STATE OF NEW YORK
SUPREME COURT : COUNTY OF JEFFERSON

In the Matter of the Petition of	:	RJI #22-18-0762
		Index #2018-1865
JOHN DOE "1", JOHN DOE "2", JOHN DOE "3", JOHN DOE "4", JOHN DOE "5", JOHN DOE "6", JOHN DOE "7", JOHN DOE "8", JOHN DOE "9", and JOHN DOE "10",	:	
Petitioners,	:	
-vs-	:	
SYRACUSE UNIVERSITY,	:	
		Motion and
Respondent.	:	Decision

Dulles State Office Building
317 Washington Street
Watertown, New York 13601
August 22, 2018

B E F O R E:

HON. JAMES P. McCLUSKY,

Supreme Court Justice

A P P E A R A N C E S:

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Senior Court Reporter

THE COURT: We're here on John Doe Number 1 through 10 versus Syracuse University. First of all, it's scheduled for 10:00 o'clock, it's a little before 10:00, any objection to starting early?

MR. POWERS: No objection, your Honor.

MS. FELTER: None, your Honor.

THE COURT: In addition, we have -- procedurally, we'll start with an order to show cause, which was properly served on the Respondent, and to give them an opportunity to be heard. They were heard and the Court requested additional written documents so to clarify the issues, and in response we got a cross motion in response to the cross motion.

Just jurisdictionally, I don't know if we have jurisdiction to hear the motion yet, Syracuse has not officially been served with an order to show cause. Is there any objection to waiving that or having nuc pro tunc to the day you got the original papers?

MR. POWERS: We're not going to be objecting to service of the -- of the proceeding, assuming it goes forward.

THE COURT: All right. No objection to me hearing the summary judgment motion today?

MS. FELTER: No, your Honor.

THE COURT: All right. And the Court has reviewed

the papers. Miss Felter, I'll give you first chance -- anything to add to your written paperwork?

MS. FELTER: Well, I think, your Honor, I'd like to just add a couple of things. First of all, as I explained to the Court during the telephone conference that we had last week in the case with Counsel, we believe that there was no basis for -- jurisdictional basis to bring the Article 78 claim in federal court, and I think that the papers that we submitted both in support of and in reply to the opposition to our application have borne that out.

The -- it's ironic, frankly in a way, because at the time that we were struggling to get this matter first filed in federal court back in April, on the 24-hour period between when we met with the students and learned that they had been improperly suspended, and then scrambled to get something filed and seek injunctive relief regarding the improper suspension, we were looking for a federal claim to bring.

We were racking our brains trying to figure out how we could bring a federal claim, in addition to the state law claims, for breach of contract and defamation. We ended up settling on a due process claim that was based on state action, based on the University's adoption and implementation of a provision of the education law.

But ultimately, after the case was filed and things

were going forward, we recognized that in a motion to dismiss, which surely would be filed, that that claim would be subject to dismissal based on the availability of a remedy in Article 78, which we then determined would not be something that the Court in the federal case would have jurisdiction over.

So we eliminated the federal claim from the complaint, and all that remained is the state claims for breach of contract and defamation, seeking monetary damages which, according to the case law that we have provided to the Court, that that type of claim -- that monetary damage claim is not available in an Article 78, and federal courts cannot hear Article 78 petitions for reversal, annulment, et cetera, of an administrative determination unless there's a separate basis for federal jurisdiction, which there isn't in this case.

So I think it's ironic because if we had included the Article 78 claim in the federal action, as sure as I'm standing here, Mr. Powers and his firm would have moved to dismiss that, as they have the other causes of action in the federal case.

They recently filed a motion to dismiss, that's now pending. I'm certain that they would have said that the Article 78 claim for relief was subject to dismissal based on the Court's lack of jurisdiction to hear or consider it.

The second thing I think that isn't explicitly laid out in our papers, and I know the Court has read the papers, is that, you know, the idea that these students are not -- that they haven't asserted a privacy interest that would entitle them to proceed anonymously, is -- is particularly troubling to me because of the fact that it's the University and its student newspaper, The Daily Orange, which created the situation, the hysteria, the publicity, the media attention on this particular situation, and they did that in an effort to distance themselves from what they obviously knew was a social stigma associated with these kinds of incidents.

So in order to -- to deflect attention from themselves and project that they were doing everything in their power, you know, to eliminate these monsters on campus, you know, they basically accused these kids of being criminals, engaging in violent sexual misconduct, of being virulent, racist, and antisemite, and they created the situation where there's all this notoriety and media attention, national and international, over this case.

And that was completely unnecessary. Because the fact is that this was a private, satirical roast that was conducted in the basement of a fraternity. It had no -- there was nobody in -- that was present there that was offended, assaulted, injured in any way by the performance

of that skit, and it's the University and its daily newspaper that made the situation as public and as controversial as it is. So they created --

THE COURT: Just -- I'm sure we're going to hear from Mr. Powers when he gets the chance to speak, but the newspaper is an independent organization; correct?

MS. FELTER: We don't know. They claim that it's an independent organization; but, frankly, that would be the subject of discovery as to what the financial support arrangements are. It's a student-run organization. You know, just because it's run by students doesn't necessarily means it's independent of the University.

So I mean, you know, I -- it can't be lost on anyone, including the Court, that, you know, the world that we live in now, you know, these kind of allegations of being virulent, violent, racist, antisemite, engaging in acts of sexual harassment, misconduct -- those kinds of allegations bring out the pitch forks. These kids are subject to threats, they're subject to social stigma for the rest of their lives for being associated with this.

So regardless of whether they are victims of sexual assault -- and the provision of state law doesn't specifically apply to them or protect them -- the balance of equities in terms of the common law duty to assess whether they have a privacy interest absolutely weighs in their

favor.

So I think, as I said, it's just ironic that the University, which created the circumstances under which this hysteria exists, now claims that these students are not entitled to a privacy while it's determined by this Court whether they should have been prosecuted in the first instance for this conduct that has nothing to do with the Code of Conduct violations that were charged and prosecuted.

So I'll reserve my right, perhaps, to respond additionally.

THE COURT: Mr. Powers?

MR. POWERS: Thank you, your Honor. A lot was said in the papers, and I apologize for the length of them. There were -- there was a lot of ground to cover and we didn't want to leave anything on the table since this is a very important issue and this is a very important decision point.

So I want to cover the things that Miss Felter has raised, but I want to start out with the observation that the federal court action, which is deciding the same arguments -- in other words, the arguments that were made mainly in the reply papers are the same arguments, many of which have already been made to Judge Scullin, he's already ruled on them.

THE COURT: There's three people in this action

that aren't in the federal action; correct?

MR. POWERS: That's correct, your Honor.

THE COURT: At best, even if I buy the Syracuse University argument that we don't have jurisdiction because there's another matter pending, we could still leave those three people pending.

MR. POWERS: Well, perhaps we should discuss that argument, your Honor, because the group of clients that this law firm has represented has been much larger than the clients that they chose to put forward in the federal action.

They chose those clients so that they would have diversity and they would have a federal forum for what Ms. Felter admits her state law claims. They chose the forum, they chose to leave certain of their clients off that caption. Now they come in front of you, having already litigated many of the issues that are in this petition, seeking to relitigate those petitions selecting a different subset of their clients.

THE COURT: Well, if they had a separate lawsuit, brought by a separate attorney, with three students who are New York State residents, they bring the Article 78, we could still have two different decisions, then, if you're arguing they're the same -- it would be the same decision. I could decide differently than Judge Scullin.

MR. POWERS: My response to that, your Honor, is what they should have done, and the argument's been made, if we add these three Plaintiffs, also our clients, to the first filed action, that that will defeat diversity jurisdiction; and in that case, we'll get remanded to state court. That's the argument. There's nothing preventing them from doing that.

Now, when they do that, that action goes to state court with its entire procedural history. Everything that Judge Scullin has done and decided, or Judge Peebles as the case may be, goes with it. You avoid all the problems that we're facing right now with the same issue potentially being decided by the same -- by different courts at the same time, and that's an issue that we try to void.

THE COURT: You can't force somebody to go to Smith Sovik if they don't want to go with Smith Sovik.

MR. POWERS: What I'm suggesting, your Honor, is that this was a conscious choice they made at the outset. They chose federal court. They could have had all their clients together in one action, they could have brought it in state court. They must have viewed -- and I would suggest they do view -- that any ruling in that federal court case was going to benefit their clients who are not part of the lawsuit.

Indeed, all of their claims aren't based on a

specific conduct by individuals, they're based on conduct against the group. They treat them all uniformly and we see it in this action.

You don't have individual affidavits from each of the clients, each of the Petitioners stating what their irreparable harm is. They're treating the entire body as a group, and so they must have believed -- and I would submit they do believe -- that all their clients are going to benefit or would have benefited from the rulings that they got from Judge Scullin, that's why they chose strategically, tactically to do what they did.

Now, conceivably, Judge, I think you make a point that those three non- -- those three individuals that aren't in the federal court action, perhaps they could have brought their own -- their own case. But I would also suggest to you that the court -- and the court's frown upon a law firm representing a group of clients litigating the same issues serially in different courts so that they have multiple chances to argue the same things -- to litigate the same things, that both the federal court and the state court has a problem with that.

So if your solution is, A, we allow this case to go forward with respect to the three, you know, nonidentical Petitioners, I agree that's one option. The other option is to make them or have them or allow them to add those

Petitioners to the federal court action and then let the Court do what it has to do with respect to jurisdiction. Now that will end up in state court --

THE COURT: How many students were suspended or affected by this? More than 10?

MR. POWERS: I think 18. One settled, I think Smith Sovik -- it was represented to me that they represented 16 or 17. I know one on appeal got their suspension reduced to probation, I think there may have been a couple that chose not to appeal. So I think the entire --

MS. FELTER: There's one who did not appeal.

MR. POWERS: I think the entire subset now is, what -- 16 or 15 that have gone all the way through the appeal process?

MS. FELTER: There were 15 that went through the entire appeal process, there were 3 that accepted informal resolutions, either before the disciplinary action -- the disciplinary proceedings took place or at the end of it. There was one who actually, I think, just at the tail end -- the last day of the disciplinary hearing ended up accepting an informal resolution. So of the 18 that were originally charged, there were 15 that received decisions from the conduct board, and of those 15, 14 filed appeals.

MR. POWERS: So --

THE COURT: Are there only 10, then, that are now

pending that --

MS. FELTER: There are 10 --

THE COURT: -- to resolve the issues?

MS. FELTER: There are 10, and there's one who's waiting in the wings, so there's potentially 11. The one who is waiting is trying -- is waiting to see what the Court's determination is on the -- I can never say this word -- anonymity motion before he elects to participate.

The other 10 were, of the 14, were the ones that were able financially to provide, you know, retainer -- financial to go forward with it. So there were some that just elected -- that their families just don't have the money to proceed with the litigation, so --

THE COURT: All right.

MR. POWERS: So sounds like there may be a third action once the client waiting in the wings decides whether to file suit, so I would --

MS. FELTER: We would just add him to this. I think we can amend the petition to add him as a Petitioner.

THE COURT: So a possible third suit, we'll leave it at that.

MR. POWERS: So I would suggest to you, your Honor, under the circumstances, and these are the types of circumstances where the Court's look at 3211(a)4, the parties don't have to be exactly the same. It contemplates

a situation like this where the parties aren't identical, but the issues are the same, the relief's the same. And so you have the authority under 3211 to dismiss this case.

These three Petitioners are not left without a remedy. They keep -- their counsel can add them to the federal court action, there's nothing prohibiting them, and then that case obviously gets remanded to state court and it proceeds together with its entire procedural history, as it should, and you avoid all these problems that we're having here which are, you're being asked to litigate the same issues that have already been litigated.

These contract arguments that are made to you for likelihood of success on the merits, they were already made to Judge Scullin.

Now, I'm not suggesting there's res judicata affect, but this Court doesn't like -- this Court doesn't like when litigants litigate the same issue twice in different courts. That's why we have the common law claims spliting the forum shopping, that's why we have 3211(a)4.

Now, I would suggest to you, even if you decide I'm entirely wrong on all of my -- all of my challenges based on the multiplicity of actions, that there's no likelihood of success on the merits here. That everything you need to know and you're going to be deciding this case is in front of you and it's available.

You know what the conduct is here. And I've heard this -- these individuals referred to as kids. They're not kids, these are young men that have engaged in this conduct that, hopefully, you have viewed.

I don't think -- in order for you to find that a TRO is appropriate, you have to think it's likely, looking down the road, that I'm going to let them off the hook, that they're not going to be subject to any punishment. These adult men, for this conduct which was not in a private room, they weren't whispering to each other, this is a student organization -- it's a chartered, student organization. This was a scheduled event of a chartered student organization. What happens there is imputed to the University. University has an obligation to oversee what happens in these fraternities at these events. It wasn't in private --

THE COURT: Does the University have a rule saying that students can't say -- be rude, crude, and socially unacceptable, that they can't say anything racist, sexist, homophobic, ageist, or et cetera, et cetera.

MR. POWERS: It absolutely does, your Honor. In fact, it references the student -- it references the student organizations. This is Exhibit M, Syracuse University Statement of Student Rights and Responsibilities, this is on Page 2 of the student handbook, it's under Paragraph 2:

Students have the right not to be discriminated against by any agent or organization of Syracuse University for reasons of age, creed, ethnic or national origin, gender, pregnancy, disability, marital status, age --

THE COURT: And this fraternity, who did they discriminate against?

MR. POWERS: They discriminated against individuals with disabilities, they discriminated --

THE COURT: Did they discriminate?

MR. POWERS: -- African Americans, they discriminated against --

THE COURT: What I understand, they said some inappropriate things, but is that discrimination? Did they prevent somebody from doing something?

MR. POWERS: The way that I would analogize this, your Honor, is as follows: These are adults, they were at an organization sanctioned event, and they are having -- they are putting on skits for an audience of 30 to 40 other members of the organization that have objectively racist, homophobic, other -- other ethnic slurs. Any organization in the country, whether it's employment or it's a private organization, for an adult, you're going to be punished for this conduct.

It's -- it's -- it is not a stretch. It's certainly not shocking to the conscience -- that's the

standard.

THE COURT: So if they show All in the Family in the fraternity, a TV show, would that not be allowed?

MR. POWERS: If they show --

THE COURT: The TV show, All in the Family. If they ran an afternoon where they showed six hours of All in the Family, which is certainly racist, sexist, et cetera, et cetera, by today's standards -- maybe not when it was showed -- but it's -- and has the N-word in it, it has all that in, would that not be allowed? Could they be punished for watching All in Family, Blazing Saddles? Where do you draw the line according to your handbook here?

MR. POWERS: Well, Judge, I would suggest to you that when viewing this conduct in context, it's very different than All in the Family. And the real issue in these cases is not a court's overseeing how the University is applying its own standards -- that's a matter for the University to determine what the level of appropriateness is of this, and I would suggest to you it's objectively inappropriate, but that's the University's decision. The Court only gets involved if the punishment is so out of proportion with the conduct that it shocks the conscience. That's the standard.

THE COURT: Isn't the standard, also, they have to violate something before they can punished? If they're

being punished for not violating the rules of the school, isn't that shock -- you know, shocks the conscience?

MR. POWERS: Judge, with all due respect, in a public event, at a student organization, where discriminatory things are said, it's well within the discretion of the University to find that that's discriminatory towards the bodies that are being -- the groups that are being slurred.

To -- to suggest that it's okay in an organizational setting or a public setting to use the, for example, the N-word, or other equally unacceptable slurs, or to, in one skit, mimic the gang rape of an individual in a wheelchair, to suggest that that's a not punishable conduct -- if that's not punishable conduct, I don't know that there is any punishable conduct. I mean, that's --

THE COURT: It was alleged it was done in satire. You haven't raised any issue saying it wasn't satire at this point in time.

MR. POWERS: I think we have opposed that in numerous places in our papers, Judge. In fact, satire, as I understand it, is speech that's made to make a higher social or political point.

Now, I've heard that this is satire, but all I see is a -- is a bunch of fraternity members yucking it up, making racist statements and other -- you know, the racist

statements, in my view, aren't the worst of it. There are other fraternity members laughing at it.

Now, I'm not sure that that's making a higher political or social commentary; if it is, I'd like to know what that is. I haven't seen it. They've called it satire, but that's it.

I don't think that the majority of the alumni, faculty, student body that have seen these videos get the satirical point. I don't get it. Maybe it's there. It's not on the surface, but the University is within its -- within the bounds of its authority to punish for the objective conduct. They don't have to divine some secret -- a higher satirical meaning. I would suggest it's not there. But that's not the -- that's not the standard for this Court to intervene in private college's disciplinary decision.

THE COURT: Well, it is if your standard says that harassment, whether physical, verbal, or electronic, which is beyond the bounds of protected speech, directed at specific individuals, easily construed as fighting words.

I don't see any of that here, and you -- and they were found guilty under Section 2 of the Code of Student Conduct.

MR. POWERS: Well, Judge, even though I -- I'm not agreeing that that's the standard in the Disciplinary Code, because the other provision in the Disciplinary Code says

you can engage in free speech as long as you don't violate the Code. But even if there were free -- even if this Disciplinary Code imported the first amendment standard, this is not protected speech, your Honor. They're not free to give this speech. They're not free to be free from punishment for giving this speech.

Look at the Keefe case that I cited, your Honor. That was a public university, first amendment applied. The speech there, which was also on Facebook, was much, much less severe.

THE COURT: That was the nursing student?

MR. POWERS: Nursing student, yes, your Honor.

THE COURT: He threatened her; that's a lot more severe than this.

MR. POWERS: He didn't threaten her to her face, he made a statement on Facebook. You just told me, your Honor, that these people didn't discriminate against anybody because they just made these statements on Facebook.

THE COURT: No. They made the statements, I'm not saying they didn't make the statements, but making -- I had -- my question was, is making statements discrimination?

MR. POWERS: The answer is yes, it is discrimination. If -- if you made those statements in open court, you'd be subject to some censure if you used those words. Why are these individuals not -- why are they not

held accountable for what they do? If you or I did this, we might lose our employment.

You have free speech rights. You have a lot more free speech rights because we're in the well of the courtroom, but you wouldn't expect to not have some form of censure or reaction if you engaged in this type of conduct.

I would suggest it's no different in any other organization. Any other organization, any place of employment, this is not protected speech. They're not free to walk around campus and utter these words without fear of punishment. I don't -- I would suggest that that's not a reasonable interpretation of this Student Disciplinary Code. And that's -- I grant you, that seems to be the argument the Petitioners are making, that what this Disciplinary Code does is -- it would allow them to walk around campus and say these things without fear of punishment. That's -- that's just not a reasonable interpretation of this provision.

And it's not -- with all due respect, and I would again cite you to the Fernandez case. Fernandez case, there were a couple of e-mails that were sent that were described as harassing. The Court said that the Petitioner have notice of the charges, had an opportunity to be heard, also had an appeal, punishment doesn't shock our conscience, was a year suspension, we're not going to become involved. That's what the Court says. That's the standard in this

state.

So what Petitioner is asking you to do is, they're asking you to second-guess the interpretation of these Disciplinary Code provisions for the University, to get involved and really be a second level of appeal, to provide a de novo review whether or not you think this conduct violates the harassment provisions. There's harassment provisions in the Code, there's harassment provisions in the fraternity and sorority policy. That's not the role of the Court with all due respect.

The question is, does this punishment shock your conscience, or are you likely to find down the road -- because we're here on a TRO -- are you going to find down the road that this one-year suspension is shocking given what these students engaged in. I would suggest we're not even close to that.

This is within the discretion of the University. This one-year suspension, this two-year suspension -- those are within the published punishments in the guidelines for violation of these types of provisions. These are within the discretion of the University.

The student in Keefe, the nursing student who just -- he posted a rant on Facebook -- he also used the I-was-just-joking defense. He got expelled. The 8th Circuit not only found that that wasn't a violation of the

first amendment, they found it wasn't arbitrary and capricious. That's the same standard applied here.

So, your Honor, just backing up, I -- I think there are real problems with respect to two courts deciding the same issue, issues at the same time now. I think Counsel's correct that, which she mentioned in her reply papers, that 3211(a)4 gives you the discretion to fashion an appropriate remedy under the circumstances.

And I do think that there are, perhaps, other work-arounds for you, but that's a very real problem which I would respectfully suggest needs to be addressed. That you should not be deciding things that Judge Scullin has either already decided or things that are already pending in front of him, and that it's not fair to the University to have to defend the same issues in different courts, which we are doing right now, arguing the same things that I've already argued to Judge Scullin.

The other thing that I would bring to your attention, your Honor, and I -- and I don't know if -- if it's going to change your view, and I would like to supplement the record, but we learned -- we've learned yesterday that four of the Petitioners are currently enrolled in other colleges and universities.

And this goes to two issues -- it goes to this anonymity issue and it goes to this issue of an irreparable

harm. I believe the Petitioner from Hawaii is enrolled in another university, and the two petitioners from Massachusetts are enrolled in universities there, and the California petitioner is enrolled in a university there.

So what we've done here, instead of what you would ordinarily expect on a preliminary injunction motion where you have an actual affidavit from the Petitioner detailing to you, in specifics, what is the irreparable harm that I'm going through -- you don't have that here.

The reason we don't have it is because of this anonymity issue. It makes it more difficult for the University to defend itself because we have to -- we have to steer around not always exactly knowing who the petitioners are, and we have to be careful about what we say in court and what we do in court and what evidence we submit. It's an -- it's an obstacle to defending a case the way it should be defended, but this is -- this is indicative of it, because we're going forward on an extraordinary remedy and you don't have specific evidence of irreparable harm, and I would suggest to you that if this is true, I'd like to supplement the record. The four individuals who are currently going to school in other places don't need to be readmitted to Syracuse University, and there is not irreparable harm as to those individuals, even if Petitioner is correct.

We have cited the law that says an interruption in schooling of a semester -- which is what we're talking about on Article 78 -- that's not irreparable harm. It's not unusual for students to take more than four years to finish their schooling. I've got one of them who is living in my house right now. That's not irreparable harm.

If they're unsuccessful in either the federal court litigation or this Article 78 petition, then -- then there may be things that flow from that, but that's -- that's a result of the conduct, that's not -- that's not a harm that's created by the period between now and your decision on the merits, if there is one.

THE COURT: Melvin v. Union College says missing a semester is irreparable harm, it's a Second Department case.

MR. POWERS: Well, I think that there were two other aspects to that. I think that there were -- there was a real question of a disputed issue of fact. In other words, whether or not this academic dishonesty had actually occurred, and I also think the court found there was no harm to the University -- that there's no equities involved with respect to the University.

It was a single female student accused of academic dishonesty. No one was going to be harmed by her readmittance during the pendency of the Article 78.

You've got -- certainly, you've got the Melvin

case, I would suggest it's very different than this case, but you've also got other cases that say --

THE COURT: The Melvin case, though, is the irreparable harm statute, says it is irreparable harm. There's two other factors they have to meet to -- which would be the likelihood of success and the balance of the equities. They found that was this irreparable harm for factor number two.

MR. POWERS: I can't -- I can't argue with you there, the court did find it in its discretion, but I'm just saying there's case law going the other way.

THE COURT: But not Fourth Department, Court of Appeals.

MR. POWERS: Melvin's not Fourth Department.

THE COURT: The Second Department. And if there's no Fourth Department case, I have to follow the other Department's position.

MR. POWERS: Well, we don't know what proof the Plaintiff submitted regarding the irreparable harm. You have no such proof in front of you.

THE COURT: I think you may raise a valid point there on that issue, and that's separate and looking at the fact that you're going to be out -- possibly out a semester in the abstract. You raise a point, we don't have individual statements from the students.

MR. POWERS: All right. So on this issue of the federal court not being able to hear the Article 78 provision and Counsel said that it's ironic because we would certainly have moved to dismiss it arguing that the Court lacked jurisdiction.

Well, I've included in my submissions representation that I make to the Court in the federal action and I represented to the Court that we were going to consent -- we, being the Defendants, were going to consent to an amendment of the complaint to add an Article 78 claim.

In fact, I represented to the Court that they intended to do so. I represented that because Counsel of record told me they were going to do it, and so as an officer of the court, I couldn't have consented to the amendment of the pleadings to allow a claim which the court had no jurisdiction over, which I was going to then turn and argue the Court lacked jurisdiction over. I couldn't do that.

And, also, I would suggest to you that it wasn't just me who represented that to the Court, it was both parties. That stipulation and that letter that I sent to the Court, I sent to Mr. Hulslander in advance for this reason -- the same reason we do this in practice, make sure that he's okay with what I'm representing to the Court about his intentions.

So it's not -- it's not ironic and it's not a certainty that I would challenge the jurisdiction of the Court to hear the Article 78. In fact, that would have been fairly stupid on my part because it would have ensured a second action. I never would have done that to my client. I would have never put my client in the position it's in now having to litigate two different cases at the same time.

It also took me about 20 minutes to find Doe v. Zucker, which is a case from the Northern District from last year -- or last month, excuse me, by the Chief Judge, Judge Suddaby. In that case, the Petitioner argued to the Court, you've got to cleave off the Article 78 claim because that's a -- that claim can only be held, exclusively be considered in state court. That was the argument the Petitioner made in Doe v. Zucker. Judge Suddaby rejected that. You cannot accept what Counsel was telling you and accept the holding of Doe v. Zucker. They are irreconcilable.

Now, I -- I acknowledged the case law that Counsel is relying on, there's cases on both sides in the district, and I referenced this in my papers. But those cases are determining -- and they use the term, we're declining to exercise jurisdiction. They're exercising their discretion under 28 USC -- Title 28 of the United States Code, Section 1367. That is a section that was created for this very purpose, to make sure that all the claims, including state

law claims, that arise out of the same set of events get tried in one case. That's the purpose of 1367.

Now, these cases, and sometimes very emphatic language say, you know, we're going to decline jurisdiction over the Article 78, those are better heard in state court. Most of those are cases against the government or a regulatory agency, state agency involving the application of state law. This is not such a case. The federal court is just as well equipped to interpret the student handbook as you are, your Honor.

The other significance is -- and I'll cite you back the Melvin case -- Melvin v. Union College, the Court held, including the Second Circuit -- or Second Department, that a breach of contract claim arising out of student discipline is functionally equivalent to an Article 78 claim. And how do we know that? We know that because the trial court converted the breach of contract claim to an Article 78 claim, and Second Department affirmed.

Breach of contract claim arising out of student discipline is already in the federal action. That's a functional equivalent of this claim that's now being brought in front of you. The standard for breach of contract in the federal -- federal court for this type of claim, is did the University substantially comply with its own procedures and was the result arbitrary or not. As you can see, it's the

same standard -- same standard under Article 78, so there's good reason why the case law say these are basically the same claim.

Now, Counsel has cited to you some case law that have -- where cases have said, well, you can get more relief in a breach of contract claim. True. But in those cases, the Article 78 claim was brought first, and so the case allowed the -- the contract tort claim secondary suit to go forward because there was more relief available that wasn't going to be available in the first cause of action.

That's not the situation here. The entire scope of this action is already subsumed within the first action. Counsel -- the plaintiffs in that action can get more relief in the federal action than they can get here, but they can certainly get everything they can get here.

Now, there's been no suggestion or argument that the Plaintiffs in the federal court action can't overturn disciplinary result. There's been no argument made. That's what they're seeking to do here. That relief is available to them in federal court, there's no jurisdictional bar. It's highly unlikely that Judge Scullin is going to decline jurisdiction over a related claim where the chief judge of his district last month said, court has jurisdiction over these types of claims.

The injunction could have been brought in federal

court. I represented to the Court that the Article 78 claim was going to be added because they told me it was going to be added. So all this is pointing us in one direction, that this is -- that the filing of this action is not the result of some circumstances that were unknown to them at the time they originally brought the federal court action. They knew in April that they were going to challenge the result when they chose the federal forum. They didn't have to choose federal court. They chose it.

So now they don't like where things are going in federal court, so they bring another action -- relitigation. This is a 3211(a)4 situation, Judge. And with all due respect, it's a problem.

Now, Judge Scullin doesn't know about this yet. We haven't advised him, and at the Plaintiffs have not advised him yet. But we've got matters pending that are identical to matters that are pending in front of you. I mean, we've got a -- we're on the road to inconsistent -- potential inconsistent decisions in different courts. It's going to be a real mess.

Your Honor, I have kind of gone on --

THE COURT: That's all right.

MR. POWERS: -- are there any other issues that trouble you that I can address or any questions?

THE COURT: Not at this time. Anything in

response?

MS. FELTER: Yes. Your Honor. First of all, a couple of things just to start out. First of all, we are absolutely not seeking the same relief in the federal case as this case, and there are not identical proceedings in both actions. That's just a complete misstatement.

The federal action was filed initially to obtain injunctive relief because there was no final administrative determination by the University to challenge in an Article 78 proceeding. What was happening at the time was that they had been improperly suspended and prevented from going to class, prevented from meeting with professors, going to review classes. They were prohibited from engaging in any University activities in the last two or three weeks of the semester, which was the most critical time for any student, especially these engineering students that are in aerospace, and all these other complicated majors.

So the notion that we started the action -- that we didn't do the Article 78 first, well, we couldn't do the Article 78 first because we had a completely different situation. And the fact that the Plaintiffs at the time that we chose to get in before the Court, to get immediate relief, chose to go to federal court rather than state court for that remedy is their right. They're entitled to file an action in federal court if there's jurisdiction for the

claim, which there was, so --

THE COURT: Also, though, the seven students that have a case pending in federal court have the right to bring the Article 78 there. There's cases on each side, I admit, but --

MS. FELTER: Well, my reading of the cases on that issue is that the Court would have jurisdiction -- it would have jurisdiction to consider those claims if they were part of a case that was otherwise based on federal -- a federal question determination. So I don't think that the courts, particularly in the northern district, have elected to proceed on Article 78 grounds or accept that jurisdiction if there's not otherwise either federal law involved or a federal question.

And that's exactly the situation with the Judge Suddaby case that Mr. Powers was talking about. The whole question of the Article 78 relief was the impact of federal regulations on these nursing homes. So there was a question of federal interpretation that was at issue. Here, we don't have that situation.

The other thing is that he keeps saying that things aren't going well in the federal case and, frankly, I don't know what he's talking about. I mean, we made an initial request for injunctive relief based on the circumstances I just described -- you know, this critical time for the

students at the end of the semester. As a result of us making that application to the Court, we withdrew it because we reached an agreement with Mr. Powers' office regarding the fact that the University would ensure that these students had alternative arrangements to get through the last part of the semester.

So there was no need to go forward with that request before the Court because we reached an agreement that the University would respect the fact that the kids were trying to finish out the semester.

The second claim for injunctive relief that we made in the case involved the fact that, prior to issuing appellate decisions from the appeals board on the student appeals, the University advised them that they were putting the notation of the disciplinary action on their transcripts and they were doing it prematurely, based on their own rules that said that a disciplinary action is stayed pending result of an appeal determination, but they were delaying in issuing appeal decisions and, nevertheless, chose to mark the transcripts of the students, stating that they had been found responsible for this particular code of conduct and that they were being administratively withdrawn from the University.

So that impacted their ability to transfer. They were -- they couldn't get the transcripts in the first place

because of the pendency of the disciplinary action; then, when they tried to get unmarked transcripts, because of the fact that the thing was on appeal, the University chose to prematurely mark their transcripts and release them. And I think that they did that because they didn't want to be accused of preventing them from transferring but, you know, our position was that the status quo in the case was established before they were disciplined and before the hold was in place and that the Court should allow to the students to get unmarked transcripts.

We lost that argument on the issue of what was the statuses quo, but it had nothing to do with the substance of what the University has done. In fact, Judge Scullin specifically declined to listen to any arguments on the merits of the case.

So they have now made a motion to dismiss the state court -- of the state law claim, the breach of contract action and the defamation claims, but that is an entirely different analysis than what's before the Court.

In that motion and those claims, we are seeking punitive and compensatory damages for the impact of the breaches of contract on the students. These damages are not incidental to the claim for relief, they're separate and apart. That they're going to affect them long-term for the rest of their lives. That they've been defamed, that

they've been put -- associated on the internet for the rest of their lives with, you know, charges that never should have been brought in the first place.

So it's a completely separate analysis as to whether the breach of contract resulted in actual -- and defamation resulted in damages to these students. Then what is this Court being asked to do, which is to determine whether procedurally the University followed its own rules and regulations on the Conduct Board determinations and appellate board decision, and whether the ultimate determinations of those boards were are based on substantial evidence.

And we argue, in both instances, that they were absolutely wrong. These students should never have been prosecuted for these Code of Conduct violations because they have no application whatsoever to the conduct that took place. He keeps talking about the fact that these are -- that these were discriminatory statements. It was a -- indisputably, it was a satirical performance in the basement.

The University's own investigation, which is the -- the administrative record is not before the Court at this point because we don't have access to it to print -- that investigation by Detective Toia, and the other members of the Department of Public Safety, established unequivocally

to a person, that this was a satirical performance, that it didn't -- it wasn't intended to offend anybody, that the whole reason they did the racist oath was an effort to make fun of a fellow member who is a Trump supporter, so they portrayed him in the most outrageous light that they possibly could, by claiming that he's forcing his pledges to engage in this racist oath, to hate all these different groups.

It was obviously offensive, and that was the point. The point was to be offensive. To be so offensive and so over the top and so outrageous that everybody present knew it was ridiculous. Because this kid is not a racist. He supports Trump, but he's not a white supremacist who would never engage in any of that kind of speech.

And the University's own investigation, before they started -- before they continued making these public accusations against these kids as racists, established that fact. They knew very well that every single one of these kids was saying, it wasn't offensive, nobody got hurt, it was just a joke, this was a satire, we were trying to make fun of Trump.

I mean, it's absurd for them to suggest that this was discriminatory action against anybody. It's a joke. And by that standard, half of the stuff that's on TV is punishable by some standard of criminal activity or

otherwise, because you have roasts on Comedy Central, you have all kinds of things that are insanely offensive, and that is the point. And that was the point of this performance.

He brought up the fact -- Mr. Powers brought up the fact that the policy of the University against organizations covers this, but the fact of the matter is that that policy applies to organizations, not individuals. The fraternity and sorority policy that he refers to was already implemented to kick the entire organization off-campus permanently forevermore, never to return.

So they -- as soon as this happened, they took the opportunity to say to Theta Tau: You're out of here and don't ever come back. They implemented that policy to punish the organization. There's nothing in that policy that applies to individuals, and that's the point.

These -- while the -- the organization itself might be charged with engaging in conduct that's offensive, you know, or violates the fraternity's policies in terms of what's acceptable conduct, these individual students had to be found guilty of some specific provision of the Code of Conduct in order to be punished, and that just simply didn't happen.

As your Honor pointed out, the harassment provision requires that these -- that the speech target a specific

individual and not constitute free speech. And the University's own policy adopts and protects the first amendment standard regarding free speech, as long as it doesn't constitute fighting words, then it's protected free speech.

The -- it was satire. I mean, there's no person that was targeted, no person that was harmed, no person that claimed to be offended. The only people that were offended and got hysterical over this performances were people that watched the videos three weeks or four weeks after the fact, because they were publicized by The Daily Orange, and by that time every single person who watched the videos knew the story of what the videos contained, had all of the editorial commentary by both the University and The Daily Orange to set up what it was they were going to be watching, and then they clicked on the link and watched the videos.

How is that the fault of these students, who did not ever intend that this be made public. They committed this action in the basement of a fraternity house, for the private viewing of the people in the fraternity, someone other than the Petitioners, a student who is not part of this proceeding, ended up posting the video of the performance to a private Theta Tau Facebook group and somebody came into somebody's room, or somewhere on campus and used their cell phone to copy that video and then send

it to the University and The Daily Orange.

So every single person that watched this or became aware of this did it voluntarily. It had nothing to do with the intent of these students.

The other thing is that Mr. Powers said a number of times that the students don't have the right to wander around campus and engage in this kind of conduct, but that's -- again, that's not what they did. They did not wander around campus. This was a private event, meant for private viewing, and at the University disciplinary hearings there was not a single bit of evidence presented by Detective Toia, or any other witness, suggesting that there was an actual person who was offended or harassed or upset by this conduct.

And, in fact, the evidence that the University relied on at the disciplinary hearing to show that there was massive hysteria and mental health issues on campus related to a campus forum that took place before the videos were even released by The Daily Orange. So all the students that came in and filed up one after another to the microphone and complained about how they felt unsafe, and there were horrible things going on, and there's monsters on campus, and there's inequality, and racism, and blah, blah, blah, had nothing to do with the video because they hadn't even been released. It was only the University's statements

about what the videos contained that got these people hysterical.

And the case that -- the Keefe case that Mr. Powers talked about, you know, is completely distinguishable, as your Honor pointed out, in -- from this situation. In that case, the person who claimed that he was joking had actually targeted specifically and harassed a specific person. That is absolutely not what is going on here by any stretch of the imagination, and the University can't even dispute the underlying fact that this was -- it was satirical, it was a roast.

It's obvious, from even the video itself, there's a narrator who is narrating a story that these kids are performing, and it's obvious to anybody that this -- and every single person, to a person explain that to the public safety officers when they were interviewing them, that this was an satire, it was a performance, it was a joke, and it never targeted anybody. They were making fun of themselves and nobody was offended.

The piece of evidence that the University relied on in support of its position that somebody was harmed by these videos is in the video itself, the -- I think it's the one involving the wheelchair scene, somebody yells out -- some unidentified person yells out, as everybody is laughing about the skit, "Too far." And one after another of the

board members at the conduct board asked the students if that constituted evidence that somebody was offended. The fact that an unidentified person, while the whole room is laughing, yells out, "Too far." So that's the basis of their claim that somebody was harassed or harmed.

THE COURT: Any last words, Mr. Powers?

MR. POWERS: Yeah, I was wondering what's the satirical -- what was the satirical point of the gang rape of the individual in the wheelchair in -- I don't -- I don't mean to get cute with you, but think about the parent of the applicant -- the disabled applicant to the University who sees that nationally publicized video. What do they think about sending their child to Syracuse University?

This is -- this conduct is not conduct in the basement -- private conduct in the basement, this is conduct that has harmed the University. It is just not true to say that this -- that nobody objects or nobody was offended by this. Conduct to a person, the faculty, the alumni, the student body was outraged -- this caused such problems for the University, these are all detailed in the decisions.

This was very harmful. There were people that felt discriminated against, there were people that felt harassed, there were people that felt bullied by this conduct. This is something, as an alumni of Syracuse University, this is something that impunes the alumni.

THE COURT: But the Code of Conduct -- my problem is that the Code of Conduct directs -- goes to the intent of the actor -- the intent of the one who's speaking or doing the actions. What you're talking about is based on people's response, and that could be -- how do you know what the person's response is going to be? It's subjective.

MR. POWERS: Well, I think you're focusing on Two, but I think Three is also important. Conduct, whether physical, verbal, electronic, oral, written, or video which threatens the mental health of any person or persons, including or not limited to -- and it gives some examples -- and the ones that I would point out are the examples of bullying and other destructive behavior.

This is destructive behavior. This is intimidating conduct. This is conduct that created a very real feeling of a threat from minority communities within the University. That they're at a place of higher education where their particular ethnicity, their particular race is being discussed this way at a University -- in a sanctioned event of a University organization.

It's up to the University to determine the interpretation of these provisions. These provisions, just like our penal law, just like all of our state law, you can't put every manifestation of a violation in words. These have to be interpreted. They're interpreted by the

University, and our law says that that interpretation is entitled to extreme significant discretion by this Court. You're only to second-guess if it's shocking to you what they found.

They found that this conduct which, if you or I engaged in it, we would surely be punished in some form or fashion. These are adult men, they're not -- they're no different. They're embarrassed by this, that's why they want to proceed anonymously. Has nothing to do with anything the University did.

They're not sexual assault victims, they are responsible for their own conduct. If they're embarrassed by it, it's because of what's on the internet. The Daily Orange is not a Syracuse University controlled organization, it's a newspaper. They publish what they believe is newsworthy. Syracuse has no control over that, and there's no evidence to the contrary, your Honor.

That's a -- so to the extent they're embarrassed by this -- I'm sorry, but they should be. They -- they have an opportunity to accept accountability, they have an opportunity to come back and make good. They're not being expelled, they're being suspended. That's a -- that is a permissible range of punishment for this behavior. With all due respect, it's based on the case law, it would be outside the purview of the courts to second-guess that, to try to

get it and say: Well, I'm interpreting Section 2 differently than the University.

That's not really the function in these types of cases. The function is, did the University interpret their provisions, did they give due process, which they did, does the result shock the conscience -- that's in a nutshell --

THE COURT: Was the decision arbitrary and capricious.

MR. POWERS: Right. But the way that that has been described in terms of what, does that exactly mean, Fernandez case, First Department. The way they've articulated it is, it's got to shock. The penalty has to be so out of proportion that the offense, that it shocks us -- shocks our conscience. That's the way the Fernandez case described the arbitrary and capricious, standards formulated different ways by different courts.

But what arbitrary and capricious is not, is getting in and providing an additional layer of appeal, providing a de novo review, providing -- disagreeing with the interpretation of the rules.

And we find this in the contract cases, too. The contract cases say, if it's a question of interpretation, the courts don't get involved. It has to be a clear provision that has been disregarded by the University. Has to be unequivocal.

So unless there's anything further, your Honor?

THE COURT: Nothing further.

MS. FELTER: So according to Mr. Powers' interpretation, the University can publish a Code of Conduct with specific provisions about what is prohibited and what isn't and then decide for itself that, well, there's all kinds of other things that we can add in if this doesn't apply. I mean, he's basically suggesting that the University isn't required to stand by any standards. That it can just make its own ad hoc determination in any case that a standard -- well, I know it says this, but what it really means is this. Just because it doesn't specifically apply.

I mean, the students are there abiding by the rules in the Code of Conduct. They know what they are, that's the purpose of them being published. So to suggest that they're not bound by what they write and put out there in terms of what constitutes a violation is just nonsense.

Secondly, the -- he mentioned the issue with the wheelchair skit. I think that that's very specifically laid out in the verified petition, as it has been in other papers in the federal case. It's -- the students were making fun of -- that was the whole point of the skits to begin with -- making fun of existing members of the fraternity based on their reputations, stories about them in the fraternity.

So this one particular guy has a girlfriend who he's so obsessed with, he talks about her incessantly, you know, that's all he does is mumble about his girlfriend. So the idea is to suggest that he's so brain dead and so controlled by his girlfriend that he can't function as a normal person. The wheelchair was a parody, it was satire to suggest the kid is so whipped and, you know, mentally screwed up by being controlled by his girlfriend that he can't think or respond to the fact even that he's being assaulted.

So, I mean, offensive? Absolutely. But has nothing to do with suggesting that, you know, these students or anybody at the University has a hostility towards people with actual disabilities. I mean, this is like a fantasy thing that they made up.

That was also, by the way, based on something that was publically available on YouTube. Some crazy shock comedian had done the same sort of thing and made the same kind of statement. That's what that skit was based on.

The other thing is, that he keeps saying that the result has to shock the conscience, arbitrary and capricious. The Hill case, which was most recently decided by the Fourth Department, specifically overturned an administrative disciplinary determination because the record was devoid of evidence, much less substantial evidence to

support the determination.

So in addition to the fact that they violated -- that we are alleging that they violated the procedural rights of the students not to be charged in the first place with these Code of Conduct violations, and the fact that they were charged is an arbitrary and capricious violation of the procedures, we are alleging, and we have support -- there's case law to support it, most recently from the Fourth Department -- that if the -- the result itself is not supported by substantial evidence, then it can be overturned.

And that's exactly what the situation is here. There's -- by no stretch of the imagination could you contend that these students were guilty of committing harassment against any person or group based on what's written in the Code of Conduct.

And finally, the last thing I meant to talk about when I was standing before, the issue of whether there's any evidence to suggest that there's irreparable harm. It's my understanding, based on communications with the students, that there were two students who had gone through the disciplinary process, filed appeals, and then ultimately decided, for financial reasons, that they were not going to pursue this litigation, that their money and time would be better spent trying to transfer to other schools. So the

two, that I know of, who were able to transfer to another institution -- a private institution, are not parties in this case.

There's a third one. The third one that I mentioned would be John Doe Number 11 -- who is contemplating whether he wants to participate in this litigation -- he's awaiting a determination by both the federal court and this Court on the issue of the anonymity provision, and whether the lawsuit could proceed anonymously; and if that's the case, he would join this lawsuit as a party and forego the alternative arrangements that he's made to attend another school.

THE COURT: We don't have any affidavits saying I want to go to Syracuse, because I'm not going to Syracuse I'm not going to get an education.

MS. FELTER: Right.

THE COURT: As we know, there's somebody who got denied admittance to a school, I can't remember which one -- Rutgers or something like that --

MR. POWERS: Rutgers.

THE COURT: -- denied to the school based on it, but I don't know if he got in another school, applied, or wants to go back to Syracuse this semester.

MS. FELTER: Well, based on the responses that the students were getting to, as evidenced in the Exhibit A,

which you're referring to, that was the common experience of the students. When they're trying to apply to other schools, there were two -- I don't know, frankly, what the circumstances were under how they managed -- they had family connections or something to Rutgers -- were able to transfer there, but the vast majority of students who were in a situation where they were trying to transfer are getting responses like the one that's attached there.

Well, you can't come here until you get reinstated at SU or you spend a year at another institution. So a lot of these students are electing to wait out the -- the period of suspension at SU, some are going to work, some are going to go to community college, but that's not the same thing as being denied the opportunity to continue their education at Syracuse University where they originally matriculated.

And if the Court is concerned about that issue and is going to entertain further submissions from Mr. Powers on this issue, then we could certainly submit additional -- to tie up that end piece in terms of not only have they been suspended and prevented from coming back to the University, which a court has already held in this state is irreparable harm, they are either going to a different institution or not able to attend an institution based on the existence of this demarcation on their transcripts.

MR. POWERS: I've got four names and I have the

specific schools they're enrolled in from the National University Clearinghouse. I don't want to necessarily put it in the record because I don't know where we are on the anonymity issue, and I don't know if Counsel may have an objection with respect to identifying the new schools where these individuals are enrolled at.

What I would just like is a straight answer on whether or not four of the Petitioners are currently enrolled in other colleges, and maybe that Counsel doesn't know. But from my information, which is reliable and is based on information that universities customarily rely, indicates that four are currently enrolled in other colleges and I just think that that's something that the Court should know and should be --

THE COURT: Certainly, if I allow them to proceed -- and honestly, we're going to have some kind of setup where the attorneys know who John Doe 1 is. It's not publicized, the attorneys will know, so when papers are submitted for John Doe 1 -- I'm not saying I'm going to.

But -- but I appreciate the argument, I understand the need to have an answer in this right away, so I'm going take a short 10- or 15-minute recess and come out with my decision.

(Subsequent to a brief recess, the following transpired.)

THE COURT: The Court's considered all the papers submitted to this date, which includes the verified petition, the memorandum of law, affirmation of Attorney Felter from August 20th, and the memorandum of law from August 10th and the 20th, the notice of cross motion, the affirmation of Attorney Powers from August 16th, Daniel French August 16th, and the memorandum of law, together with the oral arguments heard here today.

The Court will take the motion to dismiss first. The motion to dismiss, the petition is denied. Respondent must make prima facie showing of entitlement to summary judgment, at this point they failed to do.

The courts do give wide latitude to the schools in their disciplinary proceedings; however, they must follow their own rules and enforce their rules. I believe the Petitioners have raised a triable issue on this.

No doubt the actions of the Petitioners were -- said during questioning was rude, crude, and socially unacceptable, the school does not have a rule about this, nor do they have a rule that states you can't bring shame on their school.

Arguably they -- Petitioner alleges the speech in question was protected speech. At this point, the motion to dismiss, the Court must assume the allegations in the petition are true. The allegations are that words were

spoken in skits are satire. They allege the University officials investigating the incident confirmed that it was satire and done in skits. They were directed at individuals who did not feel harassed or threatened by the speech or by the actions.

Later an individual, without permission, broadcasted the skits to outside individuals, including the school newspaper. Upon hearing the report of the skits and seeing them, the people in the school community and beyond were offended by the skits.

The school rules, as argued so far, I've seen -- the school rules limits speech on the basis of intent of the speakers, not on the reactions those words caused.

The -- it was argued that the issue -- does the punishment fit what I consider is -- is the punishment reasonable considering the infraction, and I think as part of that the Court does have to look at what the actions were. If there was no violation and you punished them, that's not reasonable -- arbitrary and capricious. And if there was a punishment -- if they did violate it, then that's -- Court will have to determine if it's arbitrary and capricious for the suspensions handed down. I think there's -- I mean, there's issues of fact that do have to come out and may have to be fleshed out more.

The Respondent also argued that it should be heard

in federal court. Three of the ten individuals cannot bring an action in federal court. I'm not sure where that would go, but I believe there is merit to having this tried in one place. At this point, the Court will not dismiss on that issue, but the Court will give each -- either side 30 days to petition to transfer the federal action here or the state action there -- or this action there. If there is an issue, if they would hear it or not.

Petitioners also requested preliminary injunction, they must show likelihood of ultimate success on the merits, irreparable injury, and balancing of the equities. And -- or they must show each of those individually and separately.

And the Court finds that in irreparable injury, they did not show any irreparable injury. Melvin v. Union College has held a suspension from college for one or two semesters is an irreparable harm. However, as that Court said in that case, the Appellant had shown that, without an injunction to preserve the status quo, the suspension for two semesters will cause her irreparable injury for which monetary compensation is not adequate.

I think implicit in that is an actual allegation from the individuals harmed -- what harm they are having and will suffer. And at this point, we don't have any of that. We don't have what each individual is doing. There's been some allegation that four of them are going to be attending

another university or college, so based on that the Court will deny that part of the preliminary injunction.

Court is also asked to allow the students to proceed as John Does. Customarily, and -- there is presumption in openness of judicial proceedings, but both the federal and the state legislature has ruled that school disciplinary proceedings are protected from disclosure. So the legislature is telling the courts that this is a special situation where we should take into account the children -- the students' rights.

During the disciplinary proceeding, the school is prohibited from disclosing any personal information about the students. Here it is alleged that they are incorrectly punished -- the school incorrectly punished the students for the actions. To enforce their rights, they are forced to bring an action in court which then the school is allowing -- arguing that they should be allowed to publish their names now.

If this Court finds that the school was incorrect, it should not have done what they did, the protection the legislature gave these students is gone. So under these circumstances, the Court will allow the students to proceed as anonymously as John Does, but has indicated the attorneys should exchange a list of who John Doe 1 through John Doe 10 are so each individual knows these students' names -- each

-- that each party here know their names of the students, they just don't know which one is which. So there's no harm in providing the names of the student -- that the school alleging which one is John Doe 1 and John Doe 3, et cetera.

The proceedings will still otherwise be open to the public and the Court finds that the public right to know will be satisfied in that way as to how the proceeding is going.

For the next step and return date, what are the parties looking for?

MS. FELTER: I'm sorry, I missed the last --

THE COURT: What are the parties looking for the next date?

MR. POWERS: Return date.

MS. FELTER: Well, I guess we have to take into account the fact that the Court has directed us to switch --

THE COURT: Consider if either party wants to move to consolidate the two actions in one court, it would be 30 days to decide that.

MS. FELTER: Right.

THE COURT: Obviously if you're doing that, it's going to take longer than 30 days, I would imagine.

MS. FELTER: Yes. So, I mean, given the, you know, the urgency of the matter and the fact that the students are trying to get this resolved as soon as possible, I think the

inclination would be to try to consolidate the state law claims with this action here as additional causes of action, separate and apart from the administrative review.

THE COURT: I won't make either party decide today. I understand they have to talk to other people, clients, and everything.

MS. FELTER: But I mean, assuming that that's what we do, you know, we would have to -- we would make the arrangements with the Court and then we'd like to get back before your Honor as soon as possible to address the factual issue that you raised regarding the irreparable harm, if necessary, again, and any other issues on the merits to resolve this.

MR. POWERS: I think, your Honor, correct me if I'm wrong, I think what you were referring to was a return date for the actual Article 78 itself?

THE COURT: Correct.

MR. POWERS: For decision and hearing on the merits?

THE COURT: Right; if one is needed.

MR. POWERS: Yeah. And so --

MS. FELTER: The record is really big -- the administrative record, which we don't have at this point. I know it's quite extensive, so we have to get the record, we have to breach to make arguments based on that.

THE COURT: If we schedule a telephone conference for September 19th, will that --

MS. FELTER: Yeah, that's fine.

MR. POWERS: We'll set the date on that day, your Honor, for the --

THE COURT: Right. We can see where we're at, hopefully the record is completed by then so we can proceed. How's 9:00 o'clock on the 19th?

MS. FELTER: That a telephone --

THE COURT: It would be a telephone conference. We'll do it as a call-in conference, Court will send out directions on how to call in.

MR. POWERS: That works for me, your Honor.

THE COURT: Mr. Powers, if you could get a copy of the transcript of the Court's decision --

MR. POWERS: Submit an order.

THE COURT: -- submit an order based on that.

MR. POWERS: I'll send it to Karen in advance.

THE COURT: Anything further?

MS. FELTER: No, your Honor, thank you.

MR. POWERS: Thank you, your Honor.

THE COURT: We are adjourned.

(Proceedings concluded.)

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I, CARRIE L. SORENSEN, Senior Court Reporter for for the Fifth Judicial District, certify that I attended and reported the above-entitled proceedings; that the foregoing is a true, accurate and correct transcript of the proceedings had therein, to the best of my knowledge and ability.

Carrie L. Sorensen, RMR
Senior Court Reporter

DATED: __8/28/2018_____