and their unverified incident reports were submitted as Jane Roe's formal Title IX complaint.[23] Doe thereafter submitted a response to the preliminary investigation report on January 3, 2017.[24] In that response, he noted, among other things, that (1) one witness whom he alleges had confided in him that Jane Roe had feelings for him and pursued a physical relationship refused to participate in the investigation after consultation with her parents, (2) Roe's statements to University Police concerning her feelings for Doe were contradicted by one of her witnesses to the investigation, and (3) Roe's statements concerning the extent of physical contract and Doe's statements to her during the incident on September 7, 2016 were inconsistent.[25] These statements were subsequently redacted by Ms. Matic.[26]

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22 *Id.* ¶ 90, at 30.

23 *Id.* ¶¶ 90–91, at 30.

24 Compl. (ECF No. 1) ¶ 97, at 32; *see also* John Doe's Unredacted Response to the Preliminary Investigation Report (Defs.' Exhibit 2).

25 *See* John Doe's Unredacted Response to the Preliminary Investigation Report (Defs.' Exhibit 2).

26 *See* Pennsylvania State University Office of Sexual Misconduct Prevention and Response Investigative Report (ECF No. 31-6), Attachment J, at 65–67.

On January 13, 2017, Doe again met with the Investigator to review the revised investigation report, and, in the course of that meeting, told Ms. Matic that he disagreed with the numerous redactions that had been made in the report.[27] Ms. Matic subsequently conducted a second interview of the witness for Doe, and twice interviewed Roe for clarification.[28]

On March 21, 2017, Doe reviewed another draft of the investigation report, and thereafter submitted another response.[29] At the close of her investigation, Ms. Matic had a telephone conversation with Roe in which Roe stated that (1) she had a medical examination a week after the September 7, 2016 incident, and (2) she had provided physical evidence in the form of blood stained underwear and shorts to University Police.[30] Despite Ms. Matic's subsequent email requests, Roe never responded, and thus did not provide this physical evidence for purposes of this investigation.[31]

The final Investigative Report and Exhibits was provided to Defendant Karen Feldbaum, Associate Director of Student Conduct ("Ms. Feldbaum") on

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27 Compl. (ECF No. 1) ¶ 98, at 32.

28 *See* Pennsylvania State University Office of Sexual Misconduct Prevention and Response Investigative Report (ECF No. 31-6), at 23–26.

29 Compl. (ECF No. 1) ¶ 101, at 33.

30 *See* Pennsylvania State University Office of Sexual Misconduct Prevention and Response Investigative Report (ECF No. 31-6), at 26.

31 *Id.*

April 18, 2017.[32] On May 10, 2017, Ms. Feldbaum notified John Doe that, based on her review of the investigative packet, it was her determination as case manager "that it is reasonable to believe a code of conduct violation has occurred."[33] This notification further stated:

> As such, I have issued the following charge and sanctions:
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> 02.03 / Nonconsensual Penetration: Digital or with an Inanimate Object.
>
> Conduct Suspension through FA2017.
> Educational Program and/or Counseling required for readmission determine by assessment.
>
> I have attached the University form which indicates the charge and sanctions. You have five business days to respond (the form indicates 3 but we provide 5 given the nature of the violation and sanction). Your decision is due to me no later than 5:00PM on May 17, 2017. Your options are:
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> 1) Accept the charge and sanction
> 2) Accept the charge and contest the sanction
> 3) Contest the charge, which will also carry with it a determination of the sanction.[34]

John Doe refused to accept the charge and accompanying sanction, and filed a written response on May 17, 2017 denying Roe's allegations and objecting specifically to Penn State's failure to inform him as to a November 3, 2016

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[32] *See generally id.*

[33] *See* May 11, 2017 Email Concerning Charges and Sanctions Notification (ECF No. 11-7).

[34] *Id.*

revision in the Code of Conduct.[35] That Response was again subject to redaction by Ms. Matic.[36] A hearing before a Title IX Decision Panel was then scheduled.[37]

C. The Hearing and the Board's Decision

The Title IX Decision Panel was held on June 6, 2017. Plaintiff alleges that the following errors occurred before the decision panel. First, Doe alleges that he was silenced when he attempted to talk about the procedural errors committed by Penn State which had impacted the investigation and adjudication in violation of Penn State's Code of Conduct.[38] Second, Doe alleges that the hearing panel improperly rejected eighteen of twenty-two submitted questions as either not relevant or pertaining to new evidence.[39] Doe specifically alleges that the hearing panel rejected the following questions relating to the medical exam which Roe declined to provide:

> When and where did you have a medical examination?

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[35] Compl. (ECF No. 1) ¶ 103, at 33. Doe specifically stated that, at the September 23, 2016 meeting with Matic, he was directed to find a copy of the "Office of Student Code of Conduct and Student Conduct 4/25/2016" procedures online. Despite meeting with administrators and staff regarding the alleged incident more than a dozen times thereafter, he was not informed until until the last May 1, 2017 that the procedures had been revised and reissued nearly 6 months prior on November 3, 2016. Compl. (ECF No. 1) ¶ 105, at 34.

[36] *Cf.* John Doe's June 1, 2017 Un-redacted Response to Charge and Sanction Notification (ECF No. 11-9) *with* John Doe's Redacted Response to Charge and Sanction Notification (ECF No. 11-10).

[37] *See* May 23, 2017 Email from Karen Feldbaum to John Doe and Marybeth Sydor Report (Defs.' Exhibit 6).

[38] Compl. (ECF No. 1) ¶ 118, at 39.

[39] *Id.* ¶ 121, at 40.

> You were examined to see if there was any evidence of non-consensual penetration by [Doe]. Is this correct?
> You received the results of that medical examination, in a report or records, right?
> Before you were examined, you explained to someone there what happened and why you wanted a medical examination, is this correct?
> And you provided information about whether you had any medical conditions and whether you are taking any medications?[40]

The Hearing Chair rejected all these questions, reasoning:

> We understand you already went for a medical exam and we also understand that a medical exam is not going to determine whether it was consensual or nonconsensual activity in any case, so that's not relevant. **Again, that's new information so not considering.**[41]

The Title IX Decision Panel found Doe to be in violation of Penn State's Code of Conduct that same day,[42] and issued an opinion memorializing these findings on June 7, 2017.[43] The Panel issued the following sanctions: (1) "Disciplinary Suspension through FA2017"; (2) "Required to successfully complete counseling evaluation/assessment under the direction of the Office of Student Conduct"; (3) "Loss of on-campus privileges"; and (4) "Recommendation for the loss of participation in the Penn State Jefferson premed/medical program as long as [Roe] is a participant in this program."[44]

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40 Questions for Complaint (ECF No. 11-11).

41 Compl. (ECF No. 1) ¶ 125, at 42 (emphasis added).

42 *See* Email from Karen Feldbaum to Doe on June 6, 2017 (Defs.' Exhibit 10).

43 *See* Title IX Decision Panel (ECF No. 11-12).

44 *Id.*

D. The Appeal

On June 16, 2017, Doe appealed this decision to the Student Conduct Appeals Officer, Yvonne Gaudelius.[45] On appeal, Doe raised made the following arguments: (1) "Respondent has been deprived of his rights"; (2) "Stated procedures were not followed that affected the outcome"; and (3) "the sanctions imposed were outside the University's sanction range for such violations and were not justified by the nature of the offense."[46] On June 27, 2017, Dr. Gaudelius denied the appeal on grounds that "there was no deprivation of rights or failure to follow stated procedures, such that the outcome would have been different."[47]

E. This Action

On July 25, 2017, Plaintiff John Doe commenced the instant action against Defendants The Pennsylvania State University; The Pennsylvania State University Board of Trustees; Eric J. Barron, individually and as agent for the Pennsylvania State University; Paul Apicella, individually and as agent for the Pennsylvania State University; Karen Feldbaum, individually and as agent for the Pennsylvania State University; and Katharina Matic, individually and as agent for the Pennsylvania State University.[48] In the operative Complaint, Doe alleged the

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[45] Doe's Appeal of Title IX Decision Panel Findings (ECF No. 31-11).

[46] *Id.*

[47] Penn State's June 27, 2017 Appeal Denial Letter (ECF No. 11-8).

[48] ECF No. 1.

following causes of action: (1) denial of Fourteenth Amendment procedural due process pursuant to 42 U.S.C. § 1983; (2) violation of Title IX of the Education Amendments of 1972; (3) breach of contract; (4) breach of covenant of good faith and fair dealing; and (5) estoppel and reliance.[49] A subsequently filed Motion to Proceed under a Pseudonym was granted by the Court on August 3, 2017.[50]

On July 28, 2017, Plaintiff filed the instant Motion for a Temporary Restraining Order and Preliminary Injunction to prohibit Defendants from barring Plaintiff from attending Fall Semester 2017 Classes at Penn State and from participation in the Penn State–Jefferson seven (7) year pre-med program.[51] This Motion has since been fully briefed,[52] and an evidentiary hearing held on August 10–11, 2017.[53] The matter is now ripe for disposition.

II. LAW

The United States Court of Appeals for the Third Circuit has recognized that "the grant of injunctive relief is an extraordinary remedy, which should be granted only in limited circumstances."[54] In order to obtain a preliminary injunction, the moving party must demonstrate (1) a reasonable probability of success on the

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[49] *Id.*

[50] ECF No. 20.

[51] ECF No. 11.

[52] ECF Nos. 12, 31, & 33.

[53] ECF No. 34.

[54] *Instant Air Freight Co. v. C.F. Air Freight. Inc.*, 882 F.2d 797, 800 (3d Cir.1989) (internal quotations and citation omitted).

merits; (2) whether the movant will be irreparably harmed by denying the injunction; (3) whether there will be greater harm to the non-moving party if the injunction is granted; and, (4) whether granting the injunction is in the public interest.[55]

In *Reilly v. City of Harrisburg*, the Third Circuit recently clarified the burden on a party seeking issuance of a preliminary injunction.[56] The *Reilly* Court specified that a party seeking a preliminary injunction must first demonstrate that: (1) "it can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not)," and (2), "it is more likely than not to suffer irreparable harm in the absence of preliminary relief."[57] The *Reilly* Court continued that "[i]f these gateway factors are met, a court then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief."[58] Finally, I note that "[i]t is well established that 'a preliminary injunction

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55 *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 302 (3d Cir. 2013); *Crissman v. Dover Downs Entm't, Inc.*, 239 F.3d 357, 364 (3d Cir. 2001); *Beattie v. Line Mountain Sch. Dist.*, 992 F. Supp. 2d 384, 391 (M.D. Pa. 2014).

56 858 F.3d 173 (3d Cir. 2017).

57 *Id.* at 179.

58 *Id.*

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.' "[59]

III. ANALYSIS

In Doe's Motion for a Temporary Restraining Order and Preliminary Injunction, he argues that injunctive relief is appropriate because he has shown (1) a likelihood of success on the merits of both his due process and Title IX gender discrimination claim,[60] (2) immediate irreparable injury if the imposition of his suspension and recommendation of a multi-year suspension from the Penn State-Thomas Jefferson program is not stayed, (3) that the balance of harms favors injunctive relief, and (4) that the public interest favors relief. Penn State, for its part, denies the satisfaction of all factors in favor of injunctive relief. Having heard and considered the arguments of both parties, I find that preliminary relief is appropriate.

A. Plaintiff Has Demonstrated a Likelihood of Success on the Merits of his Due Process Claim.[61]

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[59] *Kos Pharmaceuticals Inc. v. Andrx Corporation*, 369 F.3d 700, 718 (2004) (citing *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)).

[60] Plaintiff has not briefed, and the Court will therefore not opine on, the likelihood of success on the merits of the remaining claims within his Complaint.

[61] This merits determination is only for purposes of the instant motion for injunctive relief, and, as such, the Court is not bound by its findings and conclusions in deciding a future dispositive motion. *See Morris v. Hoffa*, 361 F.3d 177, 189 (3d Cir. 2004)("[A] decision on a preliminary injunction is, in effect, only a prediction about the merits of the case." Therefore, "a trial court, in deciding whether to grant permanent relief, is not bound by its decision or the appellate court's decision about preliminary relief." (citations omitted)).

The Due Process Clause of the Fourteenth Amendment provides that "nor shall any state deprive any person of life, liberty, or property, without due process of law."[62] The leading case on Due Process rights in the public educational context is *Goss v. Lopez*, 419 U.S. 565 (1975). There, the Supreme Court of the United States held that the notion that "the Due Process Clause does not protect against expulsions from the public school system . . . misconceives the nature of the issue and is refuted by prior decisions."[63] Rather, the Court concluded that the Due Process Clause does in fact protect against arbitrary suspensions from the public education system, writing:

> A short suspension is, of course, a far milder deprivation than expulsion. But, "education is perhaps the most important function of state and local governments," *Brown v. Board of Education*, 347 U.S. 483 (1954), and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.[64]

Turning to the application of the Due Process Clause, the Court wrote: "Once it is determined that due process applies, the question remains what

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62 U.S. Const. Amend. XIV.

63 *Goss v. Lopez*, 419 U.S. 565, 572 (1975) (White, J.).

64 *Id.* at 576.